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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Strasbourg, May 2007

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Argentina , Bulgaria, Finland (Supreme Administrative Court), Japan, Norway, Sweden (Supreme Administrative Court), Ukraine.

Précis of important decisions of the reference period 1 May 2006 – 30 August 2006 will be published in the next edition, *Bulletin* 2006/3, for the following countries:

Netherlands, Portugal.

Albania
Constitutional Court

Important decisions

Identification: ALB-2006-2-001

a) Albania / **b)** Constitutional Court / **c)** / **d)** 22.05.2006 / **e)** 14 / **f)** Constitutionality of the Law on High Council of Justice / **g)** *Fletore Zyrtare* (Official Gazette), 53/06, 1530 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.4 **General Principles** – Separation of powers.
3.17 **General Principles** – Weighing of interests.
4.7.4.1.4 **Institutions** – Judicial bodies – Organisation – Members – Term of office.
4.7.4.1.6.1 **Institutions** – Judicial bodies – Organisation – Members – Status – Incompatibilities.
4.7.4.1.6.3 **Institutions** – Judicial bodies – Organisation – Members – Status – Irremovability.
4.7.5 **Institutions** – Judicial bodies – Supreme Judicial Council or equivalent body.
5.3.13.15 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Impartiality.

Keywords of the alphabetical index:

Balance, institutional / Judge, mandate, termination, incompatibility / Judge, incompatibility.

Headnotes:

The principle of separation and balance of powers, set out in Article 7 of the Constitution, gives the three branches of government (legislative, executive and judicial) autonomy in the exercise of their functions. It allowed for mutual assistance where necessary, in order to achieve maximum efficiency, and resulted in power being distributed to several entities, with different tasks and functions. Irrespective of changes in government, the principle of the separation and balance of powers should remain constant.

The High Council is predominantly composed of judges, which helps to ensure judicial independence and to avoid interference from other state powers. It is desirable to keep the three branches of power separate so that they can assist each other in fulfilling their respective constitutional mandates. There is no incompatibility between the mandate of a member of the High Council and the day to day exercise of the function of judge. The constitutional draftsmen took steps to ensure that this would not be the case, and accorded priority to the principle of judicial independence.

Summary:

I. Several members of the Albanian Parliament asked the Constitutional Court to assess the compliance with the Constitution of an amendment to the Law on the Composition and Working Practices of the High Council of Justice (HCJ). They suggested that this infringed the principle of self-regulation of the judiciary and that it was in conflict with the regulations set out within the Constitution governing the composition and working practices of the High Council of Justice. The change in the legislation meant that members of the HCJ who were also judges had to devote themselves to their Council work full-time and stop working as judges. They could resume their judicial work at a later stage. Parliament made this change with a view to avoiding a conflict of interest between the role of judge and that of Council member.

The Court went on to stress that judicial autonomy and independence constitute an effective guarantee for the rights of citizens. These guarantees are expressed within Article 147 of the Constitution. This article states that the regulation of the judiciary is within the remit of the High Council of Justice. In effect, the HCJ is at the pinnacle of the organisational pyramid of judicial power. To this end, the High Council is predominantly made up of judges and is therefore very closely connected with the judiciary. The constitutional draftsmen intended to keep the courts independent of the legislative and executive powers.

Judicial self-regulation is only feasible if the principle of democracy is respected. Thus, note must be taken of the wishes of the sovereign. The sovereign not only approves the legislation governing the composition and working practices of the judiciary but also the appointment of members of the High Court and its President. In addition, three members of the High Council of Justice are voted into place by the sovereign. A good example of the working relationship between the executive and the High Council is to be found in the context of disciplinary proceedings against judges. These are taken upon the initiative and with the participation of the Minister of Justice, and it is the Chairman of the Council who appoints the judges of the first and second instance courts.

Judicial independence has two components. These are the impartiality and independence of judges presiding over the cases put before them. Impartiality refers to the subjective position of the judge in connection with the case and with the parties to it. Independence in this context refers to the exercise of the judicial function, as well as relationships with other entities, especially the executive.

The Court concluded that the amendments and additions not only weakened judicial self-regulation, but that they were also at odds with the provisions within the Constitution governing the composition and working practices of the High Council of Justice. The rationale behind the amendments was to avoid conflicts of interest for members of the High Council, so that they would have to devote themselves to this role full-time and relinquish the duty to preside over cases and direct the courts. Laudable though this aim may be, judicial independence must be paramount. Any conflict of interest which High Council members might experience, which could have an impact on their decision-making, can be avoided by law.

The Court ruled that there is no incompatibility between the exercise of the mandate of a High Council member and the everyday function of judge. The Constitution allows for the National Judicial Conference to elect nine judges who may also be High Council members. Article 147 of the Constitution speaks of judges, elected in the capacity of members of the HCJ. The amendments are accordingly in conflict with this article and with the Constitution as a whole.

The Court made the observation that exceptions to constitutional regulations cannot be decided by law. The Constitution already covers in a comprehensive fashion the role of those working for constitutional organs and their immunity. The amendment in question has added a regulation which was not been provided for by the Constitution. The Constitution does not provide for immunity for members of the High Council. Only judges are accorded immunity, due to the importance of their role. In the Court's view, therefore, a provision of law conferring immunity upon High Council members is unconstitutional.

The current law, as amended, obliges High Council members to choose between that role and that of a judge, and results in the forced abandonment of one or the other of these roles. As a result, it is in conflict with the Constitution, which provides that a judge's length of service cannot be limited. The amendment allows Council members to return to office in their original court once their term of office with the Council is over. The Court pronounced this unconstitutional. Another problem with the amendment is that High Court judges cannot return to their former duties. This is a powerful disincentive for High Court judges to serve on the Council and this has an adverse impact on the constitutional formula for the composition of the Council.

The Court accordingly resolved to repeal Articles 3, 4, 5 and 6 of the Law on the Composition and Working Practices of the High Council, on the grounds that they were unconstitutional.

Languages:

Albanian.

Armenia
Constitutional Court

Statistical data
1 May 2006 − 31 August 2006

- 130 applications have been filed
  - The admissibility of 102 applications has been rejected;
  - 15 cases heard and 15 decisions delivered, concerning the compliance of international treaties with the Constitution (all examined treaties were declared compatible with the Constitution);
  - 13 cases are in the process of examination.

CONSTITUTIONAL AND LEGISLATIVE AMENDMENTS AND ACTIVITIES OF THE CONSTITUTIONAL COURT

The constitutional referendum of 27 November 2005 resulted in certain changes to the 1995 Armenian Constitution. Several of the Constitution's provisions on the Constitutional Court's activities were altered (notably Chapter 6, Judicial Power). These changes have widened the Court's jurisdiction, as well as the scope of persons eligible to apply to it.

The list of those entitled to apply to the Constitutional Court now includes the President of the Republic, the National Assembly, at least one-fifth of the total number of the deputies, Government, local government authorities, individuals, courts, the Prosecutor General, the Human Rights' Defender, candidates for presidential and parliamentary elections. The Constitution and the Law on the Constitutional Court define very strictly the matters in respect of which applications may be made.

According to Article 101.6 of the Constitution: "Every person may file an application to the Constitutional Court in specific cases where the final judicial act has been adopted, where no further possibility of judicial protection remains, and where the constitutionality of provision of law is being challenged". Meanwhile, an extra article – Article 42.1 – has been added to Chapter 2 of the Constitution (Fundamental human and civil rights and freedoms), according to which "The fundamental human and civil rights and freedoms shall apply to legal persons to the extent these fundamental rights and freedoms are applicable to them." This entitles both legal and natural persons to apply to the Constitutional Court. As some of the provisions of the Constitutional Court will now need amending, particularly with regard to individual applications, it is stipulated in Chapter 9 of the Constitution (Final and Transitional Provisions) that: "The provisions of Clause 6, Article 101 shall enter into force on 1 July 2006" (Article 116).

In addition, Article 117 of the Constitution allows the National Assembly two years in which to bring the current legislation into line with the constitutional amendments. The National Assembly accordingly adopted the new Law on the Constitutional Court on 1 June 2006, and the Venice Commission considered it at its 67th Plenary Session. In its opinion on "Amendments to the Law on the Constitutional Court of the Republic of Armenia" (CDL-AD (2006) 017), the Commission stated: "The amendments are coherently drafted and should allow the Court to assume its widened jurisdiction."

The new law consists of eighty four articles and eleven chapters, as follows: General provisions Chapter 1), Composition of the Constitutional Court (Chapter 2), Termination of powers of members of the Constitutional Court (Chapter 3), Organization of Activities of the Constitutional Court (Chapter 4), Principles for the Review of Cases by the Constitutional Court (Chapter 5), Appeals to the Constitutional Court (Chapter 6), Preliminary Review of Applications (Chapter 7), General Rules for Case Review in the Constitutional Court (Chapter 8), Acts of the Constitutional Court, the Order of an Adoption and Requirements for an Act (Chapter 9), Peculiarities of Consideration and Solution of Cases at the Constitutional Court (Chapter 10) and Judicial Service at the Constitutional Court (Chapter 11).

Article 101.6 of the Constitution came into force on 1 July 2006. Individual applications to the Constitutional Court are already being filed. Between 1 July and 31 August, one hundred and twelve individual applications were registered in the Constitutional Court. Ninety two of these were clearly unfounded (the issues raised did not fall within the Court's jurisdiction), and were rejected. Six of the applications did not comply with the requirements set out in Articles 27 and 29 of the Law on the Constitutional Court and were rejected. The Court accepted fourteen individual applications for review. All bar one of them were filed by natural persons. The Court decided that the issues raised in four of the fourteen individual applications did not fall within the jurisdiction of the Constitutional Court. The Court has found eight of the applications to be admissible and

has already decided that the court hearing of the cases will commence between September and November 2006. The other two individual applications are still under review.

Belgium
Court of Arbitration

Important decisions

Identification: BEL-2006-2-006

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 10.05.2006 / **e)** 71/2006 / **f)** / **g)** *Moniteur belge* (Official Gazette), 25.07.2006 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

3.14 **General Principles** – *Nullum crimen, nulla poena sine lege*.
3.19 **General Principles** – Margin of appreciation.
3.20 **General Principles** – Reasonableness.
3.21 **General Principles** – Equality.
5.2 **Fundamental Rights** – Equality.

Keywords of the alphabetical index:

Harassment, protection / Worker, protection / Penalty, proportionality / Harassment, interpretation.

Headnotes:

The principle that criminal offences and the corresponding punishments must be strictly defined by law *(nullum crimen, nulla poena sine lege)* derives from the idea that criminal law must be framed in terms enabling everyone to know, upon adopting a form of conduct, whether it is punishable. The requirement that an offence must be clearly defined by law is met where it is possible for people to infer from the wording of the relevant provision, if necessary based on its interpretation by the courts, which acts or omissions render them criminally liable.

Choosing a scale of penalties is a matter for legislative discretion but the constitutional principle of equality and non-discrimination (Articles 10 and 11 of the Constitution) may be breached where the choice made by parliament entails an inconsistency resulting in a clearly unreasonable difference in treatment between comparable offences.

Summary:

Article 442bis of the Criminal Code penalising harassment, which was introduced by an Act of 30 October 1998, provides: “Anyone who has harassed someone and who knew, or should have known, that this conduct would seriously disrupt that person's peace of mind, shall be liable to a prison sentence of between fifteen days and two years and a fine of fifty [euros] to three hundred [euros] or to only one of these penalties. The offence established in this article can be prosecuted only where the person alleging to have been harassed has filed a complaint.”

A number of criminal courts before which cases of harassment were pending asked the Court whether the *nullum crimen, nulla poena sine lege* principle (Articles 12 and 14 of the Constitution) was breached, firstly, by the lack of a legal definition of the essential element of the offence established in the article under consideration and, secondly, by the fact that the definition of the mental element of the offence allowed the courts too much discretion.

Basing its reasoning on Articles 12 and 14 of the Constitution, Article 7.1 ECHR and Article 15.1 of the International Covenant on Civil and Political Rights, the Court to begin with pointed out that this principle required lawmakers to specify in sufficiently precise, clear terms, affording legal certainty, what acts were punishable, firstly so that someone adopting a particular line of conduct could adequately weigh in advance what the criminal consequences of that conduct would be and secondly so that the courts were not given too much discretion. However, the principle did not prevent the law from allowing the courts some degree of discretion.

The Court then explained in detail, in the light of the wording of Article 442bis of the Criminal Code and the preparatory work on this legislation, how the different elements of the offence of harassment should be construed. The Court thus concluded that there had been no breach of the *nullum crimen, nulla poena sine lege* principle.

One of the preliminary questions also concerned the distinction drawn between the above-mentioned Article 442bis, which established a penalty of up to two years' imprisonment and/or a fine of up to 300 euros for the offence of seriously disrupting another person's peace of mind, and Section 114.8.2 of the Act of 21 March 1991 on reform of certain public economic undertakings, whereby anyone who used a means of telecommunication to pester another person was liable to up to four years' imprisonment or a fine of 50,000 euros. The Court concerned asked whether the heavier penalties imposed in the second case constituted discrimination.

The Court replied that determining the degree of gravity of an offence and the severity with which it should be punished was a matter for legislative discretion, although, where the legislature's decision entailed an inconsistency resulting in a clearly unreasonable difference in treatment between comparable offences, an assessment in the light of the constitutional principle of equality and non-discrimination was nonetheless possible.

The Court observed that, in the case under consideration, the two comparable offences doubtless differed on certain points. However, it was not apparent why these differences, in particular the use of a means of telecommunication, should justify such far harsher penalties. The Court accordingly held that the aforementioned Section 114.8.2 breached Articles 10 and 11 of the Constitution in this respect.

A preliminary question was also raised as to whether Section 81.1 of the Act of 4 August 1996 was compatible with the principle that criminal offences and the corresponding punishments must be strictly defined by law, in that it provided that a criminal penalty would be imposed for breaching Sections 5.1.1 and 5.1.2.i of this Act. Section 5.1 required employers to “take the necessary measures to promote their employees' wellbeing in the performance of their work” and to “apply a number of general principles of prevention, as defined by law”.

The Court again examined the tenor of these provisions on the basis of their wording and context, notably in the light of Directive no. 89/391/EEC of the European Council of 12 June 1989, which parliament had sought to implement through the Act of 4 August 1996. The Court nonetheless found that the fact that parliament was implementing a European directive did not dispense it from abiding by the *nullum crimen, nulla poena sine lege* principle when it drew up the provisions establishing these offences.

Following a detailed examination, the Court reached the conclusion that the particularly vague terms used in Sections 5.1.1 and 5.1.2.i of the Act of 4 August 1996 could not be sufficiently clarified by the other relevant provisions of this Act, the preparatory work on it or the international legislation on which it was based. Since it penalised all breaches of this Act, Section 81.1 did not permit the persons at which it was aimed to know, upon adopting a form of conduct, whether that conduct was punishable. The Court held that it violated Articles 10 and 11 of the Constitution in this respect.

Languages:

French, Dutch, German.

Identification: BEL-2006-2-007

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 07.06.2006 / **e)** 91/2006 / **f)** / **g)** *Moniteur belge* (Official Gazette), 23.06.2006 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

1.6.5.2 **Constitutional Justice** – Effects – Temporal effect – Retrospective effect (*ex tunc*).
2.1.1.4 **Sources** – Categories – Written rules – International instruments.
2.1.3.2.1 **Sources** – Categories – Case-law – International case-law – European Court of Human Rights.
3.19 **General Principles** – Margin of appreciation.
5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
5.3.2 **Fundamental Rights** – Civil and political rights – Right to life.
5.3.21 **Fundamental Rights** – Civil and political rights – Freedom of expression.
5.3.22 **Fundamental Rights** – Civil and political rights – Freedom of the written press.
5.3.24 **Fundamental Rights** – Civil and political rights – Right to information.
5.3.32 **Fundamental Rights** – Civil and political rights – Right to private life.

Keywords of the alphabetical index:

Media, journalist, source, disclosure, refusal, right / Media, information, source, disclosure / Media, journalist, information, source.

Headnotes:

Anyone working as a journalist is entitled to keep his or her sources of information secret. Confining protection of the confidentiality of sources to persons who regularly work as journalists and who carry on the occupation in a self-employed capacity or as paid employees violates freedom of expression and freedom of the press, as guaranteed in the Constitution and conventions.

The Court, which has no jurisdiction to perform a direct review of statute law's compliance with the terms of a convention, can nonetheless take into consideration provisions of international law guaranteeing rights and freedoms similar in scope to the constitutional provisions effectively coming within its powers of review.

It is not discriminatory nor does it breach the right to respect for private and family life that the legislator has provided that the courts can waive confidentiality of sources where this makes it possible to prevent the commission of offences involving a serious threat of physical harm to one or more individuals, but they are not authorised to do so where individuals' reputation, good name and/or privacy could be jeopardised.

Allowing the courts to waive confidentiality of journalists' sources solely if there is a serious threat of physical harm to individuals, but not where an offence has already taken place, does not infringe the right to life.

Summary:

A number of individuals applied to the Court seeking the annulment of the Act of 7 April 2005 on protection of journalists' sources.

According to this Act, journalists and editorial staff are entitled not to disclose their sources of information (Section 3). They can be obliged to reveal their sources only by a court order and "if this might prevent the commission of offences representing a serious threat of physical harm to one or more individuals" (Section 4).

Section 2.1 defines a "journalist" as "any person who, in a self-employed capacity or as a paid employee, and any legal entity which contributes regularly and directly to gathering, drafting, producing or distributing news via a media outlet for the public's benefit."

The protection afforded by law is accordingly enjoyed by individuals only if they pursue journalistic activities as their occupation, in a self-employed capacity or as a paid employee.

In their first submission, the applicant complained that freedom of expression and freedom of the press were restricted in a discriminatory manner since a person who did not meet the above conditions could not assert the legally recognised right not to disclose his or her sources of information.

Relying on the provisions guaranteeing freedom of expression and freedom of the press (Articles 19 and 25 of the Constitution, Article 10 ECHR and Article 19.2 of the International Covenant on Civil and Political Rights), the Court pointed out that freedom of expression was one of the essential foundations of society and that a free press constituted a key component of that freedom.

Referring to the case-law of the European Court of Human Rights (*Goodwin v. United Kingdom* of 27 March 1996, § 39, *Reports* 1996-II; *Roemen and Schmit v. Luxembourg* of 25 February 2003, § 46, *Reports of Judgments and Decisions* 2003-IV; *Bulletin* 2003/1 [ECH-2003-1-004]; *Ernst and Others v. Belgium* of 15 July 2003, § 91), the Court observed that the right to confidentiality of journalistic sources must be guaranteed not to protect the interests of journalists as a professional category but to enable the press to play its role of "watchdog" and to inform the public on matters of public interest. Anyone performing journalistic activities was entitled under the above-mentioned constitutional and convention provisions to keep his or her sources of information secret.

The Court held that the first submission was founded. By denying the right of confidentiality of information sources to persons who performed journalistic activities other than in a self-employed capacity or as paid employees and to those who did not perform such activities on a regular basis, Section 2.1 of the impugned Act breached Articles 19 and 25 of the Constitution, whether or not taken together with Article 10 ECHR and Article 19.2 of the International Covenant on Civil and Political Rights. The Court annulled *(ex tunc)* the phrases "journalists, that is to say", "in a self-employed capacity or as a paid employee, and any legal entity which" and "regularly and".

The applicants also complained that, under Section 4 of the impugned Act, a court could order journalists and editorial staff to disclose their sources only where it might prevent the commission of offences posing a serious threat of physical harm to one or more individuals. The applicants contended that the law's failure to allow a court to waive confidentiality of sources where the reputation, good name and/or privacy of individuals were seriously jeopardised constituted a discriminatory breach of the right to respect for private and family life.

In this connection, the Court pointed out that freedom of expression and freedom of the press were not unconditional in nature. The European Court of Human Rights had also acknowledged that, in certain circumstances, an interference with the right to confidentiality of sources could be justifiable. Where freedom of expression and freedom of the press were at risk of coming into conflict with the right to respect for private and family life (Articles 22 and 29 of the Constitution, Article 8 ECHR) a fair balance must be struck between these rights and freedoms and the related interests.

The Court considered that the legislator could have deemed that, on account of the gravity and the often irreparable nature of offences involving physical harm, the need to prevent their commission could justify an exception from the confidentiality of sources. It was also for the legislature to decide whether this exception must extend to prevention of offences interfering with private and family life, which were neither as serious nor as irreparable in nature. Declining to extend the exception to interferences with private and family life would doubtless have disproportionate consequences if individuals were as a result deprived of effective protection of their right to respect for their private and family life. However, in particular since a journalist was liable for any serious breach of privacy and was free to conceal or reveal his or her sources in cases involving his or her liability, the Court held that it was not unreasonable to treat the right to life or physical integrity differently from the right to respect for private and family life, with regard to a source disclosure order that might be issued by a court as a departure from the principle that journalistic sources are confidential.

In a subsequent submission – we will not examine all of their arguments – the applicant complained of an infringement of the right to life, in that a court could indeed waive source confidentiality where there was a serious threat of physical harm to individuals, but not where the offences had actually been perpetrated.

The Belgian Constitution recognises that all children have a right to respect for their moral, physical, mental and sexual integrity (Article 22bis of the Constitution) and that everyone is entitled to a life consistent with human dignity (Article 23 of the Constitution). Although these provisions do not guarantee the right to life as such, the exercise of the rights enshrined in them entails respect for it, with the result that the constitutional provisions mentioned can be combined with the convention provisions which expressly safeguard this right, in particular Article 2 ECHR and Articles 6.1 and 9.1 of the International Covenant on Civil and Political Rights.

The Court considered that the legislator could have deemed that where life or physical integrity had already been jeopardised, there was no reason to interfere with the fundamental right to freedom of expression, of which the secrecy of journalists' sources

was part, since the judicial authorities had sufficient other means of conducting investigations into the offences committed. The Court further observed that where an individual had not already suffered physical harm, a journalist in possession of information that might avert such harm had a legal obligation to come to the assistance of someone in grave danger, which was not the case where the harm had already been done and the journalist was subsequently in possession of information on the subject. The Court held that this submission was unfounded.

Languages:

French, Dutch, German.

Identification: BEL-2006-2-008

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 21.06.2006 / **e)** 104/2006 / **f)** / **g)** *Moniteur belge* (Official Gazette), 12.07.2006 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

1.4.3.3 **Constitutional Justice** – Procedure – Time-limits for instituting proceedings – Leave to appeal out of time.
1.6.2 **Constitutional Justice** – Effects – Determination of effects by the court.
1.6.5.3 **Constitutional Justice** – Effects – Temporal effect – Limitation on retrospective effect.
2.1.1.4.5 **Sources** – Categories – Written rules – International instruments – Geneva Convention on the Status of Refugees of 1951.
4.7.1.2 **Institutions** – Judicial bodies – Jurisdiction – Universal jurisdiction.
4.7.4.3.1 **Institutions** – Judicial bodies – Organisation – Prosecutors / State counsel – Powers.
5.1.1.3.1 **Fundamental Rights** – General questions – Entitlement to rights – Foreigners – Refugees and applicants for refugee status.
5.2.2.4 **Fundamental Rights** – Equality – Criteria of distinction – Citizenship or nationality.
5.3.13.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.
5.3.15 **Fundamental Rights** – Civil and political rights – Rights of victims of crime.

Keywords of the alphabetical index:

Genocide, jurisdiction, universal, in absence / Crime against humanity / Refugee, rights / Convention relating to the status of refugees, direct effect / Law, repeal, effects.

Headnotes:

Article 16.2 of the Convention of 28 July 1951 relating to the status of refugees has direct effects in the Belgian legal system: it is sufficiently precise and complete to be applied without any further implementing measure. Being directly applicable, it acted as a barrier to relinquishment of jurisdiction, by Belgian courts, over complaints lodged by individuals recognised as refugees at the time when proceedings were initiated, giving them the same treatment as individuals holding Belgian nationality at that time.

By organising the relinquishment of jurisdiction by Belgian courts over complaints lodged on the basis of the Law of 18 June 1993 by individuals recognised as refugees in Belgium at the time when criminal proceedings were initiated, whereas complaints lodged by individuals holding Belgian nationality at that time could not be removed from the jurisdiction of courts, the legislator violated Articles 10, 11 and 191 of the Constitution, together with Article 16.2 of the Convention of 28 July 1951 relating to the status of refugees.

The setting aside of the provision by the Court does not give rise to any incrimination and exerts no coercive pressure, its aim being solely to determine the jurisdiction of Belgian courts. The setting aside of the provision does not have the effect of giving rise to a new incrimination or establishing a penalty, nor does it restore incrimination or a penalty previously repealed. The effect of the setting aside concerns only the jurisdiction of Belgian courts, and its effect is to restore a jurisdictional rule which had been adopted by an elected deliberative assembly before the acts challenged were committed.

Summary:

I. Judgment no. 104/2006 of 21 June 2006 follows on from Judgment no. 68/2005 of 13 April 2005 [BEL-2005-1-006].

Article 4.2 of the Special Law of 6 January 1989 opens up a new time limit of six months to lodge an application to set aside a law when the Court, ruling on a preliminary point of law, has stated that this law violates a constitutional provision. In such a case, application may be made to the Court not only by an

authority designated by the law but also by any physical or moral person able to justify their interest.

On the basis of that provision, a recognised refugee who was party to the procedure for the relinquishment of jurisdiction before the Court of Cassation – *juge a quo* – and third party in the procedure concerning a preliminary point of law which resulted in Judgment no. 68/2005, lodged an application to have Article 29.3 of the Law of 5 August 2003 on Grave violations of international humanitarian law, set aside. Following that judgment, the Court of Cassation handed down a judgment on 29 June 2005 removing from the jurisdiction of the Belgian Court the case examined by the examining judge of Brussels on the basis of a complaint lodged *inter alia* by the applicant.

II. The Court of Arbitration accepted that it was in the applicant's interest to lodge an action as the provision challenged was likely to have a direct and unfavourable impact on their situation and that impact persisted after the judgment on a preliminary point of law of the Court of Arbitration and the subsequent judgment by the Court of Cassation, with the removal of the case from the Belgian courts ordered by that judgment demonstrating that the applicant's interest in requesting that the challenged provision be set aside was not exhausted.

The applicant took as their sole cause of action the violation of Articles 10, 11 and 191 of the Constitution, combined with Article 16.2 of the Convention of 28 July 1951 relating to the status of refugees. The Court of Arbitration firstly confirmed the point already set out in Judgment no. 68/2005: while the legislator may, in accordance with the aim pursued, take a transitional measure in favour of individuals linked to Belgium by the legal tie of nationality, it may not exclude individuals with recognised refugee status in Belgium from the benefit of that transitional measure, on grounds of Article 16.2 of the Convention of 28 July 1951 relating to the status of refugees, which has direct effects in the Belgian legal system.

The Court of Arbitration did note, however, the fact that the Court of Cassation, in the cases concerning the applicant, had ruled that the aforementioned Article 16.2 “does not have the effect of rendering applicable the transitional provisions of Article 29.3.2 of the law where a complainant, who is habitually resident in Belgium, has refugee status there”.

The Court of Arbitration then stated that, since the aforementioned Article 16.2 was directly applicable, the challenged provision had to be applied in a manner that made it compliant with the Convention. However, as worded, the provision did not allow recognised refugees to access the courts in the same manner as complainants holding Belgian nationality.

The Court held therefore that, since the legislator was bound to respect the international commitments entered into by Belgium, it was for the Court to penalise the failings of the legislator if these constituted a violation of the Constitution. It concluded that the argument was founded and partially set the law aside.

The Court specified the extent and scope of the setting aside. It wished to avoid a situation in which setting aside the law would make it possible to remove complaints lodged by Belgians from the jurisdiction of the courts, which would be the opposite effect to the one sought by the legislator and deemed legitimate by the Court in its Judgment no. 68/2005. Moreover, setting aside the law to such an extent had no beneficial consequences for individuals with refugee status, who suffered discrimination as noted by the Court.

In reply to the intervening parties, the Court stated that the setting aside of the provision did not have the effect of giving rise to a new incrimination or establishing a penalty, nor did it restore incrimination or a penalty previously repealed. The effect of the setting aside concerned only the jurisdiction of Belgian courts, and its effect was to restore a jurisdictional rule which had been adopted by an elected deliberative assembly before the acts challenged were committed.

Finally, the Court decided to maintain some of the effects resulting from the provision set aside. In Judgment no. 68/2005, the Court accepted the relinquishment of jurisdiction of Belgian courts organised by the legislator where the complainant was neither Belgian nor recognised as a refugee. In that case the setting aside could not have the effect of making it possible for Belgian courts having all the complaints removed from their jurisdiction pursuant to the provision set aside referred back to them again. Consequently, it is necessary, pursuant to Article 8.2 of the Special Law of 6 January 1989, to indicate which effects of the provision set aside are to be considered as definitive, so that the setting aside concerns only those cases where at least one of the complainants was a recognised refugee in Belgium at the time when proceedings were initiated.

Languages:

French, Dutch, German.

Identification: BEL-2006-2-009

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 28.07.2006 / **e)** 130/2006 / **f)** / **g)** *Moniteur belge* (Official Gazette), 09.08.2006 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

1.5.4.5 **Constitutional Justice** – Decisions – Types – Suspension.
3.16 **General Principles** – Proportionality.
4.8.2 **Institutions** – Federalism, regionalism and local self-government – Regions and provinces.
5.2.1.4 **Fundamental Rights** – Equality – Scope of application – Elections.
5.3.41.1 **Fundamental Rights** – Civil and political rights – Electoral rights – Right to vote.
5.3.41.2 **Fundamental Rights** – Civil and political rights – Electoral rights – Right to stand for election.

Keywords of the alphabetical index:

Election, regional / Eligibility, conditions / Simultaneous holding, political offices.

Headnotes:

The conditions governing the right to stand for election must reflect a concern to maintain the integrity and effectiveness of an electoral procedure intended to establish the will of the people via universal suffrage.

Eligibility is a fundamental right intended to enable individuals to stand as a candidate for an elected office representing the people. It follows that this right may be governed by stricter requirements than those governing the right to vote, especially where such requirements are intended to guarantee that the electorate's vote has a useful effect.

Summary:

The Court of Arbitration received an application to set aside provisions of decrees of the Walloon Region amending the Code of local democracy and decentralisation, which stipulate that the members of a federal parliamentary assembly as well as members of the European Parliament or a regional or community parliament are not eligible to stand for election to the provincial council. Previously, the Walloon code stipulated that the offices of provincial councillor and parliamentarian were incompatible, but the Walloon legislator wished to reinforce the applicable rules by laying down a condition of eligibility for the sake of transparency vis-à-vis the electorate.

A Walloon parliamentarian and a federal parliamentarian applied to the Court of Arbitration to have these provisions set aside and suspended (the Court can suspend the entry into force of a norm that is challenged if there is a danger of it causing serious damage prior to the judgment on the application to set it aside). The Court ruled on the applications for suspension in its Judgment no. 84/2006 of 17 May 2006. It recognised the applicants' interest in lodging an action but turned down the applications for suspension owing to the lack of prejudice that would be difficult to make good. The damage claimed by the applicants, namely being forced to choose between the office of parliamentarian and standing as candidates in a provincial election, would only actually have effect on the date (September 2006) when candidatures had to be lodged. Since the deadlines for lodging observations in the procedure to have the provisions set aside had been shortened by the president of the Court, the Court's judgment on the applications concerned could be handed down before that date. According to the Court, suspension of the norm to avoid the damage claimed to the applicants was therefore unnecessary.

In the event, the Court's Judgment no. 130/2006 of 28 July 2006 on the applications to have the provisions set aside was handed down in good time. It rejected the applications.

The applicants took as their sole cause of action the violation of Articles 8, 10 and 11 of the Constitution, combined or not with Article 162 of the Constitution and with Article 25 of the International Covenant on Civil and Political Rights.

The Court of Arbitration held firstly that the Walloon Region was competent to establish the rules challenged, as it proceeded on the basis of its prerogative to regulate the composition, organisation, competence and functioning of municipal and provincial institutions, in accordance with the constitutional rules on the division of powers and responsibilities between the federal State, the communities and the regions. In stipulating that members of the Chamber of Representatives, the Senate, the European Parliament or a regional or community parliament were not eligible to stand for election to the provincial council, the challenged provision regulated a regional matter. It had neither the purpose nor the effect of regulating the status of parliamentarians.

The Court then held that the right to elect and be elected were fundamental political rights in a State ruled by law which, under Articles 10 and 11 of the Constitution, had to be guaranteed without discrimination. However, those rights were not absolute. They could be restricted on condition that such restrictions pursued a legitimate aim and were proportionate to that aim.

In the light of the preparatory work on the decree, the Court of Arbitration held that the Walloon legislator had pursued a legitimate aim, namely to guarantee that the electorate's vote had a useful effect. However, the Court had yet to examine whether the measure taken was reasonably justified as regards that aim. It pointed out in this respect that the conditions governing the right to stand as a candidate must reflect a concern to preserve the integrity and effectiveness of an electoral procedure intended to establish the will of the people via universal suffrage.

Eligibility is a fundamental right intended to enable individuals to stand as a candidate for an elected office representing the people. It follows that this right may be governed by stricter requirements than those governing the right to vote, especially where such requirements are intended to guarantee that the electorate's vote has a useful effect.

The Court concluded that there had been no damage disproportionate to the aim pursued: restricting the right to stand as a candidate does not constitute an absolute bar on standing as a candidate in provincial elections; the individual concerned may surmount the problem by standing down from the political offices affected by the challenged provision.

Languages:

French, Dutch, German.

Bosnia and Herzegovina
Constitutional Court

Important decisions

Identification: BIH-2006-2-005

a) Bosnia and Herzegovina / **b)** Constitutional Court / **c)** Plenary session / **d)** 26.06.2006 / **e)** U-13/05 / **f)** / **g)** *Službeni glasnik Bosne i Hercegovine* (Official Gazette), 60/05 / **h)** CODICES (Bosnian, English).

Keywords of the systematic thesaurus:

1.3.5.3 **Constitutional Justice** – Jurisdiction – The subject of review – Constitution.
2.1.1.1.1 **Sources** – Categories – Written rules – National rules – Constitution.
2.1.1.4.4 **Sources** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
2.1.1.4.7 **Sources** – Categories – Written rules – International instruments – International Convention on all Forms of Racial Discrimination of 1965.
2.2.1.1 **Sources** – Hierarchy – Hierarchy as between national and non-national sources – Treaties and constitutions.
2.2.1.4 **Sources** – Hierarchy – Hierarchy as between national and non-national sources – European Convention on Human Rights and constitutions.
4.4.2.3 **Institutions** – Head of State – Appointment – Direct election.
4.9.5 **Institutions** – Elections and instruments of direct democracy – Eligibility.
5.2.1.4 **Fundamental Rights** – Equality – Scope of application – Elections.
5.2.2.3 **Fundamental Rights** – Equality – Criteria of distinction – Ethnic origin.
5.3.41.2 **Fundamental Rights** – Civil and political rights – Electoral rights – Right to stand for election.

Keywords of the alphabetical index:

Election, ineligibility, discrimination, ethnic.

Headnotes:

It is not within the Constitutional Court's jurisdiction to review the conformity of constitutional provisions with the European Convention on Human Rights. Consequently it has no jurisdiction to review provisions in other legislation which derive in full from the Constitution.

Summary:

I. A member of the Presidency of Bosnia and Herzegovina asked the Constitutional Court to examine the conformity of Article 8.1.1 and 8.1.2 of the Election Law of Bosnia and Herzegovina ("the Election Law") with Article 3 Protocol 1 ECHR and Article 1 Protocol 12 ECHR, and with Articles 2.1.c and 5.1.c of the International Convention on Elimination of All Forms of Racial Discrimination.

Article 8.1 of the Election Law reads as follows:

> "Members of the Presidency of Bosnia and Herzegovina directly elected from the territory of the Federation of Bosnia and Herzegovina – one Bosnian and one Croat – shall be elected by voters registered to vote within the Federation. Voters may vote either for a Bosnian or a Croat Member of the Presidency, but not for both. The Bosnian and Croat member with the highest number of votes among candidates from the same constituent people shall be elected. Member of the Presidency of Bosnia and Herzegovina to be elected from the territory of the Republika Srpska − one Serb – shall be elected by voters registered to vote in the Republika Srpska. The candidate with the highest number of votes shall be elected."

The applicant pointed out that the Election Law meant that only a Bosnian or a Croat from the Federation of Bosnia and Herzegovina and a Serb from the Republika Srpska can be a Member of the Presidency. Serbs in the Federation and Bosnians and Croats in the Republika Srpska are prevented from standing for election for that office. This prevents citizens of Serb ethnicity from the Federation and those of Bosnian or Croat ethnicity from the Republika Srpska from exercising their passive electoral rights, namely the right to run for elections and to be elected to the Presidency of Bosnia and Herzegovina.

The Election Law as it stands means that citizens from amongst the Others (who do not belong to one of the three constituent peoples) are precluded from becoming members of the Presidency of Bosnia and Herzegovina. By implication, only Bosnians, Croats and Serbs have access to these public offices. This constitutes direct discrimination against citizens from amongst the Others in the exercise of their passive electoral rights on the grounds of ethnicity.

II. The Constitutional Court noted that Article 8.1 of the Election Law is, in fact, an expanded version of Article 5 of the Constitution, which reads:

> "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."

Therefore, if the Constitutional Court was to examine the case on its merits, it would, in fact, be examining constitutional provisions in the context of the European Convention on Human Rights and the International Convention on Elimination of All Forms of Racial Discrimination.

The Constitutional Court referred to its decision in case no. U-5/04 of 27 January 2006. This arose from a request for a review of the conformity of certain provisions of the Constitution with the provisions of the European Convention on Human Rights. At the time, the Court emphasised that when interpreting its jurisdiction, it must abide by the text of the Constitution, which in the case in point did not allow for a wider interpretation relating to its jurisdiction. The Constitutional Court is under an obligation to "uphold this Constitution". Provisions of the European Convention on Human Rights cannot have a superior status in relation to the Constitution. The European Convention on Human Rights, as an international document, came into force on the basis of the Constitution. Therefore, constitutional powers derive from the Constitution and not from the European Convention on Human Rights.

In the present case, it is the provisions of the Election Law which are under scrutiny, rather than constitutional ones. Nonetheless, the Election Law provisions derive in their entirety from the provisions of Article 5 of the Constitution, and this removes any doubts to their unconstitutionality. As a result, the Constitutional Court is not competent to decide on this matter, as this would imply a review of the conformity of the constitutional provisions with the provisions of international documents relating to human rights. The Court has ruled in earlier proceedings that the European Convention on Human Rights cannot have a superior status in relation to the Constitution.

The Constitutional Court therefore dismissed the request as being inadmissible, as it is not competent to take a decision.

Judge Feldman gave a separate concurring opinion. Judges Grewe and Palavric gave dissenting opinions.

Cross-references:

- Decision no. U-5/04 of 27.01.2006, *Bulletin* 2006/1 [BIH-2006-1-003].

Languages:

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

Canada
Supreme Court

Important decisions

Identification: CAN-2006-2-002

a) Canada / **b)** Supreme Court / **c)** / **d)** 21.07.2006 / **e)** 30211/30295 / **f)** United States of America v. Ferras; United States of America v. Latty / **g)** *Canada Supreme Court Reports* (Official Digest), [2006] 2 S.C.R. xxx / **h)** Internet: http://scc.lexum.umontreal.ca/en/index/html; 268 *Dominion Law Reports* 1; 351; *National Reporter* 1; [2006] S.C.J. no. 33 *(Quicklaw)*; CODICES (English, French).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Extradition, guarantees / Evidence, assessment by judge / Extradition, detention / Extradition, evidence by receiving state.

Headnotes:

Section 7 of the Canadian Charter of Rights and Freedoms guarantees that no one may be deprived of liberty except in accordance with the principles of fundamental justice. The provisions of the Extradition Act for the admission of evidence on a hearing for committal for extradition (Sections 32.1.a, 32.1.b and 33) do not violate the Section 7 right of a person sought because the requirements for committal under Section 29.1 of the Act, properly construed, grant the extradition judge discretion to refuse to extradite on insufficient or unreliable evidence.

Summary:

I. The United States sought the extradition of the accused under the “record of the case” method provided for in Sections 32.1.a and 33 of the Extradition Act. The records of the case submitted at their committal hearings consist of unsworn

statements from law enforcement agents summarising the evidence expected to be presented at each trial. The United States certified that the evidence is available for trial and is sufficient to justify prosecution under the law of the US. The accused alleged that Sections 32.1.a and 33 infringe Section 7 of the Canadian Charter of Rights and Freedoms because they allow for the possibility that a person might be extradited on inherently unreliable evidence. In both cases, the extradition judges rejected the constitutional objection and committed the accused for extradition. The Court of Appeal upheld the decisions.

II. The Supreme Court of Canada, in a unanimous judgment, upheld the constitutionality of the impugned provisions and concluded that the accused should be committed to extradition.

The provisions of the Extradition Act governing the admission of evidence at a committal hearing are consistent with the guarantee in Section 7 of the Canadian Charter of Rights and Freedoms that no one may be deprived of liberty except in accordance with the principles of fundamental justice. Section 7 of the Canadian Charter of Rights and Freedoms does not guarantee a particular type of process for all situations where a person's liberty is affected; it guarantees a fair process, having regard to the nature of the proceedings. The principles of fundamental justice applicable to an extradition hearing require that the person sought for extradition receive a meaningful judicial determination of whether the case for extradition prescribed in Section 29.1 of the Act has been established − that is, whether there is sufficient evidence to permit a properly instructed jury to convict. This requires a meaningful judicial hearing before an independent, impartial judge and a judicial decision based on an assessment of the evidence and the law. A person cannot be extradited upon demand, suspicion or surmise. Here, the Extradition Act offers two protections to the person whose liberty is at risk: first, admissibility provisions aimed at establishing threshold reliability; and second, a requirement that the judge determine the sufficiency of the evidence to establish the legal requirement for extradition. These dual protections, considered together, offer a fair process that conforms to the fundamental principles of justice.

Under Section 29.1, the extradition judge is required to determine what evidence is admissible under the Act and whether the admissible evidence is sufficient to justify committal. The inquiry into admissibility of the evidence depends on the nature of the evidence. Under the record of the case method, the inquiry is whether the certification requirements of the Act have been met. Under the treaty method, the inquiry is whether the evidence meets the requirements of the relevant extradition treaty. The inquiry into the sufficiency of the evidence involves an evaluation of whether the conduct described by the admissible evidence would justify committal for trial in Canada. A fair extradition hearing that accords with the Charter requires that the extradition judge must be able to decline to commit on evidence that is unavailable for trial or manifestly unreliable. Section 29.1 can be interpreted in such a way that the extradition judge may provide the factual assessment and judicial process necessary to conform to the Charter. Because the requirements for committal of Section 29.1 grant the extradition judge a discretion to refuse to extradite on insufficient evidence, such as where the reliability of evidence is successfully impeached or where it is not shown that the evidence is available for trial, Section 32.1.a and 32.1.b and Section 33 of the Extradition Act do not violate Section 7 of the Canadian Charter of Rights and Freedoms.

Due to the principles of comity between Canada and the requesting state, certification under the record of the case method raises a presumption that the evidence is reliable. Pursuant to Section 32.1.c, the person sought for extradition may challenge the sufficiency of the case. An extradition judge must look at the whole of the evidence and, if it fails to disclose a case on which a jury could convict or it is so defective that it would be dangerous or unsafe to convict, the test for committal is not met. Under the treaty method, showing that the evidence actually exists and is available for trial is fundamental to extradition. The judge cannot commit for extradition under Section 29.1 unless a prima facie case has been made out that evidence exists upon which the person may be tried. Accordingly, where the requesting state does not certify or otherwise make out a prima facie case that the evidence is available for trial, the case for committal is incomplete and should be dismissed. If the evidence is certified as available, that certification results in a presumption of availability for trial, and the person sought for extradition could challenge the presumption.

In this case, the accused were properly committed for extradition. The records submitted by the United States against the accused contained sufficient admissible evidence that a reasonable jury, properly instructed, could convict had the conduct occurred in Canada. The certifications by the United States in compliance with Section 33.3 make the records presumptively reliable and no evidence discloses any reason to rebut the presumption of reliability.

Languages:

English, French (translation by the Court).

Croatia
Constitutional Court

Important decisions

Identification: CRO-2006-2-007

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 09.03.2006 / **e)** U-IIIA-3138/2004 / **f)** / **g)** *Narodne novine* (Official Gazette), 43/06 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

5.3.13.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.
5.3.13.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Trial/decision within reasonable time.
5.3.17 **Fundamental Rights** – Civil and political rights – Right to compensation for damage caused by the State.

Keywords of the alphabetical index:

Legal vacuum, stay of proceedings pending new legislation / State, successor, liability for obligations of former state / Compensation for damage.

Headnotes:

In case of a legal vacuum, to stay proceedings already under way pending new legislation is justifiable. The period between the staying of the proceedings and their resumption should not be so long as to jeopardise the right to a trial within a reasonable time, as guaranteed in the Constitution, or restrict access to the Court.

Summary:

I. The applicant filed a civil claim against the former state (SFRY), for compensation in respect of damage he had suffered during military service. During the proceedings, there were certain changes to procedural law (Article 184a and b of the Act on Amendments of the Civil Obligations Act), notably in that part relating to the transfer of responsibilities and claims to the Croatian Republic, as legal successor to

the former SFRY. There was a statutory stay of proceedings pending the enactment of new regulations. Eventually, the Act on the Responsibility of the Croatian Republic for Damage Incurred in the Former SFRY for which the SFRY was liable covered these particular issues. The civil proceedings in point could therefore have been resumed.

II. The Court considered whether the stay of the proceedings had resulted in a breach of the constitutional right to a trial within a reasonable time. It concluded that a stay in such circumstances could have this effect, although the court itself is not responsible for being unable to decide within a reasonable time. The Court also held that the dissolution of the former SFRY resulted in a legal vacuum with respect to the juxtaposition of responsibilities of the former state and those of the new states. To stay proceedings already under way pending new legislation was therefore justifiable. However, the stay should not have been of such a length as to jeopardise the applicant's right to a trial within a reasonable time.

Languages:

Croatian, English.

Identification: CRO-2006-2-008

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 05.04.2006 / **e)** U-III-338/2002 / **f)** / **g)** *Narodne novine* (Official Gazette), 58/06 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

3.10 **General Principles** – Certainty of the law.
5.3.39.2 **Fundamental Rights** – Civil and political rights – Right to property – Nationalisation.

Keywords of the alphabetical index:

Property, socially owned, transfer to state.

Headnotes:

Social organisations could legitimately acquire certain resources or rights over resources and use and dispose of these resources in accordance with the legislation on social ownership then in force for their own purposes.

The fact that the applicant was registered proprietor of real property in the land registry does not preclude the application of provisions of Article 38 of the Associations Act and transfer into state ownership, even though the same fact may be at issue in another case before the court.

Summary:

I. The Union of State and Local Officials and Employees lodged a constitutional complaint against judgments of the Čakovec Municipal and County Courts where the Croatian Republic was to register as the proprietor of certain real property. The applicants lodged a constitutional complaint before all the legal remedies have been exhausted (judicial review was later disallowed) on the basis that the courts had misapplied substantive law, leading to the breach of Articles 3, 29.1 and 48.1 of the Constitution. The applicants contended that Article 38 of the Associations Act did not apply to the property registered in the Union's name, because the Union had purchased it out of its own assets through a contract of sale, and it was not socially owned property.

Article 38 of the Associations Act provides:

> "Socially-owned real property used and enjoyed by social organisations prior to the coming into force of this Act shall, unless this Act provides otherwise, become real property under the ownership of the Croatian Republic on the day this legislation is enacted."

II. The Constitutional Court considered the case file and the provisions of Article 19 of the Social Organisations and Associations of Citizens Act, together with previous regulations that were in force under conditions of social ownership. Social organisations (including unions) were able to acquire resources or certain rights over resources and to use and dispose of them for their own purposes, as they were socially-owned, in accordance with the statute and law.

Under the Ownership Relations Act of 1980, only associations of citizens and other civil law persons (excluding social organisations) enjoyed the right of ownership. This right was restricted to certain

moveable property, business buildings and premises, residential buildings and flats, and land, but only insofar as it served the common interest, goals and needs of members of the association or those who worked in them.

The fact that the applicant was registered proprietor of the disputed real property in the land registry of the competent court may be at issue in proceedings before another court.

The Court accordingly found that these judicial proceedings had been held before the competent courts, that the relevant procedural law had been correctly applied, and that there had been no breach of the applicant's right to a fair trial or of the constitutional right guaranteeing the right to ownership. The Court took the view that the constitutional complaint was not well founded, and rejected it.

The vice-president of the Court, Professor Jasna Omejec, LL.D., gave a separate dissenting opinion. She pointed out that the Union had acquired the property as long ago as 1959, and the courts had taken no account of the fact that the applicant acquired proprietary rights over the property before the introduction of the concept of social ownership into the legal orders of the former SFRY and the Republic of Croatia.

Moreover, the courts had not taken into consideration the relevant legislation for acquiring rights of ownership and registering it in the land registry, as well as the meaning and content of legislation which could result in property in certain instances falling under state ownership. The applicants' rights under Article 29.1 of the Constitution had therefore been breached.

In her view, the reasoning behind the Constitutional Court's decision was inadequate and incomprehensible for the applicants, and accordingly unacceptable from the point of view of the protection of their constitutional rights.

Languages:

Croatian, English.

Identification: CRO-2006-2-009

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 05.04.2006 / **e)** U-IIIB-4366/2005 / **f)** / **g)** *Narodne novine* (Official Gazette), 53/06 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

3.9 **General Principles** – Rule of law.
3.10 **General Principles** – Certainty of the law.
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.
5.3.39 **Fundamental Rights** – Civil and political rights – Right to property.

Keywords of the alphabetical index:

Delivery, presumption / Building permit, revocation.

Headnotes:

Where delayed action on the part of the administration has an impact upon an individual's right of ownership, this constitutes a breach of his right of ownership under Article 48.1 of the Constitution, that is to say, his peaceful enjoyment under Article 1 Protocol 1 ECHR. The requirement for mandatory personal service of an order on repeal upon supervision within the prescribed deadline represents an important safeguard of the rights of those affected by an administrative act.

The principle of the rule of law is the highest value of the constitutional order of the Croatian Republic.

Summary:

I. A complaint was lodged before the Constitutional Court against the ruling by the Croatian Ministry of Environmental Protection, Physical Planning and Construction. At that stage, not all legal remedies had been exhausted.

The order in question repealed the applicant's construction permit upon supervision. It was served on the applicant after the elapse of the deadline of one year from the date when the construction permit became final. The applicant lodged a complaint against the order with the Administrative Court. He also lodged a complaint with the Constitutional Court, as he was concerned that he could suffer severe and irreparable consequences while his administrative dispute was being decided. In the constitutional complaint, he refers to the Administrative Court's

practice in determining whether service of an order on repeal upon supervision has been carried out in time. Their practice is that service is deemed to have been effected in time only if the supervisory administrative body issued its order and forwarded it to the first instance body within one year from the day when the order being repealed became final, regardless of when the order was served on the party.

II. The Constitutional Court upheld the applicant's allegations. It had been established that the order in question was forwarded to the applicant by mail on 16 September at 15.0 hours. It could not, therefore, have been properly served on the applicant within one year from the date of the finality of the construction permit.

In this particular case, the applicant neither knew nor could have been expected to have known that the supervisory body was preparing proceedings to repeal the final, enforceable and binding administrative act which had been issued to him. The requirement of service within one year is the minimum prerequisite with which the competent bodies have to comply. The above legal stance has been confirmed in jurisprudence from the Croatian Supreme Court, in U-8420/70 of 10 February 1971. "The day on which the legal consequences of the order repealed upon supervision cease to have effect is the day when the party was served with the order issued upon supervision."

There has been a direct breach in this instance of the applicant's right to equality before the law, as set out in Article 14.2 of the Constitution, as well as objective violation of the principle of the rule of law, guaranteed under Article 3 of the Constitution. This is the highest value of the constitutional order of the Croatian Republic.

The Constitutional Court held that the requirement that the order as to repeal be served personally within one year from the finality of the order being repealed is an important safeguard of the rights of those affected by administrative acts (in this case, the protection of the applicant's right of ownership under Article 1 Protocol 1 ECHR). Interference with an individual's right of ownership by delayed action on the part of the administration, which was the case here, represents a violation of his right of ownership in the context of Article 48.1 of the Constitution, i.e. his right to peaceful enjoyment of ownership within the meaning of Article 1 Protocol 1 ECHR.

Languages:

Croatian, English.

Identification: CRO-2006-2-010

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 23.05.2006 / **e)** U-IIIA-3807/2005 / **f)** / **g)** *Narodne novine* (Official Gazette), 72/06 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Civil procedure, duration, excessive / Compensation, just.

Headnotes:

Courts must use all available procedural possibilities to streamline proceedings in order to avoid the violation of the right to a hearing within a reasonable time.

Summary:

I. The Constitutional Court accepted the constitutional complaint of the applicants, parties to civil proceedings for disturbance of possession, and awarded appropriate compensation for violation of the constitutional right to a judgment in a reasonable time, guaranteed in Article 29.1 of the Constitution.

Civil proceedings were launched before the Municipal Court, over six years before the lodging of the constitutional complaint. The municipal court took no action for four years.

II. The Constitutional Court found that the Municipal Court had not directed hearings and arranged for evidence to be heard which would have made it easier to establish the relevant facts at an early stage of the proceedings. It had failed to decide on the merits of the claim and to come to a decision, despite the fact that the proceedings were of an urgent, though not complex, nature. As a result, the case was still pending before the first instance court. The Constitutional Court found that the first instance Court had not made sufficient use of procedural authorisations which could have streamlined and expedited the proceedings and could have prevented procedural rights from being abused.

As the applicants were partly responsible for the duration of the proceedings, the Court decreased the amounts of appropriate compensation for violation of the right to a judgment within a reasonable time.

Languages:

Croatian, English.

Identification: CRO-2006-2-011

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 24.05.2006 / **e)** U-III-4087/2003 / **f)** / **g)** *Narodne novine* (Official Gazette), 70/06 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Enforcement, judgment, scope.

Headnotes:

Enforcement proceedings are not, by their legal nature, proceedings in which the main issue should be decided. Decisions as to the main issue will have been set out in the writ of execution. They may not be altered or overturned, whether wholly or in part. They can only be executed.

Summary:

I. Enforcement proceedings were launched on 19 October 2001 in respect of the final and enforceable judgment in proceedings for compensation of damage before the Novi Sad Municipal Court, which was handed down in 1991. On two occasions, a claim by the applicants regarding the payment of interest on the adjudicated claim between 3 July 1992 and 5 October 1996 was turned down.

Upon appeal by the debtor, the courts invoked various legislation, including the Decree by the Croatian Government on the Implementation of UN Security Council Resolution no. 757 (*Narodne novine* no. 32/92), the Ordinance on the Implementation of the UN Security Council Resolution no. 757 Concerning Finances (*Narodne novine* no. 32/92) and the Decree on the Implementation of the UN Security Council Resolution Imposing Embargo on the Federal Republic of Yugoslavia (*Narodne novine* no. 41/93). In deliberations in the course of the enforcement proceedings, as to the creditors' rights to interest for the period stated, the court also considered the time limits of regulations which prevented any payments to legal and natural persons in the SFRY during that period.

II. The Constitutional Court found that in the enforcement proceedings the courts had violated procedural and substantive regulations, notably provisions of Articles 46 and 48 of the Execution Act. The lower courts did not instruct the debtor to institute proceedings before a competent civil court to decide as to whether execution was permissible in respect of the default interest. Instead, the courts dealt with these issues themselves in the enforcement proceedings, and as a result the existing writ of execution was rendered unenforceable in part. The Constitutional Court concluded that the applicants' rights to equality before the law, as enshrined in Article 14.2 of the Constitution, and their right to a decision within a reasonable time, enshrined in Article 29.1 of the Constitution, had been breached.

The Constitutional Court upheld the constitutional complaint, overturned the judgments delivered in the course of the enforcement proceedings, and referred the matter to the first instance Court for retrial. The Court's legal stance was clear: enforcement proceedings are not the correct forum in which to decide the main issue of a case. Decisions on main issues, as set out in a writ of execution, cannot be altered or overturned, wholly or in part. They can only be executed.

Languages:

Croatian, English.

Czech Republic
Constitutional Court

Statistical data

1 May 2006 − 31 August 2006

- Judgment of the plenum: 9
- Judgment of panels: 53
- Other decisions of the plenary Court: 13
- Other decisions by chambers: 1 172
- Other procedural decisions: 100
- Total: 1 347

Important decisions

Identification: CZE-2006-2-006

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 03.05.2006 / **e)** Pl. US 66/04 / **f)** / **g)** *Sbírka zákonů* (Official Gazette), 434/2006 / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

2.1.1.3 **Sources** – Categories – Written rules – Community law.
2.2.1.6 **Sources** – Hierarchy – Hierarchy as between national and non-national sources – Community law and domestic law.
2.3.6 **Sources** – Techniques of review – Historical interpretation.
3.9 **General Principles** – Rule of law.
5.3.8 **Fundamental Rights** – Civil and political rights – Right to citizenship or nationality.

Keywords of the alphabetical index:

Extradition / European Arrest Warrant / Criminal prosecution / Community law, uniform interpretation / European Union, member states, mutual trust.

Headnotes:

Under Article 1.2 of the Constitution, read in conjunction with the principle of cooperation enshrined in Article 10 of the EC Treaty, domestic legal enactments, including the Constitution, must be interpreted in conformity with the principles of European integration and the cooperation between Community and Member State organs. Where there are several possible interpretations of the Constitution, not all of which lead to the achievement of a Treaty obligation, then an interpretation must be selected which supports the carrying out of that obligation.

Article 14.4 of the Charter of Fundamental Rights and Freedoms precludes the exclusion of a Czech citizen from the community of citizens of the Czech Republic.

When assessing of the meaning of the phrase “forcing someone to leave his homeland” in Article 14.4 of the Charter, one has to bear in mind that it was drafted with the experience of the Communist regime in mind. A historical interpretation of the Charter demonstrates that it was never concerned with extradition.

The surrender of a citizen for a limited period of time for criminal proceedings taking place in another EU Member State, with a view to their subsequent return to their homeland, does not and cannot constitute forcing them to leave their homeland within the meaning of Article 14.4 of the Charter.

A request by a foreign government may be turned down if granting it would result in a violation of the Czech Constitution or a provision of Czech law which must be adhered to without exception, or if granting it could be prejudicial to the interests of the Czech Republic.

It cannot be said that the domestic rules relating to the European Arrest Warrant (hereinafter as “EAW”) have cast doubt on the permanent relationship between a citizen and the state. A citizen surrendered to an EU Member State for criminal prosecution remains under the protection of the Czech Republic throughout the proceedings. The EAW merely permits the surrender of a citizen for a limited period for criminal prosecution in an EU Member State. Once the proceedings are over, there is nothing to stop somebody in this position returning and indeed he may even serve his sentence in the Czech Republic.

There is no conflict between Article 412.2 of the Criminal Procedure Code and Article 39 of the Charter. This provision lists the criminal offences not requiring double criminality and in no way defines those offences. Article 412 is a provision of procedural, as opposed to substantive, law. Had it been a substantive law enactment, then to enumerate criminal offences with no statutory definition, would certainly constitute a violation of Article 39 of the Charter. However, a surrender pursuant to the EAW

does not constitute the imposition of punishment in the sense of Articles 39 and 40 of the Charter.

Those surrendered under the EAW will be dealt with under the substantive law of the requesting EU state, as opposed to Article 412.2. The statutory enumeration of criminal offences in Article 412.2 is simply for the purpose of procedural steps taken by courts. The adoption of Article 412 did not result in the criminal law of all EU Member States becoming applicable in the Czech Republic. The Czech Republic is merely assisting the other Member States with the enforcement of their criminal law.

By dispensing with the principle of dual criminality in relation to EU Member States, the Czech Republic in no way violates the principle of legality. As a general rule, the requirement of dual criminality can be dispensed with as between Member States of the EU, as they have similar values and mutual confidence in each other, as democratic regimes bound by the rule of law.

The surrender of persons to another EU Member State for prosecution will be a matter for consideration only where the conduct constituting a criminal offence, did not occur in the Czech Republic, but in another Member State.

There may be very exceptional circumstances where the application of the EAW might conflict with the Czech Republic's constitutional order, for instance where a crime committed elsewhere constitutes a criminal act under the law of the requesting state, but would not constitute one under Czech criminal law.

Summary:

Members of parliament asked the Constitutional Court to examine the provisions of the Criminal and Criminal Procedure Codes, which were amended to implement the Framework Decision of the EU Council on the European Arrest Warrant. They contended that these amended provisions conflict with that part of Article 14.4 of the Charter, which provides that "No citizen may be forced to leave his homeland" and that part of Article 39 of the Charter which provides that "Only a law may designate the acts which constitute a crime."

They argued that if the Czech Republic surrenders its citizens pursuant to an EAW, this constitutes forcing them to leave their homeland in conflict with Article 14.4. The Constitutional Court rejected this argument, finding, by means of a comparative survey and historical interpretation, that Article 14.4 was not intended to forbid the extradition of citizens. "Forced leaving" would only arise if the Czech Republic excluded them on a permanent or long-term basis. The EAW procedure involves a temporary absence, and Czech citizens condemned abroad pursuant to an EAW are entitled to return to the Czech Republic to serve their sentences.

The petitioners also contended that an EAW could result in Czech citizens being prosecuted for acts which are not defined as criminal acts under Czech law, and thus Article 39 could be breached. The Court held that, as the contested provisions are procedural in nature, they do not define criminal offences. Further, it has long been generally accepted that persons under Czech jurisdiction may be prosecuted by another state for acts defined in that state's criminal law. In complying with an EAW, the Czech Republic is merely assisting them in that endeavour. As all EU Member States are signatories to the European Convention on Human Rights, so that fundamental rights within the framework of criminal proceedings are adequately protected, the Czech Republic would not violate the general principle of legality by executing an EAW.

Languages:

Czech.

Identification: CZE-2006-2-007

a) Czech Republic / **b)** Constitutional Court / **c)** Third Chamber / **d)** 12.07.2006 / **e)** III US 151/06 / **f)** / **g)** *Sbírka nálezů a usnesení Ústavního soudu ČR* (Official Digest) / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.
1.3.5.12 **Constitutional Justice** – Jurisdiction – The subject of review – Court decisions.
3.22 **General Principles** – Prohibition of arbitrariness.
5.3.13.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.
5.3.13.17 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Rules of evidence.

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:

Arbitrariness, criteria / Relevance, substantive, principle / Civil procedure, deadline, respect by court.

Headnotes:

The right to fair trial corresponds to the duty of ordinary courts to make reasoned decisions and deal with evidence and arguments put forward by parties to the proceedings in a rational and logical manner. To do otherwise would result in a constitutional deficit on a par with the category of unconstitutional acts in the form of disregarded evidence. Ordinary courts must deal with all relevant matters which come to light in the course of the proceedings. The Constitutional Court must assess whether failure on the part of the ordinary court to deal with the arguments put before it is serious enough to constitute arbitrariness. The Constitutional Court has interpreted the concept of arbitrariness in several ways: as extreme discrepancy between the factual and legal findings made and the legal conclusions reached; failure to respect mandatory norms; an interpretation in direct conflict with the principles of justice; the interpretation and application of statutory concepts with a meaning other than that prescribed by statute.

Review proceedings are governed by the principle of substantive relevance; that is, the principle that the court only takes into account those procedural flaws resulting in nullity, and other procedural flaws which could result in an incorrect decision on the merits. As the adjudication of substantive relevance is in principle an issue of ordinary law, it comes within the jurisdiction of ordinary courts, in which the Constitutional Court is not competent to intervene. There is an exception in cases where the relevance of the procedural flaw for the decision of the case on the merits is *prima facie* insufficient, that is, where the further appeal at issue would contain no objections pertaining to the matter decided by the ordinary court, or would be identical to the original appeal.

Summary:

I. The complainant was the administrator of the bankruptcy of a commercial company. He appealed to the Constitutional Court to overturn a ruling by the Appeal Court which removed him from his post as administrator. The Appeal Court had rejected his appeal and had upheld as substantively correct the ruling of the municipal court at first instance.

The complainant stated that he had filed an appeal in time against the municipal court ruling, in which he had drawn the municipal court's attention to his intention to elaborate upon and supplement the appeal, before the deadline for filing an appeal expired. The municipal court referred the appeal to the superior court with a covering letter, but no submission report. He argued that the first instance court carried out this procedural step before the deadline for filing an appeal had expired, in contravention of the Civil Procedure Code, and, in consequence, his supplementary appeal was not sent. In his view, this action on the municipal court's part, and the subsequent Appeal Court decision, constituted a violation of the fundamental right to judicial protection and fair process and to assistance from counsel in court proceedings.

II. The Constitutional Court stated that there are several components to an assessment of the constitutionality of a public authority's encroachment upon fundamental rights and basic freedoms. They include the constitutional review of the legal provisions applied in the case, the assessment of whether constitutional procedural rights have been observed, and the assessment of the constitutional conformity of the interpretation and application of substantive law rights. The relevant law in the context of the constitutional review of the case in point is the Civil Procedure Code, according to which the Chairman of the first instance court must allow for the elapse of the deadline for all parties to file their appeals, before referring the matter to the Appeal Court.

It is clear that this particular case was submitted to the Appeal Court before the deadline for filing an appeal had passed, and therefore it cannot be argued that the right of parties to the proceedings to appeal has been exhausted by the submission of the appeal. The municipal court here had contravened the provisions of the Civil Procedure Code, and its actions had resulted in the superior court arriving at a decision without taking into account all matters which came to light in the proceedings.

From the constitutional law perspective, it is necessary to determine the nature of cases in which improper application of ordinary law by ordinary courts results in the infringement of a fundamental right or basic freedom. In the course of a constitutional complaint, an example would be the arbitrary application of ordinary law. One of the principles of due and fair process is the fundamental right of parties to a case to a genuine and effective

opportunity to put forward arguments of both law and fact to the court. The right to fair trial corresponds to the ordinary courts' duty to arrive at a reasoned decision and to deal adequately with the evidence and arguments evinced during the proceedings. The Constitutional Court found that the ordinary court here had failed to respond to the parties' arguments to such an extent that it constituted arbitrariness. It had failed in its procedures and decision-making to respect the mandatory norms contained in the Civil Procedure Code.

In principle the assessment in review proceedings of the substantive law relevance of procedural flaws falls within ordinary courts' jurisdiction. There is an exception where the procedural flaw is not sufficiently relevant to the merits of the case. This was not the case here, and therefore the Constitutional Court concluded that there had been sufficient contravention of the Civil Procedure Code as to affect the fundamental rights arising from the Charter of Fundamental Rights and Basic Freedoms. It accordingly granted the constitutional complaint.

Languages:

Czech.

Identification: CZE-2006-2-008

a) Czech Republic / **b)** Constitutional Court / **c)** First Chamber / **d)** 13.07.2006 / **e)** I US 85/04 / **f)** / **g)** *Sbírka nálezů a usnesení Ústavního soudu ČR* (Official Digest) / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

2.2.1.5 **Sources** – Hierarchy – Hierarchy as between national and non-national sources – European Convention on Human Rights and non-constitutional domestic legal instruments.
4.7.16.1 **Institutions** – Judicial bodies – Liability – Liability of the State.
5.3.14 **Fundamental Rights** – Civil and political rights – *Ne bis in idem*.
5.3.17 **Fundamental Rights** – Civil and political rights – Right to compensation for damage caused by the State.

Keywords of the alphabetical index:

Damage, immaterial, compensation / Damage, compensation, scope / State, liability, pecuniary.

Headnotes:

The Constitutional Court has stated in a previous plenary judgment that a claim for compensation for immaterial harm is a component of compensation for damage, which is defined in the Civil Code. It concluded that the current legal concept of damage as material harm does not allow for such an interpretation. Individuals may still seek compensation for immaterial harm consisting of encroachment upon personal rights by means of an action for the protection of personhood under the Civil Code. Under the current legislation, this is a different type of claim from compensation for damage.

In the context of compensation for previous unlawful restrictions on personal liberty, the conclusions contained in the judgment of the Constitutional Court Plenum must be revised. Claims for compensation in such cases is laid down not only in ordinary law, but also in Article 5.5 ECHR, which is directly applicable within Czech law and which prevails over national legislation.

In the field of the domestic application of the European Convention on Human Rights, the concept of compensation for damage must be approached in the same way as the approach taken by national constitutional courts and supreme courts in Europe and in accordance with jurisprudence from the European Court of Human Rights. In cases of restrictions on personal freedoms by the state, the situation in particular European states is that Article 5.5 ECHR prevails. It is construed by the national courts in an entirely autonomous manner.

Summary:

The complainant asked the Constitutional Court to review various decisions by the ordinary courts which had rejected his claim for compensation for damage, by virtue of state liability for damage arising from unlawful decisions and improper official acts, due to his having served a sentence of imprisonment. In the early 1990s he was convicted twice for the same offence − that of evading civilian national service. In the first set of criminal proceedings, he was given a suspended sentence. In the second, the suspended sentence was changed to an unconditional sentence, and was added to the sentence he received for the second conviction. He served both sentences. The Minister of Justice subsequently filed a complaint in

support of the complainant in these proceedings, but the Supreme Court did not annul the contested decision. Only after the Constitutional Court issued a judgment overturning the Supreme Court's ruling because it had violated the principle of *ne bis in idem*, did the Supreme Court overturn its own ruling "including all other substantively-related decisions" and dismiss the second criminal proceedings. However, it concluded that the ruling converting the first suspended sentence could not be defined as a "substantively related decision", and, in relation to the first proceedings, neither quashed the indictment nor dismissed the proceedings. Since the relevant decision was not quashed as unlawful, the basic condition for asserting a claim of compensation for damage was not met in relation to the first criminal proceedings, which meant that the complainant could not assert further related claims, namely demands for compensation for loss of earnings, compensation for immaterial harm or just satisfaction.

With regard to the second set of proceedings, the Constitutional Court ascertained that the ordinary courts arrived at their decisions on the claims for compensation for damages on the basis of the Civil Code provisions under which the complainant could, in appropriate circumstances, be granted actual damage and lost profits. The term, "lost profits" (or in the complainant's case "lost wages"), was understood to mean his actual wage level. From the definition of damage, the courts concluded that the complainant could not be granted compensation for immaterial harm. The ordinary courts implied that these particular statutory provisions were conformed to Article 5.5 of the Convention; that is to say, they covered the situation of a claim to compensation by someone whose personal liberty was restricted in conflict with Article 5.1 − 5.4 of the Convention.

In earlier decisions, the Constitutional Court had expressed the view that criminal prosecution and punishment arising from it represents a serious interference with individual personal liberty. There is thus no doubt that a criminal prosecution or the imposition of a punishment which conflicts with statutory law, or the constitutional order of the Czech Republic, can give rise both to material and immaterial harm. The current legislative concept of damage as material harm does not allow for an interpretation that would include immaterial harm. Individuals are, however, still able to seek compensation for immaterial harm consisting in encroachment upon personal rights by means of an action for the protection of personhood under the Civil Code. In cases of compensation for previous unlawful restriction on personal liberty, these conclusions must be revised. Here, the claim for compensation is provided for in ordinary law and also in the European Convention on Human Rights. According to case law of the European Court of Human Rights, harm is understood to mean both material and immaterial harm.

The decision by the ordinary courts in the case in point to refuse the complainant's claim for compensation for immaterial damage is in conflict with the concept of the compensation for damage enshrined in the European Convention on Human Rights, which the ordinary courts are obliged to apply in preference to national statutes.

The Constitutional Court's previous judgment in the complainant's case unambiguously laid down that, in clear conflict with the principle of *ne bis in idem*, the complainant had been convicted twice for the same deed. This conclusion also extends to situations where a final decision that is quashed is directly connected with a further decision relating to the same deed, which resulted in the conversion of the sentence originally imposed. All the more so if an individual's personal liberty was restricted on the strength of this fact. Any other approach would represent in effect a continuation of the complainant's double jeopardy.

The Constitutional Court stated that the ordinary courts would have to resolve the issue of the complainant's claim for damage for loss of earnings within the context of its decision on the claim for compensation for immaterial harm. In determining the amount of compensation, the courts would need to consider the period of time during which the payment of compensation was refused, as well as the fact that there had been a flagrant error on the part of the ordinary courts, and particularly of the Supreme Court in resolving the complaint of the violation of the law. This resulted in a significant extension to the length of the proceedings.

The Constitutional Court granted the constitutional complaint and overturned the contested decision.

Languages:

Czech.

Denmark
Supreme Court

Important decisions

Identification: DEN-2006-2-001

a) Denmark / **b)** Supreme Court / **c)** / **d)** 05.12.2005 / **e)** 59/2003 / **f)** / **g)** / **h)** *Ugeskrift for Retsvæsen* 2006, 770H; CODICES (Danish).

Keywords of the systematic thesaurus:

5.1.1 **Fundamental Rights** – General questions – Entitlement to rights.
5.3.5.2 **Fundamental Rights** – Civil and political rights – Individual liberty – Prohibition of forced or compulsory labour.
5.4.15 **Fundamental Rights** – Economic, social and cultural rights – Right to unemployment benefits.

Keywords of the alphabetical index:

Unemployment, benefit, conditions / ILO, Convention no. 122, effect on national law.

Headnotes:

Participation in a job training programme, as a condition for receiving unemployment benefit, does not constitute forced or compulsory labour as prohibited by the European Convention on Human Rights. Furthermore, the obligation under the Danish Constitution whereby the State must help those who cannot support themselves does not preclude the State from setting certain conditions to be met by a recipient of benefit in order to be granted assistance.

Summary:

The applicant's unemployment benefit was stopped at the end of May 2000, on the basis that he had refused to participate in a job training programme. The payment of unemployment benefit was resumed in August 2000, when he began to participate in the job training programme. The applicant brought a case before the Danish courts, claiming payment of unemployment benefit for the months of June and July.

The applicant acknowledged before the Supreme Court that:

- the job training programme offered to him had been in accordance with the Danish Act on an Active Social Policy;
- he had refused to participate in the job training programme without sufficient reason;
- the Danish Social Authorities were entitled for the above reasons to stop the payments under the above Act.

However, he claimed that the condition of participation in the job training-programme in order to be entitled to unemployment benefit contravened the Danish Constitution, the European Convention on Human Rights and the ILO Conventions, at least in so far as it did not meet the requirements of minimum wage or right to paid holidays. The relevant provisions were Article 75.2 of the Constitution and Article 4.2 ECHR as well as Article 1.1, cf. Article 2.1 of ILO Convention no. 29 and Article 1 of ILO Convention no. 122.

Article 75.2 of the Constitution states that anyone unable to support himself must receive assistance from the State. The Supreme Court found that this article is not to be interpreted so that the State cannot set certain conditions to be met by a recipient in order to be granted assistance. If the applicant had taken part in the job training programme, he would have received unemployment benefit ensuring him a level of existence above subsistence level. Furthermore, the job training programme that was offered to him was reasonable, as the applicant was able to carry out the proposed work, and it was purposeful as it aimed to improve his ability to support himself.

The Supreme Court therefore found that the applicant had been offered public assistance in the months of June and July 2000 in accordance with Article 75.2 of the Constitution.

The Supreme Court did not perceive the job training programme to be forced or compulsory labour in the sense of Article 4.2 ECHR.

The condition of participation in the job-training-programme was not at variance with the obligation to abolish forced or compulsory labour, as imposed by Article 1.1, cf. Article 2.1 of ILO Convention no. 29. Furthermore, the relevant Danish Act was not considered to be in contravention of the aim to "declare and pursue an active policy designed to promote full, productive and freely chosen employment", as required by ILO Convention no. 122, although the job training programme did not meet the

requirements of the collective agreement regarding wage and paid holidays.

Finally, the Supreme Court stated that the ILO Conventions could not cause the Act on an Active Social Policy to be set aside and declared inapplicable to the case in point.

Languages:

Danish.

Estonia

Supreme Court

Important decisions

Identification: EST-2006-2-003

a) Estonia / **b)** Supreme Court / **c)** En banc / **d)** 17.06.2004 / **e)** 3-2-1-143-03 / **f)** Action of Estonian Health Insurance Fund against AS Laverna claiming the payment of 46 051 kroons / **g)** *Riigi Teataja III (RTI)* (Official Gazette), 2004, 18, 211 / **h)** http://www.riigikohus.ee; CODICES (Estonian, English).

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
5.1.3 **Fundamental Rights** – General questions – Positive obligation of the state.
5.3.39.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.
5.4.14 **Fundamental Rights** – Economic, social and cultural rights – Right to social security.

Keywords of the alphabetical index:

Social security, contribution, purpose / Social security, contribution, evasion, penalty / Health care, fund, economic situation.

Headnotes:

If an employer has to reimburse the costs of treatment of an employee for whom it has failed to pay social security contribution on time, as well as having to pay the tax due and interest thereon, this constitutes a disproportionate interference with the right to property.

Summary:

I. AS Laverna, an employer, failed to pay contributions to social security for its employees by the due date. Several of its employees fell ill and the Health Insurance Fund was obliged to cover their medical treatment costs, by virtue of the Health Insurance Fund Act (HIFA). Under Section 4.2 of HIFA, the Health Insurance Fund can claim reimbursement of treatment costs from an employer who fails to pay the correct

contribution to social security on time. Under the tax legislation, the employer must pay the tax due, together with interest because of the delay. AS Lavena argued that the claim by the Health Insurance Fund represented unconstitutional interference with its right to property. Lääne County Court upheld the claim brought by the Health Insurance Fund. AS Laverna filed an appeal with the Tallinn Circuit Court against the County Court's judgment. Tallinn Circuit Court upheld the judgment of the county court. AS Laverna filed an appeal in cassation against the Circuit Court judgment.

II. The Civil Chamber of the Supreme Court refused to review the Tallinn Circuit Court's judgment and referred the matter to the general assembly of the Supreme Court. The Chamber took the view that a legal opinion would be needed for the hearing of the appeal in cassation, as to the conformity of Section 4.2 of HIFA to Article 32 of the Constitution (in conjunction with Article 11 of the Constitution). The plenary of the Supreme Court found that the term 'property' in Article 32 of the Constitution includes money and the right to property extends to legal persons. According to the General Assembly of the Supreme Court, Section 4.2 of HIFA places an additional financial obligation on a taxpayer, which effectively determines how that income is to be used, thereby restricting the constitutional freedom of a person to decide how to dispose of his property.

Against the background of an earlier decision by the Supreme Court (Decision no. 3-4-1-7-01, *Bulletin* 2001/3 [EST-2001-3-005]) the Court found that Article 11 of the Constitution is a norm which embraces all fundamental rights and sets limits to any restrictions on them. Any interference with fundamental rights must be proportionate. The rationale behind Section 4.2 of HIFA was to ensure there were sufficient funds for the proper performance of the health insurance fund and to avoid it being embroiled in financial problems. As such, it could be described as a suitable measure. A measure can be described as necessary if the aim cannot be achieved by another less burdensome but equally effective measure. According to HIFA, the assets of the health insurance fund consisted of funds set aside for health insurance in the state budget. The performance of the duties imposed on the health insurance fund by law is directly dependent upon regular and continuous receipts of social security tax. The state taxation system includes sufficient measures to force somebody owing tax arrears to fulfil his obligations. These include the possibility of issuing precepts to those owing tax, collecting tax arrears without court proceedings, calculating interest and imposing fines or detention for a tax offence. The legislation also allows a cash reserve to be built up within the health insurance fund, so that its funding could continue should economic conditions deteriorate.

The General Assembly of the Supreme Court found that the measure established in Section 4.2 of HIFA was not necessary for the achievement of the aim, and constituted a disproportionate restriction on the right of ownership. It was accordingly in conflict with Articles 32 and 11 of the Constitution. As there was no need to ascertain new facts, the General Assembly overturned the judgments of Lääne County Court and the civil chamber of Tallinn Circuit Court and handed down a new judgment, in which it dismissed the Health Insurance Fund's action against AS Laverna.

Supplementary information:

- Legal norms referred to: Sections 11 and 32 of the Constitution.

Cross-references:

- Decision no. 3-4-1-7-01 of 11.10.2001, *Bulletin* 2001/3 [EST-2001-3-005].

Languages:

Estonian, English.

Identification: EST-2006-2-004

a) Estonia / **b)** Supreme Court / **c)** En banc / **d)** 25.10.2004 / **e)** 3-4-1-10-04 / **f)** Review of constitutionality of Subsections 1, 4 and 8 of Section 41.3 of Traffic Act / **g)** *Riigi Teataja III (RTI)* (Official Gazette), 2004, 28, 297 / **h)** http://www.riigikohus.ee; CODICES (Estonian, English).

Keywords of the systematic thesaurus:

3.10 **General Principles** – Certainty of the law.
5.3.14 **Fundamental Rights** – Civil and political rights – *Ne bis in idem*.

Keywords of the alphabetical index:

Traffic offence / Penalty, administrative, fine / Punishment, definition / Driving licence, suspension as a reprimand / Coercive measure, non-punitive, criteria.

Headnotes:

A temporary driving ban, imposed by an administrative agency as a result of and in the context of criminal proceedings, should be regarded as an automatic consequence of the conviction of the person. Therefore, it does not violate the *ne bis in idem* principle established in the Constitution.

Summary:

I. Mr Viigimäe exceeded the speed limit twice and was fined for both offences by the police. The Motor Vehicle Registration Centre (hereinafter referred to as "MVRC") banned him from driving a car for six months after the second offence. Mr Pugi was fined for drunken driving by the police. The MVRC banned him from driving for three months. Mr Kivivare exceeded the speed limit four times and was fined for each incident by the police. The MVRC suspended his right to drive for twenty-four months. All three appealed to the Tallinn Administrative Court. The Court declared Subsections 1, 4 and 8 of Section 41.3 of the Traffic Act, which provide for the imposition of driving bans, unconstitutional and did not apply them. The Administrative Court referred the cases to the Supreme Court.

II. The Supreme Court considered the rationale behind the principle of *ne bis in idem* in Section 23.3 of the Constitution. It provides that no one shall be tried or punished again for an act for which he has been finally convicted or acquitted pursuant to law. This enables an accused person to discern the measures of state coercion which might be applied if he is ultimately pronounced guilty. It also guarantees the predictability of legal decisions. In deciding whether a driving ban imposed under the above provisions of the Traffic Act contravenes this principle, it is necessary to check whether a ban falls within the scope of protection of Section 23.3 of the Constitution. First, one has to consider whether the temporary driving ban under Articles 1, 4 and 8 of Section 41.3 of the Traffic Act is the same act for which the person was punished in criminal proceedings. Secondly, one has to determine whether the ban amounts to a punishment and, finally, whether it constitutes repeated punishment under Section 23.3 of the Constitution.

If a temporary ban is imposed for one misdemeanour, or the last in a series of misdemeanours for which somebody has been fined, this means that both sanctions are applied for the same act.

The actions for which the right to drive is suspended fall within the category of offences. The application of the above provisions of the Traffic Act requires the existence of a valid decision as to punishment made in criminal proceedings. The assessment also has to be made, as to whether suspension of the right to drive amounts to a measure which has the essence and objective of punishment and is sufficiently severe to be considered equal to a criminal punishment.

Not every restriction on rights and freedoms amounts to a punishment. There is a difference between punishment for an offence and a non-punitive coercive measure. The basis for punishment is guilt and punishment entails reproach, which is manifested in the restriction. The basis for the imposition of a non-punitive coercive measure is the danger the person concerned poses to society through his activities.

There are no proceedings on the merits in the MVRC. Its role is simply to formalise the suspension of the right to drive. It does not assess the danger the person in question poses on the roads. Their guilt will be determined in the criminal proceedings. The Supreme Court followed the reasoning here of the European Court of Human Rights, in the case of *Malige v. France*. In that case, it was held that a driving ban, imposed by an administrative agency as a result of and in the context of proceedings arising from an offence, should be regarded as "an automatic consequence of the conviction" of the person.

A driving ban can be imposed for a duration of between one and twenty-four months, under the Traffic Act. A prohibition on driving for a period of years is sufficiently onerous to be regarded as a punishment for the purposes of Section 23.3 of the Constitution.

The judgment handed down by the European Court of Human Rights in *Escoubet v. Belgium* indicates that a ban on driving for a short period does not fall within the categories of punishment to which the guarantees provided for hearing offences should be extended. However, it would not be practical or reasonable to draw a line between Subsections 1 to 8 of Section 41.3 of the Traffic Act, as the provisions form an integrated system.

It is clear from the wording of Section 23.3 of the Constitution that the imposition of a principal and a supplementary punishment is not prohibited in principle. The prohibition is on the matter being tried and punished again in independent proceedings.

There is no independent investigation. Instead, the decision in the criminal proceedings serves as a basis for the suspension. That is why the suspension of the right to drive does not constitute a new trial. Rather, it is the inevitable consequence of the criminal proceedings, and an integral part of them.

According to Section 28.3 of the Traffic Act, a person wishing to acquire a driving licence must be familiar with the requirements of the road traffic legislation. Somebody incurring a penalty for a traffic offence should not be surprised if the decision on his punishment is followed by a temporary driving ban. As a result, there is no violation of legal certainty. A driver could very well foresee the consequences of his activities and defend himself during the criminal proceedings.

The Court ruled that as a temporary ban under the Traffic Act could not be regarded as punishing a person again for the same offence, it did not breach the *ne bis in idem* principle. The petitions from the Tallinn Administrative Court were dismissed and Subsections 1, 4 and 8 of Section 41.3 of the Traffic Act were not pronounced unconstitutional. Three separate opinions were given.

Cross-references:

- *Malige v. France* – 27812/95 (1998) ECHR (23.09.1998), *Reports* 1998-VII;
- Escoubet *v. Belgium* – 26780/95 (1999) ECHR 106 (28.10.1999), *Reports of Judgments and Decisions* 1999-VII.

Languages:

Estonian, English.

Identification: EST-2006-2-005

a) Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 02.12.2004 / **e)** 3-4-1-20-04 / **f)** A petition by the President of the Republic to review the constitutionality of Act on Amendments to Dwelling Act and Section 12.1 of the Republic of Estonia Principles of Ownership Reform Act / **g)** *Riigi Teataja III (RTI)* (Official Gazette), 2004, 35, 362 / **h)** http://www.riigikohus.ee; CODICES (Estonian, English).

Keywords of the systematic thesaurus:

1.1.4.1 **Constitutional Justice** – Constitutional jurisdiction – Relations with other institutions – Head of State.
1.2.1.1 **Constitutional Justice** – Types of claim – Claim by a public body – Head of State.
1.3.5.15 **Constitutional Justice** – Jurisdiction – The subject of review – Failure to act or to pass legislation.
3.10 **General Principles** – Certainty of the law.
3.11 **General Principles** – Vested and/or acquired rights.
4.4.1.2 **Institutions** – Head of State – Powers – Relations with the executive powers.
4.4.1.4 **Institutions** – Head of State – Powers – Promulgation of laws.
5.4.13 **Fundamental Rights** – Economic, social and cultural rights – Right to housing.

Keywords of the alphabetical index:

Housing, contract, extension / Municipality, rent control / President, right to veto legislation, limits.

Headnotes:

The principle of legitimate expectation cannot be invoked to pressurise Parliament into establishing benefits which have been the subject of political discussion. The President of the Republic may not challenge parliament for failure to act when the provisions in question are in fact included in other legislation already in force.

Summary:

I. The Estonian Parliament enacted the "Act on Amendments to Dwelling Act and to Section 12.1 of the Estonian Republic Principles of Ownership Reform Act," referred to here as "the contested Act". The President refused to proclaim the Act and asked Parliament to bring it into line with the Constitution. Parliament, however, passed the contested Act unamended. The President petitioned the Supreme Court to declare it unconstitutional.

The President argued that the date of entry into force of the amendments made to the Dwelling Act and to the Estonian Republic Principles of Ownership Reform Act (PORA) by the contested Act was at variance with the principle of legal certainty enshrined in Section 10 of the Constitution. In his opinion, the period prescribed by the contested Act, which was under two months, was too short. The President also observed that once the Act came into force, the current social security system would not fully guarantee the right to housing, set out both in Section 28 of the Constitution and in international human rights conventions. He contended that the Dwelling Act and PORA resulted in a legitimate expectation for the tenant of a restituted dwelling that

the tenancy would be extended and that rent margins would be determined during a fixed period.

II. The Court noted that local government regulations, establishing rent margins on their administrative territories, would become invalid once the contested Act came into force, to the extent that they applied to rent margins for dwellings within restituted houses. The tenants and owners of restituted dwellings are the indirect addressees of the contested Act.

The President's petition is based on the principle of legitimate expectation. The Court held in 1994 that the principle of legitimate expectation means that everyone has the right to proceed with their lives in the reasonable expectation that the applicable Acts will remain in force. Everyone must be able to enjoy the rights and freedoms granted to them by law at least within the period established by the law.

The principle of legitimate expectation does not rule out the possibility of restrictions on rights or withdrawal of benefits. Parliament may make changes to legal relationships to adapt to changing circumstances, and this will inevitably be prejudicial to certain members of society.

The Court also considered whether the tenants of restituted houses have a legitimate expectation that the rent margins will remain in force. An examination of the history of rent margins showed that from the outset they were always regarded as a transitory measure.

Tenants of restituted houses have never had a statutory subjective right to rent margins. Local government had the power to establish (or not to establish) rent margins within its administrative territory. There is no provision in the Dwelling Act for a term during which rent margins will not be abolished. Neither does the Act prohibit revising rent margins or setting upper limits on them.

The Court held that tenants of restituted houses do not have and never have had grounds for a legitimate expectation that rent margins will remain in force.

The President's petition suggested a possible breach of the principle of legitimate expectation if a solution to the housing problems of tenants of restituted houses was not in place by the time the rent margins were abolished. Mention has been made, during parliamentary debates, of solutions such as compensation for the higher rental costs and the provision of social housing for tenants of restituted houses. However, the state has made no promises to the effect that the abolition of rent margins would be accompanied by measures to secure the wellbeing of tenants of restituted houses. The principle of legitimate expectation cannot be invoked to demand that the legislator establish benefits which have been the subject of political discussions.

The President suggested that the gap in the law was at odds with the principles of legal certainty and legitimate expectation, as set out in the Constitution. The Court pointed out that the proposed changes are not on a large scale, neither are they totally unexpected. There are no grounds to establish a longer term for the entry into force of the contested Act than that prescribed by the Constitution. When the landlord increases the rent, he will need to respect that term, as well as the restrictions on rent increases set out in the Law of Obligations Act and the possibility of disputes. Therefore, tenants of restituted houses have had sufficient time to take steps to adjust to the new circumstances.

The President also expressed concern about the abolition of rent margins, as once the contested Act comes into force, the current social security system will not fully guarantee the universal right to housing, under Section 28 of the Constitution. The Chamber observed that if an Act lacks a provision which it should contain pursuant to the Constitution, the President of the Republic has the right not to proclaim it. However, there are certain restrictions. He is not entitled to contest a legislative omission if the provision is included in another statute which has already been proclaimed, or if Parliament has included it in another Act.

In essence, the President has contested the norms of the Social Welfare Act, concerning the right to housing allowance. This Act is already in force. The President has no such competence, and therefore the Court cannot review that part of his petition on its merits.

Cross-references:

- Case III-4/A-5/94 of 30.09.1994 of the Supreme Court of Estonia, *Bulletin* 1994/3 [EST-1994-3-004].

Languages:

Estonian, English.

France
Constitutional Council

Important decisions

Identification: FRA-2006-2-005

a) France / **b)** Constitutional Council / **c)** / **d)** 22.06.2006 / **e)** 2006-537 DC / **f)** Resolution amending the Rules of Procedure of the National Assembly / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 27.06.2006, 9647 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

3.21 **General Principles** – Equality.
4.5.4.1 **Institutions** – Legislative bodies – Organisation – Rules of procedure.
4.5.4.4 **Institutions** – Legislative bodies – Organisation – Committees.
4.5.10 **Institutions** – Legislative bodies – Political parties.

Keywords of the alphabetical index:

Parliament, group, rights / Parliament, opposition, status / Parliament, majority.

Headnotes:

The arrangements introduced by the new Rule 19 of the Rules of Procedure of the National Assembly, insofar as they require parliamentary groups to make a statement of allegiance to the Majority or Opposition and, if they object, confer decision-making power on the Bureau of the National Assembly, are at variance with Article 4.1 of the Constitution. Rule 19 also leads to an unwarranted difference in treatment, to the detriment of parliamentary groups that object to declaring such an allegiance, by attaching to such a statement of allegiance certain consequences in respect of the right to participate in a number of parliamentary oversight activities.

Summary:

The Speaker of the National Assembly, under Article 61 of the Constitution, referred a resolution amending the Assembly's Rules of Procedure to the Constitutional Council.

The resolution encapsulated some of the recommendations of the Speaker of the National Assembly, Mr Jean-Louis Debré, for improving the quality of work on the preparation of legislation. It also incorporated in the Assembly's Rules of Procedure the concepts of “Majority” and “Opposition”.

The rules were designed to improve the quality of work on the preparation of legislation, which concerned both committee proceedings and proceedings in public sittings. They were deemed to be in keeping with the Constitution.

On the other hand, the provisions introducing the concepts of “Majority” and “Opposition”, which were presented as being necessary for the purpose of giving the Opposition a status, were considered unconstitutional.

The new provision in Rule 19 of the Rules of Procedure, regarding the formation of parliamentary groups, reads: “The leader of the group shall submit to the Speaker's office a statement of the group's allegiance to the Majority or Opposition. Should the leader of a group object, the decision shall be taken by the Bureau.”

The statement of allegiance afforded special rights, in that it restricted access to the post of chair or rapporteur in enquiry commissions and parliamentary fact-finding delegations to members of groups that had declared themselves to be part of the Opposition.

The Constitutional Council held that these provisions were unconstitutional. Insofar as they required parliamentary groups to make a statement of allegiance to the Majority or Opposition and, if they objected, conferred decision-making power on the Bureau of the National Assembly, the provisions of the resolution were contrary to Article 4.1 of the Constitution, which reads: “Political parties and groups shall contribute to the exercise of suffrage. They shall be formed and carry on their activities freely ...” The consequences of such allegiance meant that there was unjustified difference of treatment, to the detriment of groups refusing to declare such an allegiance.

Languages:

French.

Identification: FRA-2006-2-006

a) France / **b)** Constitutional Council / **c)** / **d)** 20.07.2006 / **e)** 2006-539 DC / **f)** Immigration and Integration Act / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 25.07.2006, 11066 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

5.1.1.3 **Fundamental Rights** – General questions – Entitlement to rights – Foreigners.
5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
5.3.9 **Fundamental Rights** – Civil and political rights – Right of residence.
5.3.32 **Fundamental Rights** – Civil and political rights – Right to private life.
5.3.33 **Fundamental Rights** – Civil and political rights – Right to family life.

Keywords of the alphabetical index:

Family, protection, constitutional / Family, reunion / Foreigner, entrance, residence / Foreigner, residence, permit, conditions / Foreigner, family reunion, right.

Headnotes:

There is no constitutional principle or rule assuring aliens of a general and absolute right of access to national territory and the right to reside there. A provision that simply amends the list of categories of aliens automatically entitled to a temporary residence permit bearing the inscription “private and family life” is not, therefore, unconstitutional. Nor does it undermine the principle of respect for human dignity, enshrined in the Preamble to the 1946 Constitution.

It follows from the tenth paragraph of the Preamble to the 1946 Constitution, which reads: “The Nation shall provide the individual and the family with the conditions necessary to their development”, that aliens who are lawfully resident in France on a stable basis have, like nationals, the right to a normal family life. It is, however, for parliament to ensure that the protection of law and order and the protection of public health, which is a constitutional objective, are reconciled with the right to a normal family life.

In increasing from 12 to 18 months the minimum period of residence for aliens applying for permission for their spouses and under-age children to join them, the law did not undermine the rights of aliens lawfully settled in France on a stable basis. It simply modified the criterion for assessing this stability. The assessment is not manifestly erroneous.

The law may make family reunion subject to the applicant's ability to provide normal housing conditions for his or her spouse and children, such as prevail in France, the host country. Parliament could, without overstepping its powers, refer to the concept of “geographical region”.

In providing that applicants who did not comply with the “fundamental principles recognised by the laws of the Republic” could be refused the right to family reunion, parliament intended to refer to the essential principles which, in accordance with the laws of the Republic, govern family life in France, the host country. Subject to this interpretation, this measure is not unconstitutional.

In deciding that the period during which authorisation to stay in the country for reasons of family reunion may be withdrawn if the people in question cease to live together would be three years as from the issue of such authorisation, except in certain circumstances (spouses who are victims of domestic violence), parliament simply defined the circumstances under which the authorisation would continue to apply, which were related to the genuineness of their cohabitation.

Summary:

The Immigration and Integration Act substantially amplifies the law of 26 November 2003, recent though the latter is. Several measures were challenged.

Abolition of the automatic issue of a residence permit to aliens who have had their habitual place of residence in France for more than ten years means that temporary residence permits bearing the inscription “private and family life” are no longer automatically issued to foreigners unlawfully present in the country. It does not, however, deprive the persons concerned of the opportunity to be issued a residence permit on other grounds, and does not prevent the administrative authorities from making use of their acknowledged general power to grant residence permits in exceptional circumstances.

There is no constitutional principle or rule assuring aliens of a general and absolute right of access to national territory and right to reside there. The argument that doing away with this arrangement undermines the principle of human dignity is rejected.

1. The new provisions concerning family reunion amend the conditions for the assessment of the stability and lawfulness of the residence of persons applying for permission to bring their families into the country:

- they must now provide evidence of 18 months' residence (instead of a year's residence);
- their housing conditions will no longer be assessed at national level but with reference to "a comparable family in the same geographical region".

2. The law also introduces a new requirement whereby applicants must comply with key principles which, in accordance with the laws of the Republic, govern normal family life in France: monogamy, equality between the man and the woman, respect for the physical safety of the wife and children; respect for freedom to marry; regular school attendance, respect for ethnic and religious differences and acceptance of the rule that France is a secular Republic.

None of these requirements violates the right to a normal family life.

3. Lastly, the law makes it possible to withdraw, within three years, the residence permit of the spouse of a foreign national lawfully present in the country if the spouses cease to live together, except when the break-up is the result of the spouse's death or of domestic violence, or if one or more children have been born of the marriage.

There is no constitutional principle guaranteeing that authorisation should be maintained or renewed when the conditions laid down when it was issued are no longer met.

Cross-references:

- Decision no. 93-325 DC of 13.08.1993, *Bulletin* 1993/2 [FRA-1993-2-007].

Languages:

French.

Identification: FRA-2006-2-007

a) France / **b)** Constitutional Council / **c)** / **d)** 27.07.2006 / **e)** 2006-540 DC / **f)** Law on Copyright and related rights in the information society / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 03.08.2006, 11541 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

1.4.10.7 **Constitutional Justice** – Procedure – Interlocutory proceedings – Request for a preliminary ruling by the Court of Justice of the European Communities.
2.2.1.6.3 **Sources** – Hierarchy – Hierarchy as between national and non-national sources – Community law and domestic law – Secondary Community legislation and constitutions.
2.3.1 **Sources** – Techniques of review – Concept of manifest error in assessing evidence or exercising discretion.
3.12 **General Principles** – Clarity and precision of legal provisions.
3.14 **General Principles** – *Nullum crimen, nulla poena sine lege*.
5.2 **Fundamental Rights** – Equality.
5.4.12 **Fundamental Rights** – Economic, social and cultural rights – Right to intellectual property.

Keywords of the alphabetical index:

Intellectual property, right / Copyright / Downloading / Counterfeiting, protection / Internet, piracy.

Headnotes:

1. Under Article 88.1 of the Constitution, there is a requirement to transpose EU directives into domestic law. It is up to the Constitutional Council, when a law designed to transpose an EU directive into domestic law has been referred to it, to ensure that this requirement is complied with, save in exceptional circumstances where France's constitutional identity would be undermined.

Accordingly, arguments against statutory requirements that merely draw the necessary conclusions from the specific and unconditional provisions of a directive on which the Constitutional Council is not responsible for expressing an opinion carry no weight.

As it must take a decision within a period of a month, before the law is promulgated, the Constitutional Council may not submit a preliminary question to the Court of Justice of the European Communities. It cannot therefore declare a statutory requirement to be unconstitutional unless it is manifestly incompatible with the directive it is designed to transpose into domestic law.

According to the provisions of Directive no. 2001/29/EC, in particular Article 5, which concerns the "three-point test", exceptions to the sole rights of authors and holders of related rights must neither conflict with the normal exploitation of the work or other subject-matter nor unreasonably prejudice the legitimate interests of the rightholder.

The law must be interpreted as not prohibiting rightholders from making use of technical protection measures limiting recourse to the exception to the right to reproduce a single copy, or preventing any copies from being made, in special circumstances where this is dictated by the need to comply with the principle of the "three-point test".

The reference to compliance with copyright in the provisions concerning means of getting round technical protection measures, for which interoperability should not serve as a pretext, should be interpreted as also covering related rights.

The exemption from liability provided for in the case of "research" should be interpreted as referring to scientific research into cryptography.

Subject to these interpretations, the provisions of the law are not manifestly incompatible with the directive.

2. The aims of the exercise of the right to property, safeguarded by Articles 2 and 17 of the Declaration of the Rights of Man and of the Citizen of 1789 as an inviolable and sacred right, and the conditions attached to it, have changed since 1789: its scope has been extended to new fields, including intellectual property rights and, in particular, copyright and related rights. These rights must be understood as being applicable both to holders of copyright or a related right who make use of technical protection measures and to holders of intellectual property rights to the technical protection measures themselves.

The intellectual property rights of persons who design technical protection measures may not be violated in a manner that can be deemed to be tantamount to expropriation unless this is warranted on grounds of public necessity. If interoperability constitutes such a necessity, within the meaning of Article 17 of the Declaration of the Rights of Man and of the Citizen of 1789, compensation must be provided where third parties gain access to data essential for the purpose of interoperability without the consent of the rightholder.

3. The need for parliament to exercise its responsibilities fully and uphold the constitutional principle of the intelligibility and accessibility of the law require it to introduce provisions that are sufficiently precise and couched in unambiguous terms.

It follows from Article 8 of the Declaration of the Rights of Man and of the Citizen of 1789 and Article 34 of the Constitution, which provides that Statutes shall lay down the rules concerning the determination of serious crimes and other major offences and the penalties applicable to them, that parliament itself must specify the scope of criminal law and define crimes and other major offences sufficiently clearly and precisely.

The exception provided for in respect of software intended for collaborative work in the provisions penalising the production and dissemination of illegal downloading software is not sufficiently clear and precise to comply with the rule that offences and punishments must be strictly defined by law.

Similarly, parliament could not make "interoperability" a factor affecting the scope of criminal law without clearly and precisely defining the meaning it afforded to this concept. In refraining from doing so, it undermined the rule that offences and punishments must be strictly defined by law.

The exception provided for in the case of software for swapping files not subject to copyright is at variance with the principle of equality, in that it means there is no criminal law protection for the non-pecuniary rights of authors who have waived remuneration.

4. In providing that the unauthorised swapping of works on "peer-to-peer" networks alone will in future constitute a petty offence and not an indictable offence, parliament ignored the principle of equality in criminal law. From the point of view of the infringement of copyright and related rights, "peer-to-peer" swapping has no special features justifying a difference in treatment of this kind.

Summary:

The Bill "on copyright and neighbouring rights in the information society", tabled in 2003, was designed to adapt literary and artistic copyright to the rapid

development of digital information processing technology by translating into domestic law Directive no. 2001/29/EC of the European Parliament and Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society. In parliament, where there was an impassioned debate, an attempt to reconcile intellectual property with freedom to communicate led to the adjustment of the Bill in favour of the latter.

Further to developments in case-law in summer 2004, the Constitutional Council now reviews legislation transposing directives into domestic law. This case-law is based on Article 88.1.1 of the Constitution, which makes the transposition of secondary EU legislation into domestic law a constitutional requirement. This requirement is only waived where France's constitutional identity might be undermined, which, in the opinion of the Constitutional Council, can occur only in exceptional circumstances (where, for instance, the principle of a secular state is violated).

If the Constitutional Council has doubts about the scope of a directive, given that it has only one month in which to give its decision, it cannot submit a preliminary question to the Court of Justice of the European Communities. For this reason, it can censure only a statutory requirement that is manifestly contrary to the directive it is designed to transpose into domestic law.

The question was whether the French law transposing the directive into domestic law infringed the rights afforded by the directive to holders of copyright or related rights in respect of the reproduction and communication to the public of their works or performances, in which case it would be manifestly contrary both to the general objective of the directive and its unconditional provisions.

The applicants criticised parliament's reference to the “three-point test”, which limits, across the board, opportunities to make use of exceptions to copyright and related rights, in particular by preventing interference with the normal exploitation of the work.

The Constitutional Council pointed out that parliament had simply reiterated the precise and unconditional terms of the directive. In its opinion, this principle is of general scope. The exceptions and restrictions introduced by the law in question in respect of rightholders' sole rights must be considered in this context. It follows that the provisions of the law must be interpreted as not prohibiting authors or holders of related rights from making use of technical protection measures designed to make it possible to produce only one copy, or preventing the production of any copies, if this is necessary in order to ensure the normal exploitation of the work or prevent unreasonable prejudice to their legitimate interests. The Constitutional Council considers that any other interpretation would be manifestly incompatible with the directive.

Indeed, it would be contrary to the directive for the law in question to restrict the opportunity afforded to rightholders to protect themselves, by means of effective technical means, against the unauthorised reproduction and communication of their works, particularly as the directive requires member states to provide lawful protection for recourse to such technical methods.

Similarly, measures taken by parliament to reconcile copyright with the objective of “interoperability” would be contrary to the constitutional requirement to transpose directives into domestic law if, because of their scope or loopholes introduced into the protection system provided for in the directive, they caused the law to be applied in a way that was manifestly at variance with the directive.

The same analysis holds true for measures concerning recourse to the exception allowing production of a private copy.

Raising by its own motion the question of respect for intellectual property rights, the Constitutional Council expresses two reservations as regards interpretation.

Firstly, the reference to respect for copyright must, given the context, be understood as referring not only to copyright in the strict sense but also to related rights; any other interpretation would be manifestly incompatible with the directive.

Secondly, the parties in question are all those with intellectual property rights, i.e. not only copyright holders and holders of related rights who use technical protection measures to protect the content of their works, but also those who hold intellectual property rights to the protection processes themselves. The technical protection measures may be either patented inventions or software (which is considered as intellectual property both by the French intellectual property code and by European and international legal instruments). These measures are therefore, as such, protected by Article 17 of the Declaration of the Rights of Man and of the Citizen of 1789. They may be compulsorily divulged and used only on grounds of public necessity and subject to prior fair compensation.

The clauses making it a criminal offence to get round technical protection measures by means of "code breakers" made provision for a general exception on grounds of interoperability. Because it did not define this concept sufficiently clearly and precisely, parliament infringed the rule that offences and punishments must be strictly defined by law.

The criminal law provisions punishing certain activities of manufacturers and suppliers of "peer-to-peer" file-swapping software were also challenged. The law made an exception in the case of software "intended for collaborative work, research or the swapping of files or objects not subject to copyright". Because of its vagueness, the concept of collaborative work failed to comply with the constitutional requirements which, in accordance with Article 8 of the Declaration of the Rights of Man and of the Citizen of 1789 and Article 34 of the Constitution, apply to the definition of offences (and hence to supporting evidence that makes it possible to determine their exact scope).

If software for swapping objects and files not subject to copyright were exempt, the non-pecuniary rights of copyright holders who have waived remuneration and related rights would not be protected. This would destroy the equality that exists between rights of the same kind, which deserve the same level of protection.

Lastly, the purpose of Article 24 was to ensure that illegal downloading by means of "peer-to-peer" file-swapping software did not qualify as the offence of counterfeiting, whereas other unlawful online swapping continues to constitute such an offence. Making the unauthorised swapping of works on peer-to-peer networks alone a petty offence led to inequality in respect of criminal law.

Cross-references:

- Decision no. 2006-535 DC of 30.03.2006, *Bulletin* 2006/1 [FRA-2006-1-004];
- Decision no. 2004-498 DC of 29.07.2004, *Bulletin* 2004/2 [FRA-2004-2-006];
- Decision no. 2004-499 DC of 29.07.2004;
- Decision no. 2004-497 DC of 01.07.2004, *Bulletin* 2004/2 [FRA-2004-2-005];
- Decision no. 2004-496 DC of 10.06.2004, *Bulletin* 2004/2 [FRA-2004-2-004];
- Decision no. 99-416 DC of 23.07.1999, *Bulletin* 1999/2 [FRA-1999-2-007];
- Decision no. 98-403 DC of 29.07.1998, *Bulletin* 1998/2 [FRA-1998-2-006];
- Decision no. 90-283 DC of 08.07.1991;
- Decision no. 89-254 DC of 04.07.1989.

Languages:

French.

Germany
Federal Constitutional Court

Important decisions

Identification: GER-2006-2-006

a) Germany / **b)** Federal Constitutional Court / **c)** Third Chamber of the First Panel / **d)** 05.12.2005 / **e)** 1 BvR 1730/02 / **f)** Obligation to take the master's examination / Skilled Trades Code / **g)** / **h)** *Gewerbearchiv* 2006, 71-74; *Deutsches Verwaltungsblatt* 2006, 244-246; *Die Steuerberatung* 2006, 146-148; *Wettbewerb in Recht und Praxis* 2006, 463-467; CODICES (German).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Examination, professional, compulsory / Skilled trade, access, examination / Profession, admission.

Headnotes:

In view of the changes which have taken place in the legal and economic circumstances, there are doubts as to the constitutionality of the provisions of the Skilled Trades Code that require from qualified German craftsmen considerably more in time, technical skills and financial input in order to gain market access than from their foreign competitors on the German market. The severity of the encroachment on their professional careers created by the obligation to take the master's examination may no longer have been proportionate to the goal of quality assurance.

Summary:

I. The applicant is a skilled carpenter with many years of professional experience. After successfully taking his final apprenticeship examination, and following ten years of professional activity, he had himself entered in the Skilled Trades Register in 1999 with the trade "Installation of standardised pre-fabricated construction parts". The additional request to be entered for carpentry work was rejected because he had not taken his master's examination. The applicant nonetheless carried out carpentry and roofing work via his business establishment from 1998 to 2001, achieving proceeds from turnover amounting to one million euros. The competent authority took steps against this in 2001 by imposing an administrative fine. The amount of the fine was reduced in response to the applicant's appeals, but the appeals submitted to the Local Court and the Higher Regional Court were unsuccessful in other respects.

In his constitutional complaint, the applicant challenged: the administrative fine, the court rulings confirming same and the provisions of the Skilled Trades Code on which these were based. He complained, in particular, of a violation of his fundamental right under Article 12.1 of the Basic Law (right to freely choose an occupation).

II. The constitutional complaint was successful. The Federal Constitutional Court overturned the impugned court rulings on account of a violation of the right to freely choose an occupation (Article 12.1 of the Basic Law) and referred the case back to the Local Court. The ruling is based essentially on the following considerations:

> The impugned measures are based on the provisions regarding the main qualification for skilled trades (obligation to take the master's examination) in accordance with § 1.1.1 in conjunction with § 7 of the Skilled Trades Code in the version applicable until the end of 2003 (hereinafter: the Code). Accordingly, only those persons who were entered in the Skilled Trades Register were permitted to engage in a skilled trade on an independent basis (§ 1.1.1 of the Code). In principle, only persons who had passed the master's examination in the skilled trade in which they engaged, or in a skilled trade related thereto, would be entered in the Skilled Trades Register (§ 7 of the Code).

This provision is a subjective precondition for admission to a profession, which restricted the right to freely choose an occupation. In accordance with Article 12.1.2 of the Basic Law, encroachments on the right to freely choose an occupation are only permitted on the basis of a statute. This must be justified by adequate reasons of the common good, taking account of the nature of the activity in question and of the intensity of the encroachment, and must correspond to the principle of proportionality.

The essential purpose pursued in 1953 in enacting legislation regarding the obligation to take the master's examination was to maintain standards in and the capacity of the skilled trades, as well as to safeguard the training of young skilled persons for the trades sector as a whole. The Federal Constitutional Court has approved these objectives as interests serving the common good.

It appears to be questionable, however, whether the obligation to take the master's examination is still to be considered proportionate in the stricter sense of the word in order to serve the statutory goal of quality assurance in skilled trade services, given the changes which took place in the legal and economic circumstances towards the end of the last century. For that to be the case, there is a need, in an overall weighing of the severity of the encroachment and the weight of the reasons justifying it, to remain within the restrictions imposed by reasonableness. The major effort with respect to the amount of time spent, technical skills and budget required by the master's examination would still have to have been acceptable with regard to the maintenance of standards and capacity within the skilled trades.

Whether the resulting situation is reasonable is questionable because a considerable change in the circumstances had come about for the period under consideration due to increasing competition from other EU countries. In accordance with § 9 of the Code in conjunction with § 1 of the German regulation governing the conditions for entering nationals of other Member States in the Skilled Trades Register, craftsmen from other EU countries only had to fulfil the pre-condition of several years' professional experience with senior professional responsibility in order to work on a self-employed basis in Germany. They did not have to possess a qualification equivalent to the master craftsmen's title.

It appears to be questionable whether it was reasonable, in the light of competition pressure, to continue to impose on qualified German craftsmen a statutory provision which required from them considerably more in time, technical skills and financial input in order to gain market access than from their foreign competitors on the German market. Hence, the severity of the encroachment on their professional careers created by the obligation to take the master's examination may no longer have been proportionate to the goal of quality assurance.

The necessity of the obligation to take the master's examination in order to fulfil the further goal pursued by the legislature (i.e. ensuring training) has not been established beyond all doubt. It applies only if the goal of ensuring training cannot be achieved by milder means than having to take the master's examination, but which are equally effective. The argument defending the obligation to take the master's examination, namely that without it the number of master craftsmen's establishments in the skilled trades would fall resulting in fewer trainers available, can only be convincing if such training may only be entrusted to master craftsmen. That this precondition is not mandatory could follow however from the re-enactment of the Law on Skilled Trades of 24 December 2003. In accordance with the version of the Skilled Trades Code applicable since 2004, experienced qualified craftsmen who have been entered in the Skilled Trades Register are also professionally suited for training if they have passed the examination to prove that they possess the required professional and pedagogical skills, or an equivalent examination. Since no fundamental changes in the economic and legal circumstances can be recognised in the few years running up to the re-enactment of the Law on Skilled Trades, it seems that in view of this less incisive regulation, the requirement of the obligation to take the master's examination could already have ceased to apply in the period that is relevant here.

The reservations that have been described regarding the proportionality of the encroachment on the freedom to choose an occupation confirm the need to apply the statutory exemption contained in § 8 of the Code liberally with regard to the significance and scope of the applicant's fundamental right under Article 12.1 of the Basic Law. Administrative practice has, however, not sufficiently taken account of this. In particular, § 8 of the Code was not applied in favour of experienced qualified craftsmen; rather, knowledge and skills were required to be roughly equivalent to those of a master craftsman, which as a rule are established by experts by means of a comparative examination.

That the application of the statutory exemption in favour of the applicant was indicated is confirmed by the fact that the legislature took account of the doubts as to the constitutionality of the main qualification in its original structure, and by re-enacting the Law on Skilled Trades of 24 December 2003 made it easier to gain access to self-employed activity in particular for experienced qualified craftsmen – such as the applicant. At the same time, the profession of carpenter is still one of those skilled trades which are permitted as a self-employed business establishment only on entry in the Skilled Trades Register. However, craftsmen who have authorisation to engage in their trade may now also be entered in the Skilled Trades Register.

If the regulation contained in the re-enacted skilled trades law is used as a standard for the previously necessary liberal application of § 8 of the Code, there is much to indicate that the applicant should have been granted exceptional authorisation. The applicant might already have met the preconditions provided by the new law for granting authorisation to engage in a trade in the period in question.

It is not apparent from the impugned rulings that they took account of the circumstance that the examination of the constitutionally required liberal application of § 8 of the Code had been omitted in the administrative procedure. Had this taken place, it would have suggested itself to discontinue the administrative offence proceedings against the applicant in accordance with § 47.2 of the Administrative Offences Act. The case is therefore to be referred back to the Local Court for a ruling on the discontinuation of the proceedings.

Languages:

German.

Identification: GER-2006-2-007

a) Germany / **b)** Federal Constitutional Court / **c)** First Chamber of the First Panel / **d)** 14.02.2006 / **e)** 1 BvR 240/04 / **f)** Image manipulation in photographic reporting / **g)** / **h)** *Wettbewerb in Recht und Praxis* 2005, 595-598; *Archiv für Presserecht* 2005, 171-173; *Deutsches Verwaltungsblatt* 2005, 635-637; *Zeitschrift für Urheber- und Medienrecht* 2005, 384-387; *Gewerblicher Rechtsschutz und Urheberrecht* 2005, 500-502; *Europäische Grundrechtezeitschrift* 2005, 259-262*; Recht der Datenverarbeitung* 2005, 114; *Monatsschrift für Deutsches Recht* 2005, 806-808; *Kommunikation & Recht* 2005, 224-227; *Neue Juristische Wochenschrift* 2005, 3271-3273; *Versicherungsrecht* 2006, 850-852; CODICES (German).

Keywords of the systematic thesaurus:

5.3.21 **Fundamental Rights** – Civil and political rights – Freedom of expression.
5.3.22 **Fundamental Rights** – Civil and political rights – Freedom of the written press.
5.3.31 **Fundamental Rights** – Civil and political rights – Right to respect for one's honour and reputation.

Keywords of the alphabetical index:

Satire, photo, manipulation / Caricature, photo, manipulation / Photo, manipulation / Information, incorrect, protection, interest, lack.

Headnotes:

The general right of personality also protects against the dissemination of a technically manipulated picture giving the impression of being an authentic portrayal of an individual.

The holder of the right of personality has a right to a photographically produced likeness not being distorted by manipulation if it is made accessible to third parties without the consent of the person portrayed. The pictorial content certainly becomes incorrect if the photograph is altered over and above those alterations which occur in photographic reproduction but are immaterial to the content. Such manipulations affect the right of personality, regardless of whether they are carried out with a good or injurious intention, or whether observers regard the alteration as advantageous or disadvantageous for the person portrayed.

Incorrect information which is unable to serve the constitutionally required possibility of correct opinion forming is not a right worthy of protection from the point of view of freedom of opinion. This also applies to the utilisation of photographic portrayals in satirical contexts if the manipulation is not recognisable to the observer. The observer is then unable to interpret the alteration as constituting a part of the alienation and distortions that are typical of satirical portrayals, and hence to evaluate them for his or her opinion formation.

Summary:

I. The applicant was the Chairman of the Board of Management of Deutsche Telekom AG. A periodical reported in 2000 on the economic situation of Deutsche Telekom. It illustrated the article with a photograph of a man wearing a business suit sitting on a large and crumbling magenta “T”. The photographical portrayal of the applicant’s head has been placed onto the torso of another man using photomontage techniques. In doing so, the portrayal of the head was processed using technical means. The intensity of this processing has not been conclusively clarified by the courts. It is however not

contentious that the head has been stretched by approx. 5%. The applicant can be clearly identified despite the processing that has been carried out. He considers the alteration to constitute a subliminal, negative manipulation of his facial characteristics. The action requesting forbearance filed by the applicant against the publisher of the periodical was successful at the first instances, but was rejected by the Federal Court of Justice. The applicant has filed a constitutional complaint against the judgment of the Federal Court of Justice. He complains of a violation of his general right of personality (Article 2.1 in conjunction with Article 1.1 of the Basic Law).

II. The constitutional complaint was successful. The Federal Constitutional Court has overturned the judgment of the Federal Court of Justice and referred the case back to that Court. The decision is largely based on the following considerations:

> Freedom of opinion (Article 5.1 of the Basic Law) also encompasses the graphical implementation by means of a satirical photomontage of a critical statement contained in a periodical article. The general right of personality (Article 2.1 in conjunction with Article 1.1 of the Basic Law) however provides protection against the dissemination of a picture manipulated by technical means which gives the impression of being an authentic portrayal of an individual. Such an encroachment on the right of personality is also not justified by freedom of opinion if the picture is placed in a satirical light.

The photograph of the applicant's head which was used for the photomontage alleges to be a photographic portrayal. At the same time – and in contrast to a typical caricature drawing – it does not give the observer any indication that the facial characteristics have been manipulated. Such an indication also does not follow from the fact that the rest of the portrayal is manifestly fictitious in nature. This particularly does not apply to the portrayal of the head.

Photographs suggest authenticity, and the observer presumes that the individual portrayed really looks as in the photograph. This presumption is however incorrect if the appearance of the face has been changed via photographic manipulation. The right of personality provides protection against manipulative distortion of a photographic portrayal, which is made accessible to third parties. The pictorial content certainly becomes incorrect if the photograph is altered over and above those alterations which occur in photographic reproduction but are immaterial to the content. Such manipulations affect the right of personality, regardless of whether they are carried out with a good or injurious intention, or whether the observer regards the alteration as advantageous or disadvantageous for the person portrayed. The factual allegation regarding the appearance of the person portrayed which as a rule is combined with the photographic portrayal becomes incorrect. Incorrect information is however not a right worthy of protection from the point of view of freedom of opinion. This also applies to the utilisation of photographic portrayals in satirical contexts, if the manipulation is not recognisable to the observer and the observer is then unable to interpret the alteration as constituting a part of the alienation and distortions that are typical of satirical portrayals, and hence to evaluate them for his or her opinion formation.

The ruling of the Federal Court of Justice does not meet these constitutional requirements. The Federal Court of Justice largely argues that satirical pictorial content should be perceived as a whole, and that the face of the applicant was not to be taken into account as a separate component of the picture. This principle is however not to be applied if the manipulated part of the portrayal – as in the case at hand – has separate content. In such a case, there is a need for a separate assessment from the point of view of protection of personality. The Federal Court of Justice will still need to carry out this assessment.

Languages:

German.

Identification: GER-2006-2-008

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 04.04.2006 / **e)** 1 BvR 518/02 / **f)** / **g)** / **h)** *Zeitschrift für Steuern und Recht* 2006, R382-R394; *Neue Juristische Wochenschrift* 2006, 1939-1951; *Deutsches Verwaltungsblatt* 2006, 899-910; *Datenschutz und Datensicherung* 2006, 443-452; *MultiMedia und Recht* 2006, 531-540; *Recht der Datenverarbeitung* 2006, 158-168; CODICES (German).

Keywords of the systematic thesaurus:

5.3.2 **Fundamental Rights** – Civil and political rights – Right to life.
5.3.4 **Fundamental Rights** – Civil and political rights – Right to physical and psychological integrity.
5.3.32.1 **Fundamental Rights** – Civil and political rights – Right to private life – Protection of personal data.

Keywords of the alphabetical index:

Electronic profile searching / Informational self-determination / Danger, averting / Data, comparison / Terrorist, attack / Terrorist, Islamic extremist / Terrorist, sleeper.

Headnotes:

Preventive police electronic profile searching of the type defined in § 31 of the North-Rhine/Westphalia Police Act is only compatible with the fundamental right to informational self-determination (Article 2.2 in conjunction with Article 1.1 of the Basic Law) if there is a concrete danger to a person's life, limb or freedom. Such electronic profile searching may not be carried out in advance of acts averting danger.

A general situation of threat such as has existed without interruption with regard to terrorist attacks since 11 September 2001, or tense situations in foreign policy, are not sufficient for a court order authorising electronic profile searching. Instead, it is necessary for further facts to be present which give rise to a concrete danger, for example a danger that terrorist attacks will be planned or carried out.

Summary:

I. Electronic profile searching is a search method which uses electronic data processing. The police authority arranges for other public or private agencies to transmit personal data to it in order to compare these electronically with other data. This procedure is followed in order to determine a subset of persons who match specific characteristics which are laid down in advance and are regarded as important for the further course of investigations. After the terrorist attacks of 11 September 2001, the police authorities of the German states, in cooperation with the Federal Office of Criminal Investigation, carried out electronic profile searching coordinated throughout Germany for Islamic extremist terrorists. The objective, in particular, was to detect "sleepers". The state Offices of Criminal Investigation collected data for example from universities, residents' registration offices and the Central Foreigners Registry and screened the data according to the following criteria: male, age 18 to 40, (former) student, Islamic religion, country of birth. The data obtained were then compared with further data collected by the Federal Office of Criminal Investigation. The electronic profile searching did not succeed in discovering "sleepers".

In October 2001, the Düsseldorf Local Court, on the application of the police authority, ordered electronic profile searching to be introduced in North-Rhine/Westphalia. The court order was based on § 31 of the Police Act of the State North-Rhine/Westphalia, as amended on 24 February 1990 (hereinafter: "the Act"). Under Subsection 1 of this Act, the police may require personal data of particular groups of persons to be supplied by public or private agencies for the purpose of electronic comparison with other data. For this to be permitted, the requirement is that it is necessary to avert a present danger to the existence or the safety of the federation or a state or to life, limb or freedom of a person.

The complainant, who was born in 1978, is a Moroccan citizen of the Islamic faith and was a student at the date when the court order for electronic profile searching was made. He filed appeals against the order of the Local Court which were unsuccessful at the Regional Court and the Higher Regional Court.

II. In response to the constitutional complaint, the First Senate of the Federal Constitutional Court held that the orders challenged violate the complainant's fundamental right to informational self-determination. The proceedings were referred back to the Regional Court for a new decision.

The decision is largely based on the following considerations:

> The challenged orders of the Regional Court and the Higher Regional Court are based on a constitutional foundation for encroachment upon rights. § 31.1 of the Act restricts the fundamental right of informational self-determination. It satisfies constitutional standards if it is interpreted to include the requirements of a concrete danger based on facts.

Electronic profile searching, which is dealt with in § 31 of the Act, serves to protect important interests (the existence and security of the Federal Government and of a state, and the life, limb and freedom of a person). In order to protect these interests, the provision authorises substantial encroachments on the right to informational self-determination. The severity of the encroachment follows from the very scope of the authorisation and from the possibility it creates of linking data from

separate collections held by public and private agencies. In addition to the identification data, which are stated separately, that is, name, address, date and place of birth, all other "data needed in the individual case" may be included in the search. By combining and comparing the data supplied and other data, a wide variety of new information can be obtained.

Furthermore, electronic profile searching creates an increased risk that the persons affected will be subject to further official investigative actions. The fact that electronic profile searching has been carried out in accordance with particular criteria may also in itself reproduce prejudices and the groups involved may be stigmatised in the public perception.

Finally, it is significant that § 31.1 of the Act provides for encroachments on fundamental rights without any suspicion. All persons who satisfy the selection criteria may be included, and there are no requirements as to the proximity of these persons to danger or to suspicious persons. The extent to which the measure is applied without the existence of suspicion is increased even more if – as in the case of terrorist "sleepers" – it is precisely the unobtrusiveness and conformism of behaviour that is chosen as a decisive search criterion.

In view of the weight of the encroachments on fundamental rights that accompany electronic profile searching, this method is reasonable only if the legislature satisfies the requirements imposed by a state under the rule of law by providing that the encroachment should be made only at or above a minimum level of sufficiently concrete danger to the threatened objects of legal protection. Prior to such a concrete danger, electronic profile searching is out of the question, even if the adverse effect on the object of legal protection is of the greatest possible weight.

The principle of proportionality requires that the legislature may provide for severe encroachments on a fundamental right only at or above particular levels of suspicion or danger.

§ 31 of the Act sets out "present danger" as the threshold requirement for encroachment. This satisfies the constitutional standards, but it is not a mandatory requirement from a constitutional point of view. If this were the requirement, electronic profile searching would, as a matter of course, be carried out too late to be effective. It is constitutionally sufficient if the legislature makes electronic profile searching admissible only subject to the existence of a *concrete* danger to the important objects of legal protection involved. According to this, it is a requirement that in the specific case there is sufficient probability that a danger for these objects of legal protection will arise in the foreseeable future. A concrete danger in this sense includes a continuing danger. However, sufficiently well-founded concrete facts are necessary for the assumption of a concrete continuing danger arising from what are known as terrorist sleepers. A general situation of threat such as has existed without interruption with regard to terrorist attacks since 11 September 2001, or tense situations in foreign policy, are not sufficient for a court order of electronic profile searching. Instead, there must be concrete facts that indicate that terrorist attacks are being planned or carried out.

The decisions challenged do not satisfy the constitutional requirements. They are based on a broad interpretation of § 31 of the Act that conflicts with these principles. The Regional Court even regards it as sufficient if "the possibility of the occurrence of particularly serious harm is not excluded", and the Higher Regional Court goes as far as to regard it as sufficient if there is the "distant possibility of the occurrence of harm". If – as the Higher Regional Court states with regard to the situation at that time – "concrete indications of terrorist attacks in Germany [are] not known of", but a mere "possibility of such attacks" based on surmise exists, then the electronic profile searching carried out despite this is a measure taken before any danger needs to be averted, but not the averting of a concrete danger itself.

One member of the Senate presented a dissenting opinion on the decision. The member sees no reason to object to the Higher Regional Court's interpretation and application of § 31.1 of the Act on constitutional grounds. According to this dissenting opinion, the Higher Regional Court correctly proceeded on the basis of a sufficient factual foundation for a terrorist danger. In view of the situation of threat to a large number of innocent people, in this opinion, no objection can be made to attributing more weight to the interest of all citizens in the guarantee of security and freedom than to the encroachments to be suffered by the complainant.

Languages:

German.

Identification: GER-2006-2-009

a) Germany / **b)** Federal Constitutional Court / **c)** First Chamber of the Second Panel / **d)** 04.05.2006 / **e)** 2 BvR 120/03 / **f)** / **g)** / **h)** *Neue Juristische Wochenschrift* 2006, 2908-2909; CODICES (German).

Keywords of the systematic thesaurus:

1.3.1.1 **Constitutional Justice** – Jurisdiction – Scope of review – Extension.
1.3.5 **Constitutional Justice** – Jurisdiction – The subject of review.
1.4.3.1 **Constitutional Justice** – Procedure – Time-limits for instituting proceedings – Ordinary time-limit.
4.16.1 **Institutions** – International relations – Transfer of powers to international institutions.
5.3.39 **Fundamental Rights** – Civil and political rights – Right to property.

Keywords of the alphabetical index:

Supranational organisation, act, protection of individual / International organisation, act, protection of individual / International organisation, act, affecting subject of fundamental rights / International Monetary Fund, decision, effects.

Headnotes:

Acts of a non-German sovereign power can affect the subjects of fundamental rights in Germany. In these cases the Federal Constitutional Court has a duty to provide constitutional protection against such legal acts.

However, this principle applies only to the extent that the international organisations are those that can affect the subjects of fundamental rights. This in turn is only the case where the organisations whose acts are challenged by the constitutional complaint have been transferred sovereign rights within the meaning of Article 24.1 of the Basic Law. This is to be assessed by asking whether the organisation is granted power to take measures which will have a direct legal effect on individuals. The International Monetary Fund (IMF) does not satisfy these prerequisites. The purely practical effect of decisions of the IMF on individuals must be clearly distinguished from the state giving the organisation authority to enact legislation with a direct effect on constitutionally protected legal positions of the citizens of member countries.

Summary:

I. The constitutional complaint concerns the IMF policy on lending to the Republic of Argentina after the serious financial crisis in 2001 and, in particular, it is directed against the effects of the IMF's lending conditions on private holders of Argentine government bonds. The complainant asked the Court to find that:

a. the provisions of Article IX, Parts 1 and 3 of the articles of Agreement of the IMF in the version of the IMF Amendment Act of 27 June 2000, (IMF Act);
b. all of the acts of the IMF since 1 December 2001 which were done in connection with lending from the Fund's general resources to the Republic of Argentina, in particular the decision of the IMF of 5 December 2001 not to complete the Fifth Review;
c. all acts of the IMF since 1 December 2001 which were done in connection with the introduction of statutory sovereign debt restructuring, in particular the preparation and dissemination of opinions without the involvement of the Parliament as well as the preparation of a draft to amend the IMF Articles of Agreement due to a communiqué of the International Monetary and Financial Committee (IMFC) of 28 September 2002 are unconstitutional under the Basic Law.

II. The First Chamber of the Second Panel of the Federal Constitutional Court has decided that the constitutional complaint is not to be admitted for decision because it does not have any fundamental significance in view of the established case-law of the Senates and the Chambers of the Federal Constitutional Court on the protection of fundamental rights after sovereign rights have been transferred to a supranational organisation and also because there is nothing to indicate that it should be admitted in order to enforce the rights specified in § 90.1 of the Federal Constitutional Court Act.

The grounds of the decision are, in part, as follows: The complainant withdrew his constitutional complaint to the extent that it was directed against acts of the IMF after 1 December 2001 which were done in connection with the introduction of statutory sovereign debt restructuring. To the extent that the complainant has not withdrawn his constitutional complaint, it is inadmissible. Its inadmissibility is based in part on the fact that the complainant failed to comply with the time limit for lodging a constitutional complaint, and because there is otherwise no suitable subject-matter for the constitutional complaint.

Insofar as the constitutional complaint is directed at the IMF Act, the complainant has not complied with the statutory time limit. Pursuant to § 93.3 of the Federal Constitutional Court Act, constitutional complaints against statutes must be lodged within one year from the time when they enter into force. Even if one were to take the view that the period of limitation began to run when the Approval Act on the Last Amendment to the Articles of Agreement of the IMF of 27 June 2000 entered into force, the constitutional complaint is statute-barred. The Act entered into force on 1 July 2000 whereas the complainant did not lodge his constitutional complaint until 27 October 2002, and thus not until after the one-year limitation period had expired. The question whether an Act amending previous legislation can cause time to start to run again for the lodging of a constitutional complaint against a statute in respect of provisions which are not affected by the amendment can thus be left open.

Furthermore, the constitutional complaint is inadmissible because it is not based on a suitable subject-matter for a constitutional complaint. The challenged acts of the IMF, which were done in connection with lending to the Republic of Argentina, are neither sovereign acts of German public authority nor sovereign measures of a supranational organisation in respect of which the Federal Republic of Germany must provide constitutional protection to the subjects of fundamental rights.

The case-law of the Federal Constitutional Court shows that the acts of a non-German sovereign power can also affect the subjects of fundamental rights in Germany and that the Federal Constitutional Court has a duty in these cases to provide constitutional protection also against such legal acts. This principle, which was initially developed in relation to secondary legislation of the institutions of the European Community, was subsequently extended to the legal acts of international organisations. This only applies, however, to the extent that the international organisations are those that can affect the subjects of fundamental rights. This in turn is only the case where the organisations whose acts are challenged by the constitutional complaint have also been transferred sovereign rights within the meaning of Article 24.1 of the Basic Law. This is to be assessed by asking whether the organisation is granted power to take measures which will have a direct legal effect on individuals.

The IMF does not satisfy these prerequisites. The Federal Republic of Germany has not granted the organs of the IMF any powers to enact secondary legislation which has a direct effect vis-à-vis the citizens of member countries. The Articles of Agreement of the IMF do not contain any provisions from which such powers could be derived. The purely practical effect of decisions of the IMF on individuals must be clearly distinguished from the state giving the organisation authority to enact legislation with a direct effect on constitutionally protected legal positions of the citizens of member countries. The IMF's decisions to lend Fund resources to the Republic of Argentina only have an indirect, practical effect on the complainant. The decision not to redeem matured bonds of private bondholders, which is essentially the subject of the complainant's complaint, was the political decision of the debtor − a sovereign state − and not a legal consequence of the challenged acts of the IMF.

Languages:

German.

Identification: GER-2006-2-010

a) Germany / **b)** Federal Constitutional Court / **c)** First Chamber of the Second Panel / **d)** 03.07.2006 / **e)** 2 BvR 1458/03 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

1.3.1.1 **Constitutional Justice** – Jurisdiction – Scope of review – Extension.
1.3.5.1 **Constitutional Justice** – Jurisdiction – The subject of review – International treaties.
4.16.1 **Institutions** – International relations – Transfer of powers to international institutions.
5.3.13.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.
5.3.21 **Fundamental Rights** – Civil and political rights – Freedom of expression.
5.3.27 **Fundamental Rights** – Civil and political rights – Freedom of association.
5.3.36.3 **Fundamental Rights** – Civil and political rights – Inviolability of communications – Electronic communications.
5.4.11 **Fundamental Rights** – Economic, social and cultural rights – Freedom of trade unions.

Keywords of the alphabetical index:

International organisation, internal rules / International organisation, act, affecting subject of fundamental rights / International organisation, immunity from national jurisdiction / European Patent Office, immunity from jurisdiction.

Headnotes:

The protection of fundamental rights applies vis-à-vis the acts of secondary legislation of those organisations to which the Federal Republic of Germany has transferred sovereign powers under the Basic Law with effect in its state territory.

The decisive question for granting such protection is whether the challenged measures in a specific case have to be assigned to the area of the supranational powers of the organisation if examined from a functional point of view, and whether or not in this respect they have direct legal effects within the German legal system.

The European Patent Office in principle enjoys, within the scope of its official activities, immunity from jurisdiction and execution. Therefore, it is not possible to have recourse to German courts in the case of administrative acts connected with the internal organisation of the Patent Office or employment-law disputes because they do not involve an act of German public authority.

Summary:

I. The constitutional complaint concerns the question of the circumstances in which measures of the European Patent Office may be challenged by way of a constitutional complaint.

The European Patent Office is an organ of the European Patent Organisation (EPO). Within the scope of its official activities, the EPO enjoys immunity from the jurisdiction of the courts of the Contracting States and is authorised, as an international organisation, to organise its internal structure autonomously (organisational authority). This includes the ability to make rules to govern its legal relationships with its employees autonomously and independently of the national laws of Contracting States, including the country where it has its seat (sovereignty in personnel matters).

The employees of the Patent Office are represented by a Staff Committee. In addition, the Staff Union of the European Patent Office (SUEPO) was established to be the union representing employees' interests. It performs its work parallel to, and independently of, the Staff Committee. The complainants are − in addition to their employment as permanent [patent] examiners − members of the Staff Committee and active members of SUEPO.

Pursuant to the European Patent Convention, employees and former employees may apply to the Administrative Tribunal of the International Labour Organisation (ILOAT) in the case of disputes between them and the EPO after exhausting certain internal measures.

The starting point for the challenged decisions are the disputes between the Staff Committee and the Patent Office about unimpeded access to an internal e-mail system (OV system). Members of the Staff Committee, including the complainants, were temporarily denied access to the system after they had been given several warnings following their use of the system to send documents which were only related to the business of SUEPO. The President of the Patent Office confirmed that decision and stated that therefore the internal appeal could not be successful. The actions brought by the complainants against this decision were dismissed by ILOAT.

In their constitutional complaint against the judgment of the ILOAT and the decision of the President of the Patent Office, the complainants challenged a violation of their fundamental rights under the Basic Law.

The complainants argue that the EPO is an intergovernmental organisation within the meaning of Article 24.1 of the Basic Law and that the standard for judging the decision by ILOAT should be the fundamental rights since sovereign rights that were directly enforceable vis-à-vis subjects of fundamental rights in the territory of the Federal Republic of Germany had been transferred to the EPO. Furthermore, they allege that the Tribunal had failed to provide the extent of legal protection required by the Basic Law.

II. The First Chamber of the Second Panel of the Federal Constitutional Court has decided that the constitutional complaint is not admitted for decision.

The grounds for the decision are, in part, as follows: The constitutional complaint is inadmissible because it is not directed against an act of public authority within the meaning of the Basic Law and the Federal Constitutional Court Act. The fundamental rights in the Basic Law do have a protective effect vis-à-vis the measures of supranational organisations to the extent that those measures relate to subjects of fundamental rights in Germany. However, the challenged decision of the President of the Patent Office, which was

confirmed by ILOAT, has no direct legal effect within the national legal system, and thus cannot be challenged by the constitutional complaint. Furthermore, the complainants have made no submissions that give rise to the assumption that a duty of protection exists on the part of the Federal Republic of Germany.

The protection of fundamental rights applies in principle vis-à-vis the acts of secondary legislation of those organisations to which the Federal Republic of Germany has transferred sovereign powers under the Basic Law with effect in its state territory. However, the decisive question is whether the challenged measures in a specific case have to be assigned to the area of the supranational powers of the organisation if examined from a functional point of view, and whether or not in this respect they have direct legal effects within the German legal system.

The EPO is an intergovernmental institution within the meaning of Article 24.1 of the Basic Law. An intergovernmental institution exists where at the time it was founded it was transferred sovereign rights that give it the power to pass enactments and make individual rulings which directly address the legal subjects of, and the organs responsible for the application of the law in, the national legal system (supranationality), that is to say where the measures taken by the organisation have direct legal effect.

The challenged decision of the President of the Patent Office does not, however, fall within the area of the supranational powers of the EPO. The complainants are not affected as the subjects of fundamental rights in Germany because the measures have no legal effect on the national legal system and do not alter the legal position of individuals within it.

To the extent that the complainants were temporarily unable to access the OV system, this had no effect on their legal position from the national point of view. The denial of access did not extend outside the area of the EPO's internal organisation.

Furthermore, the EPO in principle enjoys, within the scope of its official activities, immunity from jurisdiction and execution. It follows from this that it is not possible to have recourse to German administrative courts and the Federal Constitutional Court in the case of administrative acts connected with the internal organisation of the Patent Office or employment-law disputes because they do not involve the act of a German public authority.

The result would be the same if the review under constitutional law would start with the duty of protection referred to by previous Federal Constitutional Court decisions.

Under that duty, if the internal area of an organisation is affected, legal protection can only be granted if the German legislature and the Federal Government (which is responsible for foreign relations) use means that are suitable for ensuring that any conditions in the intergovernmental organisation which are contrary to fundamental rights are removed. However, in the present case the complainants did not make any submissions as to such an obligation to act on the part of the Federal Republic of Germany.

Furthermore, the claimants would need to substantiate a claim of structural deficit as far as legal protection was concerned. The Federal Constitutional Court has already determined that the system of legal protection in the European Patent Convention corresponds essentially to the standards of the Basic Law. Where there is a dispute between employees and the EPO, employees and former employees of the Patent Office have the right to apply to ILOAT if they have exhausted the internal means of appeal available.

The proceedings before the ILOAT are independent of the internal appeal proceedings and governed by the rules of due process. Its judges are obliged to be independent and impartial. Accordingly, the Federal Constitutional Court has determined that ILOAT's status and its procedural rules satisfy both the international minimum standards for basic procedural justice as well as the minimum requirements of the rule of law contained in the Basic Law. The complainants have not substantiated their claim that a structural deficit existed as far as legal protection was concerned which should have been dealt with by the federal organ responsible for foreign issues.

Languages:

German.

Greece
Council of State

Important decisions

Identification: GRE-2006-2-001

a) Greece / **b)** Council of State / **c)** Assembly / **d)** 07.11.2003 / **e)** 3216/2003 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

1.3.5.15 **Constitutional Justice** – Jurisdiction – The subject of review – Failure to act or to pass legislation.
2.2.1.6.4 **Sources** – Hierarchy – Hierarchy as between national and non-national sources – Community law and domestic law – Secondary Community legislation and domestic non-constitutional instruments.
4.7.4.1.6 **Institutions** – Judicial bodies – Organisation – Members – Status.
5.2.1.2.2 **Fundamental Rights** – Equality – Scope of application – Employment – In public law.
5.3.33 **Fundamental Rights** – Civil and political rights – Right to family life.

Keywords of the alphabetical index:

Child, care, leave, conditions / Leave, right / Judge, female, child, leave, special.

Headnotes:

Female judges are entitled to a special nine month leave of absence, granted under the Civil Servants' Code to female civil servants only, for the upbringing of a newborn child. This is in accordance with Article 21 of the Constitution, which places maternity and children's matters under State protection, and which seeks to tackle the demographic problems facing Greece.

Summary:

I. A female judge, who was a member of the Council of the State, sought annulment of the tacit refusal by the Minister of Justice to provide her with a special nine month paid leave of absence for the upbringing of her child. Such leave is granted to civil servants who are mothers, under Article 53.2 of the Civil Servants' Code.

II. In the majority opinion of the Court, the leave of absence under Article 53.2 should also be available to female judges. The Code of Organisation of Courts and of the Status of Judges makes reference to the provision under the Civil Servants' Code, in the context of maternity issues.

In arriving at this interpretation, the Court had regard to the following points:

- Article 21 of the Constitution places maternity and children's issues under state protection and aims to combat the demographic problems facing Greece;
- There is no specific provision in the legislation for the regulation of the upbringing of judges' children, corresponding to the conditions of the exercise of their functions. Such provision exists for most categories of public officers;
- The provisions of Council Directive no. 96/34/EC of 3 June 1996 (EE L 145/4/19.6.1996) on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, as amended by Council Directive no. 97/75/EC of 15 December 1997 (EE L 16/16.1.1998) establishes the principle of a balance between professional and personal life through the recognition of the right to parental leave.

Seven members of the Court put forward a dissenting opinion. In their view, those provisions within the Code of Organisation of Courts and of the Status of Judges which apply to Civil Servants only allow for maternity leave of absence before and after the delivery of a child, under Article 52.1 of the "Civil Servants Code". They do not apply to leave for the upbringing of a child, as set out in Article 53.2 of the Code. This is because the type of leave envisaged under Article 53.2 is permitted on condition that civil servants follow a certain working pattern, which judges are not obliged to follow in carrying out their duties.

Finally, two members of the Council suggested that the failure by parliament to take steps to grant this type of leave to judges who are mothers is illegal under Article 4 of the Constitution, which enshrines the principle of equality. As the working conditions of judges do not correspond to those of other civil servants, it must be considered that Articles 4 and 21 of the Constitution require the State to provide judges who become mothers with leave of absence of a reasonable duration, to enable them to raise their children, in accordance with their working conditions and their duties.

Languages:

Greek.

Identification: GRE-2006-2-002

a) Greece / **b)** Council of State / **c)** Division C / **d)** 09.01.2006 / **e)** 1/2006 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

1.4.11 **Constitutional Justice** – Procedure – Hearing.
2.2.1.6.4 **Sources** – Hierarchy – Hierarchy as between national and non-national sources – Community law and domestic law – Secondary Community legislation and domestic non-constitutional instruments.
2.3.4 **Sources** – Techniques of review – Interpretation by analogy.
4.7.4.1.6 **Institutions** – Judicial bodies – Organisation – Members – Status.
5.2.1.2.2 **Fundamental Rights** – Equality – Scope of application – Employment – In public law.
5.2.2.1 **Fundamental Rights** – Equality – Criteria of distinction – Gender.
5.3.33 **Fundamental Rights** – Civil and political rights – Right to family life.
5.4.17 **Fundamental Rights** – Economic, social and cultural rights – Right to just and decent working conditions.

Keywords of the alphabetical index:

Child, care, leave, conditions / Leave, right / Judge, status, male, child, leave, special.

Headnotes:

Male and female judges are entitled to paid leave of absence under Article 53.2 of the Civil Servants' Code for the upbringing of a child. Regard was given to the principle of equality between sexes as set out in the Constitution, and those principles of European law relating to equal treatment between men and women and the balance between the professional and personal life of individuals.

Summary:

Here, the Court extended the effect of the interpretation given to Decision no. 3216/2003 [GRE-2006-2-001] to men, in accordance with the principle of equality between sexes.

A male judge sought leave of absence under Article 53.2 of the Civil Servants' Code for the upbringing of his child. The Minister tacitly refused the request. The judge asked the Council of State to decide upon the constitutionality of this decision.

The majority of the members of the court voted in favour of the annulment of the Minister's refusal, basing their decision on the following reasons:

a. the principle of equality between sexes, under Article 4.2 of the Constitution;
b. the provisions of Council Directive no. 76/207/EEC of 9 February 1976 (EE, N 39/40/14.12.1976) on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions which forbids any discrimination on the grounds of sex either directly or indirectly by reference in particular to marital or family status;
c. on the provisions of Council Directive no. 96/34/EC of 3 June 1996 (EE L 145/4/19.6.1996) on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, as amended by Council Directive no. 97/75/EC of 15 December 1997 (EE L 16/16.1.1998), which establishes the principle of a balance between professional and personal life through the recognition of a right to a parental leave not only for women but also for men, especially as a means to encourage men to undertake an equal share of family duties and to become involved in the upbringing of their children.

One member of the Court put forward a dissenting opinion, to the effect that the applicant's request could only be upheld if Article 53.2 of the Civil Servants' Code was found to contravene the Constitution. The legislative provision granting female judges the right to paid leave for the upbringing of children should be interpreted as excluding the father from this leave; otherwise, the said provision should be deemed unconstitutional, which constitutes, nonetheless, a judgment reserved for the Court acting in Plenum.

Languages:

Greek.

Identification: GRE-2006-2-003

a) Greece / **b)** Council of State / **c)** Chamber D / **d)** 24.01.2006 / **e)** 211/2006 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

1.3.5.15 **Constitutional Justice** – Jurisdiction – The subject of review – Failure to act or to pass legislation.
4.6.3.2 **Institutions** – Executive bodies – Application of laws – Delegated rule-making powers.
5.4.1 **Fundamental Rights** – Economic, social and cultural rights – Freedom to teach.
5.4.6 **Fundamental Rights** – Economic, social and cultural rights – Commercial and industrial freedom.

Keywords of the alphabetical index:

Delegation of powers, failure to act / Omission, legislative.

Headnotes:

An omission or refusal by the administration to exercise delegated legislative power is only subject to judicial review in exceptional circumstances. An example might be where the administration is obliged by legislation to issue a certain regulatory act in particular circumstances or within a specified period, or when the obligation of the administration is specified directly by the Constitution.

Summary:

I. A company which owned a private school of cinematography challenged the omission by the administration (in this instance the Ministry of Culture) to issue the decree required by Article 4.3 of Law no. 1158/81 which would specify the necessary documents and certificates for the granting of a license to set up and operate a Higher School of Art Education. It alleged that the omission was a breach of statutory duty and asked the Constitutional Court for a ruling.

The applicant had owned the cinematography school since 1962 on the basis of a license issued that year by virtue of Law no. 4208/1961. In 1981, parliament enacted Law no. 1158/1981 on the Organisation and Administration of Schools of Higher Art Education. This Act provides that Higher Art Education (including cinematography) is provided by higher public and private schools. Under Article 4.4, the Ministry of Culture may issue a decree specifying the documents and certificates which should accompany an application for a license to set up and operate a higher school of art education. Special provisions within that and subsequent legislation permitted schools operating under the regime of Law no. 4208/1961 to continue their operations until 1999. In 1999, the Ministry of Culture informed the applicant that it would not approve the registration of first year students in its school from the year 1999-2000 onwards as the appropriate legal framework was not in place. The administration did, however, make a special exception for the year 1999-2000, and approved the registration of first year students. At the same time, the Ministry revealed plans to set up a Higher Practical School of Cinematography as well as a Department of the Theory of Cinematography in at least one University.

II. The jurisprudence of the Council of the State shows that proceedings arising from omissions and also tacit refusals by the administration to enact legislation (breach of statutory duty) may be brought where the administration has a statutory duty to resolve a particular situation by issuing an administrative act (one which resolves an individual case). Such an omission or refusal will not normally occur in situations where the legislation authorises the administration to issue a regulatory act (an act containing general rules or delegated legislation). This is because the assessment made by the administration of the necessity and the appropriate time to issue a regulatory act is not subject to judicial review. An exception to this principle is possible, according to jurisprudence, if the delegation of the power to legislate obliges the administration to issue the regulatory act under particular circumstances or within a specified period, or when the obligation on the part of the administration is directly specified in the Constitution.

In view of the distinctive character and the increasing importance to society of professional and higher education, Article 16.7 of the Constitution states that professional education at all stages is organised by the State and sets out a framework for educational institutions within this category and the rights of their graduates. This provision does not necessarily mean that only the state may organise professional education. Thus, there is neither a constitutional right for individuals to set up professional schools, nor a constitutional prohibition on the setting up of private professional schools. The law may allow or prohibit the foundation and operation of such schools, after taking into consideration the existing public schools

and whether they suffice to cover the educational needs in this field. Where the law provides for the right of individuals to found and operate private professional schools, this right is protected under Article 5.1 of the Constitution, which guarantees individual professional and economic freedom. Accordingly, the administration, when issuing regulatory acts or omitting to do so, may not infringe on that right.

In view of the above, the Court held that twenty four years after the enactment of Law no. 1158/81 the administration had still not issued the necessary decree for the foundation and operation of Higher Schools of Art Education for Cinematography and Television. Such decrees have, however, been issued in other fields of art education, such as drama schools and dance schools. There was, accordingly, an omission (breach of statutory duty) on the part of the administration to act according to law.

Languages:

Greek.

Hungary
Constitutional Court

Statistical data
1 May 2006 − 31 August 2006

Number of decisions:

- Decisions by the plenary Court published in the Official Gazette: 18
- Decisions by chambers published in the Official Gazette: 4
- Number of other decisions by the plenary Court: 18
- Number of other decisions by chambers: 15
- Number of other (procedural) orders: 40

Total number of decisions: 95

Important decisions

Identification: HUN-2006-2-002

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 02.05.2006 / **e)** 1075/B/2004 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 2006/5 / **h)**.

Keywords of the systematic thesaurus:

3.10 **General Principles** – Certainty of the law.
5.2.2.5 **Fundamental Rights** – Equality – Criteria of distinction – Social origin.
5.3.9 **Fundamental Rights** – Civil and political rights – Right of residence.
5.3.38 **Fundamental Rights** – Civil and political rights – Non-retrospective effect of law.
5.4.13 **Fundamental Rights** – Economic, social and cultural rights – Right to housing.

Keywords of the alphabetical index:

Flat, owner, public / Squatter, residence, right / Residence, discrimination.

Headnotes:

There is no violation of the law if a decree of a local authority prohibits entering into a tenancy agreement with a person who violated tenancy law at the owner's expense.

Summary:

I. A petition challenged Decree no. 7/2001 (6 March) on the renting of flats owned by the local authority and on other social duties relating to residence of the local representative body of Debrecen. The petition requested the annulation of a paragraph, which stipulated that no tenancy agreement could be signed with a person who qualified as a squatter or was not entitled to the use of the flat. The petitioner listed several reasons to substantiate the unconstitutionality of the debated paragraph. He alleged that there was a violation of the prohibition of discrimination, embodied in Article 70/A of the Constitution, in that the prohibition contained in the decree extended to *bona fide* occupiers, and that the decree was discriminatory towards Roma, who belong to the poorest layer of society. For this reason, in the petitioner's opinion, Act CXXV of 2003 on the promotion of the equality of chances was also violated. The petitioner also alleged that the decree violated the prohibition of *ex post facto* laws, because the legal consequences of the decree also affected behaviour prior to the entering into force of the decree. For this reason, and because of the uncertain normative content, the decree violated the principle of democracy guaranteed by Article 2.1 of the Constitution.

II. The Constitutional Court first examined the relationship between the decree and the relating legal provisions and stated that Debrecen's local representative body drafted the debated decree within the framework of Act LXXVIII of 1993 on the renting of flats and premises and the rules of their alienation. According to the Act, the conditions of renting flats owned by the local authority is regulated by a decree of the owner, which is the local authority in this case. This power of regulation is naturally extended to defining who could not be a tenant of the flat. According to the Constitutional Court, there is no violation of the law if the decree of the local authority prohibits entering into a tenancy agreement with a person who violated tenancy law at the owner's expense, which is the local government in this case.

The Constitutional Court recalled that on the basis of Article 9.1 of the Constitution, public property also needed to be protected. Even Decision no. 71/2002 of the Constitutional Court pointed out that a person without a flat could not solve his tenancy problems at the expense of the local authority.

The judges of the Constitutional Court did not find it discriminatory that the decree did not differentiate between a *bona fide* occupier and a squatter. On the basis of the practice of the Constitutional Court, discrimination occurs when the subjects are not equal before the law. Since the decree does not differentiate between any occupiers in particular, no discrimination can be found. In relation to the debated provisions of the decree, it can be said that they contain identical regulations for all subjects, therefore there is no violation of either Article 70/A of the Constitution or of the Act on the promotion of the equality of chances.

The Constitutional Court also rejected the petitioner's allegation that the decree violated the constitutional prohibition of *ex post facto* laws. On the contrary, the Court pointed out that the behaviour referred to in the decree already had been considered to be against the law prior to the entering into force of the decree. There was no violation of the principle of democracy in relation to the use of terms of the decree as all terms in question could also be found in the Act.

Two judges of the Constitutional Court did not agree with the decision of the Court, and they summed up their views in dissenting opinions. Mihály Bihari was of the opinion that the decree was unconstitutional because it excluded persons from the possibility of renting a flat without the possibility of being considered individually or severally, if they were considered to be squatters or not entitled to the use of the flat. In this way, the ones who were excluded were the ones who were in the most disadvantaged position socially, and thus discriminated against. With respect to all of the above, the debated paragraph of the decree should have been annulled.

András Bragyova, who handed in a dissenting opinion, stated that the majority opinion, which held that the protection of public property justified the debated restriction, was not acceptable. On the contrary, he pointed out that the decree arbitrarily excluded a group of legal subjects from the possibility of renting a flat. This restriction related to a certain group of perpetrators only, who were also motivated by social disadvantage, yet not to other perpetrators committing even more serious crimes against the premises of the local authority. In András Bragyova's opinion, this discrimination could not be reasonably justified. Excluding the violators of law from the possibility of renting a flat was not constitutionally justifiable when these occupiers were only people in real need of a flat.

Languages:

Hungarian.

Identification: HUN-2006-2-003

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 13.07.2006 / **e)** 32/2006 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 2006/84 / **h)**.

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.
4.5.2.4 **Institutions** – Legislative bodies – Powers – Negative incompetence.
4.6.3.1 **Institutions** – Executive bodies – Application of laws – Autonomous rule-making powers.
5.3.24 **Fundamental Rights** – Civil and political rights – Right to information.
5.3.25 **Fundamental Rights** – Civil and political rights – Right to administrative transparency.
5.3.25.1 **Fundamental Rights** – Civil and political rights – Right to administrative transparency – Right of access to administrative documents.

Keywords of the alphabetical index:

Government, rules of procedure / Government, session, minutes, publicity.

Headnotes:

The government is under the obligation to keep records for public information, whether for a short or a long period of time, because it would otherwise directly and seriously restrict the right of access to public information. Article 8.2 of the Constitution states that an Act is needed to set out the rules concerning fundamental rights and duties. Thus, the regulation on record keeping regarding governmental sessions is also in the legislative domain.

Summary:

I. Two petitions to Constitutional Court challenged the constitutionality of provisions on record keeping of governmental sessions. One of the petitioners asked for a declaration of unconstitutionality based on the omission of such record keeping, because parliament did not prescribe the duty of basic record keeping of governmental sessions, and thus violated the right of access to public information secured in Article 61.1 of the Constitution. The other petition questioned the related provisions of Act LXV of 1995 on state and official secrets. Among others, the petitioner argued that any data made for the preparation of a decision, for use in-house, relating to the operation of a body created by the government and based on its rules of procedure and any summary, memento or record pertaining thereto, can be made a state secret.

II. Before making a decision, the judges of the Constitutional Court reviewed the relevant regulations of several European countries. They stated that for this question, the individual states have different practices and the Hungarian solution, namely that the Constitution delegates the elaboration of minor provisions concerning the operation of the Government to the Government itself, is similar to regulations of several other European countries. After this international review, the judges of the Constitutional Court examined the development of regulations concerning the record keeping of governmental sessions. They stated that this question was settled by governmental resolutions setting out the rules of procedure of the Government, but no coherent practice was developed in this field. Individual governments changed their regulations time and again, according to their own conceptions. In this way, regulations have varied over the past sixteen years, from compulsory word-to-word recording to the almost complete lack of record keeping. According to the current rules of procedure, a recording is made of governmental sessions, which serves as word-to-word minutes of sessions.

In its decision, the Constitutional Court found that record keeping (and especially the lack of it) of governmental sessions concerns more than one fundamental right, among others the right of access to public information, referred to by the petitioners. The judges of the Constitutional Court repeatedly emphasised that one of the most important conditions of the democratic operation of public authority is publicity, the transparency of its decision-making. Current regulations give a relatively broad margin for the Government in this respect. Naturally, when deciding its rules of procedure, the Government is compelled to respect the fundamental right of access to public information; otherwise the provisions of the rules of procedure can be annulled by the Constitutional Court. It is obvious however, that a decision of the Constitutional Court can only prevent future legal injuries, which is not enough. The Court was of the opinion that the Government is under the obligation to keep records for public information, whether for a short or a long period of time, because it would otherwise directly and seriously restrict the right of access to public information. Article 8.2 of the

Constitution states that an Act is needed to set out the rules concerning fundamental rights and duties. Thus, the regulation on record keeping regarding governmental sessions is also in the legislative domain. With respect to the above, the Constitutional Court held that parliament, by omitting to provide for the obligation to keep records of governmental sessions, created a situation of unconstitutionality. The Constitutional Court therefore summoned parliament to fulfil its legislative duty before 31 December 2006.

Thereafter, the Court examined the petition concerning the Act on state secrets. Rendering secret statements made during governmental sessions is a direct and serious restriction of the right to access to public information. However, not all records of governmental sessions can be made secret, only data declared secret through a legal procedure indicating that their publicity or access by unauthorised persons directly violates or threatens protected interests, namely: national defence, national security, criminal prosecution, prevention of crime, central financial interests, foreign or international affairs or jurisdiction.

In addition, in the case of an unlawful declaration of secrecy, the Data Protection Ombudsman and courts provide an adequate forum for legal remedy. Therefore, the challenged provision cannot be viewed as an unreasonable restriction of the right of access to public information.

Languages:

Hungarian.

Identification: HUN-2006-2-004

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 27.06.2006 / **e)** 88/B/1999 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 2006/6 / **h)**.

Keywords of the systematic thesaurus:

3.19 **General Principles** – Margin of appreciation.
5.2.1.2.2 **Fundamental Rights** – Equality – Scope of application – Employment – In public law.
5.4.10 **Fundamental Rights** – Economic, social and cultural rights – Right to strike.

Keywords of the alphabetical index:

Military, right to strike / Police, right to strike / Civil servant, right to strike, discrimination.

Headnotes:

The right to strike is not protected by Article 8.2 of the Constitution. It is a unique right, which, under Article 70/C.2 of the Constitution, may be exercised within the framework of the statute regulating such a right. Therefore, parliament has a greater freedom to regulate it.

Summary:

I. Two petitions challenged the constitutionality of the first sentence of Article 3.2 of the Act VII of 1989 on strikes. According to this provision, judicial organs, the Hungarian Armed Forced, armed bodies, law enforcement agencies and national security services are not allowed to strike.

According to one of the petitions, this provision is discriminatory and violates the right to employment of civil servants working for armed forces, secured by the Constitution. The other petition alleged that the prohibition of striking in the case of civil servants working for police forces breached Article 70/A.1 of the Constitution. They alleged that it was not the duty of civil servants to carry out the basic tasks of the police, they therefore asked for the annulment of the provision.

II. When judging the petition, the Court first had to clarify the place of the right to strike among fundamental rights. The right to strike is generally acknowledged in modern states that respect economic and social rights, as a safeguard of collective action in the case of economic and social conflicts of interests.

Article 8.1.d and 8.2 of the International Covenant on Economic, Social and Cultural Rights and Appendix to Article 6.4 of the European Social Charter concern the right to collective action, including the right to strike. International agreements born under the aegis of International Labour Organisation (ILO) contain no direct provisions on the right to strike. The case law of the ILO, however, recognises the right to strike as a right that is indispensable for effective collective negotiations, which enjoys the protection of these agreements.

Under Article 70/C.1 of the Constitution, everyone has the right to establish or join organizations together with others in order to protect his or her economic or

social interests. According to Article 70/C.2 of the Constitution, the right to strike may be exercised within the framework of the statute regulating such a right, but a majority of two-thirds of the votes of MPs present is required to pass the statute on the right to strike (Article 70/C.3 of the Constitution).

The Constitution neither determines the field of those entitled to exercise the right to strike, nor the content or conditions of this right. It entrusts the overall regulation of the right to strike to a separate Act. On the basis of Article 70/C.2 and 70/C.3 of the Constitution, the Act regulates the field of those entitled to exercise the right to strike; for what purpose it is possible to exercise the right to strike; and it also settles the economic, legal and procedural conditions of a lawful strike; it states the manifestation of the right to strike, the guaranteed provisions for the protection of those participating in a lawful strike and it also determines the cases where a strike is unlawful.

The right to strike, therefore, may be exercised within the framework of the statute regulating such a right. However, that does not mean that this legislative entitlement is without any constitutional restraints. The legislator is compelled to secure the conditions for practicing the right to strike, any exclusion of this right can only occur on a constitutional basis, for the protection of a constitutional right, aim or value.

Thereafter, the Court examined whether the exclusion of armed forces, armed bodies and security services (and at the same time the exclusion of civil servants, who worked for these bodies) from the right to strike, under Article 3.2 of the Act, had a constitutional basis.

The Hungarian Armed Forces and law enforcement agencies protect constitutional order and fundamental human rights. The armed forces and law enforcement agencies fulfil their duties with the staff appointed under relating Acts. According to these Acts, civil servants employed by these bodies are also members of their staff. This staff is the only one entitled to secure the effective fulfilment of the constitutional duties of armed forces and law enforcement agencies. In case of a strike by civil servants directly helping those with official duties, the lack of their work or its delay can seriously set the organization's work back, which can detain the fulfilment of state duties, the protection of life and property, that is, the manifestation of others' fundamental rights.

On the basis of the above and as concerns civil servants working for the armed forces and law enforcement agencies, the prohibition of striking under Article 3.2 has a constitutional justification. In this way a violation of Article 70/C.2 of the Constitution cannot be found.

In addition, the Court held that Article 3.2 of the Constitution contained the same provision for the enlisted members of the armed forces and law enforcement agencies and civil servants working for them, in terms of the practice of the right to strike, therefore no violation of Article 70/A.1 could be found.

There is no unconstitutional discrimination between civil servants working for the armed forces, law enforcement agencies and public servants working in the civil sector.

The civil servants employed by armed forces and law enforcement agencies fulfil their duties in organizations, the effective and undisturbed functioning of which is of special constitutional importance. Due to the legal status of armed forces and law enforcement agencies, which is different from other bodies of public service, together with their constitutional situation and function, in relation to the practice of the right to strike, civil servants working for these bodies cannot be viewed as falling into the same sphere of regulation as civil servants working for administrative bodies and public institutions. The violation of Article 70/A.1 of the Constitution could not be found here either.

Constitutional Judge Péter Kovács attached a dissenting opinion (joined by Judge László Kiss) to the judgment.

Among civil servants working for law enforcement agencies, there are people whose duties are not directly related to the protection of others' fundamental rights. The exclusion of these civil servants is not self-evident. In this respect, the legislator has to work out which employees, status, spheres of work within the personnel are the ones that serve the effective protection of citizens' rights.

One of the main problems of the current regulation is its lack of differentiation.

On the other hand, it is necessary for the legislator to compensate, through the means of legal guarantees, for the lack or restriction of the right to strike. Such guarantees are the adequate, impartial and quick conciliatory or arbitratory procedures available for all parties in all phases of the settlement of the debate, the decisions of which can fully and immediately be carried out. The legislator has developed this compensational mechanism effectively for the official members of armed forces. However, this was not extended to civil servants employed there. This

category of civil servants therefore neither has the right to strike nor the effective mechanism to manifest their interests. This is the other fundamental problem of the current regulation.

Languages:

Hungarian.

Israel
Supreme Court

Important decisions

Identification: ISR-2006-2-002

a) Israel / **b)** High Court of Justice (Supreme Court) / **c)** / **d)** 03.03.2004 / **e)** 5432/03 / **f)** / **g)** to be published in the Official Digest / **h)** CODICES (English).

Keywords of the systematic thesaurus:

5.2.2.1 **Fundamental Rights** – Equality – Criteria of distinction – Gender.
5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
5.3.21 **Fundamental Rights** – Civil and political rights – Freedom of expression.
5.3.23 **Fundamental Rights** – Civil and political rights – Rights in respect of the audiovisual media and other means of mass communication.

Keywords of the alphabetical index:

Pornography, television, broadcasting, tolerance / Media, pornography, television, broadcasting.

Headnotes:

Although pornographic expression falls within the scope of freedom of expression and occupation, it has to be balanced against the extent to which such an expression may cause injury to feelings. The level of tolerance for injury to feelings is very high when it comes into conflict with the freedom of speech and expression.

Summary:

I. Israeli law prohibits the "depiction of a person or any part of a person as a sex object". Notwithstanding this law, and after a series of legislative developments, the Israeli Council for Cable TV decided to approve the broadcast of the "Playboy" channel, subject to a number of restrictions. The Council determined that the phrase "sex object" should be interpreted as applying to situations where

a human being is treated as an object or tool with no personality or will of its own. It therefore resolved that since it had already been decided that the main objective of the legislation was the protection of children, the channel could be broadcasted subject to restrictions and conditions preventing minors from gaining access to the channel.

The petitioners argued that the Council's decision that it was legal to broadcast the channel was wrong. In their view, the main purpose of the law is to protect women. The broadcast of the channel portrays women as sex objects available for sexual intercourse, harms women's dignity and inculcates sexual discrimination in society. This outweighs any injury to the right to freedom of expression and/or occupation that would be caused by prohibiting the broadcast of the channel. The petitioners also claimed that the principle of proportionality requires the prevention of pornographic and erotic broadcasts, including cable TV and satellite television, because these media outlets are under state supervision.

The respondents supported the Council's interpretation of the law. In their view, there is no degradation of women on the "Playboy" channel, neither are they portrayed as sex objects. In any event, the broadcast of the channel does not fall within the scope of the purpose of the law, which, in the respondents' view, is the protection of children. In their view, suppressing the channel would harm the freedom of expression and the freedom of occupation under Israeli constitutional law.

II. The Supreme Court determined that freedom of expression applies to pornography, but, in common with all other basic rights, it is not an absolute right. The policy behind freedom of expression is to facilitate the self-realisation of human beings, further democracy, and enrich the marketplace of ideas that leads to the discovery of truth. The Court noted that the social value of pornographic expression is low and likely to cause harm and damage, and so there is sometimes a need for restraint by criminal law. Nevertheless, the harm inherent in the expression of pornography does not as a rule exclude it from freedom of expression, and accordingly, even pornographic expression falls within the scope of freedom of expression. Similarly, the Court determined that an activity within the freedom of occupation does not involve any judgment as to its content or morality, and accordingly, an occupation in the pornographic field is covered by freedom of occupation.

The Court acknowledged that the broadcast of the "Playboy" channel causes injury to feelings, but noted that those who are exposed to the broadcast are not a "captive audience" as they are not obliged to watch it. Accordingly, the Court held that any injury to feelings caused by the broadcast of the channel cannot justify an injury to the freedom of expression and freedom of occupation unless required by the clear language of the law, and that a vertical balance between the protection against the harm to feelings, which is not a basic right, and the freedom of expression and occupation, which are basic rights, is achieved by a proportional restriction of the broadcasting rights of the channel.

The Court also acknowledged that the broadcast of the channel does harm the dignity of women, but that the constitutional right to dignity is not an absolute right. It is one that must be balanced with the rights of freedom of expression and occupation, and a horizontal balance between these two basic rights is in fact reached, since the broadcast of the channel is permitted subject to a number of restrictions. The Court considered the widespread accessibility of pornography today, from DVDs to the Internet, and determined that the harm to the dignity of women from the addition on cable TV or satellite of a single pornographic or erotic channel with relatively softcore content cannot be particularly serious. Moreover, the Court noted that prohibiting the broadcast of the channel would open the floodgates to the prohibition of much sexual content broadcast on television, and this risk of intensive censorship is something of which a democratic and open society should be wary.

The Court also noted that there was an "international consensus" against imposing a prohibition on the pornographic content that this channel presents, and that the democratic legal institutions from which Israel derives inspiration recognise that different pornographic expressions must be distinguished according to their gravity, and that only a limited proportion of these expressions, not including the "Playboy" channel, should be restricted as prohibited obscenity.

Languages:

Hebrew, English (translation by the Court).

Identification: ISR-2006-2-003

a) Israel / **b)** High Court of Justice (Supreme Court) / **c)** / **d)** 04.03.2004 / **e)** 10356/02 / **f)** / **g)** to be published in the Official Digest / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
3.17 **General Principles** – Weighing of interests.
5.3.18 **Fundamental Rights** – Civil and political rights – Freedom of conscience.
5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of worship.
5.3.39.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.

Keywords of the alphabetical index:

Expropriation, purpose / Land, property, protection / Property, taking / State, duty to guarantee the protection of fundamental rights and freedoms / Terrorism, fight.

Headnotes:

International law grants authority to the military commander to act in two fields: first, to protect the occupier's legitimate security interests and secondly to secure the needs of the local population under occupation.

While the protection of the right to life is of greater importance than the constitutional right to worship where additional security measures allow a balance to be struck between the two, then the constitutional right may be exercised, subject to second balancing test between the right to worship and the right to property.

The right to property is not an absolute right, and may be limited in the furtherance of the protection of other constitutional rights, such as the right to worship.

Summary:

I. Jewish worshippers wish to exercise their right to pray at the Machpela cave, which is regarded as a holy site by both Judaism and Islam. On the Sabbath and Jewish festivals, a large number of pedestrians walk along the "worshippers' route" on the way to pray at the Machpela cave, a route which has been targeted by terrorists in recent years, resulting in murderous attacks on Jewish worshippers. Because of the terror threat posed to pedestrians on this route, the IDF commander directed that the path be widened in order to allow security and rescue vehicles to pass in the case of a terrorist attack. This was not possible before that, as the path was so narrow. In order to widen the route, the IDF commander issued an order for the requisitioning of land along the path to be widened, and to carry out a partial demolition of thirteen uninhabited buildings along the path. Following a petition brought against this original order requesting that alternative means be implemented, the IDF commander determined that no alternative means existed, but nevertheless, in an effort to reduce the damage caused to owners of the land, he significantly reduced the extent to which the path was to be widened, and suggested that only two of the abandoned homes be demolished, rather than the original thirteen, limiting the passage of security or rescue vehicles to one-way traffic only.

Petitioners attacked the legality of the requisition order. They claimed it was unreasonable and disproportionate in view of the purpose for which it was made, set against the severe harm to the property owners affected. They also noted the harm inherent by the demolition order on the buildings. They claimed that these had unique archaeological value, and suggested that there would be a breach of the duty under international law on occupying power to conserve cultural assets. In addition, they alleged that the requisition order was improperly motivated by irrelevant considerations including the desire to create territorial continuity between the holy site and a nearby Jewish settlement. They suggested that the order was contrary to international law which prohibits the destruction of civilian property in an occupied area unless such action is essential for military operations. Finally, the petitioners claimed that the order was in violation of Israeli constitutional law as it failed to strike a balance between the right to worship and the right to property.

The respondents argued that the order was motivated entirely by security considerations. They pointed out that significant efforts were being made, to minimise the degree of harm caused to local inhabitants, and that this was borne out by the modification of the original requisition order. They also observed that international law requires a military commander to maintain security in an occupied area and allows land to be requisitioned for the purpose of ensuring public security. In their view, the duty under international law to conserve cultural assets is not an absolute one. It may be overridden by urgent security needs. In the respondents, view, the order strikes the correct balance between the right to worship and the right to property, and is therefore both reasonable and proportionate.

II. The Court first determined that no sufficient factual basis had been presented by the petitioners to establish that irrelevant considerations influenced the requisition order, especially in view of the numerous terrorist attacks against Jewish pedestrians on the route. The Court noted that international law grants authority to the military commander to act in two fields: first, to protect the occupier's legitimate security interests and secondly to secure the needs of the local population under occupation, which here includes both Arab and Israeli inhabitants. The Court noted numerous provisions and cases under international and Israeli law where the requisition of land may be required in order to realise both interests, subject to a balancing test.

In reaching its decision, the Court carried out a two-tiered analysis. Firstly, it weighed up the value of protecting human life against the right to worship, and held that, while the protection of the right to life is of greater importance than the constitutional right to worship where additional security measures allow a balance to be struck between the two, which is the case here, then the constitutional right may be exercised, subject to the second balancing test between the right to worship and the right to property. In this regard, the Court noted that the right to worship is a basic human right under Israeli law, and that this fundamental right was actualised by the increased security measures along the "worshippers' route". The Court also noted that the homes singled out for demolition were uninhabited, diminishing the weight of the right to property, and that intense efforts were made to minimise any harm caused to property owners along the route, as evidenced by the modifications to the requisition order. Furthermore, the Court noted that, under Israeli law, the right to property is not an absolute right, and may be limited in the furtherance of the protection of other constitutional rights, such as the right to worship. In upholding the order, the Court held that the requisition order struck a proportional, horizontal balance between the conflicting constitutional rights, allowing the realisation of the right of worship while reducing to a minimum the harm to private property, which is accompanied by financial compensation. The Court also noted that the requisition order is limited in time and that when the security situation improves, the requisitioned property will be returned to its owner.

Languages:

Hebrew, English (translation by the Court).

Identification: ISR-2006-2-004

a) Israel / **b)** High Court of Justice (Supreme Court) / **c)** / **d)** 03.02.2005 / **e)** 1890/03 / **f)** / **g)** to be published in the Official Digest / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
3.17 **General Principles** – Weighing of interests.
3.20 **General Principles** – Reasonableness.
5.3.6 **Fundamental Rights** – Civil and political rights – Freedom of movement.
5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of worship.
5.3.39.1 **Fundamental Rights** – Civil and political rights – Right to property – Expropriation.

Keywords of the alphabetical index:

Terrorism, fight / Proportionality, horizontal, definition.

Headnotes:

The military commander has authority to issue land sequestration orders based on the Fourth Geneva Convention. The military commander's authority to issue such an order, however, is discretionary, and must strike a balance between two equally important rights, that of the right to freedom of worship and the right of freedom of movement.

Summary:

I. In the autumn of 2004, the military commander of Judea and Samaria issued a land sequestration order that would ensure the safe arrival of worshippers coming to Rachel's Tomb, in Bethlehem. The order included the construction of an alternative road to be used exclusively as an access road to Rachel's tomb, with a wall built adjacent to the road to prevent gunfire on cars travelling along the road. This order was a modification of two previous orders issued by the military commander in 2003 which had the effect of boxing in an entire neighbourhood within Bethlehem, preventing the freedom of movement of its residents. The petitioners claimed in prior proceedings that the two original orders would harm their basic right to freedom of movement and lacked reasonableness and proportionality, and after a series

of negotiations, the military commander modified the order, resulting in the new order under dispute here, to minimise the level of harm caused to residents of Bethlehem. Notwithstanding these modifications, the petitioners still claim that this new order infringes their right to freedom of movement.

At issue in this case are the competing fundamental rights of freedom to worship and freedom of movement. Rachel's Tomb is a holy place for Jewish people, but access to the site has been limited since the outbreak of the "Intifada" in 2000 by virtue of terrorist attacks perpetrated by Palestinians against Jewish worshippers. The respondent accordingly claimed that the order serves a vital security need – defending the lives of Jews visiting Rachel's Tomb and thereby ensuring the right to freedom of worship.

According to the petitioners, the order causes unreasonable damage to residents due to its restriction on their freedom of movement, its purpose could have been achieved by alternative means, it is based on irrelevant considerations and is actually an attempt to "annex" Rachel's tomb to Jerusalem. They also suggested that the order infringes their property rights, and that they were denied the right to a hearing before the new order was made.

II. The Court dismissed petitioners' claims that they were denied the right to a hearing and also held that any infringement on personal property here was marginal, as compensation had already been paid to the owners of the land. It dismissed the property right claim. The Court concurred with the respondent's suggestion that the order was based on real security risks, and thus denied the petitioners' claim that the order was based on irrelevant considerations. However, the Court held that while the right to freedom of worship is a fundamental right, it is not an absolute one, and may be limited to the extent that it conflicts with other fundamental rights, such as freedom of movement. Accordingly, where such a clash between two rights of equal value exists, the Court explained, a "horizontal" balance between the two rights is necessary, so that the nucleus of both rights can co-exist.

In determining the severity of the infringement upon the freedom of movement of the petitioners, the Court examined:

1. the geographical scope of the restriction of movement;
2. the intensity of the restriction of movement;
3. the duration of the restriction; and
4. the person's interest in exercising the freedom of movement.

Applying these factors, the Court determined that the new order reduced the geographical scope and intensity of the restrictions on freedom and movement, and that it was a temporary measure which could be removed once the threat of terrorist attacks on Jewish worshippers had ceased. Moreover, under the new order, while there still remained a number of residents whose freedom of movement would be compromised by the access road, the number had been reduced by 70% from the original order. Thus, the Court held that the new order serves as a reasonable and proportional means for bringing about the essential realization of freedom of worship without essentially compromising freedom of movement.

In confirming the reasonableness and proportionality of the new order, the Court determined that the alternative means suggested by the petitioners had not been proved to be superior to the order at issue. Great weight will, in any case be given to the professional opinion of a military official who has expertise in determining the appropriate means for ensuring security of an area under his control.

Languages:

Hebrew, English (translation by the Court).

Identification: ISR-2006-2-005

a) Israel / **b)** High Court of Justice (Supreme Court) / **c)** / **d)** 23.06.2005 / **e)** 3799/02 / **f)** / **g)** to be published in the Official Digest / **h)** CODICES (English).

Keywords of the systematic thesaurus:

5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
5.3.2 **Fundamental Rights** – Civil and political rights – Right to life.
5.3.31 **Fundamental Rights** – Civil and political rights – Right to respect for one's honour and reputation.

Keywords of the alphabetical index:

International humanitarian law, violation / Terrorism, fight / Civilian, use in military operation.

Headnotes:

The "Early Warning" procedure enacted by the Israeli Defence Forces (IDF) allows the IDF forces to use consenting local Palestinian residents during arrest operations of Palestinians suspected of terrorist activity, by giving prior warning of possible injury to the suspect and others with him. The Court held that this procedure was illegal and contradicted international law.

Summary:

I. On 26 November 2002, the IDF (Respondents) enacted the "Early Warning" procedure, laying out the procedures for soliciting the assistance of local Palestinian residents in order to arrest wanted persons. The respondents argued that the procedure was enacted as a means of minimising the danger to innocent civilians and the wanted persons themselves during arrest operations, providing innocent civilians with sufficient time before the arrest to evacuate the site in which the suspect is located. The "early warning" operational procedure specifically laid out guidelines for when the implementation of the procedure is and is not appropriate. *Inter alia*, the guidelines stated that:

1. consent of local residents is required and must be obtained through verbal, non-forceful means;
2. solicitation of local residents is forbidden where the IDF commander believes local residents will be in danger; and
3. implementation of the procedure is forbidden when there are effective alternative means available.

The petitioners claim that the procedure violates the principles of international humanitarian law regarding the military activity of an occupying force in occupied territory, and is therefore illegal. In their view, the "early warning" procedure is in fact the use of a protected civilian as a "human shield". The Supreme Court had previously issued a temporary interlocutory injunction ordering the Respondents to refrain from using Palestinian civilians in this way. Petitioners also claim that the procedure puts local residents in real danger, and that local Palestinian residents are incapable of giving true consent to participation in the procedure. This is because a protected civilian cannot waive the rights granted to him under international law, and because of the power differential inherently exerted by Israeli soldiers over local residents. Additionally, Petitioners claim that the procedure creates a certain and tangible injury to the dignity of the protected civilian by assisting someone who is perceived to be his "enemy". Petitioners also claim that, under international humanitarian law, Respondents have the duty to protect the civilian population. Moreover, the procedure grants substantial discretion to military personnel regarding its implementation – the same military personnel who have violated interlocutory injunctions in the past.

Respondents claim that the procedure complies with international law, which requires that every attempt be made to reduce collateral damage to non-combatants. In their opinion, the procedure is legal and proportionate in that it allows the making of arrests while substantially reducing the need to resort to force, which damages property and endangers innocent civilians. Considering the fact that terrorists hide out amongst innocent civilians and therefore put their lives in danger, Respondents argue that the procedure was developed for the protection of the innocent local population, and that the procedure neither endangers the safety nor the dignity of the consenting participants.

II. In examining the issue, the Court balanced two conflicting considerations – the value of human life and the duty of the occupying power to safeguard the lives and dignity of the civilian population. The Court ruled that the procedure contradicted international law. First, the Court reasoned that it is not clear whether a civilian can truly consent to participate in the procedure, and that, regardless of whether there is consent, the dignity of a local civilian sent by the "enemy" to relay a warning to his family or friends is injured when he does so. Moreover, the Court based its decision on the basic principle of humanitarian law that prohibits the use of protected persons as part of the war effort of the occupying army and the principle which requires that everything is to be done to separate the civilian population from military activity. Finally, the Court determined that a military commander may not be able to properly estimate the degree of danger under which the local resident giving the warning would be placed, which means that the written procedural guidelines, stating that local residents are not to be placed in danger, are unrealistic in practice.

Languages:

Hebrew, English (translation by the Court).

Italy
Constitutional Court

Important decisions

Identification: ITA-2006-2-002

a) Italy / **b)** Constitutional Court / **c)** / **d)** 03.05.2006 / **e)** 200/2006 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), 24.05.2006 / **h)**.

Keywords of the systematic thesaurus:

1.3.4.2 **Constitutional Justice** – Jurisdiction – Types of litigation – Distribution of powers between State authorities.
4.4.1.2 **Institutions** – Head of State – Powers – Relations with the executive powers.
4.4.1.3 **Institutions** – Head of State – Powers – Relations with judicial bodies.
4.6.2 **Institutions** – Executive bodies – Powers.

Keywords of the alphabetical index:

President, pardon / Ministry of Justice, pardon, counter-signature.

Headnotes:

The judgment solves the conflict of allocation of power raised by the President of the Republic against the Minister of Justice because the latter refused to implement the President's decision to grant pardon to Ovidio Bompressi.

In particular, the claim specified that the Minister of Justice refused to draw up the pardon proposal and the relevant granting decree, although the President had expressed his own wish to grant pardon: hence the violation of Articles 87 and 89 of the Constitution, since the refusal of the Minister implies, *de facto*, the claiming of a power assigned to the Head of State by the Constitution.

The Court declared the claim founded, ruling that the Minister of Justice had no right to hinder the procedure aimed at granting pardon to Ovidio Bompressi.

Summary:

After recalling the origin and historic evolution of the legal institute in question, the Court judgment clarified the type of relation existing between the role of the Head of State, entitled to grant pardon, and the Minister of Justice, who is responsible for the collection of all the necessary elements to make a decision. If the aim of the pardon is to mitigate or to annul punishment for exceptional humanitarian reasons, it is clear that, in this case, it is necessary to recognise the decision-making power of the Head of State as a *super partes* organ, representing national unity, and not belonging to the political and governmental circuit.

This conclusion also meets the additional need to prevent the evaluation of the prerequisites to adopt a measure capable of annulling a criminal sentence from being influenced by the decisions of organs belonging to the executive power. In this regard, the Court recalled its previous judgments, in particular Judgment no. 274 of 1990, showing a consolidated orientation that – with the implicit reference to the principle of separation of powers – excludes any participation of members of the government during the phase of enforcement of criminal sentences.

Finally, the Court specifies the tasks of the Minister in relation to the activity for the adoption of the pardon.

The pardon decree is the result of a procedure started by the convicted person who asks for a pardon (or by a close relative, the cohabitant, the guardian, the lawyer of the convicted person). The petition for pardon is addressed to the President and submitted to the Minister. Pardon can also be granted where there is no petition or proposal and, in any case, the initiative can be taken directly by the President of the Republic.

The start of the procedure is followed by the procedural activity carried out by the Ministry. After collecting all the necessary elements, the Minister decides whether to present a grounded pardon proposal to the President or to dismiss the case: in the first instance, if the Head of State thinks that humanitarian reasons exist to grant the pardon, the relevant decree shall be countersigned by the Minister of Justice (whose countersignature has a purely formal value); in the second instance, if the Head of State, after being informed of the decision to dismiss the case, asks for the continuation of the procedure, the Minister has no power to hinder it.

When the initiative is taken by the President, he can ask the Minister to start the procedure and the Minister is obliged to start and complete it, presenting

the relevant proposal: any refusal by the Minister, in fact, would in substance bar/preclude the exercise of the power to grant pardon, thus impairing a capacity – as to the final decision − granted by the Constitution to the Head of State.

Therefore, when the President asks for the continuation of the procedure or directly takes the initiative, the Minister cannot refuse to carry out that task or to complete it. He can only inform the Head of State of the legitimate reasons that, in his opinion, prejudice the granting of the pardon. Otherwise, he would be recognised as having an inhibitory power – a sort of veto power – with respect to the conclusion of the procedure to grant pardon. However, if the President of the Republic does not agree with the evaluation of the Minister, he may directly issue the pardon decree setting out the reasons for which the pardon must be granted, notwithstanding the Minister's dissent.

Consequently, when the President is in favour of granting a pardon, the countersignature of the decree by the Minister of Justice is the act by which the Minister merely testifies the completeness and regularity of the procedure.

Judge Rapporteur: Judge Alfonso Quaranta.

Languages:

Italian.

Latvia
Constitutional Court

Important decisions

Identification: LAT-2006-2-003

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 15.06.2006 / **e)** 2005-13-0106 / **f)** On the Compliance of Section 5 (Items 5 and 6) of the *Saeima* (Parliament) Election Law and Section 9 (Items 5 and 6 of the first paragraph) of the City Dome, District Council and Rural District Council Election Law with Sections 1, 9, 91 and 101 of the Republic of Latvia *Satversme* (Constitution) as well as with Sections 25 and 26 of the International Covenant on Civil and Political Rights / **g)** *Latvijas Vestnesis* (Official Gazette), no. 95(3463), 20.06.2006 / **h)** CODICES (Latvian, English).

Keywords of the systematic thesaurus:

1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.
1.6.3.1 **Constitutional Justice** – Effects – Effect *erga omnes – Stare decisis*.
5.2.1.4 **Fundamental Rights** – Equality – Scope of application – Elections.
5.2.2 **Fundamental Rights** – Equality – Criteria of distinction.
5.3.41.2 **Fundamental Rights** – Civil and political rights – Electoral rights – Right to stand for election.

Keywords of the alphabetical index:

Lustration, secret service / State security, organ / Secret service, member, right to be elected / Loyalty, to democratic state.

Headnotes:

Restrictions on the passive electoral rights of members or former members of the regular staff of the USSR or the Latvian SSR, foreign state security, intelligence or counter-intelligence services, as well as those who, after 13 January 1991, had been active in CPSU (CP of Latvia), Working People's International Front of the Latvian SSR, the United Council of Labour Collectives, the Organisation of War and Labour Veterans and the All-Latvia Salvation

Committee or its regional committees comply with the Latvian Constitution and the International Covenant on Civil and Political Rights.

The principle of legal equality accommodates and sometimes even demands differing attitudes for people in differing circumstances. Such a differentiated attitude is necessary for those who decided to support Latvia in becoming an independent and democratic state. When the parliamentary draftsmen imposed restrictions on election rights for all former State Security Committee employees and did not allow for the possibility of different treatment for those who helped to bring about Latvia's independence, they brought about equal treatment for persons in fundamentally different circumstances. There are no reasonable and objective grounds for such equal treatment.

Summary:

I. Under the Parliamentary Election Law and the City Council, District Council and Rural District Council Election Law, persons cannot be included in candidate lists and cannot stand as parliamentary candidates or in local elections if they:

1. belong or have belonged to the regular staff of the USSR, Latvian SSR or foreign state security, intelligence or counter-intelligence services;
2. played an active role after 13 January 1991 in the CPSU (Latvian Communist Party), Working People's International Front of the Latvian SSR, the United Council of Labour Collectives, the Organisation of War and Labour Veterans and the All-Latvia Salvation Committee or its regional committees.

Two cases were joined for the purpose of these constitutional proceedings. Twenty members of parliament asked the Constitutional Court to decide whether the above-mentioned provisions were in accordance with various norms of higher legal force. Juris Bojārs submitted a constitutional complaint on the conformity of restrictions in the parliamentary election law upon former regular staff of the USSR state security service.

This is the second time the compliance of these provisions has been challenged in the Constitutional Court. On 30 August 2000, the Constitutional Court handed down Judgment no. 2000-03-01 [LAT-2000-3-004], which held that the norms complied with Articles 89 and 101 of the Constitution, Article 14 ECHR, Article 3 Protocol 1 ECHR and Article 25 of the International Covenant on Civil and Political Rights.

II. The Court began by settling various procedural points, emphasising that it carries out its reviews by assessing the circumstances which exist at the time the matter is adjudicated. At this point and under certain defined circumstances, the claim is deemed to be "already adjudicated". New proceedings can only be launched if there is a fundamental change to the circumstances. Major changes resulted from the Law of 27 May 2004 "Amendments to the Law on Maintenance and Use of Documents of the Former State Security Committee and on the Stating of Facts about Persons' Collaboration with the State Security Committee". When the Constitutional Court handed down its judgment on 30 August 2000, the applicable law was Section 17 of the KGB Documentation Law. It stated that "once ten years have elapsed from the entry into force of this legislation, statements of the fact of collaboration with the KGB under the procedure established by Articles 14 and 15 of this law shall not be permitted and the possibility that someone may have collaborated with the KGB will not be used in legal proceedings involving this person". The amendments to the KGB Documentation Law extended the above term to twenty years.

Reference was made to the decision of the European Court of Human Rights Grand Chamber in "*Ždanoka v. Latvia*". The Constitutional Court established that restrictions on those who had played an active role after 13 January 1991 in CPSU (the Latvian Communist Party), the Working People's International Front of the Latvian SSR, the United Council of Labour Collectives, the Organisation of War and Labour Veterans and the All-Latvia Salvation Committee or its regional committees were in line with the norms of higher judicial force. However, the Constitutional Court pointed out to the parliament several times that the necessity for such restrictions should be reviewed as a matter of urgency.

The Court went on to examine restrictions upon members or former members of the regular staff of the USSR, the Latvian SSR or the state security, intelligence or counter-intelligence services. It also looked at restrictions on former or existing employees of the current foreign state security, intelligence or counter-intelligence services. It held that restrictions on these categories of citizens were not at variance with norms of higher legal force.

Nonetheless, the Court emphasised to parliament that these restrictions needed to be reviewed as soon as possible. If they cannot be repealed, a procedure should be put in place which allows for exceptions for certain persons. Such a procedure must not jeopardise democratic values.

The Court also explained the significance of January 1991 as "decision time", when the people of Latvia chose where their respective allegiances lay. The point was made that those who fought for Latvia as an independent and democratic state, and those who opposed this could not be regarded as posing an equal danger to state security, territorial integrity and democracy.

The Court recognised that Mr J. Bojārs, who had submitted the constitutional complaint, had contributed significantly to the renewal of democratic values in Latvia. In presenting Mr Bojārs with the high State Order, the State acknowledged his proven loyalty to Latvia as an independent and democratic state. He is in a different situation from somebody who opposed Latvia's independence and should accordingly be treated differently.

The Court held that Section 5.5 and 5.6 of the Parliamentary Election Law and Section 9.1.5 and 9.1.6 of the City Council, Regional Council and Rural District Council Election Law complied with Articles 1, 9, 91 and 101 of the Constitution and with Articles 25 and 26 of the International Covenant on Civil and Political Rights.

It also held that with regard to the plaintiff in these proceedings, Juris Bojārs, Section 5.5 of the Parliamentary Election Law and Section 9.1.6 of the City Council, Regional Council and Rural District Council Election Law are incompatible with Articles 1, 9, 91 and 101 of the Constitution and with Articles 25 and 26 of the International Covenant on Civil and Political Rights. They will lose their validity immediately the judgment is published.

Cross-references:

Previous decisions of the Constitutional Court in the following cases:

- Judgment no. 2000-03-01 of 30.08.2000, *Bulletin* 2000/3 [LAT-2000-3-004];
- Judgment no. 2004-18-0106 of 13.05.2005, *Bulletin* 2005/2 [LAT-2005-2-005];
- Judgment no. 3-4-1-7-02 of the Constitutional Review Chamber of the Supreme Court of Estonia, *Bulletin* 2002/2 [EST-2002-2-006];
- Judgment no. Pl. US 1/92, 26.11.1992, Czechoslovakia Constitutional Court, *Special Bulletin Leading Cases 1* [CZE-1992-S-002].

European Court of Human Rights:

- *Ždanoka v. Latvia* [GC, 2006];
- *Sidabras and Džiautas v. Lithuania*; [2004] ECHR 395, *Reports of Judgments and Decisions* 2004-VIII;
- *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, *Reports of Judgments and Decisions* 2002-VI.

Languages:

Latvian, English (translation by the Court).

Liechtenstein
State Council

Important decisions

Identification: LIE-2006-2-002

a) Liechtenstein / **b)** State Council / **c)** / **d)** 03.07.2006 / **e)** StGH 2006/4 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

2.1.3.2.1 **Sources** – Categories – Case-law – International case-law – European Court of Human Rights.
5.1.1.3 **Fundamental Rights** – General questions – Entitlement to rights – Foreigners.
5.3.9 **Fundamental Rights** – Civil and political rights – Right of residence.
5.3.33 **Fundamental Rights** – Civil and political rights – Right to family life.

Keywords of the alphabetical index:

Family reunion, right / Family, reunion / Residence permit / Foreigner, residence / Immigration / European Convention on Human Rights, reservation / Reservation, ineffectiveness.

Headnotes:

It is clearly established in the Strasbourg case-law that a reservation to a provision of the European Convention on Human Rights cannot apply to a statutory regulation that came into force after notification of the reservation was issued, whether or not the substantive scope thereof is broadened by the regulation in question. It may be inferred that Liechtenstein's reservation to Article 8 ECHR can no longer purport to be effective in respect of later regulations than the Ordinance restricting the number of foreign residents, LGBI 1980/66, the text referred to in the reservation to Article 8 ECHR.

While a time limit of two years established by law for filing an application for family reunion does constitute an obstacle to family reunion, it is nevertheless a justified restriction on the fundamental right to respect for family life under Article 8 ECHR.

Summary:

In proceedings to verify the constitutionality of provisions in accordance with Section 20.1.b of the Constitutional Court Act (StGHG), the Administrative Court lodged an application to have Article 70.2 of the Code governing the movement of persons (PVO), LGBI 2004/253, set aside on the ground that it interfered with the protection of family life secured in Article 8 ECHR, since the said article of that Code stipulated a time limit of two years to file an application for family reunion. On the basis of the finding that Liechtenstein's reservation to Article 8 ECHR was not applicable to the PVO, the State Council did not allow the application.

Languages:

German.

Identification: LIE-2006-2-003

a) Liechtenstein / **b)** State Council / **c)** / **d)** 03.07.2006 / **e)** StGH 2006/5 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
3.25 **General Principles** – Market economy.
5.4.4 **Fundamental Rights** – Economic, social and cultural rights – Freedom to choose one's profession.
5.4.5 **Fundamental Rights** – Economic, social and cultural rights – Freedom to work for remuneration.
5.4.6 **Fundamental Rights** – Economic, social and cultural rights – Commercial and industrial freedom.

Keywords of the alphabetical index:

Lawyer, partnership / Lawyer, firm / Freedom of enterprise, restriction / Protection, need, change over time.

Headnotes:

Section 10 of the Act governing the legal profession (RAG) rules out the possibility of choosing a corporation as the form of partnership for a lawfirm. The exclusion of corporations from legal practice

does not constitute disproportionate interference with the principle of freedom of trade and industry established by Article 36 of the Constitution, considering the wide latitude which the legislator possesses by way of freedom as regards political organisation, and further considering the restraint observed in control over the proportional ranking of principles – in this instance, freedom to engage in an occupation as against protection of the client – although valid reasons obviously exist to support the granting of a wider choice to lawyers where forms of partnership are concerned.

Time considerations should also apply to the principle of proportionality, so that protective provisions should be relaxed or repealed when no longer necessary at the time.

Summary:

In proceedings to verify the constitutionality of provisions, in accordance with Section 20.1.b of the Constitutional Court Act (StGHG), the Administrative Court lodged an application to have certain passages of Section 10.1 RAG set aside, chiefly on the ground that the principle of freedom of trade and industry was disproportionately restricted by the exclusion of corporations stipulated in this provision. The State Council did not allow the application.

Languages:

German.

Lithuania
Constitutional Court

Important decisions

Identification: LTU-2006-2-006

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 09.05.2006 / **e)** 13/04-21/04-43/04 / **f)** On appointment, promotion, transfer of judges and their dismissal from office / **g)** *Valstybės Žinios* (Official Gazette), 51-1894, 11.05.2006 / **h)** CODICES (English, Lithuanian).

Keywords of the systematic thesaurus:

3.9 **General Principles** – Rule of law.
4.4.1.3 **Institutions** – Head of State – Powers – Relations with judicial bodies.
4.7.4.1.2 **Institutions** – Judicial bodies – Organisation – Members – Appointment.
4.7.4.1.5 **Institutions** – Judicial bodies – Organisation – Members – End of office.

Keywords of the alphabetical index:

Judiciary, organisation, independence / Judge, appointment, prolongation.

Headnotes:

A very important component of judicial independence, as enshrined in the Constitution, is that all judges have equal legal status when administering justice, and are not subordinate to any other judge or to the President of any court.

The Constitution allows for a special panel of judges to be set up. Its ranks are to be formed solely of judges, and it acts as a balance to the President of the Republic, who is a subject of the executive.

Summary:

I. Three applications were joined for the purpose of these proceedings. The Constitutional Court received two applications from members of the Lithuanian Parliament, and one from the Lithuanian Court of Appeal.

a. On 19 February 2004, a group of members of parliament asked the Constitutional Court to investigate the compliance with the Constitution of certain provisions of the Law on Courts. The members of parliament made the point that under the Law on Courts, when a judge from Lithuania's various courts reaches the age of 65, the institution which appointed him may extend his term of office by a further five years. A judge in such a position should apply to the President of the Republic for an extension.

b. The petitioners observed that there is no obligation on the institution which actually makes the decision to extend the judge's term of office and, indeed, it is not bound by any formal criteria, which would enable it to arrive at such a decision. Situations could arise where pressure might be exerted upon a judge whose term of office was about to expire, by intimating to him that the success of his application for extension would depend on the way in which a particular case was to be decided. Furthermore, the Constitution provides that a special panel of judges, set up by statute, shall advise on the appointment, promotion and transfer of judges or their dismissal from office. Criticism was made of the powers vested in the President of the Supreme Court under the Law of Courts. He is able to select candidates for judicial office within the Supreme Court, to recommend them to the President of the Republic and to advise the President of the Republic on the appointment or dismissal of the Chairman of a division of the Supreme Court from office. It was suggested that these powers restrict the competence of the special panel of judges to advise the President of the Republic on questions of judicial careers.

c. The Lithuanian Court of Appeal presented a petition to the Court on 15 April 2004. The Appeal Court observed that, under the Constitution, the President of the Republic must be advised of the appointment of judges or their dismissal from office by a special panel of judges set up by statute. The Law on Courts describes such a panel as "the Council of Courts." However, Article 57.3 of this law provides that the President of the Republic may decline the judge's application and not extend his term of office, without seeking advice from the Council of Courts. Potentially, this could jeopardise the balance between institutions, between the President of the Republic and the judiciary, as set out in the Constitution. It could also compromise the constitutional principles of the independence of the judiciary and universal equality. The duties of the panel of judges are set out in the Constitution, and the Law on Courts provides that issues in respect of the extension of a judge's term of office are to be decided in accordance with the procedure for the appointment of a judge of an appropriate court. The President of the Republic may not, therefore, decide of his own volition upon a judge's application for an extension, without applying to the Council of Courts for advice.

d. On 2 November 2004, several members of parliament sought a ruling from the Constitutional Court as to the compliance with the Constitution of Article 128.2 of the Law on Courts. This article provides that draft state investment programmes must be approved by the Council of Courts, and state investment programmes are to be approved by the Ministry of Justice. The petitioners argued that this contravened the constitutional principles of separation of powers and that of a state under the rule of law. It was also at odds with the principle of independence of the judge and court, which encompasses the independence of court finance from the executive power.

II. The Constitutional Court began by examining the formula set out in the Constitution – "a special panel of judges shall advise." It stressed that this phrase should not be widely construed, in such a way that it might pave the way for future legislation which could permit people who are not members of the judiciary to join the panel. Such an interpretation could give rise to violations of the principle of judicial and court independence (including self-regulation by judges).

The Constitutional Court emphasised that self-regulation and self-governance of the judiciary include the role of a special panel of judges in selecting the make-up of the judiciary. The panel is an important balance to the President of the Republic, who is a subject of the executive. If the President applies to the panel, over an issue of the dismissal of a judge, either because he has reached retirement age or because he has been convicted by a court judgment, the panel must make sure that the alleged facts actually exist. If they do, the panel has no choice but to advise the President to dismiss the judge from office, and the President must then dismiss him.

The Court concluded that Article 90.3 of the Law on Courts, which allows the President of the Supreme Court to propose to the President of the Republic the dismissal of a judge of the Supreme Court, is in conflict with the Constitution. In the Court's view, this provision is a groundless extension of the powers of the President of the Supreme Court. It also places a fetter on the powers of the President of the Republic

over the makeup of the judiciary, upon the advice of the panel, as set out in Article 112.5 of the Constitution. It also constitutes an interference with the constitutional competence of the panel.

It held that Article 57.3, the legal regulation allowing for the extension of judges' terms of office to the age of 70, save the exceptions allowed by the Constitution itself, is incompatible with the principles enshrined within the Constitution, including the principle of a state under the rule of law.

Languages:

Lithuanian, English (translation by the Court).

Identification: LTU-2006-2-007

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 10.05.2006 / **e)** 25/03 / **f)** On the language of referendum ballot-papers / **g)** *Valstybės Žinios* (Official Gazette), 52-1917, 12.05.2006 / **h)** CODICES (English, Lithuanian).

Keywords of the systematic thesaurus:

3.3.2 **General Principles** – Democracy – Direct democracy.
3.9 **General Principles** – Rule of law.
4.3.1 **Institutions** – Languages – Official language(s).
4.3.4 **Institutions** – Languages – Minority language(s).
4.9.7.4 **Institutions** – Elections and instruments of direct democracy – Preliminary procedures – Ballot papers.
5.2.2.10 **Fundamental Rights** – Equality – Criteria of distinction – Language.
5.3.40 **Fundamental Rights** – Civil and political rights – Linguistic freedom.
5.3.45 **Fundamental Rights** – Civil and political rights – Protection of minorities and persons belonging to minorities.

Keywords of the alphabetical index:

Language, minority, use in official communications / Language, official, use / Referendum, ballot papers, minority language, use / Public spirit, lack.

Headnotes:

Referendum ballot-papers must only be printed in the official language of the state. To do otherwise would be to ignore the constitutional concept of the state language, which presupposes the use of the state language when making decisions of national significance. It would also deviate from the imperative of public spirit and the concept of the nation state which are enshrined in the Constitution.

Summary:

I. Members of the Lithuanian Parliament asked the Constitutional Court for a ruling as to whether the Law on Supplementary Article 3 of the Law on the Central Electoral Commission conformed to Articles 14 and 29 of the Constitution. They observed that a referendum ballot paper is an official document, and, as such, must only be printed in the official state language. However, the Law on Supplementary Article 3 states that the Central Electoral Commission must organise additional printing of referendum ballot papers, which not only contains text in the state language but also a translation of this text into the language of a national minority in areas where there are traditionally large numbers of national minorities. The petitioners suggested that this was in breach of Article 14 of the Constitution, under which use of the state language is obligatory in public life, and also the principle of equal rights contained in Article 29 of the Constitution. Effectively, these exceptional rights are granted only to those national minority groups using the Polish and Russian languages. They are the only groups with a significant number of representatives and they tend to live together in close communities.

II. The Constitutional Court held that the establishment of the status of the state language in the Constitution means that Lithuanian is a constitutional value. This does also mean that the state language is only to be used in public life; the fact that official documentation is written in Lithuanian does not prevent those belonging to national minorities from reading, writing and communicating in any other language, if they so wish.

The Court went on to say that the institute of citizenship of the Lithuanian Republic and citizens' rights and responsibilities are to be construed in the context of the concept of public spirit, as a constitutional value. Public spirit is closely related as a constitutional principle to that of a state under the rule of law.

When examining the concept of Lithuanian citizenship, the Constitutional Court has stated that permanent residence in the state for a period of time prescribed by law and knowledge of the state language are prerequisites for a foreigner or stateless person to integrate him or herself into society. They will give him a valuable insight into the mentality of the Nation and its goals, as well as the constitutional order of the state, and will help him to acquaint him or herself with Lithuanian history, culture, customs and traditions. They could also help to prepare him or her to assume responsibility for the present and the future of the state. For these reasons, it is not enough for a foreign citizen or a stateless person seeking Lithuanian citizenship simply to settle in the country. It is clear that knowledge and use of the state language in Lithuanian public life is also a constitutional imperative for those who are already citizens even if one takes into consideration the fact that (as described in the Constitutional Court ruling of 30 December 2003, *Bulletin* 2003/3 [LTU-2003-3-011]) "an absolute majority of persons are citizens not because they have expressed their wish to be citizens of the state but because they are linked with it by means of a certain objective relationship: their parents, or one of their parents, were citizens of that state". It cannot be denied that a citizen of Lithuania who does not know the state language has not fully integrated into Lithuanian society. If a citizen does not know the state language and makes no effort to try to learn it, even where there are no objective reasons to prevent him or her from doing so, this is indicative of a lack of public spirit.

The Court held that referendum ballot papers must only be printed in the state language. Otherwise, the constitutional concept of the state language would be ignored, which presupposes the use of the state language when making decisions of national significance. It would deviate from the imperative of public spirit and the concept of the nation state established in the Constitution.

The Court held that the provisions allowing referendum ballot papers which contained text in the state language and a translation into the language of a national minority to be used in areas where there were traditionally large numbers of inhabitants drawn from national minorities were in conflict with Article 14 of the Constitution.

Languages:

Lithuanian, English (translation by the Court).

Identification: LTU-2006-2-008

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 12.05.2006 / **e)** 16/03-17/03-18/03 / **f)** On granting land lots to recipients of the Order of the Cross of Vytis / **g)** *Valstybės Žinios* (Official Gazette), 54-1965, 16.05.2006 / **h)** CODICES (English, Lithuanian).

Keywords of the systematic thesaurus:

3.9 **General Principles** – Rule of law.
4.10.8 **Institutions** – Public finances – State assets.
5.2.2.13 **Fundamental Rights** – Equality – Criteria of distinction – Differentiation *ratione temporis*.

Keywords of the alphabetical index:

Property, state, award / Award, material benefit, privileged treatment.

Headnotes:

There is no scope within the Constitution for legislation whereby the recipient of a certain state award also receives certain material and financial benefits or privileges, on the basis of the award he has received.

Summary:

I. Three petitions from the Vilnius Regional Administrative Court were joined for the purpose of these proceedings. The Administrative Court asked the Constitutional Court for a ruling as to the compliance with the Constitution of Article 1 of the Law Amending Article 7 of the Law on Land Reform. The petitioners observed that Lithuanian citizens who were decorated with the Order of the Cross of Vytis and the Cross of Vytis before 3 July 2002 and who failed to submit a request before 3 July 2002 were deprived of the right to receive a plot of land free of charge. They suggested that this state of affairs was at variance with Article 29.1 of the Constitution of the Republic of Lithuania (which provides that all people are equal), as well as the constitutional principles of protection of legitimate expectations and of a state under the rule of law.

II. The Constitutional Court noted that an award from the state is a sign of the esteem in which its recipient is held. It should not be a precursor to the granting of

material, financial or other benefits of any kind (apart, of course, from the order or medal itself). The inference cannot be drawn from the Constitution that the recipient of any type of state award could expect, let alone demand, any additional material, financial or other benefit or privilege, simply because he has won the award. Circumstances may, of course, exist under statute where somebody may receive material or financial benefits from the state, arising from the same actions which gained him the award.

A legal provision which granted somebody material and financial support, or material and financial benefits from the state, simply because they had won a state award, would be regarded as being at variance with Article 23.2 of the Constitution, under which both national and local rights of ownership enjoy legal protection. If Article 23.2 is construed in conjunction with Article 128.2 of the Constitution (which states that the procedure for the possession, use and disposal of state property shall be established by law), any such provision would also be regarded as being out of line with Article 128.2 of the Constitution. It would also contravene the constitutional principle of a state under the rule of law and the constitutional concept of state awards. There is no scope within the Constitution for any such provision.

The Constitutional Court examined the state of affairs whereby Lithuanian citizens who were decorated with the Order of the Cross of Vytis and the Cross of Vytis before 3 July 2002 and who failed to submit a request before 3 July 2002 were deprived of the right to receive a plot of land free of charge, as a result of Article 1 of the Law on Amending Article 7 of the Law on Land Reform. The Court held that this situation did not contravene Article 29.1 of the Constitution. It also held that the provision allowing plots of land of the size decreed by the Government to be conveyed free of charge to recipients of the Order of the Cross of Vytis and the Cross of Vytis was in conflict with the Constitution.

Languages:

Lithuanian, English (translation by the Court).

Identification: LTU-2006-2-009

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 06.06.2006 / **e)** 12/06 / **f)** On the status of the Constitutional Court / **g)** *Valstybės Žinios* (Official Gazette), 65-2400 10.06.2006 / **h)** CODICES (English, Lithuanian).

Keywords of the systematic thesaurus:

1.1 **Constitutional Justice** – Constitutional jurisdiction.
1.1.1.1.1 **Constitutional Justice** – Constitutional jurisdiction – Statute and organisation – Sources – Constitution.
1.1.4.4 **Constitutional Justice** – Constitutional jurisdiction – Relations with other institutions – Courts.
1.3 **Constitutional Justice** – Jurisdiction.
1.3.5.5 **Constitutional Justice** – Jurisdiction – The subject of review – Laws and other rules having the force of law.
1.6.3 **Constitutional Justice** – Effects – Effect *erga omnes*.
3.9 **General Principles** – Rule of law.

Keywords of the alphabetical index:

Constitutional Court, jurisdiction / Court, nature.

Headnotes:

The Constitutional Court (the constitutional justice institution which is charged with the exercise of constitutional judicial control) is referred to by name in the Constitution. An institution of state power, which is named as a court in the Constitution, may not be considered as anything other than a court, or a judicial institution.

Summary:

I. Various Members of the Lithuanian Parliament *(Seimas)* asked the Constitutional Court for a decision as to whether the Law on the Constitutional Court was in line with Articles 5.1, 5.2, 111.1 and Chapters VIII and IX of the Constitution. They focused particularly on the title “The Constitutional Court − a Judicial Institution” and Article 1.3 of the Law on the Constitutional Court. This legislation provides that the Constitutional Court shall be a free and independent court, exercising judicial control according to the procedure established by the Constitution and by statute.

The petitioners observed that Article 5.1 of the Constitution establishes that state power in Lithuania is to be exercised by Parliament, the President of the Republic, government ministers and the judiciary. Article 111.1 of the Constitution enumerates the courts within the Lithuanian system of justice, to include the Supreme Court, the Court of Appeal, regional and local courts. They commented that the Constitutional Court does not feature on this list, although a whole chapter of the Constitution (Chapter VIII) is assigned to it. Article 5.2 of the Constitution provides that the scope of power shall be limited by the Constitution. If Chapter IX of the Constitution is dedicated to "the Court which executes state power" whilst Chapter VIII is dedicated to the Constitutional Court, arguably this means that under the Constitution, the Constitutional Court is not a court and does not execute state power.

II. The Constitutional Court held that the courts that exercise judicial power in Lithuania under the Constitution are affiliated to at least two court systems. Indeed, the current constitutional and statutory provisions in Lithuania envisage three court systems:

1. the Constitutional Court, which executes constitutional judicial control;
2. the Supreme Court, the Court of Appeal, regional and local courts (as specified in Article 111.1 of the Constitution), which constitute the system of courts of general jurisdiction;
3. specialised courts for the consideration of administrative, labour, family and other matters may be established by virtue of Article 111.2 of the Constitution. Currently, a system of administrative courts has been set up, comprising the Supreme Administrative Court and other regional administrative courts.

The Constitutional Court observed that the Constitutional Court is defined in the Constitution as the institution of constitutional justice which exercises constitutional judicial control. The Constitutional Court has confirmed several times in its jurisprudence that it is an individual and independent court, administering constitutional justice and guaranteeing the supremacy of the Constitution within the legal system. Its title − the Constitutional Court − is entrenched in the Constitution itself. Thus a state power institution, named as a court in the Constitution, cannot be regarded as anything other than a court.

The Constitutional Court went on to examine the separate chapters – "The Courts" and "The Constitutional Court" in the Constitution. It held that the existence of separate chapters did not mean that the Constitutional Court is not a court and somehow separate from the judicial system. The existence of a separate chapter serves to emphasise its particular status, not only in the court system but also in relation to all state institutions executing state power. The separate chapter also serves to highlight the peculiarities of the constitutional purpose and competence of the Constitutional Court.

In the Constitutional Court's view, the petitioners' presumption that the Constitutional Court is not a court and does not exercise state power was at variance with the concept of power and the powers of the Constitutional Court established under the Constitution. For instance, it has the power to recognise legal acts of other institutions exercising state power – including the parliament, the President of the Republic and government ministers – as being in conflict with legal acts of greater power, particularly the Constitution. It can strip these acts of legal power and eradicate them permanently from the legal system. The fact that only the Constitutional Court has the constitutional power to interpret the Constitution and to make decisions which are binding on all law-making and law-applying institutions, leaves no doubt that the Constitutional Court is an institution exercising state power.

The Constitutional Court ruled that the title "The Constitutional Court – a Judicial Institution" of Article 1 and 1.3 of the Law on the Lithuanian Constitutional Court did not contravene Articles 5.1, 5.2 and 111.1 of the Constitution.

Languages:

Lithuanian, English (translation by the Court).

Identification: LTU-2006-2-010

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 19.08.2006 / **e)** 23/04 / **f)** On compensation for damage inflicted by unlawful activity by the Office of Prosecutions and the courts / **g)** *Valstybės Žinios* (Official Gazette), 90-3529, 24.08.2006 / **h)** CODICES (English, Lithuanian).

Keywords of the systematic thesaurus:

3.4 **General Principles** – Separation of powers.
3.9 **General Principles** – Rule of law.
4.7.1.1 **Institutions** – Judicial bodies – Jurisdiction – Exclusive jurisdiction.
5.3.17 **Fundamental Rights** – Civil and political rights – Right to compensation for damage caused by the State.
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:

Damage, compensation, natural and legal persons / Compensation, fair.

Headnotes:

The necessity to recompense somebody who has suffered material and moral damage is a constitutional principle. As such, it is inseparable from the principle of justice entrenched in the Constitution. The Constitution requires statutory provision to the effect that somebody who has suffered damage through unlawful actions, would be able in every case to claim for just recompense for that damage and to receive that compensation.

The Constitution does not allow for statutory exceptions which result in there being no entitlement to recompense for moral or material damage, for example because it resulted from illegal activity on the part of state officials or institutions. Neither does parliament have the constitutional power to set a ceiling on the amount of compensation payable to somebody injured by state institutions or officials. This would fetter the court's decision-making and would prevent them from adjudicating just compensation in those circumstances.

Summary:

I. The Vilnius Regional Court asked the Constitutional Court for a ruling as to the compliance with the Constitution of Articles 3.3 and 7.7 of the Law on Compensation for Damage Inflicted by Unlawful Actions of Interrogatory and Investigatory Bodies, the Prosecutor's Office and Court (referred to here as "the Law"). The petitioner pointed out that the right to inheritance is guaranteed under the Constitution. Yet Article 3.3 of the Law states that the right to compensation for damage inflicted by the unlawful actions of interrogation and investigation by the Office of Prosecutions and the courts cannot be transferred or inherited. Effectively, it prevents a person from enjoying his constitutional right to compensation for damage. As a result, members of his family lose the right of inheritance as to the entirety of property and non-property rights, although once the person who has suffered this ordeal is dead, this right is the only satisfaction available to the family for the damage sustained (upon the loss of their husband or father). The obligation to compensate for damage is entrenched in Article 30.2 of the Constitution; whilst it may be regulated by law, it cannot be removed. However, the impact of Article 3.3 of the law is to remove this obligation.

Article 7.7 of the law also imposes a ceiling of 10 000 litas on awards in cases of moral damage. This has the effect of limiting the state's responsibility. The state's powers over a natural person are very wide. The obligation to award a limited amount of compensation for moral damage does not correspond to the damage the state can inflict upon a natural person. In this regard, the legal situation of the state differs from that of other subjects, who are obliged to make full recompense for any damage they inflict. This is at odds with the constitutional principles of justice and of a state under the rule of law.

II. The Constitutional Court held that the state must ensure that human rights and freedoms are protected from unlawful activities by others and that state institutions and officials do not encroach upon or violate them. State institutions and officials may be considered as the expression or embodiment of the will of the state. As such, they may not act *ultra vires*, or violate human rights and freedoms through their unlawful actions.

The Constitutional Court observed that compensation for damage is an especially important concept, in the context of the protection of human rights and freedoms (those of natural as well as legal persons). Under Article 30.2 of the Constitution, compensation for material and moral damage is to set by statute. Thus, the necessity to compensate material and moral damage is a constitutional principle. As such, it is inseparable from the principle of justice entrenched in the Constitution: appropriate legislation must be enacted so that proper recompense can be made for damage. The Constitution does not allow for any statutory provision which would rule out entitlement to compensation for moral or material damage because it came about as a result of unlawful activity on the part of state officials or institutions. To allow the enactment of any such statute would be to disregard the constitutional concept of compensation for damage. This would also undermine the *raison d'être* of the state itself, as the common good of society as a whole.

Parliament may not set a ceiling on the amount of compensation to be awarded to somebody who has suffered injury through the actions of state officials or institutions. This would fetter the courts in their decision-making and prevent them from adjudicating fair compensation. The Constitution allows a person to claim for compensation for damage in these circumstances when no provision exists in the legislation for the type of compensation available. Courts presiding over such claims are able to award appropriate compensation. In so doing, they may apply the Constitution directly, with especial regard to the principles of justice, legal certainty, legal security, proportionality, due process, equality of persons and protection of legitimate expectations. They will also consider general principles of law, such as the principle of reasonableness. The Constitutional Court held that Articles 3.3 and 7.7 of the Law on Compensation for Damage Inflicted by Unlawful Actions of Interrogatory and Investigatory Bodies, the Office of Prosecutions and Court were in conflict with the Constitution.

Languages:

Lithuanian, English (translation by the Court).

Luxembourg
Constitutional Court

Important decisions

Identification: LUX-2006-2-001

a) Luxembourg / **b)** Constitutional Court / **c)** / **d)** 07.04.2006 / **e)** 29/06 / **f)** Case of Berckes v. Fonds National de Solidarité / **g)** *Mémorial*, *Recueil de législation* (Official Gazette), A no. 69 of 21.04.2006 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

5.2.1.3 **Fundamental Rights** – Equality – Scope of application – Social security.
5.2.2 **Fundamental Rights** – Equality – Criteria of distinction.
5.4.14 **Fundamental Rights** – Economic, social and cultural rights – Right to social security.

Keywords of the alphabetical index:

International organisation, staff, protection of fundamental rights / Social security, benefit, equality.

Headnotes:

Section 7.2 of the Law of 28 June 2002 instituting a flat-rate pension supplement for a person who has reared a child is incompatible with Article 10bis.1 of the Constitution which enshrines the equality of Luxembourg citizens before the law, in that persons drawing a pension in respect of their appointment with an international body are disqualified from receiving the aforesaid supplement on the sole ground of their affiliation with an international scheme.

Summary:

Having received an application for the award of the flat-rate pension supplement for child-rearing instituted by the Law of 28 June 2002, the *Fonds national de solidarité* rejected the application on the ground that the applicant drew a pension from the European Communities, a ground of refusal prescribed in Section 7.2 of the aforesaid law. The arbitration board for social insurance upheld the decision at appeal.

Its decision was appealed before the Higher Council for social insurance, which put the following preliminary question to the Constitutional Court:

"Is the provision in Section 7.2 of the Law of 28 June 2002 instituting a flat-rate pension supplement for child-rearing, under which persons drawing a pension in respect of their appointment with an international body are ineligible for the supplement, compatible with Article 10bis.1 of the Constitution?"

On the grounds stated in the headnotes, the reply was that the impugned provision did not comply with Article 10bis.1 of the Constitution.

Languages:

French.

Identification: LUX-2006-2-002

a) Luxembourg / **b)** Constitutional Court / **c)** / **d)** 12.05.2006 / **e)** 34/06 / **f)** Case of the State of the Grand Duchy of Luxembourg v. Berthe and Yvonne Linster / **g)** *Mémorial*, *Recueil de législation* (Official Gazette), A no. 96 of 31.05.2006 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Compensation, posterior / Real estate, expropriation, compensation, posterior / Expropriation, compensation, posterior.

Headnotes:

Any statutory provision permitting the complete or partial transfer of ownership before full payment of just compensation, as prescribed by Section 27 of the amended Law of 16 August 1967 for the purpose of creating major road transport infrastructure and instituting a road building fund, is contrary to Article 16 of the Constitution which provides that "none may be deprived of his property except on grounds of public interest in cases and in the manner prescribed by law and in consideration of prior and just compensation".

Summary:

I. In a case of expropriation on grounds of public interest, the district court of Luxembourg asked the Constitutional Court the following preliminary question:

> "In so far as they prescribe the steps in the expropriation and compensation procedure, and a time sequence for the judgments to be delivered prior to payment of the expropriation indemnity, in so far as they provide that when it first delivers judgment the court shall certify the due completion of the expropriation formalities and grant the application to expropriate, in so far as this judgment is entered in the mortgage register, and only in its second judgment does the court determine the expropriation indemnity, while the payment thereof does not occur until a third stage, after the judgment which has already granted the application to expropriate and after the transcription of the judgment, are Sections 26, 27, 34 and 35 of the amended Law of 16 August 1967 for the purpose of creating major road transport infrastructure and instituting a road building fund compatible with Article 16 of the Constitution, which provides that "none may be deprived of his property except on grounds of public interest in cases and in the manner prescribed by law and in consideration of prior and just compensation?"

II. The Constitutional Court held that the judgment provided for in Section 27 of the Law of 16 August 1967, granting the application of the expropriating authority, effected the conveyance of the property in question from the expropriated party's estate to the applicant's, and that the transcription of this decision in the mortgage register rendered the transfer of ownership binding; that Section 27, by way of indemnity, only provided for an advance payment and left the final compensation to be determined at a later stage upon assessment by experts.

On the grounds stated in the headnotes, the reply was that the impugned provisions did not comply with Article 16 of the Constitution stipulating prior and just compensation.

Languages:

French.

Mexico
Supreme Court of the Nation

Important decisions

Identification: MEX-2006-2-001

a) Mexico / **b)** Supreme Court of the Nation / **c)** / **d)** 29.01.2002 / **e)** 155 / **f)** Action of unconstitutionality 10/2000, Deputies of the Legislative Assembly of the Federal District / **g)** / **h)**.

Keywords of the systematic thesaurus:

2.1.1.1.1 **Sources** – Categories – Written rules – National rules – Constitution.
3.14 **General Principles** – *Nullum crimen, nulla poena sine lege*.
5.2 **Fundamental Rights** – Equality.
5.3.2 **Fundamental Rights** – Civil and political rights – Right to life.

Keywords of the alphabetical index:

Abortion, punishment, exception.

Headnotes:

The protection of the right to life of the product of conception is derived from the Federal Constitution.

Summary:

I. On 29 and 30 January 2002, the Supreme Court, resolved action of unconstitutionality 10/2000 filed by deputies of the Legislative Assembly of the Federal District, who demanded that Article 334.III of the Federal District Penal Code and Article 131bis of the Federal District Code of Penal Procedures be declared null and void, in addition to the aforementioned legal instruments through a reform published in the Federal District official gazette on 24 August 2000.

II. As far as aforementioned Article 334.III is concerned, the Court recognised its validity and pointed out that said section contemplates a provision unrelated to the principle of legal certainty in the criminal division, consisting of a prohibition against imposing, by straightforward analogy or even by majority of reason (see Article 14 of the Constitution), any punishment at all that has not been decreed by a law that applies precisely to the crime in question, as the only thing it determines is that, by satisfying the requirements set forth therein, the punishment specified in the provisions relating to abortions shall not be imposed, and it is therefore clear that this principle was not being violated.

Similarly, given that said section sets forth an absolving reason, by considering that when the unlawful conduct (the abortion) − prohibited by Article 329 of the aforementioned code − is perpetrated, but the requirements set forth under Article 334.III are satisfied, the punishments set forth under Articles 330, 331 and 332 may not be applied, there can be no doubt that it does not violate the guarantee of equality set forth under Article 4 of the Federal Constitution, as this regulation does not establish that given products of conception, by their very nature, may be deprived of life.

As far as Article 131bis of the Federal District Code of Penal Procedures is concerned, the Supreme Court rejected the action of unconstitutionality and ordered the filing of the matter, by virtue of the fact that the necessary eight qualified votes were not obtained for the purposes of declaring the unconstitutionality of the challenged article as set forth under Article 72 of the Regulatory Act under Article 105.I and 105.II of the Constitution.

Finally, the Supreme Court, decided that the protection of the right to life of the product of conception derives from the Federal Constitution, international treaties, and federal and local laws. These legal instruments set forth the protection of the legal asset of human life in the context of physiological gestation, as the unborn party as deemed a living being, and the causing of the death thereof is punishable. Furthermore, it is specified that the product of conception is protected from that moment and may be designated as an inheritor or beneficiary.

Languages:

Spanish.

Identification: MEX-2006-2-002

a) Mexico / **b)** Supreme Court of the Nation / **c)** First Chamber / **d)** 19.03.2003 / **e)** 182 / **f)** Contradicting Resolutions 81/2002-PS, between the Twenty-Third Circuit Second and Third Collegiate Courts / **g)** / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

DNA, testing, damage, irreparable / DNA, testing, data, access / DNA, testing, privacy, invasion.

Headnotes:

The admission and presentation of expert genetic evidence affect the fundamental rights of the individual.

Summary:

I. The contradicting Resolutions of the Twenty-Third Circuit Courts were the following: the former court maintained that the admission of expert evidence to identify the genetic imprint (DNA) of an individual does not bring irreparable consequences for the defendant and does not affect his individual rights, while the latter court maintained that the aforementioned expert evidence was liable to affect the fundamental rights of the defendant given that samples of organic matter needed to be taken from the defendant to be able to present such evidence. This could jeopardise the physical well-being of the individual irreparably.

II. Having determined the existence of such a conflict of Resolutions, the First Chamber of the Supreme Court undertook to resolve whether the admission and presentation of the expert genetic evidence accepted by a First Instance Judge could bring irreparable consequences potentially affecting the fundamental rights of the individual.

The First Chamber established that unrestricted authorization or prohibition to take DNA samples from an individual could be considered an invasion of the individual's privacy for it could potentially bring to light other genetic factors unrelated to a paternity lawsuit registered in the reports of the experts and held in records. Anyone consulting such files might become aware of such information, to a certain degree undermining the right to privacy, freedom, and physical well-being.

Likewise the First Chamber decided that admitting and ordering the presentation of expert genetic evidence, with its inherent implications, does affect the individual in question although it might appear a routine process. The fact is that in order to take a sample of organic matter required for purposes of presenting evidence, the individual's presence is required in a given place at a given time to have the respective tests done laboratory tests and samples taken. This affects the individual irreparably for even if the outcome of the related lawsuit should favor the individual, the organic tissue removed to present the evidence cannot be recovered. The legally transcendent fact is that the right to privacy, freedom, and physical well-being cannot be redressed by merely obtaining a favorable outcome in the related proceedings.

The prevailing ruling issued by the First Chamber was that, whenever an ordinary civil lawsuit involves paternity issues, a court order must be issued admitting the presentation of expert evidence aimed at identifying the genetic imprint and accrediting whether a parental link can be established by inbreeding. Such an act must be considered an irreparable act that potentially violates the fundamental rights of an individual. Thus, such a court order can be submitted to an immediate constitutional analysis through indirect relief proceedings, in terms of Article 107.III.b of the Federal Constitution, and Article 114.IV of the Amparo Law.

The Court's ruling was accounted for by the fact the expert evidence in question is special and its presentation requires the taking of organic tissue and blood samples to obtain a scientifically supported DNA match; i.e., a genetic imprint. This allows not only the existence of a parental tie to be established but also other genetic characteristics inherent to any individual who undergoes this test. Such information may be totally unrelated to the lawsuit in question and could potentially reveal another type of hereditary genetic condition in the individual tested − but such information is private.

Languages:

Spanish.

Identification: MEX-2006-2-003

a) Mexico / **b)** Supreme Court of the Nation / **c)** First Chamber / **d)** 03.09.2004 / **e)** 214 / **f)** Contradicting opinions 24/2004-PS, between the First Circuit Eighth and Thirteenth Collegiate Civil Courts / **g)** / **h)**.

Keywords of the systematic thesaurus:

5.3.38.2 **Fundamental Rights** – Civil and political rights – Non-retrospective effect of law – Civil law.
5.3.39 **Fundamental Rights** – Civil and political rights – Right to property.

Keywords of the alphabetical index:

Divorce, property claim / Marriage, separation of goods regime, divorce / Spouse, work at home, contribution to family budget / Spouse, work at home, cost of opportunity.

Headnotes:

The compensation set forth under Article 289bis of the Federal District Civil Code, in force since 1 June 2000, may be demanded in divorce claims filed after such date, regardless of whether or not the marriage took place prior to it.

Summary:

I. While the First Circuit Eighth Collegiate Civil Court considered that Article 289bis of the Federal District Civil Code cannot be applied to marriages executed prior to 1 June 2000, because this would modify the property rights guaranteed under the separation of goods regime adopted by the bride and bridegroom prior to the coming into effect of the aforementioned article, the First Circuit Thirteenth Collegiate Civil Court considered that the compensation set forth in the aforementioned article does not amount to a penalty or sanction for the spouse sentenced to pay it and that nor does it modify the right acquired under the separation of goods regime, so the that application thereof to marriages executed prior to the specified date does not infringe the guarantee of non-retroactivity of the law.

II. The First Chamber of the Supreme Court determined that there were contradicting opinions, whose subject matter lay in determining whether the compensation set forth in the article in question may be claimed and granted by a Judge in divorce proceedings filed after the coming into effect of such article, but derived from marriages executed beforehand. The First Chamber resolved that its own criterion should prevail with the standing of jurisprudence, insofar as it does not violate the guarantee of non-retroactivity of the law, given that Article 289bis of the Federal District Civil Code applies in divorce proceedings in connection with marriages executed prior to the coming into effect of said article.

According to the First Chamber, the aforementioned article makes it possible, in the divorce claim, and given the possibility of dissolving the separation of goods regime that had been agreed, for the spouses to ask the Family Court Judge for compensation of up to 50% of the value of the goods acquired by the other spouse during the marriage. From the point of view of Article 14.1 of the Federal Constitution, which prohibits the retroactivity of laws to the prejudice of any person, it was necessary to look at whether the compensation set forth in such article may or may not be applied to divorce claims filed prior to its coming into effect. Nonetheless, from the point of view of the guarantee of non-retroactivity of the law, the application of the aforementioned article of the Civil Code to marriages executed prior to the coming into effect thereof, did not pose any problem at all, as this was a regulation on the settlement of a marital economic regime, applicable exclusively to settlements made after the coming into effect of the article, which set aside its retroactive application.

The First Chamber pointed out that Article 178 and the following articles of the Federal District Civil Code, both before and after the 2000 reform, set forth that the marriage must be executed under the patrimonial regimes of marital union or separation of goods, but it allows the spouses to freely modulate, in marital capitulations, the specific aspects of these regimes which shall be applied if appropriate. Overall, if the spouses do not use their free will, either in part in full, the Code sets forth provisions for complementary application.

However, the Chamber also stated that neither was it possible to argue that the application of Article 289bis of the Civil Code for the Federal District to marriages executed prior to the coming into effect thereof would be tantamount to a retroactive application of the law to the prejudice of someone because the aforementioned article sets forth a penalty. According to the First Chamber, the origin of the compensation contained in the aforementioned article was in response to the need to find a means to remedy any unfairness that may arise when the economic regime of separation of goods

is settled. This compensation is conceived by the Code as a compensation whose granting by the Judge is possible, but not mandatory, provided that a series of circumstances set forth by the law take place. The compensation − explained the First Chamber − is set in accordance with the economic prejudice suffered by the spouse who has been involved in certain activities, which has given rise to costs of opportunity whose unbalancing effects are seen as especially serious in a specific case. Similarly, the compensation is complemented by the obligation of the spouses to contribute to the covering of family-related burdens, as set forth under Article 164 of the Federal District Civil Code. In effect, the fact that two persons marry under the separation of estates regime does not free them from the obligation to contribute to the covering of family-related burdens. The spouse who does not work outside the home covers the family's economic burdens through a non-monetary contribution. The law understands that the way in which a spouse contributes to the covering of marital − and family − related burdens may prejudice him or her to the extent that it may seem disproportionate when a marriage executed under the separation of estates regime is dissolved. In economic terms, the aim is to compensate the cost of opportunity associated with the inability to perform the same activity in the conventional labor market, where he or she would have obtained the corresponding economic compensation.

As a result, the First Chamber pointed out that the compensation described was not punitive by nature, but rather reparatory, and could be requested and granted in favor of either an innocent spouse or a guilty one in a necessary divorce case. Thus the maximum limit of the compensation stands at 50% of the goods that the spouse working outside the home has acquired during the time the marriage lasted, because it is during this period that the interaction between two types of work on the part of the spouses took place and whose effects on the estate of the spouses it may be necessary to correct.

Languages:

Spanish.

Identification: MEX-2006-2-004

a) Mexico / **b)** Supreme Court of the Nation / **c)** First Chamber / **d)** 15.06.2005 / **e)** 1/2004-PS / **f)** Appeal no. 1/2004 PS, derived from power of attraction 8/2004-PS / **g)** / **h)**.

Keywords of the systematic thesaurus:

2.1.1.4 **Sources** – Categories – Written rules – International instruments.
5.3.38.1 **Fundamental Rights** – Civil and political rights – Non-retrospective effect of law – Criminal law.

Keywords of the alphabetical index:

Genocide, statute of limitations, interruption / Statute of limitations, official, interruption / Treaty, interpretative statement, effect / Treaty, reservation.

Headnotes:

The prohibition of retroactivity is inapplicable to norms of the same hierarchical level.

Summary:

I. On 22 July 2004, the Special Public Prosecutor's Office for Past Social and Political Movements indicted Luis Echeverría Álvarez and Mario Augusto José Moya Palencia (Former President of Mexico (1970-1976) and Secretary of the Interior, respectively) for the crime of genocide, as contemplated under Article 149bis of the Federal District and Territories Penal Code, effective in 1971.

The Second Federal District Penal Judge heard the case and ruled in favor of the accused by dismissing the case. Dissatisfied, the Federal Public Prosecutor's Office filed an appeal – heard by the 5th Unitary Criminal Court of the 1st Circuit. After the public hearing, and while awaiting a final decision, the Public Prosecutor's Office requested that the First Chamber of the Mexican Supreme Court exercise its power of attraction to take cognizance of the above-mentioned appeal.

II. The First Chamber was competent to exercise such authority and, with regard to the accusations presented by the Federal Public Prosecutor's Office, recalled firstly that the guarantee of non-retroactivity contemplated under Article 14 of the Federal Constitution prohibited retroactive application of the law against any individual. It also recalled that the principle in question protects individuals both from

the legislative authorities and from the law-enforcement authorities, establishing that the retroactive application of the law operates for criminal purposes in the substantive aspect and, to a lesser degree, in the procedural aspect.

The above-mentioned principle, added the First Chamber, also governs international treaties. Moreover, the President of Mexico had signed, *ad referendum*, the Convention on the Statute of limitations of War Crimes and Crimes against Humanity on 3 July 1969, subsequently sent – along with the respective Interpretative Statement – for consideration by the Senate; which ratified it on December 2001. The First Chamber indicated that, although such international instrument is called the Convention, it is really a Treaty in terms of Article 2.1 of the Vienna Convention on the Law of Treaties. As for the interpretative statements, they clarify or indicate the scope of the norms of the Treaty impact upon domestic law, so they cannot “exclude or modify” the legal effects of a Treaty for a signatory State in the same way as “reservations”.

Thus, if the intention of the Convention is to govern over crimes committed, regardless of the time they happened, the interpretative statement prepared by the Mexican State would in reality modify the provisional scope of the Convention − generating the requirement to qualify it as a “reservation” applicable to it. However, such “reservation” would lead to that already established under Article 14 of the Federal Constitution. Therefore even in this case, it could not be declared invalid or not applicable to the specific case as a result of contravening “the object and purpose of the Treaty” for this would indirectly mean the non-application of Article 14 of the Supreme Law.

Moreover, the First Chamber ruled that Articles 110 and 111 of the Penal Code in force at the time of the events made clear that not all procedural acts can influence the Statute of limitations – rather, only proceedings (by the Public Prosecutor’s Office or the judicial authorities) carried out as part of the preliminary investigation and with regard to the allegedly guilty party, aimed at investigating the events from which the offense attributed to the defendants originated, and not any other actions, provided that such actions are not undertaken when more than half of its term of effectiveness has elapsed, as otherwise all that would be interrupted would be the detention of the accused.

The First Chamber observed that the preliminary investigation initiated in June 2001 could not interrupt the Statute of limitations because, though it might be considered a procedural act carried out by the public prosecutor’s office to investigate the events that comprise the crime of genocide in question along with those allegedly responsible, such action had been undertaken after half the term of effectiveness of the lapsing of the period of prosecution. The records of criminal proceeding 848/71 at the Federal District Second Criminal Court, and the preliminary investigation which generated such proceeding and brought on appeal 39172, derived from the aforementioned proceeding at the Sixth Chamber of the Federal District Superior Court of Justice, did not represent grounds to interrupt the aforementioned term of prescription. This was because the documentation in question did not refer to the preliminary investigation and the defendant but referred to events other than those accused. Consequently, its purpose was not to bring an offense to light or the identication of a criminal.

Furthermore, the allegation that the judge hearing the case denied the value of the evidence kept in single copy form for preliminary investigation 1863/71, initiated on 11 July 1971, was also unfounded because the documentation in question did not represent grounds to accredit the existence of procedural acts that might have interrupted the term of effectiveness of the prescription over legal action for the crime of genocide, considering that reference was made therein to supposed processes undertaken during the investigation in question but no documentation supporting such processes actually existed.

Neither did the copy of the court records dated 10 November 1982, through which it was decided not to incoate legal proceedings and file the investigation, represent grounds to interrupt the term of the aforementioned prescription, as erroneously is maintained by the Public Prosecutor’s Office. The purpose of such records had not been to investigate the acts constitutive of the crime or the supposedly defendant. Instead, their purpose was for the prosecutor for investigating crimes, to make known its decision not to exercise legal action with respect to the events related to the investigation, for prescription was considered to have taken place.

The arguments put forward by the plaintiff in the third section of the second indictment resulted ineffective, for the Public Prosecutor’s Office maintained that prescription was of a procedural and not a substantive nature − thus reinforcing the viewpoint that currently effective procedural norms were required in the case at hand, and not those in effect at the time of the events. However, from the perspective of the First Chamber prescription of a criminal suit is essentially regulated in the same manner both in the Federal Penal Code – effective at the time of the events – and under the current Federal Penal Code.

The third indictment was also unfounded for the following reasons: the arguments put forward by the Federal Public Prosecutor's Office were primarily aimed at calling to doubt the independence of the bodies responsible for procuring justice at the time of the events. They had lacked the autonomy necessary to prosecute crimes committed by the defendant, given Luis Echeverría Álvarez's position as President of Mexico and the pervading situation in the country at that time. This meant that the victims and their relatives were deprived of the right to effective criminal protection and to due procurement and administration of justice and retribution for damages, among other things. This was not be considered valid because Articles 21 and 102 of the Federal Constitution grant the Public Prosecutor's Office investigating authority, title over the criminal action, and the representation of society. Under such circumstances, although it is true that the Public Prosecutor's Office has and had a monopoly over the exercise of the criminal action, it is also true that such justice procurement system adjusted itself to the mandate established under the aforementioned constitutional articles and could not contravene any individual liberty for the constitutional norms cannot jeopardise the rights contemplated by other identical norms given that no contradiction between them may exist.

For the same reasons, the motives for inconformity put forward by the Public Prosecutor's Office resulted groundless. The prosecutor indicated that because its determinations in the preliminary investigation could not be called to doubt and were not subject to any form of judicial control, there was a contravention of Articles 3, 8 and 10 of the Universal Declaration of Human Rights; Article 2.3.A, 2.3.B and Article 14.1 of the International Covenant on Civil and Political Rights; Articles V and XVIII of the American Declaration on the Rights and Duties of Man, and Article 4.1, *in fine*, and Article 25 of the American Convention on Human Rights (San José Agreement), and of the *ius cogens* principles − incorporated into the Mexican legal system in conformity with Article 133 of the Federal Constitution − regarding the need for impartial, objective, and expedite action by the authorities responsible for justice procurement to achieve effectiveness in individual liberties.

On the other hand, the fact that Luis Echeverría Álvarez, as President of Mexico had direct control over the Federal District Public Prosecutor's Office, as did the Governor of the capital was derived from a constitutional mandate, specifically as established under Articles 73.VI.3, 73.VI.5, 89.II and 102 of the Constitution meaning that the violation of guarantees could not have been valid in this case either.

The fourth indictment was deemed procedent because Luis Echeverría Álvarez and Mario Augusto José Moya Palencia served as President of Mexico and Secretary of the Interior from 1 December 1970 to 30 November 1976, respectively − the time of the events in question. In conformity with Article 108.3 of the Constitution in effect at the time, the President of Mexico during his term of office could be accused of treason and other serious crimes. To undertake legal proceedings for serious crimes committed by the President, Article 109.1 of the Constitution establishes that it is necessary to obtain a majority vote at the Chamber of Deputies, operating as plaintiff. As for the Secretaries, they were held liable for any crimes committed during their term in office but prior mediation by the Chamber of Representatives was also required in order to institute legal proceedings against them. Therefore, the Public Prosecutor's Office could not institute legal proceedings against the accused as it was first necessary to strip them of their constitutional authority.

Title IV of the Federal Constitution was reformed by means of a decree published in the *Diario Oficial* on 28 December 1982, expressly establishing, in Article 114.2 of the Constitution the principle whereby the terms of prescription are to be interrupted in the case of crimes committed by public servants, as referred to in Article 111 of the Constitution, while such servants remain in office. The First Chamber indicated that this constitutional reform could be effective on the events occurred in 1971, given that the prohibition of retroactivity is inapplicable to norms of the same hierarchical level.

In these terms, it was inferred that the Statute of limitations was interrupted until Luis Echeverría Álvarez and Mario Augusto José Moya Palencia concluded their respective terms of office. In this sense, if the events alleged to represent the crime of genocide took place on 10 June 1971, when the two were still in office, the term to compute the prescription did not begin until they stepped down. For such reason, the Chamber considers of the fourth indictment is well-grounded, whereby the Federal Public Prosecutor alleged that the Judge had *a quo* interpreted and applied incorrectly Articles 100, 101 and 102 of the Federal District and Territories Penal Code then in effect, by isolating the provisions relating to the aforementioned Statute of limitation from the constitutional provisions in effect at that time, in relation to Luis Echeverría Álvarez and Mario Augusto José Moya Palencia.

Consequently, the First Chamber decided to modify the first point of resolution in the ruling in dispute passed by the Second Federal District Criminal Judge

declaring that the Statute of limitation of the legal action had not operated in relation to Luis Echeverría Álvarez and Mario Augusto José Moya Palencia given that the 30 year term, to be valid in terms of Article 105 of the Federal Penal Code, could not be computed as from 11 June 1971, but starting 1 December 1976, the date in which their respective terms of office as President and Minister of the Interior concluded.

Languages:

Spanish.

Moldova
Constitutional Court

Important decisions

Identification: MDA-2006-2-002

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 20.06.2006 / **e)** 10 / **f)** Review of constitutionality of certain provisions of Law no. 61-XV of 21.02.2003 on amendment and completion of Law no. 1252-XIV of 28.09.2000 on consumers' cooperative / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

3.12 **General Principles** – Clarity and precision of legal provisions.
3.25 **General Principles** – Market economy.
5.3.39 **Fundamental Rights** – Civil and political rights – Right to property.

Keywords of the alphabetical index:

Cooperative, activity, profitable / Cooperative, property, possession / Cooperative, right to own, use, administration, possessions.

Headnotes:

The socio-economic nature of the activity of consumers' cooperatives and the indissoluble link between the activity of consumers' cooperatives, territorial unions and central unions requires detailed regulation of their relations, including property relations, in order to protect cooperative members' rights and to strengthen and defend, in market economy conditions, the cooperative's property.

Summary:

I. Law no. 1252-XIV of 28 September 2000 on consumers' cooperatives covers the legal, economic, social and administrative basis of the organisation and activity of consumers' cooperatives in the Republic of Moldova.

A consumers' cooperative is an autonomous and independent association of persons united voluntarily to meet their common economic, social and cultural needs and aspirations through a jointly-owned and democratically-controlled enterprise. In Law no. 1252-XIV, the legislator retained the right of consumers' cooperatives to exercise their property rights as legal entities. Therefore, under Article 32.1 of this law, the consumers' cooperative has the right to own, use and dispose of its property for its own purpose. Article 40.2.i of this law provides that the administrative council of consumers' cooperatives deals with problems regarding the transfer of goods that belong to such cooperatives and presents its decisions to the general assembly, for approval.

The applicant challenged Articles 58.2.m, 62.1.l, 74.1.i, 77.2.r, 77.2.s, 81.v and 89.3 and the third and fourth sentences of Law no. 61-XV of 21 February 2003 on amendments to Law no. 1252-XIV of 28 September 2000 on consumers' cooperatives.

The applicant objected that the above-mentioned provisions of Law no. 61-XV were contrary to Articles 9.3, 46.1, 126.1, 127.1 and 127.2 of the Constitution. Therefore, legal provisions that forbid the transfer, pawning, mortgaging and leasing of goods which belong to consumers' cooperatives without the consent of the cooperatives hierarchical superior, violate a fundamental attribute of the right to property, the right to its disposal, and impose restrictions contrary to Article 54.1, 54.2 and 54.4 of the Constitution.

The amendments to Law no. 1252-XIV by Law no. 61-XV, which are the object of the application, concern legal provisions on the procedure of transferring, pawning, mortgaging and leasing the property of consumers' cooperatives.

II. The Court emphasised that the association of consumers' cooperatives into territorial unions and/or a central unions is considered, by the legislator, to be a right and not a duty.

This conclusion was reached on the basis of Article 54.2 and 54.4 of the Constitution, which provide that the exercise of certain rights and freedoms can only be restricted by law, but that these restrictions must correspond to unanimously recognised norms of international law, to a general interest, be proportionate and not undermine rights and freedoms.

The General Conference of the International Labour Organisation, to which the Republic of Moldova became a member in February 1995, emphasised in its Recommendation R193 of 2002 on Promotion of Cooperatives that "A balanced society necessitates the existence of strong public and private sectors, as well as a strong cooperative…". It is in this context that governments should provide a supportive policy and legal framework consistent with the nature and function of cooperatives.

Under Article 12.1 of Law no. 1252-XIV, cooperatives, associated into unions, participate in an equal measure to the functioning of consumers' cooperatives, to the creation of capital and to the control of the activity and transactions operated by these cooperatives.

The Constitutional Court observed already in its previous case-law, namely in Decision no. 21 of 9 October 2003, *Bulletin* 2003/3 [MDA-2003-3-008] that the socio-economic nature of the activity of consumers' cooperatives and the indissoluble link between the activity of consumers' cooperatives, territorial unions and central unions requires detailed regulation of their relations, including property relations, in order to protect cooperative members' rights and to strengthen and defend, in market economy conditions, the cooperative's property.

The aim of the amendments introduced by parliament is to strengthen the protection of consumers' cooperative property in order to avoid the abusive exercise of the right to property and the irreversible damage it could cause to cooperative members.

Consumers' cooperatives consolidated this right in their own statutes, approved in conformity with the provisions of Law no. 1252-XIV, which regulates their activity.

The Court declared constitutional Articles 58.2.m, 62.1.l, 74.1.i, 77.2.r, 77.2.s, 81.v and 89.3 and the third and fourth sentences of Law no. 1252-XIV amended by Law no. 61-XV of 21 February 2003.

A judge of the Constitutional Court dissented from the Court's decision stating that the new provisions of Law no. 1252-XIV, as amended by Law no. 61-XV, restrict the constitutional principle of a person's freedom – especially of cooperative members – to freely decide, unconstrained, on their own and in their interest, the future of their property. This principle is stipulated by the Constitution of the Republic of Moldova and international treaties ratified by parliament.

Languages:

Romanian, Russian.

Identification: MDA-2006-2-003

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 27.06.2006 / **e)** 11 / **f)** Review of constitutionality of Government Decision no. 162 of 10.02.2005 on institution of the National Committee for Adoption / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

3.4 **General Principles** – Separation of powers.
3.13 **General Principles** – Legality.
4.6.3 **Institutions** – Executive bodies – Application of laws.
4.6.5 **Institutions** – Executive bodies – Organisation.

Keywords of the alphabetical index:

Competence, normative, limits / Adoption / Child, protection.

Headnotes:

Article 24 of the Law on Government includes the exhaustive list of specialised central bodies of public administration, which form the structure of the central public administration. In accordance with Articles 72.3.p and 107.2 of the Constitution, this list can be amended and completed by organic law. The creation of a National Committee for Adoption by government decision is therefore unconstitutional.

Summary:

I. According to Article 107 of the Constitution, the specialised central public administration is composed of ministries and other administrative authorities. Under the law, they put into practice government policy, decisions and orders and they exercise control over areas of competence and are answerable for their actions.

In order to manage, coordinate and control the national economy, as well as other areas outside the direct responsibility of ministries, other administrative authorities may be set up in accordance with the law.

By adopting government Decision no. 162 on instituting the National Committee for Adoption, the Regulations of the National Committee for Adoption was approved.

General provisions of the Regulations set out that the National Committee for Adoption is an authority of the central public administration, subordinated to government, which promotes the state policy on the protection of children's rights, including adoption.

Members of parliament asked the Constitutional Court to review the constitutionality of government Decision no. 162 of 10 February 2005 on instituting the National Committee for Adoption.

The applicants asserted that the creation of the National Committee for Adoption by the government is contrary to constitutional provisions limiting the duties of the State's central public authorities. In their opinion, these duties relate to Ministries of Education, Health and Social Protection, the organisation of which is regulated by organic law. The applicants also alleged that the government appropriated, by adopting the Decision no. 162, the legislature's exclusive power to modify the structure of the central public authority, thereby violating Articles 72, 97 and 107 of the Constitution.

Article 113.1.a of the Family Code no. 1316-XIV of 26 October 2000 served as a legal basis for the approval of Decision no. 162.

II. The Court stated that Article 113.1.a of the Family Code does not empower the government to set up the central tutelary authority on children's protection, which will promote and execute state policy on the protection of children's rights, including on adoption, and to approve, in this context, a normative act. Article 167 of the Family Code provides that the government's duties in regulating family relations shall be to conform its normative acts to the Family Code and to approve normative acts guaranteeing its application.

The government's competences include the organisation and functioning of ministries, central administrative authorities and others, State's inspectorates, governmental commissions and councils, other authorities subordinated to the government and to approve their regulation (Articles 10.2, 20.1 and 20.2 of the Law on Government). Central administrative authorities are set up by parliament, at the Prime-Minister's proposal, under Article 22 of the Law on Government.

In this context, the Court considered that by adopting Decision no. 162, the government had exceeded its constitutional powers, contrary to Article 102.2 of the Constitution, on Government's Acts, which states that decisions shall be adopted for law enforcement.

The government had no right to set up the Nation Committee for Adoption, to modify and to complete by its decision the structure of the central public administration, because the Constitution and Law on Government set out that the creation of administrative authorities can only be done in accordance with the law. The constitutional provision "other administrative authorities may be set up in accordance with the law" of Article 107.2 means the creation of these authorities by parliament in accordance with the Law on Government. The non-constitutionality of Decision no. 162 is also due to its non-conformity with the Convention on Protection of Children and Co-operation in respect of Intercountry Adoption ratified by the parliament of the Republic of Moldova in the Decision no. 1468-XIII of 29 January 1998.

Decision no. 162 is entirely contrary to the express provisions of: Article 102.2 of the Constitution, to the Law of Government and to the Convention on Protection of Children and Co-operation in respect of Intercountry Adoption. This decision also violates the general constitutional principles concerning the State of the Republic of Moldova, which is a rule of law according to Article 1.3, Article 6 on separation and cooperation of powers and Article 8 on observance of international law and international treaties.

The Court declared unconstitutional the Decision of government no. 162 of 10 February 2005 on instituting the National Committee for Adoption.

Languages:

Romanian, Russian.

Identification: MDA-2006-2-004

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 04.07.2006 / **e)** 12 / **f)** Review of constitutionality of Article LXXVI of Law no. 154-XVI of 21 July 2005 on amendment of certain legislative acts / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

3.11 **General Principles** – Vested and/or acquired rights.
4.7.16.1 **Institutions** – Judicial bodies – Liability – Liability of the State.
5.3.15 **Fundamental Rights** – Civil and political rights – Rights of victims of crime.
5.3.17 **Fundamental Rights** – Civil and political rights – Right to compensation for damage caused by the State.

Keywords of the alphabetical index:

Victim, damage, fair compensation / Victim, expenses, refunding / Offender, liability, criminal / State, duty to protect / Victim, crime, compensation by state.

Headnotes:

According to Article 53 of the Constitution, any person whose rights have been violated in any way by a public authority through an administrative decision or lack of a timely legal reply to an application is entitled to obtain redress for the violation of those rights, the annulment of the decision and damages. The State is liable, as foreseen by law, for any prejudice or injury caused during legal proceedings through errors of the police or the judiciary.

The Code on Criminal Procede secures the victim's rights that have been breached as result of an offence or due to an abuse of power, the rights of the convicted person arrested illegitimately or injured in his/her rights in another way, as well as the right to compensation for costs incurred in a criminal case and damage caused following illegal actions by prosecuting bodies.

Summary:

I. A member of parliament asked the Constitutional Court to review the constitutionality of Article LXXVI of Law no. 154-XVI excluding point 16 of Article 60.1 of the Code of Criminal Procedure, which provided that the victim of an offence has the right to receive damages from the State.

The applicant complained that the exclusion of these provisions from the Code of Criminal Procedure undermines Articles 15 and 54 of the Constitution, point 12 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by General Assembly of the United Nation and Articles 14, 17 and 18 ECHR.

II. In its examination of the application, the Court noted that, according to the Constitution and normative acts in force, the State is liable for damages caused by illegal actions of prosecuting

bodies, the prosecutor's office and courts of law. As for the rest, the material liability lies with the persons who caused the damage.

The victim's compensation represents a direct way to impute liability for the indictable offence and corresponds to the financial and moral interests of the victim.

The national legislation in force guarantees to the victim of the offence the right to damages. A way to defend this right is through a civil action in criminal proceedings. It should be brought against the person who is or can be held responsible for these acts.

According to point 8 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by General Assembly of UN, "Offenders or third parties responsible for their behaviour should, where appropriate, make fair restitution to victims, their families or dependants."

Point 12 of the above-mentioned international text provides that, in certain circumstances, the State "…should endeavour to provide financial compensation to:

a. victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes;
b. the family, in particular dependants of persons who have died or become physically or mentally incapacitated as a result of such victimisation."

These requirements are respected by the Republic of Moldova. Therefore, the State provides invalidity or survivor's pension, under the Law on Pension of State social insurances.

Point 16 of Article 60.1 of the Code of Criminal Procedure, in its previous amendment, provided that the State is liable in all cases against the victim of the offence. This regulation was contrary to the principle of personal criminal liability.

In order to execute constitutional provisions, if a citizen becomes a victim of an offence, the State has the obligation to provide compensation. However, the State cannot compensate the material damage for the offender.

It is worth mentioning that Articles 57.1 and 90.3 of the Criminal Code stipulate that once damages are paid by the offender, criminal liability is lifted.

Point 16 of Article 60.1 of the Code of Criminal Procedure, in its previous amendment, was declarative in nature. No law has been approved that establishes the amounts of expenses that could be compensated or returned to the victim on the state account; no financial resources have been allocated for this purpose.

The Court concluded that the exclusion of provisions of point 16 of Article 60.1 of the Code of Criminal Procedure does not undermine the right of the victim to claim from the offender or authority an equitable compensation for the damage caused, and puts the victim in the same position as other participants to criminal proceedings.

A judge of the Constitutional Court dissented from the Court's decision stating that the legislative body took into consideration the fact that the State has the obligation to defend, through its specialised bodies, the person's rights and interests in approving the provisions allowing the victim's right to claim the compensation of the damage caused by an offence attributable to the State. This indisputable right of the victim can be fulfilled in circumstances when the offender is precluded from providing compensation. The exclusion of the above-mentioned provision from the Code of Criminal Procedure is contrary to Article 18 ECHR, to Article 8 of the Constitution on the obligation of the Republic of Moldova to respect the Charter of the United Nations and the treaties to which it is a party, and to Article 54.1 of the Constitution according to which laws that may suppress or diminish the fundamental human and citizens' rights and freedoms shall not be adopted by the Republic of Moldova.

Therefore, Article LXXVI of Law no. 154-XVI, that introduced the amendment to the Code of Criminal Procedure, should be declared unconstitutional, considering that the constitutional judiciary does not review the appropriateness nor the legality, but the constitutionality of the challenged acts.

Languages:

Romanian, Russian.

Poland
Constitutional Court

Statistical data
1 May 2006 – 31 August 2006

Number of decisions taken:

- Final judgments: 29
- Cases discontinued: 14 (6 fully, 8 partially − When the Tribunal is delivering a final judgment it may at the same time partially discontinue the case on a given point. Partial discontinuation may also occur in the form of a separate procedural decision).

Decisions by procedure:

- Abstract review *ex post facto*: 12 judgments, 4 cases discontinued (1 fully, 3 partially)
- Preliminary review: no judgments, no cases discontinued − Initiated, on the basis of Article 122.3 of the Constitution, by the President of the Republic of Poland.
- Questions of law referred by a court: 7 judgments, 5 cases discontinued (3 fully, 2 partially)
- Constitutional complaints: 10 judgments, 5 cases discontinued (2 fully, 3 partially)

Important decisions

Identification: POL-2006-2-007

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 19.04.2006 / **e)** K 6/06 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2006, no. 75, item 529; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2006, no. 4A / **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.
3.12 **General Principles** – Clarity and precision of legal provisions.
3.17 **General Principles** – Weighing of interests.
3.18 **General Principles** – General interest.
4.7.15 **Institutions** – Judicial bodies – Legal assistance and representation of parties.
4.7.15.1.1 **Institutions** – Judicial bodies – Legal assistance and representation of parties – The Bar – Organisation.
4.7.15.2 **Institutions** – Judicial bodies – Legal assistance and representation of parties – Assistance other than by the Bar.
4.7.15.2.1 **Institutions** – Judicial bodies – Legal assistance and representation of parties – Assistance other than by the Bar – Legal advisers.
5.1.4 **Fundamental Rights** – General questions – Limits and restrictions.
5.4.4 **Fundamental Rights** – Economic, social and cultural rights – Freedom to choose one's profession.
5.4.6 **Fundamental Rights** – Economic, social and cultural rights – Commercial and industrial freedom.

Keywords of the alphabetical index:

Legal access, profession, conditions / Legal profession, confidence.

Headnotes:

There are limitations upon the constitutional freedom of access to and pursuit of certain professions in which the public has confidence. These are set out in Article 65.1 of the Constitution, along with a requirement that members of such professions must belong to the appropriate regulatory body.

For a particular profession to be included amongst those professions in which the public places its confidence, it should be recognised that the limitations and obligations mentioned above exist not to confer privileges upon the profession, but to serve the public interest, especially the recipients of professional services. Under the Constitution, it is for the legislator to designate a profession as being one in which the public has confidence and to establish the regulatory body for that profession.

It is also the legislator’s task to choose the mode of access to the legal profession. The procedure for theoretical and practical preparation for the practice of the regulated legal professions is not set out in the Constitution. Nevertheless, it is in the interests of both the administration of justice and of those seeking legal advice that such preparation should be rigorous and should inspire confidence. Any regulation introduced by the legislator should be clear, legally correct and should ensure equal treatment of those who practice, or aspire to do so, in different branches of the professions.

Improved access to the legal professions and to legal services are desirable. However, there is a need for a clear definition of the new model for professional legal training and the principles governing transfer between highly-qualified branches of the legal professions. The provision of certain types of legal advice within a strictly defined field by persons who are not legally-qualified would also conform to the Constitution, although certain provisions would require radical amendment.

Summary:

I. Access by law graduates to the learned legal professions in Poland (in particular, advocates and legal advisors) has been the subject of political controversy and legal dispute. Only those associated with professional regulatory bodies may engage in these professions. A candidate wishing to be included in the list of advocates (or legal advisors) must complete the professional training (known as “the traineeship”) and pass a professional examination. The regulatory bodies organise the traineeship. They used to organise the professional examinations too, until recently. The system has attracted some criticism for lack of clear criteria for admission to traineeships. It is also claimed that the regulatory body has too broad a discretion.

The first step towards wider access to the two professions for young lawyers came in the form of the Constitutional Tribunal’s Judgment of 18 February 2004, P 21/02, *Bulletin* 2004/2 [POL-2004-2-012].

The “Bar Act and Certain Other Acts Amendment Act” of 2005 (referred to as “the 2005 Act”), amended certain legislation governing advocates, legal advisors and notaries, such as the Bar Act of 1982 (referred to as “the 1982 Act). It made several changes with a view to further liberalisation of these professions.

A highly significant feature of the 2005 Act was that it entrusted examination committees established by the Ministry of Justice with the organisation of both the traineeships’ examinations and the professional examinations. As a result, the advocates’ regulatory board lost its decisive influence over the examinations.

Article 66.1a (as amended) of the 1982 Act also made it possible for persons who had completed their legal studies and had followed a certain activity for at least five years to be admitted to the advocates’ professional examinations, without the need to complete the traineeship. The activity in question could include employment “in positions connected with the application or formulation of law” (Article 66.1a.2); the continuous rendering, on the basis of a civil law contract, of “services consisting in the application or formulation of law” (Article 66.1a.3); or engagement in registered economic activity including the provision of legal advice (Article 66.1a.4).

The 2005 Act also allowed those who had passed the examinations for the professions of judge, prosecutor, legal advisor or notary to be automatically permitted to apply for enrolment on the list of advocates – without the need to pass the advocate’s professional examination (Article 66.1.2 of the 1982 Act).

The newly-inserted Article 4.1a of the 1982 Act allows for the provision of legal advice by lawyers who are not advocates. Article 4.1 defines the scope of the advocate’s profession as the provision of legal advice, the drawing up of legal opinions, the drafting of legal acts, and appearances before courts and offices). This, according to Article 4.1a, does not preclude legal advice being provided by other persons who have completed their legal studies. The only exceptional situation, in which advocates enjoy exclusivity, applies – in principle – to “representation in proceedings at law”.

The Chief Council of Advocates, part of the advocates’ professional governing body, challenged these and other provisions. It referred to the status of regulatory bodies governing those professions in which the public have confidence, under Article 17.1 of the Constitution. The applicant also indicated that a review should take place, with the principles of equality (Article 32.1 of the Constitution) and correct legislation (Article 2 of the Constitution) in mind. The Chief Council of Advocates also challenged the 2005 Act in its entirety, on the grounds that there had been infringements of legislative procedure.

II. The Tribunal ruled that:

1. The 2005 Act conforms to constitutional Article 118.3 of the Constitution (under which anyone proposing to introduce legislation must also make clear the financial consequences the proposed law might have), Article 119.1 of the Constitution (principle of three readings of a statute in parliament) and Article 119.2 of the Constitution (right to introduce amendments to a draft statute under consideration by parliament).

2. To the extent that Article 1.5.b of the 2005 Act deprives the advocates’ regulatory body of influence over the advocates’ examination; it contravenes Article 17.1 of the Constitution.

3. Article 4.1a of the 1982 Act does not conform to Article 2 of the Constitution.

4. To the extent that Article 66.1.2 of the 1982 Act permits those who have passed examinations for the professions of judge, prosecutor, legal advisor or notary to apply for entry in the advocates' list, although they do not possess appropriate legal experience, it contravenes Article 17.1 of the Constitution.

5. Articles 66.1a.2-66.1a.4 of the 1982 Act do not conform to Articles 2 and 17.1 of the Constitution.

6. Articles 75a-75j of the 1982 Act (governing the organisation of the competitive examination for advocates' traineeships by examination committees established by the Ministry of Justice) conform to Articles 2 and 17.1 of the Constitution.

7. Article 78.1 and 78.6 of the 1982 Act (organisation of the advocate's examination by committees established by the Ministry of Justice) do not conform to Article 17.1 of the Constitution.

The provision envisaging the possibility of legal advice being provided by persons who do not belong to the higher echelons of the legal profession and who are not members of a professional regulatory body is not itself unconstitutional. However, the reference made within Article 4.1a to Article 4.1 of the 1982 Act could give the misleading impression that the legislator aimed to move the provision of legal advice from the category of legal services provided within the framework of registered economic activity towards the sphere of activity of the advocates' profession. In general terms, Article 4.1a permits persons to carry out certain activities on the basis that they have completed legal studies. If this is allowed, then there is no point in seeking to distinguish advocates, legal advisors and notaries as professions in which the public have confidence.

Article 66.1.2 of the 1982 Act is defective because there is no requirement for any professional experience, neither is a maximum period prescribed, following success in the legal examination by somebody seeking enrolment in the list of advocates.

Similar doubts arise regarding Article 66.1a.4 of the 1982 Act. This provision does not even require a person engaging in the economic activity mentioned therein to offer legal advice in person and in a continuous manner.

Article 66.1a.3 of the 1982 Act introduces a concept with no real equivalent within the Polish legal system ("services consisting in the application or making of law"). Both legislative activity and application of the law are tasks for the appropriate public authorities.

Articles 66.1a.2-66.1a.4 of the 1982 Act allow for access to the advocates' examination by candidates whose professional skills have not been objectively verified, as they have not completed the traineeship. These provisions mean that the advocates' regulatory body cannot adequately oversee the proper practice of the profession by such persons.

The procedure relating to access to advocates' (or legal advisors') traineeships remains beyond the limits of overseeing the "proper practice" of the profession exercised by the advocates' professional body under Article 17.1 of the Constitution, since it does not concern persons carrying out the professional actions of an advocate.

Despite the amendments, the advocates' examination is still a professional examination. That circumstance, as well as the fact that many candidates taking the advocates' examination are trainee advocates, justifies the need for harmonisation of the procedure for organising their examination with the constitutional tasks of the regulatory body of a profession in which the public has confidence. Whilst the advocates' examination and their professional training regime remain in their current form, the advocates' professional body must be allowed sufficient influence in specifying the scope of the examination, adequate representation on the committee organising the examination, and participation in appellate proceedings arising from the examination.

Cross-references:

- Judgment K 30/01 of 21.05.2002, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2002, no. 3A, item 32;
- Judgment SK 22/02 of 26.11.2003, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2003, no. 9A, item 97; *Bulletin* 2004/1 [POL-2004-1-004];
- Judgment P 21/02 of 18.02.2004, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2004, no. 2A, item 9; *Bulletin* 2004/2 [POL-2004-2-012].

Languages:

Polish, English, German (summary).

Identification: POL-2006-2-008

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 15.05.2006 / **e)** P 32/05 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2006, no. 86, item 601; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2006, no. 5A, item 56 / **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:

3.16 **General Principles** – Proportionality.
3.18 **General Principles** – General interest.
5.1.4 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.39.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.

Keywords of the alphabetical index:

Environment, protection, property, right, restriction.

Headnotes:

The property rights guaranteed under Article 64 of the Constitution are not absolute in nature; the legislator may impose limits on them. Any such limitation is subject to verification as to whether its introduction complies with the Constitution (see Article 31.3 of the Constitution).

The constitutional notion of “the essence of a right” (Articles 31.3 and 64.3 of the Constitution) is linked with the prohibition on imposing limitations that eliminate the identity of a given right or freedom, or deprive it of real content.

The Constitution allows for statutory limitations on the exercising of constitutional rights and freedoms, with a view, inter alia, to the protection of the natural environment (Article 31.3 of the Constitution). The environment is a constitutional value of particular importance (see also Articles 5, 74.1 and 86 of the Constitution). Limiting rights and freedoms for reasons of environmental protection is not only permissible, but also necessary. Forests are an especially valuable component of the natural environment.

Summary:

I. Under Polish legislation, the owner of a private forest has no right to engage in the arbitrary felling of trees, i.e. without obtaining permission. This constitutes a petty offence carrying a possible fine of up to 5,000 Polish Zloty (Article 158.1, read in conjunction with Article 24.1 of the Petty Offences Code 1971; referred to here as “the 1971 Code”); the Court is at the same time obliged to order the forfeiture of illegally acquired wood (Article 158.2).

Proceedings were initiated by the District Court for Zamość, on a question of law.

II. The Tribunal ruled that Article 158.2 of the 1971 Code complies with Articles 2 and 64 of the Constitution, applying respectively to the rule of law and to protection of ownership.

Article 158 of the 1971 Code only applies to forest owners who do not observe the rules governing the use of forests. These rules reflect a common good (protection of the natural environment). Forfeiture of the wood acquired does not constitute interference with the ownership of the forest, which remains intact. The limitation on ownership in such a case is by nature more apparent than real, in that it forms part of a sanction for infringement of the rules laid down in the Forests Act 1991. The aims of this sanction would not be achievable in the absence of a penalty which involved the forfeiture of the wood.

Cross-references:

- 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].

Languages:

Polish, English, German (summary).

Identification: POL-2006-2-009

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 26.06.2006 / **e)** SK 55/05 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2006, no. 119, item 819; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2006, no. 6A, item 67 / **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:

5.2 **Fundamental Rights** – Equality.
5.3.13.1.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – Civil proceedings.
5.3.13.1.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – Criminal proceedings.
5.3.13.4 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Double degree of jurisdiction.
5.3.13.15 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Impartiality.

Keywords of the alphabetical index:

Civil proceedings / Challenging, judge / Default judgment, retrial, judge, challenging.

Headnotes:

When a defendant files an objection to a default judgment pronounced in civil proceedings, he automatically initiates the reconsideration of the case and maintains all procedural rights. Once an objection has been filed, the court proceeds to hear evidence from both parties, wholly or in part. It may also be possible to extend the legal action. This stage of proceedings is entirely adversarial in nature.

When considering an appeal within civil proceedings, the second instance court does not review the case *ab initio*, but simply assesses and exerts control over the judicial decision of the first instance court, within the limits of the appeal. For this reason, the judge who pronounced judgment at lower instance may not participate in the consideration of the appeal, as otherwise he would be monitoring himself.

Variation in the regulation of analogous procedural steps stemming from two different statutory acts does not *per se* violate the principle of equality.

Summary:

I. If a defendant fails to submit any documents or to participate in the hearing during civil proceedings, the court will pronounce a default judgment, which is in principle based on the factual circumstances indicated by the claimant (Articles 339 and 340 of the Civil Procedure Code 1964; referred to here as “the 1964 Code”). The defendant in such a case may file an objection to the default judgment. As a result of the objection, the case is considered afresh at first instance by the same court which pronounced the default judgment; the same judge often handles it. Both parties are entitled to appeal against the first instance judgment. The appeal will be considered by the second instance court.

Article 48.1.5 of the 1964 Code (under review in the present case) precludes a judge who pronounced judgment at lower instance from adjudicating in the same case at higher instance. However, no such restriction exists in terms of the consideration of a case at first instance following the filing of an objection to a default judgment.

The Constitutional Court was asked to consider the constitutionality of the absence of an automatic disqualification of a judge in first instance proceedings initiated by an objection to a default judgment pronounced by the same judge.

II. The Tribunal ruled that Article 48.1.5 of the 1964 Code does not infringe Article 45.1 of the Constitution (right to an impartial court) and Article 32.1 of the Constitution (equality).

There are differences between the consideration of an objection and the consideration of an appeal. Therefore, the fact that there is nothing in Article 48.1.5 of the 1964 Code to prevent the judge from lower instance from adjudicating in proceedings following an objection to a default judgment does not contravene the right to an impartial court under Article 45.1 of the Constitution.

The complainant did not put forward any constitutional arguments to back up his contention that the variation in the legislator’s treatment of the addressees of the regulation contained in Article 48.1.5 of the 1964 Code, when compared to the relevant legal provisions of the Criminal Procedure Code 1997, had resulted in a breach of the principle of equality. The procedural situations of parties to the civil proceedings and criminal proceedings are based on very different principles. A particularly important point is that in criminal proceedings, by contrast with civil proceedings, the default judgment may be entered in the defendant’s

absence, but the court becomes familiar with all of the material collected at the preparatory stage, including the suspect's explanations or their refusal to testify. The Civil Court, however, does not have the possibility to acquaint itself with the defendant's position prior to the pronouncement of the default judgment.

Cross-references:

- Judgment 17602/91 of 10.06.1996 (*Thomann v. Switzerland*), ECHR, *Reports* 1996-III.

Languages:

Polish, English, German (summary).

Identification: POL-2006-2-010

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 28.06.2006 / **e)** SK 25/06 / **f)** / **g)** *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2006, no. 6A, item 74 / **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:

1.3.5 **Constitutional Justice** – Jurisdiction – The subject of review.
1.4.10.4 **Constitutional Justice** – Procedure – Interlocutory proceedings – Discontinuance of proceedings.
1.6 **Constitutional Justice** – Effects.
5.3.14 **Fundamental Rights** – Civil and political rights – *Ne bis in idem*.

Keywords of the alphabetical index:

Res iudicata, identical subject / Constitutional review, identical subject.

Headnotes:

The *res iudicata* principle will not apply in proceedings before the Constitutional Tribunal where the subject of the challenge is identical to the subject of a challenge in another case which has been decided by the Tribunal, (the *materiae* aspect), but the proceedings have been initiated by different parties (the *personae* aspect). In such a case, the *ne bis in idem* principle applies.

If the prerequisites for the *res iudicata* principle applied, the Tribunal would, on the basis of Article 39.1.1 of the Constitutional Tribunal Act 1997 (referred to as "the 1997 Act"), be required to discontinue the proceedings due to inadmissibility of pronouncing judgment. If the prerequisites for the *ne bis in idem* principle applied, the basis for discontinuation of the proceedings is the superfluity of adjudication.

Summary:

In June 2005, the complainant requested a review by the Constitutional Tribunal of the compliance of Article 15.5 of the Pensions from the Social Insurance Fund Act 1998 with Articles 2, 32.1 and 67.1 of the Constitution (respectively the rule of law, equality and right to social security). The Tribunal questioned whether the complaint was admissible, as it had ruled in Case no. P13/04 of October 2004 that the above provision conformed to Articles 2 and 32.1 of the Constitution.

The Tribunal discontinued the proceedings, under Article 39.1.1 of the Constitutional Tribunal Act 1997 (referred to as "the 1997 Act"), on the basis that it would be superfluous to pronounce judgment.

The same provision is being challenged in the present case as in Case no. P 13/04. In that judgment, the bases of review were Articles 2 and 32.1 of the Constitution, whereas in the present case the complainant also alleges non-conformity with Article 67. However, in the reasoning for case no. P13/04, the Tribunal also referred to the question of conformity of the challenged provision with Article 67 of the Constitution – with a positive result. This position remains valid in the present case.

Supplementary information:

The Tribunal shall discontinue proceedings when it would be "superfluous or inadmissible" to pronounce judgment on the merits of the case (Article 39.1.1 of the 1997 Act).

Cross-references:

- Procedural decision K 29/98 of 21.12.1999, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1999, no. 7, item 172;
- Procedural decision SK 3/01 of 03.10.2001, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2001, no. 7, item 218;
- Procedural decision P 26/02 of 28.07.2003, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2003, no. 6A, item 73;
- Procedural decision K 35/03 of 25.02.2004, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2004, no. 2A, item 15;
- Procedural decision SK 34/02 of 09.03.2004, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2004, no. 3A, item 25;
- Procedural decision U 4/04 of 22.03.2005, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2005, no. 3A, item 33;
- Procedural decision SK 47/04 of 20.06.2005, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2005, no. 6A, item 73;
- Judgment P 13/04 of 24.10.2005, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2005, no. 9A, item 102.

Languages:

Polish, English, German (summary).

Romania
Constitutional Court

Important decisions

Identification: ROM-2006-2-002

a) Romania / **b)** Constitutional Court / **c)** / **d)** 11.07.2006 / **e)** 567/2006 / **f)** Decision concerning the objection that the provisions of Section 12.1 of Law no. 3/2000 on the Organisation and conduct of referendums were unconstitutional / **g)** *Monitorul Oficial al României* (Official Gazette), 613/14.07.2006 / **h)** CODICES (Romanian, French).

Keywords of the systematic thesaurus:

3.4 **General Principles** – Separation of powers.
4.4.1.1 **Institutions** – Head of State – Powers – Relations with legislative bodies.
4.9.2 **Institutions** – Elections and instruments of direct democracy – Referenda and other instruments of direct democracy.
4.9.2.1 **Institutions** – Elections and instruments of direct democracy – Referenda and other instruments of direct democracy – Admissibility.

Keywords of the alphabetical index:

President, referendum, right to call, power, sole / Referendum, instigation, conditions.

Headnotes:

The fact that the law exhaustively lists situations considered to constitute matters of national interest restricts the constitutional right of the President of the Republic to consult the nation by holding a referendum. It also undermines the principle of the separation and balance of powers within a constitutional democracy.

Summary:

I. In June 2006 the Ombudsman directly referred to the Constitutional Court an objection to the effect that the provisions of Section 12.1 of Law no. 3/2000 on the Organisation and conduct of referendums were unconstitutional. The contested law specified the matters of national interest on which the President of

Romania could ask the nation to express its will by means of a referendum.

In the submissions accompanying the objection, it was argued that the powers of the President of Romania set out, *inter alia*, in Articles 80, 85-90 and 91-94 of the Constitution were exercised without the assistance of the other organs of state, whereas other powers required the latter's involvement. An analysis of the power provided for in Article 90 of the Constitution showed that it covered consultation and decisions. Consultation of parliament took place prior to a decision and was compulsory, and parliament's opinion was binding, even though the decision rested with the President of Romania.

II. The Court, agreeing that the objection was admissible, held that Article 90 of the Constitution did not specify what constituted matters of national interest that could not be settled by law. In the absence of such specification, Section 12.1 of the law supplemented the text of the Constitution, which provided only for the procedure for holding a referendum, at the President's instigation, on matters of national interest. This procedure entailed consultation of parliament, which adopted a decision involving both houses of parliament, failing which the President could not call a referendum and consult the nation, asking the people to express its will on matters of national interest.

It was quite clear that, under Article 90 of the Constitution, the President had sole power to decide which matters of national interest should be put to a referendum, even though it was compulsory to consult parliament. Only the President of Romania was entitled to decide what constituted matters of national interest, the specific issue that was to be put to a referendum and the date on which the referendum was to be held. The Court held that the exhaustive list, in Section 12.1 of the law, of situations considered to constitute matters of national interest was such as to restrict the President's right to consult the nation. Given that the national interest could change over time, new circumstances necessitating the organisation of another referendum could arise at any time. Any list could, at a later date, become a restriction affecting the President's constitutional right to decide alone, in accordance with Articles 2.1, 80, 81.1 and 1.4, on issues he wished to put to the nation.

The Court also held that the fact that matters of national interest were defined by law was contrary to the principle of the separation and balance of powers within a constitutional democracy and to Article 73.3.d of the Constitution. The latter provided for the establishment, by law, of certain technical procedural measures needed for the consultation of the nation by means of a referendum.

Languages:

Romanian.

Russia
Constitutional Court

Statistical data
1 January 2006 – 31 August 2006

Total number of decisions: 8

Type of decision:
- Rulings: 8
- Opinions: 0

Categories of cases:
- Interpretation of the Constitution: 0
- Conformity with the Constitution of acts of state institutions: 8
- Conformity with the Constitution of international treaties: 0
- Conflicts of jurisdiction: 0
- Observance of a prescribed procedure for charging the President with high treason or other grave offence: 0

Types of claim:
- Claims by state institution: 4
- Individual complaints: 5
- Referral by a court: 2
  (Some proceedings were joined with others and heard as one set of proceedings)

Important decisions

Identification: RUS-2006-2-001

a) Russia / **b)** Constitutional Court / **c)** / **d)** 15.05.2006 / **e)** 5 / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 24.05.2006 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

3.5 **General Principles** – Social State.
3.6.3 **General Principles** – Structure of the State – Federal State.
3.11 **General Principles** – Vested and/or acquired rights.
4.8.7.2 **Institutions** – Federalism, regionalism and local self-government – Budgetary and financial aspects – Arrangements for distributing the financial resources of the State.
5.3.44 **Fundamental Rights** – Civil and political rights – Rights of the child.
5.4.2 **Fundamental Rights** – Economic, social and cultural rights – Right to education.

Keywords of the alphabetical index:

Parent, education, duty / Education, access / Education, state obligation / Education, establishment / Education, free cost, limits / Education, public, free / Education, nursery school, fee.

Headnotes:

The costs of maintaining children in municipal public pre-school establishments must be covered by local budgets and, where the necessary funding is lacking, by the federal budget and the budgets of the Federation's constituent entities.

Summary:

I. At the request of the leader of Tver city council and the Duma of Tver, the Court examined the case in connection with the violation of constitutional rights to local self-government in the administrative field by certain provisions of Federal Law no. 122 of 22 August 2004. This law changed the procedures for implementing a number of entitlements and social services granted to certain categories of citizens in kind. The law stipulated that the amount of entitlements and services could not be reduced and the conditions for granting them could not be breached.

With regard to implementation of the right to education in municipal pre-school establishments, statutory regulations had been in force prior to the adoption of the disputed law, under which a limit was established for the amount of payment required from the parents. It was expressed as a percentage of the expense of maintaining children in the establishment in question. Under the disputed law, these regulations lost their effect.

The leader of Tver city council decided to increase the payment due from parents from 313 to 858 roubles per month.

Tver Municipal Court declared this decision contrary to the law.

According to the applicants, the challenged provisions did not allow a reduction in the scale of entitlements for maintaining children in pre-school establishments as they did not provide for the possibility of distributing funding differently to resolve social problems considered as priorities by local government bodies. They claimed that the rights of others were violated and the rights of citizens to resolve matters of local importance by themselves were limited.

II. The Court noted that one of the Russian Federation's most important functions as a welfare State is to guarantee everyone's right to education, including at pre-school level, to which general access, free of charge, is guaranteed by the Constitution. At the same time, the parents, pursuant to their constitutional obligation to look after children, cannot discharge themselves of their duty to cover the costs of maintaining them in pre-school establishments.

The disputed law obliged the constituent entities of the Russian Federation and the municipal authorities, when replacing entitlements in kind by monetary compensation, to introduce legal machinery ensuring that citizens' previously acquired level of social protection was preserved and possibly increased, while enabling them to adapt to the changes made during the transition period. Within the meaning of the disputed law, a change in the machinery for granting social guarantees must not result in no or lesser guarantees being granted. In terms of pre-school education, that means an obligation on the part of local self-governing bodies to ensure the proportions already established in the division of expenditure between the parents and the municipal authorities for the maintenance of children.

The Court concluded that the disputed provisions are not contrary to the Constitution because they presuppose an obligation on the part of local self-governing bodies to maintain the proportions established in the division of expenditure between the parents and the municipal authorities, as well as the volume of budget funding.

Languages:

Russian.

Identification: RUS-2006-2-002

a) Russia / **b)** Constitutional Court / **c)** / **d)** 15.06.2006 / **e)** 6 / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 21.06.2006 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

3.5 **General Principles** – Social State.
3.11 **General Principles** – Vested and/or acquired rights.
4.10.8.1 **Institutions** – Public finances – State assets – Privatisation.
5.2.2.13 **Fundamental Rights** – Equality – Criteria of distinction – Differentiation *ratione temporis*.
5.3.39.4 **Fundamental Rights** – Civil and political rights – Right to property – Privatisation.
5.4.13 **Fundamental Rights** – Economic, social and cultural rights – Right to housing.

Keywords of the alphabetical index:

Housing, rent, regulated / Housing, privatisation / Privatisation, procedure / Housing, flat, assignment / Housing, flat, privatisation / Housing, privatisation, procedure / Housing, social.

Headnotes:

The right of citizens to free privatisation of residential premises is not regulated by the Constitution. The legislator is entitled to enact laws on privatisation and to repeal them.

Summary:

I. The Supreme Court and a number of citizens challenged the constitutionality of certain provisions of the Federal Laws “On the Entry into force of the Residence Code” and “On Privatisation of Housing Stock”. Under these provisions the period for the free transfer of property to citizens of premises they occupied within state and municipal housing stock was to cease on 1 January 2007. Similarly, the privatisation of premises allocated under social leasing conditions would cease from 1 March 2005.

Prior to the adoption of these acts, the legal basis for modifying owner relations in the sphere of housing was the 1991 Law “ On Privatisation of the Housing Stock”, which established the basic principles for privatising the housing stock without specifying the details.

According to the applicants, the annulment of the right of citizens to free privatisation of residential premises is contrary to the principles of justice, stability and the guarantee of rights, as well as the provision in the Constitution stating that the adoption of laws annulling or diminishing human and civil rights and freedoms is inadmissible.

II. The Court noted that the entitlement of citizens to the free purchase of housing via the privatisation of public stock is not regulated by the Constitution and does not form part of human rights and fundamental freedoms. This entitlement arose, exists and is implemented as a subjective entitlement of a physical person pursuant to a law.

The federal legislator, under its discretionary powers, has the right to adopt and annul acts concerning free transfer of ownership of premises. Furthermore, in determining the deadline for free privatisation, the legislator must give citizens the opportunity to adapt to the changes during a certain period of transition. The disputed legal provision is not contrary to the Constitution because it set a deadline for the completion of the process of free privatisation of premises, which had been ongoing since 1991. The legislator did, therefore, give citizens an opportunity to adapt to the changes made.

In guaranteeing the right of citizens to housing, the Constitution obliges state and local authorities to create additional conditions allowing poor citizens and others to exercise this right by providing them with free housing or establishing an affordable rent through the use of state, municipal or other funds. In giving this constitutional obligation tangible form, the legislator decreed, in the Residence Code, that state and local authorities have to provide the necessary conditions for the provision of housing to citizens on the basis of a social lease.

Having introduced, in the Law "On Privatisation of the Housing Stock", a prohibition on the privatisation of premises allocated to citizens from 1 March 2005 onwards on the basis of a social lease, the legislator argued that its decision was justified by the new conditions for concluding social leases following the entry into force of the Residence Code and, in fact, had placed citizens in a situation of inequality in relation to those who had received housing prior to that date and, consequently, kept their right to privatisation within the limits of the entire period of its validity.

But the sole difference in the conditions for concluding social leases before and after 1 March 2005 is the form taken by the administrative decision granting housing to a needy citizen: before 1 March 2005, the housing was provided pursuant to an order and, after that date, in compliance with a decision of the local authority. This difference is of a formal, legal nature. It is not substantive and has no impact on the legal regime governing residential premises occupied on the basis of a social lease. The legal regime governing these premises is the same, which does not imply any difference in the rights acquired by the citizens concerned.

In that case, prohibiting the free privatisation of residential premises allocated to citizens on the basis of a social lease from 1 March 2005 onwards within the limits of the entire period of privatisation of the housing stock is not contrary to the Constitution.

Languages:

Russian.

Identification: RUS-2006-2-003

a) Russia / **b)** Constitutional Court / **c)** / **d)** 16.06.2006 / **e)** 7 / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 21.06.2006 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

3.3.1 **General Principles** – Democracy – Representative democracy.
3.17 **General Principles** – Weighing of interests.
4.9.8.2 **Institutions** – Elections and instruments of direct democracy – Electoral campaign and campaign material – Campaign expenses.
5.2.1.4 **Fundamental Rights** – Equality – Scope of application – Elections.
5.3.21 **Fundamental Rights** – Civil and political rights – Freedom of expression.
5.3.24 **Fundamental Rights** – Civil and political rights – Right to information.
5.3.41.1 **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:

Electioneering, finance, limit / Election, campaign, financing, limit / Election, campaign, finance, control.

Headnotes:

Prohibiting citizens from the independent financing of electioneering is intended to ensure equality between candidates and the protection of the rights and freedoms of others, as well as transparency of the funding of elections, which is necessary for equality between candidates and the freedom of voters to form their own opinion.

Summary:

I. The Court examined the conformity with the Constitution of certain provisions of the Federal Law “On Essential Guarantees of Electoral Rights” at the request of the State Duma of the Astrakhan region. The disputed provisions stipulate that expenditure on electioneering may come only from the corresponding electoral funds.

According to the applicant, the challenged law does not enable a citizen who is not a candidate himself or does not represent a candidate or an electoral bloc to engage in electioneering and pay the corresponding expenses himself. It is claimed that freedom of thought and speech and also the right of citizens to seek and disseminate information via any legal channel would be restricted.

II. The Court noted that free elections, which reflect the true will of the people and determine the formation of elected bodies of public authority, are closely linked to freedom of thought and speech and the right of any person to freely seek, obtain, transmit, produce and disseminate information via any legal channel, guaranteed by the Constitution, and also to freedom of mass information. In resolving conflicts of law between freedom of thought and speech on the one hand and the right to free elections on the other hand, the federal legislator must maintain a balance between these constitutionally protected values.

Information work within the electoral process entails informing voters about the candidates and electoral blocs and deadlines and procedures for carrying out electoral actions. It also involves electioneering, which is an activity aimed at encouraging voters to vote for a given candidate. The Court concluded that a restriction on information for voters and electioneering, as established by the disputed law, serves to ensure free expression of citizens' will and publicity for elections. This restriction therefore complies with the requirements of the Constitution.

In laying down the procedure for electioneering, the disputed law provided for different legal regimes for the participants: candidates and electoral blocs are entitled to create electoral funds, spend their resources on electioneering and also freely disseminate electoral material.

Citizens who are not candidates and do not represent candidates or electoral blocs are entitled to engage in electioneering in forms and using resources that do not require financial expenditure. As for citizens' participation in the financing of electioneering, this consists in the entitlement to make voluntary contributions to electoral funds, whose limits are established by law.

The differences in conditions governing electioneering, including its financing by candidates and electoral blocs on the one hand and by citizens on the other hand, are linked, according to the legislator, to the specific characteristics of the exercise of active and passive electoral rights, as well as the aims pursued. By exercising his passive electoral right, a candidate is pursuing the aim of being elected, which implies the financial expenditure necessary to run his election campaign. Exercise of the active electoral right is geared, above all, to expression of the electorate's will, which is free from unlawful pressures, including financial pressure.

Therefore, although the challenged provision represents a restriction of the forms and methods of electioneering carried out by citizens, it is intended to ensure equality between candidates and the protection of the rights and freedoms of others, including voters.

Prohibiting citizens from financing electioneering themselves, independently of election funds, is also determined by the need to ensure the transparency of funding of elections as a condition for equality between candidates and the freedom of voters to form their own opinion.

By taking into consideration the status and real possibilities of control of the financing of elections, the challenged provision pursues an aim in line with the laws, does not violate the balance of constitutionally protected values, meets the criteria of necessity in a democratic society and complies with the Constitution.

Languages:

Russian.

Slovakia
Constitutional Court

Statistical data
1 May 2006 – 31 September 2006

Number of decisions taken:

- Decisions on the merits by the plenum of the Court: 12
- Decisions on the merits by the Court panels: 172
- Number of other decisions by the plenum: 0
- Number of other decisions by the panels: 235

Important decisions

Identification: SVK-2006-2-002

a) Slovakia / **b)** Constitutional Court / **c)** Senate / **d)** 17.05.2006 / **e)** III. ÚS 84/06 / **f)** / **g)** / **h)** CODICES (Slovak).

Keywords of the systematic thesaurus:

2.1.3.2.1 **Sources** – Categories – Case-law – International case-law – European Court of Human Rights.
2.2.1.2 **Sources** – Hierarchy – Hierarchy as between national and non-national sources – Treaties and legislative acts.
5.3.5.1.3 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty – Detention pending trial.
5.3.13.6 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to a hearing.

Keywords of the alphabetical index:

Detention, duration, prolongation / Detainee, right to be heard / Release, pending trial.

Headnotes:

Detention constitutes a significant encroachment into the fundamental right to individual liberty guaranteed by the Constitution and by the European Convention on Human Rights.

As a consequence, taking into consideration the case law of the European Court of Human Rights, a court of general jurisdiction adjudicating upon the proposal for prolongation of detention, must hear the person detained.

Summary:

I. The complainant (a foreign woman) claimed, in front of the Constitutional Court, that her fundamental right to individual liberty under Article 17.1, 17.2 and 17.5 of the Constitution and under Article 5.1.c, 5.3 and 5.4 ECHR had been breached.

The complainant claimed that in spite of her repeated requests, the Supreme Court did not hear her with respect to the proposal for the prolongation of her detention. The proposal was filed by a lower court.

After this prolongation the complainant’s detention would even exceed a period of 3 years.

The Supreme Court is the only court entitled to decide on the proposal to prolong detention to a period exceeding 2 years and there is no possibility to bring an appeal.

The Supreme Court provided a possibility for the complainant to express her opinion on the reasons for the prolongation of the detention in writing. The complainant referred, in her written statement, to the case law of the European Court of Human Rights and pointed out that the fact that the court allowed her to submit only the written opinion does not correspond to the requirements stated in Article 5.4 ECHR.

The Supreme Court based its decision on the reasons of the detention as they were presented in its previous decisions in the same case. The Supreme Court found these reasons still applied.

II. The Constitutional Court followed, in its decision, the case law of the European Court of Human Rights and of the Constitutional Court itself, according to which every person who is deprived of her/his liberty by detention shall be entitled to bring proceedings by which the lawfulness of the detention shall be decided speedily by a court, and his/her release is ordered if the detention is unlawful. The Constitutional Court also respects the complainant’s right to be released pending trial in the event that the detention is no longer necessary.

The Constitutional Court considered the complaint from the aspect of Article 5.4 ECHR (the cited provision also applies to the decision-making on the prolongation of detention) and held that the Supreme Court's decision on the prolongation of the detention without hearing the complainant, violated the cited provision of the Convention, despite the fact that it allowed her to submit her statement in writing (e.g. *Nikolova v. Bulgaria,* 31195/96, *Reports of Judgments and Decisions* 1999-II). At the same time, the Constitutional Court ordered the Supreme Court to release the complainant from detention immediately and to pay the costs of proceedings to her legal representative.

Since the Constitutional Court quashed the challenged decision as the only title for detention, the Constitutional Court referred the case to the Supreme Court and ordered to the Supreme Court to release the complainant.

The Constitutional Court held that the finding of the violation of the rights under Article 5.4 ECHR and the order to release the complainant to be sufficient. It therefore did not investigate the violation of the other rights claimed in her application.

Justice Babjak, in his concurring opinion, agreed with the verdict and the substantial part of the reasoning and emphasised the obligation of the court of general jurisdiction to observe international human rights treaties, which are binding on the Slovak Republic.

Languages:

Slovak.

Slovenia
Constitutional Court

Statistical data
1 May 2006 − 30 August 2006

The Constitutional Court held 19 sessions (8 plenary and 11 in chambers: 2 civil chamber, 3 penal chamber, 6 administrative chamber) during this period. There were 454 unresolved cases in the field of the protection of constitutionality and legality (denoted U- in the Constitutional Court Register) and 1 195 unresolved cases in the field of human rights protection (denoted Up- in the Constitutional Court Register) from the previous year at the start of the period (1 May 2006). The Constitutional Court accepted 90 new U- and 988 Up- new cases in the period covered by this report.

In the same period, the Constitutional Court decided:

- 49 cases (U-) in the field of the protection of constitutionality and legality, in which the Plenary Court made:
  - 17 decisions and
  - 32 rulings;
- 5 cases (U-) cases joined to the above-mentioned for joint treatment and adjudication.

Accordingly the total number of U- cases resolved was 134.

The Constitutional Court also resolved 388 (Up-) cases in the field of the protection of human rights and fundamental freedoms (27 decisions issued by the Plenary Court and 234 decisions issued by a Chamber of three judges).

Decisions are published in the Official Gazette of the Republic of Slovenia, whereas the rulings of the Constitutional Court are not generally published in an official bulletin, but are delivered to the 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-2006-2-002

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 06.07.2006 / **e)** Up-555/03, Up-827/04 / **f)** / **g)** *Uradni list RS* (Official Gazette), 78/06 / **h)** *Pravna praksa*, Ljubljana, Slovenia (abstract); CODICES (Slovenian, English).

Keywords of the systematic thesaurus:

1.5.4.3 **Constitutional Justice** – Decisions – Types – Finding of constitutionality or unconstitutionality.
5.1.3 **Fundamental Rights** – General questions – Positive obligation of the state.
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.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Effective remedy.
5.3.13.14 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Independence.
5.3.13.15 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Impartiality.

Keywords of the alphabetical index:

State, repressive activities / Police, act, death / Investigation, right.

Headnotes:

In cases of death during repressive action carried out by state authorities, the state should guarantee an independent investigation of the circumstances of the incident and allow the deceased's relatives (the plaintiffs in the case in point) effective access to the investigation. This is set out in Article 15.4 of the Constitution, relating to Article 13 ECHR.

Summary:

The complainants requested a criminal investigation in respect of the conduct of police officers who participated in the police action during which one person (the husband or son of the complainants respectively) died. They placed special emphasis in their constitutional complaint on the interference by the police officers with the human rights set out in various articles of the Constitution.

Article 17 guarantees the inviolability of human life. Article 18 of the Constitution *inter alia* determines that no one may be subjected to torture, inhuman or degrading punishment or treatment. Article 21 of the Constitution guarantees respect for the person and dignity not only in criminal and in other legal proceedings, but also during the deprivation of liberty and while punitive sanctions are being carried out. It also prohibits violence of any form against any person whose liberty has been restricted in any way, as well

as the use of any form of coercion in obtaining confessions and statements. In its Decision no. Up-183/97 of 10 July 1997 (OdlUS VI, 183), the Constitutional Court held that the primary purpose of Article 18 of the Constitution is protection against the use of various forms of physical and psychological violence while state authorities are carrying out repressive activity.

Under Article 5.1 of the Constitution, the state must protect human rights and fundamental freedoms in its own territory. In so doing, the state has both negative and positive duties. It must abstain from conduct that might interfere with or limit human rights; equally, it must take action to ensure that it creates the means for the most effective exercise of human rights possible. To quote from a decision of the Constitutional Court: “In a state governed by the rule of law there must exist a system of organisation to enable enforcement of the Constitution and statutes, and a system of procedure to enable the exercise of rights and freedoms” (the decision in Case no. U-I-13/94 of 21 January 1994, Official Gazette RS, no. 6/94 and OdlUS III, 8; *Bulletin* 1994/1 [SLO-1994-1-001]). Human rights that protect life, physical and psychological integrity and the dignity of individuals are fundamental values of a democratic society. The state must afford them especial protection and ensure their effective exercise.

Article 15.4 of the Constitution is to be interpreted in such a way that it includes the right to an independent investigation of the circumstances of an incident in which a person was allegedly subjected to torture or inhuman or degrading treatment by repressive state authorities, or in which a person died during action carried out by repressive state authorities. This right also embraces the right of those affected to effective access to such an investigation. Article 15.4 of the Constitution guarantees the judicial protection of human rights. However, case-law of the European Court of Human Rights indicates that the investigation must be conducted outside the scope of judicial proceedings, it must be independent and it must guarantee effective participation to those affected. It does not follow from Article 15.4 of the Constitution and Article 13 ECHR that an independent investigation must be conducted within the scope of criminal proceedings. Criminal proceedings cannot be extended to the investigation of the circumstances of an incident within the sense of the requirements stemming from the European Court case law; neither can they be regarded as a substitute for an investigation. If independent investigations were to be limited to criminal proceedings, this would rule out the possibility of an independent investigation of state violence in cases where it could not be alleged that individuals had committed a criminal offence or where criminal proceedings could not be launched. The rights of the complainants in the case in point under Article 15.4 of the Constitution (in conjunction with Article 13 ECHR) were not breached simply because no criminal investigation was initiated with reference to the incident.

The above articles of the Constitution and the Convention impose a duty upon the state, in cases such as the present one, to guarantee an independent investigation of the circumstances of the incident and allow the complainants effective access to such investigation. Here, the state did not guarantee such investigation. The Constitutional Court established that the fact that a criminal investigation was not initiated did not mean that the complainants’ human rights and fundamental freedoms had been breached. Accordingly, it did not repeal the provisions in point but instead adopted a declaratory decision. It upheld the constitutional complaints, on the basis that the complainants’ right to effective protection of rights determined in Article 15.4 of the Constitution (in conjunction with Article 13 ECHR) had been breached.

Supplementary information:

References to legislation:

- Articles 5.1, 15.4, 15.5, 17, 18, 19, 21, 23.1 and 36 of the Constitution;
- Articles 47 and 49 of the Constitutional Court Act;
- Articles 2, 3 and 13 ECHR;
- Articles 1.1, 4.1, 12, 13 and 16.1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Languages:

Slovenian, English (translation by the Court).

South Africa
Constitutional Court

Important decisions

Identification: RSA-2006-2-004

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 27.02.2006 / **e)** CCT 73/05 / **f)** Matatiele Municipality and Others v. the Republic of South Africa and Others (no. 1) / **g)** http://www.constitutionalcourt.org.za/uhtbin/hyperion-image/J-CCT73-05 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.
4.5.2 **Institutions** – Legislative bodies – Powers.
4.8.5 **Institutions** – Federalism, regionalism and local self-government – Definition of geographical boundaries.
4.8.6.1 **Institutions** – Federalism, regionalism and local self-government – Institutional aspects – Deliberative assembly.
4.13 **Institutions** – Independent administrative authorities.
5.3.29 **Fundamental Rights** – Civil and political rights – Right to participate in public affairs.

Keywords of the alphabetical index:

Boundary, administrative, change / Border, competence, legislative, limits / Consultation, public / Legislative procedure, province / Legislative process, right to a hearing / Municipality, boundary, change / Parliament, powers, restrictions.

Headnotes:

The national Municipal Demarcation Board to determine municipal boundaries is limited by parliament's authority to re-draw provincial boundaries, even where the re-drawing of provincial boundaries results in the altering of municipal boundaries.

The Constitutional Court is entitled to investigate whether the correct procedure was followed in enacting a constitutional amendment, notwithstanding the applicants' concession that such procedures had been complied with.

Summary:

I. Matatiele Municipality and a group of business people, educators, associations and non-governmental entities, made an urgent application to the Constitutional Court challenging the constitutional validity of the Constitution Twelfth Amendment ("the Twelfth Amendment") and the related Cross-Boundary Municipalities Laws Repeal and Related Matters Act ("the Repeal Act"). These laws, amongst other things, re-drew the boundaries of the majority of South Africa's provinces. As a result of the re-determination of provincial boundaries, new municipal boundaries were created and the area that was previously known as Matatiele Local Municipality was moved from the KwaZulu-Natal Province to the Eastern Cape Province.

The question raised was whether, in enacting the Twelfth Amendment and the Repeal Act, Parliament unlawfully took over the functions that the Constitution had reserved for an independent authority, the Municipal Demarcation Board.

II. Writing for the majority, Ngcobo J held that the Municipal Demarcation Board is an independent authority, which is vested with the power to determine municipal boundaries. However, he found that the power of the Board to determine municipal boundaries is limited by the constitutional authority of Parliament to determine provincial boundaries. Ngcobo J held that Parliament has the constitutional authority to alter municipal boundaries in the course of re-drawing provincial boundaries. He concluded that the Twelfth Amendment did not violate the Constitution by altering the municipal boundaries of Matatiele in the course of redrawing the provincial boundary between the Eastern Cape and KwaZulu-Natal.

However, the Court found that on the papers before it, the question arose whether the Provincial Legislature of KwaZulu-Natal had followed the correct constitutional procedures in giving its approval to the alteration of its boundary. Any constitutional amendment that amends a provincial boundary must, in terms of Section 74.8 of the national Constitution, be approved by the legislature of the province concerned. In particular, whilst the majority of the provincial legislatures whose boundaries were affected had held public hearings with the people of the affected areas, the record indicated that the KwaZulu-Natal legislature had not consulted with the people of Matatiele. Although the applicants had conceded that the correct procedures had been

followed in the enactment of the Twelfth Amendment, Ngcobo J held that the Court is not bound by a concession made by a legal representative if it considers that concession to be wrong in law.

The Court therefore set a date for a further hearing and issued an order calling upon the parties to submit argument on whether, prior to deciding whether to approve a national constitutional amendment altering its boundary, a provincial legislature is required by the Constitution to facilitate the involvement of the people in the affected area in that process. In addition, the Court called for argument on the consequences of failure to facilitate public involvement if such involvement was required by the Constitution. Since the provincial legislatures of KwaZulu-Natal and the Eastern Cape were not parties in the application, the Court ordered that they be joined as parties to the proceedings. It also ordered that the Independent Electoral Commission be joined as a party.

In a dissenting judgment, Skweyiya and Yacoob JJ agreed that the Twelfth Amendment and Repeal Act did not unconstitutionally usurp the powers of the Municipal Demarcation Board. They held, however, that it was not in the interests of justice to postpone the case for further argument on a new issue raised by the Court because the likelihood of the applicants benefiting from the postponement was too small to justify the further investigation and delay.

Cross-references:

- *Azanian Peoples Organisation (AZAPO) and Others v. President of the Republic of South Africa and Others* 1996 (4) SA 671 (CC); 1996 (8) BCLR 1015 (CC), *Bulletin* 1996/2 [RSA-1996-2-014];
- *Executive Council, Western Cape v. Minister of Provincial Affairs and Constitutional Development and Another*;
- *Executive Council, KwaZulu-Natal v. President of the Republic of South Africa and Others*, 2000 (1) SA 661 (CC); 1999 BCLR 1360 (CC);
- *Mary Patricia King and Others v. Attorneys Fidelity Fund Board of Control and Another* 2006 (1) SA 474 (SCA).

Languages:

English.

Identification: RSA-2006-2-005

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 08.06.2006 / **e)** CCT 49/05 / **f)** Isaac Metsing Magajane v. The Chairperson, North West Gambling Board and Others / **g)** 2006 (5) SA 250 (CC); http://www.constitutionalcourt.org.za/Archimages/6978.PDF / **h)** CODICES (English).

Keywords of the systematic thesaurus:

1.1.4.4 **Constitutional Justice** – Constitutional jurisdiction – Relations with other institutions – Courts.
1.6.2 **Constitutional Justice** – Effects – Determination of effects by the court.
3.16 **General Principles** – Proportionality.
5.3.32 **Fundamental Rights** – Civil and political rights – Right to private life.

Keywords of the alphabetical index:

Gambling, licence / Search, warrant, purpose / Privacy, invasion, proportionality / Privacy, business premises.

Headnotes:

The North West Gambling Board Act 2 of 2001 (the Act), to the extent that it authorised warrantless searches of premises which were not licensed under the Act, was unconstitutional for infringing the right to privacy because the objectives of such searches could have been achieved by requiring warrants, which would have been less invasive of the right to privacy. It was therefore not necessary to determine the other issues raised by the applicant, which were whether other provisions of the Act resulted in a violation of the right to remain silent and exceeded the constitutional competence of the provincial legislature respectively.

Summary:

I. Inspectors from the North West Gambling Board received a report that illegal gambling was taking place at an establishment known as Las Vegas Gold Lichtenburg (Las Vegas Gold). Four days later Mr Erasmus, an inspector from the Board, arranged for undercover agents to visit Las Vegas Gold and to play on the gambling machines using marked ‘trap’ money. When the agents returned, Mr Erasmus led a team of Board inspectors and members of the South African Police Service on a raid of Las Vegas Gold.

The raid was conducted under Section 65 of the North West Gambling Board Act 2 of 2001 (the Act).

Section 65.1.a instructed an inspector to enter any licensed or unlicensed premises occupied for gambling activities, or on which it is suspected that such activities are being conducted or allowed, or on which any of numerous specified gambling related items are present. Section 65.1.b instructed the inspector to perform a wide range of tasks on the premises referred to in Section 65.1.a, which include requiring the person in control of the premises to produce a licence or written permission or authorisation to conduct gambling activities under Section 65.b.i. Section 65.1.c stated that the inspector shall require a person who is deemed or appears to be in charge to point out any item or produce all records referred to in Section 65.1.a that is in his or her possession, custody or control and to provide any information in connection with those items or records. Section 65.1.d stated that the inspector is authorised to seize and remove any gambling machine, equipment, device, object, book, record, note or other document referred to in paragraph a which in his or her opinion may furnish proof of a contravention of any provision of this Act or mark it for the purposes of identification. Section 82 of the Act provides, in relevant part, that it is an offence to contravene or fail to comply with any provision of the Act, to hinder or obstruct any police officer or inspector in the performance of his or her functions under the Act and to give an explanation or information to a police official or inspector which is false or misleading while knowing it to be false or misleading.

Mr Erasmus asked the applicant to produce a gambling licence or similar written authorisation, which he could not produce. It is common cause that Las Vegas Gold was not licensed. A police officer arrested the applicant and three employees for conducting a casino without a licence in violation of the Act. Money was seized: R 4890 from the cash register and R24 120 from the safe. There were 60 machines on the premises which Mr Erasmus seized by locking the premises.

The applicant raised four issues in the Constitutional Court:

1. Whether there was a need to join the Board as a party in addition to the chairperson of the Board.
2. Whether Sections 65.1.b.ii and 65.1.c.iii, read together with Section 82, violate the applicant's right to remain silent, by requiring him to answer questions that could be used against him in future criminal proceedings.
3. Whether Section 65.1.b and 65.1.d violates his right to privacy by authorising inspectors to inspect his commercial premises and to seize items without a warrant.
4. Whether Section 65.3 exceeds the constitutional competence of the North West provincial legislature by deeming inspectors to have been appointed as peace officers in accordance with Section 334 of the Criminal Procedure Act.

II. In a judgment concurred in by all the judges, Van der Westhuizen J rejected the respondents' contention that the application should fail because of the failure to join the Board as a party on the basis that Section 23.1 of the Act provides that in any legal proceeding against the Board, service on the chairperson constitutes sufficient service on the Board.

With regards to the right to privacy, Van der Westhuizen J held that the right to privacy extended to business premises, although the further one moves from a person's inner sanctum the more attenuated the right becomes, with regulated, public businesses having the most limited right to privacy. He held that an inspection is an intrusion, albeit a less intrusive one, and that Section 65.1 therefore limited the right to privacy. Van der Westhuizen J held that such a limitation was not justified because there was a less restrictive means to achieve the purpose, which was to require a warrant prior to the search. Warrants were not merely a formality. They were the method which had been tried and tested in our criminal procedure to defend the individual against the power of the state, ensuring that police cannot invade private homes and businesses upon a whim, or terrorise members of the public. Warrantless searches should be the exception to the rule and should only be used for regulatory inspections when necessary for protecting the public health, safety and general welfare. He held that in this case the invasion of the applicant's right to privacy was not justified because it was not a regulatory search but rather a search to collect evidence for a criminal prosecution and the inspectors had not shown that their purposes could not have been achieved by obtaining a warrant for the search.

With regard to Section 65.3 of the Act which provides that 'an inspector shall…be deemed to have been appointed a peace officer in accordance with Section 334 of the Criminal Procedure Act 51 of 1977', the applicant argued that the provincial legislature had no authority to enact such a provision and consequently that Mr Erasmus's actions as a police officer were invalid. Van der Westhuizen J held that it would not be in the interests of justice to consider the challenge to Section 65.3 because it did not have the benefit of judgments from the High Court and the Supreme Court of Appeal on this issue, or of extensive argument by the parties and of the reasons and opinions of interested parties.

With regards to the remedy, Van der Westhuizen J held that it would be impossible to sever Section 65.1.b, 65.1.c and 65.1.d from 65.1.a because these provisions depended on Section 65.1.a as did the remainder of Section 65.1 and Section 65.2. He therefore ordered that both these sections should be struck but that the remainder of Section 65 stands on its own and is not affected. He held further that it was not in the interests of justice to suspend the order of invalidity of Section 65.1 and 65.2 because inspectors can investigate alleged violations of the Act and the police can use their powers under the Criminal Procedure Act to conduct searches with warrants.

With regards to the constitutionality of Section 65.1.b.ii and 65.c.iii, Van der Westhuizen J consequently held that there may have been merit to the applicant's argument that these provisions violated the right to remain silent. However, due to his conclusion that Section 65.1, which authorised an inspector to enter unlicensed premises without a warrant, was unconstitutional and invalid the inspector who questioned the applicant had therefore not been authorised to do so. It was therefore not necessary to decide whether Section 65.1.b.ii and 65.1.c.iii was unconstitutional.

Cross-references:

- *Isaac Metsing Magajane v. The Chairperson of the North West Gambling Board and Others,* Case no. 1008/04, 12.12.2004, unreported;
- *Safcor Forwarding (Johannesburg) (Pty) Ltd v. National Transport Commission* 1982 (3) SA 654 (A);
- *African Christian Democratic Party v. The Electoral Commission and Others* 2006 (5) BCLR 579 (CC), *Bulletin* 2005/3 [RSA-2005-3-016];
- *Fraser v. Naude and Others* 1999 (1) SA 1 (CC);
- *De Freitas and Another v. Society of Advocates of Natal (Natal Law Society Intervening)* 1998 (11) BCLR 1345 (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);
- *Bruce and Another v. Fleecytex Johannesburg CC and Others* 1998 (2) SA 1143 (CC); 1998 (4) BCLR 415 (CC);
- *Bernstein and Others v. Bester and Others* NNO 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC), *Bulletin* 1996/1 [RSA-1996-1-002];
- *Mistry v. Interim Medical and Dental Council of South Africa and Others* 1998 (4) SA 1127 (CC); 1998 (7) BCLR 880 (CC);
- *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].

Investigating Directorate:

- *Serious Economic Offences and Others v. Hyundai Motor Distributors (Pty) Ltd and Others v. Smit NO and Others* 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC), *Bulletin* 2000/2 [RSA-2000-2-011];
- *S v. Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC), *Bulletin* 1995/3 [RSA-1995-3-002];
- *S v. Manamela and Another* (Director-General of Justice Intervening) 2000 (3) SA 1 (CC); 2000 (5) BCLR 491 (CC), *Bulletin* 2000/1 [RSA-2000-1-005];
- *Omar v. Government of the Republic of South Africa and Others (Commission for Gender Equality, Amicus Curiae)* 2006 (2) SA 289 (CC); 2006 (2) BCLR 253 (CC), *Bulletin* 2005/3 [RSA-2005-3-012] ;
- *Coetzee v. Government of the Republic of South Africa*, *Bulletin* 1995/3 [RSA-1995-3-005];
- *Matiso and Others v. Commanding Officer, Port Elizabeth Prison, and Others* 1995 (4) SA 631 (CC); 1995 (10) BCLR 1382 (CC), *Bulletin* 1995/3 [RSA-1995-3-005];
- *S v. Coetzee and Others* 1997 (3) SA 527 (CC); 1997 (4) BCLR 437 (CC), *Bulletin* 1997/1 [RSA-1997-1-002].

Languages:

English.

Identification: RSA-2006-2-006

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 28.07.2006 / **e)** CCT 51/05 / **f)** AAA Investments (Proprietary) Limited v. The Micro Finance Regulatory Council and Another / **g)** http://www.constitutionalcourt.org.za/uhtbin/hyperion-image/J-CCT51-05 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.9 **General Principles** – Rule of law.
3.13 **General Principles** – Legality.
4.6.3.2 **Institutions** – Executive bodies – Application of laws – Delegated rule-making powers.
4.6.7 **Institutions** – Executive bodies – Administrative decentralisation.
4.15 **Institutions** – Exercise of public functions by private bodies.

Keywords of the alphabetical index:

Competence, delegation / Credit institution / *Delegata potestas non potest delegari* / Delegation of powers / Exemption, conditions / Law making, constitutional rules / Minister, law-making power / Public power, exercise, definition / Regulation, competence to issue / Subordinate legislation, limits.

Headnotes:

Public power may be exercised by a private body. When such power is exercised, it is always subject to the rule of law and the doctrine of legality.

In determining whether the authority to exercise public power by a private body is properly delegated, regard must be had to what powers would be necessary for the private body to perform its functions properly.

Summary:

I. The judgment concerns the status, legality and effect of rules relating to the micro-lending industry, which encompasses money-lenders who advance loans of up to R10 000 payable within a period of thirty six months. The rules in question were made by the Micro Finance Regulatory Council (MFRC), which had been appointed by the Minister of Trade and Industry (the Minister) as a regulatory institution to control the abuse of money-lending transactions by micro-lenders. These types of transactions had, in terms of Section 15A of the Usury Act 73 of 1968, been exempted from the ordinary provisions of the Act, but it was decided that some regulation of the micro-lending industry was required because of potential abuse of the exemption.

An Exemption Notice was published in 1999, requiring registration by micro-lenders with the regulatory institution and compliance with rules promulgated by the Minister, contained in the Notice, in order to qualify for exemption. By that stage, the MFRC had already been formed. The MFRC purported to amend its rules; a challenge to its competence to do so was raised by one of the represented microlenders. Challenges were also raised to specific rules, particularly those relating to the disclosure of information, on the basis of the right to privacy.

The High Court struck the MFRC's rules down as unconstitutional, because they constituted an exercise of legislative power which had not properly been delegated. The Supreme Court of Appeal held that public power was not exercised, but that the MFRC acted as a private regulator whose members had consented to its authority. Any coercive elements would have come from the Exemption Notice, which had not been challenged. The matter was appealed to the Constitutional Court.

II. Yacoob J, writing on behalf of the majority of the Court, held that, even though a new Exemption Notice had since been published which expressly adopted the new MFRC's rules; it would be in the interests of justice for leave to appeal to be granted because of the importance of the issues. He found that the MFRC was an organ of state, and that it exercised public power, which was subject to the rule of law, the doctrine of legality and the rights in the Bill of Rights. He held that the power had been properly delegated by the Minister. With the approval of the MFRC as the regulatory institution came the authority to make rules reasonably necessary for the performance of its functions.

The factors important in characterising the power as public in nature were the fact that the MFRC acted in terms of national legislation; the extent of the Minister's control over the MFRC; the source of the functions in the Exemption Notice; and the composition and mandate of the MFRC. With regard to the challenge to the specific rules on the basis of the right to privacy, Yacoob J held that it would not be in the interests of justice to consider the attack because the regulatory regime had been replaced. Any decision would therefore be of no practical significance.

Langa CJ dissented from this judgment. He held that while public power had been exercised, it had not been properly delegated by the Minister. He adopted a stricter approach than Yacoob J as to when delegation would be permissible. Only those measures that were reasonably necessary to implement the rules already put in place by the Minister could properly be delegated. The MFRC could therefore exercise power to enforce the existing rules, but not to create new standards. Rules that created new conditions for exemption were therefore beyond the scope of delegation and should be struck down on that basis.

In a separate judgment, concurring with Yacoob J, O'Regan J held that the rules constituted an exercise of public power because they were coercive and general in nature. She held that the delegation of power by the Minister was necessary because continuous regulation of the micro-lending industry required ongoing research and review by the regulatory institution. The Minister's rules in the Exemption Notice were not exhaustive, and must be read to facilitate the effective functioning of the MFRC. Delegation within these boundaries was therefore considered lawful. She held further that the power to grant exemptions includes the power to delegate administrative functions necessary for effective regulation. Only the class of transactions that qualified for the exemption were within the sole power of the Minister. She held that the privacy argument was moot in light of the replacement of the regulatory regime, and it would therefore not be in the interests of justice to consider that attack.

Cross-references:

- *AAA Investments (Pty) Ltd v. Micro Finance Regulatory Council and Another* 2004 (6) SA 557 (T);
- *Executive Council, Western Cape Legislature and Others v. President of the Republic of South Africa and Others* 1995 (4) SA 877 (CC), 1995 (10) BCLR 1289 (CC), *Bulletin* 1995/3 [RSA-1995-3-006];
- *Hoffmann v. South African Airways* 2001 (1) SA 1 (CC); 2000 (11) BCLR 1211 (CC), *Bulletin* 2000/3 [RSA-2000-3-013];
- *Matatiele Municipality and Others v. President of the Republic of South Africa and Others* 2006 (5) BCLR 622 (CC);
- *Micro Finance Regulatory Council v. AAA Investments (Pty) Ltd and Another* (2006) 1 SA 27 (SCA);
- *Minister of Trade and Industry and Others v. Nieuwoudt and Another* 1985 (2) SA 1 (C).

Languages:

English.

Identification: RSA-2006-2-007

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 03.08.2006 / **e)** CCT 62/05 / **f)** David Dikoko v. Thupi Zacharia Mokhatla / **g)** 2006 (5) SA 250 (CC); http://www.constitutionalcourt.org.za/uhtbin/hyperion-image/J-CCT62-05 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

1.3.5.12 **Constitutional Justice** – Jurisdiction – The subject of review – Court decisions.
4.8.3 **Institutions** – Federalism, regionalism and local self-government – Municipalities.
4.8.6.1.1 **Institutions** – Federalism, regionalism and local self-government – Institutional aspects – Deliberative assembly – Status of members.
5.3.21 **Fundamental Rights** – Civil and political rights – Freedom of expression.
5.3.31 **Fundamental Rights** – Civil and political rights – Right to respect for one's honour and reputation.

Keywords of the alphabetical index:

Damage, compensation, limitation / Damages, constitutional right / Damages, punitive, excessive / Defamation, against public official / Defamation, politician / Fundamental right, conflict / Immunity, scope / Immunity, functional / Immunity, limits / Municipality, mayor, expression in municipal Council, defamation.

Headnotes:

Defamatory statements made outside of the business of the municipal council are not privileged. Privilege does not extend to municipal councillors not performing the real and legitimate business of the council. Privilege in respect of provincial legislatures is granted only to members of the provincial legislature. Appellate courts will only interfere with damages awards where special circumstances warranting such interference exist.

Summary:

I. The applicant, Mr David Dikoko, sought leave to appeal against the judgment and order of the Pretoria High Court, in which it was found that the applicant had defamed the respondent, Mr Thupi Zacharia Mokhatla. At the time the cause of action arose, the applicant was the Executive Mayor and the respondent was the Chief Executive Officer of the Southern District Municipality incorporating the Southern District Council (the Council). The applicant was called before the provincial standing accounts committee to explain his indebtedness to the Council in respect of his overdue personal cellphone account.

During his explanation, the applicant stated his indebtedness had arisen because the respondent had deliberately changed the accounting procedures of the Council, in order to secure political opponents a basis for an attack on the mayor's integrity.

The respondent instituted an action for damages against the applicant in the High Court, claiming that the applicant's statement to the Standing Committee was defamatory. In his defence, the applicant entered a special plea claiming that the statement enjoyed privilege under the relevant legislation. The High Court dismissed the applicant's special plea of privilege, and ordered that he pay the respondent R110 000 in damages. The applicant applied to the Constitutional Court for leave to appeal.

The applicant argued, firstly, that the Court should interpret Section 161 together with Section 28 of the Local Government: Municipal Structures Act 117 of 1998 to allow privilege to extend to municipal councillors performing their functions outside of Council. These provisions provide privilege and immunity from criminal or civil liability to a councillor for anything said in, produced before, or submitted to a Council or one of its Committees. Secondly, he argued that Section 117 of the Constitution together with the relevant provisions of the North West Provincial Legislature's Powers, Privileges and Immunities Act 5 of 1994 should be interpreted to provide privilege to persons other than members of the provincial legislature.

II. Mokgoro J on behalf of a unanimous court (Langa CJ, Moseneke DCJ, Madala J, Ngcobo J, Nkabinde J, O'Regan J, Sachs J, Skweyiya J, Van der Westhuizen J and Yacoob J concurring) dismissed the applicant's first argument on the basis that the applicant's explanation of his personal indebtedness to the Council did not constitute the Council's real and legitimate business. She dismissed the applicant's second argument on the basis that the constitutional and legislative provisions extend privilege to members of provincial legislatures only. She therefore found that the appeal against the High Court's decision denying the applicant privilege should be dismissed.

With regard to the question of the amount of damages to be awarded, Moseneke DCJ, writing for a majority of the Court (Langa CJ, Madala J, Ngcobo J, O'Regan J, Van der Westhuizen J and Yacoob J concurring), held that an excessive award of damages will deter free speech and therefore have a chilling effect on freedom of expression. He therefore assumed, without deciding, that the issue of the amount of damages awarded in a defamation suit is a constitutional matter. He found further that there is no reason why, for the purposes of Section 38 of the Constitution, an appropriate award in a defamation case should not include an award of damages. He held, however, that the general rule is that damages should be left to the determination of the trial court and that an appellate court should only interfere when there are special circumstances which justify interfering with the lower court's award. Moseneke DCJ found in this regard that it is not possible to conclude that the High Court did not have regard to the factors which Mokgoro J refers to as mitigating. He concluded that, in this case, there are no special circumstances that justify interfering with the High Court's award.

On the question of the amount of damages awarded, Mokgoro J, in a minority judgment (Nkabinde J and Sachs J concurring) considered the issue of whether the amount of damages awarded by the High Court was excessive. She found that amount of damages awarded is in itself a constitutional issue and that the amount of damages is generally best left to the discretion of the trial court, but that an appeal court can replace the trial court's award if it finds, in the exercise of its discretion, that the trial court had been influenced by wrong principles of law or a mistaken view of the facts. She held that in this case the trial court had not taken all the relevant factors into account, in particular, facts which would have served to mitigate damages. Mokgoro J therefore concluded that the High Court did not exercise its discretion reasonably and an award of R50 000 would have been more appropriate.

Sachs J, in a separate judgment, proposed that the law of defamation should be developed so as to move away from an almost exclusive preoccupation with monetary awards, which are unsuitable to restoring the damage done to a person's reputation and which often serve to drive parties further apart rather than to reconcile them. The goal of the remedy should be reparation rather than punishment which would accord more with the constitutional value of *ubuntu-botho*, which is consonant with the notion of restorative justice.

Skweyiya J dissented on the question of the amount of damages awarded. He held that, in this case, the issue of the amount of damages awarded is not a constitutional issue, on the basis that the applicant argued that the High Court did not evaluate the facts correctly and that it did not therefore raise a constitutional matter even if constitutional rights were implicated. He held however that this did not mean that a challenge to the amount of damages awarded by a lower court will not ever raise a constitutional issue, but that it did not do so in this case.

Cross-references:

- *Thupi Zacharia Mokhatla v. David Dikoko TPD* 31668/2, 24.05.2005, as yet unreported;
- *Swartbooi and Others v. Brink and Another* (2) 2006 (1) SA 203 (CC); 2003 (5) BCLR 502 (CC);
- *Van der Berg v. Coopers and Lybrand Trust (Pty) Ltd* 2001 (2) SA 242 (SCA);
- *Charles Mogale and Others v. Ephraim Seima SCA* 575/04, 14.11.2005, as yet unreported;
- *Shepstone & Wylie and Others v. Geyser NO* 1998 (3) SA 1036 (A);
- *Knox-D'arcy Ltd and Others v. Jamieson and Others* 1996 (4) SA 348 (A);
- *Media Workers Association of South Africa and Others v. Press Corporation of South Africa Ltd* 1992 (4) SA 791 (A);
- *Skinner v. Shapiro* (I) 1924 SA Witwatersrand Local Division 157;
- *Khumalo and Others v. Holomisa* 2002 (5) SA 401 (CC); 2002 BCLR 771 (CC), *Bulletin* 2002/2 [RSA-2002-2-012];
- *Mineworkers Investment Company (Pty) Ltd v. Modibane* 2002 (6) SA 512 (W);
- *Young v. Shaik* 2004 (3) SA 46 (C);
- *Buthelezi v. Poorter and Others* 1975 (4) SA Witwatersrand Local Division;
- *Hulley v. Cox* 1923 SA Appellate Division 234;
- *Fose v. Minister of Safety and Security* 1997 (3) SA 786 (CC), 1997 BCLR 851 (CC), *Bulletin* 1997/2 [RSA-1997-2-005];
- *Neethling v. Du Preez and Others*;
- *Neethling v. Weekly Mail and Others* 1995 (1) SA 292 (A);
- *Botes v. Van Deventer* 1966 (3) SA 182 (A);
- *Rondalia Assurance Corporation of South Africa v. Britz* 1976 (3) SA 243 (T);
- *Matiwane v. Cecil Nathan, Beattie & Co* 1972 (1) SA 222 (N);
- *S v. Basson* 2005 (12) BCLR 1192 (CC), *Bulletin* 2005/2 [RSA-2005-2-008];
- *S v. Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC);
- *S v. Joyce Maluleke and Others, Pretoria High Court* 83/04, 13.06.2006, as yet unreported;
- *Van der Walt v. Metcash Trading Ltd* 2002 (4) SA 317 (C); 2002 (5) BCLR 454 (CC), *Bulletin* 2002/1 [RSA-2002-1-005];
- *S v. Boesak* 2001 (1) SA 912 (CC); 2001 BCLR 36 (CC);
- *Phoebus Apollo Aviation CC v. Minister of Safety and Security* 2003 (2) SA 34 (CC); 2003 (1) BCLR 14 (CC);
- *South African National Defence Union v. Minister of Defence and Another* 1999 (4) SA 469 (CC); 1999 (6) BCLR 615 (CC), *Bulletin* 1999/2 [RSA-1999-2-006];
- *Islamic Unity Convention v. Independent Broadcasting Authority and Others* 2002 (4) SA 294 (CC); 2002 (5) BCLR 433 (CC), *Bulletin* 2002/1 [RSA-2002-1-004].

Languages:

English.

Identification: RSA-2006-2-008

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 17.08.2006 / **e)** CCT 12/05 / **f)** Doctors for Life International v. The Speaker of the National Assembly and Others / **g)** http://www.constitutionalcourt.org.za/uhtbin/hyperion-image/J-CCT12-05 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

1.6.5.5 **Constitutional Justice** – Effects – Temporal effect – Postponement of temporal effect.
3.3 **General Principles** – Democracy.
4.5.6 **Institutions** – Legislative bodies – Law-making procedure.
5.3.29 **Fundamental Rights** – Civil and political rights – Right to participate in public affairs.

Keywords of the alphabetical index:

Consultation, public / Decision-making, public participation / Democracy, participatory / Legislation, formal requirement / Legislative process, right to public consultation / Obligation, positive / Procedural unconstitutionality / Proceedings, participation, restriction / Province, legislative structures and procedures / Public affairs, right to participate / Public hearing / Transparency, of decision-making process / Law, public consultation, mandatory.

Headnotes:

The Constitution imposes a duty on the National Council of Provinces (NCOP) and the provincial legislatures to facilitate public involvement in their respective legislative processes. Parliament and the provincial legislatures are given a discretion as to the manner in which they fulfil the obligation to facilitate public involvement. The level of public involvement

that is necessary will vary depending on the nature of the legislation that is being enacted. Reasonableness is a key factor in determining whether the legislature has complied with the obligation to facilitate public involvement. A failure to comply with the obligation to facilitate public involvement will result in the invalidity of enacted legislation.

Summary:

I. Doctors for Life (DFL) applied to the Constitutional Court for direct access in terms of Section 167.4.e of the Constitution which gives the Constitutional Court exclusive jurisdiction to decide whether parliament or the President has failed to fulfil a constitutional obligation. DFL sought to challenge the constitutional validity of certain Bills relating to health matters. The application was originally brought against the Speaker of the National Assembly and the Chairperson of the National Council of Provinces; the Minister of Health and the Speakers of the nine provincial legislatures were subsequently joined as respondents in the matter.

DFL argued that parliament failed to fulfil its constitutional obligation in terms of Sections 72.1.a and 118.1.a of the Constitution to facilitate public involvement when it passed four bills: the Sterilisation Amendment Bill; the Traditional Health Practitioners Bill; the Choice on Termination of Pregnancy Amendment Bill; and the Dental Technicians Amendment Bill. DFL's complaint was confined to the process followed by the National Council of Provinces (NCOP).

II. The judgment focussed on the nature and scope of the constitutional obligation of a legislative organ of state to facilitate public involvement in the law-making process; and whether on the facts of the case the NCOP complied with that obligation when passing the health legislation under challenge, and, if it did not, the consequences of its failure.

Ngcobo J held with regard to the nature and scope of the duty to facilitate public involvement that the NCOP has an important role to play in the national law-making process, it represents the provinces to ensure that provincial interests are taken into consideration in the national law-making process – the provinces have a say in the national law-making process as they give voting mandates to their NCOP delegations. Furthermore parliament and the provincial legislatures have a broad discretion to determine how best to fulfil their constitutional obligation to facilitate public involvement in a given case, provided that it is reasonable to do so. This duty will often require parliament and the provincial legislatures to provide citizens with a meaningful opportunity to be heard in the making of laws that will govern them. In determining whether parliament has acted reasonably, the Court will have regard to a number of factors including the nature of the legislation, and what parliament itself has assessed as being the appropriate method of facilitating public involvement in a particular case.

The Sterilisation Amendment Act was only in Bill form when the proceedings were launched while the Dental Technicians Amendment Act was not of such a nature to warrant the need for public participation; and thus neither was considered by the Court. As to whether the NCOP had complied with its duty to facilitate public involvement in relation to the Traditional Health Practitioners Act, and the Choice on Termination of Pregnancy Amendment Act, the Court held that:

a. these two Bills had generated great public interest at the NCOP as evidenced by requests for public hearings;
b. in the light of these requests, the NCOP decided that public hearings would be held in the provinces and advised the interested groups of this fact;
c. the nature of these Bills was such that public hearings should be held;
d. a majority of the provinces did not hold hearings on these Bills because of insufficient time and this fact was drawn to the attention of the NCOP; and
e. the NCOP did not hold public hearings.

In the light of this, it was held that the failure by the NCOP to hold public hearings in relation to the Traditional Health Practitioners Act and the Choice on Termination of Pregnancy Amendment Act was unreasonable. The majority of the Court therefore concluded that the NCOP did not comply with its obligation to facilitate public involvement in relation to these two Acts as contemplated by Section 72.1.a of the Constitution. Accordingly the Traditional Health Practitioners Act and the Choice on Termination of Pregnancy Amendment Act were declared invalid, but the order of invalidity was suspended for a period of 18 months to enable parliament to enact these statutes afresh in accordance with the provisions of the Constitution.

The judgment emphasised the importance of participatory democracy in the constitutional order and the nature of the constitutional obligation imposed on the legislature to facilitate public involvement. The participation by the public on a continuous basis provides vitality to the functioning of representative democracy. It encourages citizens of the country to be actively involved in public affairs, to identify themselves with the institutions of government and

become familiar with the laws as they are made. It enhances the civic dignity of those who participate by enabling their voices to be heard and taken into account. It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It strengthens the legitimacy of legislation in the eyes of the people. Finally, because of its open and public character it acts as a counterweight to secret lobbying and influence peddling.

In his concurring judgment, Sachs J stated that the Constitutional Assembly itself came into being as a result of prolonged and intense national dialogue, while the Constitution it finally produced owed much to an extensive countrywide process of public participation in which millions of South Africans took part. Public involvement in South Africa has ancient origins and continues to be a strongly creative characteristic of democracy, in the country, in which a rich culture of *imbizo*, *lekgotla*, *bosberaad* and *indaba* has been developed. The principle of consultation and involvement had become a distinctive part of national ethos. Democracy did not go into a deep sleep after elections, only to be kissed back to short spells of life every five years. He added that a vibrant democracy has a qualitative and not just a quantitative dimension, so that dialogue and deliberation go hand in hand. This is part of the tolerance and civility that characterises the respect for diversity that the Constitution demands.

In his dissenting judgment Yacoob J concluded that the application should be dismissed holding that:

a. the Constitution does not require the public involvement provision to be complied with as a pre-requisite to any legislation being validly passed;
b. to infer a requirement of this kind when it is not expressly provided for is to impermissibly undermine the legislature and the right to vote; and
c. in the circumstances, the fact that no opportunity was given for public comment in the National Council of Provinces and in most of the provinces in the process of the passing of the health Bills, though regrettable, is of no constitutional moment in relation either to whether the NCOP or the provincial legislatures have complied with their constitutional obligations or to whether the health Bills have been validly passed.

Van der Westhuizen J concurred in the judgment of Yacoob J on the basis that public involvement in the processes of parliament is very important and desirable, but not a constitutional requirement for the passing of every Bill.

Cross-references:

- *King and Others v. Attorneys Fidelity Fund Board of Control and Another* 2006 (1) SA 474 (SCA); 2006 (4) BCLR 462 (SCA);
- *President of the Republic of South Africa and Others v. South African Rugby Football Union and Others* (“SARFU 1”) 1999 (2) SA 14 (CC); 1999 (2) BCLR 175 (CC);
- *President of the Republic of South Africa and Others v. South African Rugby Football Union and Others* (“SARFU 2”) 1999 (4) SA 147 (CC); 1999 (7) BCLR 725 (CC), *Bulletin* 1999/2 [RSA-1999-2-005].

Ex parte Chairperson of the Constitutional Assembly:

- *In re Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC);
- *President of the Republic of South Africa and Others v. United Democratic Movement (African Christian Democratic Party and Others Intervening; Institute for Democracy in South Africa and Another as Amici Curiae) (“UDM”)* 2003 (1) SA 472 (CC); 2002 (11) BCLR 1164 (CC);
- *In re Constitutionality of the Mpumalanga Petitions Bill* 2000, 2002 (1) SA 447 (CC); 2001 (11) BCLR 1126 (CC).

Ex parte President of the Republic of South Africa:

- *In re Constitutionality of the Liquor Bill* 2000 (1) SA 732 (CC); 2000 (1) BCLR 1 (CC);
- *Matatiele Municipality and Others v. President of the Republic of South Africa and Others* 2006 (5) BCLR 622 (CC);
- *S v. Rens* 1996 (2) BCLR 155 (CC).

Ex parte Speaker of the KwaZulu-Natal Provincial Legislature:

- *In re Certification of the Constitution of the Province of KwaZulu-Natal,* 1996 (4) SA 1098 (CC); 1996 (11) BCLR 1419 (CC);
- *Khosa and Others v. Minister of Social Development and Others*;
- *Mahlaule and Others v. Minister of Social Development and Others* 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC);
- *Minister of Health and Another NO v. New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amicus Curiae)* 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC);
- *Minister of Health and Others v. Treatment Action Campaign and Others* 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC);

- *Harris and Others v. Minister of the Interior and Another* 1952 (2) SA 428 (A);
- *Government of the Republic of South Africa and Others v. Grootboom and Others* 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC), *Bulletin* 2000/3 [RSA-2000-3-015].

Languages:

English.

Identification: RSA-2006-2-009

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 01.09.2006 / **e)** CCT 65/05 / **f)** Trevor B Giddey NO v. J C Barnard and Partners / **g)** http://www.constitutionalcourt.org.za/uhtbin /hyperion-image/J-CCT65-05 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

Discretion, limitation / Costs, award / Evidence, costs / Costs, security.

Headnotes:

In applying discretion to order a company that institutes action to furnish security for costs if there is reason to believe that it will be unable to pay the costs of its opponent, courts are obliged to balance the potential injustice to a plaintiff if it is prevented from pursuing a legitimate claim as a result of an order requiring it to pay security for costs on the one hand, and the potential injustice to a defendant who successfully defends the claim and is then unable to recover its costs, on the other hand.

This allows for discretion in the strict sense and can therefore only be interfered with if it was not exercised judicially or if it was exercised on the basis of incorrect facts or principles of law.

Summary:

I. This case concerns the correct constitutional approach to a court's decision whether to require a litigant to furnish security for costs. Section 13 of the Companies Act 61 of 1973 vests a court with a discretion to order a company that institutes action to furnish security for costs if there is reason to believe that it will be unable to pay the costs of its opponent. The procedure whereby an application for security for costs is made is governed by Rule 47 of the Uniform Rules of Court. If a company ordered to provide security for costs is unable to do so, it will, in the ordinary course, be prevented from proceeding with its action. The question in this case is how a court should approach the exercise of that discretion given Section 34 of the Constitution which entrenches the right to have disputes resolved by courts.

The applicant is the liquidator of Sadrema Explorations Ltd. In the Johannesburg High Court the applicant claimed an amount of US $100 million plus interest that the respondent had allegedly received on behalf of Sadrema Explorations Ltd. The money was supposed to be held in trust for Sadrema, but it is alleged that the respondent's failure to safeguard the money resulted in Sadrema's liquidation. In terms of Rule 47.3, the High Court ordered that the applicant furnish security for costs; the amount to be fixed by the Registrar. The applicant then sought leave to appeal this order. However, the High Court and the Supreme Court of Appeal refused leave to appeal.

This matter raises a constitutional issue since an order for the furnishing of costs, where it cannot be met, has the effect of stifling the right of access to courts enshrined in Section 34 of the Constitution. It is therefore necessary for a court granting such an order to take into account the provisions of the Constitution. The importance of the issues raised by this case and the interests of justice warrant granting the application for leave to appeal.

II. O'Regan J for a unanimous court held that Section 13 of the Companies Act, which vests a court with a discretion to order a plaintiff company to furnish security for costs, is a longstanding provision that mirrors provisions in other countries. The rationale behind Section 13 is to deter would-be plaintiff companies who are unlikely to be able to pay costs and therefore not effectively at risk of an adverse costs order if unsuccessful, from instituting proceedings vexatiously or in circumstances where their prospects of success are poor. In applying Section 13, courts are obliged to balance the potential injustice to a plaintiff if it is prevented from pursuing a legitimate claim as a result of an order requiring it to pay security for costs on the one hand, and the

potential injustice to a defendant who successfully defends the claim and is then unable to recover its costs, on the other hand.

As to the effect of an order of security for costs on Section 34 of the Constitution, the applicant did not challenge the constitutionality of Section 13 of the Companies Act. The Court's approach therefore is one that assumes that Section 13 is constitutional. The constitutional question is whether the court's exercise of its Section 13 discretion should be set aside on appeal. The ordinary rule is that the approach of an appellate court to a lower court's exercise of discretion will depend on the nature of the discretion concerned. Section 13 is a discretion in the strict sense and can therefore only be interfered with if it was not exercised judicially or if it was exercised on the basis of incorrect facts or principles of law. The Court of first instance is better placed to make an assessment on the relevant facts and correct legal principles. The High Court took account of the case before it, the facts and the allegation that the inability to furnish security for costs is because of the allegedly fraudulent conduct of the respondent. In awarding an order of security for costs, the High Court held that the applicant had not established that the grant of security would necessarily lead to the termination of the action, and that it may well be that the creditors or shareholders appraised of the prospects of success of the action would furnish the necessary security to assist the applicant in pursuing the claim. The Court concluded that it could not be said that the High Court did not act in a judicial manner or based its decision on incorrect facts or wrong legal principles.

The application for leave to appeal was granted and the appeal was dismissed.

Cross-references:

- *Lappeman Diamond Cutting Works (Pty) Ltd v. MIB Group (Pty) Ltd (No 1)* 1997 (4) SA 908 (W);
- *Shepstone & Wylie and Others v. Geyser NO* 1998 (3) SA 1036 (SCA);
- *Bookworks (Pty) Ltd v. Greater Johannesburg Transitional Metropolitan Council and Another* 1999 (4) SA 799 (W);
- *Chief Lesapo v. North West Agricultural Bank and Another* 2000 (1) SA 409 (CC), 1999 (12) BCLR 1420 (CC);
- *Beinash and Another v. Ernst & Young and Others 1999* (2) SA 116 (CC), 1999 (2) BCLR 125 (CC);
- *S v. Basson* 2005 (12) BCLR 1192 (CC), *Bulletin* 2005/2 [RSA-2005-2-008];
- *Mabaso v. Law Society, Northern Provinces, and Another* 2005 (2) SA 117 (CC), 2005 (2) BCLR 129 (CC).

Languages:

English.

Switzerland
Federal Court

Important decisions

Identification: SUI-2006-2-003

a) Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 25.01.2006 / **e)** 1P.579/2005 / **f)** A. and associates v. Municipality of Bern, Prefecture of the City of Bern and Administrative Court of Bern Canton / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 132 I 49 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

3.12 **General Principles** – Clarity and precision of legal provisions.
3.13 **General Principles** – Legality.
3.16 **General Principles** – Proportionality.
3.18 **General Principles** – General interest.
3.22 **General Principles** – Prohibition of arbitrariness.
5.2.2 **Fundamental Rights** – Equality – Criteria of distinction.
5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
5.3.5 **Fundamental Rights** – Civil and political rights – Individual liberty.
5.3.28 **Fundamental Rights** – Civil and political rights – Freedom of assembly.

Keywords of the alphabetical index:

Expulsion, from a public place / Public order, threat / Policing measure / Police, power / Public safety.

Headnotes:

Decisions to expel and exclude persons from a certain place; Article 7 of the Federal Constitution (human dignity), Article 8 of the Federal Constitution (equality and prohibition of discrimination), Article 10 of the Federal Constitution (right to personal freedom), Article 22 of the Federal Constitution (freedom of association) and Article 36 of the Federal Constitution (restriction of fundamental rights).

Statutory foundation in cantonal law for temporary measures of expulsion and exclusion (recital 2).

The persons concerned cannot infer anything to their advantage from the mere invocation of the guarantee of human dignity (Article 7 of the Federal Constitution); they may avail themselves of freedom of assembly (Article 22 of the Federal Constitution), personal freedom (Article 10.2 of the Federal Constitution), the prohibition of discrimination (Article 8.2 of the Federal Constitution) and the prohibition of arbitrary action (Article 9 of the Federal Constitution; recital 5).

Statutory provision accepted as being sufficiently precise (recital 6).

Recognition of the public benefit and proportionality of the decisions to expel and exclude (recital 7).

Non-violation of the prohibition of discrimination (recital 8).

Summary:

I. During an operation carried out by the police of the city of Bern, twelve persons gathered in the city railway station underwent an identity check. The police issued to each of them an instruction not to congregate in the station or in its immediate vicinity while consuming alcohol, the prohibition being valid for three months.

The persons affected by the instruction appealed unsuccessfully to various bodies up to the Administrative Court of Bern Canton as the highest cantonal authority. Then, lodging a public law appeal, they asked the Federal Court to overturn the instruction not to congregate in the Bern railway station. In particular, they complained that it violated freedom of association and the prohibition of all discrimination.

II. The Federal Court dismissed the appeal.

The facts found in the cantonal proceedings show that the persons who underwent the identity check used to gather in the Bern railway station, consuming large quantities of alcohol, and that the floor was covered with litter and empty bottles, causing some disorder. Users of the station felt importuned and unsettled by the noise and disorderliness of this gathering.

As issued, the instruction not to congregate affected several fundamental rights. The appellants, however, could not infer anything to their advantage from the mere invocation of human dignity. To the extent that they claimed to be discriminated against because of their lifestyle and social circumstances, they referred

more specifically to the prohibition of discrimination. The challenged instruction firstly represented interference with freedom of assembly; it also affected personal freedom. These, then, were the standpoints from which the Federal Court was to determine the appeal against this temporary prohibition of assembly.

The aforementioned fundamental rights are not absolute and may be restricted according to the criteria laid down in Article 36 of the Federal Constitution. In the first place, this provision requires a statutory basis for so doing. The appellants did not deny the existence of a statutory foundation in cantonal law, but contended that the law on the police, relied upon by the authorities, lacked precision. Indeed, the principle of compliance with the law requires that laws restricting fundamental rights be accessible and sufficiently precise to ensure certainty of law, predictability of state acts, and equal treatment. The degree of precision, however, is not to be determined in the abstract but depends on the issue to be settled by applying those laws. Absolute precision is particularly unattainable in the sphere of law that governs policing. In the instant case, the cantonal law on the police defined police operations and mentioned coercive measures. It afforded a means of appeal, and the relevant case-law had defined the admissible limits of police actions. Thus, the law on the police met the requirement of an adequate statutory foundation.

As to the proportionality of the prohibition of assembly, it must be acknowledged that the measure tended to safeguard public order and safety. This aspect was all the more important considering the presence in the various parts of the station of a large number of people. The measure taken was apt to maintain public order and safety. The interference with fundamental rights was of trifling importance. The persons affected could continue using the station; assemblies of persons consuming an inordinate amount of alcohol were all that was forbidden, and moreover in a very limited area; the three-month term of the prohibition was not excessive either. Thus the challenged measure met the requirements of proportionality.

The complaint of discrimination on the ground of the appellants' lifestyle and convictions was immaterial in the instant case. The appellants did not succeed in substantiating to what extent they formed a group with distinctive characteristics and were discriminated against because of it.

Thus, the instructions requiring the appellants to leave the station premises and stay away for a certain period were compatible with fundamental rights. The public law appeal was therefore unfounded.

Languages:

German.

Identification: SUI-2006-2-004

a) Switzerland / **b)** Federal Court / **c)** Criminal Cassation Division / **d)** 11.05.2006 / **e)** 6P.45/2006 / **f)** X. v. Zurich Canton's prosecution department and Cantonal Court / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 132 I 181 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
3.17 **General Principles** – Weighing of interests.
5.3.22 **Fundamental Rights** – Civil and political rights – Freedom of the written press.

Keywords of the alphabetical index:

Media, journalist, refusal to testify / Media, journalist, source, disclosure, refusal / Media, information, source disclosure.

Headnotes:

Protection of journalists' sources; Article 17.3 of the Federal Constitution (editorial secrecy) and Article 36 of the Federal Constitution (restriction of fundamental rights); Article 10 ECHR; Article 27bis of the Swiss Penal Code (protection of sources).

Protection of journalistic sources in criminal procedure (recital 2).

The elucidation of the homicide in question is not of such paramount interest that the journalist could be compelled to disclose the sources of his information (recital 4).

Summary:

I. During an operation performed at the Zurich university hospital on 20 April 2004, a Mrs A. received a heart transplant from a donor but died three days later. An expert examination established with certitude that her death had been caused by reaction to incompatible blood typing, as her blood group was 0 and she had received the heart of a group A donor.

Criminal proceedings for homicide by negligence were instituted against B., medical professor and head doctor, who had operated on the patient. According to the findings of the inquiry, various doctors including B. had had a discussion on the night before the heart transplant operation and the fact that the donor and the patient A. were not of the same blood group had been mentioned.

On 12 June 2005 the newspaper *"NZZ am Sonntag"* published two articles by the journalist X. Under the headlines "Fatal risk in the operating theatre" and "Hazardous venture by star surgeon", X. made disclosures relying on three well-informed sources and alleging that the doctors had wittingly transplanted a "bad" heart. The investigation of charges against B., the medical professor, was later extended to that of intentional manslaughter. The public prosecutor called upon journalist X. to disclose his sources of information, which he refused to do.

The prosecutor then lodged with the competent authorities a petition under Article 27.2 of the Swiss Penal Code that the journalist be compelled to testify and to disclose his sources, failing which it would not be possible to shed light on events. The Cantonal Court granted the petition and directed X. to disclose his sources.

In a public law appeal lodged with the Federal Court, the journalist asked that the cantonal decision be set aside and that he be permitted to keep the source of his information secret.

II. The Federal Court's cassation division declared the appeal admissible.

According to Article 17.3 of the Federal Constitution, editorial secrecy is guaranteed. This guarantee is part of media freedom, securing to journalists the right freely to obtain the information needed for the performance of their task in a democratic society, and is the condition sine qua non of freedom of the press. Yet these freedoms are not absolute and may be limited. Considering the importance of editorial secrecy, only exceptional circumstances can justify interference. Accordingly, Article 27.2 of the Swiss Penal Code provides that the Court may demand journalists' sources of information if lack of testimony prevents the solution of a homicide or if the arrest of a person charged with homicide cannot proceed. Although criminal prosecution serves a paramount public interest, it does not warrant coercion to disclose sources of information in all cases of homicide. The interests must therefore be weighed in each case. Forcing a person to testify is justified only if the testimony is indispensable to clear up the circumstances of a serious offence and if there is no other evidence.

In the instant case, journalist X.'s testimony could no doubt have elucidated the actual events that occurred on the night before the operation. In so far as the investigations did not produce clear results, the journalist's testimony would in fact appear indispensable. But neither did the investigation of all those implicated furnish proof that professor B. had wittingly run the risk of transplanting into A. a heart of a different blood group. In such circumstances, it was doubtful whether the disclosure of the information sources could furnish new, conclusive evidence. In the light of the circumstances as a whole, editorial secrecy outweighed the interest of the investigation.

Languages:

German.

"The former Yugoslav Republic of Macedonia"
Constitutional Court

Important decisions

Identification: MKD-2006-2-002

a) "The former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 31.05.2006 / **e)** U.br.34/2005 / **f)** / **g)** *Sluzben vesnik na Republika Makedonija* (Official Gazette), 75/2006, 20.06.2006 / **h)** CODICES (Macedonian, English).

Keywords of the systematic thesaurus:

3.4 **General Principles** – Separation of powers.
3.9 **General Principles** – Rule of law.
5.3.5.1.3 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty – Detention pending trial.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Effective remedy.
5.3.13.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.
5.3.13.22 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Presumption of innocence.

Keywords of the alphabetical index:

Criminal procedure / Detention pending trial / Life imprisonment.

Headnotes:

A provision of the Criminal Procedure Code which obliges courts to impose detention pending trial without any discretion is unconstitutional because it shifts the constitutional position of the court as an independent body and deprives the person detained from any effective right to appeal to a court.

Summary:

A non-profit-making corporate body asked the Court to assess the constitutionality of those parts of Articles 184.2 and 185.1 of the Criminal Code which read "except when detention is compulsory".

The Court took account of Articles 8.1.4, 12.1, 12.2, 13.1 and 118 of the Constitution of the Republic of Macedonia and Amendment XXI.1.1. It also considered Articles 5.1.b, 5.3 and 6.2 ECHR, together with the provisions of the Criminal Procedure Code mentioned above, and held:

- Detention may only be defined or extended by a decision of a competent court within the parameters of the law. Thus its duration is not limited by the Constitution.

- The Constitution proclaims the irrevocability of the freedom of man as a fundamental right. It also declares that a person's freedom can only be restricted by a court decision or in circumstances defined by law. This is a safeguard against arbitrary conduct on the part of the authorities. The court's competence as an independent and autonomous body to decide upon any such restriction is a special guarantee.

- A citizen may be deprived of his or her liberty where the law provides for this and when a court decision to this effect has been made.

- A very important factor in the presumption of innocence is that the defendant does not have to suffer any legal consequences until the court judgment is final, and he or she is not to be considered guilty until he has been convicted.

- Detention restricts personal liberty and the Code contains detailed provisions about it, based on the Constitution.

- Detention is the strictest measure available to the Court, and consists of deprivation of freedom of movement, based on a resolution by a competent court, when the conditions defined in the Code have been met.

Under the Constitution, personal freedom is an irrevocable right and can only be restricted by court decision, under strict legally-defined circumstances for a duration of 180 days maximum and only as long as all conditions set by law are fulfilled (Article 12 of the Constitution).

The provision stipulating that the detention should last for the shortest time possible obliges the authorities and parties to the proceedings to act with "special urgency", if the defendant is in detention.

The Court examined the measure of compulsory detention for criminal offences carrying a penalty of life imprisonment, "*de jure* and *de facto*", irrespective of whether the authorised prosecuting attorney has requested detention. By enacting this measure, parliament has effectively prevented a judge from making his or her own judicial finding on the basis of full and careful evaluation of the facts and evidence as to whether there are grounds for detention pending trial. The disputed provisions of the Code are therefore out of line with the principle of the presumption of innocence, under Article 13 of the Constitution.

Article 184.2 of the Code places an obligation on the Court to order detention "only as a formality". As a result, it is the Code, and not the Court, making the decision about detention.

The Court ruled that the disputed provision of Article 184.2 of the Code does not conform to the fundamental value of the constitutional order under Article 8.1.4 of the Constitution (the division of state powers into legislative, executive and judicial powers). Neither is it in accordance with the principle that it is the Court which decides on the deprivation of liberty, under Article 12 of the Constitution and its Amendment III.

If a criminal panel is to decide on an appeal against a resolution by an investigating judge for compulsory detention, the panel cannot make its own assessment of all the relevant evidence and circumstances in deciding on the necessity for detention. The provisions within the legislation as to the compulsory nature of detention prevent it from doing so. In such a situation, the right to an appeal loses its fundamental nature and has only a procedural one. The Constitutional Court accordingly found that the disputed provisions of the Code did not accord with the right to an appeal as guaranteed by the Constitution.

Taking as a starting point the fact that the court must be completely independent in its decision-making processes on the justification for the imposition of detention, the Court held that the relevant articles of the Code were not in conformity with the Constitution of the Republic of Macedonia.

Languages:

Macedonian, English.

Identification: MKD-2006-2-003

a) "The former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 12.07.2006 / **e)** U.br.28/2006 / **f)** / **g)** *Sluzben vesnik na Republika Makedonija* (Official Gazette), 84/2006, 20.07.2006 / **h)** CODICES (Macedonian, English).

Keywords of the systematic thesaurus:

3.3 **General Principles** – Democracy.
3.9 **General Principles** – Rule of law.
4.5.4.3 **Institutions** – Legislative bodies – Organisation – Sessions.
5.3.24 **Fundamental Rights** – Civil and political rights – Right to information.

Keywords of the alphabetical index:

Parliament, rules of procedure.

Headnotes:

A provision of the Rules of Procedures of the Parliament of the Republic of Macedonia, which provides that a majority of the representatives may decide upon the exclusion of the public from parliamentary deliberations without debate, is unconstitutional.

Summary:

An individual petitioner asked the Court to examine the constitutionality of Article 231.2 of the Rules of Procedure of the Parliament of the Republic of Macedonia and in particular the part that reads "a majority vote of the total number of representatives".

The Court established that under Article 231.2, parliament may carry out its work without members of the public being present, if this is proposed by the President of the Assembly, the government, or at least twenty representatives. The controversial part of Article 231.2 envisages that parliament would take a decision on the proposal without a debate, with a majority vote of the total number of representatives.

The Constitution and the Rules of Procedures regulate parliamentary activities. Under Article 66.4 of the Constitution, parliament adopts the Rules of

Procedures by a two-thirds majority vote of the total number of representatives.

The Rules of Procedure contain general provisions, that is, basic norms about the work of parliament. It also contains provisions relating to the constitution of the Assembly, the rights and duties of representatives, the rights and duties of the President, Vice-President and Secretary General of the Assembly, parliamentary sessions, general elections, the election and discharge of holders of public mandates, parliamentary working parties, the programme of work, procedures for the adoption of laws and other regulations, procedures for amending the Constitution, proposals to establish liability on the part of the President of the Republic, the relationship of parliament with government and publicity of the work carried out by parliament.

Under Article 70.1 of the Constitution of the Republic of Macedonia, parliamentary sessions are to be open to the public.

The Court observed that the Rules of Procedure constitute the basic legal act regulating the work carried out by parliament. With regard to the publicity of its activities, the drafters of the Constitution made provision for parliamentary sessions to be held in public.

This approach of the Constitution is based on the fact that publicity of the work of organs of state power (in this case, parliament) is an expression of respect for fundamental rights and freedoms within a democratic society, in particular the right of citizens to be publicly informed and to free access to information.

Insofar as the Rules of Procedure provide that the public may be excluded from parliamentary deliberations by a majority vote with no debate, the Court ruled that the disputed article is not in accordance with the Constitution.

Languages:

Macedonian, English.

Turkey
Constitutional Court

Important decisions

Identification: TUR-2006-2-005

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 30.09.2005 / **e)** E.2005/78, K.2005/59 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 23.03.2006, 26117 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

1.3.4.5.5 **Constitutional Justice** – Jurisdiction – Types of litigation – Electoral disputes – Elections of officers in professional bodies.
5.3.38 **Fundamental Rights** – Civil and political rights – Non-retrospective effect of law.
5.3.41.2 **Fundamental Rights** – Civil and political rights – Electoral rights – Right to stand for election.

Keywords of the alphabetical index:

Election, professional body, ineligibility for election / Professional association, election.

Headnotes:

The stipulation that presidents of Professional Organisations of Craftsmen and Tradesmen may not be elected for more than two terms was ruled unconstitutional. The law must not have a retroactive effect. The new rules governing the elections of presidents of Professional Organisations should not be applied to existing presidents. The second sentence of Article 54/1 of Law no. 5362 does not guarantee legal protection for these organisations and is accordingly at variance with the Constitution.

Summary:

Several members of parliament petitioned the Constitutional Court regarding the repeal of the second sentence of Article 54/1 of the Law no. 5362, which governs the Professional Organisations of Craftsmen and Tradesmen. This sentence provided that presidents of organisations of craftsmen and tradesmen who have served for two consecutive

terms as President may not be re-elected until one election term has passed.

The members of parliament argued that the rules concerning the election of presidents of the Union of Chambers and Commodity Exchanges and the Union of Agricultural Chambers differ from those pertaining to the Professional Organisations of Craftsmen and Tradesmen. The organisations are similar, and so the election procedures should be the same.

Article 135.1 of the Constitution states that public professional organisations and their higher echelons are public corporate bodies established by law. Their officials are to be elected by secret ballot under judicial supervision by their members in accordance with the procedure set out in the law. It is clear from this constitutional principle that the process of election of presidents of professional organisations and their higher echelons must be regulated by law, as must their qualifications.

The principle of the rule of law is enshrined within Article 2 of the Constitution. A State governed by this principle is one which respects and upholds human rights and freedoms. Its activities must be open to judicial review. Parliament must be aware that there are fundamental principles governing the laws, which have to be respected. Legislation must contain provisions to govern situations which may arise in the future, in order to maintain stability and confidence in the law. As a rule, laws cannot be retroactively applied, except with a view to ensuring equity and to the protection of fundamental rights.

The provision under scrutiny affects current presidents of professional organisations, in that those who have served two consecutive terms as president may not be re-elected until an election term has passed. It is accordingly at variance with the principle of the rule of law. The Court held that the provision contravened Articles 2 and 11 of the Constitution and ordered its repeal. Justices Mrs F. Kantarcioglu, Mr M. Erten, Mr S. Apalak and Mr S. Kaleli put forward dissenting opinions.

Languages:

Turkish.

Identification: TUR-2006-2-006

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 05.01.2006 / **e)** E.2005/8, K.2006/2 / **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:

Licence, granting, function of the State / Expropriation, by private entity.

Headnotes:

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 and is of a permanent nature. As such, it must be performed in accordance with the principles of general administration. The Constitution provides that such functions must be carried out by public servants and other public employees. Any legislation allowing this to be done by private sector employees would be at variance with the Constitution.

Only the State or public corporations have the competence to expropriate privately-owned real estate. Public corporate bodies may, however, expropriate real estate in favour of real or legal private personalities if this is in the public interest.

Summary:

The President of the Republic requested a ruling from the Constitutional Court as to the compliance with the Constitution of certain provisions of Technology Development Zones Law no. 4691.

The Court began by examining the third sentence of Article 4.3 of Law no. 4691. This states that licences and permissions covering the use of land and the planning, building construction and usage of buildings and establishments within the technology development zones shall be given to “the administrative company”, which will then control 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. As such, it must be performed in accordance with the principles of general administration. However, the provision under scrutiny bestows these powers upon foreign private 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 statute, regulations and zoning plans. Owners must prepare plans for the usage of the land and the buildings and establishments to be set up there and submit them 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 held 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 and is 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”. This law also 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 to be unconstitutional and repealed. Justice Mr H. Kiliç put forward a dissenting opinion as to this part of the judgment.

The Court then turned to the first sentence of Article 5.5 of Law no. 4691. This provides that “administrative companies may expropriate or have real estate expropriated on their 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. This is set out in Article 46 of the Constitution. Compensation must, however, be paid in advance.

Expropriation is the termination of private ownership of real estate against the will of the owner to satisfy the needs of society as a whole. The subject of expropriation is privately owned real estate. 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, although 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-2006-2-007

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 04.05.2006 / **e)** E.2006/51, K.2006/57 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 19.01.2006, 26054 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

4.4.1 **Institutions** – Head of State – Powers.
4.6.8.1 **Institutions** – Executive bodies – Sectoral decentralisation – Universities.
5.4.21 **Fundamental Rights** – Economic, social and cultural rights – Scientific freedom.

Keywords of the alphabetical index:

University, autonomy / University, rector, appointment / Council of higher education, role.

Headnotes:

The scientific autonomy of universities requires that the political power should not intervene in the nomination process of university rectors and the Council of Higher Education must have some influence over the nomination process. According to the Constitution, the President of the Republic has competence in the appointment of university rectors. However, the details of the appointment process are left to parliament. Parliament must observe the principle of the scientific autonomy of the universities in the exercise of its regulatory power in this field.

Summary:

The President of the Republic and several members of parliament asked the Constitutional Court to order the repeal of provisional Article 1 of Law no. 5467. This statute makes amendments to a number of laws, including the Law on Higher Education.

Under the provisions of Law no. 5467, fifteen State Universities were created. Provisional Article 1 of this law stipulated that “the founder rectors of the universities established by that law shall be appointed by the President of the Republic for a term of two years from a list of three candidates nominated by the Prime Minister and the Minister of National Education.”

The President of the Republic and the members of parliament argued that the power to appoint rectors of the State universities must be left to the Council of Higher Education as it handles all other higher education and teaching matters. The provisional article, in their view, was at odds with the rule of law, the supremacy of the Constitution and the principle of scientific and administrative autonomy of the universities. It contravened Articles 2, 11, 123, 130 and 131 of the Constitution.

Article 130.1 of the Constitution states that universities are to be established by law as public corporations, with autonomy as to their teaching. Article 130.9 states that the establishment, duties, administrative bodies, Senates and other university-related issues are to be regulated by law.

Case law and legal doctrine both demonstrate that scientific autonomy is regarded as being indispensable to the performance of scientific studies within the universities. Scientific autonomy is defined as the possibility of education, research, publication and other scientific activities by university staff without pressure and direction from legal or other bodies wielding economic and political power. University staff should not feel that they are under pressure to reach conclusions which match generally accepted ideas and perceptions within society.

Administrative functions and the decision-making powers of universities are pivotal to the determination of the extent of their scientific autonomy, particularly at the stages of education, research and publication. Autonomy within universities must be structured in such a way that the university administration is not influenced by political power.

The principles of scientific and administrative autonomy are clearly inter-dependent. That is why scientific autonomy is given prominence in Article 130 of the Constitution, and a measure of protection is given to universities, to ensure their administrative autonomy.

Under Article 104 of the Constitution, the President of the Republic may appoint University rectors. Article 130.6 of the Constitution requires him to select them in accordance with the procedures and provisions prescribed by law. Thus, the President of the Republic has the power to select university rectors as well as the power to appoint them. However, the Constitution does not specify whether he should appoint them directly or from a list suggested by another authority. The qualifications required by University Rectors are not mentioned in the Constitution either. Parliament has competence within this sphere, and it is clear that provisions related to the nomination of rectors are to be regulated by law. Any such regulation must, however, be drafted in such a way that the President of the Republic can exercise his power of appointment in the way which was intended and so that the scientific autonomy of the universities is not violated.

The principle of scientific autonomy and the provisions of Article 131 of the Constitution require that the Council of Higher Education should have influence over and involvement in the process of appointment of University Rectors. They represent the university as a whole and have prime responsibility for education, scientific research and publication activities, and university administration and inspection matters. As Law no. 5467 has set up new universities, the process of appointment of their rectors may be different from that stipulated in Law no. 2547 on Higher Education. This does not mean that the Council of Higher Education may be excluded from the nomination process in new universities. If this is the case, it is at variance with the Constitution.

The provision in question was therefore repealed. Justices Serdar Özgüldür, Şevket Apalak, Haşim Kiliç and Sacit Adali put forward dissenting opinions on certain points.

Languages:

Turkish.

United States of America
Supreme Court

Important decisions

Identification: USA-2006-2-003

a) United States of America / **b)** Supreme Court / **c)** / **d)** 15.06.2006 / **e)** 04-1360 / **f)** Hudson v. Michigan / **g)** 126 *Supreme Court Reporter* 2159 (2006) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.17 **General Principles** – Weighing of interests.
5.3.13.17 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Rules of evidence.
5.3.35 **Fundamental Rights** – Civil and political rights – Inviolability of the home.

Keywords of the alphabetical index:

Evidence, admissibility / Evidence, destruction, risk / Evidence, exclusionary rule / Evidence, illegally obtained.

Headnotes:

Under the constitutional “knock and announce” rule, failure by the police to knock and announce their presence when executing a search warrant at an individual’s home might serve as a basis for finding a search of the home illegal, thereby triggering application of the exclusionary rule that makes any evidence obtained subject to suppression in judicial proceedings.

When executing a search warrant at an individual’s home, constitutional prohibitions against illegal searches and seizures do not require police officers to knock and announce their presence when circumstances present a threat of physical violence, or if there is reason to believe that evidence would likely be destroyed if advance notice were given, or if knocking and announcing would be futile.

In deciding in a particular case whether a violation of the “knock-and-announce” requirement requires suppression of evidence, courts must not apply the

exclusionary rule indiscriminately; instead, they must balance the deterrence benefits of enforcing the requirement against the substantial social costs of suppressing evidence.

Summary:

I. Police in the city of Detroit, state of Michigan, obtained a warrant authorizing a search for illegal drugs and firearms at the home of petitioner Booker Hudson. When the police arrived to execute the warrant, they announced their presence, but waited only a short time – perhaps three to five seconds – before turning the knob of the unlocked front door and entering Hudson's home. Upon entry, they discovered large quantities of drugs and a loaded gun. Hudson was charged under Michigan law with unlawful drug and firearm possession.

Prior to conclusion of his trial, Hudson moved to suppress all of the drug and firearm evidence, arguing that the premature entry violated his rights protected under the Fourth Amendment to the U.S. Constitution. The Fourth Amendment states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Under the "exclusionary rule" remedy adopted by the U.S. Court in its 1914 *Weeks v. United States* decision, illegally obtained evidence may be subject to suppression in related judicial proceedings in which the state would seek to introduce that evidence. The Court began applying the exclusionary rule to the states, by means of the Fourteenth Amendment, in its 1961 *Mapp v. Ohio* decision. Specifically, in seeking suppression of the evidence, Hudson invoked the so-called "knock-and-announce" rule, which the U.S. Supreme Court recognised as a matter of constitutional dimension in *Wilson v. Arkansas* (1995). Under that rule, failure by the police to observe the knock-and-announce requirement would serve as a basis for finding a search of the home illegal, thereby making any evidence obtained subject to the exclusionary rule. The knock-and-announce rule requires the police to announce their presence and provide residents an opportunity to open the door.

The Michigan state trial court granted Hudson's motion. On a review prior to conclusion of his trial, the Michigan state Court of Appeals reversed. The Court of Appeals relied on Michigan Supreme Court cases that ruled that suppression is not an appropriate remedy when entry is made pursuant to a warrant, but without the proper knocking and announcement. The Michigan Supreme Court declined to review the Court of Appeals decision, and Hudson was convicted of drug possession at the trial court. He renewed his Fourth Amendment claim on appeal, but the Court of Appeals rejected it and affirmed the conviction. The Michigan Supreme Court again declined review, and the U.S. Supreme Court accepted Hudson's petition for review of the first decision of the Michigan Court of Appeals.

II. The U.S. Supreme Court affirmed the decision of the Michigan Court of Appeals. The Court noted that Michigan had conceded that the entry was a knock-and-announce violation, and that therefore the only issue was whether the exclusionary rule was the appropriate remedy for such a violation. In this regard, the Court recalled that it long had rejected indiscriminate application of the exclusionary rule. It stated that it is not necessary for police officers to knock and announce when circumstances present a threat of physical violence, or if there is reason to believe that evidence would likely be destroyed if advance notice were given, or if knocking and announcing would be futile. In addition, the Court stated that exclusion would not be required simply because the evidence in question would not have been obtained except for the constitutional violation. Instead, the Court articulated a balancing test: suppression of evidence will be applied as a remedy only where its deterrence benefits outweigh its substantial social costs. The Court identified the interests that the constitutional guarantee protects, such as the protection of human life and physical safety (because an unannounced entry may provoke violence from a surprised resident), as well as of protection of property and the privacy and dignity of individuals, and stated that it does not protect one's interest in preventing the government from seeing or taking evidence described in a warrant. It also described some of the social costs to be weighed against deterrence: the risk of releasing dangerous criminals, the threat to judicial economy from "a constant flood of alleged failures to observe" the exclusionary rule, and the risk that a decision to refrain from a timely entry might produce preventable violence against police officers or destruction of evidence. In the factual circumstances of the instant case, the Court concluded that the value of deterrence was outweighed by the social costs of applying the exclusionary rule. Therefore, the violation of the knock-and-announce rule did not require suppression of the evidence used against Hudson.

Supplementary information:

Four of the nine Justices dissented from the Court's judgment, with Justice Breyer filing a dissenting

opinion. In that opinion, Justice Breyer stated that the Court's decision was a significant departure from legal principles set forth in the Court's precedents. In this regard, he attached an appendix of prior Court decisions applying the exclusionary rule. As a practical matter, he said, the decision would serve to destroy the strongest legal incentive for the police to comply with the knock-and-announce requirement.

Cross-references:

- *Weeks v. United States*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914);
- *Mapp v. Ohio*, 367 U. S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961);
- *Wilson v. Arkansas*, 514 U.S. 927, 115 S.Ct. 1914, 131 L.Ed.2d 976 (1995).

Languages:

English.

Identification: USA-2006-2-004

a) United States of America / **b)** Supreme Court / **c)** / **d)** 28.06.2006 / **e)** 04-10566, 05-51 / **f)** Sanchez-Llamas v. Oregon / **g)** 126 *Supreme Court Reporter* 2669 (2006) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

2.1.1.4.19 **Sources** – Categories – Written rules – International instruments – International conventions regulating diplomatic and consular relations.
2.2.1.2 **Sources** – Hierarchy – Hierarchy as between national and non-national sources – Treaties and legislative acts.
4.7.6 **Institutions** – Judicial bodies – Relations with bodies of international jurisdiction.
4.8.8.3 **Institutions** – Federalism, regionalism and local self-government – Distribution of powers – Supervision.
5.3.13.17 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Rules of evidence.

Keywords of the alphabetical index:

Proceedings, irregularity / Evidence, admissibility / Evidence, exclusionary rule / Treaty / Consular assistance, right / Foreigner, detention / Foreigner, consular assistance, right / Vienna Convention on Consular Relations, effectiveness.

Headnotes:

Highest federal court lacks authority to exercise supervisory authority over courts of the states in the form of a remedy of suppression of evidence in criminal proceedings, unless such authority is found in a federal constitutional requirement or in an explicit applicable international treaty provision which then will operate as a requirement of federal law.

An international court's interpretation of an applicable treaty provision deserves respectful consideration in the domestic courts, but is not binding on them.

An international court's interpretation of an applicable treaty provision does not take precedence over a conflicting procedural default rule designed to advance the finality of judicial proceedings in which all appellate remedies have been exhausted.

Summary:

Petitioner Moises Sanchez-Llamas, a citizen of Mexico, was found guilty in a court in the state of Oregon of multiple crimes stemming from a shootout with police. Petitioner Mario Bustillo, a citizen of Honduras, was convicted of murder in a court of the state of Virginia.

Both men sought relief in the respective state courts from their convictions and sentences on the basis of the Vienna Convention on Consular Relations ("VCCR"). The United States ratified the VCCR in 1969, along with the Optional Protocol Concerning the Compulsory Settlement of Disputes. The Optional Protocol grants the International Court of Justice compulsory jurisdiction to decide disputes arising out of the VCCR. The United States withdrew from the Protocol on 7 March 2005. Sanchez-Llamas and Bustillo based their claims on Article 36.1.b of the VCCR, which provides that if a person detained by a foreign state-party "so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State" of such detention, and "inform the [detainee] of his rights under this sub-paragraph." In both of their cases, it was undisputed that the authorities did not comply with Article 36.1.b. Because of this, Sanchez-Llamas both before and after his conviction asked the Oregon

courts to suppress evidence in the form of incriminating statements that he had made to the police after his arrest. The trial denied his motion for application of such an exclusionary rule remedy and the Oregon appellate courts affirmed that decision. Bustillo did not invoke the VCCR until after his trial and appeals in the Virginia courts. After his conviction became final, he sought relief on the ground that he would have communicated with the Honduran Consulate if he had known about his right to do so. In addition, he filed a claim of ineffective assistance counsel because his attorney had not informed him of his rights under Article 36.1.b. The Virginia state court dismissed the first claim as procedurally barred because he failed to raise the issue at trial or on appeal.

The U.S. Supreme Court accepted review of the state court decisions in order to decide three questions:

1. whether VCCR Article 36 grants rights that may be invoked by individuals in a judicial proceeding;
2. whether suppression of evidence is a proper remedy for a violation of Article 36; and
3. whether an Article 36 claim may be deemed forfeited under state procedural rules because a defendant failed to raise the claim at trial.

The Court concluded that the petitioners were not entitled to relief under the second and third questions, respectively, and that therefore it was not necessary to resolve the first.

Regarding the suppression of evidence, the Court concluded that it lacked authority over state court proceedings in these circumstances because suppression is an exercise of higher court supervisory authority and the U.S. Supreme Court does not hold such supervisory authority over state courts. An exception to this rule might be found in the U.S. Constitution or in an explicit treaty provision, which would then be applied as superior federal law, but the Court noted that the VCCR does not prescribe specific remedies for violations of Article 36. Instead, the Court stated, Article 36.2 leaves the implementation of Article 36.1 to domestic law. The Court also rejected an argument by Sanchez-Llamas that the VCCR text implicitly requires a judicial remedy. The Court concluded that it does not, and emphasised that its interpretation would govern because the question of the availability of the exclusionary rule for Article 36 violations is a matter of domestic law. In sum, the Court ruled that neither the Article 36 text nor the Court's precedents applying the exclusionary rule supported suppression of Sanchez-Llamas' statements to the police.

In seeking to overturn the Virginia court decision applying that state's procedural default rule, Bustillo argued that the rule cannot apply to claims under Article 36. In this regard, he cited recent International Court of Justice ("ICJ") rulings in two cases involving the VCCR: the 2001 *LaGrand (Germany v. U.S.)* decision and the 2004 *Avena (Mexico v. U.S.)* decision. These decisions were rendered after the Supreme Court's 1998 *Breard v. Greene* decision, in which the Supreme Court declined to apply Article 36 to set aside application of Virginia's procedural default rule. In *LaGrand* and *Avena*, the ICJ ruled that application of procedural default rules in cases where individuals had not been advised of their Article 36.1.b rights failed to give "full effect" to the VCCR's purposes. As a result, Bustillo argued that the Supreme Court should revisit its *Breard* holding. In addition, several intervenors in their filings contended that the United States is obliged to comply with the VCCR as interpreted by the ICJ. The Supreme Court rejected these arguments, stating that although the ICJ's interpretation deserves "respectful consideration", it does not compel the Court to reconsider the interpretation of the VCCR made in *Breard*. The Court also declined to adopt the ICJ interpretation on the basis of "respectful consideration", noting that the interpretation would be "inconsistent with the basic framework of an adversary system": an established principle in the U.S. legal system. For these reasons, following *Breard*, the Court denied Bustillo's claim.

The Court's judgment was adopted by a 6-3 vote among the Justices. Justice Ginsburg filed a separate concurring opinion, and Justice Breyer authored a separate dissenting opinion. In his opinion, Justice Breyer argued that the Court should have given greater weight to the ICJ's interpretations of the treaty provisions.

Cross-references:

- *Breard v. Greene*, 523 U.S. 371 (1998).

Languages:

English.

Identification: USA-2006-2-005

a) United States of America / **b)** Supreme Court / **c)** / **d)** 29.06.2006 / **e)** 05-184 / **f)** Hamdan v. Rumsfeld / **g)** 126 *Supreme Court Reporter* 2749 (2006) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

2.1.1.4.3 **Sources** – Categories – Written rules – International instruments – Geneva Conventions of 1949.
2.1.3.1 **Sources** – Categories – Case-law – Domestic case-law.
3.4 **General Principles** – Separation of powers.
4.6.2 **Institutions** – Executive bodies – Powers.
4.7.1 **Institutions** – Judicial bodies – Jurisdiction.
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*.

Keywords of the alphabetical index:

Conspiracy / Terrorism, suspect, detention, length / Geneva Convention of 1949 / Guantanamo, detainee.

Headnotes:

In establishing special institutions for trial of non-citizens detained during armed conflict and charged with violations of laws of war, the acts of the executive branch lack authority unless given sufficiently explicit legislative authorisation or are otherwise justified under the constitution or case-law on the law of war.

International treaty standards are applicable and relevant to the determination of whether bodies for trial of certain individuals are lawful in respect to their structure and composition.

Summary:

In November 2001, the petitioner Salim Ahmed Hamdan, a Yemeni national, was captured by militia forces and turned over to the U.S. military during hostilities in Afghanistan. Since June 2002, he has been detained at the U.S. naval base at Guantanamo Bay, Cuba. In 2003, the President of the United States determined that Hamdan was eligible for trial by a military commission established pursuant to a 13 November 2001 presidential military order governing the "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism". In July 2004, the military commission proceedings commenced and Mr Hamdan was charged with conspiracy to commit a number of offenses, including: attacking civilians; murder by an unprivileged belligerent; and terrorism.

Meanwhile, in April 2004, Hamdan's counsel had filed a petition in U.S. District Court for a writ of *habeas corpus* (a judicial order to review the legality of an individual's detention). The petition alleged that the military commission lacked authority to try him. In November 2004, the U.S. District Court for the District of Columbia granted Hamdan's petition and placed a stay on the military commission proceedings against him. In July 2005, the U.S. Court of Appeals for the District of Columbia reversed the lower court's decision.

In November 2005, the U.S. Supreme Court accepted review of the Court of Appeals decision, in order to decide:

1. whether the military commission had authority to conduct proceedings against Hamdan; and
2. whether in these proceedings Hamdan was entitled to rely on the 1949 Geneva Conventions governing treatment of certain persons during times of armed conflict.

II. On 29 June 2006, the Supreme Court reversed the decision of the Court of Appeals, ruling that the President lacked authority to establish the system of military commissions set forth in his 13 November 2001 order. The Court addressed a number of issues and decided them by interpreting and applying the U.S. common law of war, U.S. statutes, and Common Article 3 of the Geneva Conventions. The Court initially rejected the government's procedural defenses. It ruled that the 2005 Detainee Treatment Act, by which the U.S. Congress stripped the courts of jurisdiction to consider *habeas corpus* petitions filed by Guantanamo Bay detainees, was not applicable because Hamdan's petition had been filed prior to the Act's effective date. It also rejected the government's contention that a civilian court should abstain from intervening in an on-going military proceeding.

On the substantive questions, the Court determined that the U.S. Congress had not made explicit legislative authorisation for the President's system of military commissions. It concluded this after examining three acts of the U.S. Congress: the Uniform Code of Military Justice; the 18 September 2001 Resolution entitled the "Authorisation for Use of Military Force"; and the 2005 Detainee Treatment Act. The Court then examined judicial practice and precedent to determine whether, under its 1942 decision in *Ex parte Quirin*, the President's establishment of military commissions was justified under the "Constitution and laws", including the law of

war. The Court concluded that it was not, in large part because the crime of conspiracy is not a recognised offense under the law of war. Finally, the Court held that the military commission was not authorised to proceed against Hamdan because its structure and composition, as well as certain of its procedural rules (such as preclusion of the accused and his counsel from certain evidence used in the proceeding, and the use of certain types of evidence not normally admissible in criminal trials and court-martial proceedings) were not consistent with standards for courts-martial in the Uniform Code of Military Justice and the minimum requirements in Common Article 3 of the Geneva Conventions. In regard to Common Article 3, the Court did not accept the government's arguments that the Geneva Conventions are not judicially enforceable and that Hamdan was outside the scope of their protections.

Although the Court's opinion was based on its interpretation and application of legislative acts, judge-made law, and a treaty, the overall tenor of this decision, particularly when read in conjunction with the concurring and dissenting opinions, reflects consideration of fundamental questions associated with the allocation, balance, and separation of powers in the U.S. governmental structure. These include the extent to which the Constitution requires the President, when invoking the powers of Commander-in-Chief, to act upon explicit authorisation of the legislative branch, and the amount of judicial deference to be granted executive branch determinations that certain acts are necessary to exercise those powers effectively. The decision also highlights important questions about the allocation of authority between the executive and judiciary for interpretation of treaty provisions.

The Court's judgment was adopted by a 5-3 vote among the Justices. Chief Justice Roberts did not participate in the case because he was one of the two judges who had voted to uphold the military commissions in the Court of Appeals decision. Justice Kennedy, while he was among the five-Justice majority, wrote a separate concurring opinion and declined to join the Court's opinion on the questions of the conspiracy charge and the commission's procedures. Justice Breyer also wrote a concurring opinion. Justices Scalia, Thomas, and Alito authored separate dissenting opinions. Justice Scalia's opinion focused on the Court's determinations regarding the applicability of the Detainee Treatment Act and the abstention doctrine. The opinions of Justices Thomas and Alito were devoted primarily to the Court's rulings on the substantive questions.

Supplementary information:

This case received, and continues to receive, great attention among the public and within the U.S. government. Its aftermath includes the intense debate in the U.S. Congress in August and September 2006, over legislation sought by the executive branch (and adopted by the Congress in late September) to establish military commissions on a basis that will meet both the war power concerns of the executive branch and the standards set forth in the Court's *Hamdan* decision.

Cross-references:

- *Ex parte Quirin*, 317 U.S. 1 (1942).

Languages:

English.

Inter-American Court of Human Rights

Important decisions

Identification: IAC-2006-2-005

a) Organisation of American States / **b)** Inter-American Court of Human Rights / **c)** / **d)** 08.09.2005 / **e)** Series C 130 / **f)** Yean and Bosico Children v. The Dominican Republic / **g)** Secretariat of the Court / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

1.6.2 **Constitutional Justice** – Effects – Determination of effects by the court.
3.20 **General Principles** – Reasonableness.
5.3.8 **Fundamental Rights** – Civil and political rights – Right to citizenship or nationality.
5.3.17 **Fundamental Rights** – Civil and political rights – Right to compensation for damage caused by the State.
5.3.44 **Fundamental Rights** – Civil and political rights – Rights of the child.
5.4.2 **Fundamental Rights** – Economic, social and cultural rights – Right to education.

Keywords of the alphabetical index:

Damage, psychological, concept / Damage, compensation, non-economic loss / Education, duty of the State / Citizenship, *ius soli* / Name, right / Citizenship, deprivation / Citizenship, right / Rehabilitation and compensation, right / Birth, registration, requirement / Statelessness, prevention.

Headnotes:

The right to nationality is a non-derogable fundamental human right for all human beings.

Lack of nationality and statelessness deprive stateless persons of their recognised legal personality, denying them fundamental civil and political rights, placing them in an extremely vulnerable position and hindering their access to basic rights, such as housing, education and health care.

The right to a name is a fundamental and essential component of the identity of an individual for his recognition by society.

States must protect a person's right to a name, and put in place the necessary measures to facilitate the registration of an individual, immediately after his birth.

Nationality shall be granted at birth or upon application. Such an application may not be rejected arbitrarily.

A person's migratory status cannot be a condition for the State to grant or refuse nationality; neither can it be transmitted to his children.

The requirements needed to prove that somebody was born within a State's territory should be reasonable, clear and objective, and should not present an obstacle to the enjoyment of the right to nationality.

Summary:

I. On 11 July 2003, the Inter-American Commission on Human Rights asked the Court to decide whether the Dominican Republic had infringed various articles of the American Convention on Human Rights. These included Article 3 ACHR (the right to a legal personality), Article 8 ACHR (the right to a fair trial), Article 19 ACHR (rights of the child), Article 20 ACHR (right to nationality), Article 24 ACHR (right to equal protection), and Article 25 ACHR (right to judicial protection). The above articles were to be examined against the background of Article 1.1 ACHR (obligation to respect rights) and Article 2 ACHR (domestic legal effects). It was suggested that the Dominican Republic's infringements were to the detriment of two children, Dilcia Oliven Yean and Violeta Bosico Cofi. The petitioners alleged violation of other articles of the Convention, including Article 5 ACHR (right to humane treatment), Article 12 ACHR (freedom of conscience and religion), Article 17 ACHR (rights of the family), Article 18 ACHR (right to a name) and Article 26 ACHR (progressive development), also in relation to Articles 1.1 and 2 ACHR.

The Constitution of the Dominican Republic stipulates that all those born on its territory are Dominicans, under the principle of *ius soli*, apart from children of foreigners who are in transit. Dilcia Yean and Violeta Bosico were both born in the Dominican Republic, in 1996 and 1985, respectively. On 5 March 1997, the two girls applied for late registration of their birth before the competent Civil Status Registry Office. At first, their application was denied. Eventually, on

25 September 2001, the State granted birth certificates to the two children. The Dominican Republic had left the two girls stateless for over four years, and arbitrarily denied them their legal personality. They were obliged to live on a long-term basis in an illegal situation, which left them extremely vulnerable and with limited access to housing, health care, sanitation and education services. Violeta Bosico was unable to attend regular day school for one year as she did not have an identity document, and instead had to attend adult evening classes, which were not appropriate for her needs. This caused suffering, uncertainty, anxiety and insecurity for both girls, their mothers and Violeta's sister.

II. By a judgment of 8th September 2005, the Court rejected the three preliminary objections filed by the State of non-exhaustion of domestic remedies, non-compliance with a friendly settlement, and lack of jurisdiction *ratione temporis*.

The Court also held that the State violated Articles 3, 18, 20 and 24 ACHR, in the context of Articles 19 and 1.1 ACHR, to the detriment of Dilcia Yean and Violeta Bosico. It was also in breach of Article 5 ACHR in the context of Article 1.1 ACHR, to the detriment of the girls' mothers and Violeta's sister.

The Court ordered the State to acknowledge its international responsibilities publicly and to apologise to the victims. The State was also ordered to adopt legal and administrative measures, under the Convention, with a view to the regulation of the pprocedure and requirements for acquiring Dominican nationality based on a late declaration of birth. The Court also ordered the State to recompense the girls for moral damage and to pay their costs and expenses.

Judge Cançado Trindade wrote a separate opinion.

Languages:

Spanish.

Identification: IAC-2006-2-006

a) Organisation of American States / **b)** Inter-American Court of Human Rights / **c)** / **d)** 12.09.2005 / **e)** Series C 132 / **f)** Gutiérrez Soler v. Colombia / **g)** Secretariat of the Court / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

5.3.3 **Fundamental Rights** – Civil and political rights – Prohibition of torture and inhuman and degrading treatment.
5.3.4 **Fundamental Rights** – Civil and political rights – Right to physical and psychological integrity.
5.3.5.1.1 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty – Arrest.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Effective remedy.
5.3.17 **Fundamental Rights** – Civil and political rights – Right to compensation for damage caused by the State.

Keywords of the alphabetical index:

Damage, psychological, concept / Damage, compensation, non-economic loss / Detainee, rights / Detention, conditions / Detention, unlawful / Integrity, physical, right / Investigation, effective, requirement / Obligation, international, state / Rehabilitation and compensation, right / Torture, in police custody / Treatment or punishment, cruel and unusual / State, duty to protect fundamental rights and freedoms.

Headnotes:

The American Convention on Human Rights obliges the State to respect and guarantee the rights of all persons within its jurisdiction. Where there is an accusation or good reason to believe that an act of torture has been committed, the State must immediately launch an effective investigation in order to identify those responsible, bring them to trial and punish them.

If the victim has been the target of a very lengthy campaign of threats and attacks against his life and security, which may also have affected his family, this prevents him from achieving his expectations of personal and vocational development and causes irreparable damage to his life. Sometimes he will have to sever family ties and seek refuge abroad, often with severe financial and emotional problems. Specific forms of torture, such as sexual abuse, not only cause the victim physical harm and moral damage, but also have a profound and debilitating impact on his self-esteem and his ability to form relationships.

Summary:

I. On 26 March 2004, the Inter-American Commission on Human Rights filed a court application against the State of Colombia in relation to the cruel, inhumane and degrading treatment and the arbitrary arrest of Mr Wilson Gutiérrez Soler. The Inter-American Commission also complained about the lack of a full, effective and impartial investigation into the facts and the apparent impunity of those responsible. The Commission suggested that the State had violated Article 5.1, 5.2 and 5.4 ACHR (right to humane treatment), Article 7.1, 7.2, 7.3, 7.4, 7.5 and 7.6 ACHR (the right to personal liberty), Article 8.1, 8.2.d, 8.2.e, 8.2.g and 8.3 ACHR (the right to a fair trial) and Article 25 ACHR (the right to legal protection). These articles were to be viewed in the context of Article 1.1 ACHR (the obligation to respect rights). This had had a detrimental effect on Mr Gutiérrez Soler. The State acquiesced to the Inter-American Commission's claims, acknowledged its international responsibilities and apologized to Mr Gutiérrez Soler and his next of kin.

II. In its Judgment of 12 September 2005, the Court found that the arbitrary arrest, imprisonment and cruel, inhumane and degrading treatment inflicted upon Mr Gutiérrez Soler caused him serious physical and psychological harm. He and his family were the victims of a campaign of threats and attacks on their lives, which meant that they constantly had to move, change occupation and seek refuge abroad. This caused them poverty and instability. The Court also held that the facts of the case had not been investigated properly, neither had those responsible been brought to justice.

It accordingly ruled that the State had breached the articles of the Inter-American Convention mentioned overleaf, against the background of Article 1.1 ACHR, to the detriment of Mr Wilson Gutiérrez Soler. The Court also found that the State had not complied with the obligations enshrined in Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture, to the detriment of Mr Wilson Gutiérrez Soler. It had also infringed Article 5.1 ACHR, to the detriment of Mr Wilson Gutiérrez Soler's family.

The Court ordered the State to carry out a full and effective investigation of the facts of the case and to bring to justice and punish those responsible. Mr Wilson Gutiérrez Soler and his family were to receive psychological and psychiatric treatment. The State was also ordered to ensure that police and military criminal court staff received training on the jurisprudence of the Inter-American System of Human Rights Protection, and to reinforce the existing control mechanisms in State detention centres. The Court also ruled that the State had a special duty of care to protect the life, integrity and security of Mrs Wilson and Ricardo Gutiérrez Soler and their families, and to make recompense for the material and moral damages to Mr Wilson Gutiérrez Soler and his next of kin, as well as the costs and expenses they had incurred.

Judges García Ramírez, Cançado Trindade and Jackman wrote separate opinions.

Supplementary information:

On 11 March 2005, the Court had issued a resolution ordering the State to adopt temporary measures in order to protect the life, personal integrity and liberty of Mrs Wilson and Ricardo Gutiérrez Soler and their families.

Languages:

Spanish.

Identification: IAC-2006-2-007

a) Organisation of American States / **b)** Inter-American Court of Human Rights / **c)** / **d)** 15.09.2005 / **e)** Series C 133 / **f)** Raxcacó Reyes v. Guatemala / **g)** Secretariat of the Court / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

5.1.4.1 **Fundamental Rights** – General questions – Limits and restrictions – Non-derogable rights.
5.3.2 **Fundamental Rights** – Civil and political rights – Right to life.
5.3.3 **Fundamental Rights** – Civil and political rights – Prohibition of torture and inhuman and degrading treatment.
5.3.4 **Fundamental Rights** – Civil and political rights – Right to physical and psychological integrity.

Keywords of the alphabetical index:

Damage, psychological, concept / Death penalty, application, mandatory, human rights violation / Death row phenomenon, treatment or punishment, cruel and unusual / Obligation, international, state / Penalty, excessive / Penalty, mandatory / Penalty, proportionality / Prisoner, treatment / Punishment, adaptation to personal circumstances of offender.

Headnotes:

The death penalty may not be extended to crimes to which it did not previously apply under domestic law. This prohibition is infringed where the *nomen iuris* of a crime remains unaltered, but the factual assumptions contained in the corresponding crime categories change substantially, to the extent that it becomes possible to apply the death penalty for actions that were not previously punishable by this sanction.

Summary:

The death penalty was designed for truly exceptional circumstances, for those crimes that affect most severely the most important individual and social goods, and therefore merit the most severe punishment, always taking into account the circumstances of the case *sub judice*.

The mandatory death penalty treats those accused not as individual, unique human beings, but as indistinguishable, faceless members of a mass who will be subjected to the blind application of the death penalty, with no consideration of the specific circumstances of the crime and of the accused, such as his criminal record, the motive, the extent and severity of the harm caused, and possible extenuating or aggravating circumstances. Such an automatic and mandatory application of the death penalty violates the prohibition on arbitrarily depriving somebody of his life.

The violation of human rights by self-executing laws, whether they be individual or collective, occurs upon their promulgation. The mere existence of a provision establishing the mandatory death penalty and expanding the number of crimes punishable with this sanction constitutes, *per se*, a violation of Article 2 ACHR, even when the execution has not yet taken place.

The so-called “death row phenomenon,” consisting of a prolonged period of detention awaiting execution, during which the condemned suffers mental anguish and is subject to extreme tension and psychological trauma, involves cruel, inhuman and degrading treatment.

In all cases in which the death penalty is imposed, it is necessary to consider the condemned person’s personal circumstances, the conditions of his detention while he awaits execution and the duration of the detention prior to the execution.

Languages:

Spanish.

Identification: IAC-2006-2-008

a) Organisation of American States / **b)** Inter-American Court of Human Rights / **c)** / **d)** 15.09.2005 / **e)** Series C 134 / **f)** “Mapiripán Massacre” v. Colombia / **g)** Secretariat of the Court / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

1.3.1.1 **Constitutional Justice** – Jurisdiction – Scope of review – Extension.
1.6.2 **Constitutional Justice** – Effects – Determination of effects by the court.
4.7.11 **Institutions** – Judicial bodies – Military courts.
5.3.2 **Fundamental Rights** – Civil and political rights – Right to life.
5.3.3 **Fundamental Rights** – Civil and political rights – Prohibition of torture and inhuman and degrading treatment.
5.3.4 **Fundamental Rights** – Civil and political rights – Right to physical and psychological integrity.
5.3.6 **Fundamental Rights** – Civil and political rights – Freedom of movement.
5.3.10 **Fundamental Rights** – Civil and political rights – Rights of domicile and establishment.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Effective remedy.
5.3.17 **Fundamental Rights** – Civil and political rights – Right to compensation for damage caused by the State.
5.3.44 **Fundamental Rights** – Civil and political rights – Rights of the child.

Keywords of the alphabetical index:

Damages, compensation, non-economic loss / Disappearance, forced / Displaced person, right to return / Obligation, international, state / Rehabilitation and compensation, right / Obligation, positive / Investigation, obligation.

Headnotes:

Acts committed by private third parties against civilians may be attributed to a State if there has been support, direct or indirect collaboration, tolerance or acquiescence by public authorities in the infringement of the rights enshrined in the American Convention on Human Rights, or omissions that enabled these violations to take place. An example would be the failure to investigate them properly.

States are obliged to accord preferential treatment to displaced persons, and to take positive steps to reverse the effects of the displacement, even if this has happened through the actions of private third parties.

The right of freedom of movement is violated when internally displaced persons are, to all intents and purposes, prevented from returning home due to concerns about inadequate safety measures, and when the State has not carried out a proper investigation as to the facts that led to the internal displacement with a view to punishing those responsible.

Reparation of a right protected by the American Convention on Human Rights cannot be restricted to a mere civil liability and to a payment of compensation to the victim's next of kin. Rather, the State is under an obligation to identify and prosecute those responsible.

Breaches of certain human rights, for example the rights to life, personal liberty and to humane treatment, are made even worse if an effective investigation does not take place and the culprits are not brought to justice. Compliance with Article 4 ACHR (the right to life) in this context does not simply impose a negative obligation on the State to ensure that nobody is arbitrarily deprived of his life. It also imposes the positive obligation on the State to take any steps necessary to protect and preserve the right to life. This includes all State institutions such as police forces and armed forces.

In cases of extra-legal executions, the State has the duty to begin, *ex officio* and promptly, a serious, impartial and effective investigation. This is not to be perceived as a mere formality. The onus should not be on the victims or their representatives to bring about such an investigation.

The Court has the authority and even the duty to apply the relevant legal provisions to a case, even if the parties do not explicitly invoke them.

Special protective measures are necessary for children who are the victims of human rights violations in internal armed conflicts.

Military criminal jurisdiction must have a limited and exceptional scope, only applicable to crimes with a direct effect on the legal issues surrounding military orders.

Summary:

I. On 5 September 2003, the Inter-American Commission on Human Rights filed an application before the Court against the State of Colombia in relation to the "Mapiripán Massacre". The Commission asked the Court to determine whether the State had violated Articles 4, 5 and 7 ACHR, in relation to Article 1.1 ACHR, to the detriment of the alleged victims of the massacre. The Court also had to decide whether the State had contravened Articles 8.1 and 25 ACHR, in relation to Article 1.1 ACHR, to the detriment of the alleged victims and their next of kin. The representatives alleged, in addition, a violation of Articles 19 and 22 ACHR. The State of Colombia submitted its acquiescence to a violation of Articles 4.1, 5.1, 5.2, 7.1 and 7.2 ACHR to the detriment of the victims of the massacre, and partially acknowledged its international responsibility for the facts of the case.

II. In its Judgment of 15 September 2005, the Court noted that between 15 and 20 July 1997, over one hundred members of a paramilitary group known as the *"Autodefensas Unidades de Colombia"* (referred to here as "AUC") intimidated and terrorised the inhabitants of Mapiripán. They impeded their free movement, kidnapped, tortured, killed approximately forty nine individuals, including children, and threw their remains in a river. As a result, many inhabitants had to seek refuge elsewhere. The Court held that the massacre could not have been prepared and carried out without the logistical support, collaboration, and acquiescence of the Armed Forces of Colombia.

Eight years after the massacre, most of those responsible had yet to be identified and brought to trial.

The Court held that the State had violated the rights to life, humane treatment, and personal liberty under the American Convention on Human Rights, of the "approximately 49 individuals" for which the State had acknowledged responsibility, as well as Article 5.1 and 5.2 ACHR, to the detriment of the victims' next of kin. The State infringed the rights of the child, to the detriment of certain specified minors of Mapiripán. The State also infringed the rights to freedom of

movement and residence to the detriment of the identified displaced persons, many of whom were children. Finally, the State violated the rights to a fair trial and to judicial protection, under Articles 8.1 and 25 ACHR, to the detriment of the victims' next of kin.

The Court ordered the State to take various measures:

- to investigate the facts and prosecute those responsible;
- to identify each victim who had been executed or who had "disappeared", as well as their next of kin;
- to ensure a safe and secure return to Mapiripán for the displaced;
- to put in place permanent training schemes on human rights and international humanitarian law for the Colombian Armed Forces;
- to recompense the victims and their next of kin for the material and moral damage, as well as their costs and expenses.

Judge Cançado Trindade and Judge *ad hoc* Zafra Roldán wrote separate opinions.

Supplementary information:

On 7 March 2004, the Court issued a Judgment on Preliminary Objections and Acknowledgement of Responsibility in the case in point. It also issued a Resolution on Provisional Measures on 27 June 2005, in order to protect the lives and personal integrity of twenty individuals and their families.

Languages:

Spanish.

Court of Justice of the European Communities and Court of First Instance

Important decisions

Identification: ECJ-2006-2-007

a) European Union / **b)** Court of Justice of the European Communities / **c)** Fifth Chamber / **d)** 29.04.2004 / **e)** C-222/01 / **f)** British American Tobacco Manufacturing BV v. Hauptzollamt Krefeld / **g)** *European Court Reports* I-04683 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

1.2.3 **Constitutional Justice** – Types of claim – Referral by a court.
1.4.10.7 **Constitutional Justice** – Procedure – Interlocutory proceedings – Request for a preliminary ruling by the Court of Justice of the European Communities.
2.1.1.3 **Sources** – Categories – Written rules – Community law.

Keywords of the alphabetical index:

European Community, law, uniform interpretation / Preliminary ruling, admissibility.

Headnotes:

Questions referred for a preliminary ruling are not inadmissible where referred in a context in which the Community rules to be interpreted apply only by virtue of a reference made by domestic law, since, where, in relation to purely internal situations, domestic legislation adopts solutions which are consistent with those adopted in Community law in order, in particular, to ensure a single procedure in comparable situations, it is clearly in the Community interest that, in order to forestall future differences of interpretation, provisions or concepts taken from Community law should be interpreted uniformly, irrespective of the circumstances in which they are to apply (see para 40).

Summary:

I. The *Bundesfinanzhof* had referred to the Court for a preliminary ruling three questions on the interpretation of the Community rules concerning the incurring, remission and repayment of a customs debt. The questions had arisen in a dispute between British American Tobacco Manufacturing BV and the Krefeld principal customs office concerning the refusal by the latter of the company's application for repayment of excise duties levied on the grounds of presumed breaches of the Community transit system (Judgment, paragraphs 1 and 2).

II. Given that the dispute in the main proceedings concerned the repayment of excise duties due under national legislation alone, the Court considered at the outset that it needed to examine whether the questions referred to it, which related to the interpretation of Community customs rules, were admissible (Judgment, paragraph 39).

The Court observed that referrals for a preliminary ruling were not inadmissible in cases in which the Community rules to be interpreted applied only by virtue of a reference made by domestic law, since where, in relation to purely internal situations, domestic legislation adopted solutions which were consistent with those adopted in Community law in order, in particular, to ensure a single procedure in comparable situations, it was clearly in the Community interest that, in order to forestall future differences of interpretation, provisions or concepts taken from Community law should be interpreted uniformly, irrespective of the circumstances in which they were to apply (Judgment, paragraph 40).

Languages:

Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish, Swedish.

Identification: ECJ-2006-2-008

a) European Union / **b)** Court of Justice of the European Communities / **c)** Fifth Chamber / **d)** 29.04.2004 / **e)** C-338/01 / **f)** Commission v. Council / **g)** *European Court Reports* I-04683 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

4.10.7 **Institutions** – Public finances – Taxation.
4.17.4 **Institutions** – European Union – Legislative procedure.

Keywords of the alphabetical index:

European Community, legislation, legal basis, dual / Taxation, legal foundation.

Headnotes:

The choice of the legal basis for a Community measure must rest on objective factors amenable to judicial review, which include in particular the aim and the content of the measure. If examination of a Community measure reveals that it pursues a twofold purpose or that it has a twofold component and if one of these is identifiable as the main or predominant purpose or component whereas the other is merely incidental, the act must be based on a single legal basis, namely that required by the main or predominant purpose or component. By way of exception, if it is established that the measure simultaneously pursues several objectives which are inseparably linked without one being secondary and indirect in relation to the other, the measure must be founded on the corresponding legal bases. No dual legal basis, however, is possible where the procedures laid down for each legal basis are incompatible with each other.

In that regard, the procedures set out under Articles 93 and 94 EC, on the one hand, and that set out under Article 95 EC, on the other, mean that the latter article cannot be applied in conjunction with one of the other two Articles mentioned above in order to serve as the legal basis for the adoption of a Community measure. Whereas unanimity is required for the adoption of a measure on the basis of Articles 93 and 94 EC, a qualified majority is sufficient for a measure to be capable of valid adoption on the basis of Article 95 EC. Thus, of the provisions cited above, Articles 93 and 94 EC alone may provide a valid dual legal basis for the adoption of a legal measure by the Council (see paragraphs 54-58).

Summary:

I. In this case and on the basis of Article 230.1 EC, the Commission had requested the annulment of Council Directive no. 2001/44/EC of 15 June 2001 amending Directive no. 76/308/EEC on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the European Agricultural Guidance and Guarantee

Fund, and of agricultural levies and customs duties and in respect of value added tax and certain excise duties (OJ 2001 L 175, p. 17) and for maintenance of the effects of that directive until the entry into force of a directive adopted on the correct legal basis (Judgment, paragraph 1).

Directive no. 2001/44 resulted from a procedure which the Commission had initiated when it submitted a proposal for a European Parliament and Council directive amending Directive no. 76/308. This proposal, which sought to extend the scope of Directive no. 76/308 to certain direct taxes and was also to have a bearing on the procedure for the recovery of the taxes and charges covered by Directive no. 76/308, was based on what was at the time Article 100a of the EC Treaty (now, after amendment, Article 95 EC) (Judgment, paragraph 12). Following the opinion of the European Parliament, the Commission submitted a new proposal for a European Parliament and Council directive amending Directive no. 76/308 (OJ 1999 C 179, p. 6) which took account of a number of the modifications which the Parliament had proposed. This proposed text was also based on Article 95 EC (Judgment, paragraph 13). As it had taken the view, however, that this proposal related to fiscal matters, the Council of the European Union had adopted Directive no. 2001/44 on the basis of Articles 93 EC and 94 EC. Maintaining that the directive in question ought to have been adopted on the basis of Article 95 EC, the Commission had brought an action for annulment (Judgment, paragraphs 14 and 15).

In its observations, the Commission had submitted at the outset that Directive no. 2001/44 could be adopted only on the basis of Articles 93 EC and 94 EC or on that of Article 95 EC (Judgment, paragraph 17). In contrast, the Council had held that the correct legal bases for the adoption of Directive no. 2001/44 were not limited to either Articles 93 EC and 94 EC or Article 95 EC, and that there was, for instance, nothing to preclude the choice of Articles 93 EC and 95 EC as a legal basis (Judgment, paragraph 28).

II. However, the Court ruled, first of all, that the two articles could not be applied in conjunction as the procedures provided for in each legal basis were incompatible, pointing out that the procedures pertaining to Articles 93 EC and 94 EC and that set out under Article 95 EC meant that the latter article could not be applied in conjunction with one of the other two articles in order to serve as the legal basis for such a Community measure. Whereas unanimity was required for the adoption of a measure on the basis of Articles 93 EC and 94 EC, a qualified majority was sufficient for a measure to be capable of valid adoption on the basis of Article 95 EC. Consequently, of the provisions cited above, Articles 93 EC and 94 EC alone could provide a valid dual legal basis for the adoption of a legal measure by the Council (Judgment, paragraphs 57 and 58).

Pointing out that it was clear from the very wording of Article 95.1 EC that that article applied only if the Treaty did not provide otherwise and that if the Treaty contained a more specific provision that was capable of constituting the legal basis for the measure in question, that measure must be founded on such provision, as was the case with regard to Article 93 EC insofar as it concerned the harmonisation of legislation regarding turnover taxes, excise duties and other forms of indirect taxation, the Court stated that Article 95.2 EC expressly excluded certain areas from the scope of that article, such as 'fiscal provisions', the approximation of which could not therefore take place on the basis of that article (Judgment, paragraphs 59-61).

Accordingly, having found that Directive no. 2001/44 did in fact relate to 'fiscal provisions' within the meaning of Article 95.2 EC, with the result that the said article could not constitute the correct legal basis for the adoption of that directive, the Court found that the Council had acted correctly in adopting Directive no. 2001/44 on the basis of Article 93 EC and Article 94 EC (Judgment, paragraphs 76 and 77).

Languages:

Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish, Swedish.

Identification: ECJ-2006-2-009

a) European Union / **b)** Court of Justice of the European Communities / **c)** Grand Chamber / **d)** 29.06.2004 / **e)** C-486/01 P / **f)** Front National v. European Parliament / **g)** *European Court Reports* I-06289 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

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

1.4.9.2 **Constitutional Justice** – Procedure – Parties – Interest.
3.3.1 **General Principles** – Democracy – Representative democracy.
4.7.1.1 **Institutions** – Judicial bodies – Jurisdiction – Exclusive jurisdiction.

Keywords of the alphabetical index:

Political group, formation / Political party, interest in bringing proceedings in respect of its parliamentary group / Parliamentary group, foundation / Parliamentary group, interest in bringing proceedings.

Headnotes:

The condition that the decision forming the subject-matter of an action for annulment must be of 'direct concern' to a natural or legal person, as it is stated in Article 230.4 EC, requires the Community measure complained of to affect directly the legal situation of the individual and leave no discretion to the addressees of that measure, who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from Community rules without the application of other intermediate rules.

A decision of the European Parliament concerning the interpretation of Article 29.1 of the Parliament's Rules of Procedure and dissolving with retroactive effect the '*Groupe technique des députés indépendants (TDI) – Groupe mixte*' – to the extent to which it deprived the members having declared the formation of the TDI Group, and in particular the members from the Front National's list, of the opportunity of forming by means of the TDI Group a political group within the meaning of Rule 29 – affected those members directly. Those members were in fact prevented, solely because of the contested act, from forming themselves into a political group and were henceforth deemed to be non-attached members for the purposes of Rule 30; as a result, they were afforded more limited parliamentary rights and lesser material and financial advantages than those they would have enjoyed had they been members of a political group within the meaning of Rule 29.

Such a conclusion cannot be drawn, however, in relation to a national political party such as the Front National. Although it is natural for a national political party which puts up candidates in the European elections to want its candidates, once elected, to exercise their mandate under the same conditions as the other members of the parliament, that aspiration does not confer on it any right for its elected representatives to form their own group or to become members of one of the groups being formed within the parliament.

Under Rule 29.2 the formation of a political group within the parliament requires a minimum number of members from various member states and, in any event, Rule 29.1 mentions only the possibility of members forming themselves into groups according to their political affinities. The rule assigns no specific function in the process of forming political groups to the national political parties to which those members belong (see paragraphs 34-37).

Summary:

I. The case concerned the decision of the European Parliament of 14 September 1999 regarding the interpretation of Article 29.1 of the Parliament's Rules of Procedure and dissolving with retroactive effect the '*Groupe technique des députés indépendants (TDI) – Groupe mixte*'. The Front National had appealed to the Court against the judgment of the Court of First Instance of 2 October 2001 in the Case of *Martinez and Others v. Parliament* (T-222/99, T-327/99 and T-329/99, ECR. II-2823), by which the Court of First Instance had dismissed its action for the annulment of the decision of the European Parliament (Judgment, paragraph 1). Following the notification of 19 July 1999 to the President of the Parliament of the formation of a new political group, the '*Groupe technique des députés indépendants (TDI) – Groupe mixte*' (Technical Group of Independent Members – Mixed Group), the declared purpose of which was to ensure that all members were able to exercise their parliamentary mandates in full, the Presidents of the other political groups had raised objections concerning the formation of that group because of the lack of political affinities between the persons of which it was composed. Consequently, the Parliament's Committee on Constitutional Affairs had been asked, pursuant to Rule 180.1, to give an interpretation of Rule 29.1 (Judgment, paragraph 6). The President of that committee had sent the interpretation requested to the President of the Parliament by letter, concluding that the constitution of the TDI Group was not in conformity with Rule 29.1 of the Rules of Procedure of the European Parliament. The President of the Committee on Constitutional Affairs had considered that the formation of a group which openly rejected any political character and all political affiliation between its members was unacceptable (Judgment, paragraph 6). Since the TDI group had contested, on the basis of Rule 180.4 of the Rules of Procedure, the interpretative note put forward by the Committee on Constitutional Affairs, the note had been put to a vote of the Parliament, which had adopted it by a majority of its members at the Plenary Session on 14 September 1999 (Judgment, paragraph 8). Taking the view that in those

circumstances the vote adversely affected it, the *Front National* had brought an action for annulment of the contested act (Case T-327/99). Two actions having the same purpose had, moreover, also been lodged by, Messrs Martinez and de Gaulle (Case T-222/99) and Mrs Bonino, Messrs Pannella, Cappato, Dell'Alba, Della Vedova, Dupuis, Turco and La Lista Emma Bonino (Case T-329/99) (Judgment, paragraph 9). In the judgment under appeal, the Court of First Instance had declared the Front National's action admissible but dismissed it as unfounded (Judgment, paragraph 10).

By its appeal leading to the decision summarised herewith, the Front National had asked the Court to find that there had been an infringement of Community law by the Court of First Instance (Judgment, paragraph 20). By its cross-appeal, the parliament had disputed, in essence, the Front National's standing to bring proceedings for annulment of the contested act. It had argued in that regard that, although the Court of First Instance, in paragraph 66 of the judgment under appeal, had correctly assessed the impact of that act on the legal position of the members who had declared the formation of the TDI Group (some of whom were also members of the Front National), it had nevertheless made an error of law in holding that the contested act had to be regarded as 'directly' affecting the Front National. The party did not meet that condition, laid down in Article 230.4 EC, precisely because it was concerned only indirectly by the contested act. (Judgment, paragraph 22).

II. The Court held that the condition that the decision forming the subject-matter of the proceedings must be of 'direct concern' to a natural or legal person, as it was stated in Article 230.4 EC, required the Community measure complained of to affect directly the legal situation of the individual and leave no discretion to the addressees of that measure, who were entrusted with the task of implementing it, such implementation being purely automatic and resulting from Community rules without the application of other intermediate rules. In this respect, according to the Court, a decision of the European Parliament, concerning the interpretation of Article 29.1 of the Rules of Procedure of the European Parliament and dissolving with retroactive effect, the *Groupe technique des députés indépendants (TDI) – Groupe mixte* – to the extent to which it deprived the members having declared the formation of the TDI Group, and in particular the members from the Front National's list, of the opportunity of forming by means of the TDI Group a political group within the meaning of Rule 29 – affected those members directly. Those members had in fact been prevented, solely because of the contested act, from forming themselves into a political group and had henceforth been deemed to be non-attached members for the purposes of Rule 30; as a result, they had been afforded more limited parliamentary rights and fewer material and financial advantages than those they would have enjoyed had they been members of a political group within the meaning of Rule 29. Such a conclusion could not be drawn, however, in relation to a national political party such as the Front National. Although it was natural for a national political party which put up candidates in the European elections to want its candidates, once elected, to exercise their mandate under the same conditions as the other members of the parliament, that aspiration did not confer on it any right for its elected representatives to form their own group or to become members of one of the groups being formed within the parliament. Under Rule 29.2 the formation of a political group within the parliament required a minimum number of members from various member states and that, in any event, Rule 29.1 mentioned only the possibility of members forming themselves into groups according to their political affinities. The rule assigned no specific function in the process of forming political groups to the national political parties to which those members belonged. (Judgment, paragraphs 34-37).

Languages:

Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovakian, Slovenian, Spanish, Swedish.

Identification: ECJ-2006-2-010

a) European Union / **b)** Court of First Instance / **c)** Fourth enlarged Chamber / **d)** 01.07.2004 / **e)** T-308/00 / **f)** / **g)** Salzgitter AG v. Commission / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

2.1.2.2 **Sources** – Categories – Unwritten rules – General principles of law.
3.10 **General Principles** – Certainty of the law.

Keywords of the alphabetical index:

Expectation, legitimate, protection / European Coal and Steel Community, Treaty / Limitation period, time-bar, setting / Aid, grant, recovery.

Headnotes:

1. In order to fulfil their function, limitation periods must be fixed in advance. The fixing of their duration and the detailed rules for their application come within the powers of the Community legislature. The latter has not taken steps to prescribe a limitation period concerning the review of aid granted under the ECSC Treaty.

However, the fundamental principle of legal certainty in its various forms aims to ensure that situations and legal relationships governed by Community law remain foreseeable and must be taken into account when the validity of a Commission decision ordering recovery of illegally granted State aid from a steel undertaking is being examined (see paras 159-161).

2. The possibility of relying on the principle of legal certainty is not subject to conditions enabling a party to plead that he had a legitimate expectation that State aid was properly granted.

Accordingly, a steel undertaking which obtained State aid which was not notified to the Commission may, in order to contest a Commission decision ordering recovery, rely on the principle of legal certainty, even though, save in exceptional circumstances, a recipient cannot have a legitimate expectation that aid was properly granted unless it has been granted in compliance with the provisions on prior control of State aid (see paragraphs 165-166).

Summary:

Salzgitter AG – Stahl und Technologie is a group operating in the steel sector which includes *Preussag Stahl AG* and other undertakings involved in the same sector. The German law on the development of the border zone between the former German Democratic Republic and the former Czechoslovak Socialist Republic had been adopted on 5 August 1971 and approved, along with subsequent amendments to it, by the Commission following assessment of the measures planned pursuant to Article 92 of the EC Treaty (now, after amendment, Article 87 EC) and Article 93 of the EC Treaty (now Article 88 EC). The most recent amendments to the law had been approved by the Commission as State aid compatible with the EC Treaty (OJ 1993 C 3, p. 3). The law had come to an end definitively in 1995. From the outset, the law had provided for tax incentives in the form of special depreciation allowances and tax-free reserves for investments made in any establishment of an undertaking situated along the border area between the former German Democratic Republic and the former Czechoslovak Socialist Republic. The special depreciation allowances made it possible for a higher rate of depreciation for eligible investment to be entered in the company accounts than would normally be the case, under the ordinary legislation, in the initial year or years of the investment of the company in question. In this way, the company's tax base had been reduced and liquidity increased for the first year or years of the investment, thereby procuring a gain for the company. Tax-free reserves had also produced a gain for the company. The special depreciation allowances and tax-free reserves could not be combined, however (Judgment, paragraphs 6-8).

After having observed from a reading of the annual accounts of *Preussag Stahl AG*, one of the companies of the current *Salzgitter AG* group, that the company had been subsidised repeatedly between 1986 and 1995 on the basis of the above German law, the Commission had informed Germany of its decision to initiate the procedure under Article 6.5 of the Sixth Steel Aid Code in respect of the aid granted by Germany to *Preussag Stahl AG* and to the other subsidiaries of the *Salzgitter AG* group (Judgment, paragraph 9). In June 2000, the Commission had adopted Decision no. 2000/797/ECSC, on State aid granted by the Federal Republic of Germany to *Salzgitter AG*, *Preussag Stahl AG* and the group's steel-industry subsidiaries, now known as *Salzgitter AG – Stahl und Technologie (SAG)*, by which the special depreciation allowances and tax-free reserves pursuant to the German law on the development of the border zone between the former German Democratic Republic and the former Czechoslovak Socialist Republic of which *Salzgitter AG – Stahl und Technologie* (SAG) had been the recipient had been found to be State aid incompatible with the common market. By this decision, the Commission had ordered the Federal Republic of Germany to recover that aid from the recipient and had requested it to state the specific conditions for its recovery (Judgment, paragraph 11).

The present case concerned an application for annulment of this Commission decision, brought by the Salzgitter AG group, supported by Germany.

The Court of First Instance annulled the contested decision. It accepted the argument that the principle of legal certainty had been violated, by which the applicant complained that the Commission had argued that under the ECSC Treaty there was no time-bar on the right to recover aid (Judgment, paragraph 148). In

acknowledging that in order to fulfil their function limitation periods must be fixed in advance, that the fixing of their duration and the detailed rules for their application came within the powers of the Community legislature and that the latter had not taken steps to prescribe a limitation period concerning the review of aid granted under the ECSC Treaty, the Court maintained that the fundamental principle of legal certainty in its various forms aimed to ensure that situations and legal relationships governed by Community law remained foreseeable and must be taken into account in the examination of the validity of a Commission decision imposing the repayment by a steel company of unlawfully granted state aid (Judgment, paragraphs 159-161).

The Court further considered that the breach by the Commission of the fundamental principle of legal certainty in this case could not be excluded either on grounds of the lack of a limitation period or the failure by the Federal Republic of Germany to give prior notification of the aid measures in question in accordance with the procedure provided for under the ECSC Treaty (Judgment, paragraph 161). It pointed out that the possibility of relying on the principle of legal certainty was not subject to the conditions required for the creation of a legitimate expectation that aid was properly granted and that, consequently, the steel company which had received state aid which had not been notified to the Commission could, in order to challenge the Commission's decision ordering repayment, rely on the principle of legal certainty, even though, save in exceptional circumstances, a recipient could not have a legitimate expectation that aid was properly granted unless it had been granted in compliance with the provisions on prior control of State aid (Judgment, paragraphs 165-166).

Languages:

Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish, Swedish.

Identification: ECJ-2006-2-011

a) European Union / **b)** Court of Justice of the European Communities / **c)** Plenary / **d)** 13.07.2004 / **e)** C-27/04 / **f)** Commission v. Council / **g)** *European Court Reports* I-06649 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

1.3.5.15 **Constitutional Justice** – Jurisdiction – The subject of review – Failure to act or to pass legislation.
3.19 **General Principles** – Margin of appreciation.
4.10.2 **Institutions** – Public finances – Budget.
4.10.6 **Institutions** – Public finances – Auditing bodies.

Keywords of the alphabetical index:

Deficit, state, reduction / Economic policy, measure / Monetary policy, measure, mandatory, suspension / European Council, measure.

Headnotes:

1. Failure by the Council to adopt acts provided for in Article 104.8 and 104.9 EC that are recommended by the Commission cannot be regarded as giving rise to acts open to challenge for the purposes of Article 230 EC. Where the Commission recommends to the Council that it adopt decisions under Article 104.8 and 104.9 EC and the required majority is not achieved within the Council, no decision is taken for the purposes of that provision (see paragraphs 29, 31, 34).

2. The Council's conclusions – under which it agreed to hold the excessive deficit procedure in abeyance for the time being and declared itself ready to take a decision under Article 104.9 EC if it were to appear that the member state concerned was not complying with the commitments which it had entered into, set out in the conclusions – are designed to have legal effects, at the very least inasmuch as they hold the ongoing excessive deficit procedure in abeyance and in reality modify the recommendations previously adopted by the Council under Article 104.7 EC. The Council thus renders any decision to be taken under Article 104.9 EC conditional on an assessment which will no longer have the content of the recommendations adopted under Article 104.7 EC as its frame of reference, but the unilateral commitments of the member state concerned (see paragraphs 46, 48, 50).

3. It follows from the wording and broad logic of the system, established by the Treaty, governing the excessive deficit procedure that the Council cannot break free from the rules laid down by Article 104 EC and those which it set for itself in Regulation no. 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure. Thus, it cannot have recourse to an alternative procedure, for example in order to adopt a measure which would not be the very decision envisaged at a given stage of the excessive deficit procedure or

which would be adopted in conditions different from those required by the applicable provisions (see paragraph 81).

Summary:

The Council had decided, on a recommendation from the Commission, that excessive deficits existed in France and in Germany. Accordingly, it had adopted two recommendations setting those two member states a deadline for adoption of the measures recommended for correcting their excessive deficit.

After expiry of the deadlines, the Commission had recommended that the Council adopt decisions establishing that neither France nor Germany had taken adequate measures to reduce their deficit in response to the Council's recommendations. The Commission had also recommended that the Council give the two member states concerned notice to take measures to reduce their deficit.

On 25 November 2003 the Council had voted on the Commission's recommendations for decisions, but had not achieved the required majority. On the same day the Council had adopted, in respect of each of the two member states concerned, essentially similar conclusions stating that it had decided to hold the excessive deficit procedures in abeyance with regard to France and Germany and addressing recommendations to them for correcting the excessive deficit in the light of the commitments made by each of them.

This is the background for the action for annulment brought by the Commission leading to the judgment summarised below. The Commission had brought an action before the Court of Justice challenging (i) the Council's failure to adopt the decisions recommended by the Commission and (ii) the conclusions adopted by the Council (Press release, no. 57/04).

In respect of the claim for the annulment of the Council's decision concerning France and Germany, the Council, challenging the admissibility of the Commission's appeal on this point, submitted that its conclusions were texts of a political nature and not acts entailing legal effects (Judgment, paragraph 37).

The Court, however, considered that the Council's conclusions, whereby it had decided to hold the excessive deficit procedures in abeyance for the time being and had declared itself ready to take a decision under Article 104.9 EC if it were to appear that the member state concerned was not complying with the commitments which it had entered into as set out in the conclusions, were indeed intended to have legal effects, at the very least inasmuch as they held the ongoing excessive deficit procedures in abeyance and in reality modified the recommendations previously adopted by the Council under Article 104.7 EC. The Council had thus rendered any decision to be taken under Article 104.9 EC conditional on an assessment which would no longer have the content of the recommendations adopted under Article 104.7 EC as its frame of reference, but the unilateral commitments of the member state concerned (Judgment, paragraphs 46, 48, 50).

In essence, notwithstanding the terms in which its application was couched, the Commission was seeking annulment of the Council's conclusions only in so far as they contained a decision to hold the excessive deficit procedure in abeyance and a decision modifying the recommendations previously made to the member state concerned (Judgment, paragraph 65). The Commission submitted that the Council, having recommendations for decisions under Article 104.8 and 104.9 EC before it, had adopted 'conclusions', a measure not provided for by the Treaty and, in particular, Article 104 EC. In the Commission's view, the Council could not adopt instruments other than those provided for by that Article, namely decisions, which were binding measures. In holding the excessive deficit procedure in abeyance, the Council's conclusions had infringed the first indent of Article 9.1 of Council Regulation (EC) no. 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure (OJ L 209, p. 6), under which that procedure was to be held in abeyance if the member state concerned acted in compliance with recommendations adopted in accordance with Article 104.7 EC. The decisions to hold the procedure in abeyance, in the Commission's view, did not show that this condition had been met (Judgment, paragraphs 53-54).

The Court accepted the Commission's arguments on this point, finding that it followed from the wording and the broad logic of the system established by the Treaty that the Council could not break free from the rules laid down by Article 104 EC and those which it had set for itself in Regulation no. 1467/97. Accordingly, it could not have recourse to an alternative procedure, for example in order to adopt a measure which would not be the very decision envisaged at a given stage or which would be adopted in conditions different from those required by the applicable provisions (Judgment, paragraph 81).

Languages:

Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovakian, Slovenian, Spanish, Swedish.

Identification: ECJ-2006-2-012

a) European Union / **b)** Court of First Instance / **c)** Fifth Chamber / **d)** 06.09.2004 / **e)** T-213/02 / **f)** SNF SA v. Commission of the European Communities / **g)** *European Court Reports* II-03047 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

1.3.5.2.2 **Constitutional Justice** – Jurisdiction – The subject of review – Community law – Secondary legislation.
1.4.9.1 **Constitutional Justice** – Procedure – Parties – *Locus standi*.
1.4.9.2 **Constitutional Justice** – Procedure – Parties – Interest.
2.1.1.3 **Sources** – Categories – Written rules – Community law.

Keywords of the alphabetical index:

European Community, directive, interest direct and individual / European Community, legislation, review / Specific interest in bringing legal proceedings / European Community, act, form, determination of individual interest.

Headnotes:

1. Although Article 230.4 EC makes no express provision regarding the admissibility of actions brought by private persons for annulment of a directive, that fact is not sufficient to render such an action inadmissible. Moreover, the Community institutions cannot exclude, merely by the choice of the form of the act in question, the judicial protection afforded to individuals under that provision of the Treaty. Further, in certain circumstances, even a legislative measure which applies to economic operators generally may be of direct and individual concern to some of them (see paragraphs 54-55).

2. The possibility of determining more or less precisely the number or even the identity of the persons to whom a legislative measure applies by no means implies that those persons must be regarded as individually concerned by that measure, within the meaning of Article 230.4 EC, as long as it is established that such application takes effect by virtue of an objective legal or factual situation defined by the measure in question.

Therefore, the mere fact of being concerned as an undertaking operating in the sector affected by a measure, does not suffice for that undertaking to be regarded as individually concerned in the absence, in particular, of an additional factor, namely a causal link between the operator in question and the intervention of the institution showing that when it adopted the contested measure the institution determined the treatment to be accorded to it. It follows that, in the context of an action for annulment of a directive, which applies to objectively defined situations and gives rise to legal effects in respect of categories of persons defined in general or abstract terms, it matters little that the operators concerned are limited in number, in so far as that circle is not closed when the contested directive was adopted, since there is nothing in that directive to preclude undertakings which were not yet active prior to its adoption from deciding subsequently to carry on the activity concerned by the directive (see paragraphs 59-63).

3. An action brought by the holder of a patent filed in a member state for the manufacture of solid polyacrylamides for use in the cosmetic industry, contrary to Directive no. 2002/34 adapting to technical progress Annexes II, III and VII to Council Directive no. 76/768 on the approximation of the laws of the member states, relating to cosmetic products, is inadmissible in so far as it limits the use of polyacrylamides in the composition of cosmetic products. The applicant does not have an exclusive right to produce a 'cosmetic product' as defined by Article 1 of Directive no. 76/768 and therefore is not affected by the contested directive in its capacity as the proprietor of exclusive rights, but merely as a manufacturer of raw materials or ingredients used in the manufacture of cosmetic products in the same way as any other operator manufacturing those raw materials or ingredients. Furthermore, its exclusive rights are still valid and the exploitation of them is not necessarily limited to cosmetic products, but may also apply to pharmaceutical, veterinary and detergent products (see paragraphs 67, 69-70).

Summary:

I. This case had its origin in an application for annulment lodged by one of the world's leading producers of acrylamide and acrylamide-based polymers, such as polyacrylamides, against the Twenty-sixth Directive no. 2002/34/EC adapting to technical progress Annexes II, III and VII to Directive no. 76/768 (OJ L 102, p. 19), adopted in accordance with Article 8.2 of the "Cosmetics Directive" after

consultation of the Scientific Committee on Cosmetic Products and Non-Food Products intended for Consumers (Judgment, paragraphs 7 and 9).

The applicant submitted *inter alia* that the application was admissible under Article 230 EC, since the contested directive was a binding act intended to produce legal effects of a definitive nature which were of direct and individual concern to it (Judgment, paragraph 19).

II. The Court dismissed the application as inadmissible, since the applicant had failed to show that it was individually concerned by the contested directive. It nonetheless reasserted that, although Article 230.4 EC made no express provision regarding the admissibility of actions brought by private persons for annulment of a directive, the mere fact that the contested measure was a directive was not sufficient to render such an action inadmissible. In addition, the Community institutions could not exclude, merely by the choice of the form of the act in question, the judicial protection afforded to individuals under that provision of the treaty. Moreover, in certain circumstances, even a legislative measure which applied generally to the economic operators concerned could be of direct and individual concern to some of them (Judgment, paragraphs 54-55).

Cross-references:

- TPICE, 10.12.2004, *European Federation for Cosmetic Ingredients (EFfCI) v. Parliament and Council*, T-196/03, not yet published in *Reports* (cf. paragraphs 34, 37)

Languages:

Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovakian, Slovenian, Spanish, Swedish.

Identification: ECJ-2006-2-013

a) European Union / **b)** Court of Justice of the European Communities / **c)** Grand Chamber / **d)** 07.09.2004 / **e)** C-456/02 / **f)** Michel Trojani v. Centre public d'aide sociale de Bruxelles (CPAS) / **g)** *European Court Reports* I-07573 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
3.26 **General Principles** – Principles of Community law.
5.1.1.2 **Fundamental Rights** – General questions – Entitlement to rights – Citizens of the European Union and non-citizens with similar status.
5.2.1.3 **Fundamental Rights** – Equality – Scope of application – Social security.
5.2.2.4 **Fundamental Rights** – Equality – Criteria of distinction – Citizenship or nationality.
5.3.9 **Fundamental Rights** – Civil and political rights – Right of residence.
5.4.18 **Fundamental Rights** – Economic, social and cultural rights – Right to a sufficient standard of living.

Keywords of the alphabetical index:

Minimum subsistence allowance / Social assistance, entitlement, conditions / European Union, citizenship / Residence, permit.

Headnotes:

A citizen of the European Union who does not enjoy a right of residence in the host member state under Articles 39 EC, 43 EC or 49 EC may, simply as a citizen of the Union, enjoy a right of residence there by direct application of Article 18.1 EC. The exercise of that right is subject to the limitations and conditions referred to in that provision, including the requirement of having sufficient resources, but the competent authorities must ensure that those limitations and conditions are applied in compliance with the general principles of Community law, in particular the principle of proportionality. However, once it is ascertained that a citizen of the Union who is not economically active is in possession of a residence permit, he may rely on Article 12 EC in order to be granted a social assistance benefit such as the minimum subsistence allowance (see paragraphs 33, 43, 46, operative part 2).

Summary:

I. This case had its origin in a reference for a preliminary ruling concerning the interpretation of Articles 18 EC, 39 EC, 43 EC and 49 EC, Article 7.1 of Regulation (EEC) no. 1612/68 of the Council, of 15 October 1968, on freedom of movement for workers within the Community, as amended by Council Regulation (EEC) no. 2434/92 of 27 July 1992, and Council Directive no. 90/364/EEC of 28 June 1990 on the right of residence (Judgment, paragraph 1). This reference had been made in the course of proceedings between Mr Trojani and the *Centre public d'aide sociale de Bruxelles (CPAS)* concerning the latter's refusal to grant him the minimum subsistence allowance (“minimex”) (Judgment, paragraph 2). Mr Trojani, a French national, had, after a short stay in Belgium in 1972 during which he allegedly worked as a self-employed person in the sales sector, returned to Belgium in 2000. He had lived there, without being registered, first on a campsite in Blankenberge and then, from December 2001, in Brussels. After staying at the Jacques Brel youth hostel, from 2002 he had been accommodated in a Salvation Army hostel, where in exchange for his board and lodging and some pocket money he had done various jobs for about 30 hours a week as part of a personal socio-occupational reintegration programme. As he had no resources, he had applied to the CPAS to be granted the “minimex”, arguing that he had to pay 400 euros per month to the hostel and should also be able to leave the hostel and live independently. The CPAS, having refused on the grounds that, firstly, Mr Trojani did not have Belgian nationality and, secondly, he could not benefit from the application of Regulation no. 1612/68, he had brought appeal proceedings in the Brussels Labour Court. This court had then recognised Mr Trojani's entitlement to receive provisional financial assistance of 300 euros from the CPAS. It had also decided to stay the proceedings and refer two preliminary questions to the Court (Judgment, paragraph 2).

In its second question, the Brussels Labour Court essentially asked whether a person in a situation such as that of the claimant in the main proceedings, while not coming under Articles 39, 43 and 49 EC, could, simply by virtue of being a citizen of the European Union, enjoy a right of residence in the host member state by direct application of Article 18 EC (Judgment, paragraph 30).

II. The Court held that a citizen of the European Union who does not enjoy a right of residence in the host member state under Articles 39 EC, 43 EC or 49 EC may, simply as a citizen of the Union, enjoy a right of residence there by direct application of Article 18.1 EC. It also specified that, although exercise of this right is subject to the limitations and conditions referred to in that provision, not least the requirement that the person concerned should have sufficient resources, the competent authorities must ensure that those limitations and conditions are applied in compliance with the general principles of Community law, in particular the principle of proportionality. However, once it has been ascertained that a citizen of the Union, who is not economically active, is in possession of a residence permit, that person may rely on Article 12 EC in order to be granted a social assistance benefit such as the minimum subsistence allowance (Judgment, paragraphs 33, 43, 46, operative provision 2).

Languages:

Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovakian, Slovenian, Spanish, Swedish.

Identification: ECJ-2006-2-014

a) European Union / **b)** Court of Justice of the European Communities / **c)** Second Chamber / **d)** 07.10.2004 / **e)** C-239/03 / **f)** Commission v. France / **g)** *European Court Reports* I-09325 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.
1.3.4.14 **Constitutional Justice** – Jurisdiction – Types of litigation – Distribution of powers between Community and member states.
1.3.5.1 **Constitutional Justice** – Jurisdiction – The subject of review – International treaties.
1.3.5.2 **Constitutional Justice** – Jurisdiction – The subject of review – Community law.
2.2.1.6 **Sources** – Hierarchy – Hierarchy as between national and non-national sources – Community law and domestic law.

Keywords of the alphabetical index:

Treaty, European Community, obligation to fulfill / Agreement, mixed / Pollution, control / European Community, law, breach.

Headnotes:

1. The application of Article 4.1 and 4.8 of the Barcelona Convention for the protection of the Mediterranean Sea against pollution and Article 6.1 and 6.3 of the Protocol for the protection of the Mediterranean Sea against pollution from land-based sources to discharges of fresh water and alluvia into a saltwater marsh, falls within the Community framework, even though such discharges have not been the subject of specific Community legislation, since those articles are in mixed agreements concluded by the Community and its member states and concern a field in large measure covered by Community law. The Court therefore has jurisdiction to assess a member state's compliance with those articles in proceedings brought before it under Article 226 EC.

Mixed agreements concluded by the Community, its member states and non-member countries have the same status in the Community legal order as purely Community agreements in so far as the provisions fall within the scope of Community competence. In ensuring compliance with commitments arising from an agreement concluded by the Community institutions, the member states therefore fulfil, within the Community system, an obligation in relation to the Community, which has assumed responsibility for the due performance of the agreement (see paragraphs 25-26, 31).

2. Article 6.1 of the Protocol for the protection of the Mediterranean Sea against pollution from land-based sources, in conjunction with Article 1 thereof, imposes a particularly rigorous obligation on the Contracting Parties, namely an obligation to limit strictly, by appropriate measures, pollution from land-based sources in the area caused by discharges of, *inter alia*, any substances even of a non-toxic nature which may become harmful to the marine environment. The strictness of this obligation reflects the nature of the instrument, which is designed in particular to avoid pollution caused by the failure of the public authorities to act. The scope of the obligation must be construed in the light of Article 6.3 of the Protocol which, by setting up a regime of prior authorisation by the competent national authorities of the discharge of substances referred to in Annex II to the Protocol, requires the member states to control pollution from land-based sources in the area to which the Protocol applies.

Accordingly, a member state which fails to take all appropriate measures to prevent, abate and combat heavy and prolonged pollution of the Mediterranean Sea area, and which fails to take account of the requirements of Annex III to the Protocol concerning the authorisation regime for discharges of those substances by not amending its national arrangements following the conclusion of the Protocol, fails to fulfil its obligations under *inter alia* Article 6.1 and 6.3 of the Protocol (see paragraphs 50-51, operative part).

Summary:

I. In this case, the Commission contended that France had failed to fulfil its obligations under Article 4.1 and 4.8 of the Convention for the protection of the Mediterranean Sea against pollution, signed in Barcelona on 16 February 1976 and approved on behalf of the European Economic Community by Council Decision no. 77/585/EEC of 25 July 1977 (OJ L 240, p. 1), under Article 6.1 and 6.3 of the Protocol for the protection of the Mediterranean Sea against pollution from land-based sources, signed in Athens on 17 May 1980 and approved on behalf of the European Economic Community by Council Decision no. 83/101/EEC of 28 February 1983 (OJ L 67, p. 1), by amending the authorisation for discharge of the substances covered by Annex II to the Protocol following the conclusion of the latter, and under Article 300.7 EC (Judgment, paragraph 1). The Commission had received a complaint concerning damage to the aquatic environment of the *Étang de Berre*, a saltwater lake which communicates directly with the Mediterranean Sea via the Caronte Canal, principally as a result of fresh water being artificially discharged into the *Étang de Berre* whenever the turbines of the hydroelectric power station at Saint-Chamas, run by *Électricité de France (EDF)*, were in operation (Judgment, paragraph 14). EDF's Durance facilities not only serve to generate electricity at a regional level, but also contribute to the security of electricity generation by providing a maximum output capacity that is immediately available to deal with incidents on the network (Judgment, paragraph 17).

Having taken the view that France had failed to take all appropriate measures to prevent, abate and combat heavy and prolonged pollution of the *Étang de Berre* or had failed to take due account of the provisions of Annex III to the Protocol by amending the authorisation for the discharge of substances covered by Annex II and, as a consequence, had failed to fulfil its obligations under Article 4.1 and 4.8 of the Convention, Article 6.1 and 6.3 of the Protocol and Article 300.7 EC, the Commission had served a letter of formal notice on the French Government in

order to enable it to submit its observations (Judgment, paragraph 18). Since it had not been persuaded by the arguments advanced by the French Republic, the Commission had sent it a reasoned opinion reiterating the terms of the letter of formal notice and calling on it to take the measures necessary in order to comply within two months of notification of the reasoned opinion. The French Government had sent the Commission a dossier in response to the reasoned opinion (Judgment, paragraphs 19-20). Since it considered that this dossier did not enable it to abandon its complaints, as set out in the reasoned opinion, the Commission had in the end brought the action for failure to fulfil obligations, which gave rise to this case.

The French Government had submitted, *inter alia*, that the Court lacked jurisdiction to adjudicate in this case, on the ground that the obligations which the French authorities were alleged to have infringed did not fall within the scope of Community law. It contended that no Community directive regulated discharges of fresh water and alluvia into a saltwater lake, with the result that the provisions of the Convention and the Protocol that covered such discharges did not fall within Community competence (Judgment, paragraph 22).

II. The Court nonetheless rejected this argument. It held that the application of Article 4.1 and 4.8 of the Barcelona Convention for the protection of the Mediterranean Sea against pollution and Article 6.1 and 6.3 of the Protocol for the protection of the Mediterranean Sea against pollution from land-based sources to discharges of fresh water and alluvia into a saltwater lake fell within the Community framework, although such discharges had not been the subject of a specific Community regulation, since the articles concerned appeared in mixed agreements concluded by the Community and its member states and concerned a field in large measure covered by Community law. In proceedings brought before it under Article 226 EC, the Court therefore had jurisdiction to assess a member state's compliance with those articles. Mixed agreements concluded by the Community, its member states and non-member countries had the same status in the Community legal order as purely Community agreements, in so far as the provisions fell within the scope of Community competence. In ensuring compliance with commitments arising from an agreement concluded by the Community institutions, the member states fulfilled, within the Community system, an obligation in relation to the Community, which had assumed responsibility for the due performance of the agreement (Judgment, paragraphs 25-26, 31).

Languages:

Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovakian, Slovenian, Spanish, Swedish.

Identification: ECJ-2006-2-015

a) European Union / **b)** Court of First Instance / **c)** Fifth Chamber / **d)** 09.11.2004 / **e)** T-252/03 / **f)** Fédération nationale de l'industrie et des commerces en gros des viandes (FNICGV) v. Commission of the European Communities / **g)** *European Court Reports* II-03795 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.
1.4.3.1 **Constitutional Justice** – Procedure – Time-limits for instituting proceedings – Ordinary time-limit.

Keywords of the alphabetical index:

Appeal, deadline, unlimited, scope / Action for annulment, admissibility, time-limit / European Community, law, penalty / Penalty, appeal, deadline.

Headnotes:

The Treaty does not recognise the 'action under the Court's unlimited jurisdiction' as an autonomous remedy. Article 229 EC confines itself to providing that regulations adopted pursuant to the provisions of the Treaty may give the Community judicature unlimited jurisdiction with regard to the penalties provided for in those regulations.

On the basis of Article 229 EC, a number of regulations have given the Community judicature unlimited jurisdiction with regard to penalties. In particular, Article 17 of Regulation no. 17 provides that '[t]he Court of Justice shall have unlimited jurisdiction within the meaning of Article [229 EC] to review decisions whereby the Commission has fixed a fine or periodic penalty payment' […]. The Court of First Instance has power to assess, in the context of the unlimited jurisdiction accorded to it by

Article 229 EC and Article 17 of Regulation no. 17, the appropriateness of the amounts of fines. In the context of its unlimited jurisdiction, the powers of the Community judicature are not limited to declaring the contested decision void, as provided in Article 231 EC, but allow it to vary the penalty imposed by that decision.

However, that unlimited jurisdiction can be exercised by the Community judicature only in the context of the review of acts of the Community institutions, more particularly in actions for annulment. The sole effect of Article 229 EC is to enlarge the extent of the powers the Community judicature has in the context of the action referred to in Article 230 EC. Consequently, an action in which the Community judicature is asked to exercise its unlimited jurisdiction with respect to a decision imposing a penalty necessarily comprises or includes a request for the annulment, in whole or in part, of that decision. Such an action must therefore be brought within the time-limit laid down by Article 230.5 EC (see paragraphs 22-25).

Summary:

I. The action which gave rise to the case mainly sought the annulment of a fine imposed on the applicant by Article 3 of Commission decision no. 2003/600/EC of 2 April 2003 in proceedings concerning the application of Article 81 EC, case COMP/C.38.279/F3 – French beef (OJ L 209, p. 12). The action also sought a reduction of the fine (Order, paragraph 1). In the contested decision, the Commission had found that the applicant, an association representing cattle slaughterers in France, had infringed Article 81.1 EC by concluding, with other organisations in the beef and veal sector in France, agreements aimed at suspending imports of beef into France and fixing a minimum purchase price for certain categories of cattle (Article 1 of the contested decision). The fine imposed on the applicant had been fixed at 720,000 euros, Article 3 of the contested decision (Order, paragraph 5).

The Commission submitted that the action was manifestly inadmissible since it had been brought after the expiry of the period of two months and ten days laid down by Article 230.5 EC in conjunction with Article 102.2 of the Court's rules of procedure (Order, paragraph 15). The applicant submitted that its action was based on Article 229 EC and consequently was not subject to the time-limit of two months and ten days after which an action was statute-barred in accordance with Article 230.5 EC, as that applied only to the actions for annulment referred to in Article 230 EC (Order, paragraph 18).

II. The Court rejected the applicant's argument. The treaty did not recognise “action under the Court's unlimited jurisdiction” as an autonomous remedy (Order, paragraph 22) and although the Court had power to assess, in the context of the unlimited jurisdiction accorded to it by Article 229 EC and Article 17 of Regulation no. 17, the appropriateness of the amounts of fines (Order, paragraph 24), that unlimited jurisdiction could be exercised by the Community judicature only in the context of the review of acts of the Community institutions, more particularly in actions for annulment (Order, paragraph 25). The sole effect of Article 229 EC was to enlarge the extent of the powers the Community judicature had in the context of the action referred to in Article 230 EC. Consequently an action in which the Community judicature was asked to exercise its unlimited jurisdiction with respect to a decision imposing a penalty necessarily comprised or included a request for the annulment, in whole or in part, of that decision. Such an action must therefore be brought within the time-limit laid down by Article 230.5 EC (Order, paragraph 25).

Cross-references:

- TPICE, 14.01.2004, *Makedoniko Metro and Michaniki AE v. Commission of the European Communities*, T-202/02, 2004 p. II-00181 (cf. paragraph 53).

Languages:

Czech, Danish, Finnish, French, German, Latvian, Portuguese, Swedish.

Identification: ECJ-2006-2-016

a) European Union / **b)** Court of First Instance / **c)** Fifth Chamber / **d)** 23.11.2004 / **e)** T-84/03 / **f)** Maurizio Turco v. Council of the European Union / **g)** *European Court Reports* II-04061 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

3.18 **General Principles** – General interest.

5.3.25.1 **Fundamental Rights** – Civil and political rights – Right to administrative transparency – Right of access to administrative documents.

Keywords of the alphabetical index:

Transparency, administrative / Burden of proof / Document, disclosure / Document, confidentiality / Document, official, access.

Headnotes:

1. The words "legal advice", in Article 4.2.2 of Regulation no. 1049/2001 regarding public access to European Parliament, Council and Commission documents, must be understood as meaning that the protection of the public interest may preclude the disclosure of the contents of documents drawn up by the Council's legal service in the context of court proceedings but also for any other purpose. Whilst it is true that the exceptions to access to documents fall to be interpreted and applied restrictively so as not to frustrate application of the general principle of giving the public the widest possible access to documents held by the institutions, that principle set forth in the case-law applies, however, only to the definition of the scope of an exception where that exception is capable of giving rise to several different constructions. In this case, the expression "legal advice" does not, in itself, present any difficulty of interpretation, so that there is no reason for thinking that it covers only advice drawn up in the context of court proceedings. The consequence of the contrary construction suggested by the applicant would be that the inclusion of legal advice among the exceptions under Regulation no. 1049/2001 had no practical effect (see paragraphs 60-62).

2. The wording of Article 4.2.2 of Regulation no. 1049/2001 regarding public access to European Parliament, Council and Commission documents, as well as the interpretation resulting from its comparison with the Code of Conduct concerning public access to Council and Commission documents and the institutions' decisions concerning public access to their documents adopted prior to Regulation no. 1049/2001, show that the Community legislature intended, in that regulation, to provide for an exception relating to legal advice distinct from that relating to court proceedings. Since the term "court proceedings" has already been interpreted in the context of the right of public access to the institutions' documents, the Court considers that that definition, reached for the purpose of interpreting Decision no. 94/90 on public access to Commission documents, is relevant for the purposes of Regulation no. 1049/2001. Thus, since legal advice drawn up in the context of court proceedings is already included in the exception relating to the protection of court proceedings, the express reference to "legal advice" among the exceptions necessarily has a meaning distinct from that of the exception relating to court proceedings. It follows that an applicant is not justified in claiming that a legal opinion relating to an institution's legislative activity cannot come within the exception relating to legal advice within the meaning of Article 4.2.2 of Regulation no. 1049/2001. However, the institution is bound to assess in each individual case whether the documents, the disclosure of which are sought, actually fall within the exceptions set out in Regulation no. 1049/2001 (see paragraphs 57-58, 64-66, 69).

3. The overriding public interest, under Article 4.2 of Regulation no. 1049/2001 regarding public access to European Parliament, Council and Commission documents, capable of justifying the disclosure of a document which undermines the protection of legal advice must, as a rule, be distinct from the principles of transparency, of democracy and of greater participation of citizens in the decision-making process, principles which are implemented by the provisions of that regulation as a whole. If that is not the case, it is, at the very least, incumbent on the applicant to show that, having regard to the specific facts of the case, the invocation of those same principles is so pressing that it overrides the need to protect the document in question. In addition, although it may be possible that the institution in question itself identifies an overriding public interest capable of justifying the disclosure of such a document, it is for the applicant who intends to rely on such an interest to invoke it in his application so as to invite the institution to give a decision on that point (see paragraphs 81-84).

Summary:

I. The case originated in a request from Mr M. Turco to the Council for access to the documents appearing on the agenda of the Justice and Home Affairs Council meeting which took place in Luxembourg on 14 and 15 October 2002, including an opinion of the Council's legal service on a proposal for a Council directive laying down minimum standards for the reception of applicants for asylum in member states (Judgment, paragraph 4). The Council had granted Mr Turco's request in respect of 15 of the 20 documents, but had refused him full access to four documents relating to legislative proposals, on the basis of Article 4.3.1 of Regulation EC no. 1049/2001 of the European Parliament and the Council dated 30 May 2001 concerning public access to European Parliament, Council and Commission documents. The Council had also refused Mr Turco access to its

legal service's opinion under Article 4.2 of the regulation (Judgment, paragraph 5). Mr Turco had therefore made a confirmatory application under Article 7.2 of Regulation no. 1049/2001, claiming that the Council had incorrectly applied the exceptions to the right of public access to documents of the institutions as provided for in Article 4.2 and 4.3 of Regulation no. 1049/2001 and that the overriding public interest in disclosure of the documents in question was the principle of democracy and citizen participation in the legislative process. The Council had rejected the confirmatory application (Judgment, paragraphs 6 and 7). This latter judgment was the subject of Mr Turco's application for annulment in which the present case originated.

II. Mr Turco's application was rejected in so far as it concerned the refused access to the Council's legal opinion. The Court was finally not required to deal with the remaining issues, as the Council had by then informed the applicant that the four documents relating to legislative proposals to which he had had only partial access had, in part, been made public in their entirety or, as to the remainder, had been sent to him personally (Judgment, paragraph 9).

Languages:

Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovakian, Slovenian, Spanish, Swedish.

Identification: ECJ-2006-2-017

a) European Union / **b)** Court of First Instance / **c)** Fifth Chamber (Extended Composition) / **d)** 30.11.2004 / **e)** T-168/02 / **f)** IFAW Internationaler Tierschutz-Fonds GmbH v. Commission of the European Communities / **g)** *European Court Reports* II-04135 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

5.3.25.1 **Fundamental Rights** – Civil and political rights – Right to administrative transparency – Right of access to administrative documents.

Keywords of the alphabetical index:

Document, disclosure / Document, confidentiality / Transparency, administrative / Document, official, access.

Headnotes:

1. Article 4.4 of Regulation no. 1049/2001 regarding public access to European Parliament, Council and Commission documents places the institutions under an obligation to consult the third party author of the document in respect of which access is sought with a view to assessing whether an exception in Article 4.1 or 4.2 is applicable, unless it is clear that the document should or should not be disclosed. Accordingly, consultation of the third party is, as a general rule, a precondition for determining whether the exceptions to the right of access provided for in Article 4.1 and 4.2 of the regulation are applicable in the case of third-party documents.

However, according to Article 4.5 of the Regulation, which reflects Declaration no. 35 annexed to the Final Act of the Treaty of Amsterdam regarding documents from a member state in possession of an institution, the member state has the power to request that institution not to disclose that document without its prior agreement. Thus, a request made by a member state under Article 4.5 does constitute an instruction to the institution not to disclose the document in question (see paras 55, 57-58).

2. The restrictions imposed by Article 4.5 of Regulation no. 1049/2001 regarding public access to European Parliament, Council and Commission documents, on the access to the documents originating from a member state and in the possession of an institution do not affect the institution's duty to state sufficient reasons for the decision to refuse the request for access to documents which the member state has requested not to be disclosed. However, that institution is not required to explain why the member state had made a request for non-disclosure, since there is no obligation on the member states themselves to state the reasons for such a request (see paras 59, 72).

Summary:

IFAW Internationaler Tierschutz-Fonds GmbH, formerly Internationaler Tierschutz-Fonds GmbH (IFAW), established in Hamburg (Germany), is a non-governmental organisation active in animal welfare and nature conservation. In April 2000, the Commission had issued an opinion authorising the Federal Republic of Germany to declassify the

Mühlenberger Loch site, an area protected under Council Directive no. 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora. Between May and September 2001 IFAW exchanged correspondence with the Commission in order to obtain access to certain documents relating to a project concerning the Mühlenberger Loch site, which consisted in enlargement of the Daimler Chrysler Aerospace Airbus GmbH and reclamation of part of the estuary for a runway extension. The correspondence was exchanged under the rules on access to documents laid down in Commission Decision no. 94/90/ECSC, EC, Euratom of 8 February 1994 on public access to Commission documents, which was then in force. In the course of the correspondence, the Commission had communicated certain documents to IFAW. By letter of 20 December 2001, IFAW requested access to a series of additional documents under Regulation (EC) no. 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents. IFAW listed the documents in three categories: category “A”, which concerned a note sent by the Directorate-General (DG) “Environment” to the Commission legal service on 12 November 1999; category “B”, which concerned documents originating from the German authorities; and category “C”, which concerned documents originating from other third parties. By fax of 24 January 2002 the acting Director-General of Commission DG “Environment”, Mr Verstrynge, informed IFAW that, under Article 4.5 of Regulation no. 1049/2001, the Commission had to have the German authorities' agreement before disclosing any documents received from them. IFAW replied that it did not accept that interpretation of Article 4.5. In its view, the German authorities might request the Commission not to disclose a document originating in that member state without its prior agreement but the final decision concerning disclosure remained with the Commission. On 12 February 2002, Germany asked the Commission not to disclose the correspondence between it and the City of Hamburg in relation to the Mühlenberger Loch site and the project or the correspondence of the German Chancellor. On 13 February 2002, IFAW received a fax from Mr Verstrynge in which he granted it access to the documents listed in categories “A” and “C”. In the same fax he informed IFAW that the documents in category “B” – those originating from the German authorities – could not be made available to it. IFAW accordingly submitted a confirmatory application to the Secretary-General of the Commission under Article 7.2 of Regulation no. 1049/2001 requesting him to review the refusal to disclose the documents listed in category “B”. IFAW in particular reiterated its objection to the Commission's interpretation of Article 4.5. The Secretary-General of the Commission informed IFAW that he upheld the refusal to disclose the documents from the German authorities (Judgment, paragraphs 8-170). It was against that decision that IFAW made the application for annulment in which the case originated. The Court dismissed its application.

Languages:

Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovakian, Slovenian, Spanish, Swedish.

European Court of Human Rights

Important decisions

Identification: ECH-2006-2-004

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 19.06.2006 / **e)** 35014/97 / **f)** Hütten-Czapska v. Poland / **g)** *Reports of Judgments and Decisions* of the Court / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

1.6.1 **Constitutional Justice** – Effects – Scope.
1.6.9.1 **Constitutional Justice** – Effects – Consequences for other cases – Ongoing cases.
3.16 **General Principles** – Proportionality.
3.17 **General Principles** – Weighing of interests.
5.3.39.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.

Keywords of the alphabetical index:

Housing, rent, regulated / Housing, rent, increase, limitation / Housing, rent, maximum, fixing by the State / Housing, lease, termination / Systemic situation, pilot judgment.

Headnotes:

A system of rent control which does not permit landlords to increase rents sufficiently to cover the costs of maintenance which they are required to carry out by law, combined with severe restrictions on termination of leases, imposes a disproportionate and excessive burden on landlords.

Summary:

I. The applicant is one of around 100,000 landlords in Poland affected by a restrictive system of rent control, which originated in laws adopted under the former Communist regime. The system imposes a number of restrictions on landlords' rights, in particular setting a ceiling on rent levels, which is so low that landlords cannot even recoup their maintenance costs, let alone make a profit.

The property in question was taken under State management after the entry into force of a 1946 decree giving the Polish authorities power to assign flats in privately-owned buildings to particular tenants. The applicant's parents tried unsuccessfully to regain possession of their property. In 1974 a new regime on the State management of housing entered into force, the so-called "special lease scheme". In 1975, the mayor issued a decision by which the ground floor of the house was leased to another tenant. In the 1990s the applicant tried to have that decision declared null and void but only succeeded in obtaining a decision declaring that it had been issued contrary to the law.

In 1990, the District Court declared that the applicant had inherited her parents' property and, in 1991, she took over the management of the house. She then brought several unsuccessful sets of proceedings – civil and administrative – to regain possession of her property and to relocate the tenants.

In 1994, a rent control scheme was applied to private property in Poland, under which landlords were both obliged to carry out costly maintenance work and prevented from charging rents which covered those costs. Severe restrictions on the termination of leases were also in place. The 1994 Act was replaced by a new act in 2001, designed to improve the situation, which maintained all restrictions on the termination of leases and obligations in respect of maintenance of property and also introduced a new procedure for controlling rent increases. For instance, it was not possible to charge rent at a level exceeding 3% of the reconstruction value of the property in question.

In 2000 and 2002 the Constitutional Court found that the rent-control scheme under both the 1994 Act and the 2001 Act was unconstitutional and that it had placed a disproportionate and excessive burden on landlords. The provisions in question were repealed and from 10 October 2000 until 31 December 2004 the applicant was able to increase the rent she charged by about 10%. In January 2005, new provisions entered into force which for the first time allowed rents exceeding 3% of the reconstruction value of the property being rented to increase by not more than 10% a year. The new provisions still maintained State control over levels of rent. Those provisions, after being challenged by the Proscutor General of Poland before the Constitutional Court, were later repealed as unconstitutional. The applicant's property has since been vacated.

In her application to the Court, the applicant complained of a violation of her property rights and invoked Article 1 Protocol 1 ECHR.

II. The Grand Chamber of the Court agreed with the assessment of the applicant's situation set out in the Chamber judgment, which found that the Polish authorities had imposed a "disproportionate and excessive burden" on the applicant, which could not be justified by any legitimate community interest. The Grand Chamber added, however, that the violation of the right of property in the applicant's case was not exclusively linked to the question of the levels of rent chargeable, but rather consisted in the combined effect of defective provisions on the determination of rent and various restrictions on landlords' rights in respect of termination of leases, the statutory financial burdens imposed on them and the absence of any legal ways and means making it possible for them either to offset or mitigate the losses incurred in connection with maintenance of property or to have the necessary repairs subsidised by the State in justified cases.

The Court referred to its case-law confirming that in many cases involving limitations on the rights of landlords the limitations applied had been found to be justified and proportionate to the aims pursued by the State in the general interest. However, in none of those cases had the authorities restricted the applicants' rights to such a considerable extent as in the applicant's case. In the first place, she had never entered into any freely-negotiated lease agreement with her tenants; rather, her house had been let to them by the State. Secondly, Polish legislation attached a number of conditions to the termination of leases, thus seriously limiting landlords' rights. Finally, the levels of rent were set below the costs of maintenance of the property such that landlords were not able to increase the rent in order to cover necessary maintenance expenses. The Polish scheme did not, and does not, provide for any procedure for maintenance contributions or State subsidies, thereby causing the inevitable deterioration of the property for lack of adequate investment and modernisation.

It was true that the Polish State, which inherited from the Communist regime an acute shortage of flats available for lease at an affordable level of rent, had to balance the exceptionally difficult and socially sensitive issues involved in reconciling the conflicting interests. It had to secure the protection of the property rights of landlords and respect the social rights of tenants, who were often vulnerable individuals. Nevertheless, the legitimate interests of the community in such situations called for a fair distribution of the social and financial burden involved in the transformation and reform of the country's housing supply. That burden could not, as in the applicant's case, be placed on one particular social group, however important the interests of the other group or the community as a whole.

In the light of the foregoing, and having regard to the effects of the operation of the rent-control legislation during the whole period under consideration on the rights of the applicant and others in a similar situation, the Polish State had failed to strike the requisite fair balance between the general interests of the community and the protection of the right of property. There had therefore been a violation of Article 1 Protocol 1 ECHR.

The Grand Chamber further agreed with the Chamber's conclusion that the applicant's case was suitable for the application of the pilot judgment procedure. It was common ground that the operation of the impugned housing legislation potentially entailed consequences for the property rights of a large number of people whose flats were let under the rent control scheme. Eighteen similar applications were pending before the Court, including one lodged by an association of some 200 landlords. The Court noted, however, that the identification of a "systemic situation" justifying the application of the pilot judgment procedure did not necessarily have to be linked to, or based on, a given number of similar applications already pending. In the context of systemic or structural violations the potential inflow of future cases was also an important consideration in terms of preventing the accumulation of repetitive cases on the Court's docket, which hindered the effective processing of other cases giving rise to violations, sometimes serious, of the rights it was responsible for safeguarding.

Although the Polish Government maintained that the rent control scheme no longer existed in Poland, the Court reiterated its view that the general situation had not yet been brought into line with the Convention standards.

The Grand Chamber shared the Chamber's general view that the problem underlying the violation of Article 1 Protocol 1 ECHR consisted in "the malfunctioning of Polish housing legislation". However, the Grand Chamber saw the underlying systemic problem as a combination of restrictions on landlords' rights, including defective provisions on the determination of rent, which was and still is exacerbated by the lack of any legal ways and means enabling them at least to recover losses incurred in connection with property maintenance, rather than as an issue solely related to the State's failure to secure to landlords a level of rent reasonably commensurate with the costs of property maintenance.

The Court noted that one of the implications of the pilot judgment procedure was that its assessment of the situation complained of in a "pilot" case necessarily extended beyond the sole interests of the individual applicant and required it to examine that case from the perspective of the general measures that needed to be taken in the interest of other people who might be affected. Given the systemic nature of the underlying problem, the fact that the applicant's property had been vacated did not prevent the Court from ascertaining whether the cause of the violation for other people had been removed.

The Court held that the violation originated in a systemic problem connected with the malfunctioning of Polish legislation in that it imposed, and continues to impose, restrictions on landlords' rights and it did not and still does not provide for any procedure or mechanism enabling landlords to recover losses incurred in connection with property maintenance.

The Court further held that in order to put an end to the systemic violation identified in the applicant's case, Poland had to, through appropriate legal and/or other measures, secure in its domestic legal order a mechanism maintaining a fair balance between the interests of landlords and the general interest of the community, in accordance with the standards of protection of property rights under the Convention.

It was not for the Court to specify what would be the most appropriate way of setting up such remedial procedures or how landlords' interest in deriving profit should be balanced against the other interests at stake. However, the Court observed in passing that the many options open to the State certainly included the measures indicated by the Constitutional Court in its June 2005 Recommendations, setting out the features of a mechanism balancing the rights of landlords and tenants and criteria for what might be considered a "basic rent", "economically justified rent" or "decent profit".

Supplementary information:

In June 2004 the Court delivered the *Broniowski* judgment (*Broniowski v. Poland* [GC], no. 31443/96, ECHR 2004-V – 22.06.2004) concerning a compensation scheme for Polish citizens displaced after Wold War II ("Bug river claimants"). The expression "pilot judgment" does not actually appear in the text of the judgment, but it was clearly a judgment of a new type in which the Court, having found the existence of a systemic violation, indicated that the government should adopt measures to remedy this systemic defect. Its stated reason for doing so was to avoid overburdening the Convention system with large numbers of applications. In the meantime all other "Bug river" cases pending in Strasbourg were adjourned. This first judgment was followed a year later by a strike-out judgment (*Broniowski v. Poland* (friendly settlement) [GC], no. 31443/96, ECHR 2005-IX – 28.09.2005) in the same case, which expressly considered the implications of the pilot judgment procedure. The Court recalled the growing threat to the Convention system that resulted from large numbers of repetitive cases deriving from the same structural or systemic problem. In considering whether the case could be struck out the Court had regard not only to the applicant's individual situation but also to measures aimed at resolving the underlying general defect in the Polish legal order. The terms of the settlement concluded in this case stressed "the obligation of the Polish Government under Article 46 of the Convention, in executing the principal judgment, to take not only individual measures of redress in respect of Mr Broniowski but also general measures covering other Bug River claimants".

The Court pronounced itself satisfied both with the general measures, including new legislation, and with the individual redress accorded to the applicant. Thus by issuing a single judgment the Court had apparently dealt not only with all the "same issue" cases pending in Strasbourg (some 200), but also brought about the prospects of a solution for the 80,000 other "Bug river claimants". The essence of the pilot judgment procedure is the attempt to address a problem affecting large numbers of persons through a judgment in an individual case. This can be seen as a logical extension of the obligation to take general measures following a finding of a violation.

Since *Broniowski* the Court has sought to follow a broadly similar approach in a number of cases, which have however disclosed divergences of practice. These include *Lukenda v. Slovenia*, no. 23032/02 (Sect. 3), ECHR 2005-X – 06.10.2005), *Xenides-Arestis v. Turkey*, no. 46347/99 (Sect. 3) (Eng) – (22.12.2005) and *Scordino v. Italy (no. 1)* [GC], no. 36813/97, ECHR 2006-… – 29.03.2006). The *Hutten-Czapska v. Poland* [GC], no. 35014/97, ECHR 2006-.. – 19.06.2006) case concerned the operation of a rent-control scheme potentially affecting an even larger number of individuals than in *Broniowski* – some 100,000 landlords and from 600,000 to 900,000 tenants. The Grand Chamber recalled that one of the implications of the pilot-judgment procedure was that the Court's assessment of the situation complained of in a "pilot" case necessarily extended beyond the sole interests of the individual applicant and required it to examine that case also from the perspective of the general measures that needed to be taken in the interest of other potentially affected persons.

The cases since *Broniowski* recognise the flexibility needed to accommodate the range of different situations with which the Court is confronted. Thus in some judgments the Court will go further in specifying the type of general measures required, sometimes include its recommendation as to general measures in the operative part, sometimes adjourn consideration of similar applications. The practice will no doubt develop in the light of experience and different sets of facts.

Cross-references:

- *Sporrong and Lönnroth v. Sweden*, Judgment of 23.09.1982, Series A, no. 52; *Special Bulletin ECHR* [ECH-1982-S-002];
- *James and Others v. the United Kingdom*, Judgment of 21.02.1986, Series A, no. 98;
- *Mellacher and Others v. Austria*, Judgment of 19.12.1989, Series A, no. 169;
- *Spadea and Scalabrino v. Italy*, Judgment of 28.09.1995, Series A, no. 315-B;
- *Scollo v. Italy*, Judgment of 28.09.1995, Series A, no. 315-C; *Bulletin* 1995/3 [ECH-1995-3-018];
- *Immobiliare Saffi v. Italy* [GC], no. 22774/93, *Reports of Judgments and Decisions* 1999-V;
- *Broniowski v. Poland* [GC], no. 31443/96, *Reports of Judgments and Decisions* 2004-V;
- *Broniowski v. Poland (friendly settlement)* [GC], no. 31443/96, *Reports of Judgments and Decisions* 2005-IX.

Languages:

English, French.

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* Page numbers of the systematic thesaurus refer to the page showing the identification of the decision rather than the keyword itself.

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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.
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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.
[22] As understood in private international law.
[23] Including constitutional laws.
[24] For example, organic laws.
[25] Local authorities, municipalities, provinces, departments, etc.
[26] Or: functional decentralisation (public bodies exercising delegated powers).
[27] Political questions.
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[30] For the withdrawal of proceedings, see also 1.4.10.4.
[31] Pleadings, final submissions, notes, etc.
[32] May be used in combination with Chapter 1.2. Types of claim.
[33] For the withdrawal of the originating document, see also 1.4.5.

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[34] Comprises court fees, postage costs, advance of expenses and lawyers' fees.
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[36] Only for issues concerning applicability and not simple application.
[37] 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.).
[38] Including its Protocols.

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39 Presumption of constitutionality, double construction rule.
40 Including the principle of a multi-party system.
41 Includes the principle of social justice.
42 See also 4.8.
43 Separation of Church and State, State subsidisation and recognition of churches, secular nature, etc.
44 Including maintaining confidence and legitimate expectations.

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4.2.5 Motto
4.2.6 Capital city

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45 Principle according to which sub-statutory acts must be based on and in conformity with the law.
46 Prohibition of punishment without proper legal base.
47 Including compelling public interest.
48 Only where not applied as a fundamental right (e.g. between state authorities, municipalities, etc.).
49 Including questions of treason/high crimes.
50 Including prohibition on monopolies.
51 For the principle of primacy of Community law, see 2.2.1.6.
52 Including the body responsible for revising or amending the Constitution.

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[53] For example, presidential messages, requests for further debating of a law, right of legislative veto, dissolution.
[54] For example, nomination of members of the government, chairing of Cabinet sessions, countersigning.
[55] For example, the granting of pardons.
[56] For regional and local authorities, see chapter 4.8.
[57] Bicameral, monocameral, special competence of each assembly, etc.
[58] Including specialised powers of each legislative body and reserved powers of the legislature.
[59] In particular commissions of enquiry.
[60] For delegation of powers to an executive body, see keyword 4.6.3.2.
[61] Obligation on the legislative body to use the full scope of its powers.

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62 Representative/imperative mandates.
63 Presidency, bureau, sections, committees, etc.
64 Including the convening, duration, publicity and agenda of sessions.
65 Including their creation, composition and terms of reference.
66 State budgetary contribution, other sources, etc.
67 For the publication of laws, see 3.15.
68 For example incompatibilities arising during the term of office, parliamentary immunity, exemption from prosecution and others. For questions of eligibility, see 4.9.5.
69 For local authorities, see 4.8.
70 Derived directly from the Constitution.
71 See also 4.8.
72 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.

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4.7.9 Administrative courts
4.7.10 Financial courts[79]

[73] Civil servants, administrators, etc.
[74] Practice aiming at removing from civil service persons formerly involved with a totalitarian regime.
[75] Other than the body delivering the decision summarised here.
[76] Positive and negative conflicts.
[77] Notwithstanding the question to which to branch of state power the prosecutor belongs.
[78] For example, Judicial Service Commission, *Conseil supérieur de la magistrature*.
[79] Comprises the Court of Auditors in so far as it exercises judicial power.

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80 See also 3.6.
81 And other units of local self-government.
82 See also keywords 5.3.41 and 5.2.1.4.
83 Organs of control and supervision.
84 For questions of jurisdiction, see keyword 1.3.4.6.

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85 Proportional, majority, preferential, single-member constituencies, etc.
86 For aspects related to fundamental rights, see 5.3.41.2.
87 For the creation of political parties, see 4.5.10.1.
88 E.g. Names of parties, order of presentation, logo, emblem or question in a referendum.
89 Tracts, letters, press, radio and television, posters, nominations, etc.
90 Impartiality of electoral authorities, incidents, disturbances.
91 E.g. signatures on electoral rolls, stamps, crossing out of names on list.
92 E.g. in person, proxy vote, postal vote, electronic vote.
93 E.g. Panachage, voting for whole list or part of list, blank votes.
94 E.g. Auditor-General.
95 Parliamentary Commissioner, Public Defender, Human Rights Commission, etc.

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96 E.g. Court of Auditors.
97 The vesting of administrative competence in public law bodies situated outside the traditional administrative hierarchy. See also 4.6.8.
98 *Staatszielbestimmungen*.
99 Institutional aspects only: questions of procedure, jurisdiction, composition, etc. are dealt with under the keywords of Chapter 1.
100 Including state of war, martial law, declared natural disasters, etc.; for human rights aspects, see also keyword 5.1.4.1.
101 Positive and negative aspects.
102 For rights of the child, see 5.3.44.

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5.3.7 Right to emigrate

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103 The criteria of the limitation of human rights (legality, legitimate purpose/general interest, proportionality) are indexed in chapter 3.

104 Includes questions of the suspension of rights. See also 4.18.

105 Taxes and other duties towards the state.

106 According to the European Convention on Nationality of 1997, ETS No. 166: "'nationality' means the legal bond between a person and a state and does not indicate the person's ethnic origin" (Article 2) and "… with regard to the effects of the Convention, the terms 'nationality' and 'citizenship' are synonymous" (paragraph 23, Explanatory Memorandum).

107 For example, discrimination between married and single persons.

108 This keyword also covers "Personal liberty". It includes for example identity checking, personal search and administrative arrest.

109 Detention by police.

110 Including questions related to the granting of passports or other travel documents.

5.3.8 Right to citizenship or nationality........**218**, **327**
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5.3.19 Freedom of opinion
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[111] May include questions of expulsion and extradition.
[112] 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.
[113] This keyword covers the right of appeal to a court.
[114] Including the right to be present at hearing.
[115] Including challenging of a judge.
[116] Covers freedom of religion as an individual right. Its collective aspects are included under the keyword “Freedom of worship” below.

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117 This keyword also includes the right to freely communicate information.
118 Militia, conscientious objection, etc.
119 Aspects of the use of names are included either here or under “Right to private life”.
120 Including compensation issues.
121 For institutional aspects, see 4.9.5.

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[122] This keyword also covers “Freedom of work”.
[123] 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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