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*
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7. *Cross-references*
8. *Languages*

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

THE VENICE COMMISSION

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

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Strasbourg, October 2007

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There was no relevant constitutional case-law during the reference period 1 September 2006 – 31 December 2006 for the following countries:

Canada, Denmark, Luxembourg, Norway, Russia, Ukraine.

Précis of important decisions of the reference period 1 September 2006 – 31 December 2006 will be published in the next edition, *Bulletin* 2007/1, for the following countries:

Japan, Lithuania, Netherlands.

Andorra
Constitutional Court

Important decisions

Identification: AND-2006-3-001

a) Andorra / **b)** Constitutional Court / **c)** / **d)** 20.10.2006 / **e)** 2006-1 and 3-CC / **f)** / **g)** *Butlletí Oficial del Principat d'Andorra* (Official Gazette), 02.11.2006 / **h)**.

Keywords of the systematic thesaurus:

4.6.2 **Institutions** – Executive bodies – Powers.
4.8.3 **Institutions** – Federalism, regionalism and local self-government – Municipalities.
4.8.8.2.1 **Institutions** – Federalism, regionalism and local self-government – Distribution of powers – Implementation – Distribution *ratione materiae*.
4.8.8.4 **Institutions** – Federalism, regionalism and local self-government – Distribution of powers – Co-operation.

Keywords of the alphabetical index:

Conflict of powers / Cultural heritage / Heritage, natural and cultural, protection / UNESCO, list of world heritage.

Headnotes:

Title VI of the Andorran Constitution establishes principles governing the territorial structure of the state, under which it is to be regarded as a composite whole, in the sense that the exercise of public authority, as provided for by the Constitution, is not concentrated in a single sphere (the central sphere) but distributed among several area-based public authorities.

The state and municipal authorities must share their powers in compliance with the provisions of the law. The state must ensure the conservation, enhancement and promotion of historic, cultural and artistic heritage, while respecting the administrative autonomy of the municipalities, which is recognised by law through a list of matters including town planning.

An agreement between the state and four municipalities cannot change the system of powers established by the Constitution; this system cannot simply be amended at will. By implication, therefore, conservation and protection of heritage must be carried out in accordance with the domestic rules and cannot result in a change to the rules governing jurisdiction.

Summary:

The Court was asked to assess two conflicts of jurisdiction between the municipalities of Encamp and Escaldes-Engordany and the government. They related to two decrees arising from the designation of the valley of Madriu-Perafita-Claror as a "cultural landscape" following UNESCO's inclusion of the valley on its World Heritage List. The applicant municipalities considered that the two decrees encroached on their exclusive powers and undermined their capacity to manage and administer their property. The first decree set out various rules on the assignment of the valley to the category of cultural landscapes, while the second decree outlined the protection zone of the cultural landscape of the valley in question. It also dictated the procedure for public hearings and information concerning the architectural and town-planning criteria governing operations in the area designated as being of cultural significance and in the protection zone.

The Court ruled that the decrees complied with the constitutional system of powers in that they empowered the state, in designating the valley of Madriu-Perafita-Claror as property of cultural significance, to determine criteria defined as "architectural and town-planning" which would govern operations in the area concerned. The decrees also provided that the municipalities would have to clarify those criteria when drawing up regulations for protection, use and management. The state may determine criteria protecting the aesthetic, historic and cultural assets of the valley and its buffer zone, when it indirectly proclaims that these "architectural and town-planning" criteria will govern the municipalities' town planning and "heritage" powers, but also recognises that it is for the municipalities to "clarify" these criteria when drawing up the protection regulations. In so doing, the state indirectly acknowledges that its criteria must leave the municipalities sufficient room for manoeuvre so that they may "clarify" them and, of course, supplement them with other specifically town-planning and architectural criteria.

The Court therefore decided to dismiss both allegations of conflict of jurisdiction. It found that the

decrees did not encroach on the powers that the Constitution and the relevant law determining the powers of the municipalities conferred on the municipalities with regard to the management, administration and use of public municipal property, parish town-planning policy and the provision of municipal public services.

Supplementary information:

The Constitutional Court deals with conflict of jurisdiction between constitutional organs. The constitutional organs are the Co-Princes (jointly and indivisibly the heads of state), the General Council (parliament), the government, the Superior Council of Justice and the organs of representation and administration of the *Parròquies;* Andorra comprises seven *Parròquies*.

Languages:

Catalan.

Argentina
Supreme Court of Justice of the Nation

Important decisions

Identification: ARG-2006-3-002

a) Argentina / **b)** Supreme Court of Justice of the Nation / **c)** / **d)** 21.11.2006 / **e)** A. 2036. XL / **f)** Asociación Lucha por la Identidad Travesti – Transexual v. Inspección General de Justicia / **g)** *Fallos de la Corte Suprema de Justicia de la Nation* (Official Digest), 329 / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

2.2.2.2 **Sources** – Hierarchy – Hierarchy as between national sources – The Constitution and other sources of domestic law.
2.3.2 **Sources** – Techniques of review – Concept of constitutionality dependent on a specified interpretation.
3.22 **General Principles** – Prohibition of arbitrariness.
5.1.1.5.1 **Fundamental Rights** – General questions – Entitlement to rights – Legal persons – Private law.
5.2.2.11 **Fundamental Rights** – Equality – Criteria of distinction – Sexual orientation.
5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
5.3.27 **Fundamental Rights** – Civil and political rights – Freedom of association.

Keywords of the alphabetical index:

Association, registration, refusal / Transsexual, recognition / Association, common benefit.

Headnotes:

The phrase “useful purposes” mentioned in the Constitution in the context of the exercise of the right of association applies to any voluntary group seeking, by peaceful means and without incitement to violence, to pursue any objectives and claims which, in keeping with the principles of the democratic system, neither offend against public order and morality nor cause definite and tangible harm to the property or interests of third parties.

Norms which rank below constitutional level must be interpreted in the light of the Constitution.

“Common benefit” is not an abstract, impersonal term. It does not imply a distinct collective spirit or less still whatever the majority deems common, to the exclusion of minorities. It simply means benefit common to all persons, often with divergent interests, especially in modern society, which is of necessity pluralistic, that is, composed of persons with very different preferences, world views, interests and projects.

Summary:

The Court of Appeal, ruling in a civil case, had dismissed an appeal brought by the Association for the Defence of the Identity of Transvestite Transsexuals against an administrative decision which withheld the authorisation it required to function as a legal entity under the terms of Article 33 of the Civil Code. The association had filed an extraordinary appeal before the Supreme Court, which set aside the impugned judgment.

The Court held firstly that this judgment had prejudiced the association. It could operate at the level of an ordinary civil association, but it was deprived of the rights which accrue to authorised associations (for example the capacity to receive inheritances, legacies or gifts).

The Court also found that if limits are placed on the exercise of the right of association, there is a risk that certain social groups, particularly those whose effective integration into the community proves difficult, may be denied reasonable means of resolving conflicts, means which the State must preserve and encourage. Thus the way in which freedom of association is upheld by the legislation, and especially practised by the authorities, is one of the surest signs of democracy's institutional soundness.

The Court stressed that Article 14 of the Constitution secures to “all inhabitants of the Nation” the right “to associate for useful purposes”. At the very core of constitutional rights is respect for human dignity and freedom, and the structural rule of a democratic lifestyle is founded on a society's ability to resolve its conflicts by having ideas debated in public. Consequently, the “useful purposes” mentioned in the Constitution are ascribed to any voluntary group seeking, by peaceful means and without incitement to violence, to pursue any objectives and claims which, in keeping with the principles of the democratic system, neither offend against public order and morality, nor cause definite, tangible harm to the interests and property of third parties. The extent of pluralism, tolerance and understanding prompts the argument that any right of association is constitutionally expedient, in so far as this enhances respect for the opinions of others, even opinions which one finds repugnant or with which one disagrees. This concept of expediency relates to a lawful and harmless social goal.

Norms ranking below constitutional level are to be interpreted in the light of the Constitution. The foregoing will, accordingly, have an impact on the validity of the interpretation of Article 33 of the Civil Code which requires associations to have the “common benefit” as their principal objective, if the status of legal person is to be conferred. This means that associations cannot be excluded on the basis of pursuing a benefit peculiar to their members or to those who share their ideas. There are few associations of which this is not true.

“Common benefit” is not an abstract, impersonal term. It does not imply a distinct collective spirit or less still whatever the majority deems common, to the exclusion of minorities. It simply means benefit common to all persons, often with divergent interests, especially in modern society, which is of necessity pluralistic, that is, composed of persons with very different preferences, world views, interests and projects.

The Argentine Republic has not been unacquainted in the past with the prejudices that exist towards sexual minorities – based on racist ideologies and false assertions, the universal historical precedents for which have had well-known and terrible consequences, including genocide, and indeed the type of persecution now taking place in widespread parts of the world, giving rise to the development of movements claiming rights linked with human dignity and with basic respect for freedom of conscience.

Furthermore, it is virtually impossible to misconstrue the goal of common benefit so as to exclude an association which aims to extricate a group of people from an existence on the margins of society, fostering improvement of their quality of life and their standards of physical and mental health, while avoiding the spread of infectious diseases, thus improving their life expectancy and access to medical and social facilities.

In short, the administrative decision increased the requirements to be met before the status of legal personality could be conferred, by requiring the appellants to prove that this was necessary to achieve their aims, plain utility or convenience being deemed insufficient. Moreover, the Court of Appeal held that defence or assistance of persons on the grounds of their transvestism or transsexualism corresponded to no more than a self-seeking benefit. Both decisions placed restrictions on common benefit

to the disadvantage of the appellant association which was denied legal personality, not because its aim was to improve the situation of a certain group in need of assistance (an aim shared by numerous legal entities), but because the assistance was directed at the transvestite transsexual group. In other words, the sexual orientation of the social group to which the members of the association belonged had carried decisive weight in the decision to withhold the legal personality requested.

The Court recalled the previous decision relating to the principle of equality before the law under Article 24 ACHR (American Convention on Human Rights). The Inter-American Court of Human Rights held: "The notion of equality springs directly from the oneness of the human family and is linked to the essential dignity of the individual. That principle cannot be reconciled with the notion that a given group has the right to privileged treatment because of its perceived superiority. It is equally irreconcilable with that notion to characterise a group as inferior and treat it with hostility or otherwise subject it to discrimination in the enjoyment of rights which are accorded to others not so classified." (Advisory Opinion OC- 4/84, of 19 January 1984, para. 55).

Under Articles 16, 75.22 and 23 of the Constitution and Article 24 ACHR, differentiated treatment for any one organisation cannot be justified solely by what is deemed fitting by administrative officers, since at the very least a reasonable connection between a given State purpose and the measure in question is required (Article 30 ACHR). This requirement was not fulfilled in the present case, for the reasons set out above.

Supplementary information:

In the last paragraph of the summary, the Court abandoned the opposite stance, which it had earlier adopted by majority, which had been taken by other courts in a 1979 precedent. The Court also relied on the judgment in the case of *Gorzelik and others v. Poland*, *Reports of Judgments and Decisions* 2004-I of the European Court of Human Rights of 17 February 2004 (paragraphs 89/92); *Bulletin* 2004/1 [ECH-2004-1-001].

Languages:

Spanish.

Armenia
Constitutional Court

Statistical data

1 September 2006 − 31 December 2006

- 161 applications have been filed, including:
  - 13 applications, filed by the President
  - 2 applications, filed by one-fifth of the total number of deputies
  - 143 applications, filed by individuals
  - 1 application, filed by a court of first instance
  - 1 application, filed by the Prosecutor General
  - 1 application, filed by the Human Rights' Defender
- 132 individual applications were rejected as inadmissible, as the issues they raised did not fall within the Constitutional Court's jurisdiction
- 26 cases heard and 26 decisions delivered, including 10 cases concerning the compliance of domestic law with the Constitution and 16 cases concerning the compliance with the Constitution of obligations set out in international treaties
- 16 cases are currently under review.

Other Court decisions

Between 1st September and 31st December 2006, the Armenian Constitutional Court considered several other cases regarding the conformity of certain legislation with the Constitution. The following decisions are of particular note:

1. The decision as to the conformity of provisions of Article 1 of "the Law of the Republic of Armenia on Amendments to the Armenian Law on the Status of a Judge' (new wording of Article 18)" with the Constitution. (DCC-647). The provision at issue stated that the basis for determination of monthly extra payments to a judge's pension is 75 per cent of the official wage rate, not 75 per cent of the salary of their last judicial appointment. This was held to be at odds with Article 94.1 of the Constitution and to be null and void.

2. The decision as to the conformity with the Constitution of Article 11 of "the Law of the Republic of Armenia on Social Security Cards" (DCC-649). Certain provisions in Article 11.2 of this Law prevent the exercise of rights set out in Articles 31, 32.2 and 37. These provisions were held to be inconsistent with Articles 3, 6.1, 6.2, 42, 43 and 48.12 of the Constitution and null and void.

3. The decision as to the conformity of Article 160.1 of the Armenian Civil Procedure Code with the Constitution. (DCC-665). The Court examined various provisions set out in the second recital of Article 160.1 of the Code in the light of the way they are interpreted in the practice of law enforcement. It held that they were inconsistent with the provisions of Articles 18 and 19 of the Constitution and null and void.

Important decisions

Identification: ARM-2006-3-002

a) Armenia / **b)** Constitutional Court / **c)** Plenary / **d)** 07.11.2006 / **e)** DCC-664 / **f)** On the compliance of Article 35.1.3, second sentence, Article 35.1.4, and Article 36.1 of the Armenian Electoral Code with the Armenian Constitution / **g)** to be published in *Tegekagir* (Official Gazette) / **h)**.

Keywords of the systematic thesaurus:

3.4 **General Principles** – Separation of powers.
4.7.4.1.6.1 **Institutions** – Judicial bodies – Organisation – Members – Status – Incompatibilities.
4.9.1 **Institutions** – Elections and instruments of direct democracy – Electoral Commission.
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:

Election, electoral commission, formation / Court, independence / Judge, impartiality / Judge, incompatibility.

Headnotes:

A judge's duties are not compatible with a job which has no bearing on the role of a judge. For example, a judge's right to administer justice is incompatible with the function of organising and holding elections. It is therefore not appropriate to include judges in electoral commissions as the Constitution suggests. This would conflict with the administration of justice and the independence of the judiciary. It could also result in conflicts of interest between judges, and make it difficult for judges and courts to remain impartial when resolving electoral disputes.

Summary:

I. A group of deputies to the Armenian National Assembly sought a ruling from the Constitutional Court, as to the compliance with the Constitution of provisions in the second sentence of Article 35.1.3 and 35.1.4 and Article 36.1 of the Electoral Code.

The provisions stated that, after parliamentary elections, authority to appoint members of the Central Electoral Commission would be vested in the Council of the Chairmen of the Armenian Courts. The Council consists of judges from the courts of general jurisdiction, and one judge from the Court of Cassation appointed by the Court of Cassation. The applicants argued that the provisions were in conflict with Articles 5.1, 19.1 and 98.1 of the Constitution.

They emphasised that the doctrine of separation of powers means that competences belonging to one branch of power cannot be implemented by another. They went on to say that if a citizen challenges decisions by Central or Precinct Electoral Commissions, then the state body whose representatives issued the legislation in point will be reviewing the complaint. Nevertheless, a court can be unbiased and independent, if it is separate from the body that has adopted the decision and if it played no part in the decision-making. They also argued that when a judge carries out his or her official duties, this is a professional occupation, and incompatible with an occupation not related to such duties.

The respondent argued that the provisions of the Electoral Code are not in conflict with Article 5.1 of the Constitution. The electoral commissions, as independent bodies, are not included within any branch of state power and do not, in practice, exercise functions exclusively attributable either to the executive, legislative or judicial powers.

In the respondent's view, there is no inconsistency between the provisions of the Electoral Code and Article 19.1 of the Constitution. That would only be the case where a judge who is a member of the electoral commission presided over the resolution of the dispute. The point was also made that recent alterations to the Constitution have resulted in

changes to the language of Article 98.1. On that basis, the articles in question now contradict Article 98.1 of the Constitution.

II. The Constitutional Court noted the stipulation within Article 32.1 of the Electoral Code, to the effect that "The electoral commissions ensure the realisation and protection of citizens' electoral rights. While exercising their functions electoral commissions are independent from the state and from the local government."

The function of the electoral commissions is to make sure that institutions of democracy are formed by means of the exercise and protection of citizens' electoral rights. A direct comparison cannot be drawn between this function and that of other state bodies. In this respect, the involvement of all government branches in the formation of the electoral commissions is justified, as there are robust safeguards in place, to guarantee the independence of the commissions. State bodies must not be allowed to develop powers which would jeopardise the effective and impartial exercise of their own powers or which could endanger the constitutional system of checks and balances.

The Constitutional Court also pointed out that although Article 33 of the Electoral Code prescribes that judges from courts of general jurisdiction work on a voluntary basis, the nature of their work means that they hold a state position in a state agency. Furthermore, according to Article 33.3, "The Chairman, Deputy Chairman and Secretary of the Central Electoral Commission work on a permanent basis and may not carry out other paid work, apart from scientific, tutorial and creative work." These requirements help to define the particular nature of membership of the Electoral Commission, and are significant in terms of guaranteeing the equal status of commission members.

The Court emphasised that Article 98.1 of the Constitution forbids judges and members of the Constitutional Court from being engaged in entrepreneur activities, holding public office in central government or local government, which is irrelevant to their duties, positions within commercial organizations or any other paid work. The only exceptions are scientific, tutorial and creative work.

The rationale behind the provisions is to make sure that those administering justice devote their whole attention to this task, and perform it impartially. Their aim is also to avoid conflicts of interest and any undue influence on judges. The fact that the legislation precludes judges and members of the Constitutional Court from holding public office in central or local government which is not relevant to their duties is significant. It implies that the Constitution has defined the framework of a judge's term of office so that he will keep to his official duties. Any amendments to legislation pertaining to the status and powers of a judge would have to be made with due regard to this limitation, which has been imposed by the Constitution.

The Court also observed that the Constitution allows the Constitutional Court to preside over disputes arising from the outcome of Presidential and Parliamentary elections. Courts of general jurisdiction may preside over disputes which have arisen during the preparation and organization of the elections, and infringements of provisions of the Electoral Code. During local government elections, the judicial protection of electoral rights lies with courts of general jurisdiction. In this case, a judge's right to administer justice is incompatible with the function of organizing and holding elections. This will particularly be the case when judges are elected as chairpersons, deputy chairpersons or secretaries of electoral commissions, something which is not ruled out by the Electoral Code.

The Court drew attention to a document entitled "Code of Good Practice in Electoral Matters: Guidelines and Explanatory Report" adopted by the European Commission for Democracy through Law (Venice Commission) on 18-19 October 2002, which stresses the need for an independent and impartial electoral system. According to Paragraph 3.1.d of the second part of the document, the Central Electoral Commission should include at least one member from the judiciary. Paragraphs 68-85 of the mentioned document set out the way electoral commissions should be organised, so as to ensure their impartial and independent functioning. According to the commentary to paragraph 75 of the Code: as a rule, the composition of the electoral commission, together with other members, should include "a judge or a law officer: where a judicial body is responsible for administering the elections, its independence must be ensured through transparent proceedings. Judicial appointees should not come under the authority of those standing for office."

In view of the points raised above, the Constitutional Court held that the presence of "a judge or law officer" member is clearly to ensure the impartiality and independence of commissions. The provision pertains to independent, impartial lawyers and to judges. The legislation of several member states of the Council of Europe provides for the inclusion of judges in electoral commissions.

Nonetheless, due to several provisions of the Electoral Code, as well as the Law on the Judiciary, over half of the total number of judges from the courts of general jurisdiction may become members of the electoral commissions, whereas less than half may challenge the decisions adopted by their colleagues. This affects the entire system of justice. According to the Law on Judiciary, the Armenian legal system has 101 justices from courts of the first instance of general jurisdiction and 17 chairmen of those courts, 24 justices from the appeal courts and two chairmen, the chairman of the Court of Cassation, two chairmen of the chambers and 10 justices. There is also a specialist economic court, consisting of a chairman and 21 justices. Altogether, there are 179 persons (157 persons not including the justices of the economic court). 84 of them can simultaneously become members of the electoral commission.

Article 40.14 of the Electoral Code provides that "Judges appointed to electoral commissions under the procedure set out in the Electoral Code, cannot resolve disputes arising from the activities (or inactivity) of the respective electoral commissions". This does not change the situation substantially. In addition, Articles 35 and 36, read in conjunction with paragraphs 1 and 2 of part 3.1 of Article 38 of the Electoral Code, set out the procedure for filling vacancies in the central and regional electoral commissions from the judiciary. Situations could arise, as a result, where the number of judges who could hold office in the electoral commission could exceed the total amount of the judges from the courts of general jurisdiction.

Taking into account the limited number of judges in Armenia, the balance between judges who are and who are not included in the electoral commissions, the way electoral disputes are resolved and various time limitations, there is evidently a conflict between the interests of establishing independent electoral commissions and of administering efficient and impartial justice. It may, therefore, be impossible to guarantee the rights enshrined within Article 19 of the Constitution.

The Court emphasised that the role of impartial and independent electoral commissions is vital, but that in "transitional countries" impartial judicial power is also of pivotal importance. This is why Article 98 of the Constitution prevents judges from holding any office which is not relevant to his official duties. Including judges in electoral commissions, as prescribed by the Electoral Code, is at odds with the administration of justice, with the independence of the judiciary, increases the possibility of conflicts of interest, and undermines the impartiality of judges and courts when resolving electoral disputes.

The Constitutional Court held that:

1. Articles 35.1.3, 35.1.4 and 36.1 of the Electoral Code, which allow for judges to be appointed to serve as members of central or regional electoral commissions, are in conflict with Articles 19.1 and 98.1 of the Constitution and null and void.

2. Those parts of Articles 35.2, 38.3.1.1 and 38.3.1.2 of the Electoral Code which set out the procedure for filling vacancies on central and regional electoral commissions from the ranks of the judiciary are in conflict with Articles 19.1 and 98.1 of the Constitution. They are null and void.

3. Other legislation which ensured the implementation of the void provisions is repealed upon the entry into force of the Constitutional Court's decision.

Languages:

Armenian.

Belgium
Court of Arbitration

Important decisions

Identification: BEL-2006-3-010

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 14.09.2006 / **e)** 137/2006 / **f)** / **g)** *Moniteur belge* (Official Gazette), 29.09.2006 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

1.6.5.2 **Constitutional Justice** – Effects – Temporal effect – Retrospective effect (*ex tunc*).
2.1.1.3 **Sources** – Categories – Written rules – Community law.
2.1.1.4 **Sources** – Categories – Written rules – International instruments.
3.11 **General Principles** – Vested and/or acquired rights.
5.3.29 **Fundamental Rights** – Civil and political rights – Right to participate in public affairs.
5.5.1 **Fundamental Rights** – Collective rights – Right to the environment.

Keywords of the alphabetical index:

Environment, protection, standstill obligation / Environment, impact, assessment / Environment, spatial planning, zoning / Decision-making, public participation.

Headnotes:

With regard to the protection of the environment, Article 23 of the Constitution contains a "standstill obligation". It prevents the legislator from significantly reducing the level of protection afforded by applicable law, if there are no public interest grounds for doing so.

Summary:

I. The association "Inter-Environnement Wallonie" applied to the Court of Arbitration for annulment of a number of provisions of a programme-decree on economic recovery and administrative simplification adopted by the Walloon Region on 3 February 2005.

The applicant mainly challenged Article 55, which concerns spatial planning and, more specifically, zoning procedure.

The applicant argued *inter alia* that the procedure for implementing "zones designated for future industrial development" (ZADI), as laid down in the challenged article, offered fewer guarantees of due protection of the environment than the procedure previously in force and accordingly breached the constitutional guarantee on protection of the environment (Article 23 of the Constitution).

Previously, implementation of a ZADI required a municipal development plan, which could only be adopted by the municipal council following a public enquiry and an environmental impact study, with the participation of a certified project designer and opinions from specialised authorities. Under the new regulations, implementation of a ZADI merely necessitated a decision giving reasons relating to a number of factors such as the location, adjacent properties, the costs for the region concerned and that region's needs, existing transport infrastructure and so on. In addition, a ZADI now concerned all kinds of economic activities, not just industrial ones.

II. In response to the applicant's arguments, the Court first observed that, with regard to protection of the environment Article 23.3.4 of the Constitution contains a "standstill obligation". It prevents the legislator from significantly reducing the level of protection afforded by applicable law, if there are no public interest grounds for doing so.

The Court considered whether the fact that a municipal development plan was no longer required in order to establish the zones in question and the possibility of extending these zones to economic activities other than those of an industrial nature, without first having to assess the overall environmental impact or hold a public enquiry on the subject, breached Article 23 of the Constitution, regard being had to Articles 3 to 6 of Directive 2001/42/CE of the European Parliament and the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment and to Articles 7 and 8 of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters signed in Aarhus on 25 June 1998 and ratified by Belgium on 21 January 2003.

The Court pointed out, *inter alia*, that Article 7 of the Aarhus Convention made it obligatory to submit evaluation of "plans and programmes relating to the environment" to a public participation procedure, concerning which it laid down certain conditions.

Specifically, after having provided the necessary information to the public, appropriate practical and/or other provisions must be made for the public to participate during the preparation of such plans and programmes, within a transparent and fair framework.

The Court noted that the substitute guarantees introduced by the impugned article, in particular the obligation to give reasons in the light of the factors mentioned in paragraph 4 thereof, could not make good the elimination of the substantive and procedural guarantees inherent in the preparation of a municipal development plan.

The Court concluded that the occupants of properties adjacent to these zones were faced with a significant decline in the level of protection afforded by the previous legislation, which, in the light of the above-mentioned provisions of European and international law, could not be justified by the public-interest grounds underlying the impugned article.

The Court accordingly annulled the article in question. To avoid any legal uncertainty resulting from this annulment *(ex tunc)*, it decided, pursuant to Article 8.2 of the special Act of 6 January 1989 on the Court of Arbitration, that the annulled article should continue to apply to permits issued under its provisions, execution of which predated the publication of the judgment in the *"Moniteur belge"*.

Cross-references:

To be compared with Judgment no. 135/2006 of the same date (www.arbitrage.be), in which the Court had already, for the first time, recognised the standstill effect of Article 23 of the Constitution in environmental protection matters, but found no significant reduction in the level of protection (see recital B.13.6), and with the later Judgment no. 145/2006 of 28 September 2006. The Court had previously ruled on the standstill effect of Article 23 of the Constitution solely in social assistance matters (Article 23.3.2 of the Constitution) in Judgment no. 80/1999 (recital B.4.5) – see also Judgment no. 169/2002 [BEL-2002-3-012].

Languages:

French, Dutch, German.

Identification: BEL-2006-3-011

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 18.10.2006 / **e)** 157/2006 / **f)** / **g)** *Moniteur belge* (Official Gazette) / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
5.2.2 **Fundamental Rights** – Equality – Criteria of distinction.
5.3.34 **Fundamental Rights** – Civil and political rights – Right to marriage.
5.3.44 **Fundamental Rights** – Civil and political rights – Rights of the child.

Keywords of the alphabetical index:

Marriage, right, restriction / Incest, relatives by marriage in direct line, marriage, prohibition / Family, protection / Family, morality.

Headnotes:

On account of its absolute nature, the legislation banning marriage between all ascendants and descendants and relatives by marriage in the same line has disproportionate effects in that it imposes an absolute bar on marriage between a parent-in-law and a child-in-law after the death of the spouse who created the relationship by marriage. It accordingly breaches the constitutional principle of equality and non-discrimination (Articles 10 and 11 of the Constitution).

Summary:

I. Crown counsel had applied to the Verviers first-instance court seeking the annulment of a marriage between a father-in-law and a daughter-in-law since there was an absolute impediment to this marriage under Article 161 of the Civil Code, which provides "In direct line, marriage shall be prohibited between all ascendants and descendants and relatives by marriage in the same line." Under Article 163 of the same Code, marriage between an uncle and a niece or a nephew or between an aunt and a niece or a nephew remains prohibited, but Article 164 provides that this prohibition can be lifted by royal order where there are "serious grounds" for doing so.

In connection with these proceedings the court decided to question the Court of Arbitration first as to whether Article 164 of the Civil Code was compatible with the constitutional rules of equality and non-discrimination (Articles 10 and 11 of the Constitution), taken together with Article 12 ECHR, in that it made it possible for restrictions on marriage to be lifted by

royal order only in the cases set out in Article 163 of the Civil Code, whereas an absolute prohibition (Article 161) existed in other comparable situations, such as marriage between a parent-in-law and a child-in-law after the death of the spouse who created the relationship by marriage. The court also asked the Court of Arbitration to rule on the compatibility with the same constitutional provisions of Article 161 of the Civil Code, in that, in a direct line, it prohibited marriage between all ascendants and descendants and relatives by marriage in the same line, whereas in a collateral line only marriage between a brother and a sister was prohibited (Article 162).

II. The Court dealt jointly with the two preliminary questions.

It first pointed out that, according to the case-law of the European Court of Human Rights, the right enshrined in Article 12 ECHR was subject to the national laws of the Contracting States, but the limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right was impaired (*Rees v. United Kingdom*, 17 October 1986, Series A, no. 106.50).

The Court then noted that, whereas the impediment to marriage between ascendants and descendants and relatives by marriage in the same line had its basis in the incest taboo, the impediment to marriage between relatives by marriage in direct line with no biological ties was based on moral and social reasons, not on physiological or eugenic criteria. Parliament thereby sought to safeguard the sanctity of the family and to guarantee the place of each generation within the family.

The Court held that the difference in treatment resulting from the existence or lack of an impediment to marriage between, firstly, a parent-in-law and a child-in-law and, secondly, relatives in a collateral line, was founded on an objective criterion, namely the nature and degree of the relationship between the persons concerned. In view of the closer link between a parent-in-law and a child-in-law the Court deemed this criterion appropriate to achieve the aim pursued by parliament.

The Court considered that the fact that the link between a parent-in-law and a child-in-law differed from that between relatives in a collateral line other than siblings, for whom there was no impediment to marriage, could also be inferred from the maintenance obligation existing between relatives by marriage in direct line, despite the lack of any relationship by descent. For instance, a parent-in-law had a maintenance obligation vis-à-vis his or her children-in-law after their spouses' death (Article 2032 of the Civil Code). Other relatives by marriage in direct line also had a maintenance obligation, which in some cases continued after the death of the person who created the kinship (Article 206 of the Civil Code).

The Court nonetheless held that, on account of its absolute nature, the measure had disproportionate effects, since it entirely prohibited marriage between a parent-in-law and a child-in-law after the death of the spouse who created the relationship by marriage.

In the operative provisions, it ruled that since Article 161 of the Civil Code, where taken in conjunction with Articles 163 and 164, absolutely prohibited marriage between a parent-in-law and a child-in-law after the death of the spouse who created the relationship by marriage, it violated Articles 10 and 11 of the Constitution, taken together with Article 12 ECHR.

Languages:

French, Dutch, German.

Bosnia and Herzegovina
Constitutional Court

Important decisions

Identification: BIH-2006-3-006

a) Bosnia and Herzegovina / **b)** Constitutional Court / **c)** Plenary session / **d)** 29.09.2006 / **e)** U-17/06 / **f)** / **g)** *Službeni glasnik Bosne i Hercegovine* (Official Gazette), 14/07 / **h)** CODICES (Bosnian, English).

Keywords of the systematic thesaurus:

3.10 **General Principles** – Certainty of the law.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Effective remedy.
5.3.13.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.

Keywords of the alphabetical index:

Remedy, proceedings, lack / Legislation, incoherence.

Headnotes:

The right to a fair trial is violated if the legislation simply mentions the formal possibility of a remedy, but does not stipulate the court proceedings necessary to achieve this remedy.

Summary:

On 5 July 2006, the Supreme Court of the Federation of Bosnia and Herzegovina asked the Constitutional Court to review the compliance with the Constitution and with Article 6.1 ECHR of several articles of the 1996 Law on Minor Offences Violating Federation Regulations (hereinafter referred to as "the Law". The articles of the Law in question were Articles 152, 153, 154, 155, 156 and 157.

Article 157 of the Law provides that the provisions of the Criminal Procedure Code which relate to a request for extraordinary review of a final decision will apply to proceedings on a request filed for judicial review. The Supreme Court argued that these provisions were inconsistent with Article II.3.e of the Constitution and Article 6.1 ECHR, in that they stipulated the remedy that would secure access to the courts, but did not set out the procedure related to this remedy. They referred to the procedure involving an extraordinary legal remedy in criminal proceedings, which is not, in fact, provided for under the applicable law on criminal procedure. Access to court upon request for judicial review in proceedings for minor offences is accordingly prevented.

When the Law was passed, the Criminal Procedure Code for the former SFRY was in force and was subsequently adopted as the law of Bosnia and Herzegovina. Chapter XXIV of that Law provided that a request for extraordinary review of a final judgment could be used as an extraordinary remedy. In the Criminal Procedure Code enacted in 1998 in the Federation of Bosnia and Herzegovina, which superseded the Criminal Procedure Code of the former SFRY, there was no provision for an extraordinary legal remedy. Moreover, the current Criminal Procedure Code of the Federation of Bosnia and Herzegovina, which was enacted in 2003 and referred to here as the "Criminal Procedure Code of the F BiH" does not provide for this extraordinary legal remedy. Neither does it stipulate the proceedings necessary to achieve it. The Supreme Court contended that this state of affairs, where a legal remedy such as access to court is provided for in one law, and which refers to the procedure laid down by another law which does not in fact provide for such a remedy, is incompatible with Article II.3.e of the Constitution and Article 6.1 ECHR.

Articles 152 to 156 of the Law set out the requirements for filing a request for judicial protection. Article 157 provides that in cases of a request for judicial protection, the relevant provisions pertaining to extraordinary review of a valid judgment, stipulated by the Criminal Procedure Code valid in the territory of the Federation, will apply. However, the Criminal Procedure Code of the F BiH only stipulates one extraordinary remedy – renewal of proceedings. It does not contain any provisions on the proceedings to be conducted upon a request for extraordinary review of the valid judgment or upon a request for the protection of legality referred to in Article 157 of the Law. The legislator did not take into account this new legal situation after the new criminal procedure code came into force, and did not make changes or amendments to the challenged Law.

In the Federation of Bosnia and Herzegovina, the Law on Minor Offences of the Federation of Bosnia and Herzegovina entered into force on 29 June 2006. Article 83 of this Law provides that the challenged Law will cease to apply as soon as the new Law comes into force. Article 84 of the new Law also

provides that any pending proceedings involving extraordinary remedies shall be completed by the relevant court under the previous law. It follows, therefore, that although the challenged Law is no longer in force, Articles 152 to 157 still apply. During the process of drafting new legislation on minor offences, the legislator did not take into account the fact that the provisions relating to proceedings involving extraordinary remedies referred to in Article 157 of the challenged Law were ineffective and therefore there were no provisions relating to such proceedings which could be applied by the courts.

The Constitutional Court observed that Articles 152 to 157 of the challenged Law only provided for the formal possibility of using an extraordinary remedy − a request for judicial protection. They did not stipulate the court proceedings which should be undertaken in order to achieve this remedy. As a result, there was an infringement of the principle of legal certainty, which requires states to provide clear and specific norms, available to all, to enable citizens to conduct themselves in accordance with these norms and to enable the competent authorities to ensure that all citizens can exercise their constitutional rights. These include the right of access to court, within the right to a fair trial, under Article II.3.e of the Constitution and Article 6.1 ECHR.

The Constitutional Court therefore pronounced the provisions of Articles 152 to 157 of the challenged Law to be inconsistent with Article II.3.e of the Constitution and Article 6.1 ECHR.

Languages:

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

Identification: BIH-2006-3-007

a) Bosnia and Herzegovina / **b)** Constitutional Court / **c)** Plenary session / **d)** 18.11.2006 / **e)** U-4/04 / **f)** / **g)** *Službeni glasnik Bosne i Hercegovine* (Official Gazette), 14/07 / **h)** CODICES (Bosnian, English).

Keywords of the systematic thesaurus:

4.2.1 **Institutions** – State Symbols – Flag.
4.2.2 **Institutions** – State Symbols – National holiday.
5.2.2.3 **Fundamental Rights** – Equality – Criteria of distinction – Ethnic origin.

Keywords of the alphabetical index:

Constituent people, national symbols, discrimination / Flag, discrimination / Holiday, national, discrimination.

Headnotes:

The constituent peoples have a fundamental right to political representation. The symbols of Entities must represent all citizens of the Entities, that is, all citizens of Bosnia and Herzegovina must identify with those symbols.

Summary:

I. On 12 April 2004, the Chairman of the Presidency of Bosnia and Herzegovina (hereinafter referred to as “the applicant”) asked the Constitutional Court to review the compliance with the Constitution of various provisions. They included Articles 1 and 2 of the Law on the Coat of Arms and Flag of the Federation of Bosnia and Herzegovina (hereinafter: “Law on the Coat of Arms and Flag of Federation), Articles 1, 2 and 3 of the Constitutional Law on the Flag, Coat of Arms and Anthem of the Republika Srpska (hereinafter: “Constitutional Law of RS”), Articles 2 and 3 of the Law on the Use of Flag, Coat of Arms and Anthem of the Republika Srpska (hereinafter: “Law on the Use of Flag, Coat of Arms and Anthem”) and Articles 1 and 2 of the Law on the Family Patron-Saints’ Days and Church Holidays of the Republika Srpska (hereinafter: “Law on Holidays of RS”).

At its plenary session of 31 March 2006 the Constitutional Court adopted a partial decision (“Partial Decision I”) to the effect that certain parts of Articles 1 and 2 of the Law on the Coat of Arms and Flag of Federation, Articles 2 and 3 of the Constitutional Law of RS were out of line with Articles I.1 and I.2 of the Constitution, and with Article II.4 of the Constitution, in conjunction with Articles 1.1 and 2.a and 2.c of the International Convention on the Elimination of All Forms of Racial Discrimination.

As part of the applicant’s request had already been resolved by Partial Decision I, the Constitutional Court dealt in the case in point with the constitutional review of Article 1 of the Constitutional Law of RS and Articles 1 and 2 of the Law on Holidays of RS.

The applicant pointed out that the flag of the Republika Srpska contains all the features of the flags of the Principality of Serbia of 1878 and the Kingdom of Serbia of 1882 respectively. It incorporates symbols with deep roots in the history of the Serb people. The applicant suggested that the above provisions of the Constitutional Law of RS discriminated against Bosniak and Croat peoples as constituent peoples in the entire territory of Bosnia and Herzegovina and thus in the Republika Srpska as well. The provisions also discriminate against other citizens of Bosnia and Herzegovina. The enactment of these provisions resulted in direct discrimination on national grounds against the Bosniak people, the Croat people and other citizens of Bosnia and Herzegovina. This had brought about an atmosphere of fear amongst them, and distrust in the authorities of the Republika Srpska, and was impeding the return of non-Serbs to their homes of origin in the Republika Srpska. The applicant also argued that the present case raised an issue of discrimination with regard to the right to return as guaranteed under Article II.5 of the Constitution of Bosnia and Herzegovina, prohibition of discrimination on national origin and provision of equal treatment with regard to the right of freedom of movement within state boundaries.

The applicant also contended that Articles 1 and 2 of the Law on Holidays of RS contravened Article II.4 in conjunction with Articles II.3 and II.5 of the Constitution. Articles 1 and 2 of the Law on Holidays designate various family patron-saints' days and church holidays as the holidays of the Republika Srpska. They are Christmas, Day of Republic, New Year, Twelfth-day, St. Sava, First Serb Uprising, Easter, Whitsuntide, May Day – Labour Day and St. Vitus' Day. The applicant observed that, with the exception of Labour Day, the holidays of only one people, the Serb people, are included, which are orthodox religious holy days and holidays associated with the history of the Serb people and the Orthodox faith, such as the First Serb Uprising, Twelfth-day, Orthodox Christmas and Easter. The holy days of other peoples and religious denominations, such as Eid (Bajram), Catholic Christmas and Easter, are designated as working days. The enactment of holidays that are part of the Serbs' history simply serves to create an air of distrust among other peoples and citizens and maintains a sense of fear of ethnic cleansing, which they experienced during the aggression on Bosnia and Herzegovina between 1992 and 1995, when they were forced to leave their homes of origin.

The National Assembly of RS argued that this view was not well founded. It pointed out that the three colours of red, white and blue, portrayed on the flag of the Republika Srpska are in fact "Pan-Slavic" colours and that they are also displayed on the Croatian flag, albeit in a different arrangement. On the basis that all constituent peoples in Bosnia and Herzegovina are of Slavic origin, the National Assembly argued that the colours themselves could not be the subject of a constitutional dispute and that their arrangement represents an aesthetic matter, not a constitutional one.

Turning to the Law on Holidays of RS, the National Assembly pointed out that Article 2.2 of the Law grants all citizens of the Republika Srpska a right to celebrate three days per year on religious holidays of their choice, without discrimination on any grounds.

II. The Constitutional Court emphasised the importance of symbols in fostering and preserving the tradition, culture and distinctive characteristics of every people. As they represent the achievements, hopes and ideals of a state, they have to be respected by all its citizens, in this specific case by the citizens of Entities. In order to be perceived as such by all the citizens of Entities in Bosnia and Herzegovina, the flag of the Republika Srpska must be the symbol of all of its citizens and the holidays celebrated in the Republika Srpska must be regulated in such a way that none of the constituent peoples is treated in a preferential manner.

The Constitutional Court accepted the arguments the RS National Assembly put forward, to the effect that the flag of the Republika Srpska, as defined in Article 1 of the Constitutional Law of RS, did not just represent the Serb people in the Republika Srpska, as the colours displayed on it were Pan-Slavic colours, which are related to the history of all the Slavic peoples, including the constituent peoples of Bosnia and Herzegovina. The Constitutional Court observed that the flags of the Republika Srpska and the flag of Serbia were not identical as the flag of Serbia contains a coat of arms, whereas the flag of Republika Srpska does not.

The applicant had contended that the flag was used during the war and that war was waged under that symbol, another point in favour of the argument that the colours on the flag and their arrangement were unconstitutional. The Constitutional Court did not accept this argument, and pronounced Article 1 of the Constitutional Law of RS to be in conformity with Article II.4 of the Constitution in conjunction with Article 1.1. and Article 2.a, 2.b, 2.c, 2.d and 2.e of the International Convention on the Elimination of All Forms of Racial Discrimination. It could not, therefore, accept the applicant's allegations that the Republika Srpska failed to fulfil its positive obligations under Article II.1 and II.6 of the Constitution by failing to change the above article.

The Constitutional Court ruled that Articles 1 and 2 of the Law on Holidays of RS were out of line with constitutional principle of equality of the constituent peoples, citizens and Others, were of a discriminatory nature, and that they contravened Article II.4 of the Constitution in conjunction with Articles 1.1 and 2.a and 2.c of the International Convention for Elimination of All Forms of Racial Discrimination. The challenged provisions of the Law only included those holidays which reflected and exalted Serb history, tradition, customs and religious and national identity, while imposing the same values on members of other constituent peoples, other citizens and Others on the territory of the Republika Srpska. The Constitutional Court stressed that Serb people in Republika Srpska were entitled to preserve their identity and traditions through legislative mechanisms. Nonetheless, equal rights must be accorded to other citizens and constituent peoples of the Republika Srpska.

Justices David Feldman and Constance Grewe delivered separate dissenting opinions.

Cross-references:

- Decision no. U-4/04-Partial Decision I, *Bulletin* 2006/1 [BIH-2006-1-002].

Languages:

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

Bulgaria
Constitutional Court

Statistical data
1 September 2006 – 31 December 2006

Number of decisions: 3

Important decisions

Identification: BUL-2006-3-002

a) Bulgaria / **b)** Constitutional Court / **c)** / **d)** 13.09.2006 / **e)** 06/06 / **f)** / **g)** *Darzhaven vestnik* (Official Gazette), 78, 26.09.2006 / **h)**.

Keywords of the systematic thesaurus:

3.4 **General Principles** – Separation of powers.
4.1.1 **Institutions** – Constituent assembly or equivalent body – Procedure.
4.1.2 **Institutions** – Constituent assembly or equivalent body – Limitations on powers.
4.4.1.3 **Institutions** – Head of State – Powers – Relations with judicial bodies.
4.5.2 **Institutions** – Legislative bodies – Powers.
4.5.8 **Institutions** – Legislative bodies – Relations with judicial bodies.
4.7.4.1.5 **Institutions** – Judicial bodies – Organisation – Members – End of office.
4.7.4.3.5 **Institutions** – Judicial bodies – Organisation – Prosecutors / State counsel – End of office.
4.7.5 **Institutions** – Judicial bodies – Supreme Judicial Council or equivalent body.
4.7.7 **Institutions** – Judicial bodies – Supreme court.
4.7.16.2 **Institutions** – Judicial bodies – Liability – Liability of judges.

Keywords of the alphabetical index:

Judge, dismissal, by parliament / Constitution, fundamental principle, protection / Judiciary, independence / Parliament, powers, restriction / Parliament, exclusive right to amend the Constitution.

Headnotes:

The three independent branches of government are the legislature, the executive and the judiciary. The way they function can only be changed by the Grand National Assembly, not by amendment of the Constitution by the ordinary National Assembly.

Summary:

Proceedings were instituted at the instigation of the plenary Court of Cassation, alleging the unconstitutionality of § 6.1 of the Act amending the Constitution, introducing a new Article 129.4. This amendment of the Constitution concerned the form of State government, an area where any amendment of the Constitution is in fact the prerogative of the Grand National Assembly.

It should be noted first of all that the Constitution of 1991 expresses the desire of the majority of Bulgarian society for Bulgaria to occupy its rightful place among European countries which set an example both morally and economically. The law grants relative inviolability to the subject matter of Article 158 of the Constitution by stipulating that only the Grand National Assembly can modify this part of the fundamental law. The Bulgarian Constitution thus follows the tradition whereby certain subjects are too important to be amended by a qualified majority in the ordinary National Assembly. This self-restriction in the Constitution serves to guarantee stability and respect for the established constitutional order. If the ordinary National Assembly had the power to make changes and amendments to the Constitution, the Constitution would not occupy the special place it occupies today in the country's legal system. Changing essential chapters of the Constitution without following the special procedure provided for in Article 158 could expose the Constitution to hasty amendments or passing interests. It would be difficult to legitimise a political system if the amendment at its origin were the fruit of improvisation, an arrangement or misguided outside pressure.

The new Article 129.4 of the Constitution stipulates that in the event of serious breaches of their official obligations, or of activities likely to harm the prestige of the judiciary, Supreme Court Presidents and the Chief Prosecutor may be dismissed from office not only by the Supreme Judicial Council but also by the President of the Republic at the request of two thirds of the parliament.

Article 158.3 of the Constitution stipulates that questions concerning the form of state structure and the form of government are to be resolved by the Grand National Assembly. Provisions directly concerning the form of state structure and of government are to be found in Chapter One of the Constitution, on “Fundamental Principles”. This chapter contains other principles, such as national sovereignty, the rule of law, the supremacy of the Constitution, the separation of powers, and political plurality. All these principles are of fundamental importance for any modern state. It would therefore be unacceptable for the ordinary National Assembly to be able to amend this part of Chapter One.

The sole subject of this decision is a constitutional principle without which the state could not function according to the rules of civilisation, namely the fundamental principle of the separation of powers between the legislature, the executive and the judiciary.

Fundamental principles for the normal functioning of society, such as the separation of powers, mutual deterrence, and interaction and co-operation are the fruit of historical traditions and subjective attitudes, and contain ideas which have not actually been realised in the normal manner. In this particular case, in order to determine whether the law in question is in accordance with the fundamental principles of the form of state structure and government, the Court must take the Constitution into account.

The desire of the legislator to give each branch of government the power to act independently in its respective field is evident; only the National Assembly passes the budget, which determines the remuneration of law officers, and elects the eleven members of the Supreme Judicial Council. The members of that Council are responsible, in their turn, for supervising the behaviour of senior justice officials. The impugned provision, which concerns one of the most important aspects of the organisational independence of the judiciary, highlights the imbalance between the three branches of government. Accordingly, the Court considers that there has been a breach of the three-way separation of powers enshrined in the Constitution.

The impugned provision is also at variance with the rule of law. It is a well-established fact that in the continental tradition the content of this notion is linked to the provisions of the law regarding the structure, form and functioning of the State.

Following the amendments made to it, the Constitution provides for Parliament and the Supreme Judicial Council, under the same conditions and for the same reasons, to be able to take decisions independently. This state of affairs could give rise to

insurmountable problems. When more than one body is responsible for taking the same decisions they tend to avoid doing so. The result could be legal chaos.

The proper procedure for dismissing a judge should give the interested parties a say in the decision. In other words the procedure should provide from the outset for the possibility of challenging the findings of the parliament. It is inadmissible that in respect of this essential part of the Constitution, *preventive* measures are rejected in favour of *post factum* appeals to the Constitutional Court.

In the light of the above, the Court considers it necessary to protect the Constitution against amendments not in keeping with its fundamental principles and declares the impugned decision in violation of the Constitution.

Languages:

Bulgarian.

Croatia
Constitutional Court

Important decisions

Identification: CRO-2006-3-012

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 22.01.2006 / **e)** U-III-59/2006 / **f)** / **g)** *Narodne novine* (Official Gazette), 132/06 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

1.3.5.12 **Constitutional Justice** – Jurisdiction – The subject of review – Court decisions.
2.2.2.2 **Sources** – Hierarchy – Hierarchy as between national sources – The Constitution and other sources of domestic law.
3.16 **General Principles** – Proportionality.
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:

Confiscation, property, preventive measure / Confiscation, proportionality.

Headnotes:

The standpoint taken by the Constitutional Court attracted criticism in this case because the Court, when hearing a constitutional complaint, had decided on legality rather than the violation of constitutional rights, and had also held that law could be used to justify the non-application of constitutionally guaranteed human rights and freedoms.

One of the judges who voted in favour of the decision commented that the Court should express a view in its reasoning as to the proportionality of the restriction of the guaranteed right of ownership. This would not, however, bring into question the established Court practice regarding restrictive examination of penalties and safety measures adjudicated in criminal and misdemeanour proceedings.

Summary:

A foreign citizen was found guilty in misdemeanour proceedings in Croatia of an offence under Article 993.3 of the Maritime Code (Narodne novine no. 181/04). He was fined. The fine was reduced at appeal, due to extenuating circumstances. Article 1008.2 of the Maritime Code was also applied and the yacht, with its appurtenances and accessories, inventory and vessel documents, was confiscated as a precautionary measure.

The defendant in the proceedings described overleaf filed a constitutional complaint. The Constitutional Court rejected it, by a majority. In his complaint, the applicant had highlighted allegations which had already been rejected by the lower courts. The Constitutional Court found no breach of his rights under Article 29 of the Constitution to a fair and independent trial and a decision within a reasonable time or of the principle that illegally obtained evidence is not admissible in court proceedings. Article 30 provides that a sentence for a serious criminal offence may result in the loss of rights or a ban on acquiring them for a certain period of time, if this is necessary to protect the legal order. Articles 48.1 and 50.1 of the Constitution are also relevant here. They respectively provide for a constitutionally guaranteed right of ownership. This right may, however, be restricted or the property itself expropriated, upon payment of compensation equal to its market value, where this is in the interests of the Republic of Croatia.

Article 94.4 of the Maritime Code applies to owners of ships and operators of yachts or boats which transport passengers for money. Passengers may only be transported for money within the internal waters and territorial seas of Croatia by Croatian boats or yachts, owned by domestic natural or legal persons who comply with requirements contained in special regulations issued by the minister.

Six judges of the Constitutional Court opposed the rejection of the applicant's complaint. They presented a separate opinion, based on a constitutional interpretation of Article 48.1 of the Constitution, read in conjunction with Article 16.2. In it, they pointed out that the confiscation of the yacht was a grave material consequence; completely out of proportion to any illicit benefits the complainant may have derived in committing what was admittedly a serious offence.

In their view, the reasoning behind the Court's decision – that the law could be used to justify derogation from constitutionally guaranteed rights – was totally unacceptable and inappropriate in constitutional law. They expressed concern, too, about the implications of such a stance for the future practice of the Court, as the Court, in deciding on constitutional complaints, would be deciding upon legality rather than the violation of constitutional rights. It could also result in legal provisions in future cases being used to justify the non-application of constitutional provisions that guarantee human rights and fundamental freedoms.

A judge who voted to reject the constitutional complaint had certain misgivings as well, and published a separate opinion indicating disagreement with some of the reasoning behind the decision. He suggested that the Court ought to have examined whether there had been a restriction on ownership under Article 16 of the Constitution. In his view, the Court should also have expressed a view as to whether the restriction on ownership rights was proportionate here. Finally, the circumstances of this particular case did not, in his opinion, warrant a change in the Court's practice of rigorous scrutiny of penalties and safety measures in criminal and misdemeanour proceedings.

Languages:

Croatian, English.

Identification: CRO-2006-3-013

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 14.09.2006 / **e)** U-III-685/2005 / **f)** / **g)** *Narodne novine* (Official Gazette), 107/06 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

3.9 **General Principles** – Rule of law.
4.7.9 **Institutions** – Judicial bodies – Administrative courts.
5.3.13.19 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Equality of arms.

Keywords of the alphabetical index:

Judgment, enforcement / Execution, writ, basis.

Headnotes:

The rule of law is one of the highest values of the constitutional order of the Republic of Croatia. Implicit within it is the obligation of courts, when interpreting and applying regulations, to act in such a way that they do not violate human rights and fundamental freedoms.

Summary:

The applicant was the successor in title to somebody who had been involved in a labour dispute and who was awarded damages and litigation costs derived from execution proceedings. The applicant filed a constitutional complaint. The Constitutional Court began by examining the content of constitutional rights under Article 14.2 of the Constitution (equality of all before the law) and Article 29.1 of the Constitution (universal right to a fair and independent trial and a decision within a reasonable time). It held that the judgments in question infringed the provisions of the Execution Act and breached various constitutional rights.

The Court observed that execution proceedings are based on the principle of formal legitimacy. Accordingly, the Court charged with execution may only act within the framework and on the grounds of a valid execution document. Execution may only be ordered to realise the claim specified in the execution document and within the scope set out therein. Those drafting execution documents and presenting claims in civil or administrative proceedings must have regard to the suitability of the execution document. In the case in point, the execution document specified an obligation to pay interest, but gave no indication as to when the interest should begin to run. The applicant was prevented from correcting this defect in the documentation.

The Constitutional Court found that the execution court was not authorised to supplement the execution document and the writ of execution so as to establish the point at which interest began to run. This fell outside its function of providing legal protection. It would be particularly wrong to allow judgment creditors themselves to indicate the starting point for the interest and to forward that submission to those involved in payment operations for use in the calculation of the applicant's total debt. By acting in this way, the execution court overstepped the boundaries set out in the execution document. It effectively contravened the provisions of the Execution Act. The Second Instance Court did not sanction this violation.

The Constitutional Court held that the rule of law is one of the highest values of the constitutional order of the Republic of Croatia. Implicit within it is the obligation of courts, when interpreting and applying regulations, to act in such a way that they do not violate human rights and fundamental freedoms. The judgments in question were overturned and the case was referred to the First Instance Court for retrial.

Languages:

Croatian, English.

Identification: CRO-2006-3-014

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 03.10.2006 / **e)** U-III-4845/2004 / **f)** / **g)** *Narodne novine* (Official Gazette), 114/06 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

1.2.1 **Constitutional Justice** – Types of claim – Claim by a public body.
1.4.9.1 **Constitutional Justice** – Procedure – Parties – *Locus standi*.
5.1.1.5.2 **Fundamental Rights** – General questions – Entitlement to rights – Legal persons – Public law.

Keywords of the alphabetical index:

Constitutional complaint, by state, admissibility.

Headnotes:

The Constitutional Court held in these proceedings that the Republic of Croatia is not considered to be a person entitled to lodge a constitutional complaint, under Article 128.4 of the Constitution.

Summary:

The Constitutional Court rejected a constitutional complaint lodged by the Republic of Croatia against judgments by lower courts in proceedings regarding the payment of Christmas allowances and gifts for children for the year 2000, together with legal default interest and litigation costs.

The Court referred in its reasoning to a provision of Article 72 of the Constitutional Act on the Constitutional Court. This provides that the Constitutional Court shall reject a constitutional complaint if it is not competent, if the complaint was not submitted in time, or if it is incomplete, incomprehensible or not permissible. A constitutional complaint is not permissible if it is submitted by somebody who is not entitled to do so. The Court also referred to a provision of Article 128.4 of the Constitution. Under this provision, the Croatian Constitutional Court decides on constitutional complaints against individual decisions by government bodies, local and regional government authorities, and legal persons vested with public authority, where these decisions violate human rights and fundamental freedoms, as well as the right to local and regional self-government guaranteed in the Constitution.

The reasoning for the constitutional complaint, which was not taken into consideration due to its nature, has interesting implications regarding the application of substantive law to the disadvantage of the state as a party to proceedings, and regarding voluntarily alteration of the claimant's claim for payment into a claim for compensation for damage, where the Second-Instance Court had made a rough estimate of the amount of adjudicated compensation.

Languages:

Croatian, English.

Identification: CRO-2006-3-015

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 18.10.2006 / **e)** U-III-3121/2005 / **f)** / **g)** *Narodne novine* (Official Gazette), 123/06 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

3.18 **General Principles** – General interest.
5.1.2 **Fundamental Rights** – General questions – Horizontal effects.
5.1.4 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.21 **Fundamental Rights** – Civil and political rights – Freedom of expression.
5.3.24 **Fundamental Rights** – Civil and political rights – Right to information.

Keywords of the alphabetical index:

Dismissal, justification, statement to press / Freedom of expression, limitation, due to employment contract.

Headnotes:

An individual can only carry out his or her "civil duty" to report illegal and punishable deeds, without fear of repercussions, by lodging a complaint with the competent government authorities. In cases of justified public interest, the competent government authorities shall, in compliance with the existing legislation, make this information available to the media under the same conditions.

Summary:

The ordinary courts refused at three instances the applicant's claim in employment proceedings that the termination of her contract of employment should be deemed non-permissible and that she should be allowed to resume her job.

The applicant's employer terminated her contact of employment, when it discovered that she had approached a newspaper, without permission, on several occasions during April 2001. She had put forward several unprofessional analyses of business operations, she had levelled accusations against the employer's board of directors and management, and given an extremely negative view of the business operations of I. Ltd., in which she damaged the employer's reputation. She had also divulged confidential business information, and this could be harmful to her employer's business interests.

The First-Instance Court found that there was just cause in this particular case to terminate the contract of employment, within the meaning of Article 107 of the Labour Act. The Second-Instance Court rejected the applicant's appeal and upheld in their entirety the facts established and the legal views expressed by the First-Instance Court. The Second Instance Court also pointed out that there is a procedure under which government bodies inform members of the public as to how to respond to illegal activity which violates the public interest in the broadest terms, thereby making this information available to the media under the same conditions. The Court referred here to Article 38.3 of the Constitution, in conjunction with Article 5 of the Public Communications Act (*Narodne novine* nos. 83/96, 143/98 and 98/01).

The Croatian Supreme Court considered approaches to the media by workers, where their employers' business operations and resource management can be portrayed in an extremely negative light, as well as employer and employee relationships. It also studied the significance of the applicant's public appearance in the case in point.

The Supreme Court concurred with the Second Instance Court's finding that the plaintiff could have fulfilled her "intention to prevent damage and protect the respondent's property" by approaching and filing a complaint with the appropriate government bodies. There would have been publicity in the media as a result, but this would not have justified terminating the contract of employment. In her constitutional complaint, the applicant repeated the allegations she had made in the earlier proceedings, but alleged a larger number of violations of constitutional rights. Although some of them may have been relevant, she did not give a clear enough explanation. The Constitutional Court found that some of the rights could not in fact have been violated at all. This is the first case of its kind before the Constitutional Court. It has attracted considerable interest from the public, and there are further cases in the pipeline stemming from the same event, either in an official capacity or by private claim. The case concerns conflict between the individual on the one hand and a monopolistic oil company on the other. The Constitutional Court accordingly devoted more space in its statement of reasons to the decision to reject the complaint as ill founded, and gave a more detailed explanation for rejecting the complaint.

Languages:

Croatian, English.

Identification: CRO-2006-3-016

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 20.11.2006 / **e)** U-III-3678/2005 / **f)** / **g)** *Narodne novine* (Official Gazette), 133/06 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

3.10 **General Principles** – Certainty of the law.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Effective remedy.
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:

Court, decision, reasoning, references to law applied.

Headnotes:

Where reasons are given for a court's decision which explain the legislation on which it was based, parties to the proceedings are given clear direction as to why the decision was made, the fairness of the decision and as to why it would be futile to appeal. If the legislation is not explained in this way, a litigant may be hampered in exercising his or her constitutional right to appeal or other legal remedy.

Summary:

I. The applicants lodged a constitutional complaint against judgments and rulings delivered before the Second-Instance Court in civil proceedings pertaining to the joint ownership of land. They pointed out that the lower court had not referred to a single specific regulation as a basis for its decision, in its reasoning, and suggested that this was in breach of civil procedure as well as the right to an effective legal remedy, which is enshrined in the Constitution.

II. The Constitutional Court upheld the applicants' claims. They agreed that no regulation in substantive law could be found in the earlier proceedings or in the lower court's statement of reasons. Where reasons are given for a court's decision which explain the legislation on which it was based, parties to the proceedings are given clear direction as to why the decision was made, the fairness of the decision and as to why it would be futile to appeal. If the legislation is not explained in this way, a litigant may be hampered in exercising his or her constitutional right to appeal or other legal recourse.

The Court overturned the lower court's judgment and other court rulings, and referred the matter to the First-Instance Court for retrial.

Languages:

Croatian, English.

Identification: CRO-2006-3-017

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 22.11.2006 / **e)** U-I-928/2000 / **f)** / **g)** *Narodne novine* (Official Gazette), 135/06 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

4.5.2 **Institutions** – Legislative bodies – Powers.
4.10.8 **Institutions** – Public finances – State assets.
5.2.1 **Fundamental Rights** – Equality – Scope of application.

Keywords of the alphabetical index:

Company, state owned, management board, member, status / Company, state owned, official, regulation by law.

Headnotes:

If the state participates in economic affairs as a majority shareholder or the founder of a company or other institution, it enjoys the same legal position as other entrepreneurs.

Summary:

I. The Constitutional Court was charged with the assessment of the conformity with the Constitution of Article 6 of the Obligations and Rights of State Officials (Revisions and Amendments) Act. It repealed that part of the Act which refers to Article 13b of the Obligations and Rights of State Officials Act (*Narodne novine* nos. 101/98, 135/98 and 105/99).

The Court referred in particular to the following constitutional provisions:

Article 5.1 of the Constitution: Croatian legislation shall conform to the Constitution, and other regulations shall conform to the Constitution and the law.

Article 14.2 of the Constitution: All shall be equal before the law.

Article 49.1 and 49.2 of the Constitution: Entrepreneurial and market freedom are pivotal to the Croatian economy. The state shall ensure equal legal status for all entrepreneurs within the market.

Article 50.2 of the Constitution: Legal restrictions may be placed, in exceptional circumstances, on the exercise of entrepreneurial freedom and property rights, in order to protect nature, the environment, public health and the interests and security of the Republic of Croatia.

II. The Court noted that when the state participates in economic affairs, whether as a majority shareholder or as the founder of a company or institution, it enjoys the same legal position as any other entrepreneur. Such entrepreneurial rights and interests must be enjoyed in accordance with the relevant legislation. The competence and authority of the company's board of directors and the rights of its shareholders (which includes provision for determining their income) are to be found in the Companies Act and in the company's memorandum and articles of association. The state, as an entrepreneur, is subject to restrictions upon its entrepreneurial rights and freedoms, as set out in Article 50.2 of the Constitution.

There is some doubt, under constitutional law, whether the state, when it amended the legislation described overleaf, used its authority as legislator to determine the salaries of executives in companies and institutions in which it has majority shareholdings or which it set up. The Constitutional Court observed that such a state of affairs would mean that those companies and institutions would not be able to fix salaries. This is a statutory right. It would also place their management team in a different legal position from that of the management team of companies and institutions where salaries are fixed through the company's own management mechanisms. This would contravene the principle of equality before the law, which is enshrined in the Constitution.

The state's intervention as a legislator in regulating issues in the management and internal affairs of companies or institutions in which it has shareholder's or founder's rights and where it is exercising the legal function of an entrepreneur has resulted in the legislation it has enacted being declared unconstitutional.

Two judges gave a separate opinion, to the effect that the provisions in question cannot be described as unconstitutional. In their view, the state (which has the nature of a legal person) should not be put on the same footing as the Croatian Parliament (which is the representative body of citizens and the bearer of national legislative power). The state as a legal person (whether acting independently or with other founders of companies or institutions) acts *iure gestionis* in entrepreneurial undertakings. It should enjoy the same legal position as other legal and

natural persons who have set up companies or institutions, within the system of entrepreneurial and market freedom regulated by Article 49.1 of the Constitution. Entrepreneurial freedom encompasses the fixing of executive salaries on the basis of employment contracts in accordance with the Labour Act, as well as income under special contracts, where members of the management team are not employed directly by the employer.

They also suggested that the disputed legislation should be subjected to the test of constitutionality, under Article 16 of the Constitution, which stipulates that freedoms and rights may only be restricted by law in order to protect the freedoms and rights of others, public order, public morality and health. Any such restriction must be based on the Constitution. It must also be in proportion to the goal and purpose which the law is intended to achieve. There is a line of authority from the Constitutional Court to this effect.

No explanation was given in the reasoning behind the decision as to why the restriction was not in proportion to the goal and purpose that the legislator wanted to achieve, within the meaning of Article 16 of the Constitution. There was simply a statement to the effect that "the state, as entrepreneur, is subject to restrictions on its entrepreneurial rights and freedoms, as set out within Article 50.2 of the Constitution."

In their view, the reasoning behind the decision suggested that the Constitutional Court based its opinion on the fact that it is the Companies Act which designates those who have the competence to determine salaries. To regulate this issue by a special law *(lex specialis)* would be unconstitutional.

Under Article 2.4 of the Constitution, the Croatian Parliament is competent to regulate economic, legal and political relations. Any legislation it enacts within this sphere must comply with the constitutional requirement of the rule of law. The legislator is authorised by law to regulate legal relations which are already subject to legal regulation if reasons acceptable under constitutional law exist for such regulation.

The legal principles of "a later act" and "a special act" *(lex specialis)* in relation to "the general act" *(lex generalis)* may be the subject of judicial review, in cases of an unconstitutional special act, where the fact that this issue is already subject to legal regulation is irrelevant. The fact that the repealed provision in the case in point is designated a special act *(lex specialis)* in relation to a general act (the Companies Act) is not relevant under constitutional law. They pointed out that a statement of reasons for a decision by the Constitutional Court must substantiate the legal opinion as to the unconstitutionality of an Act of parliament, or provisions thereof, and must demonstrate clearly the principles or provisions of the Constitution upon which the Court is basing its constitutional interpretation.

Finally, in their separate opinion, the judges state that the absence of a criterion for drawing a line between the principle of constitutionality and the principle of purposefulness is to be observed in the decisions' statement of reasons. The principle of purposefulness is not nor can be the subject of review in the proceedings of the abstract control of an act.

The Court notes that, in making this decision, it also had in mind that the disputed legal provision is part of an act that regulates the obligations and rights of state officials. The disputed provision, however, regulates the salaries and remunerations of "members of the managements of companies, directors and other heads of institutions, and of the corresponding bodies of other legal persons" and does not refer to state officials.

Languages:

Croatian, English.

Cyprus
Supreme Court

Important decisions

Identification: CYP-2006-3-001

a) Cyprus / **b)** The Supreme Council of Judicature / **c)** / **d)** 19.09.2006 / **e)** / **f)** / **g)** to be distributed upon request / **h)** CODICES (Greek).

Keywords of the systematic thesaurus:

4.7.4.1.6.2 **Institutions** – Judicial bodies – Organisation – Members – Status – Discipline.
4.7.5 **Institutions** – Judicial bodies – Supreme Judicial Council or equivalent body.
4.7.7 **Institutions** – Judicial bodies – Supreme court.
5.3.13.14 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Independence.
5.3.13.15 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Impartiality.

Keywords of the alphabetical index:

Judge, disciplinary measure / Judge, biased, dismissed / Judiciary, independence / Judicial Council, competences.

Headnotes:

The Supreme Council of Judicature may remove a judge from office in a case of proven serious misconduct in the exercise of his or her judicial functions.

Summary:

I. Advocates, litigants, lay members of the Industrial Disputes Tribunal, two Trade Unions and two Employers' Federations filed complaints with the Supreme Council of Judicature, against the Presiding Judge of the Industrial Disputes Tribunal of Nicosia (hereinafter referred to as "the Judge"). They alleged misconduct in the exercise of his judicial functions. The complainants alleged that the Judge's constant and frequently contentious interventions and his comments during trials revealed bias and lack of impartiality, and distorted the fairness of proceedings.

The Industrial Disputes Tribunal consists of the Presiding Judge and two Lay Members of the Court. They are nominated by the Trade Unions and the Employers Federations and appointed by the Supreme Council of Judicature. The Supreme Council of Judicature consists of the President and twelve Justices of the Supreme Court of Cyprus. It has disciplinary powers over all Judges, including the power to dismiss them where there has been serious misconduct in the exercise of their judicial functions.

The Judge was served with a written notice setting out the allegations against him. In a letter to the Supreme Council of Judicature, he stated his position and gave an explanation of the matter. The President of the District Court of Nicosia was then appointed as an investigating officer. He interviewed the complainants and other witnesses (including the Judge under investigation) and then submitted a report to the Council. On the material before it, the Supreme Council of Judicature decided that disciplinary proceedings were warranted and proceeded with the filing of charges against the Judge, for serious misconduct. The Judge was called to appear before the Supreme Council of Judicature and to plead to the charges. He pleaded not guilty. The proceedings were not held in public in accordance with the Judge's wish. The witnesses appeared before the Council, read and adopted the contents of their depositions and were cross-examined by senior counsel appearing for the Judge. At the end of the case against the Judge, the Council found a prima facie case against him. The Judge chose to give evidence himself and he called numerous defence witnesses.

In order to prove the case against the Judge, witnesses (including lay members of the Industrial Disputes Tribunal, advocates and litigants) gave oral evidence and substantiated the charges against him. Furthermore, numerous files of proceedings over which the Judge had presided were presented to the Council, clearly revealing impermissible interventions on his part, with the aim of influencing the outcome of cases and leading them to the outcome he wished for.

II. Having considered all the evidence adduced and all the material facts before it, the Council concluded that there had been misconduct on the Judge's part. This consisted of discourteous behaviour in the courtroom, lack of due consideration to parties to proceedings, witnesses, counsel and lay members of the Court. He had also made remarks on a constant basis demonstrating favouritism, prejudice and bias

and, significantly, a keen interest in the outcome of cases. These acts amounted to serious breaches of judicial conduct, prejudicial to the administration of justice.

The Council accordingly held that the Judge's acts and misconduct constituted sufficient grounds for his impeachment and removal from office. It was stressed that a Judge's decisions should not be influenced by his personal views, beliefs or opinions he may hold on various issues. Judges should discharge their functions with due respect to the principles of equal treatment of parties, non-bias, honesty, integrity and impartiality, so as to safeguard the fundamental right enshrined in Article 30 of the Constitution that everyone is entitled to a fair trial. Judges should act impartially in all circumstances, thus protecting the independence and integrity of the judiciary, which are crucial features of the administration of justice. The purpose of these proceedings was not to punish Judges but to uphold the high standard of justice.

The decision of the Supreme Council of Judicature was not unanimous. The President and eleven Justices concurred, but one Justice dissented. In his opinion, the evidence put forward did not prove the serious charge of misconduct.

Languages:

Greek.

Czech Republic
Constitutional Court

Statistical data

1 September 2006 – 31 December 2006

- Judgment of the plenum: 13
- Judgment of panels: 52
- Other decisions of the plenary Court: 10
- Other decisions in chambers: 1 184
- Other procedural decisions: 243
- Total: 1 513

Important decisions

Identification: CZE-2006-3-009

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 27.09.2006 / **e)** Pl. US 51/06 / **f)** / **g)** *Sbírka zákonů* (Official Gazette), 483/2006 / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

3.10 **General Principles** – Certainty of the law.
3.13 **General Principles** – Legality.
3.16 **General Principles** – Proportionality.
3.18 **General Principles** – General interest.
3.19 **General Principles** – Margin of appreciation.
4.8.2 **Institutions** – Federalism, regionalism and local self-government – Regions and provinces.
4.8.4.1 **Institutions** – Federalism, regionalism and local self-government – Basic principles – Autonomy.
5.1.4 **Fundamental Rights** – General questions – Limits and restrictions.
5.2 **Fundamental Rights** – Equality.
5.3.2 **Fundamental Rights** – Civil and political rights – Right to life.
5.3.39.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.
5.4.19 **Fundamental Rights** – Economic, social and cultural rights – Right to health.

Keywords of the alphabetical index:

Legal order, internal harmony / Law, interpretation, according to purpose / Medical facility, control by Ministry of Health.

Headnotes:

Under Article 1 of the Constitution, the Czech Republic is a democratic state, based on the rule of law. The Constitutional Court had stated previously that the Czech Republic had declared its adherence not only to the formal but also to the substantive concept of a state based on the rule of law. The Czech Constitution accepts and respects the principle of legality as an essential part of the concept of a law-based state; positive law does not, however, bind it merely to formal legality, rather the interpretation and application of legal norms are subordinate to their substantive purpose. The internal harmony of its legal order is of crucial importance to the functioning of a law-based state.

For the above reasons, individual statutes must be comprehensible and the consequences that flow from them foreseeable. The Constitutional Court stressed that the right to life and to health, as set out in the Charter of Fundamental Rights and Basic Freedoms (referred to here as the "Charter") constitute absolute fundamental rights and values. The rights to self-government and to property have to be viewed in the light of these values. The Court did not in any way question the right of the state to select the most suitable method of ensuring they are protected. It is also up to the state to arrange the most efficient way of regulating and supervising medical facilities that provide health care. In so doing, it is pursuing a legitimate aim. However, this right is not to be interpreted in an "absolute" sense, to the exclusion of all other rights and constitutionally protected values, including the right to self-government and the right to the protection of property.

Summary:

I. A group of senators asked the Constitutional Court to repeal certain provisions of the Act on Public Non-Profit Institutional Medical Facilities (referred to here as the "Act") and its Annexes. They claimed that these provisions were in conflict with the Constitution and the Charter. The Act created a "network" of public non-profit institutional medical facilities. The provisions resulted in a loss of operational autonomy for medical facilities, in particular those which were established by municipalities or regions; they would have no right to dispose of their own property or to take decisions about the extent of health care they would provide, or the conditions under which it would be done. The Ministry of Health acquired these powers instead. Furthermore, medical providers now had no guarantee of reimbursement for the services which the state would direct them to provide. This constituted an impermissible encroachment upon their financial autonomy and their right to property.

The Assembly of Deputies and the Ministry of Health, also parties to the proceedings, pointed out that the rationale behind the network of public medical facilities created by Parliament was to pursue the public interest of ensuring care for citizens' health. This was why the provisions stipulated the way properties were to be used. The Assembly and Ministry took the view that the aims of the legislation justified any interference with property rights as a result of the transformation of certain medical facilities into public medical facilities. The Senate, another party to the proceedings, concurred with the petitioners' objections. In their reply the petitioners pointed out that the state could take certain measures in the public interest, but where they interfered with the rights of others, those measures were subject to review, as to whether they were legitimate and proportionate.

II. The Court established that Parliament adopted the provisions under dispute in accordance with constitutionally prescribed legislative procedure. It then reviewed the constitutionality of the statutory restrictions on property rights and on the capacity of self-governing units to control the sphere of public affairs which relates to health protection. It stressed that the right to life and health are absolute fundamental rights and values and the right to self-government and to property have to be viewed in that context. In cases of conflict between a fundamental right or freedom with the public interest or with another fundamental right, it is necessary to assess the reason for the encroachment on the right in the light of the means employed. The standard for this assessment is the principle of proportionality, under which there are three criteria to be satisfied in order for the encroachment to be permissible.

The Court stated that the provisions of the Act were capable of achieving the intended aim (the first criterion), that is, to secure the provision of public services in the area of health care. Parliament did not explain why it had deemed it necessary to encroach upon the property of territorial self-governing units in relation to medical facilities. It had also placed the regions under a duty to establish public heath facilities without ensuring sources of financing. Consequently, the Act did not pass muster in terms of the principle of necessity (the second criterion). The State was not prepared to provide any

recompense for these restrictions on the rights to self-government and property, and therefore the conclusion must be reached that the purpose of the Act could have been achieved in other ways which would have had a lesser impact on the constitutional protected values.

The Court reviewed the provisions to the effect that the specific medical facilities listed in the Annexes to the Act should form part of a network of public health facilities. It held that, here again, Parliament had failed to meet the criterion of necessity, as the aims pursued could have been attained by other less restrictive means. The Court did not continue to work through the test of proportionality. It observed that Parliament had breached the principle of legitimate expectations, as it had not defined the rules for bringing the medical facilities within the Annex under the Act. The list in the Annex lacked generality, which resulted in inequalities for existing medical facilities. The Court stated that the contested provisions of the Act seemed to be substantive restrictions which were unreasonable, unjustifiable and, in the light of the generally accepted and shared hierarchy of values, disproportionate. They did not match the criterion of necessity within the principle of proportionality; neither did they fulfil the requirements of the principles of the protection of legitimate expectations, the equality of legal subjects, generality of law, and legal certainty. The Constitutional Court therefore called for the repeal of the provisions in question. Several judges appended differing opinions to the judgment.

Languages:

Czech.

Identification: CZE-2006-3-010

a) Czech Republic / **b)** Constitutional Court / **c)** Third Chamber / **d)** 11.10.2006 / **e)** IV. US 428/05 / **f)** / **g)** *Sbírka zákonů* (Official Gazette) / **h)** CODICES (Czech).

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

Keywords of the alphabetical index:

Personality, right / Prosecution, restriction of right to personality.

Headnotes:

Each criminal prosecution represents a restriction on the aggregate of rights of personhood, some of which are set out in Article 10 of the Charter of Fundamental Rights and Freedoms. Such restrictions can usually be justified, by the need to protect society from perpetrators of crime. Nonetheless, some situations cannot be described as legitimate restrictions, but are in fact encroachments and violations of the rights guaranteed in Article 10 of the Charter of Fundamental Rights and Freedoms. The Constitutional Court had no desire to define, in abstract terms, the type of cases which would not qualify as legitimate restrictions on rights of personhood. However, it stated that the period when a criminal prosecution occurs, or the period when a criminal conviction (which is subsequently quashed) is in effect, is a factor which must be reviewed. Restrictions on the rights of personhood must be subjected to the test of proportionality, that is, a review as to whether the restrictions (in this case the right to respect for one's human dignity, personal honour, good reputation and privacy) are in proportion to the public interest.

The relevant provision of the Czech Civil Code was to be interpreted in this case as a legal provision which substitutes for the concept of immaterial harm as a component of the concept of damage. The lower courts should have taken into consideration the fact that although they were deciding on the encroachment upon the complainant's rights of personhood, the situation would give rise to a claim for compensation for immaterial harm in consequence of an unlawful decision, or of improper official action.

Summary:

I. The complainant refused to report for civilian service when he was called up. On 15 August 1994, the District Court found him guilty, by criminal decree, of the criminal offence of failure to report for civilian service. He was sentenced to imprisonment, which was suspended for a probationary period. In the same year, the complainant requested the proceedings be reopened. On 10 April 1998, the District Court reopened the case and overturned the criminal decree. The Regional Office for Investigation dismissed the criminal prosecution against the complainant on 21 July 1999. When the Ministry of Justice rejected the complainant's request for compensation, the complainant brought the matter before the courts again.

The District Court resolved the matter as concerns compensation for material harm, but referred the petition for recognition of immaterial harm to the regional court, as the court having jurisdiction to hear such a petition. The regional court rejected the petition on the merits, and the high court, as the appellate court in the matter, upheld its decision.

The ordinary courts rejected the complainant's claim for compensation for immaterial harm on the grounds that the applicable statutes codifying responsibility for damage caused in the exercise of public authority either by decision or by improper official action (no. 58/1969 and no. 82/1998 of the Sbornik, or Collection of Laws), emanated from the requirement of compensation for property damage (actual damage and lost profit). This case was for compensation stemming from the protection of personality rights (§ 11 and following of the Civil Code). They rejected the claim on the basis that criminal proceedings take place in the public interest and this justified any infringement of the complainant's rights to personhood.

The complainant then filed a constitutional complaint in respect of the ordinary courts' decisions. He argued that they had breached his right to fair process, a component of which is the right to a decision within a reasonable time (see Article 6.1 ECHR). His proceedings (from the submission of the request to reopen the proceedings until the dismissal of the criminal prosecution) were unreasonably protracted. Furthermore, the courts' decisions also infringed the constitutionally guaranteed right to compensation for damage caused by improper official action, as enshrined in Article 36.3 of the Charter of Fundamental Rights and Freedoms. The complainant suggested that the unfair criminal prosecution, which lasted many years, was a serious and wrongful encroachment upon his rights of personhood.

II. The Constitutional Court upheld the constitutional complaint. It found that the ordinary courts were correct in their assessment that at the time the claim arose, and at the time they made their decisions, a claim of immaterial harm could not be based on the legislation in force. Although the amending statutes made it possible to claim compensation for damage arising from immaterial harm, they did not assist in the case in point, as they did not have retrospective effect. It is evident from the complainant's argument that he claimed compensation for damage, but he also referred to the Civil Code rules. The Court held that the ordinary courts had acted properly in their handling of the complainant's claim, even with regard to the encroachment on his right to personhood.

However, it did not agree with the ordinary courts' conclusion that actions by institutions taking part in criminal procedure did not constitute such an encroachment. The Court had held in previous decisions that a criminal prosecution and the resulting punishment represent a serious intrusion into individual personal liberty and into the complex of rights of personhood enshrined in Article 10 of the Charter of Fundamental Rights and Freedoms. There is no doubt that a criminal prosecution, or the serving of the sentence imposed, which are carried out in conflict with the law or the constitutional order of the Czech Republic, may give rise to immaterial harm as well as material damage. If institutions taking part in criminal proceedings reached a final decision which then proved to be unlawful (even in cases of delay in proceedings), this potentially violated individual rights of personhood under Article 10 of the Charter of Fundamental Rights and Freedoms. Individuals who have suffered such violations may claim compensation for immaterial harm.

The Court held that the unreasonable length of the proceedings had intensified the intrusion into the complainant's rights of personhood. In reaching the conclusion that these rights were not affected by the actions of the participants in the criminal proceedings, they breached Article 10.1 of the Charter of Fundamental Rights and Freedoms, as they deprived the complainant of protection for particular expressions of his personhood. The Court upheld the constitutional complaint and overturned the disputed decisions.

Languages:

Czech.

Identification: CZE-2006-3-011

a) Czech Republic / **b)** Constitutional Court / **c)** First Chamber / **d)** 07.11.2006 / **e)** I. US 631/05 / **f)** / **g)** *Sbírka nálezů a usnesení Ústavního soudu ČR* (Official Digest) / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Credit, fraud, norm, lack, punishment.

Headnotes:

The requirements for criminal prosecution for credit fraud under the Czech Criminal Code were examined for compliance with the test of proportionality. The Code did not stipulate that harm should result from the fraud. All the same, careful consideration is needed in criminal proceedings as to whether the giving of false information might threaten the interests protected by the Criminal Code. This applies both to the influence the falsification could have on the decision processes of those advancing credit, as to whether the money lent could be recovered, and to the extent to which harm was threatened. A distinction should be drawn between business and consumer loans. Restraint is particularly appropriate in situations where the credit relationship which arose from the transaction is progressing normally, the loan is being paid off, and where the concerns which had given rise to the threat of criminal law prosecution did not materialise.

Summary:

I. In his constitutional complaint the complainant objected to decisions by the ordinary courts, on the basis that they contravened his right to fair process. He also requested the repeal of § 250b of the Criminal Code.

The complainant had applied for a loan to buy a car. In support of his application, he submitted a forged document purporting to come from his employer, stating that he earned a certain income. He did not, in fact, work for that employer. The Court of First Instance found him guilty of the criminal offence of credit fraud, and imposed a prison sentence, suspended for a probationary period.

On appeal, the complainant argued that as the documentation was not forged, the substantive elements of the offence were not in place. The Appeal Court left the conviction in place but overturned the prison sentence, thereby freeing the complainant from punishment. The Supreme Court held that the complainant's extraordinary appeal was unfounded, on the basis that fulfilment of the material elements of the crime follows from the factual findings in the conviction and that the complainant had fulfilled the substantive elements of the offence, as the level of danger his conduct posed corresponded to the least significant and most commonly occurring cases of this offence.

The complainant claimed that his right to fair process was violated because he was found guilty even though neither "guilt nor culpability" had been proved. He explained that he had followed the creditor's instructions, he was receiving the income stated in his application, and he was actually paying the loan off. In support of his proposal for the repeal of the relevant part of the Criminal Code, he argued that the material elements of the criminal offence lack sense in that they did not require harm to result from the fraud; they required a prosecution even in situations where the interests protected by the Criminal Code were lacking. He suggested that the definition of the criminal offence of credit fraud violated per se the Charter of Fundamental Rights and Basic Freedoms, as criminal liability could arise in situations where no harm was done. In this respect, § 250b was out of line with the concept of a criminal offence. It also violated the constitutional directive to preserve the essence and significance of fundamental rights in situations where they are being restricted.

II. The Constitutional Court began by examining the compliance with the Constitution of § 250b of the Criminal Code. It held that it could be interpreted as being constitutionally compliant.

The constitutional complaint was upheld. The information the complainant had submitted concerning the amount and source of income enabled the creditor to assess the likelihood that they could recover the money advanced; however, the submission of this information did not necessarily have any influence on the fact that he was granted a consumer loan, which he began to repay and continues to repay.

The Court of First Instance had interpreted the phrase "the giving of false information" in a purely mechanical manner, with no regard to the protection of credit relations. The ordinary courts did not examine whether the creditor had imposed any contractual sanctions on the debtor. This could have been significant in assessing the character of the criminal conduct. Neither did they clarify the extent to which the complainant's conduct could be vindicated, by his belief that he was following the creditor's instructions. This could have been an important factor in deciding upon culpability.

The Appeal Court made some allowance for the fact that the complainant's conduct did not pose much danger. However, it applied these considerations solely in relation to the effects of criminal responsibility. It commented that his conduct constituted a criminal offence "of a lesser danger to society". The Supreme Court concurred on this point. Nonetheless, it added that the complainant had, "without doubt", posed a threat to the creditor's property, as the creditor had advanced money without knowing his real income level, (which was considerably lower than the amount he mentioned in the credit contract and the forged confirmation), and without knowing "all sources of income" from which it might have satisfied any claim against the complainant.

The source from which the Supreme Court derived these considerations is not apparent from its ruling. The approach taken by the ordinary courts conflicts with the principle of criminal repression, as it is not clear which of the aims generally accepted as being desirable for society as a whole required the imposition of criminal law measures, especially where the creditor does not consider itself harmed by the complainant's conduct. Where Parliament protects certain civil law relationships through the criminal law system, the principle of proportionality requires that consideration be given as to whether the imposition of criminal law measures is necessary. It is for this reason that the indictment is public and that certain procedural devices are available to the courts. They must also bear in mind the specific danger which the alleged criminal conduct poses to society. The complainant's prosecution ended in a conviction.

Criminal legislation allows the public interest in the prosecution of criminal behaviour to be realised by robust methods which have a repressive impact on the integrity of the individual. Constitutional law limits must be respected during criminal prosecutions; in the given case the principle of proportionality. If this does not happen, this will result in a breach of Article 8.2 of the Charter, which sets out the boundaries for any restrictions on personal liberty as guaranteed in Article 8.1. The ordinary courts in the case in point failed to respect the principle of proportionality in criminal repression, thereby violating Article 8.1 of the Charter. This was because they had reached the conclusion that the least significant and commonly occurring cases of the offence as defined by the Code were satisfied in this type of case, where an applicant for a consumer loan included in his application information which was, strictly speaking, untrue but which did not pose a threat to the loan relationship. The Court upheld the complaint and overturned the ordinary courts' decisions. It rejected as the petition to annul the contested Criminal Code provision as manifestly unfounded.

Languages:

Czech.

Identification: CZE-2006-3-012

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 12.12.2006 / **e)** Pl. US 17/06 / **f)** / **g)** *Sbírka zákonů* (Official Gazette) / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

1.2.1 **Constitutional Justice** – Types of claim – Claim by a public body.
1.3.4.2 **Constitutional Justice** – Jurisdiction – Types of litigation – Distribution of powers between State authorities.
3.4 **General Principles** – Separation of powers.
4.6.2 **Institutions** – Executive bodies – Powers.
4.6.6 **Institutions** – Executive bodies – Relations with judicial bodies.
4.7.5 **Institutions** – Judicial bodies – Supreme Judicial Council or equivalent body.

Keywords of the alphabetical index:

Supreme Court, judge, appointment by Minister of Justice, consent, requirement / Constitutionalism, protection / Competence, conflict, non liquet, impossibility / Supreme Court, president, replacement.

Headnotes:

The Minister of Justice has the power to make a decision to assign a judge to the Supreme Court. However, when exercising this power, he must bear in mind that such decisions and their coming into force require the prior assent of the Chief Justice of the Supreme Court as a condition *sine qua non*, in the sense of satisfying the statutory requirements imposed on ministerial decisions. The Minister's act of assigning a judge to the Supreme Court can accordingly be described as a contingent act. A fundamental defect in, or the absence of, the act upon which it is contingent will constitute an incurable defect.

The exercise of the subsumed authority of the Chief Justice of the Supreme Court, which of necessity precedes the decision of the Minister of Justice, constitutes the carrying out of the Chief Justice's competences. Thus, the conflict can be considered as a positive one in the sense that the Chief Justice asserts (and the Minister of Justice calls into question), the fact that he has this exclusive competence. Where this is not respected, or the issue is evaded, the Minister's decision will lack a statutory basis.

The Chief Justice of the Supreme Court, as an organ of another organ, also has exclusive authority to lodge petitions to resolve any conflict of competence, where he is of the view that a dispute has arisen due to disregard of the authority the law has conferred upon him.

The Constitutional Court is the judicial body for the protection of constitutionalism. A situation cannot be allowed, where a serious conflict of competence between two important state organs, representing the judiciary on the one hand and the executive on the other, remains unresolved merely because nobody seems to have been authorised to make a decision. In a democratic law-based state, which the Czech Republic has declared itself to be, it is inconceivable that such an arbitrary act could not be reviewed and overturned, even though it was quite clearly illegal or unconstitutional. The Minister of Justice may be the state organ authorised to issue a decision assigning a judge to the Supreme Court, but he must first obtain the assent of the Chief Justice of the Supreme Court.

Summary:

I. The Chief Justice of the Supreme Court sought a ruling from the Constitutional Court to the effect that the Minister of Justice's decision to appoint JUDr. J.B. to the Supreme Court should have had the assent of the Chief Justice. The Chief Justice explained that, on the day the President of the Republic removed her from office, the Minister of Justice asked the Deputy Chief Justice of the Supreme Court for his assent to the above judicial appointment. After the Judicial Council had expressed its agreement, the Deputy Chief Justice informed the Minister of his assent by telephone, and subsequently in writing. In this connection, the Chief Justice drew the Minister's attention on several occasions in writing to the fact that he had not obtained, as required by statute, her assent to the assignment of an appointed judge to the Supreme Court. The Chief Justice suggested that it does not follow from the Act on Courts and Judges or from the Supreme Court Rules of Procedure, that the Deputy Chief Justice performs the duties of the Chief Justice whenever that office is not occupied. In her view, the actions taken by the Minister and Deputy Chief Justice amounted to a breach of the principle of proportionality, which is protected under the Constitution.

The Minister contended that this was not a conflict of competence, as set out in the Act on the Constitutional Court. He pointed out that, in the case of long-term non-performance of duties by the Supreme Court Chief Justice, the Deputy Chief Justice is empowered to substitute for her to the full extent. Further, the current legislation could not be interpreted as obliging the Minister to seek repeated confirmation from the competent functionary of the Supreme Court, in order as it were to update a statement of position which had already been given.

II. The Constitutional Court found that the matter before it was, essentially, a conflict between two state organs as to whether their respective powers had been exercised in conformity with their statutory definition. If certain authorities are conferred exclusively on the Chief Justice of the Supreme Court, she must also be given the scope to exercise them and to defend them in court. The Chief Justice was, therefore, within her rights to lodge this petition.

The basic question here is whether and under what circumstances the Deputy Chief Justice may assent to the assignment of a judge to the Supreme Court. In order for the Deputy Chief Justice to take on all of the Chief Justice's powers, there would have to be long-term incapacity to perform her duties, that is, the situation must come about where the authorities conferred upon the Chief Justice could not be carried out over a lengthy period. The Deputy Chief Justice is given this authority so that the Supreme Court can continue to function in situations where the Chief Justice suffers from an unusually long incapacity in

the performance of her duties. The Chief Justice's powers will pass to the Deputy at the expiration of the period indicating the long-term nature of the existing condition; further factors include reasonableness and the urgency for the exercise of these powers.

The Constitutional Court established that the conditions for the Chief Justice of the Supreme Court to be substituted by a representative were not satisfied in full. The Court in this instance had delayed the coming into force of the decision by the President of the Republic to remove her from office. At the relevant time, therefore, the Chief Justice of the Supreme Court still had all her powers. It would seem that she had not given her assent at the time the Minister took his decision, although the Act on Courts and Judges requires it and the Minister was informed of the absence of such assent.

The Constitutional Court came to the conclusion that although the Minister of Justice is the state organ competent to issue a decision assigning a judge to the Supreme Court, he needs the assent of the Chief Justice. As this assent was not obtained before the decision was taken, the decision was in conflict both with the law and with the Constitution and the Charter of Fundamental Rights and Basic Freedoms. Accordingly, the Constitutional Court quashed it.

Languages:

Czech.

Identification: CZE-2006-3-013

a) Czech Republic / **b)** Constitutional Court / **c)** First Chamber / **d)** 12.12.2006 / **e)** I. US 786/06 / **f)** / **g)** *Sbírka zákonů* (Official Gazette) / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

1.3.4.1 **Constitutional Justice** – Jurisdiction – Types of litigation – Litigation in respect of fundamental rights and freedoms.
1.3.4.5.4 **Constitutional Justice** – Jurisdiction – Types of litigation – Electoral disputes – Local elections.
1.6 **Constitutional Justice** – Effects.
4.9.7.4 **Institutions** – Elections and instruments of direct democracy – Preliminary procedures – Ballot papers.
4.9.9.3 **Institutions** – Elections and instruments of direct democracy – Voting procedures – Voting.
4.9.9.8 **Institutions** – Elections and instruments of direct democracy – Voting procedures – Counting of votes.
5.2.1.4 **Fundamental Rights** – Equality – Scope of application – Elections.
5.3.41.1 **Fundamental Rights** – Civil and political rights – Electoral rights – Right to vote.

Keywords of the alphabetical index:

Election, judicial review / Election, invalidity / Election, electoral mandate, protection, principle / Election, irregularity, effect on outcome of vote.

Headnotes:

Judicial review of electoral matters is based on the principle of the protection of the electoral mandate. Even where breaches of the law have been proved, this will not result in every case in serious consequences such as the invalidation of the election of an elected representative body. Courts are obliged to review the extent to which a violation of the law could have influenced the outcome of the vote. This will not simply involve a mechanical tabulation of votes cast in a particular electoral ward. Rather, there will be a scrutiny of the purpose and aim of the vote, the decisions relevant to specific candidates and the determination of the order of their substitutes. There is no intrinsic value in the result of a vote in a particular constituency. The result will be a factor in the scrutiny of the elected candidates (or the determination of the order of substitutes). If, in an electoral matter, a court finds that there has been a sufficiently serious breach of the law, so as to invalidate certain ballots or elections, such a conclusion will necessarily lead to the invalidity of the mandate of the representative body.

Summary:

I. The President of the Republic called elections for positions on bodies representing municipalities, municipal districts, and parts of municipalities to be held on 20 and 21 October 2006. All 55 seats in the Representative Body of Municipality "X" were up for election, and representatives took up their positions once the voting had finished. The registration office issued certificates of election, and all elected representatives took the oath at the constituency meeting of the Representative Body of Municipality X.

A voter filed a motion to declare the voting in the elections for positions on the representative council both of the municipality and of parts of the municipality to be invalid. He pointed out that a total of 93 voters in electoral ward no. 113 had received envelopes containing ballot papers to which the official stamp was not affixed. These votes were deemed invalid during the subsequent vote count. The regional court found that there had been a breach of the Act on Elections to Municipal Representative Bodies and that this breach had "without doubt" influenced the outcome of the vote.

The complainant had been elected to the Representative Body of Municipality X and had been given a certificate of election. In his constitutional complaint he contested the regional court's ruling, where the Court had declared the elections to the representative bodies, of the municipality and part of the municipality to be valid. He disagreed with the findings of the regional court. In his view, the Court was required to ascertain the extent and the gravity of the breach of the law, and to assess the relevance of these factors for the election results. He did not believe that the regional court had based its decisions on these considerations. He suggested that the results of the vote for the Representative Body of Municipality X were the results which emerged once the votes submitted by all electoral commissions had been counted. This meant that the 93 invalid votes must be considered in relation to the overall number of votes in all constituencies, in which case they represented only 0.719 % of all voters.

II. The Constitutional Court granted the complainant's request for preferential treatment for his complaint, and heard it as quickly as possible. The Court noted that although the substance of the case concerned electoral matters, the petition was actually a constitutional complaint, the function of which is the protection of fundamental rights and freedoms from erosion by public authorities.

The Constitutional Court only has cassation competence over complaints. It is up to the Court whose decision the Constitutional Court has quashed, to put right a constitutionally defective situation. The Court considered the manner in which the regional court arrived at its decision to the effect that the voting in electoral precinct no. 113 was invalid. This had cast doubt upon the complainant's election and his constitutionally guaranteed right, which gives citizens equal access to elected or public office. The Court observed that judicial review of electoral matters is based on the principle of the protection of the electoral mandate. Even where breaches of the law have been proved, this will not result in every case in serious consequences such as the invalidation of the election of an elected representative body.

The regional court decided only on the invalidity of the voting, not on the invalidity of the elections. The Constitutional Court observed that this interpretation was too rigid and failed to take future ramifications into account. In electoral matters, courts should review the extent to which a violation of the law could have influenced the outcome of the vote. This is not an inquiry into the mechanical tabulation of votes cast in a particular electoral ward. The regional court did not carry out any examination as to whether the breaches of the Act could have influenced the election of the representative body. It thereby abdicated its responsibility as regards the principle of the protection of seats acquired through election. The regional court did not interpret the Act in a way which conformed to the Constitution and thus failed to grant protection to the electoral results arising from a democratic election. It exceeded the bounds of state power set out in the Constitution.

The Constitutional Court concluded that, although the violation of the law changed the number of valid votes cast in Constituency no. 113, it was not grave enough to warrant declaring the voting as a whole to be invalid. If the law is violated during the voting process, but the results of the elections themselves demonstrably express the voters' will to elect specific candidates, there are no grounds for casting doubt on the outcome of the elections.

The Constitutional Court upheld the complaint and, to a limited extent, quashed the contested decision.

Languages:

Czech.

Estonia
Supreme Court

Statistical data
1 September 2006 – 31 December 2006

- Decisions by the Plenary of the Court: 1
- Election complaints: 1
- Genuine constitutional review cases: 0
- Decisions by the Constitutional Review Chamber: 4
- Election complaints: 3
- Genuine constitutional review cases: 1
- Opinions by the Constitutional Review Chamber: 0

Finland
Supreme Administrative Court

Statistical data
1 September 2006 – 31 December 2006

- Total number of decisions: 1 519
- Total number of precedents to be published in the Court's Yearbook: 42

France
Constitutional Council

Important decisions

Identification: FRA-2006-3-008

a) France / **b)** Constitutional Council / **c)** / **d)** 28.09.2006 / **e)** 2006-541 DC / **f)** Agreement on the application of Article 65 of the Convention on the Grant of European Patents (London Agreement) / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 03.10.2006, 14635 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

4.3.1 **Institutions** – Languages – Official language(s).

Keywords of the alphabetical index:

Patent, translation / International organisation, language, use / European Patent Office, translation.

Headnotes:

The Agreement on the application of Article 65 of the Convention on the Grant of European Patents (the London Agreement) deals with translation arrangements for patents. It stipulates that, with regard to any state party to the agreement whose national language is German, English or French, which are the official languages of the European Patent Office, only the part of the patent corresponding to the "claims" shall be translated into that language. The only effect of this article is to oblige France to waive the entitlement to require the applicant for, or holder of, a European patent to provide a French translation of the entire document. The article covers only private-law relations between the holder of a European patent and any third parties concerned. Under domestic law, it has neither the aim nor the effect of obliging public-law corporations to use a language other than French. Nor does it give private individuals the right, in their dealings with the French authorities or public services, to use a language other than French. The rationale behind the agreement is to reduce the need for translation at the stage where patents are validated. It is in line with Article 2.1 of the Constitution, which states, "the language of the Republic is French". It can therefore be ratified without prior amendment of the Constitution.

Summary:

The purpose of the Agreement on the application of Article 65 of the Convention on the Grant of European Patents, signed in London on 17 October 2000, is to reduce the need for translation at the stage where patents are validated. Pursuant to Article 54 of the Constitution, the Constitutional Council was asked to decide whether it was necessary to amend the Constitution before authorising its ratification.

In the case of state parties whose national language is German, English or French, which are the official languages of the European Patent Office, the agreement restricts the need for translation to the "claims" (defining the object for which protection is sought by reference to the technical features of the invention). The main question was whether this complied with Article 2 of the Constitution, which stipulates, "the language of the Republic is French".

When a patent, in other words the conditions governing protection of the invention in the 31 states, which are party to the Munich Convention, is validated, the London Agreement makes it impossible to require the translation of the entire text into the official language of each of these states, i.e. 22 languages.

Ratification of the Agreement would mean that France would have to waive the entitlement to require the holder of a European patent to have the entire patent translated into French in order for it to have legal effect in France. State parties which have no official language in common with one of the three official languages of the European Patent Office must waive the requirement to have the full text translated into their national language if the document is available in one of the three official languages of the European Patent Office.

The Constitutional Council has already, on several occasions, ruled on the scope of constitutional requirements regarding the use of French. It notes that, under domestic law, the Agreement has neither the aim nor the effect of obliging public-law or private-law corporations responsible for discharging a public service to use a language other than French. Nor does it give private individuals the right to use a language other than French in their dealings with the French authorities and public services. The European Patent Office is the only public body that may need to refer to a text that has not been fully translated into

French when taking a decision which will establish rights; however, the EPO does not fall within the scope of French domestic law. The legal relations between the holder of a patent and third parties, governed by the London Agreement, are also purely private-law relations.

Moreover, the possibility for France, in the event of a dispute on its territory concerning a European patent, to require that the entire text be translated into French is not called into question, thereby safeguarding the principle, deriving directly from Article 2 of the Constitution, that proceedings in French courts must be conducted in French.

There are no provisions within the London Agreement that are incompatible with the Constitution and it can therefore be ratified without prior amendment of the latter.

Cross-references:

- Decision no. 2001-456 DC of 27.12.2001, *Bulletin* 2001/3 [FRA-2001-3-013];
- Decision no. 2001-452 DC of 06.12.2001, *Bulletin* 2001/3 [FRA-2001-3-011];
- Decision no. 99-412 DC of 15.06.1999, *Bulletin* 1999/2 [FRA-1999-2-005];
- Decision no. 96-373 DC of 09.04.1996, *Bulletin* 1996/1 [FRA-1996-1-001];
- Decision no. 94-345 DC of 29.07.1994, *Bulletin* 1994/2 [FRA-1994-2-005].

Languages:

French.

Identification: FRA-2006-3-009

a) France / **b)** Constitutional Council / **c)** / **d)** 09.11.2006 / **e)** 2006-542 DC / **f)** Law on the supervision of the validity of marriages / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 15.11.2006, 17115 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

5.3.5 **Fundamental Rights** – Civil and political rights – Individual liberty.
5.3.33 **Fundamental Rights** – Civil and political rights – Right to family life.
5.3.34 **Fundamental Rights** – Civil and political rights – Right to marriage.

Keywords of the alphabetical index:

Family reunion, marriage, fraud / Marriage, non-recognition / Marriage, fraud, preventive measures / Marriage, forced, prevention / Marriage, convenience, prevention.

Headnotes:

The aim of the law on the supervision of the validity of marriages is to take more effective action against forced marriages and marriages of convenience contracted in other countries and against the forgery or fraudulent procurement of civil status documents issued in another country.

The law requires that a certificate of capacity to marry be issued in order for a marriage to be included in the register of births, deaths and marriages. If there is serious evidence that a planned marriage does not fulfil the conditions of validity set out in the Civil Code, the diplomatic or consular authorities are obliged to refer the matter without delay to the state prosecutor, who is allowed two months to lodge an objection to the marriage. The future spouses may, however, request that such an objection be set aside by the regional court, which must give a ruling within ten days.

The applicants claimed that this arrangement called into question the principle of freedom of marriage because it established prior controls disproportionate to the aim of preventing fraudulent marriages.

Freedom of marriage is a constitutional principle. It is in order for the Constitutional Council to consider whether the disputed provisions call into question this freedom, which is a component of individual freedom.

The act of issuing a certificate prior to the celebration of a marriage is by no means a discretionary decision on the part of the diplomatic or consular authorities; the formalities are the same as those set forth in the Civil Code with regard to marriages in France. The law, in substance, merely brings the conditions that must be met by French nationals wishing to marry abroad into line with those that must be met by persons wishing to marry in France. The procedure

for objecting is basically the same as that for objecting to marriages taking place in France. Nor do the disputed provisions constitute an obstacle to the actual celebration of the marriage by the authorities in another country. A marriage which is contracted in another country despite objections by the French state prosecutor, or without the preliminary formalities being observed, may still be registered in France under the conditions specified by the law.

The registration of a marriage is only deferred if there is serious evidence that the marriage is liable to be declared null and void, and the state prosecutor is immediately informed. Nevertheless, marriages are no longer automatically registered once the time-limit of six months set for the prosecutor's decision has expired. To offset these stricter rules, spouses are entitled to lodge an exceptional appeal with the regional court and subsequently, where appropriate, with the Court of Appeal. Each of these courts must give its ruling within one month.

In establishing different procedures for verifying the validity of marriages involving a French national and which are celebrated in another country by a foreign authority, parliament has taken account of the diversity of situations as regards the substance and form of the marriage. Time-limits have been set which correspond to each of these situations, and effective judicial remedies are provided against explicit or implicit decisions taken by the authorities. None of these provisions in itself constitutes an obstacle to the celebration of a marriage by a foreign authority. Finally, inclusion in the French register of births, deaths and marriages only affects its validity vis-à-vis third parties under French law; the fact that a marriage is not registered in France does not prevent the marriage from producing its full effects on relations between the spouses and their children in France.

Having regard to all of the precautions taken by parliament, the Constitutional Council concluded that the law referred to it did not call into question either freedom of marriage or the right to lead a normal family life, based on paragraph 10 of the Preamble to the 1946 Constitution, stipulating that “The Nation shall provide the individual and the family with the conditions necessary to their development”.

Moreover, the law tightens supervision of the validity of the civil status documents of both French and foreign nationals issued by a foreign authority as a means of preventing a form of fraudulent practice widespread in some countries. If there are doubts concerning the authenticity or accuracy of a foreign document submitted in support of an application for the issue of a French document, the administrative authorities make the necessary checks and inform the applicant that they are being made. Notwithstanding ordinary law, the applicants can assume that their application has been rejected if they do not receive a reply within eight months.

The applicants considered that these provisions made it possible to object to an application for family reunion for an excessive length of time. The Constitutional Council dismissed their arguments and held that parliament had not infringed the right to lead a normal family life.

Summary:

Freedom of marriage, which is a component of individual freedom protected by Articles 2 and 4 of the 1789 Declaration of the Rights of Man and the Citizen, does not prevent parliament from taking preventive or other measures against marriages contracted for reasons other than those for which the institution of matrimony exists.

By establishing a procedure which allows the state prosecutor to raise an objection to a marriage prior to its celebration, and by making the validity of a marriage vis-à-vis third parties subject to inclusion in the French register of births, deaths and marriages, parliament intended to tighten supervision of the validity of marriages celebrated in another country by a foreign authority when at least one of the two spouses is a French national. Parliament has taken account of the diversity of situations relating to compliance with the principle of freedom of marriage, set different time-limits to correspond to each of these situations and guaranteed effective judicial remedies against the decisions of the authorities concerned. None of these provisions in itself constitutes an obstacle to the celebration of a marriage by a foreign authority, and the fact that a marriage is not registered in France does not prevent it from having full effect, in civil law, on relations between the spouses themselves and between them and their children. Having regard to all the precautions taken by parliament, the law on the supervision of the validity of marriages does not call into question the principle of freedom of marriage.

The various procedures established by parliament for tightening the supervision of the validity of marriages in which at least one of the two spouses is a French national, and which are celebrated in another country by a foreign authority, does not infringe the right to lead a normal family life, deriving from the paragraph 10 of the Preamble to the 1946 Constitution, which stipulates that “The Nation shall provide the individual and the family with the conditions necessary to their development”.

In establishing a procedure for checking foreign civil status documents submitted in support of an application for the establishment or issue of a French document and stipulating that if the administrative authorities do not reply within eight months the application has been rejected, parliament has neither changed the basic rules governing the family reunion procedure nor infringed the right of foreign nationals lawfully resident in France on a stable basis to arrange for their spouse and minor children to join them.

Cross-references:

- Decision no. 2003-484 DC of 20.11.2003, *Bulletin* 2003/3 [FRA-2003-3-017];
- Decision no. 93-325 DC of 13.08.1993, *Bulletin* 1993/2 [FRA-1993-2-007].

Languages:

French.

Identification: FRA-2006-3-010

a) France / **b)** Constitutional Council / **c)** / **d)** 30.11.2006 / **e)** 2006-543 DC / **f)** Law on the energy sector / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 08.12.2006, 18544 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

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.
4.10.8.1 **Institutions** – Public finances – State assets – Privatisation.
5.4.8 **Fundamental Rights** – Economic, social and cultural rights – Freedom of contract.

Keywords of the alphabetical index:

Monopoly, *de facto* / Public service, national / Public service, continuity / Energy, tariff / Energy, sector, state control / Energy law / Public service, tariff.

Headnotes:

The obligation to transpose directives of the European Community into domestic law derives from Article 88-1 of the Constitution. It is for the Constitutional Council, when a transposing law is referred to it, to ensure that the requirement is fulfilled, on condition that this does not contravene a rule or a principle inherent to the constitutional identity of France; in addition, as the Council has to rule within one month and is therefore unable to refer a preliminary point of law to the Court of Justice of the European Communities, it is only able to censure legislative provisions which are clearly incompatible with the directive which the law is intended to transpose.

Under the directives of 26 June 2003, Member States must ensure that electricity or natural gas undertakings are operated with a view to achieving a competitive market and refrain from any discrimination. While the States may impose obligations in the general economic interest on those undertakings, particularly as regards tariffs, such obligations must clearly pursue an aim of public service, be non-discriminatory and guarantee equal access for national consumers.

The provisions governing regulated tariffs, which are different from the special tariffs instituted for social purposes, do not stop at applying regulated tariffs to contracts in force but impose on the historical operators of the energy sector, and on them alone, permanent, general tariff obligations that do not pursue any public service aims. This is not in line with the aim of opening up competitive electricity and natural gas markets, as required by the directives which the law is intended to transpose, and is contrary to the Constitution.

Under the paragraph 9 of the Preamble to the 1946 Constitution: “Any property or undertaking whose operation has or acquires the characteristics of a national public service, of a monopoly or of a *de facto* monopoly, shall become public property”. While the necessity of certain national public services is inherent in principles or rules of constitutional significance, it is for the legislator to determine the other activities which are to be specified as such by establishing how they are to be organised at national level and entrusting them to a single undertaking. The

fact that an activity is established as a national public service without this being required under the Constitution does not prevent the transfer to the private sector of the undertaking responsible for it. However, such a transfer supposes that the legislator deprives the undertaking concerned of the characteristics that made it a national public service.

The notion of *de facto* monopoly must be considered in relation to the entire market within which companies' activities are pursued, as well as the competition which they face on that market. It should not apply to the privileged situations enjoyed for a brief period of production representing only part of the undertaking's activities.

The activities of production, importation, exportation, transportation, distribution and supply of natural gas as well as the storage of liquefied natural gas (LNG) and operation of LNG installations have been either excluded from nationalisation or gradually opened to competition. As of 1 July 2007, this includes the supply of natural gas to domestic customers, and gas is a substitutable energy. The company *Gaz de France* may not be regarded as an undertaking whose operation constitutes a *de facto* monopoly within the meaning of the paragraph 9 of the Preamble to the 1946 Constitution.

Under the legislation on the energy sector, *Gaz de France* loses its national public service characteristics as of 1 July 2007. The effective transfer of that undertaking to the private sector will not be able to take effect before that date. This being so, the complaint based on a violation of the paragraph 9 of the Preamble to the 1946 Constitution, must be set aside.

The principle of continuity of public service is not disregarded by Article 39 of the Law on the energy sector. The various public service obligations laid down by the legislator apply to *Gaz de France* as they do to the other operators in the gas sector.

Finally, the law makes it possible to preserve “the vital interests of France” in the energy sector, and in particular “the continuity and security of energy supplies”.

Summary:

The purpose of the law on the energy sector is to privatise *Gaz de France* (to allow its merger with Suez) as well as to fully transpose the community directives on the opening to competition of the energy market on 1 July 2007.

1. The first problem was the fact that the legislator maintained regulated tariffs for both electricity and gas.

The Constitutional Council considered the transposition of community law into domestic law as a constitutional requirement based on the first paragraph of Article 88-1 of the Constitution, while censuring the manifest incompatibility of the transposing law with the directive to be transposed.

The establishment of regulated tariffs as a permanent fixture was challenged by the European Commission in a letter of observations sent to France on 4 April 2006. Stressing that the main aim of the “energy directives” was to develop a competitive internal market, it reiterated that their transposition had not only to guarantee the free choice of supplier but also that free establishment of the price had to be the rule; accordingly, regulation of tariffs was permitted only where justified by public service obligations within the framework defined by Article 86 EC.

The maintaining of regulated tariffs would not have been manifestly incompatible with the energy directives if the customer base benefiting from them had been required to disappear after a transition period, possibly even a prolonged one.

This was not the case in the arrangements provided for by the legislator whose effect was to impose on the historical operators the supply of energy at regulated tariffs, both to households and small businesses. This tariff was deemed to apply to any customer not having expressly relinquished it. Through its scope and permanent nature, the maintaining of regulated tariffs, not limited to the continuation of contracts in force at 1 July 2007 and not justified by the pursuit of a specific public service aim, was a “manifest error of transposition”. While it had previously established the principle, it was the first time that the Council had censured provisions manifestly incompatible with the aims of the directives.

2. The law challenged lowered the State's minimum share in the capital of GDF from 70% to one third, authorising the transfer of that undertaking to the private sector. The applicants considered this provision contrary to the paragraph 9 of the Preamble to the 1946 Constitution, under which “Any property or undertaking whose operation has or acquires the characteristics of a national public service, of a monopoly or of a *de facto* monopoly, shall become public property”.

This argument prompted the Council firstly to examine whether *Gaz de France* was operating a “*de facto* monopoly”. According to its case-law, an undertaking is in a situation of *de facto* monopoly if:

the business sectors in which it holds an exclusive or dominant position play a substantial and irreplaceable role in the national economy; and furthermore, these business sectors represent the majority of its overall activity.

In the case in point, the Council was able to base its ruling on several *de jure* and *de facto* elements: the abolition since 2003 of monopolies in the importation and exportation of gas; the opening to any operator of natural gas production and transportation activities, as well as the storage of liquefied natural gas (LNG) and operation of LNG installations; the fact that *Gaz de France* had no monopoly over gas distribution for the whole of the national territory; the possibility available to non-domestic users, since 2003, to contract with the gas supplier of their choice. Finally, as of 1 July 2007, the law referred to the court put an end to any monopoly over the supply of gas, including for domestic customers. Consequently, *Gaz de France* could not be regarded as operating a *de facto* monopoly.

There was then the question of whether *Gaz de France* was operating a "national public service".

The case-law of the Constitutional Council drew a distinction between the public services whose necessity is "inherent in principles or rules of constitutional significance", by nature immune to privatisation (essentially, "sovereign" public services) and other public services, whose establishment is left to the assessment of the legislator. With regard to the latter, it is for the Constitutional Council to check whether the legislator has stripped them, before their privatisation, of their "national public service characteristics".

Like the Council of State which had reached this conclusion in 2006, the Constitutional Council held that a national public service intended as such by the legislator, within the meaning of the Preamble, was a public service whose organisation had been established at national level by the law and had been entrusted by the legislator to a single undertaking. Conversely, this characteristic could not be considered to apply in cases where several competing operators were involved in a business sector of national interest, subject to public service obligations, but with none of them granted exclusivity over that service. This definition led the court to consider as decisive the disappearance of the last remaining aspect of monopoly, namely exclusivity over the supply of gas to domestic clients provided for by the legislator as of 1 July 2007, pursuant to community law.

Public service obligations in the gas sector were now incumbent on all the operators, which had been placed in the same situation (including distributors, transporters and suppliers), with the result that the public natural gas service was no longer exclusively entrusted to a single undertaking but to a number of competing operators, and GDF had therefore ceased to be a "national public service".

A further question might have focused on whether establishing a regulated tariff imposed solely on the historical operator as a permanent fixture was not likely, as the applicants claimed, to conserve a national public service characteristic for GDF determined by the legislator. The censure of this arrangement rendered the question redundant. The Council concluded that *Gaz de France* did not constitute a national public service determined as such by the legislator within the meaning of the Preamble.

There remained the question of the date of the planned merger between the GDF and Suez companies: the Constitutional Council formulated an interpretation in conformity with the Constitution under which privatisation could not be effective before 1 July 2007, since it was only on that date that GDF, losing exclusivity over household gas supplies, ceased to be a national public service.

3. Finally the applicants considered that the privatisation of GDF breached other constitutional requirements, including the continuity of public service.

In this case, adequate precautions had been taken by the legislator, which placed the operators in the gas sector, including GDF, under strict obligations, backed up by inspections and sanctions, in the areas of supply, storage, transport and connection to distribution and supply networks. In addition, it had instituted a specific measure ("golden share") with a view to preserving the vital interests of France in the energy sector, and in particular the continuity and security of energy supplies. The complaint was therefore rejected.

Cross-references:

- Decision no. 2006-540 DC of 27.07.2006, *Bulletin* 2006/2 [FRA-2006-2-007];
- Decision no. 2006-535 DC of 30.03.2006, *Bulletin* 2006/1 [FRA-2006-1-004];
- Decision no. 2004-501 DC of 05.08.2004, *Bulletin* 2004/2 [FRA-2004-2-008];
- Decision no. 86-207 DC of 26.06.1986.

Languages:

French.

Identification: FRA-2006-3-011

a) France / **b)** Constitutional Council / **c)** / **d)** 14.12.2006 / **e)** 2006-544 DC / **f)** Law on the financing of social security for 2007 / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 22.12.2006, 19356 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

3.4 **General Principles** – Separation of powers.
4.5.6.4 **Institutions** – Legislative bodies – Law-making procedure – Right of amendment.
4.5.6.5 **Institutions** – Legislative bodies – Law-making procedure – Relations between houses.
4.6.3.1 **Institutions** – Executive bodies – Application of laws – Autonomous rule-making powers.
4.13 **Institutions** – Independent administrative authorities.

Keywords of the alphabetical index:

Social security, funding / Welfare rider / Prime Minister, law-making power.

Headnotes:

Under paragraph 20 of Article 34 of the Constitution: "The laws on the financing of social security shall determine the general conditions for balancing those finances and, in the light of the forecast revenue, set the objectives for expenditure, in conditions and under the terms laid down by the implementing act". Provisions with no effect on the expenditure of the basic compulsory social security regimes neither pursuing the purpose nor having the effect of modifying the general conditions of its financial balance are alien to the scope of laws on the financing of social security and are therefore contrary to the Constitution.

The question of the financial admissibility of amendments originating in parliament has to be raised before the first chamber, which has the matter referred to it so that the Constitutional Council may examine their conformity with Article 40 of the Constitution; however, that requirement is subject, for each assembly, to verification of admissibility in terms of effects. This is not the case for the Senate. The Constitutional Council may therefore directly set aside senatorial amendments, on an *ex officio* basis if necessary, where these are contrary to the rules of financial admissibility laid down by Article 40 of the Constitution.

While the legislator may modify a rule of law or validate an administrative act retrospectively, it is on condition that sufficient public interest is at stake and both final court decisions and the principle that penalties and sanctions may not be retrospective are complied with. Furthermore, the act which is modified or validated must not disregard any rule or principle of constitutional value, except where the public interest aim concerned is itself of constitutional value. Finally, the scope of modification or validation must be strictly defined.

A provision correcting the effects of a court decision without undermining its formulation or disregarding its reasoning is not contrary to the separation of the powers. By stipulating that, in the hotel, cafe and restaurant sector, the benefit derived from a sixth week of paid leave and additional public holidays would be equivalent to paid overtime and granting of time off in lieu, the legislator intended to remedy, without damaging the interests of the employees concerned, the retrospective effects of the Council of State's repeal decision of 18 October 2006. It took account of the situation of this business sector, which plays an essential role in the national economy and in employment, *inter alia* by sparing small businesses the need to engage in highly complex retrospective recalculations of pay and leave periods. It consolidated the legal security of the employers and employees concerned by removing uncertainties over the applicable rules of law. It did not remove legal guarantees from any constitutional requirement. In these circumstances, the measure adopted, limited in time and in scope, responded to a sufficient public interest need.

Pursuant to Article 21 of the Constitution and subject to its Article 13, the Prime Minister exercises governing power at national level. These provisions do not prevent the legislator entrusting a state authority other than the Prime Minister with the responsibility of laying down standards making it possible to implement a law where such authorisation concerns only measures limited in terms of both scope and content. However, they do not authorise it to make the exercise of governing power by the Prime Minister subject to the approval of such an authority. The word "approval" in the provision

stipulating that a Council of State decree would be adopted after an “opinion stating approval” had been issued by the National Commission for data processing and freedoms was deemed unconstitutional.

Summary:

I. The Law on the financing of social security for 2007 had taken on substantial volume during the parliamentary debate. The applicants condemned an abuse of the right of amendment by the government and the majority. They claimed that several articles of the law challenged constituted new measures disregarding the rule of priority of examination of financial texts by the National Assembly. That complaint prompted the Council to tighten up its case-law on the quality of legislative work, in keeping with its more recent case-law.

II. Accordingly, seven articles covering measures introduced in the Senate by the government without prior deliberation by the National Assembly despite the stipulations of Article 39 of the Constitution were censured by the Council.

The legislator had also disregarded the provisions arising from Article 34 of the Constitution and the implementing law of 2 August 2005 on the content of laws on the financing of social security.

The law contained a great many “welfare riders” which had nothing to do with the expenditure of compulsory regimes for the year and neither pursued the purpose nor had the effect of modifying the general conditions of the financial balance of social security.

Twelve articles were censured by the Council.

Finally, the Council's case-law was tightened up with regard to the financial admissibility of the amendments adopted by the Senate at the initiative of its members.

Article 40 of the Constitution stipulates that “The proposals and amendments formulated by members of parliament shall not be admissible where their adoption would result in either a reduction in public funding or the creation or increase of a public burden”. It is when an amendment is tabled that the examination, in parliament, of its financial admissibility must take place (rule of parliamentary preliminaries).

Unlike the National Assembly, the Senate had omitted such a procedure from its rules of procedure. In the absence of a procedure, the Council held that it was for the Senate to be directly aware that Article 40 of the Constitution was being violated by “profligate” senatorial amendments.

Two articles (which were also “welfare riders” and would have been censured for this reason) were deemed adopted under a procedure disregarding Article 40 of the Constitution. This “double censure”, which had no practical ramifications in the case in question, was a warning from the Council for future reference.

In substance, the law contained a measure giving legislative validation to a collective agreement on the duration of work concerning the remuneration of overtime in the hotel and catering sector, repealed by a decision of the Council of State of 18 October 2006 on an appeal lodged by a trade union organisation which had not signed the agreement. Validation entailed deeming overtime as being paid in the form of additional days off.

The conditions for legislative validation were laid down by case-law: respect for the principle of the separation of powers, a sufficient public interest need, respect for the principle that the most severe penalties and sanctions may not be retrospective, no finding of unconstitutionality against the act validated (unless the reason for validation was of constitutional significance), strict definition of the scope of validation. These requirements were satisfied in the case at issue. The law voted by parliament left untouched the repeal by the Council of State and confined itself to correcting certain past effects. In addition it was justified by sufficient public interest. It avoided plunging employers and employees into deep uncertainties over the applicable regulations and obliging companies to engage in laborious recalculations and also avoided compromising the fragile financial situation of a sector playing an important role in the national economy.

Finally, on its own initiative the Council raised the unconstitutionality of a provision concerning the national records directory common to the bodies responsible for managing a compulsory social security regime as well as different welfare agencies, including those responsible for unemployment insurance.

When setting up this directory, the legislator added that its content and procedures were established by decree adopted after an “opinion stating approval” had been issued by the National Commission for data processing and freedoms. The term “approval” was censured by the Council as contrary to Article 21 of the Constitution which conferred governing power upon the Prime Minister.

The legislator could not make the exercise of governing power by the Prime Minister subject to the approval of an administrative authority, even if it was independent.

Cross-references:

- Decision no. 2002-464 DC of 27.12.2002, *Bulletin* 2002/3 [FRA-2002-3-009];
- Decision no. 97-393 DC of 18.12.1997, *Bulletin* 1997/3 [FRA-1997-3-006];
- Decision no. 96-375 DC of 09.04.1996, *Bulletin* 1996/1 [FRA-1996-1-002];
- Decision no. 95-369 DC of 28.12.1995, *Bulletin* 1995/3 [FRA-1995-3-011];
- Decision no. 80-119 DC of 22.07.1980.

Languages:

French.

Germany
Federal Constitutional Court

Important decisions

Identification: GER-2006-3-011

a) Germany / **b)** Federal Constitutional Court / **c)** Second Chamber of the Second Panel / **d)** 09.01.2006 / **e)** 2 BvR 443/02 / **f)** Right to inspect hospital files / **g)** / **h)** *Sozialrecht* 4-1300 § 25 no. 1; *Neue Juristische Wochenschrift* 2006, 1116-1121; *Recht und Psychiatrie* 2006, 94-100; *Strafverteidiger Forum* 2006, 152-157; *Europäische Grundrechte-Zeitschrift* 2006, 297-303; *GesundheitsRecht* 2006, 326-333; *das Krankenhaus* 2006, 686-687; *Medizinrecht* 2006, 419-424; CODICES (German).

Keywords of the systematic thesaurus:

3.17 **General Principles** – Weighing of interests.
5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
5.3.4.1 **Fundamental Rights** – Civil and political rights – Right to physical and psychological integrity – Scientific and medical treatment and experiments.
5.3.5.1.2 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty – Non-penal measures.
5.3.24 **Fundamental Rights** – Civil and political rights – Right to information.
5.3.25.1 **Fundamental Rights** – Civil and political rights – Right to administrative transparency – Right of access to administrative documents.
5.3.32.1 **Fundamental Rights** – Civil and political rights – Right to private life – Protection of personal data.

Keywords of the alphabetical index:

Informational self-determination, right / Medical file, inspection / Psychiatric institution, placement / Right to information, scope with regard to measures of correction and prevention.

Headnotes:

The right to self-determination and the personal dignity of the patient (Article 1.1 in conjunction with Article 2.1 of the Basic Law) make it necessary to

grant in principle to each patient a right to inspect the medical files relating to him or her. This right to information is however not constitutionally guaranteed without restrictions.

The patient's interest in information in principle takes on considerable importance in the necessary weighing of interests. The patient has in general terms a protected interest in learning what has been done with his or her health. This applies all the more to information regarding his or her mental state.

When it comes to measures of correction and prevention, the fundamental rights of the person concerned are as a matter of course subject to a special risk. This also applies with regard to keeping the files and to access to them. The file entries are a major element of the basis in fact for future decisions on the prison regime and on the execution of the sentence. Against this background, there is a particularly strong constitutionally protected interest in inspecting files if an individual undergoes measures of correction and prevention.

Summary:

I. The constitutional complaint relates to the right of a person undergoing measures of correction and prevention to inspect his or her medical files.

The complainant was sentenced in 1990 to a total of eleven years' imprisonment; furthermore, he was ordered to undergo measures of correction and prevention. In the psychiatric hospital in which the complainant was placed on the basis of the placement order, relaxations of prison regime which had previously been afforded to the complainant were subsequently rescinded. Because of the rescission of the relaxation, and for further reasons, the complainant's defence counsel requested to inspect the complete medical files. The clinic declared in this respect that it was only possible to provide objective findings such as EEG, ECG and laboratory data, but not the subjective estimations, working hypotheses and diagnostic considerations contained in the documentation.

The complainant thereupon applied to the Heidelberg Regional Court to oblige the institution to permit his counsel to inspect all medical files. By order, the Regional Court rejected the motion as unfounded. Also by order, the Karlsruhe Higher Regional Court rejected the appeal filed against this.

II. In response to the constitutional complaint, the Second Chamber of the Second Panel of the Federal Constitutional Court established that the impugned orders violate the complainant's fundamental right to self-determination – including informational – and personal dignity in accordance with Article 2.1 in conjunction with Article 1.1 of the Basic Law.

The proceedings have been referred back to the Regional Court to the extent that the orders have been overturned.

The ruling is based in essence on the following considerations:

The fundamental right to informational self-determination guarantees the entitlement of the individual to determine the disclosure and utilisation of his or her personal data in principle himself or herself. This fundamental right is not guaranteed without restrictions. Restrictions however require a statutory foundation and must correspond to the principle of proportionality; above all, they may not go further than what is indispensable for the protection of public interests.

It is further recognised that a lack of access to third-party knowledge on one's own person may also touch on the individual self-determination protected by Article 2.1 in conjunction with Article 1.1 of the Basic Law, and that the fundamental right to informational self-determination hence also affords to its bearer legal rights relating to access to the data stored on him or her.

With regard to access to medical files, the Federal Constitutional Court found that the patient's right to self-determination and personal dignity (Article 1.1 in conjunction with Article 2.1 of the Basic Law) requires to grant to each patient, in respect of his or her doctor and hospital, in principle a right to inspection of the medical files relating to him or her. This right of the patient to receive information is not constitutionally guaranteed without restrictions. This however does not change the fact that it is based directly on the patient's right to self-determination, as guaranteed by fundamental rights, and hence must take a lower priority only if opposed by correspondingly substantial interests. In the weighing of interests, which is accordingly required, considerable weight in principle attaches to the patient's interest in information. Physicians' medical files, with their information regarding case history interviews, diagnosis and therapeutic measures, directly affect the patient's private sphere. For this reason, and because of the possible considerable significance of the information contained in such documents for self-determined decisions to be made by the patient, the latter has in general terms a protected interest in learning what has been done with his or her health. This applies all the more to information regarding the patient's mental state.

These constitutional requirements have not been satisfied by the impugned orders of the Regional Court and of the Higher Regional Court.

A violation of fundamental rights also exists if it is supposed that the fundamental right to informational self-determination, with regard to access to data which are relevant to personal self-determination, only comprises a right to a weighing of the interest in information, and consequently only a right to information which from the outset is restricted by contradictory interests – regardless of any statutory arrangement. Also in this case, the fundamental right requires a weighing of interests in which the interests of the complainant which are relevant to the weighing of interests must be brought to bear with the weight afforded to them by the constitution. Neither court denied that the complainant's interest in information is protected in terms of fundamental rights by Article 2.1 of the Basic Law in conjunction with Article 1 of the Basic Law, and may only be afforded lesser priority by weighing them against opposing points of view. In their weighing, however, they have disregarded, or not taken sufficient account of, constitutionally relevant aspects both as to the weight of the complainant's interest in information, and to the significance of the opposing interests.

The particular characteristic of the case at hand is that it is not a doctor-patient relationship under private law, but that it relates to the scope of the right to information of a person who has been placed in a psychiatric hospital as a measure of correction and prevention. The detainee cannot select his or her doctor or other therapists freely. He/she cannot even change at will to treatment by different persons if he/she has no confidence in the therapist and according to his or her perception the relationship is irretrievably broken down. In light of these conditions, the patient's right of self-determination is much more intensively affected by refusal of access to major parts of his or her own medical files than would be the case were treatment to be given under private law, where the person concerned may exercise his or her right of self-determination by withdrawing from treatment.

In an area such as measures of correction and prevention, which is characterised by a particularly wide divergence in power between those involved, the fundamental rights of those concerned are naturally placed at particular risk. This also applies to the keeping of the files and to access thereto. The file entries can have multifarious impacts on everyday life in placement. As a major element of the factual basis, they are available for future decisions on the prison regime and the execution of the sentence. They exercise a considerable influence on both the pattern of the person concerned's everyday life in placement and on his or her prospects of obtaining individual freedoms or freedom as a whole.

Against this background, there is therefore a particularly strong constitutionally protected interest in inspection of files in the context of measures of correction and prevention.

Access to the information contained in medical files is also significant for the effectiveness of legal protection in matters related to the prison regime and to the execution of the sentence. The impugned rulings have not sufficiently weighed the considerable constitutional significance attaching to a patient's interest in the medical files relating to him or her as to this factual and legal situation, or the major differences which exist in this respect as to the doctor-patient relationship under private law.

Languages:

German.

Identification: GER-2006-3-012

a) Germany / **b)** Federal Constitutional Court / **c)** Third Chamber of the Second Panel / **d)** 01.02.2006 / **e)** 2 BvR 2056/05 / **f)** / **g)** / **h)** *Strafverteidiger Forum* 2006, 108-111; *Strafverteidiger* 2006, 139-143; *Europäische Grundrechte-Zeitschrift* 2006, 98-104; CODICES (German).

Keywords of the systematic thesaurus:

5.3.5.1.3 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty – Detention pending trial.
5.3.13.1.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – Criminal proceedings.

Keywords of the alphabetical index:

Freedom, guarantee / Arrest, warrant / Arrest, suspension, reinstatement / Trust, basis / Terrorism, organisation, membership.

Headnotes:

The precept expressed in § 116.4 of the Code of Criminal Procedure that a judge's suspension of the execution of a warrant of arrest is to be revoked only if the circumstances have changed from those that were the basis of assessment at the time when the suspension was granted is one of the most important (procedural) guarantees referred to in Article 104.1.1 of the Basic Law, which requires compliance with them and protects them as fundamental rights.

Within the meaning of § 116.4.3 of the Code of Criminal Procedure, circumstances that arise subsequently or become known after the order of suspension is made are "new" only if they cast doubt on the reasons for the order of suspension of execution on such a material point that no suspension would have been granted if they had already been known at the time of the decision.

If, in contrast, the sentence later awarded – or a harsher sentence – was to be expected even at that date, and if the defendant nevertheless complied with the conditions imposed, then the situation is not one of those governed by § 116.4.3 of the Code of Criminal Procedure.

Even if the requirements of § 116.4.3 of the Code of Criminal Procedure are satisfied, there must always be an assessment, as a result of the principle of proportionality, as to whether more lenient measures to safeguard the proceedings, in particular a tightening of the conditions, are possible instead of revoking the suspension.

Summary:

I. The constitutional complaint relates to the overturning of an order of suspension of execution of arrest on the basis that new circumstances have arisen.

Under the warrant of arrest of the investigating judge of the Federal Court of Justice, the complainant was subjected to pre-trial detention in November 2001 on the grounds of suspicion that he supported a terrorist organisation, in connection with the 11 September 2001 attacks in the United States of America. In August 2002, in the Hamburg Higher Regional Court, the complainant was indicted on suspicion of membership in a terrorist organisation committed concurrently with aiding and abetting murder. In February 2003, the Higher Regional Court sentenced the complainant to fifteen years' imprisonment. At the same time, it was ordered that pre-trial detention should continue. In March 2004, upon the complainant's appeal, the Federal Court of Justice overturned the decision of the Higher Regional Court and referred the matter back to the Higher Regional Court.

By order of the Higher Regional Court of April 2004, the complainant was spared further pre-trial detention and was released, subject to conditions.

In August 2005, the Higher Regional Court convicted the complainant of membership in a terrorist organisation and sentenced him to seven years' imprisonment. Not only the complainant, but also the Federal Public Prosecutor General's Office and the private co-prosecutors appealed against this. In addition, the Higher Regional Court overturned the order of suspension and reinstigated the execution of the warrant of arrest. The complainant thereupon submitted an application for review of detention; the Higher Regional Court rejected this. The complainants' defence lawyers appealed against this in September 2005; in October 2005, this appeal was dismissed as unfounded by the Federal Court of Justice.

II. In response to the constitutional complaint, the Third Chamber of the Second Panel of the Federal Constitutional Court held that the challenged decisions of the Higher Regional Court and the Federal Court of Justice violate the complainant's right of freedom under Article 2.2.2 of the Basic Law in conjunction with Article 104.1.1 of the Basic Law; it overturned the orders and referred the matter back.

In essence, the decision is based on the following considerations:

Encroachments on the substantive guarantee of freedom of Article 2.2.2 of the Basic Law are permissible only on the basis of a statute proper and only in compliance with the formal requirements contained in that statute. Here, Article 104.1 of the Basic Law takes up the constitutional requirement of the specific enactment of a statute, which is already contained in Article 2.2. 2 of the Basic Law, and reinforces it for all restrictions of freedom by not only repeating the requirement of a statute proper, but also making the duty to observe the formal requirements that follow from this statute a constitutional precept.

The precept expressed in § 116.4 of the Code of Criminal Procedure that a judge's suspension of the execution of a warrant of arrest is to be revoked only if the circumstances have changed from those that were the basis of assessment at the time when the suspension was granted is one of the most important (procedural) guarantees referred to in Article 104.1.1

of the Basic Law *(Grundgesetz)*, which requires compliance with them and protects them as fundamental rights. If the execution of a warrant of arrest has once been suspended without challenge, every new decision relating to the detention that results in the termination of suspension of pre-trial detention is possible only subject to the restrictive requirements of § 116.4 of the Code of Criminal Procedure. A repeated execution of the warrant of arrest by the judge may be considered only if new circumstances make it necessary to take the defendant into custody.

Within the meaning of § 116.4.3 of the Code of Criminal Procedure, circumstances that arise subsequently or become known after the order of suspension is made are “new” only if they cast doubt on the reasons for the order of suspension of execution on such a material point that no suspension would have been granted if they had already been known at the time of the decision. In other words, the decisive criterion for revocation consists in the cessation of the basis of trust for the decision to suspend. In order to determine whether this is the case, it is necessary to make an assessment of all the circumstances of the individual case against the background of the normative significance of personal freedom.

A judgment (not yet final and non-appealable) that is pronounced after the suspension of execution of arrest, or an application by the department of public prosecution for a harsh sentence, may be suitable to justify the revocation of a suspension of execution of arrest and the execution of a warrant of arrest. However, this presupposes that the sentence awarded by the trial judge or the sentence applied for by the department of public prosecution deviates materially from the prognosis of the investigating judge to the detriment of the defendant and as a result the danger of absconding is quite substantially increased. It must be determined by weighing and assessing all the circumstances of the individual case whether this is so. The circumstances to be considered in this connection must each relate to the grounds for detention. New circumstances, in contrast, cannot relate to the (strong) suspicion of a criminal offence. This suspicion is the fundamental basis for the issuing and upholding of every warrant of arrest in any event.

If, in contrast, the sentence later awarded was to be expected even at the date of the suspension of execution of arrest, and if the defendant nevertheless complied with the conditions imposed, then the situation is not one of those governed by § 116.4.3 of the Code of Criminal Procedure. Even if the requirements of § 116.4.3 of the Code of Criminal Procedure are satisfied, there must always be an assessment, as a result of the principle of proportionality, as to whether more lenient measures to safeguard the proceedings are possible in place of revoking the suspension.

The challenged decisions do not satisfy these requirements. The Higher Regional Court relied one-sidedly on the degree of the sentence awarded, without showing that the sentence deviates materially to the detriment of the complainant from the previously expected sentence and that as a result the danger of absconding has quite substantially increased. In addition, it did not attach any significance to the fact that, by complying with the conditions imposed on him, the defendant created a basis of trust and is therefore fundamentally worthy of protection.

In addition, by relying on the ground of detention of the particular gravity of the act and therefore on reduced standards for the degree of danger of absconding, the Higher Regional Court impermissibly shifted the basis of assessment to the detriment of the complainant. For the basis of assessment is the order of suspension, but not the satisfaction of the requirements of § 112.3 of the Code of Criminal Procedure. The decisive factor is solely whether the basis of trust of the decision of suspension ceased as a result of new circumstances.

The order of the Federal Court of Justice also does not take sufficient account of the meaning and scope of the fundamental right of the freedom of the person. As the Higher Regional Court had done before it, the Federal Court of Justice did not take into account that the defendant had, by that time, had the opportunity to give evidence of his conduct with regard to the criminal proceedings and to justify the trust placed in him, in particular by strict compliance with the conditions imposed on him. The Federal Court of Justice did not consider the question as to whether more lenient measures to safeguard the proceedings, in particular a tightening of the conditions, were possible. In this respect there is an additional violation of the principle of proportionality.

Languages:

German.

Identification: GER-2006-3-013

a) Germany / **b)** Federal Constitutional Court / **c)** First Chamber of the Second Panel / **d)** 15.02.2006 / **e)** 2 BvR 1476/03 / **f)** SS massacre v. Distomo / **g)** / **h)** *Sozialrecht* 4-7150 § 1 no. 1; *Europäische Grundrechte-Zeitschrift* 2006, 105-108; *Die öffentliche Verwaltung* 2006, 516-518; *Neue Juristische Wochenschrift* 2006, 2542-2544; *Deutsches Verwaltungsblatt* 2006, 622-624; CODICES (German).

Keywords of the systematic thesaurus:

1.2.2.1 **Constitutional Justice** – Types of claim – Claim by a private body or individual – Natural person.
1.3.4.8 **Constitutional Justice** – Jurisdiction – Types of litigation – Litigation in respect of jurisdictional conflict.
2.1.1.4 **Sources** – Categories – Written rules – International instruments.
2.1.2 **Sources** – Categories – Unwritten rules.
5.1.1.4 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons.
5.2.2 **Fundamental Rights** – Equality – Criteria of distinction.
5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
5.3.4 **Fundamental Rights** – Civil and political rights – Right to physical and psychological integrity.
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:

Immunity, state / Compensation, claim / War, retaliation, act / International law of war / Injustice, National Socialist, specific / War crime, compensation, individual, *locus standi*.

Headnotes:

Under applicable public international law, a state may claim exemption from the jurisdiction of another state if and to the extent that it is a matter of judging its sovereign action – so-called *acta iure imperii*.

Article 3 of Hague Convention (IV) does not give rise to any direct individual compensation claim in the event of violations of the international law of war. Hence, the situation remains that only the home state is entitled in principle to compensation claims under secondary law in respect of actions towards foreign nationals undertaken by a state that are in violation of public international law.

With regard to Article 3.1 of the Basic Law, the legislature is also not barred from distinguishing between a general wartime fate on the one hand and victims of persecution measures of the unjust National Socialist regime with a special ideological motivation, on the other.

Summary:

I. The constitutional complaint relates to the matter of the obligation incumbent on the Federal Republic of Germany to provide compensation and damages for "acts of retaliation" perpetrated by members of the German armed forces during the occupation of Greece in the Second World War.

The complainants are Greek nationals. Their parents were shot dead in 1944 in an "act of retaliation" perpetrated against the residents of the Greek village of Distomo by members of an SS unit forming part of the German occupation troops. The complainants, who were minors at that time, only survived because of a fortunate circumstance. As a result of the loss of their parents – in addition to material damage from handed down rights – they suffered psychological damage, as well as disadvantages in terms of their subsequent vocational training and advancement.

In 1995, the complainants filed an action to the Bonn Regional Court. They moved for a finding that the Federal Republic of Germany was obliged to compensate for the material damage caused to them by the deployment of the SS unit in Distomo. The Regional Court, as well as the Cologne Higher Regional Court, to which an appeal on points of fact and law was directed, rejected the action. The complainants' appeal on points of law to the Federal Court of Justice was also unsuccessful. By contrast, in parallel proceedings taking place in Greece, to which the complainants amongst others were party, the Levadeia Court of First Instance, which had jurisdiction, ruled in 1997 that the compensation claims made in respect of the same facts were well-founded.

II. The First Chamber of the First Panel of the Federal Constitutional Court has not admitted the constitutional complaint for decision for lack of meeting the preconditions for admission, and has concluded that, ultimately, the impugned rulings are not constitutionally objectionable.

The ruling is based in essence on the following considerations:

The rejection by the Federal Court of Justice of any binding effect of the judgment of the Greek Levadeia Court of First Instance is not constitutionally objectionable. In accordance with applicable public international law, a state may claim exemption from the jurisdiction of another state if and to the extent that it is a matter of adjudication on its sovereign action – so-called *acta iure imperii*. Since the SS unit which was involved in the events in Distomo formed part of the armed forces of the German Reich, the attacks are to be categorised as sovereign acts. The Federal Court of Justice has hence rightly rejected any binding effect of the judgment of the Greek Court of First Instance.

To the extent that the complainants assert a violation of Article 14.1 of the Basic Law, damage and compensation claims directed against the Federal Republic of Germany are said to be covered by the area protected by the guarantee of ownership. The complainants however have damage and compensation claims neither under public international law, nor under the law on official liability or on loss inflicted by a public authority.

Article 3 of Hague Convention (IV) does not give rise to direct, individual compensation claims in the event of violations of the international law of war. The genesis of the provision shows that it is intended to protect the individual, and hence indirectly to protect human rights. It does not emerge from this, however, that the provision can be considered to form the basis of a direct, original compensation claim under public international law on the part of the individual concerned against the state.

This is already countered, firstly, by the wording in accordance with which a belligerent party which violates the provisions of Convention (IV) respecting the Laws and Customs of War on Land is liable to pay compensation “if the case demands”. Since Article 3 of Convention (IV) is not self-executing in this regard as to the restrictive addition, the provision cannot be understood as a basis for individual claims already because it is not directly applicable. Secondly, according to the traditional thinking under public international law, the individual was not qualified as a legal subject. Regardless of developments at the level of human rights protection which have led to the recognition of the individual being a subject of international law in some instances, as well as to the establishment of contractual individual application proceedings, the situation remains that only the home state is entitled, in principle, to compensation claims under secondary law in respect of actions towards foreign nationals undertaken by a state that are in violation of public international law.

The complainants also do not have a claim in accordance with § 839 of the Civil Code in conjunction with Article 131 of the Weimar Constitution. Ultimately, the Federal Republic of Germany is not liable because of the lack of a guarantee of reciprocity in accordance with § 7 of the Reich Civil Servants’ Liability Act, old version.

In accordance with the version of the provision applicable until 1992, nationals of a foreign state only had a right to official liability against the Federal Republic of Germany if reciprocity was guaranteed by virtue of the legislation of the foreign state or of a state treaty. Such a guarantee by Greece against Germany was however only enacted after the end of the Second World War.

Article 25 of the Basic Law also does not oppose application of § 7 of the Reich Civil Servants’ Liability Act, old version. There are no general rules of international law requiring equal treatment of Germans and non-Germans in general terms. Admittedly, it will as a rule be in opposition to principles of humanitarian international law, as recognised under customary law, if an individual who has been unlawfully injured is denied any compensation whatever. This prerequisite is however not met in the case at hand because § 7 of the Reich Civil Servants’ Liability Act, old version, did not rule out official liability in general terms, but only the transfer of liability to the state in accordance with Article 34 of the Basic Law and Article 131 of the Weimar Constitution.

Invoking § 7 of the Reich Civil Servants’ Liability Act, old version, is hence also not ruled out because the provision is applied to facts relating to the perpetration of crimes of war. The provision was not intended to protect the German Reich against claims emerging from specific National Socialist injustices. In formal terms, however, the events in Distomo are subject to the international law of war; no specifically National Socialist injustice is inherent in them, and they are hence not to be allocated to the separately regulated area of compensation for National Socialist injustice.

The impugned rulings do not violate Article 3.1 of the Basic Law. With regard to Article 3.1 of the Basic Law, the legislature is also not barred from distinguishing between, on the one hand, a general wartime fate, albeit a particularly severe one involving violations of international law, and victims of particularly ideologically motivated persecution

measures undertaken by the unjust National Socialist regime on the other. It hence does not contradict the principle of equality if victims of persecution within the meaning of § 1.1 of the Federal Compensation Act, in the same way as forced labourers who are entitled to payment, are entitled to compensation in accordance with § 11.1 of the Law Creating a Foundation "Remembrance, Responsibility and the Future", whilst the complainants are not included in the group of entitled parties.

Languages:

German.

Identification: GER-2006-3-014

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 11.07.2006 / **e)** 1 BvR 293/05 / **f)** Asylum Seekers Benefits Act / **g)** / **h)** *Zeitschrift für das gesamte Familienrecht* 2006, 1824-1826.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Asylum, seeker, social benefit, deduction / Damages for pain and suffering, special position / Income, chargeable.

Headnotes:

It is incompatible with the principle of equality in Article 3.1 of the Basic Law for asylum seekers to be obliged, pursuant to § 7.1 of the Asylum Seekers Benefits Act, to use damages for pain and suffering under § 253.2 of the German Civil Code for their subsistence before they receive state benefits.

Summary:

I. The constitutional complaint concerns the question whether it is compatible with the Basic Law for asylum seekers to be obliged to use damages for pain and suffering as income or capital to provide for their subsistence before they receive benefits under the Asylum Seekers Benefits Act.

The Asylum Seekers Benefits Act (hereinafter referred to as "the Act") of 1993 created a separate benefit system outside social assistance in order to provide subsistence for asylum seekers. The benefits are, in principle, intended to take the form of benefits in kind, but may also be paid in cash where there are special circumstances. In addition, the Act contains special rules on the charging of income and capital against benefit. Persons entitled to benefits and the members of their families must first use up their income and capital, to the extent that these are available, before state benefits become payable. Capital also includes, in principle, other social security benefits and payments of damages for pain and suffering.

The complainant and his family, who are from Bosnia and Herzegovina and had requested asylum in the Federal Republic of Germany, received benefits under the Asylum Seekers Benefits Act. In August 1997, the complainant's wife and child were victims of a traffic accident. For quite some time they needed treatment as in-patients at an accident hospital and a dental hospital. In settlement of all claims arising from the damaging event, the victims received damages for pain and suffering totalling DM 25,000. By decision of August 1998, the agency administering benefits refused, with effect from September 1998, to grant any further benefits under the Asylum Seekers Benefits Act. According to the agency, the payment of damages for pain and suffering constituted chargeable capital for the purposes of § 7.1.1 of the Act. The complainant and his family therefore had to use it up first. The action brought against that decision, following an unsuccessful administrative appeal, was unsuccessful at all levels of jurisdiction.

II. In response to the constitutional complaint, the First Panel of the Federal Constitutional Court held it to be incompatible with the principle of equality in the Basic Law for asylum seekers to be obliged to use damages for pain and suffering for their subsistence before they receive state benefits. The contested judgments were overturned and the case was referred back to the Administrative Court.

The decision was based essentially on the following considerations:

The admissible constitutional complaint is well-founded. The charging rule in § 7.1.1 of the Act is incompatible with Article 3.1 of the Basic Law to the extent that, under that rule, persons entitled to benefit must use up any pecuniary compensation for damage other than pecuniary damage for their subsistence before they receive benefits under the Act.

Article 3.1 of the Basic Law requires all persons to be treated equally before the law. It is true that the legislature is not thereby barred from making any distinctions. However, it infringes constitutional law if it treats one group differently in comparison with another group even though there are no differences of such a kind and such significance as to be capable of justifying the difference in treatment.

The rule contested in the constitutional complaint has the effect that asylum seekers are treated differently from persons who receive social assistance. They are obliged to use damages for pain and suffering for their subsistence before they receive benefits on the basis of asylum law. This does not apply to recipients of social assistance benefits or to a certain group of asylum seekers or to other groups of persons in receipt of welfare benefits.

That difference in treatment is not sufficiently justified. It is true that it lies in the discretion of the legislature in the field of social policy to develop for asylum seekers – as has happened with the Asylum Seekers Benefits Act – a separate scheme for ensuring that they have the necessities of life and also, in so doing, to adopt rules on the award of benefits which are at variance with the law on social assistance. In particular, the legislature is not barred from making the nature and extent of social security benefits paid to foreign nationals dependent, in principle, on the likely duration of their stay in Germany. However, the specific function of damages for pain and suffering confers on such damages a special position among the other types of income and capital, which is also – so far as is apparent – taken into account in the rest of the legal system without exception by the exclusion of charging against state welfare benefits. Against that background, the reasons underlying the special scheme for ensuring that asylum seekers have the necessities of life do not support the difference in treatment inherent in counting damages for pain and suffering as income and capital.

According to their statutory function, damages for pain and suffering are not intended to cover the material necessities contemplated by the Asylum Seekers Benefits Act. The Civil Code allows entitlement to cash benefits to cover damage of a non-material nature. Damages for pain and suffering are primarily intended – as also in the case of the complainant's dependants – to compensate for past or ongoing impairments of physical and mental integrity, and in particular also to compensate for added difficulties, disadvantages and suffering which endure beyond the damaging event itself and which are not covered by the payment of material damages. They also take into account the idea that the damaging party owes the damaged party satisfaction for what he or she has done to him or her. Consequently, charging, to the extent that it means taking into account damages for pain and suffering as income or capital, cannot be justified on the ground that the benefits under that act pursue only the objective of ensuring that the asylum seeker has the minimum requirements for subsistence during the transitional period while his request is being considered. That objective may, admittedly, justify rules which require the person entitled to use all available financial means to defray the cost of his subsistence. Even to the extent that damages for pain and suffering have a compensatory function, they specifically are not assigned the function of a contribution to ensuring a means of livelihood in the material sense. They are intended to meet a need which is not covered by the benefit scheme under the Asylum Seekers Benefits Act.

Nor do other considerations underlying the special scheme under the Asylum Seekers Benefits Act justify charging to the extent that the rule in question also covers damages for pain and suffering. Disregarding damages for pain and suffering in the granting and assessment of benefits under that Act does not call into question the legislature's objective of reducing the incentive for foreign nationals to enter the country for economic reasons. Damages for pain and suffering are not based on a source of income which is calculable and which, from a rational point of view, asylum seekers would seek to exploit. The legislature therefore does not need to choose the method of charging such income or capital against benefit in order to prevent benefit recipients from having at their disposal funds with which they could, for example, pay the costs of being smuggled into Germany.

Languages:

German.

Identification: GER-2006-3-015

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 11.07.2006 / **e)** 1 BvL 4/00 / **f)** Berlin Contract Award Act / **g)** / **h)** *Zeitschrift für Wirtschaftsrecht* 2006, 2320, *Zeitschrift Arbeit und Recht* 2006, 445, *Zeitschrift für die Anwaltspraxis* EN-Nr 738/2006, *Immobilien und Baurecht* 2006, 686, *Arbeit und Arbeitsrecht*, 2006, 743; CODICES (German).

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.
2.2.1.6 **Sources** – Hierarchy – Hierarchy as between national and non-national sources – Community law and domestic law.
5.3.27 **Fundamental Rights** – Civil and political rights – Freedom of association.
5.4.4 **Fundamental Rights** – Economic, social and cultural rights – Freedom to choose one's profession.
5.4.6 **Fundamental Rights** – Economic, social and cultural rights – Commercial and industrial freedom.
5.4.8 **Fundamental Rights** – Economic, social and cultural rights – Freedom of contract.

Keywords of the alphabetical index:

Agreement, collective, obligation to respect / Court of Justice of the European Communities, preliminary ruling / Public contract, award, obligation to respect collective agreement.

Headnotes:

Where the legal situation under Community and constitutional law is contentious, there is no established order among any sets of interim proceedings that might have to be initiated by the non-constitutional court (preliminary ruling in accordance with Article 234 EC in accordance with Article 100.1 of the Basic Law).

The regulation on respect for collective agreements contained in § 1.1.2 of the Berlin Contract Award Act does not affect the fundamental right to form associations under Article 9.3 of the Basic Law, and does not violate the fundamental right of occupational freedom under Article 12.1 of the Basic Law.

Summary:

I. The ruling relates to the question of whether the regulation on respect for collective agreements contained in the Berlin Contract Award Act, in accordance with which the award of public contracts, in the construction industry amongst others, is made dependent on so-called declarations of respect for collective agreements submitted by the contractors, is constitutional.

In accordance with § 1.1.2 of the Berlin Contract Award Act, the Berlin contracting authorities are to award contracts *inter alia* for construction services on the proviso that the enterprises pay their workers carrying out these services in accordance with the respective collectively agreed remuneration scales applicable in Berlin. Similar statutory regulations on respect for collective agreements also exist in other federal *Länder*. The Federal Court of Justice considered this regulation to be unconstitutional and has suspended appeal proceedings pending with it and submitted the question to the Federal Constitutional Court for a ruling as to whether the relevant provisions of the Berlin Contract Award Act are compatible with the Basic Law.

II. The First Panel of the Federal Constitutional Court ruled that the provision contained in the Berlin Contract Award Act, in accordance with which construction service contracts are awarded on the proviso that the enterprises pay their workers carrying out these services in accordance with the respective collectively agreed remuneration scales applicable in Berlin, is compatible with the Basic Law and with other federal law.

The ruling is based in essence on the following considerations:

The submission is admissible. In particular, doubts as to the compatibility of the provision with European Community law do not prevent proceedings on the constitutionality of a specific statute. Where the legal situation under Community and constitutional law is contentious, from the point of view of German constitutional law there is no established order among any sets of interim proceedings that might have to be initiated by the non-constitutional court in accordance with Article 234.2 and 234.3 EC and Article 100.1 of the Basic Law.

The law concerning collective agreements, that is contained in the Berlin Contract Award Act, is compatible with the Basic Law and with other federal law. The *Land* Berlin was competent for issuing the provision; the statute violates neither fundamental rights nor other federal law.

The regulation on respect for collective agreements, contained in the Berlin Contract Award Act, does not violate fundamental rights. It does not affect the fundamental right to form associations, and does not violate the fundamental right to occupational freedom.

The fundamental right to form associations protects the right to form associations for all persons and for all occupations. Furthermore, it protects the association as such and its right to pursue the goals specified in Article 9.3 of the Basic Law by means of specific associative activities. The regulation on respect for collective agreements does not encroach on this protective area. The statutory obligation to respect collective agreements in particular does not affect the area protected by Article 9.3 of the Basic Law from the point of view of the right not to form associations. The obligation to respect collective agreements does not restrict the right protected by Article 9.3 of the Basic Law of the enterprises involved in the procurement proceedings to remain out of the association concluding the collective agreement. The statute also does not exert any factual coercion or considerable pressure to join.

It is unlikely that an entrepreneur, not bound by the collective agreement might seem forced to join the association concluding the collective agreement, because of the obligation to respect such agreements in order as a member to be able to influence the conclusion of future collective agreements, to which the entrepreneur would be bound by the declaration of respect for collective agreements.

The fundamental right not to form associations does not protect against the legislature taking the results of agreements concluded by associations as the starting point of statutory provisions. The statutory regulation of a declaration of respect for collective agreements also does not affect the guarantee of the existence and of the activity of associations contained in Article 9.3 of the Basic Law. Furthermore, the obligation to respect collective agreements does not lead to state legislative activity in an area in which the agreements reached autonomously between the social partners via collective bargaining take priority. The local collective remuneration agreements do not become part of the employment contracts of the workers deployed in carrying out the public contract by virtue of the state ordering their validity, but subsequent to implementation by the employers of the obligation to respect collective agreements in individual employment contracts.

The regulation on respect for collective agreements contained in the Berlin Contract Award Act also does not violate the fundamental right to occupational freedom (Article 12.1 of the Basic Law).

The protection afforded by the right to occupational freedom is affected since the regulation on respect for collective agreements concerns contractual freedom in the field of business guaranteed by Article 12.1 of the Basic Law. The legislative provision also encroaches on the fundamental right to occupational freedom. This encroachment on the right to occupational freedom is constitutionally justified, however. The Land legislature has pursued constitutionally legitimate goals by enacting the regulation on respect for collective agreements. The obligation incumbent on tenderers for a public contract to respect collective agreements is a suitable means to achieve the goals pursued by the Act, and the statutory regulation on respect for collective agreements is necessary to achieve the goal. Finally, impairing the right to occupational freedom by means of the obligation to respect collective agreements is also suitable.

However, the obligation to respect collective agreements imposed on construction companies by influencing contracts with workers and business partners concerns a major guarantee of the right of occupational freedom protected by Article 12.1 of the Basic Law. The freedom to freely negotiate the remuneration agreements with workers and sub-contractors is a major element of exercising an occupation. For these contractual conditions specially determine the economic success of the enterprises, and are hence characteristic of the activity serving to create and maintain livelihoods protected by Article 12.1 of the Basic Law.

The weight of the encroachment is, however, reduced by the fact that the obligation to pay the collectively agreed wages does not follow directly from a statutory order, but from an individual decision to submit a declaration of respect for collective agreements in order to obtain a public contract. The impact of the obligation to respect collective agreements is also restricted to the individual public contract. Only the content of the employment contracts of the workers deployed in implementing the respective public contract is prescribed, and then only for those working hours during which they are actively implementing the public contract.

The justifying reasons, which caused the legislature to enact the provision submitted for review, have considerable weight by contrast.

The fight against unemployment in conjunction with guaranteeing the financial stability of the system of social security is a particularly important goal, and the legislature must be afforded relatively broad latitude for its realisation, particularly in today’s difficult labour market conditions. This public interest, which the

regulation on respect for collective agreements tries to accommodate, takes on overriding significance.

The weighing in favour of the public interests carried out by the legislature is unobjectionable. The limit of acceptability for tenderers for a public contract, which are only to undertake to apply remuneration rates in accordance with collective agreements in parts of their entrepreneurial activity, is by no means exceeded in the light of the overriding important goals of the regulation on respect for collective agreements.

The unequal treatment resulting from the regulation on respect for collective agreements of those tenderers who do not submit a declaration of respect for collective agreements, and hence do not receive public contracts, in comparison with those tenderers who meet the condition contained in the provision submitted for review, also does not violate the principle of equality set out in Article 3.1 of the Basic Law. It is justified by the particularly important public interest described, which inspired the Land legislature to enact the statutory provision. The regulation on respect for collective agreements is also compatible with other federal laws.

Languages:

German.

Identification: GER-2006-3-016

a) Germany / **b)** Federal Constitutional Court / **c)** Third Chamber of the Second Panel / **d)** 19.09.2006 / **e)** 2 BvR 2115/01; 2 BvR 2132/01; 2 BvR 348/03 / **f)** Vienna Convention on Consular Relations / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

1.6.1 **Constitutional Justice** – Effects – Scope.
2.1.1.4.19 **Sources** – Categories – Written rules – International instruments – International conventions regulating diplomatic and consular relations.
2.1.3.2.3 **Sources** – Categories – Case-law – International case-law – Other international bodies.
4.16 **Institutions** – International relations.
5.3.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial.

Keywords of the alphabetical index:

Consular assistance, right / Defendant, foreign, advice / International Court of Justice, decisions.

Headnotes:

German courts are under an obligation to take into account the relevant case-law of the International Court of Justice when interpreting the Vienna Convention on Consular Relations.

Summary:

I. Under Article 36.1.b of the Vienna Convention on Consular Relations (hereinafter: the Vienna Convention), to which the Federal Republic of Germany is also a signatory, a foreigner who has been arrested is to be advised without delay on his or her right to have the consular post of his or her country informed of the arrest. In proceedings of the Federal Republic of Germany against the USA in the year 2001, the International Court of Justice interpreted this provision as *inter alia* creating rights for the individual that are directly enforceable by arrested persons against the receiving state (*ICJ*, LaGrand Case, Judgment of 27 June 2001 *Germany v. United States of America*, ICJ Reports 2001, 464 *et seq.*). In proceedings instituted by Mexico against the USA (ICJ, Case Concerning Avena and other Mexican Nationals, Judgment of 31 March 2004, *Mexico v. United States of America*, ILM 43 [2004] 581 *et seq.*), the International Court of Justice once more emphasised the character of the legal duties created by Article 36.1.b of the Vienna Convention as *(inter alia)* rights. The court stated that the receiving State was under an obligation to guarantee the possibility of a review before state courts in the relevant cases.

The complainants, including two Turkish nationals, were convicted of homicide offences and sentenced to imprisonment, in some cases life imprisonment. The courts based their conviction that the complainants were guilty, among other things, on the statements made by the Turkish defendants in their interrogation by the police when they were arrested. In the appeal proceedings before the Federal Court of Justice, the complainants asserted that the Turkish nationals should have been advised under Article 36 of the Vienna Convention when they were arrested by the police. They submitted that because the provision had been violated, their statements could not be used in judicial proceedings. The Federal Court of Justice dismissed the appeals as unfounded. Article 36.1 of the Vienna Convention, the court held, did not protect a person who was directly affected by arrest against

his own unconsidered statements which he had made before being given the relevant advice on his rights in this connection.

II. The constitutional complaints against this decision were successful. The First Chamber of the Second Panel of the Federal Constitutional Court overturned the challenged orders of the Federal Court of Justice, since they injured the complainants' right to a fair trial (Article 2.1 of the Basic Law in conjunction with the principle of the rule of law). The court stated that the Federal Court of Justice had had a constitutional obligation to take into account the case-law of the International Court of Justice on the Vienna Convention. However, it had interpreted Article 36.1.b.3 of the Vienna Convention in a way that was inconsistent with the interpretation of the International Court of Justice. The matters were referred back to the Federal Court of Justice. The Federal Court of Justice must now clarify what are the consequences of the infringement of the constitution for the criminal proceedings.

In essence, the decision is based on the following considerations:

1. Within the German legal system, international treaties to which the Federal Republic of Germany has acceded, such as the Vienna Convention, have the status of federal statutes (see Article 59.2.1 of the Basic Law). The non-constitutional courts therefore have an obligation to apply and interpret Article 36 of the Vienna Convention in the same way as the domestic law of criminal procedure. When they interpret Article 36 of the Vienna Convention, they must take into account the case-law of the International Court of Justice on the Vienna Convention. This follows from the principle that the Basic Law is committed to international law, in conjunction with the fact that the courts' case-law is bound by statute and law. The latter includes the decisions of an international court that was created under international law, in accordance with the contents of the treaty incorporated into the domestic legal system.

In this connection, the obligation to take the case-law into account is not restricted to the individual cases decided with German participation. On the contrary, the interpretation of a treaty by the International Court of Justice must be accorded the function of a normative precedent over and above the individual cases decided, and the parties to the treaty must orient themselves by this. The precondition for this is that the Federal Republic of Germany is a party to the relevant treaty which contains the guidelines on substantive law that are at issue in the given case and has submitted itself to the jurisdiction of the International Court of Justice, whether, as in the present case, through the Optional Protocol to the Vienna Convention, or by unilateral declaration.

2. In the challenged decisions, the Federal Court of Justice interpreted Article 36.1.b.3 of the Vienna Convention in a way that is inconsistent with that of the International Court of Justice. Unlike the Federal Court of Justice, the International Court of Justice reached the conclusion that Article 36.1 of the Vienna Treaty creates a right to consular support in the effective exercise of one's own rights of defence. The court held that it is the purpose of the advice to enable the individual to enjoy the support of his home state. If this right is injured, according to the court, the judgment of the criminal court is appealable.

Against this background, it must always be assumed that there has been an infringement of the Vienna Convention if the possibility exists that the individual, by reason of the lack of consular support, was unable to enjoy in full a particular procedural right such as the freedom to testify, and this cannot be redressed. However, it does not follow from this that in the case of an error in advice under Article 36.1.b.3 of the Vienna Convention it must inescapably be assumed that the evidentiary findings may not be used in judicial proceedings.

3. The legal consequences of a violation of the obligation to take into account the judgments of the International Court of Justice are not defined in constitutional law. To the extent that the Federal Court of Justice, when it reinterprets Article 36 of the Vienna Convention on the basis of the case-law of the International Court of Justice, comes to the conclusion that the trial courts' judgments were based on a procedural error, it is the duty of the Federal Court of Justice to determine the consequences resulting from this procedural error.

Languages:

German.

Identification: GER-2006-3-017

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 06.12.2006 / **e)** 2 BvM 9/03 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

2.1.1.4.19 **Sources** – Categories – Written rules – International instruments – International conventions regulating diplomatic and consular relations.
4.16 **Institutions** – International relations.

Keywords of the alphabetical index:

Government bonds, service, default, state liability / Immunity, diplomatic / Immunity, state / Immunity, waiver / Embassy, account / International law, general rules.

Headnotes:

Decision regarding requirements for waiving diplomatic immunity.

Summary:

I. The Republic of Argentina made considerable use of the instrument of bonds. Such bonds were also issued on the German capital market and were subscribed to by German creditors. These bonds are subject to German law. The Republic of Argentina formulated, in the conditions for the bonds, a general waiver of immunity covering (contentious) court proceedings and subsequent coercive execution. As a result of the Argentinean financial crisis, the bonds were no longer serviced.

After a creditor had brought about a judgment of the Frankfurt am Main Regional Court sentencing the Republic of Argentina to pay 766,937.82 euros, the Berlin-Mitte Local Court ordered the attachment of the accounts of the Argentinean Embassy held at Deutsche Bank. In response to an objection of the Republic of Argentina, the Local Court temporarily suspended coercive execution and, in accordance with Article 100.2 of the Basic Law, submitted to the Federal Constitutional Court the question as to whether there was a general rule of international law in accordance with which a blanket waiver of immunity is sufficient by itself to also remove immunity for property which is used by the sending state to maintain the functions of its diplomatic mission within the receiving state.

II. The Second Panel of the Federal Constitutional Court reached the conclusion that no such general rule of international law could be ascertained. It was said to emerge from state practice and from reference material on international law that a general waiver of immunity contained in bond conditions imposed by a foreign state was able to rescind the general immunity of states in contentious and execution proceedings. This was however not considered to constitute, in terms of international law, consent to execution against property being used to maintain the operation of the diplomatic mission of the sending state. This was said to be a consequence of the high level of protection of diplomatic interests recognised to apply in legal relations under public international law, which was said to be shown in the Vienna Convention on Diplomatic Relations, as well as in supplementary customary international law.

The ruling is based in essence on the following considerations:

1. In connection with issues related to the immunity of states in contentious and execution proceedings before German courts and to execution against property used for diplomatic purposes, a distinction must be made between general immunity of states on the one hand and the specific diplomatic immunity of the mission of a foreign state on the other. State immunity and diplomatic immunity are separate institutions under international law, each with its own rules. The special, broad protection of the diplomatic mission in the receiving state is an element which is particularly emphasised in state practice because of the vital role which it plays in diplomatic relations between states.

2. States may in principle waive their general immunity in contentious and execution proceedings. State practice largely distinguishes in execution between the property of a state, which is used for commercial purposes, and those assets which are used for sovereign purposes. In consequence, assets located in the executing state which are not used for sovereign purposes are, as a rule, subject to coercive execution without requiring consent or a waiver of immunity from the debtor state. Coercive execution against assets located in the executing state or which can be found there, which are used for sovereign purposes of a foreign state is, by contrast, not permissible without the consent of the state in question. The possibility of a waiver of immunity applying to assets used for sovereign purposes is recognised, however.

3. It emerges from the separation of general state immunity and diplomatic immunity under international law, that the possibility of and requirements for a

waiver of diplomatic immunity are not covered by the rules relating to general state immunity. The special status derived from the law on diplomatic relations of assets intended to maintain the operation of a diplomatic mission in the receiving state provides special protection. International customary law rules out measures of provisional attachment or coercive execution with regard to objects which are used for purposes of the diplomatic representation of a foreign state used in carrying out its official functions to the extent that the implementation of diplomatic tasks could be impaired thereby. It follows from the principle that the receiving state must refrain from all activities liable to impair the function of the diplomatic mission that a foreign state may object in terms of the inviolability of the mission to execution against objects or assets used in the operation of its diplomatic mission.

Despite the high level of protection enjoyed by objects and assets being used for diplomatic purposes, however, a waiver of special diplomatic immunity is also possible in principle. The sending state may waive the privilege of protection by the receiving state, and thereby also facilitate execution against its assets that are used for diplomatic purposes.

4. There is nothing in state practice, as particularly reflected in national court rulings – such as of German, UK, US, French and Swedish courts –, to indicate to a degree permitting to assume the general application of such a rule that mere blanket waivers which specifically mention neither diplomatic protection, nor the assets falling thereunder, are sufficient to overcome this special protection. Furthermore, it cannot be derived from regulations on diplomatic relations, from the work of the United Nations' International Law Commission, or from the reference material on international law which can be used as an additional indication of the existence of customary law, that there is a general rule under international law in accordance with which a blanket waiver of immunity would be suited to rescind the diplomatic immunity of embassy accounts.

Languages:

German.

Hungary
Constitutional Court

Statistical data

1 September 2006 – 31 December 2006

Number of decisions:

- Decisions by the Plenary Court published in the Official Gazette: 40
- Decisions in chambers published in the Official Gazette: 7
- Other decisions by the Plenary Court: 55
- Other decisions in chambers: 17
- Number of other procedural orders: 74

Total number of decisions: 203

Important decisions

Identification: HUN-2006-3-005

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 16.06.2006 / **e)** 1053/E/2005 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 2006/6 / **h)**.

Keywords of the systematic thesaurus:

1.2.4 **Constitutional Justice** – Types of claim – Initiation *ex officio* by the body of constitutional jurisdiction.
1.3.5.1 **Constitutional Justice** – Jurisdiction – The subject of review – International treaties.
1.3.5.2.1 **Constitutional Justice** – Jurisdiction – The subject of review – Community law – Primary legislation.
1.3.5.15 **Constitutional Justice** – Jurisdiction – The subject of review – Failure to act or to pass legislation.
2.2.1.6.1 **Sources** – Hierarchy – Hierarchy as between national and non-national sources – Community law and domestic law – Primary Community legislation and constitutions.

Keywords of the alphabetical index:

European Communities, constitutional review, treaty / Gambling, advertising, ban.

Headnotes:

The founding treaties of the European Union and their amendments are not to be viewed as international treaties. The treaties are primary sources of community law and the directives are secondary sources. They form part of the national legislation, since Hungary is a member of the EU. The Constitutional Court cannot interpret community law as international law within the meaning of Article 7.1 of the Constitution.

Summary:

I. The petitioner asked the Constitutional Court to examine Article 2.7 of Act XXXIV of 1991 on organising gambling (Act 1) and Article 6.5 of Act LVIII of 1997 on economic advertising (Act 2). These provisions ban marketing within Hungary (including organisation and transmitting) and advertising of gambling organised abroad. According to the petitioner, Parliament violated the obligation of member states under Article 10 EC after May 2004, by imposing even more restrictions on marketing and advertising in Hungary of gambling organised abroad. The petitioner suggested that the provisions in point contravened Articles 2.1 and 2/A.1 of the Constitution. He sought a declaration that there had been an unconstitutional omission to legislate, and asked the Constitutional Court *ex officio* to rule them to be in breach of international treaties.

II.1. The Constitutional Court examined the petition on its merits, in the light of Articles 2.1 and 2/A.1 of the Constitution.

Under Article 49.1 of the Act on the Constitutional Court, the Constitutional Court may make a finding of unconstitutional omission to legislate if the legislator has failed to fulfil its legislative duty, by not passing laws, and this has given rise to an unconstitutional situation. Apart from Articles 2.1 and 2/A.1 the petitioner did not name any other provisions of the Constitution that might have been breached.

Article 2.1 of the Constitution declares Hungary to be an independent, democratic state under the rule of law. The legislator has not necessarily failed to fulfil its obligation in the case in point. Article 2/A.1 allows Hungary, in its capacity as an EU member state, certain constitutional competences to the extent this is necessary to exercise rights and satisfy obligations under the founding treaties of the European Union. Hungary may exercise these competences independently, through the institutions of the European Union. This constitutional provision places no particular obligation on the legislator.

The petition was rejected, as the Constitutional Court did not identify any unconstitutional omission to legislate under either Article 2.1 or Article 2/A.1 of the Constitution.

2. The petitioner asked the Constitutional Court to proceed ex officio. This is possible where the legislation under dispute contravenes an international treaty. The Constitutional Court may also establish that an unconstitutional situation has arisen, as a result of a branch of the legislature failing to perform its duty to legislate.

The Constitutional Court emphasised that calling for proceedings ex officio was conceptually out of the question. Notwithstanding their “treaty origins”, it intended to deal with the founding and modifying documents of the European Union as non-international treaties. The petition was accordingly rejected.

In his opinion Judge Peter Kovács emphasised that the petitioner had alleged unconstitutional omission to legislate in view of the EC Treaty that is in many respects directly applicable in Hungary. The lawful interpretation and application of community law falls within the sphere of the Court of Justice of the European Communities. It could be dangerous for the Constitutional Court to venture into the arena and decide as to whether the legislator has violated its obligations under community law. In the European Union it is the Court of Justice that can interpret community law. The Constitutional Court would act *ultra vires*, were it to attempt to interpret obligations based on community law in such a way as to find that a state had breached community law. In his view, the Constitutional Court should have mentioned these considerations in its decision. Judge István Bagi concurred.

Chief Justice Mihály Bihari gave a dissenting opinion. He emphasised that the petitioner’s primary concern was to show that the contested provisions contravened the EC Treaty. The review of statutes for conformity with international treaties is within the competence of the Constitutional Court. This competence includes the review of the obligations of the legislator under international treaties. Under Article 21.3 of the Act on the Constitutional Court, only certain defined institutions may launch such proceedings. The EC Treaty is an international one. The petitioner had asked for a finding of unconstitutional omission to legislate, based upon

this treaty. He was not entitled to initiate proceedings to explore breaches of international treaties. Accordingly, the Constitutional Court had no option but to reject the petition.

In Decision no. 72/2006 (XII. 15.) the Constitutional Court emphasised that the founding treaties of the European Union and their amendments are not international treaties from the perspective of the Constitutional Court's competence. These treaties are primary sources of community law and the directives are secondary sources of community law. They form part of the national legislation, since Hungary is a member of the EU. The Constitutional Court cannot interpret community law as international law within the meaning of Article 7.1 of the Constitution.

Languages:

Hungarian.

Identification: HUN-2006-3-006

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 03.10.2006 / **e)** 42/2006 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 2006/122 / **h)**.

Keywords of the systematic thesaurus:

3.12 **General Principles** – Clarity and precision of legal provisions.
3.18 **General Principles** – General interest.
5.1.4 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.39 **Fundamental Rights** – Civil and political rights – Right to property.
5.3.39.1 **Fundamental Rights** – Civil and political rights – Right to property – Expropriation.
5.3.39.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.

Keywords of the alphabetical index:

Electronic communications, antenna, establishment / Easement / Telecommunication, antenna, establishment.

Headnotes:

The Constitutional Court acknowledged the great demand for mobile telephones and stated that, as a general rule, there was a public interest in the establishment of electronic telecommunications services and antennae. However, the legislation did not define the type of public interest which could justify restrictions on property rights.

Summary:

I. Almost two hundred petitioners asked the Constitutional Court to review certain provisions of Act LXXII of 1992 on Telecommunications (hereinafter described as "the Act"), and Act LXVI of 1999 amending it (described here as "the Amending Act"). They pointed out that, under these provisions, restrictions upon or withdrawal of property rights to further the interests of mobile telecommunication providers are not in the public interest, neither are such circumstances exceptional enough to justify it. They suggested that the provisions contravened Article 13 of the Constitution. Building towers and other structures for the purposes of mobile telecommunication is in conflict with environmental and health protection, and is prejudicial not only to the owners of the land where these structures are placed, but to others as well.

II.1. The Constitutional Court stated that there had been major developments in fields such as telecommunications since the political transition. In 1992, the Act introduced a system of concessions, to replace the monopoly on infrastructure and services. Parliament intended to put an end to the monopoly enjoyed by telecommunication providers, to open the telecommunications market to international providers and to bring Hungarian legislation into line with EU regulations. It accordingly passed Act XL of 2001 on Telecommunications, which annulled the Act. In 2003 another Act on telecommunications was passed, namely Act C of 2003 on Electronic Communications. This in turn annulled the Act of 2001. Articles 94-96 of the Electronic Communications Act are broadly similar to the provisions under dispute. The Court therefore reviewed Articles 94-96.

2. In Decision no. 64/1993, the Constitutional Court emphasised that because of the nature of property protection, the central point of any enquiry into the constitutionality of state intervention is proportionality between ends and means. In this case, public interest has to be weighed against the restriction on property. Article 13.2 of the Constitution merely requires the "public interest" to justify expropriation; if monetary compensation is provided, there is no need to demonstrate a more compelling and justified ''necessity'' for constitutional purposes.

In the present case, the Court observed that, several years after political transition, a more extensive protection of property rights is needed than was the case in 1993. The Constitution distinguishes the right to property from other fundamental rights. Article 13.2 of the Constitution allows for it to be withdrawn in full, in certain circumstances. Article 13.1 of the Constitution sets out the general principle of the right to property, but does not deal with restrictions on the right. Article 8.2 of the Constitution deals with the general topic of restrictions on fundamental rights. The same rules and court procedures have to be followed when restrictions are placed on the right to property, and Article 13 of the Constitution must be taken into account. A peculiarity of Article 13.2 of the Constitution is that it specifies public interest as a precondition of the full withdrawal of the right to property. Restrictions on private property should be defined by statute in such a way that the court can check the necessity for any restriction on public interest grounds in a particular case. Proportionality is also an important factor: the importance of the aim to be served by restriction.

3. Article 188.12 of the Electronic Telecommunications Act defines "electronic communications service' as objects associated with wireless connection, antennae, and antennae support structures. Article 94.1 provides for the installation of electronic communication facilities. Article 94.2 allows for the installation of electronic communications equipment on public land, or, where this is not possible, on private land. There is provision under Article 95.1 for limits on a proprietor's use of his property, if the installation of electronic communications service has not been agreed. The Act does not determine the actual conditions of the restriction; it simply refers to public interest. Article 95.2 allows for adequate compensation in the case of restriction, and refers to provisions of the Civil Code, which allow the proprietor to request compulsory purchase, or expropriation, of his or her property, under suitable circumstances. However, there is no guidance within this supplementary provision as to circumstances under which restrictions on property rights are necessary in the case of a specific property.

Article 95.3 allows the authorities to claim right to use or an easement at the builder's request where electronic communication services are to be built on a particular property or are already in situ. It does not, however, specify conditions for restricting the right to property; it simply refers to public interest. The Court therefore took the view that the provision was unconstitutional. The Court also observed that it was not possible to deduce whether public interest would extend to the owners of neighbouring properties. It accordingly ruled that the restriction on property rights was disproportionate, and unconstitutional.

Judge András Holló submitted a dissenting opinion to the decision. In his view, the version of the Electronic Telecommunications Act currently in force enabled authorities to impose restrictions on property rights in an unpredictable and arbitrary way. The Court ought, therefore, to have ruled that there was an unconstitutional omission to legislate because of the lack of guarantees for property rights.

He was concerned that the Court's decision linked the standards developed for fundamental human rights and restrictions on property rights. This could result in a relaxation of the regime for protecting human rights. Introducing a loosely-defined term of public interest into Article 8.2 of the Constitution could make it easier to restrict fundamental rights. Judge András Bragyova concurred with the dissenting opinion.

Judge Péter Paczolay also submitted a dissenting opinion to the decision. He said that the Electronic Telecommunications Act afforded the telecommunications authority to impose legal restrictions on the use of a property. Simply referring to public interest in a particular case was not enough. The authority however may impose legal restrictions on the use of property if in the given case the restriction is clearly justified by public interest and if the restriction is in accord with Articles 94.2, 94.3 and 95.1 of the EC Act. Therefore, Articles 95.1 and 95.3 of the EC Act were not against the Constitution.

Furthermore, in his view, the Court distinguished the requirements for the constitutional restriction on property rights from Article 8.2 of the Constitution in 1993. This was partly because the right to property is the only fundamental right within the Court's area of competence which can be restricted by reference to public interest. The Court should not depart from this practice without adequate reason.

Cross-references:

- 64/1993, *Bulletin* 1993/3 [HUN-1993-3-017].

Languages:

Hungarian.

Identification: HUN-2006-3-007

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 05.10.2006 / **e)** 47/2006 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 2006/122 / **h)**.

Keywords of the systematic thesaurus:

2.2.2 **Sources** – Hierarchy – Hierarchy as between national sources.
5.3.41 **Fundamental Rights** – Civil and political rights – Electoral rights.
5.3.41.1 **Fundamental Rights** – Civil and political rights – Electoral rights – Right to vote.

Keywords of the alphabetical index:

Voting / Universal suffrage.

Headnotes:

A situation whereby a citizen with a certificate can vote in the first round of an election, and the first round proves successful and where in the absence of any rule to the contrary, he can then take part in the election of a new candidate either at his own address or in a different constituency where the first round has proved unsuccessful, if he is in possession of a certificate for that constituency contravenes the principle of equal suffrage.

The Court therefore recommended that Parliament should legislate to eliminate any possibility of abuse of the right to vote.

Summary:

I. Several petitions were submitted to the Constitutional Court, regarding certain provisions of Act C of 1997 on Electoral Procedure (referred to here as "the Act") and those of Decree no. 60/2005 of 21 December of the Ministry of the Interior which brought the Act into force (referred to here as "the Decree"). Under these provisions, voters who are away from their address but in Hungary on polling day may present a certificate obtained from the head of their local election office or from the ballot counting committee of the area where they are staying. They can then be entered on the electoral register, and these certificates will enable them to vote in the area where they are staying (see Article 89). The petitioners suggested that this situation was open to abuse. A citizen with a certificate could vote in the first round, and that round could prove to be successful. In the absence of any rules to the contrary, the voter could then participate in the election of another candidate, either at his own address, or (if he holds a certificate) at a different constituency, where the first round had been unsuccessful. This would result in a violation of the principle of equal suffrage as enshrined in Article 71.1 of the Constitution.

The petitioners also drew attention to provisions of the Decree, under which a voter's name could be entered in a register from which they had been withdrawn, if they had obtained the right certificate. One of the petitioners also pointed out that voters who are away from their address but are in Hungary cannot legally use their certificates on polling day to vote for candidates in their own constituencies. Voters who are not in Hungary on polling day are able to do this, which puts them in a more advantageous situation than those in Hungary. The petitioner argued that this was discriminatory, and in contravention of Article 70/A of the Constitution. Another petitioner pointed out that voters who were away from their domicile or residence on polling day could not vote for local government representatives and mayors.

II.1. The Constitutional Court referred to their Decision no. 338/B/2002, where they had already examined the question of certificates for voters. They had decided that this practice was in line with the Constitution, and was an important feature of universal suffrage. Those provisions of the Constitution concerning the right to vote do not necessarily mean that voters away from their domicile must be granted the possibility of voting for candidates running for office in their constituencies.

The Court ruled that there were valid constitutional concerns as to the violation of the principle of universal suffrage when citizens vote on the strength of a certificate. Nevertheless, it did not repeal the disputed provisions of the Act, as this would result in greater damage to the principle of the universal right to vote than is the case under the legislation currently in force. Instead, the Court ruled that there had been an unconstitutional omission to legislate, and requested Parliament to pass legislation to eliminate the possibility of abuse, by 30 June 2007.

2. The petition as to the constitutionality of the Decree was upheld. The Court observed that, under Article 89.2 of the Act, the head of the local election office should delete voters to whom they issue certificates from the electoral register. Technically, the Act does not allow for the possibility of the repeated registration of voters in their electoral district on polling day, and as a result, there can be no reverse regulation in the Decree. The Decree also gives scope for voters with certificates to decide, after an unsuccessful first round, whether to vote in their own constituency or in the one on the certificate. This possibility violates the fairness of elections.

3. The Court took a different view of the points raised about local elections. Here, the general principle of the right to vote has to be taken into account, as well as Article 42 of the Constitution. This sets out voters' rights to local government. Local government is the independent, democratic management of local affairs affecting the electorate as a whole, and the exercise of local public authority in the interests of the population. The law does not exclude people who are away from their usual address on polling day from the right to vote, as they can still vote in the constituency in which they are residing at the time. The Constitutional Court therefore rejected the petition.

In his concurring opinion, Judge Péter Kovács observed that Parliament has to consider international legal obligations when enacting election law, as well as recommendations from international organisations. He expressed the view that there are inconsistencies in the Act, which could be removed if the regulations on the practice of voting rights were made more stringent.

Judge András Bragyova did not think the disputed provisions of the Act should be repealed. He summed up his reasoning in a dissenting opinion, with which Mihály Bihari and László Kiss concurred. In his view, a distinction had to be drawn between the provisions as they dealt with different subjects. Article 89 of the Act is concerned with the conditions for issue of certificates. The provision of the Decree under discussion relates to the administration of the electoral register. The law governing the administration of the electoral register is Act 66.2, under which the ballot counting committee enters voters in the register if they have a certificate and can certify that their address is within the constituency, provided that they do not feature on the list of disenfranchised citizens. The Decree is in conformity with Act 66.2. Under this provision, ballot counting committees have to act in a similar way as they would if the provision of the Decree was repealed. Judge András Bragyova was of the opinion that certificate misuse stemmed from a proportional system with two rounds. Votes were probably split at random between supporters of the different candidates.

Languages:

Hungarian.

Israel
Supreme Court

Important decisions

Identification: ISR-2006-3-006

a) Israel / **b)** High Court of Justice (Supreme Court) / **c)** / **d)** 11.08.2003 / **e)** 9232/01 / **f)** / **g)** / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.17 **General Principles** – Weighing of interests.
5.4.3 **Fundamental Rights** – Economic, social and cultural rights – Right to work.

Keywords of the alphabetical index:

Animal, protection / Worker, agricultural.

Headnotes:

The petitioners asked the Court to declare the force-feeding of geese for the production of *foie gras* to be illegal under Israeli law, and to repeal the regulations concerning the force-feeding of geese. The Court upheld the petition, declaring the practice as currently laid out in the regulations to be illegal, and repealing the regulations.

Summary:

I. Force-feeding geese is a process by which geese are forcibly fed high calorific food beyond their dietary needs in order to create an enlarged and fatty liver, which is then used to make a gourmet dish called "*foie gras*". The force-feeding industry has been active in Israel for the past forty years, directly employing approximately forty five family farms and generating millions of dollars each year. Investment in the industry was partially funded by the State.

According to the petitioner, an umbrella organisation for animal rights in Israel, force-feeding geese is unlawful under Israeli law, specifically under a statute which prohibits abuse and cruel treatment of animals. The petitioner also claims that regulations limiting the means by which geese may be force-fed are contrary to the said statute and must therefore be repealed.

The argument in this case did not centre on whether the practice of force-feeding caused suffering to the geese – that the Court recognised. Rather, the argument centred on whether the practice was so egregious as to warrant accepting the petitioner's argument. This would instantly render an entire agricultural industry illegal and would also encroach on the freedom of occupation.

II. In reaching its decision, the Court considered the conflicting interests – the protection of the welfare of animals, agricultural needs and the freedom of occupation. The Court noted that conflicting rights or interests are always "relative" and never absolute, a notion based on the presumption that values, principles, and freedoms are not all of equal importance. Nevertheless, while Israeli law states unequivocally that animal abuse is illegal, the Court needed to determine what exactly constitutes abuse. Drawing on a case in which the Court determined that a performance of a man battling with a crocodile was in violation of the law, the Court held that defining abuse requires a balance between the degree of suffering caused to the animal, the purpose of this suffering, and the means used to achieve this purpose.

In attempting to strike a balance between the conflicting interests, the Court recognised a tension between the protection of animal welfare and agricultural needs that exist in modern society. The Court noted various jurisdictions in which the force-feeding of geese was prohibited altogether, although it is probable that this was in countries in which the *foie gras* industry did not exist prior to the enactment of statutes prohibiting the practice. The Court also noted jurisdictions in which accepted agricultural practices are excluded from the application of animal protection laws as well as jurisdictions which do not exclude such practices from this protection. The Court held that the Israeli approach is more similar to the latter.

Using this approach, the Court held that the relevant "agricultural needs" should be weighed against the suffering inflicted on the animal, as well as the type of suffering and its severity. The Court therefore decided to repeal the regulations because they failed to achieve the very purpose for which they were enacted – to prevent the suffering of the geese. In reaching this decision, the Court held that the price paid at present in order to produce *foie gras*, i.e. the harm caused to the geese, is too high, and that the regulations do not represent a correct balance between the benefit to agricultural needs and the harm inflicted on animals.

The Court also held that the practice of force-feeding geese as currently laid out in the regulations constitutes cruel treatment of animals, justified neither by the interest of freedom of occupation nor by agricultural needs, and that it should therefore be prohibited. In reaching this decision, the Court noted that the weight granted to the interest in the "production of food" has to be in proportion to the necessity of the food item for human existence. Therefore, basic foods would be granted more weight than luxury foods, such as *foie gras*. The Court also considered the legitimate interest of the farmers in maintaining their livelihood, but noted that this interest cannot automatically override the conflicting interest of protecting animal welfare. The decision regarding the repeal of the regulations and the prohibition of the current force-feeding practice was postponed until 31 March 2005.

The minority opinion took into account the economic and social consequences of imposing a complete ban on the *foie gras* industry, and noted that if the petitioner's argument prevailed, those who had been employed in the force-feeding industry for years would be turned into felons overnight. This was viewed by the minority as unacceptable. The minority view held that there was a proportionate relationship between the means (force-feeding geese) and the ends (producing food). Taking into account the fact that the European Union has not prohibited the force-feeding of geese in countries in which the practice already existed, and considering "agricultural needs", the minority view was that the current practice of force-feeding geese was not unlawful, and that if there were to be prohibitions, there would have to be a reasonable transitional period.

Languages:

Hebrew, English (translation by the Court).

Identification: ISR-2006-3-007

a) Israel / **b)** High Court of Justice (Supreme Court) / **c)** / **d)** 09.10.2003 / **e)** 1993/03 / **f)** / **g)** / **h)** CODICES (English).

Keywords of the systematic thesaurus:

1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.
1.3.5.14 **Constitutional Justice** – Jurisdiction – The subject of review – Government acts.
4.6.2 **Institutions** – Executive bodies – Powers.
4.6.4.1 **Institutions** – Executive bodies – Composition – Appointment of members.

Keywords of the alphabetical index:

Prime Minister, power, scope / Minister, removal from office / Minister, appointment, judicial review.

Headnotes:

It was within the Prime Minister's powers to appoint the respondent in the case in point to the position of Minister of Public Security. This fell within the range of reasonableness.

Summary:

I. The petitioners sought to prevent Mr Tzachi Hanegbi's appointment to the office of Minister of Public Security. They argued that Hanegbi's connection with the following four matters meant that he was unfit to serve in this capacity. Firstly, he was convicted over twenty years ago for brawling in a public place. Secondly, and again over twenty years ago, there were allegations that he had committed perjury. No indictment was made at the time. Thirdly, there had been a police recommendation that Hanegbi be prosecuted for fraud over his involvement in the appointment of the Attorney General. The case was closed for lack of evidence but was, nonetheless, described as a "deviation from acceptable standards of behavior." Finally, there had been another police recommendation; ultimately dismissed for lack of evidence, that he be prosecuted for improper activity in respect of a non-profit organisation he had set up. With regard to the final matter, the Attorney General at the time noted that, while there was no legal impediment to Hanegbi's appointment to Minister of Public Security, the appointment was "problematic from a civil perspective."

The petitioner claimed that the Prime Minister's decision to appoint Hanegbi to the office of Minister of Public Security was unreasonable and this would justify the Court's intervention in the Prime Minister's decision. They also argued that this appointment would be damaging to the effectiveness of the police and its public image, and that numerous conflicts of interest would arise if Hanegbi held the Ministry position because of the police's involvement in investigating him in the past.

The respondents contended that there are no grounds for interfering with the Prime Minister's decision. He acted within the parameters of his authority and the affairs raised by the petitioner did not establish that this decision was unreasonable. They also pointed out that the courts in general afford the Prime Minister a wide "range of reasonableness" in appointment matters.

II. The Court began by observing that Hanegbi's appointment did not fall within the scope of Israeli law prohibiting the appointment of ministers who have committed offences of moral turpitude. It then noted that because the Prime Minister is given the authority to form a government, which includes the appointment of ministers, the only issue remaining for the Court to examine is Prime Ministerial discretion. Concerning the Court's power to exercise judicial review over the Prime Minister's discretionary appointment, the Court stated that only a radical deviation from the range of reasonableness in the exercise of the Prime Minister's powers to form a government would constitute grounds for judicial intervention.

The Court determined that only exceptional and extreme circumstances would constitute sufficient grounds to order the Prime Minister to remove a minister from office, and that the circumstances of the four alleged matters did not amount to such an egregious level. In reaching this decision, the Court considered the lapse of time between the first two affairs raised by the petitioners as well as the fact that no indictment was ever served against Hanegbi. Accordingly, noting its obligation of deference to the Prime Minister's powers, the Court held that his appointment did not overstep the range of reasonableness. The Court indicated that the Prime Minister's appointment would ultimately be judged by the political process and the public at large.

The minority view was of the opinion that removal from office should be a solution of last resort, only to be used where a conflict of interest cannot otherwise be prevented. Nevertheless, the minority opinion stated that Hanegbi should be removed from his position of Minister of Public Security because of unavoidable biases and conflicts of interest that may arise due to his having been investigated by the police in the past. The minority opinion noted its concern that allowing Hanegbi to continue to function as a Minister could very well lead to a gradual deterioration of the standards of conduct of public leaders, thereby leading to a de-sensitization and a lowering of national standards of public morality. This

minority opinion stated that striking down a prime ministerial decision falls within the boundaries of legitimate judicial review of the administration's activities, and forms part of the "checks and balances" which exist in a democracy.

Languages:

Hebrew, English (translation by the Court).

Identification: ISR-2006-3-008

a) Israel / **b)** High Court of Justice (Supreme Court) / **c)** / **d)** 11.12.2005 / **e)** 769/02 / **f)** Targeted Killings (Public Committee Against Torture) / **g)** / **h)** CODICES (English).

Keywords of the systematic thesaurus:

2.1.1.4.3 **Sources** – Categories – Written rules – International instruments – Geneva Conventions of 1949.
3.16 **General Principles** – Proportionality.
5.3.2 **Fundamental Rights** – Civil and political rights – Right to life.

Keywords of the alphabetical index:

Civilian, differentiation from combatant / Terrorism, fight / Combatant, unlawful.

Headnotes:

The State of Israel's struggle against terrorism is not conducted outside the scope of the law, and this struggle, conducted within the bounds of the law, is an expression of the difference between a democratic state fighting for its life and the terrorists fighting against it.

The legality of Israel's policy of preventative strikes against terrorists must be evaluated on a case-by-case basis, with proportionality and necessity being relevant considerations.

Summary:

I. In September 2000, the second *intifada* began. A massive assault on terrorism was directed against the State of Israel. In its war against terrorism, the State of Israel employed a policy of preventative strikes, which was directed at members of terrorist organisations involved in the planning, launching, and/or execution of terrorist attacks against Israel. The preventative strikes carried out since the implementation of the policy have resulted in the deaths of many terrorists. However, the policy has also caused collateral damage to civilians located in the vicinity of the targeted terrorists.

According to the petitioners, the policy is illegal, it violates the basic right to life, and it denies suspects the right to due process. They argued that the applicable law is the law of occupied territory under the Fourth Geneva Convention, and that these suspects should be dealt with as criminals under criminal law. The petitioners also claimed that the category of unlawful combatants does not exist, and therefore the terrorists should be viewed as civilians taking part in combat; accordingly, they may be attacked only during such time as they directly take part in combat, not beforehand and not thereafter. Furthermore, the petitioners claim the policy is disproportionate because it results in the death and injury of innocent persons and is not the least harmful means available.

According to the respondents (the State of Israel and others), Article 51 of the UN Charter allows a state to respond with military force to a terrorist attack against it. The respondents also claimed that the laws of war apply to both occupied and non-occupied territory, so long as there is an armed conflict taking place on it, and that the laws of war therefore apply to the policy at issue. They suggested that a third category of "unlawful combatants," who are thus legitimate targets for attack, should be recognised in the light of the complex reality of terrorism. The respondents argued in the alternative that the laws of war permit attacking those civilians who take a direct part in the hostilities, and that because Israel has not signed the First Protocol limiting an attack against a civilian to "such time that he is taking direct part", "hostilities" should be interpreted as including acts such as the planning, launching, or commanding of terrorist attacks. In the respondents' view, the policy fulfills the proportionality requirement, in that alternatives are implemented whenever possible and all attempts are made to minimise collateral damage. Lastly, they claimed that the policy was a military issue and therefore not subject to judicial review.

II. The Court held that the question whether or not to employ the policy of preventative strikes which cause the death of terrorists and at times civilians nearby is a legal question, and therefore the policy is justiciable. However, judicial review of this policy, by its very nature, will be retrospective.

The Court recognised the complexity of the armed conflict between the State of Israel and terrorist organisations in occupied territory, but ruled that it constitutes an international armed conflict, subject to international humanitarian law and customary international law. The Court noted the contradictory considerations inherent in international law dealing with armed conflicts, one being humanitarian, and the other being military. Accordingly, the Court held that a proper balance between these two conflicting considerations must be achieved. Such a balance results in neither being actualised to the fullest extent.

The Court held that the legality of the policy must be evaluated on a case-by-case basis, based on a variety of factors and considerations. The Court affirmed that the policy must distinguish at all times between civilians, who are protected from the dangers of combat, and combatants, who are legitimate targets for military attack. The Court held that terrorists who take part in hostilities are not entitled to the protection granted to civilians; while they do not cease to be civilians, terrorists participating in hostilities by their acts deny themselves that aspect of their civilian status which grants them protection from military attack. Regarding "taking part in hostilities", the Court held that this includes preparations before an attack and does not require the use of weapons. Regarding "taking a direct part" in hostilities, the Court recognised that the scope of this statement had not clearly been defined in international law, but held that it included more than just the terrorist himself; it also included those who have sent him, who have decided upon the act, and those who have planned the act. The Court noted that civilians who voluntarily place themselves in front of terrorists as human shields should be viewed as taking direct part in the hostilities, but that if the civilians were involuntarily being used as human shields, they are civilians who should be protected from military attack. Regarding "for such time," the Court determined that a terrorist committing a "chain of acts" of terrorism does not gain immunity from attack during the short intervals of rest between his next attack, and that only a terrorist who, after engaging in hostilities, fully detaches himself from terrorism will gain this immunity. The Court recognised the lack of a clear definition here, and therefore required clear verification by the army that that civilian is taking part in hostilities.

The Court noted that a civilian taking part in hostilities cannot be attacked if less harmful means can be employed. However, it also observed that arrest, investigation and trial are not always means that can reasonably be used, by virtue of sheer impossibility of arrest, because of the risk an arrest would pose to innocent civilians in the area, or because the risk to the lives of the soldiers is so great that it is not justified. The Court also held that a thorough investigation regarding the precision of the identification of the target and the circumstances of the attack upon him must be performed retroactively, and that in some cases it may be appropriate to pay compensation as a result of harm to innocent civilians. The Court also applied the principle of proportionality in an international armed conflict to Israel's policy and noted that the harm to innocent civilians caused by collateral damage during combat operations must be in proportion to the military gains achieved.

Languages:

Hebrew, English (translation by the Court).

Italy
Constitutional Court

Important decisions

Identification: ITA-2006-3-003

a) Italy / **b)** Constitutional Court / **c)** / **d)** 13.12.2006 / **e)** 454/2006 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), 01.01.2007 / **h)** CODICES (Italian).

Keywords of the systematic thesaurus:

1.2.3 **Constitutional Justice** – Types of claim – Referral by a court.
2.1.1.1.1 **Sources** – Categories – Written rules – National rules – Constitution.
2.1.1.3 **Sources** – Categories – Written rules – Community law.
2.2.1.6.2 **Sources** – Hierarchy – Hierarchy as between national and non-national sources – Community law and domestic law – Primary Community legislation and domestic non-constitutional legal instruments.
3.26.1 **General Principles** – Principles of Community law – Fundamental principles of the Common Market.
5.2 **Fundamental Rights** – Equality.
5.4.5 **Fundamental Rights** – Economic, social and cultural rights – Freedom to work for remuneration.

Keywords of the alphabetical index:

Gambling, discrimination / Betting, discrimination / Community law, national court, direct application.

Headnotes:

The Court held – in the light of its case-law based on Article 11 of the Constitution (Judgment no. 170 of 1984) – that national courts must directly apply immediately applicable Community provisions and not national provisions incompatible with Community provisions, after having, whenever they consider it necessary, asked the EC Court of Justice for a preliminary ruling, within the meaning of Article 234 EC, on whether the national provisions are compatible with Community law.

The Court also held that, in accordance with its case-law, national courts may apply to the Constitutional Court if a domestic provision is likely to have irreversible negative consequences for essential and fundamental Community principles and must therefore be declared unconstitutional, or if the application of self-executing Community rules is likely to violate the fundamental principles of the Italian constitutional system (in which case the judge must submit to the Court the national law which gives effect, in the domestic legal system, to the EC Treaty, see Judgment 232 of 1989).

The Court decided not to examine the merits of the case; the question was found to be inadmissible as the lower court had expressed doubt as to the compatibility of the disputed rules with Community law.

Summary:

I. Two courts raised a question concerning the compatibility with the Constitution of Section 88 of the consolidated national security laws *(Testo Unico)*, as referred to in Section 4 of Law no. 401 of 13 December 1989, (which concerns illicit gambling and betting). Of concern was that part of the provision which stipulates that licences required for collecting bets may be granted only with prior authorisation from the Italian government. The referring courts held that the impugned provision was contrary to Articles 3 and 41 of the Constitution. Its effect was that only holders of an Italian licence could collect bets. Those with licences from other EU member states were excluded. This violated the principle of equality (Article 3 of the Constitution) and the principle of freedom of economic initiative (Article 41 of the Constitution).

II. The Constitutional Court noted, first and foremost, that the referring courts had raised the question of the compatibility of the impugned provision with Community law on the grounds that, by insisting on a "national" licence to collect bets, it introduced restrictions on freedom of establishment and freedom to provide services and that such restrictions were prohibited by Articles 43 and 49 EC. Indeed, although the aforementioned Section 88, in so far as it required prior police authorisation, could be justified on grounds of public policy (under Article 46 EC), there was no justification for demanding a licence issued exclusively by the Italian authorities.

The question of the compatibility of the impugned provisions with Community law therefore arose and must first be resolved, prior to the question of constitutionality.

Cross-references:

The Court referred to Judgments nos. 168 of 1991, 232 of 1989, 170 of 1984, 183 of 1973 and 98 of 1965 and Orders nos. 536 of 1995 (*Bulletin* 1995/3 [ITA-1995-3-017]) and 132 of 1990.

Languages:

Italian.

Latvia
Constitutional Court

Important decisions

Identification: LAT-2006-3-004

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 16.10.2006 / **e)** 2006-05-01 / **f)** On the Compliance of Section 46.6, 46.7, 46.8 and 46.9 of the Radio and Television Law with Sections 58 and 91 of the Latvian Constitution / **g)** *Latvijas Vestnesis* (Official Gazette), no. 169(3537), 24.10.2006 / **h)** CODICES (Latvian, English).

Keywords of the systematic thesaurus:

2.3.6 **Sources** – Techniques of review – Historical interpretation.
2.3.8 **Sources** – Techniques of review – Systematic interpretation.
3.4 **General Principles** – Separation of powers.
4.6.2 **Institutions** – Executive bodies – Powers.
4.13 **Institutions** – Independent administrative authorities.

Keywords of the alphabetical index:

Government, powers, attribution to other state institution / Media, audiovisual council, national / Media, Council of Europe, recommendation.

Headnotes:

Latvia is a modern, democratic state, governed by the rule of law. It is not, therefore, possible for all functions of executive power to be vested in the Cabinet of Ministers and State administrative institutions. It may be possible to remove a specific section of State administration from the competence of the Cabinet of Ministers and pass it to an autonomous State institution, where it has been established that a State institution which is subordinated to the Cabinet of Ministers will not be able to ensure adequate management.

Summary:

I. The Law on Radio and Television governs the setting up, registration, operation and regulation of electronic mass media in Latvia. This law created a new state institution – the National Radio and TV Council, referred to here as the Council. Under Section 41.1 of the Radio and Television Law, the Council represents the interests of society as a whole in the electronic mass media sector, operating within the framework of the Latvian Constitution, the Radio and Television Law and other laws. Freedom of expression and information will also be guaranteed. Section 46.6, 46.7, 46.8 and 46.9 of the Radio and Television Law, which are challenged in these proceedings, determine the Council's powers.

Twenty members of the Latvian Parliament asked the Constitutional Court to declare the above provisions to be in breach of Sections 58 and 91 of the Constitution. They argued that under Section 58 of the Constitution, all State administrative institutions with the power to pass external individual legal and administrative acts against an unlimited range of person fall within the remit of the Cabinet of Ministers.

II. The Court emphasised that the principle of the separation of state power manifests itself in the division of power into legislative, executive and judicial branches, vested in independent and autonomous institutions. This principle guarantees mutual checks and balances, favours the moderate exercise of power and curbs any tendencies to usurp it. In a democratic state, under the rule of law, power is divided so as to achieve the aims of the separation of power. However, the division of State power as outlined above does not in any way imply that the State will only set up three constitutional institutions, each one fulfilling in its entirety one of the three state functions. For the division of power to achieve its goals, the various constitutional institutions must be endowed with separate functions of power.

The Court observed that institutions of State administration carry out administrative functions of the executive power. These, together with the political functions of the executive power, carried out by the Cabinet of Ministers, create the competence in the sector of the executive power, assigned to the Cabinet of Ministers under the Constitution. In order for the Cabinet of Ministers to undertake political responsibility for the exercise of the whole competence in the sector of executive power assigned to it, subordination of the State administration to the Cabinet of Ministers is necessary. The Cabinet of Ministers has at its disposal such legal mechanisms which ensure adequate activity of the State administration.

The Court held that the Council is a legal entity derived from public law and that the Council is not subordinate to the Cabinet of Ministers. It also ruled that an interpretation of Section 58 of the Constitution to the effect that it requires the subordination of all institutions of state administration institutions to the Cabinet of Ministers, with no exceptions and without assessing whether such subordination is constitutionally compliant, is based on an isolated interpretation of the provision.

The Court stressed that the Constitution is a cohesive whole and the legal norms it contains are closely inter-woven. Each norm has its place in the constitutional system and no greater significance shall be accorded to any constitutional norm than has been envisaged by those who originally drafted the Constitution. In interpreting separate constitutional norms, one also has to take Section 1 of the Constitution into consideration, from which follow several principles of the democratic state under the rule of law.

The Court established that Section 1 of the Constitution alone authorises Parliament to set up autonomous institutions of state, when there is no other way of ensuring adequate management. It is not possible in today's Latvia, which is a democratic state under the rule of law, to pass all the functions of executive power to the Cabinet of Ministers and the State administration institutions. A separate section of the State administration may be removed from the competence of the Cabinet of Ministers and passed to an autonomous State institution, if it has been established that a State institution subordinated to the Cabinet of Ministers will not be able to ensure adequate management. However, Section 1 of the Constitution sets out strict criteria to apply to these circumstances.

Reference was made to Preamble to the Recommendation Rec(2000)23 on the independence and functions of regulatory authorities for the broadcasting sector, adopted on 20 December 2000 by the Committee of Ministers of the Council of Europe.

The Court pointed out that the existence of the Council, which is not subordinated to the Cabinet of Ministers, is in conformity with the Constitution and admissible, because the Council's main duty is to make sure there is fair competition within the mass media sector, given that the power of information has a direct influence on election procedure and also State power.

The Court accordingly declared paragraphs six, seven, eight and nine of Section 46 of the Radio and

Television Law to be in conformity with Sections 58 and 91 of the Latvian Constitution.

Cross-references:

Previous decisions of the Constitutional Court in the following cases:

- Judgment no. 03-04(98), 13.07.1998, *Bulletin* 1998/2 [LAT-1998-2-005];
- Judgment no. 03-05(99), 01.10.1999, *Bulletin* 1999/3 [LAT-1999-3-004];
- Judgment no. 04-03(99), 09.07.1999, *Bulletin* 1999/2 [LAT-1999-2-003];
- Judgment no. 2001-07-0103, 05.12.2001;
- Judgment no. 2005-03-0306, 21.11.2005, *Bulletin* 2005/3 [LAT-2005-3-007];
- Judgment no. 2005-12-0103, 16.12.2005;
- Judgment no. 2005-18-01, 14.03.2006.

Languages:

Latvian, English (translation by the Court).

Identification: LAT-2006-3-005

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 23.11.2006 / **e)** 2006-03-0106 / **f)** On the compliance of the words "or other attributes" and "separate slogans voiced or speeches made" included in Section 1.4 of the Law On Meetings, Processions and Pickets; Section 9.1; the words "keepers of public order", included in Section 12.3.1, the words "and pedestrians", incorporated in Section 13.2; the second sentence of Section 14.6; the words "not earlier than 10 days", included in Section 15.4 as well as Section 16 and Section 18.4 with Section 103 of the Latvian Constitution, Section 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Section 21 of the International Covenant on Civil and Political Rights / **g)** *Latvijas Vestnesis* (Official Gazette), no. 192(3560), 01.12.2006 / **h)** CODICES (Latvian, English).

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
5.1.4 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.21 **Fundamental Rights** – Civil and political rights – Freedom of expression.
5.3.28 **Fundamental Rights** – Civil and political rights – Freedom of assembly.

Keywords of the alphabetical index:

Freedom of assembly, restriction, legitimate aim, lack / Rally, permit, requirement.

Headnotes:

Freedom of assembly, along with freedom of association and freedom of speech are among the most important individual political rights. As far as possible, state institutions should avoid imposing pointless and potentially embarrassing restrictions on the right to freedom of assembly.

Summary:

I. Twenty members of the Latvian Parliament requested an assessment of the compliance with the Constitution and international legislation of certain provisions of the Law on Meetings, Processions and Pickets. The norms of higher legal force under consideration were Section 103 of the Constitution, Article 11 ECHR and Article 21 of the International Covenant on Civil and Political Rights (ICCPR).

II. The Court stressed that freedom of assembly, along with freedom of association and freedom of speech, are among the most important individual political rights. Freedom of assembly is a vital element of a democratic society, affording members of the public the possibility of influencing the political process, by criticising the state power and protesting against the state's actions. When exercising the rights set out in Section 103 of the Constitution, people can discuss significant problems and express support or censure for State policy. Freedom of assembly means that people can inform society as a whole of their opinions.

The Court observed the influence of the Convention and the Covenant, which are binding on Latvia, and their practical application, upon the interpretation of fundamental rights contained in the Constitution, in a state under the rule of law. The compliance of the provisions of the Law on Meetings, Processions and Pickets with Section 11 ECHR and Section 21 ICCPR should be analysed in conjunction with Section 103 of the Constitution.

The Court pointed out that freedom of assembly may be extremely important, but it is not absolute. Section 116 of the Constitution expressly provides

that there may be restrictions on the right to freedom of assembly in circumstances proscribed by law, in order to protect the rights of others, the democratic structure of the State and public safety, welfare and morals. Such restrictions must be set out within the law and adopted in order to achieve certain legitimate aims. They must be in proportion to these aims. State institutions should, as far as possible, avoid imposing pointless and potentially embarrassing restrictions on freedom of assembly.

The Court held that the above provisions had been passed and promulgated under adequate procedures.

The Court analysed the separate legitimate aims of each impugned norm and their proportionality with this aim. It found some of the impugned norms to be in contravention of the norms of higher legal force.

The Court found that for a person to be able to carry out certain activities, and to exercise fundamental rights set out in the Constitution, the State may require prior notice and the possession of a permit from a competent institution. To assess whether the impugned norms comply with Section 103 of the Constitution, it is necessary to examine the requirements within the Constitution for the exercise of the right to freedom of assembly, as well as those within the Law on Meetings, Processions and Pickets.

The Court noted that the international legal norms binding on Latvia make no mention of a mandatory duty of a State to refrain from requiring permits to exercise the right to freedom of assembly. Section 103 of the Constitution requires a notice procedure, which in fact affords a wider scope for the exercise of this right than the system of permits. Thus, the Constitution guarantees a more extensive protection of the right to freedom of assembly. Thus, the system of permits, set out in the Law on Meetings, Processions and Pickets, does not comply with Section 103 of the Constitution.

The Court highlighted the duty of the State not only to ensure that a meeting, picket or a procession takes place, but also to see to it that freedom of speech and assembly is effective, namely – that the organised activity reaches the target audience. In a democratic society it is especially important not to isolate State and local government institutions from society, so that officials can gauge the attitude of the people and find out more about it, especially if the attitude is critical.

The Court also examined the word “protect” in Section 103 of the Constitution. It requires the State to protect the exercise of the right, rather than simply refraining from interfering in its exercise. It means that the State has a duty to ensure that public buildings, streets and squares are accessible to those who want to organise meetings, processions or pickets as well as to ensure that participants in such activities are protected. The requirement to appoint extra security to keep order when there is a threat to the peaceful process of the activity goes beyond the extent of the duty of collaboration. Such a requirement does not guarantee public safety, but provokes conflict and potential disorder among persons voicing points of view. Accordingly, there is no legitimate aim to this norm, which could justify the restriction in question.

Cross-references:

Previous decisions of the Constitutional Court in the following cases:

- Judgment no. 2000-03-01, 30.08.2000, *Bulletin* 2000/3 [LAT-2000-3-004];
- Judgment no. 2003-08-01, 06.10.2003, *Bulletin* 2003/3 [LAT-2003-3-010];
- Judgment no. 2003-22-01, 26.03.2004;
- Judgment no. 2004-18-0106, 13.05.2004, *Bulletin* 2005/2 [LAT-2005-2-005];
- Judgment no. 2005-19-01, 22.12.2005;
- Judgment no. 2005-24-01, 11.04.2006.

Languages:

Latvian, English (translation by the Court).

Identification: LAT-2006-3-006

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 20.12.2006 / **e)** 2006-12-01 / **f)** On the Compliance of Sections 1.1, 4.1, 6.3, 22 and 50 of the Law on the Office of the Prosecutor with Sections 1, 58, 82, 86 and 90 of the Latvian Constitution / **g)** *Latvijas Vestnesis* (Official Gazette), no. 206(3574), 28.12.2006 / **h)** CODICES (Latvian, English).

Keywords of the systematic thesaurus:

3.4 **General Principles** – Separation of powers.
4.7.4.3 **Institutions** – Judicial bodies – Organisation – Prosecutors / State counsel.

Keywords of the alphabetical index:

Prosecutor, role / Prosecutor, Council of Europe, recommendation / Prosecutor, independence / Prosecutor, part of judicial power.

Headnotes:

The existence of the Office of the Prosecutor – an institution of judicial power – is the most effective means of ensuring the smooth running of the Prosecutor's Office, and the independence of the judiciary. It also complies with the principle of separation of power.

Summary:

I. The case was submitted by the Administrative District Court. This Court reviewed the administrative matter of the abrogation by the Acting Prosecutor General, the reinstatement of Aivars Rutks to the post of Prosecutor, and compensation for material loss.

The Administrative District Court sought clarification of two legal issues:

1. In the context of the status of the Prosecutor's Office within the State constitutional system, does Section 1.1 of the Law on the Office of the Prosecutor comply with Sections 1, 58, 82 and 86 of the Constitution?
2. With regard to the criteria of clarity and certainty of the law and the ability of citizens to know their rights, do Sections 4.1, 6.3, 22 and 50 of the Law on the Office of the Prosecutor comply with Section 90 of the Constitution?

II. The Constitutional Court stressed that the status of Office of Prosecutor and its place within the State constitutional system shall be determined in accordance with the principle of the separation of powers. This principle is a pivotal legal issue for contemporary State powers. In the Constitution, the competence of the State of Latvia is divided among the constitutional institutions of State power – citizens, Parliament, the President, the Cabinet of Ministers, courts, the Constitutional Court and State Control. This is an exhaustive division.

The Court noted that Chapter VI of the Constitution regulates the constitutional basis of the judiciary, but that it is specified in the Law on Judicial Power. The first sentence of Section 86 of the Constitution empowers the legislator to pass laws, which would confer on state institutions the function of taking decisions in court proceedings, as well as that of the adoption of procedural laws, which would determine the procedure of adjudication. Section 82 of the Constitution does not contain an exhaustive list of those institutions which adjudicate justice; neither does it enumerate those institutions with judicial power. The institutions to which citizens can apply for the protection of their rights and legitimate interests may be determined in other legislation besides the Constitution.

Reference was made to Recommendation Rec(2000)19, on the Role of Public Prosecution in the Criminal Justice system, adopted on 6 October 2000 by the Committee of Ministers of the Council of Europe. The Court pointed out that the status of Office of Prosecutor might differ from state to state. The integration of the Office of Prosecutor within a specific area of state power is an issue of usage and tradition. The choice of status of Office of Prosecutor will be dictated by the traditions of the particular state and its judicial system. Any alterations to this state of affairs in a democratic state, under the rule of law, would be made by legislation.

The Court noted that the existence of the Office of the Prosecutor – an institution of judicial power – is the most effective means of ensuring the smooth running of the Prosecutor's Office, and the independence of the judiciary. It also complies with the principle of separation of power. The Court agreed with the opinion that the Office of Prosecutor is an integral part of the judiciary. Control carried out by the executive power and influence on the performance of the Office of the Prosecutor cannot be countenanced. This would be at odds with the notion of democracy, as set out in Section 1 of the Constitution. In a democratic state a prosecutor should act as an independent, inviolable and politically neutral official, within the ambit of the judiciary, which is subordinated only to the law and to rights. Those provisions of the Law on the Office of Prosecutor which regulate the status of the Office of Prosecutor, comply with Sections 1 and 86 of the Constitution.

The Court established that the contested norms also complied with Sections 58, 62, 86 and 90 of the Constitution.

Cross-references:

Previous decisions of the Constitutional Court in the following cases:

- Judgment no. 03-05-(99), 01.10.1999, *Bulletin* 1999/3 [LAT-1999-3-004];
- Judgment no. 2001-10-01, 05.03.2002;
- Judgment no. 2004-06-01, 11.10.2004;
- Judgment no. 2004-10-01, 17.01.2005, *Bulletin* 2005/1 [LAT-2005-1-001];

- Judgment no. 2004-14-01, 06.12.2004, *Bulletin* 2004/3 [LAT-2004-3-009];
- Judgment no. 2004-16-01, 04.01.2005;
- Judgment no. 2004-25-03, 22.04.2005;
- Judgment no. 2006-05-01, 16.10.2006, *Bulletin* 2006/3 [LAT-2006-3-004].

European Court of Human Rights:

- *The Sunday Times v. The United Kingdom*, Judgment of 26.04.1979, Series A, no. 30, p. 31, para. 49, *Special Bulletin ECHR* [ECH-1979-S-001];
- *Kokkinakis v. Greece*, Judgment of 25.05.1993, Series A, no. 260-A, p. 19, para. 40, *Special Bulletin ECHR* [ECH-1993-S-002].

Languages:

Latvian, English (translation by the Court).

Liechtenstein
State Council

Important decisions

Identification: LIE-2006-3-004

a) Liechtenstein / **b)** State Council / **c)** / **d)** 01.09.2006 / **e)** StGH 2005/89 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

2.1.1.4.4 **Sources** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
2.2.1.4 **Sources** – Hierarchy – Hierarchy as between national and non-national sources – European Convention on Human Rights and constitutions.
5.1.1.3 **Fundamental Rights** – General questions – Entitlement to rights – Foreigners.
5.2.2.4 **Fundamental Rights** – Equality – Criteria of distinction – Citizenship or nationality.
5.3.13.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.
5.3.13.27.1 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to counsel – Right to paid legal assistance.

Keywords of the alphabetical index:

Conflict of laws / Legal aid, free / Legal aid, equal access / Foreigner, difference in treatment / Reciprocity, requirement, human rights, violation.

Headnotes:

According to the State Council's established case-law, the European Convention on Human Rights has constitutional standing *(de facto)*. The recent constitutional revision has not altered this position. The reciprocity required by Article 31.3 of the Constitution of Liechtenstein and likewise *(de facto)* Article 6.1 ECHR are norms at constitutional level and thus of equal rank. Should any contradictions arise between these two norms, a reasonable balance must be struck. Conditions may be attached at a national level to the right to legal aid deriving from

Article 6.1 ECHR but these must be of universal application. Discrimination on the basis of nationality is not permissible under Articles 1 and 14 ECHR. Failure to secure rights for nationals of states with which there is no reciprocity is even more wrongful where these are rights guaranteed by the European Convention on Human Rights. The clear wording of Article 31.3 of the Constitution no longer bears any meaningful relationship to the fundamental rights and freedoms guaranteed by the European Convention on Human Rights. In spite of the wording of Article 31.3, the essential fundamental rights embodied in Article 6.1 ECHR apply to everyone within the jurisdiction of Liechtenstein. The same applies to the right to legal aid under Sections 63 and following of the Liechtenstein Code of Civil Procedure, so that the reciprocity required by Section 63.3 is in fact unconstitutional.

Summary:

In proceedings to assess compliance with the Constitution in accordance with Section 18.1.a of the Constitutional Court Act, the Appeal Court requested the repeal of Section 63.3 of the Criminal Procedure Code, which made legal aid for foreigners contingent on reciprocity, on the basis that this was incompatible with Article 6.1 ECHR. Section 63.3 was based on the wording of Article 31.3 of the Constitution, to the effect that the rights of foreigners shall be defined by international treaties and, in the absence of any treaties, according to the principle of reciprocity.

The State Council accordingly repealed Section 63.3 on the basis that it was unconstitutional and in breach of international treaties.

Languages:

German.

Identification: LIE-2006-3-005

a) Liechtenstein / **b)** State Council / **c)** / **d)** 01.09.2006 / **e)** StGH 2005/97 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

1.1.4.2 **Constitutional Justice** – Constitutional jurisdiction – Relations with other institutions – Legislative bodies.
1.3.5 **Constitutional Justice** – Jurisdiction – The subject of review.
1.3.5.13 **Constitutional Justice** – Jurisdiction – The subject of review – Administrative acts.
4.5.4.1 **Institutions** – Legislative bodies – Organisation – Rules of procedure.
4.13 **Institutions** – Independent administrative authorities.
5.3.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial.
5.3.13.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.

Keywords of the alphabetical index:

Parliament, act, administrative, individual, judicial review / Parliament, dismissal procedure / Media, broadcasting, Commission, member, dismissal, appeal / Parliament, procedure, minimum guarantees.

Headnotes:

All of parliament's formal individual acts, including dismissal proceedings, are subject to the right to individual appeal under Section 15.1 of the Constitutional Court Act and there is no restriction as to the power of review. The guarantees ensuring a fair trial under Article 43 of the Constitution and Article 6 ECHR are of particular relevance here.

Exceptions to the above include acts by the Sovereign, acts by the government, and political acts by supreme organs of state. These are exempted from judicial review by the separation of powers and by the State Council's lack of jurisdiction over political decisions.

Parliament can also comply with the minimum procedural guarantees when taking individual administrative decisions, such as dismissal proceedings. Examples of minimum procedural guarantees include proper convocation and the inclusion of the case in the agenda, together with preparation of the administrative decision in accordance with the procedure. If parliament did not conduct lawful dismissal proceedings in accordance with its rules of procedure, it was because essential procedural guarantees prescribed by the Constitution and the law were not observed during the proceedings.

Summary:

At its session on 23 November 2005, parliament decided upon the extraordinary dismissal of the president and a member of the administrative council of the Liechtenstein broadcasting commission. The case had only been placed on the agenda that day, which meant that it had not been prepared in accordance with procedural guarantees. A dismissal of this kind is prescribed by law only in the event of serious breach of an obligation. The State Council allowed the constitutional appeal brought against parliament's decisions on the basis of failure to uphold the guarantee of a fair trial. The decisions were overturned.

In so doing, the State Council settled a matter which had been the subject of dispute: henceforth, under certain conditions, acts by parliament are also subject to a constitutional appeal.

Languages:

German.

Moldova
Constitutional Court

Important decisions

Identification: MDA-2006-3-005

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 30.11.2006 / **e)** 20 / **f)** Review of the constitutionality of certain provisions of Act no. 245-XVI of 20 October 2005 interpreting provisions of certain legislative acts / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

2.3.3 **Sources** – Techniques of review – Intention of the author of the enactment under review.
2.3.9 **Sources** – Techniques of review – Teleological interpretation.
3.12 **General Principles** – Clarity and precision of legal provisions.
4.5.2 **Institutions** – Legislative bodies – Powers.

Keywords of the alphabetical index:

Law, interpretation, uniform / Parliament, law, interpretative.

Headnotes:

Under Article 66.c of the Constitution, one of parliament's main functions is to interpret laws and ensure the uniformity of statutory provisions throughout the country.

Under Section 42 of Act no. 780-XV of 27 December 2001 on legislative acts, the interpretation of legislative acts entails a set of logical steps, explaining the precise and full meaning of statutory provisions. Interpretation is a legal means of ensuring that legal rules can be implemented precisely as was intended. The premise on which interpretation is founded is therefore that it will provide a means of applying a legal rule correctly.

In Judgments no. 61 of 16 November 1999 and no. 16 of 28 March 2002, the Constitutional Court held that interpretative laws did not establish new

legal rules any more than they amended or supplemented the Act they were intended to interpret.

Summary:

I. A member of parliament applied to the Constitutional Court for a review of the constitutionality of certain provisions of Act no. 245-XVI of 20 October 2005 interpreting the provisions of certain legislative acts.

The applicant contested the impugned provisions, arguing that they made the tax and customs rules formerly applied to goods introduced into free zones less advantageous and limited the applicability of preferential rules concerning such goods to the time for which they were present in free zones.

II. The Constitutional Court widened its constitutional review to cover the whole of the Act referred to.

It found as follows:

- Sections I, II and III of Act no. 245-XVI introduced new regulations on the tax and customs system, economic policy measures and their application and the applicability of a special customs regime to goods entering free zones, thus altering the concept behind the rules to be interpreted;
- Sections I.4, II.3 and III.3 of the Act also related to traders operating outside free areas, and that conflicted with the legislator's initial intention, as laws on free trade zones were supposed to be special laws which governed solely the activities of the residents of such zones;
- Act no. 245-XVI contained expressions which were inappropriate for an interpretative law, such as the expression “shall be required”.

The applicant argued that there were similar provisions in the customs legislation of 1992-1993 and Act no. 1451-XII of 30 May 1993 on free business parks. The Court could not allow these arguments as the legislation referred to was no longer in force.

The Court found that Act no. 245-XVI did not constitute an interpretative law, failed to explain the concepts or provisions which it was supposed to interpret, conflicted with the legislator's intentions, established new legal rules and hence constituted a legislative act in itself, thus infringing the provisions of Article 66.c of the Constitution.

In view of these considerations, the Constitutional Court declared Act no. 245-XVI of 20 October 2005, interpreting the provisions of certain legislative acts, unconstitutional.

Languages:

Romanian, Russian.

Identification: MDA-2006-3-006

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 19.12.2006 / **e)** 2 / **f)** Review of the constitutionality of Government Decree no. 434 of 25 April 2006 on the standard programmes for 2006 for the enrolment of students and pupils in higher education establishments (first two years), specialised middle schools and vocational secondary schools / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

1.5.1.3.2 **Constitutional Justice** – Decisions – Deliberation – Procedure – Vote.
5.4.2 **Fundamental Rights** – Economic, social and cultural rights – Right to education.

Keywords of the alphabetical index:

Education, access / Education, higher, right.

Headnotes:

Under Article 35.1 of the Constitution, the right to education is implemented by the compulsory general school system, secondary schools, vocational education and higher education and by other forms of continuing education and training.

Summary:

I. To ensure that the national economy was provided with managers and skilled workers and that the system for the training of specialists matched Moldova's labour market and employment requirements, the government adopted Decree no. 434 of 25 April 2006 on the standard programmes for 2006 for the enrolment of students and pupils in higher education establishments (first two years), special ised middle schools and vocational secondary schools.

The applicants argued that Government Decree no. 434 infringed Articles 35, 72 and 126 of the Constitution as well as the Education Act, the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights.

II. The decree in question was examined in a plenary session of the Court in accordance with the procedures set out in the Code of the Constitutional Court. Following deliberations pursuant to Article 55 of the Code, the proposals made by the reporting judge and the other judges were put to a vote.

When the decision on the decree was adopted, there were equal votes for and against. Consequently, under Section 27.2 of the Constitutional Court Act and Article 66.5 of the Code of the Constitutional Court, the contested decree was regarded as constitutional and the case was adjourned.

Languages:

Romanian, Russian.

Monaco
Supreme Court

Important decisions

Identification: MON-2006-3-002

a) Monaco / **b)** Supreme Court / **c)** / **d)** 04.12.2006 / **e)** TS n° 2006/5 / **f)** / **g)** / **h)** CODICES (French).

Keywords of the systematic thesaurus:

1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.
4.7.1 **Institutions** – Judicial bodies – Jurisdiction.
4.7.9 **Institutions** – Judicial bodies – Administrative courts.
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:

Professional association, disciplinary proceedings, appeal, right / Abuse of power.

Headnotes:

A professional association, although it is not a public establishment, contributes to the smooth operation of the public service by virtue of sovereign powers vested in it by law. Accordingly, any decisions it takes in disciplinary matters may be appealed on points of law before the Supreme Court under Article 90.B.2 of the Constitution. The fact that the law provides for the severest sentences to be pronounced by the Minister of State, under judicial supervision, does not alter the fact that the Council of Architects, when issuing a reprimand, is acting as an Administrative Court of last instance. If a professional association's by-laws rule out the possibility of appeal against a reprimand, the aim or effect is not to rule out the possibility, embodied in Article 90.B.2 of the Constitution, of challenging last instance decisions of administrative courts on points of law.

Summary:

I. The Supreme Court was asked to review an application for alleged abuse of authority in an

administrative matter. It was asked to set aside a decision by the Council of Architects of the Principality of Monaco on 18 January 2006, issuing a reprimand to Mr Fabrice Notari. In earlier disciplinary proceedings Mr Notari had been issued with an initial reprimand by the Council of Architects on 12 June 2003, on the ground that prior to concluding a contract with a client he should have consulted a colleague who had already worked on the same construction project. On 6 January 2005 the Court of First Instance acknowledged, on appeal, that the Council of Architects was a private-law body, but that this "did not put it outside the jurisdiction of the Supreme Court", as the Council of Architects was vested with "regulatory and disciplinary power under the supervision of the public authorities" and therefore enjoyed "sovereign powers". The Court accordingly refused jurisdiction.

The applicant appealed to the Court of Appeal, which reviewed the 6 January 2005 decision of the Court of First Instance on 21 March 2006 and declared itself competent to rule on the appeal against the disciplinary decision of the Council of Architects: "this decision taken in the framework of the Council's disciplinary powers is not an administrative decision but a quasi-judicial decision and, as such, not subject to appeal for abuse of authority".

It thereby confirmed that the right to appeal was a principle to which there could be no exception unless provided for by law. Mr Notari's appeal should thus not have been made to the Court of First Instance, which lacked jurisdiction in such matters, but rather to the Court of Appeal, which was the natural "second-level" court.

II. This case, for which there was no precedent, raised the question of the Supreme Court's jurisdiction, as the Court of Appeal had examined an objection to jurisdiction and its ruling of 21 March 2006 did not constitute *res judicata*. It was for the Supreme Court, in conformity with the Constitution, to confirm or otherwise its own jurisdiction in respect of a decision taken by a professional body in a disciplinary matter – in the last instance – by virtue of sovereign powers vested in it by law. Under Article 90.B of the Constitution:

"The Supreme Court shall have unfettered discretion to rule on:

1. applications for annulment of administrative authorities' decisions on grounds of abuse of authority (...);
2. applications on points of law against decisions of the administrative courts at last instance;
3. applications for interpretation and for review of the validity of administrative authorities' decisions".

The Supreme Court accordingly considered that under the terms of Legal Order no. 341 of 24 March 1942 regulating the status and profession of the architect and instituting the Council of Architects in the Principality, that although the Council was not a public establishment, it contributed to the functioning of the public service responsible for enforcing the rules and regulations governing the architect's profession. It follows that the decisions it takes by virtue of the sovereign powers vested in it may be appealed before the Supreme Court in conformity with Article 90.B of the Constitution.

There was a further difficulty with the reprimand in question, in terms of the nature and severity of the sanctions imposed, the severest sanctions being pronounced by the Minister of State, under judicial supervision. Under the terms of Article 22 of the aforesaid Legal Order no. 341:

"Architects found guilty of breaches of the duties of their profession shall be subject to the following disciplinary measures:

1. A reprimand pronounced by the Court in chambers;
2. A warning issued by the Council of Architects and recorded on the person's file;
3. Temporary suspension for up to one year;
4. Being struck off the list and barred from practising the profession.

Decisions to temporarily suspend or to strike off an architect shall be pronounced by the Minister of State, based on a report of the Council of Architects and after the interested parties have been given an opportunity, within a one-month period, to present written observations in their defence".

The Supreme Court nevertheless considered that when the Council of Architects pronounces disciplinary measures 1 and 2 above it is acting as an Administrative Court of last instance, while the law provides for disciplinary measures 3 and 4 to be pronounced by the Minister of State.

Finally, under Article 1.20 of the Rules of Procedure of the Council of Architects, reprimands are not subject to appeal. However, the Court considered that this provision was not intended to, and did not, rule out the possibility of an appeal on points of law provided for in Article 90.B.2 of the Constitution, and pronounced itself competent to hear the appeal against the decision of 18 January 2006 in which the Council of Architects issued Mr Notari with a reprimand.

On the merits, the reprimand the Council of Architects issued against Mr Notari was based largely on a violation of the standard contract determining the amount of architects' fees, whereas this contract had not been approved by the government, in breach of Article 7.2 of the Order mentioned above. Accordingly, in basing Mr Notari's reprimand on a violation of the standard contract, the Council made a mistake of law. The decision of 18 January 2006 was therefore set aside and the matter referred back to the Council of Architects.

Supplementary information:

The Supreme Court, whose jurisdiction is defined by Article 90 of the Constitution, is at once a Constitutional Court, an Administrative Court and the Court responsible for settling disputes over jurisdiction. Founded in 1911, it is the oldest Constitutional Court in Europe and no doubt the only Supreme Court with such a varied role. This important decision was published in the *Bulletin* to illustrate this originality. In fact it has only an indirect bearing on constitutional law, as in this instance the Court heard an administrative case. Its decision did, however, clarify the scope of the jurisdiction embodied in the Constitution in respect of applications against last-instance Administrative Court decisions.

Languages:

French.

Netherlands
Council of State

Important decisions

Identification: NED-2006-3-001

a) Netherlands / **b)** Council of State / **c)** Chamber 3 - Standard appeals / **d)** 06.04.2005 / **e)** 200406278/1 / **f)** Stichting 'Vaders huis is moeders toevlucht' v. college van burgermeester en wethouders Valkenswaard / **g)** / **h)** *Gemeentestem (Gst)* 2005-7229, nr. 79; *Administratiefrechtelijke Beslissingen (AB)* 2005/226; CODICES (Dutch).

Keywords of the systematic thesaurus:

3.7 **General Principles** – Relations between the State and bodies of a religious or ideological nature.
3.18 **General Principles** – General interest.
5.1.4 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of worship.

Keywords of the alphabetical index:

Urban planning, land use / Land, agricultural, use for worship.

Headnotes:

Planning regulations may have resulted in a breach of the right to freedom of religion; this, however, was justified on the grounds of public safety, the protection of public order and for the protection of the rights and freedoms of others.

Summary:

A Roman Catholic foundation used former office premises as a chapel to commemorate apparitions of the Virgin Mary. It had also erected a cross and a bell tower for the chapel. The planning regulations then in force, and in particular the 'zoning plan', prohibited use of the land for anything other than agricultural purposes. The local authority decided to enforce the zoning plan and its planning regulations, and issued the foundation with an enforcement

notice. The foundation was asked to take the cross and the tower down and to stop using the former office premises as a chapel. The foundation objected to the decision but the local authority dismissed its objections. The District Court upheld the decision. On appeal to the Administrative Jurisdiction Division of the Council of State, the foundation argued that the implementation of the zoning plan (concerning the use of the former office as a chapel) was contrary to Article 9.1 ECHR.

Since the purpose of the planning regulations in question was not to define religion or to dictate the way in which it should be practiced, they did not limit these aspects of the foundation's right to freedom of religion. However, the Administrative Jurisdiction Division held that there might be some limitation of the right to freedom of religion (and the right to practice it) in this case. Nevertheless, the limitations were prescribed by law and in this case limitations on the foundation's freedom to practice religion were necessary in a democratic society in the interests of public safety, for the protection of public order and for the protection of the rights and freedoms of others.

Supplementary information:

The Administrative Jurisdiction Division of the Council of State is the highest administrative law appeal court in many administrative law cases. Dutch courts lack jurisdiction to hear petitions for constitutional review. Article 120 of the Constitution provides that the constitutionality of Acts of Parliament and treaties is not to be reviewed by the courts. Article 94 of the Constitution provides that statutory regulations in force within the Netherlands shall not apply if this would result in conflict with provisions of treaties of universal application or with resolutions by international institutions.

Languages:

Dutch.

Identification: NED-2006-3-002

a) Netherlands / **b)** Council of State / **c)** Chamber 3 - Standard appeals / **d)** 11.10.2006 / **e)** 200601880/1 / **f)** Raad voor de rechtsbijstand / **g)** / **h)** CODICES (Dutch).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Evidence, new / Evidence, admissibility.

Headnotes:

New arguments based on fundamental rights are not admissible on appeal if they have not been brought at an earlier stage of proceedings. This would be incompatible with a careful and efficient use of remedies.

Summary:

The applicant had been fined for breach of the peace. He intended to appeal, but his application for legal aid was turned down. The District Court (administrative law sector) rejected the appeal he then made against the Legal Aid Board's decision. On appeal to the Administrative Jurisdiction Division of the Council of State, the applicant brought in new arguments based on fundamental rights. However, the Administrative Jurisdiction Division held that new arguments based on fundamental rights could not be put forward at this stage of the proceedings, as this would amount to a breach of the principle of a careful and efficient use of remedies.

Languages:

Dutch.

Identification: NED-2006-3-003

a) Netherlands / **b)** Council of State / **c)** Chamber 3 - Standard appeals / **d)** 01.11.2006 / **e)** 200602809/1 / **f)** Giebels/directeur Koninklijk Huisarchief / **g)** / **h)** *Jurisprudentie Bestuursrecht (JB)* 2006/324; CODICES (Dutch).

Keywords of the systematic thesaurus:

3.2 **General Principles** – Republic/Monarchy.
3.18 **General Principles** – General interest.
4.4.1 **Institutions** – Head of State – Powers.
5.2.2.4 **Fundamental Rights** – Equality – Criteria of distinction – Citizenship or nationality.

Keywords of the alphabetical index:

Archive, document, access / Monarch, archive, private, access.

Headnotes:

No public law remedy is available which would enable access to the Royal Archive.

Summary:

A historian launched proceedings in an administrative law court, in order to gain access to the Royal Archives. Various documents had not been transferred to the National Archives, in spite of a parliamentary motion. The Queen grants access to the Royal Archives in her private capacity. No public law remedy is available, even where it can be shown that access is needed to documents of national interest.

Supplementary information:

The Queen of the Netherlands is a constitutional monarch. The Queen and the ministers together make up the Government. Acts of Parliament and Royal Decrees are always signed by the Queen, who thereby gives them the royal assent, and countersigned by a minister who accepts full constitutional responsibility for them.

Languages:

Dutch.

Identification: NED-2006-3-004

a) Netherlands / **b)** Council of State / **c)** Chamber 3 - Standard appeals / **d)** 21.11.2006 / **e)** 200404446/1b; 200404450/1b; 200607567/1; 200607800/1 / **f)** Eman & Sevinger/college van burgemeester en wethouders van Den Haag / **g)** / **h)** CODICES (Dutch).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Overseas territory, electoral right.

Headnotes:

Primary legislation restricting the right to vote of citizens from territories overseas is not in breach of the European Convention on Human Rights. However, it does contravene the principle of equality under EU law.

Summary:

The Kingdom of the Netherlands has three constituent parts; the Netherlands, the Netherlands Antilles and Aruba. In principle, each one is autonomous in its internal affairs. There also exist certain “Affairs of the Kingdom”, as well as co-operation among the countries in certain policy areas. Two citizens of Aruba sought permission from the municipal board of The Hague to participate in the elections for the Dutch Parliament (Second Chamber, Chamber of Representatives). Their application failed, since it was in breach of provisions of primary legislation, known as *“the Kieswet”*, which govern electoral matters.

Upon appeal, the applicants argued that the local authority had simply based its decision on the fact that their place of residence was in Aruba. In their view, this contravened Article 25 of the International Covenant on Civil and Political Rights (ICCPR), Article 14 ECHR and Article 3 Protocol 1 ECHR. They argued that the Dutch Parliament had to be regarded as a co-legislator in Kingdom Affairs, as ‘a Parliament of the Kingdom’.

However, the Administrative Jurisdiction Division of the Council of State held that there was no such institution as ‘a Parliament of the Kingdom’. The local authority’s decision was neither a violation of Article 25 ICCPR, nor of Article 3 Protocol 1 ECHR.

Neither had there been a breach of Article 14 ECHR. Only citizens of Aruba who had lived in the Netherlands for at least ten years were entitled to vote. This limitation had an objective and reasonable justification. The applicants had also sought permission to vote in the elections for the European Parliament. The municipal board of The Hague turned down their request; on the basis that granting permission would amount to a breach of the 'Kieswet'. The applicants contended that since Aruba was subject to EU legislation, they should be considered as EU citizens. They argued that the relevant provisions of the *Kieswet* were in breach of both EU law and Article 3 Protocol 1 ECHR. The municipal board decided that it should not be charged with the task of resolving this issue – this should be left to Parliament.

The Administrative Jurisdiction Division of the Council of State referred the matter to the Court of Justice of the European Communities for a preliminary ruling. The Court of Justice held that it was up to the Member States to determine which citizens had the right to vote. However, the Court held that certain provisions of the applicable primary legislation were not in accordance with the principle of equal treatment, nor did they provide an objective justification (Court of Justice of the European Communities, 12.09.2006, C-300/04, *Eman & Sevinger v. College van burgemeester en wethouders van Den Haag*).

The Administrative Jurisdiction Division of the Council of State overturned the municipal board's decision, and directed the board to make a new decision. It also expressed the view that Parliament should make changes to the legislation, in the light of the preliminary judgment given by the European Court of Justice.

Supplementary information:

The Netherlands Antilles and Aruba are not part of the dominion or internal market of the European Union. These countries belong to the Overseas Countries and Territories, (OCTS), listed in the EU Treaty, to which the special association arrangements set out in Title IV thereof apply.

Languages:

Dutch.

Norway
Supreme Court

Important decisions

Identification: NOR-2006-3-002

a) Norway / **b)** Supreme Court / **c)** Plenary / **d)** 09.11.2006 / **e)** 2006/623 / **f)** / **g)** *Norsk retstidende* (Official Gazette), 2006, 1409 / **h)** CODICES (Norwegian).

Keywords of the systematic thesaurus:

5.3.14 **Fundamental Rights** – Civil and political rights – *Ne bis in idem*.

Keywords of the alphabetical index:

Tax, surtax.

Headnotes:

The imposition of ordinary surtax for failure to submit an income tax return did not constitute a bar against subsequent criminal proceedings for serious tax fraud.

Summary:

I. The question arose as to whether the imposition of ordinary surtax for failing to submit an income tax return constitutes a bar against subsequent criminal proceedings for serious tax fraud.

A taxpayer had failed to file a mandatory tax return. The tax authorities in Oslo duly estimated his tax assessment for the fiscal years 1996 to 2001. At the same time, he was charged 30 % surtax.

In 2004, the Oslo Tax Office carried out a tax audit at the taxpayer's premises. This revealed that no accounts had been kept for any of the years at issue. An estimate of the turnover indicated that the total profit was more than four million Norwegian kroner. In July 2004, the tax authorities notified the taxpayer that his tax had been reassessed. Then, in November 2004, the Tax Assessment Board upheld the 30% surtax and increased the basis upon which the surtax was calculated for each year.

In December 2005, the Public Prosecutor at the National Authority for Investigation and Prosecution of Economic and Environmental Crime brought charges against the taxpayer for breach of the Penal Code Section 286, the Accounting Act Section 8-5, and various other provisions in the accounting legislation. The indictment also included serious tax fraud *inter alia* for failure to submit a tax return for the fiscal years 1996 to 2001 in breach of the Tax Assessment Act Section 12-2 cf. Section 12-2. On 17 January 2006, the district court convicted the taxpayer and sentenced him to 12 months' imprisonment. Eight months of the sentence were suspended. He was also deprived of the right to run a business or to hold any office in a business enterprise for five years.

The taxpayer appealed against sentence directly to the Supreme Court. He alleged that the district court should have dismissed that part of the criminal case that concerned failure to submit a tax return because it amounted to repeated criminal proceedings in violation of the *ne bis in idem* principle in Article 4 Protocol 7 ECHR.

II. A majority of the Supreme Court dismissed the appeal. The majority referred amongst other things to the decision of the European Court of Human Rights in 2004 in the case of *Rosenquist v Sweden* and found that the imposition of ordinary 30 % surtax does not constitute a bar against subsequent criminal prosecution and conviction for intentional or serious tax fraud.

One judge was of the opinion that the appeal should succeed and that the sentence should be reduced. He argued that the Norwegian and Swedish systems of surtax are not comparable, in that ordinary and additional surtax in Norway are tied inextricably to each other and constitute a natural whole, and additional surtax must be deemed to be based on the same facts as a criminal charge for tax fraud.

Languages:

Norwegian, English (translated by the Court).

Identification: NOR-2006-3-003

a) Norway / **b)** Supreme Court / **c)** Plenary / **d)** 27.11.2006 / **e)** 2006/871 / **f)** / **g)** *Norsk retstidende* (Official Gazette), 2006, 1498 / **h)** CODICES (Norwegian).

Keywords of the systematic thesaurus:

5.2.2.4 **Fundamental Rights** – Equality – Criteria of distinction – Citizenship or nationality.
5.3.14 **Fundamental Rights** – Civil and political rights – *Ne bis in idem*.

Keywords of the alphabetical index:

Fishing, right, withdrawal, protected zone / Jurisdiction, territorial.

Headnotes:

The withdrawal of a fishing licence and the confiscation of fishing vessels in a fishery protection zone did not constitute a violation of Article 4 Protocol 7 ECHR *(ne bis in idem)* because there was not a "sufficiently close connection" between the imposition of the two sanctions "in substance and in time".

Summary:

Fines were imposed upon the masters of two Spanish fishing vessels for failure to keep a catch log of cod fished in the fishery protection zone around Svalbard. The vessel was confiscated as a result of the offence. Both shipmasters and the ship-owner were convicted in the District Court, and the Appeal Court upheld this decision.

The shipmasters' and the ship-owner's appeals to the Supreme Court were dismissed. The Supreme Court agreed with the Court of Appeal that Section 5 of the Act relating to the Norwegian Economic Zone contained the necessary authority for the establishment of the fishery protection zone around Svalbard *(Spitsbergen)*. The Court also found that the establishment of the fishery protection zone around Svalbard must be deemed to have authority in customary international law and that it was not in violation of the United Nations Convention on the Law of the Sea. It was not necessary for the Court to decide whether the Svalbard Treaty applied to the fishery protection zone either directly or by analogy. This was because the Court found that, in any event, there had been no discrimination on the grounds of national connection in breach of the Svalbard Treaty

that could justify the appellants' acquittal or the dismissal of the criminal case against them. Neither the prohibition against discrimination in Article 26 of the International Covenant on Civil and Political Rights nor the general principle of equality in Norwegian law could lead to that result.

The ship-owner's licence to fish in the Norwegian economic zone was withdrawn on account of the offence. The Supreme Court found that this did not mean that the continued prosecution of the confiscation case against the ship-owner violated Article 4 Protocol 7 ECHR. The Court referred to the judgments of the European Court of Human Rights in the cases of *R.T. v. Switzerland* (no. 31982/86) and *Nilsson v. Sweden* (no. 73661/01) in support of its view. The Court found that in the present case there was not a "sufficiently close connection" between the imposition of the two sanctions "in substance and in time".

Languages:

Norwegian, English (translated by the Court).

Poland
Constitutional Court

Statistical data
1 September 2006 – 31 December 2006

Number of decisions taken:

Judgments (decisions on the merits): 43

- Rulings:
  - in 19 judgments the Tribunal found some or all of the provisions under dispute to have contravened the Constitution (or other act of higher rank)
  - in 24 judgments the Tribunal found all challenged provisions to conform to the Constitution (or other act of higher rank)

- Proceedings:
  - 15 judgments were issued at the request of private individuals (physical or natural persons) – the constitutional complaint procedure
  - 12 judgments were issued at the request of courts – the question of legal procedure
  - 6 judgments were issued at the request of the Commissioner for Citizens' Rights (i.e. the Ombudsman)
  - 4 judgments were issued at the request of local authorities
  - 2 judgments were issued at the request of professional organisations
  - 2 judgments were issued at the request of trade unions

- Other:
  - 7 judgments were issued by the Tribunal in plenary session
  - 2 judgments were issued with dissenting opinions

Important decisions

Identification: POL-2006-3-011

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 20.03.2006 / **e)** K 17/05 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2006, no. 49, item 358; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2006, no. 3A, item 30 / **h)** Summaries of selected judicial decisions of the Constitutional Tribunal 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.
3.17 **General Principles** – Weighing of interests.
3.18 **General Principles** – General interest.
5.1.4 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
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:

Public office, holder, private life, right, restriction.

Headnotes:

Conflict between constitutional rights should be dealt with as follows. Neither right can be eliminated altogether, so it is necessary to strike a balance and to determine the scope of application of each right. The values deemed directional or principal also require analysis, in the light of the Constitution's general principles.

Citizens are entitled under the Constitution to public information. The exercise of the right to information may have an indirect effect not only on the public activities of persons discharging public functions but also on the borderline area between their public and private lives. It will not always be possible, in practice, to draw a clear distinction between the spheres of public activity and private life in the cases of persons discharging public functions. A variety of factors may be involved here – the nature of public activities, contact with other bodies in the course of these activities, and the need or desire to undertake certain private activities whilst performing public ones.

European courts and parliamentary draftsmen usually strive to secure the broadest possible access to public information, as this constitutes a significant guarantee of transparency in the public life of a democratic state. It is acknowledged that there may be limitations on the privacy of persons discharging public functions, justified by such values as openness and the availability of information on the functioning of public institutions in a democratic state. The need for transparency in public life should not, however, lead to the total rejection and negation of protection of the private lives of persons discharging public functions. These remain under the protection of rights enshrined in Conventions, such as Article 8 ECHR. Nonetheless, those undertaking such functions must accept more interference with their privacy than is the case for other persons.

Under the Constitution, the protection of private life encompasses autonomy as regards information. This is interpreted as an individual's right to decide whether to disclose personal information, as well as the right to review such information when it comes into the possession of other entities. Limitations upon the exercise of the right to privacy are permissible when conditions such as proportionality are met.

Analysis of the constitutional provisions leads to several conclusions as to the scope of the right to information on the activities of public authorities and persons discharging public functions. Firstly, the information whose nature and character may violate the interests and rights of other persons may not go beyond what is indispensable in terms of the need for transparency in public life, as evaluated in line with the standards of a democratic state. Secondly, the information must always be significant in any evaluation of the functioning of institutions and persons discharging public functions. Thirdly, the information may not be of such a nature and scope as to undermine the essence of the protection of the right to privacy, if disclosed.

There is only ever justification for interference in the private lives of persons discharging public functions undertaken in connection with citizens' right of access to public information where the events disclosed from private life are relevant to the public life of the person in question. The impassable limit on such interference is the obligation to respect that person's dignity.

Summary:

I. Under Article 61.1 of the Constitution, citizens can obtain information on the activities of public authorities, and about persons discharging public functions. There are limits to this right, particularly under Article 61.3 of the Constitution (the protection of freedoms and rights of others).

The manner in which citizens may exercise the above right, and the duties of public authorities in this regard, are set out in the Access to Public Information Act 2001 (hereinafter: "the 2001 Act"). Article 5.2 of the Act provides that the right to public information is subject to limitation by virtue of the privacy of a natural person or a trade secret. However, the second sentence of this section is under challenge in the present case by the President of the Supreme Administrative Court. It states that the limitation specified in the first sentence "does not apply to information about persons discharging public functions, being connected with the discharge of such functions, including information on the conditions under which such functions may be conferred and discharged".

The applicant contended that the constitutional right to privacy (under Article 47 of the Constitution) was of a greater value than the right to public information. The President of the Supreme Administrative Court suggested that limitations on the right to privacy for persons discharging public functions may be necessary, but those introduced in the challenged provision cannot be justified by reference to any of the premises enumerated in Article 31.3 of the Constitution (proportionality).

II. The Tribunal ruled that the challenged regulation does not infringe Article 31.3 of the Constitution (proportionality), Article 47 of the Constitution (right to privacy), Article 61.3 of the Constitution (permissible limitations on citizens' access to public information) and Article 61.4 of the Constitution (exclusivity of statutes in relation to the manner of accessing public information).

The challenged provision has to be assessed in the light of a balance between the principal values of the common good (Article 1 of the Constitution) and the dignity of the person (Article 30 of the Constitution). The notion of "person discharging public functions", used in Article 61.1 of the Constitution and in the challenged provision of the 2001 Act, is not the same as the notion of "public person". "Public person" covers those holding prominent positions with influence over public attitudes and opinions, encouraging widespread interest in achievements in the arts, sport and science. "Persons discharging public functions" implies links of a more formal nature to public institutions. It covers people within public institutions with certain decision-making powers which have a direct impact on the legal position of others.

Cross-references:

- Judgment K 24/98 of 21.10.1998, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1998, no. 6, item 97; CODICES [POL-1998-X-003];
- Judgment P 2/98 of 12.01.1999, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1999, no. 1, item 2; *Bulletin* 1999/1 [POL-1999-1-002];
- Judgment SK 11/98 of 16.02.1999, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1999, no. 2, item 22; *Bulletin* 1999/1 [POL-1999-1-003];
- Judgment U 3/01 of 19.02.2002, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2002, no. 1A, item 3; *Bulletin* 2002/2 [POL-2002-2-014];
- Judgment K 11/02 of 19.06.2002, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2002, no. 4A, item 43; *Bulletin* 2003/2 [POL-2003-2-014];
- Judgment K 38/01 of 16.09.2002, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2002, no. 5A, item 59;
- Judgment K 41/02 of 20.11.2002, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2002, no. 6A, item 83; *Bulletin* 2003/1 [POL-2003-1-006]; [POL-2002-H-002];
- Judgment K 7/01 of 05.03.2003, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2003, no. 3A, item 19; *Bulletin* 2003/2 [POL-2003-2-017];
- Judgment K 20/03 of 13.07.2004, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2004, no. 7A, item 63.

Judgments of the European Court of Human Rights:

- Judgment 9815/82 of 08.07.1986 *(Lingens v. Austria)*, Publications of the Court, Series A, no. 103; *Special Bulletin Leading Cases ECHR* [ECH-1986-S-003];
- Judgment 10/1985/96/144 of 26.03.1987 *(Leander v. Sweden)*, Publications of the Court, Series A, no. 116; *Special Bulletin Leading Cases ECHR* [ECH-1987-S-002];
- Judgment 116/1996/735/932 of 19.02.1998 *(Guerra and Others v. Italy)*, *Reports of Judgments and Decisions*, no. 1998-I;
- Judgment 10/97/794/995-996 of 09.06.1998 *(McGinley and Egan v. United Kingdom)*, *Reports of Judgments and Decisions*, no. 1998-III;
- Judgment 28341/95 of 04.05.2000 *(Rotaru v. Romania)*, *Reports of Judgments and Decisions*, no. 2000-V;

- Judgment 58148/00 of 18.05.2004 *(Editions Plon v. France)*, *Reports of Judgments and Decisions*, no. 2004-IV;
- Judgment 59320/00 of 24.06.2004 *(von Hannover v. Germany)*, *Reports of Judgments and Decisions*, no. 2004-VI; *Bulletin* 2004/2 [ECH-2004-2-005].

Judgments of the Court of First Instance:

- Judgment T-92-98 of 07.12.1999 ("Interporc II"), *ECR* 1999, p. II-3521.

Languages:

Polish, English, German (summary).

Identification: POL-2006-3-012

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 11.04.2006 / **e)** SK 57/04 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2006, no. 64, item 457; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2006, no. 4A, item 43 / **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:

3.5 **General Principles** – Social State.
3.16 **General Principles** – Proportionality.
5.1.4 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.33 **Fundamental Rights** – Civil and political rights – Right to family life.
5.3.34 **Fundamental Rights** – Civil and political rights – Right to marriage.
5.3.39 **Fundamental Rights** – Civil and political rights – Right to property.
5.3.39.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.

Keywords of the alphabetical index:

Maintenance, obligation / Divorce, former spouse, maintenance, obligation / Social justice / Solidarity, matrimonial / *Nemo turpitudinem suam allegans audiatur*.

Headnotes:

Marriage, from a constitutional perspective, is a complex legal institution. Entering and remaining in a marriage is the expression of individual freedom. On the other hand, that situation gives rise to specific duties on the part of a spouse, which form the basis of the other spouse's rights, especially as regards financial claims. Such claims stem both from the Constitution and from other statutes.

Entry into marriage constitutes, in essence, a basis for the limitation of property rights vested individually in each spouse. This is true not only of the institution of marital community of property but also – and even principally – of financial duties in relation to the other spouse and other members of the family. The duty of mutual support, including financial support, remains one of the essential elements of marriage.

The constitutional aspect of one spouse's obligations towards the other exerts an influence upon the temporal scope thereof. Marriage is, by definition, a legal relationship of unspecified duration. Notwithstanding the existence of the institutions of divorce and separation, changes in morality and social consciousness, the principal reason for the termination of a marriage remains the death of one of the spouses. Therefore, certain types of protection of the financial claims of one ex-spouse over another may continue to exist in spite of divorce and may even be of a "life-long" nature. Where no divorce occurs, spouses have the right to expect support from each other, including financial support in satisfying justifiable needs. The statutory regulation of the situations of divorced spouses ought therefore to protect expectations of this kind. As property rights, they are also subject to protection under the Constitution.

The general obligation of solidarity with others (see the Preamble to the Constitution) is a principle of universal application. The nature of this duty depends upon the relationship between the relevant persons. Relations between spouses should be based upon solidarity. Consequently, the legislator may impose upon ex-spouses certain mutual obligations that operate to the benefit of the ex-spouse whose situation deteriorates because of a divorce.

The constitutional principle of proportionality sets out the limits which are permissible upon constitutional rights or freedoms. It requires that a challenged provision be examined as to whether it meets the requirements of relevance, necessity and proportionality *sensu stricto*.

Summary:

I. Article 60 of the Family and Guardianship Code 1964 (hereinafter: "the 1964 Code") is one of the provisions governing divorce. It imposes specific maintenance obligations for divorced spouses. If, during divorce proceedings, an ex-spouse is found not to be exclusively to blame for the marital breakdown and they are experiencing financial difficulties, they can ask their former spouse for subsistence of a level reflecting their reasonable needs and their ex-spouse's means (see Article 60.1 of the 1964 Code). A claim by one divorced spouse against the other for maintenance may arise where a court does not attribute blame within the divorce judgment and where the blame is ascribed to both parties or exclusively to one. Where only one ex-spouse is found culpable, a claim for maintenance will not be conditional upon financial difficulties, it is sufficient that the divorce results in a significant deterioration in the blameless spouse's financial circumstances (Article 60.2 of the 1964 Code).

Article 60.3 of the 1964 Code is under scrutiny in the present proceedings. It provides that the obligation to maintenance after a divorce can expire where the person entitled to it remarries or after the expiry of five years following the divorce, if the person obliged to pay maintenance has not been held responsible for the breakdown of the marriage. The five year limit will not apply where the court has found the ex-spouse with the obligation to pay exclusively to blame for the marital breakdown or where both spouses have been found culpable.

In the present constitutional complaint, Article 60.3 was criticized insofar as it allows for an indefinite (virtually life-long) duration of the maintenance obligation. The complainant alleged that it contravenes the principle of social justice (Article 2 of the Constitution), the protection of property rights (Article 64 of the Constitution), and the principle of proportionality (Article 31.3 of the Constitution).

II. The Tribunal found the article to be in conformity with Article 64 of the Constitution, read in conjunction with Article 31.3 of the Constitution and with Article 2 of the Constitution (social justice).

Article 60.3 of the 1964 Code cannot be interpreted to mean that the person found responsible for the breakdown of the marriage will only be released from the obligation to pay maintenance when their ex-spouse remarries. The jurisprudence of the Supreme Court also suggests that actions for maintenance can be dismissed where the claim infringes good custom (Article 5 of the Civil Code). Common courts examining suits filed under Article 60 of the 1964 Code must make sure that the pursuit of maintenance claims does not become harassment of the ex-spouse or a means of exploiting him or her.

The rationale behind Article 60.3 was to protect the rights of others (here, the ex-spouse of somebody obliged to provide the means of subsistence). Also of some significance is the prerequisite that public morality be protected, this being, in essence, an inherent part of the constitutional basis for differentiating between the statuses of the spouse held to be to blame for the disintegration of matrimonial life and the other one to whom blame has not been assigned. The moral and legal principle *nemo turpitudinem suam allegans audiatur*, deriving from Roman law, remains relevant to this day. The assignment of blame for the disintegration of matrimonial life constitutes the basis upon which a divorce is assumed to have occurred, as a result of behaviour on the part of the culpable spouse which may be deemed unlawful or, at least, incompatible with moral principles.

In the present case, the requirement that the limitation be relevant is fulfilled: maintenance paid by the ex-spouse meets material needs that would have been satisfied within the family, had a divorce not occurred. The requirement of necessity has also been met, since the only way to secure a certain standard of living for divorced spouses is through the imposition of a duty of maintenance. It would be hard to envisage such an obligation being imposed either upon the public authorities or relatives of the entitled spouse. An analysis of the overall content of Article 60 of 1964 Code, in the context of Article 5 of the Civil Code 1964, also leads to the conclusion that the legislator respects the requirements of proportionality *sensu stricto*.

The greater degree of social acceptance for the institution of divorce and the increase in rates of marital breakdown do not directly influence assessment of the situation faced by the spouse whose culpable conduct caused matrimonial life to disintegrate. A person's culpable contribution to the breakdown of their own marriage is something that has to be assessed negatively, from the points of view both of the other spouse and of society as a whole. Accordingly, the rigorous treatment of this category of spouse is not necessarily socially unjust.

Languages:

Polish, English, German (summary).

Identification: POL-2006-3-013

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 20.07.2006 / **e)** K 40/05 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2006, no. 136, item 970; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2006, no. 7A, item 82 / **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.
4.5.6 **Institutions** – Legislative bodies – Law-making procedure.
4.5.6.1 **Institutions** – Legislative bodies – Law-making procedure – Right to initiate legislation.
4.5.6.4 **Institutions** – Legislative bodies – Law-making procedure – Right of amendment.
4.5.6.5 **Institutions** – Legislative bodies – Law-making procedure – Relations between houses.

Keywords of the alphabetical index:

Parliament, chamber, right of amendment / Bill, amendment, depth / Bill, amendment, width.

Headnotes:

In a democratic state governed by the rule of law, the principles of legislative procedure established by the Constitution do not fall within the scope of autonomy of the first or second chambers of the parliament. Rather, they constitute a significant guarantee that laws will be made with due diligence, observing institutional requirements for the full consideration of proposals for new legislation, before they become binding law. So-called legislative "shortcuts" are, therefore, impermissible.

A distinction must be drawn between the concept of amendment within legislative procedure and legislative initiatives. The latter is, in principle, of an unlimited character, which is to say that the determination of the subject-matter and the scope of a draft bill fall within the discretion of its sponsors. The Senate may be one of those sponsors.

In examining the admissibility of amendments introduced by deputies of the first chamber to a bill it was reviewing, or amendments introduced by the Senate (or second chamber) to a bill already adopted by the first chamber, the Tribunal recognised a distinction between the "depth" and "width" of an amendment. The former notion describes the extent of modifications to the substantive content of a bill, while the latter makes it possible to determine the subject-related limits to the scope of matters regulated. The more advanced the legislative process, the more limited the freedom to introduce amendments as regards "width".

Where a bill has already been adopted by the first chamber, the Senate can only make limited amendments as to the subject matter. In the light of the constitutional principle of the legality of public administration operation, presumptions concerning the competence of constitutional organs are impermissible.

Summary:

Legislative power in Poland is vested in the first and second chambers of parliament. The chambers do not have identical powers. The first chamber reviews and adopts bills submitted by institutions empowered to introduce legislation (cf. Articles 118-120 of the Constitution). The Senate reviews any legislation the first chamber passes; it may adopt the bill without proposing any amendments, suggest some amendments or reject it in its entirety. If Senate rejects a bill or suggests changes, the first chamber may reject such a resolution by an absolute majority of votes. The Senate's amendments will be deemed adopted, unless the first chamber rejects them. (cf. Article 121 of the Constitution).

Over the past thirteen years, the Constitutional Tribunal has examined the scope of permissible "innovations" which the Senate may introduce into a bill. The present judgment continues the Tribunal's line of authority in that respect.

The Prosecutor General brought to the Tribunal's attention two provisions of the Professional Sports Act 2005 (hereinafter: "the 2005 Act"). He alleged that the Senate exceeded the permissible scope of amendments. Chapter 8 of the 2005 Act contains provisions amending several other statutes in connection with the regulation of professional sport.

These amending provisions include Articles 60.2 and 61.2, introducing modifications to the PIT Act and CIT Act that were not anticipated by the Professional Sports Act 2005 in the version adopted by the first chamber, and were subsequently, referred to the Senate. Both articles were proposed within the framework of Senate amendments adopted by the first chamber. They introduced a specific tax relief for payers of PIT and CIT incurring expenditure on the activity of sports clubs. Such taxpayers may deduct from their gross annual income outlay on the activity of sport clubs that meet the criteria set out in the above provisions, providing this does not exceed 10 % of overall income.

The Tribunal ruled that Article 60.2 and Article 61.2 of the Professional Sports Act 2005 contravened Article 7 of the Constitution (legality of public administration operation), Article 118.1 of the Constitution (catalogue of authorities empowered to introduce legislation) and Article 121.2 of the Constitution (the Senate's competence with regard to a bill already passed by the first chamber).

In the government's draft of the 2005 Act, the sponsor proposed the incorporation among the provisions of the CIT Act of an amendment which would exempt from tax part of the income earned by sport clubs, where this is spent on activities connected with participation in training by, and competition between, children and teenagers. It was explained in the reasoning for the draft that the proposed amendments would not result in any reduction in budgetary receipts. As the bill progressed through the first chamber, the scope of the exemption was broadened, to include payers of PIT. However, the Senate amendments to the 2005 Act introduced a different tax relief to both the PIT and the CIT Act, whereby expenses incurred in the activity of sports clubs could be donated from the gross annual income of all taxpayers. Thus, the Senate included, within the scope of its amendments, issues which were not in any way the subject-matter of the bill adopted by the first chamber. Furthermore, the financial consequences of these amendments fell outside the "financial framework" of the government's draft (cf. Article 118.3 of the Constitution).

Cross-references:

- Judgment K 5/93 of 23.11.1993, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1993, no. II, item 39; *Bulletin* 1993/3 [POL-1993-3-018];
- Judgment K 18/95 of 09.01.1996, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1996, no. 1, item 1; *Bulletin* 1996/1 [POL-1996-1-001];
- Judgment K 25/97 of 22.09.1997, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1997, no. 3-4, item 35; *Bulletin* 1997/3 [POL-1997-3-017];
- Judgment K 25/98 of 23.02.1999, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1999, no. 2, item 23; *Bulletin* 1999/1 [POL-1999-1-004];
- Judgment K 47/01 of 27.02.2002, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2002, no. 1A, item 6;
- Judgment K 11/02 of 19.06.2002, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2002, no. 4A, item 43; *Bulletin* 2003/2 [POL-2003-2-014];
- Judgment K 43/01 of 18.12.2002, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2002, no. 7A, item 96; *Bulletin* 2003/1 [POL-2003-1-001];
- Judgment K 37/03 of 24.03.2004, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2004, no. 3A, item 21.

Languages:

Polish, English, German (summary).

Identification: POL-2006-3-014

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 21.07.2006 / **e)** P 33/05 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2006, no. 141, item 1008; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2006, no. 7A, item 83 / **h)** Summaries of selected judicial decisions of the Constitutional Tribunal of the Republic of Poland (summary in English, http://www.trybunal.gov.pl/eng/summaries/wstep_gb.htm); CODICES (Polish).

Keywords of the systematic thesaurus:

2.2.2 **Sources** – Hierarchy – Hierarchy as between national sources.
3.10 **General Principles** – Certainty of the law.
3.12 **General Principles** – Clarity and precision of legal provisions.
3.14 **General Principles** – *Nullum crimen, nulla poena sine lege*.

4.6.3.2 **Institutions** – Executive bodies – Application of laws – Delegated rule-making powers.
5.3.38.1 **Fundamental Rights** – Civil and political rights – Non-retrospective effect of law – Criminal law.

Keywords of the alphabetical index:

Criminal law, provision, complete / Criminal law, provision, incomplete / Criminal law, referral, blanket legislation.

Headnotes:

The Polish Constitution requires a very clear definition, by statute, of criminal acts, and the penalties they carry. Some elements of the crime may be specified more fully in sub-statutory acts. Where this is the case, the definitions must be even more precise. The statute must be worded so as to enable the addressee of the norm to deduce, solely on the basis of that statute, the essential content of the prohibition (the principle of clarity and precision of the law). Moreover, under the principle of *lex retro non agit*, penalties cannot be imposed for a crime which was not on the statute book at the time the deed was perpetrated.

Clarity and precision of legal provisions requires communication of the elements of a crime in a clear, precise and unambiguous way so that those affected by the law understand the risk of punishment. A distinction has to be drawn between so-called "complete criminal law provisions", which clearly set out the elements of a criminal law statute, and "incomplete criminal law provisions", which refer to other provisions or to "blanket legislation". In the latter example, the elements of the prohibited act are set out in legislation other than that containing the norm that sanctions it. A provision referring to another provision differs from blanket provision in that the former expressly indicates the regulations constituting a given criminal law norm, while the latter refers, in general terms, to regulations which have been, or will be, enacted and promulgated.

It is possible under the Constitution for one provision to make reference to another, so as to define more specifically the elements of a prohibited act. The legislator may also, to a limited degree and within strictly defined limits, use general clauses and blanket norms. This should only be done in exceptional circumstances, where the legislator cannot incorporate the complete regulation within a given criminal law provision. The principle of legal certainty must prevail, as otherwise this might result in the use of discretion by public authorities in applying norms, or for them to take over certain areas of life, and for behaviour to become criminalized when it has not been prohibited *expressis verbis* in the criminal law.

Summary:

I. Article 42.1 of the Constitution requires that a prohibited act subject to punishment be specified by statute" (i.e. Act of parliament).

The Warsaw Regional Court sought a ruling from the Constitutional Tribunal over a question arising from Article 210.1.5 of the Aviation Law 2002. This article creates a petty offence, subject to a fine, for failure to carry out orders and instructions issued by an airport administrator, the aim of which is to guarantee flight safety or maintenance of order at an airport, "as referred to in Article 82.3 of the Aviation Law 2002." Article 82.3 sets out the responsibilities of airport administrators. The orders and instructions which they issue are binding upon all persons present at the relevant time.

The Regional Court observed that the content of the offence was set out within an order, which is not an act of universally binding law (cf. Article 87 of the Constitution). It suggested that this infringed the principle of the exclusivity of statutes in relation to repressive law, as well as requirements regarding the specificity of repressive provisions.

II. The Tribunal ruled that the challenged provision contravened Article 42.1 of the Constitution (exclusivity of statutes in relation to criminal law; requirements for acts prohibited under criminal law to be sufficiently defined).

The disputed part of Aviation Law 2002 can be described as "blanket legislation," as all the ingredients of the prohibited act are specified in sub-statutory regulations. A full understanding of the content of the prohibition cannot be deduced from the provision. That is only apparent from the order issued by the airport administrator. The notion "orders and instructions of an airport administrator" could encompass several prohibitions and orders – from the purely administrative and organisational through to those with a significant impact on somebody's liberty, for example freedom of movement or privacy of persons making use of an airport. The provision in the Aviation Act makes no distinction between different types of orders; neither does it explain the content of the type of orders and instructions referred to. There is not even a general definition of the prerequisites for the use of particular measures. As a result, airport users could be made subject to orders and instructions issued by airport administrators in an

arbitrary manner, rendering verification impossible, even in subsequent court proceedings.

The referral contained in the provision encompasses regulations issued by an airport administrator that are of a purely internal character. That signifies reference to a regulation which odes not constitute universally binding law (cf. Article 87 of the Constitution).

Cross-references:

- Judgment U 7/93 of 01.03.1994, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1994, no. I;
- Judgment P 2/00 of 20.02.2001, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2001, no. 2, item 32;
- Judgment P 10/02 of 08.07.2003, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2003, no. 6A, item 62;
- 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 2/03 of 05.05.2004, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2004, no. 5A, item 39; *Bulletin* 2004/2 [POL-2004-2-015].

Languages:

Polish, English, German (summary).

Identification: POL-2006-3-015

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 25.07.2006 / **e)** P 24/05 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2006, no. 141, item 1012; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2006, no. 7A, item 87 / **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.
3.17 **General Principles** – Weighing of interests.
3.18 **General Principles** – General interest.
4.6.3.2 **Institutions** – Executive bodies – Application of laws – Delegated rule-making powers.
5.1.4 **Fundamental Rights** – General questions – Limits and restrictions.
5.4.6 **Fundamental Rights** – Economic, social and cultural rights – Commercial and industrial freedom.

Keywords of the alphabetical index:

Security, national, energy / Energy, pricing, regulation.

Headnotes:

By its nature, freedom of economic activity under the Constitution may be subject to greater limitations than freedoms and rights of an individual or political character. This is especially true of the requirement that the limitation be imposed by statute (the principle of certainty of law). Under the principle of proportionality, parliament should implement measures serving towards the achievement of a goal that could not be attained by other means.

The energy industry is subject to regulated market restrictions. Access to energy sources is vital both to society and individuals, as well as to the sovereignty and independence of the State and hence to the protection of the freedoms and rights of persons and citizens. The possession of energy sources constitutes a condition of the common good. The field of energy management thus brings together a variety of constitutional principles including the freedom of economic activity, the security of citizens and the principle of sustainable development of the State, and the protection of the environment.

Summary:

I. The Warsaw Court of Appeal considered appeals from a number of energy enterprises about penalties imposed on them for failing to heed the obligation that energy is purchased from specified sources. The statutory basis of that obligation was Article 9.3 of the Energy Law 1997, under which “the Minister of Economy shall, by way of a regulation impose upon energy enterprises engaged in the trade in, or transmission and distribution of, electricity or heating the obligation to purchase electricity from unconventional and renewable energy sources, as well as electricity co-generated with heat, and heat from unconventional and renewable sources; and specify the detailed scope of this obligation, including,

as regards the technology applied in energy generation, the size of the source and the method by which the purchase costs are to be reflected in tariffs."

The Court of Appeal stayed the proceedings and sought a ruling from the Constitutional Tribunal as to the compliance with the Constitution of the above provision, as well as that of the 2000 Regulation of the Ministry of Economy, issued on the basis of it. The Court alleged that the legislator had breached Article 22 (freedom of economic activity).

It also pointed out that the Energy Law 1997 did not satisfy constitutional conditions for authorising the issuing of a government regulation (Article 92.1 of the Constitution), as it did not specify in detail the contents of the obligation to be imposed upon economic entities by way of such a regulation; nor did it offer any guidelines which might be followed in the issuing of a regulation. The Court suggested that this contravened constitutional conditions for the issuing of regulations (Article 92.1 of the Constitution).

II. The Tribunal ruled that the challenged provision, insofar as it obliges the energy enterprises specified therein to purchase energy and heat from unconventional and renewable energy sources, conforms to Article 22 of the Constitution (freedom of economic activity) and Article 92.1 of the Constitution (conditions for the issue of government regulations).

The provision is an example of a public authority exerting influence upon the energy industry with a view to the requirement of economic efficiency being reconciled with the need to achieve the common good. Both the specific nature of the energy market as a regulated one and the common good justify limitations upon the freedom of economic activity in this sector of the economy.

The "guidelines" concerning the provisions of a government's regulation – being the necessary element underpinning statutory authorisation to issue a regulation (within the meaning of Article 92.1 of the Constitution) – are, in the present case, contained within the Energy Law 1997. Moreover, the legislator stated directly in the authorising statutory provision that the regulation would encompass the technology of energy generation, the size of the source and the method by which the costs of purchase thereof are to be reflected in tariffs. Accordingly, the reviewed statutory authorisation fulfils the constitutional requirements.

Cross-references:

- Judgment K 10/97 of 08.04.1998, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1998, no. 3, item 29;
- Judgment P 11/98 of 12.01.2000, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2000, no. 1, item 3; *Bulletin* 2000/1 [POL-2000-1-005]; [POL-2000-H-001];
- Judgment P 2/00 of 20.02.2001, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2001, no. 2, item 32;
- Judgment P 11/00 of 05.03.2001, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2001, no. 2, item 33; *Bulletin* 2001/1 [POL-2001-1-009];
- Judgmemt K 32/99 of 03.04.2001, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2001, no. 3, item 53; *Bulletin* 2001/2 [POL-2001-2-014];
- Judgment U 7/00 of 10.04.2001, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2001, no. 3, item 56;
- Judgment U 6/00 of 26.06.2001, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2001, no. 5, item 122; *Bulletin* 2001/2 [POL-2001-2-019];
- Judgment SK 16/00 of 11.12.2001, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2001, no. 8, item 257;
- Judgment P 7/00 of 06.03.2002, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2002, no. 2A, item 165; *Bulletin* 2002/3 [POL-2002-3-021].

Languages:

Polish, English, German (summary).

Portugal
Constitutional Court

Statistical data
1 September 2006 – 31 December 2006

Total: 228 judgments, of which:

- Prior review: 1 judgment
- Abstract *ex post facto* review: 4 judgments
- Referendum: 1 judgment
- Appeals: 183 judgments
- Complaints: 34 judgments
- Political parties and coalitions: 1 judgment
- Political parties' accounts: 4 judgments
- Unsuitable activities by holders of political office: 3 judgments

Important decisions

Identification: POR-2006-3-002

a) Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 15.11.2006 / **e)** 617/06 / **f)** / **g)** *Diário da República* (Official Gazette), 223 (Series II), 21.11.2006, 7970(2)-7970(29) / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

1.3.4.6 **Constitutional Justice** – Jurisdiction – Types of litigation – Admissibility of referenda and other consultations.
3.17 **General Principles** – Weighing of interests.
5.3.2 **Fundamental Rights** – Civil and political rights – Right to life.

Keywords of the alphabetical index:

Abortion, decriminalisation / Referendum, conditions / Referendum, scope / Comparative law.

Headnotes:

The various issues raised by the question of the proposed referendum on the decriminalisation of abortion should be viewed in the context of a complex cultural setting. The Court cannot ignore history or the prevailing current opinion. Three main topics arise in this context: the relationship between the concept of a democratic state under the rule of law (Article 2 of the Constitution) and the need to discuss values; the question of punishment as a solution to the problem of crime; and the justification of criminalisation on the basis that punishment is necessary.

In the field of comparative law, there is a tendency to favour legal solutions which decriminalise, or provide for diminished responsibility in certain circumstances. As far as we know, none of the group of democratic countries under the rule of law has "turned the clock back" towards criminalisation. This applies both to states which have introduced time limits as a solution and to those which have opted for therapeutic grounds. During the legal and political debate, some people have maintained and developed their stance against the decriminalisation, while others have taken positions which, within the framework of Portuguese legislation, tend to acknowledge the moral difficulties involved in prosecuting women who have illegal abortions.

Those in favour of decriminalisation advocate prevention and public health, highlighting the moral and social difficulties encountered by women who have abortions. There is thus a tendency to place the debate on a level which is not exclusively ideological and to base decisions on reasoning that takes into account the individual's life plans, the practical and social ramifications of motherhood, emotions such as anxiety, that can cause women to reject maternity and, in general, the role of emotions such as compassion in enlightened moral judgment and political decision making. Those who do not want to see decriminalisation spread warn of the dangers of the "culture of death", referring pragmatically, to the criminogenic effects of decriminalisation and the impact it has on the value society as a whole places on life.

Something shared both by advocates of decriminalisation and those who oppose it is that they are tackling the issue of abortion with ideas which are not fixed, they are acknowledging that a problem exists, and are using arguments which are easy to follow by all concerned, and which have repercussions in their lives. As a result, the debate on the decriminalisation of abortion, within a certain time limit and under certain conditions, has been addressed as a separate issue from the pure and abstract manifestation of values such as life or freedom.

The Constitution allows a certain degree of leeway for decisions concerning the criminalisation, justification and decriminalisation of abortion. This is because, from the constitutional perspective, criminal law is not

considered as a categorical imperative imposed on the ordinary lawmaker. On the contrary, it is governed by the comparative analysis of values and interests in a historical context, justified by necessity in the field of criminal policy and by the delivery of justice to resolve criminal problems on a day to day basis. Such a leeway is not impeded by the recognition of rights, which cannot be the subject of a referendum. The referendum would be concerned with the balance between conflicting laws and values, or possible solutions to such a conflict through criminal law, rather than with the rights themselves.

The Court takes the view that, in cases of conflict between constitutionally guaranteed rights and values and instances where it is necessary to draw a line between them, to bring them into conformity, there is nothing to prevent one of the authorities with responsibility for interpreting them, such as Parliament, from submitting them to the citizens' vote under certain circumstances. This conclusion is valid provided that the possible solutions do not lead to the Constitution being modified or violated, but remain at the level of facilitating the development of constitutional values.

The Constitutional Court is also charged with examining the content of the subject of the referendum for conformity with the Constitution. The Court has to verify the compatibility of the 'yes' and 'no' outcomes with constitutional principles and standards. It simply has to examine whether either answer (or even both) to the dilemma behind the question results in a violation of the Constitution. It has to ascertain whether the essence or nature of the replies constitutes a violation of the Constitution which would have repercussions on the legal solutions.

Even if one considers the dignity of intra-uterine life as a legal interest protected by the Constitution, irrespective of when it is deemed to begin, an affirmative answer to the referendum question cannot be declared unconstitutional. A “yes” vote does not presuppose abandoning legal protection of intra-uterine life; moreover, it amounts to a comparison of values and even a harmonisation, a practical conformity, a co-ordination and a combination of the legally protected interests at issue, in order to avoid completely sacrificing some for the benefit of others. The only conclusion to be drawn is that, in this first phase, freedom to pursue a life project is what prevails in terms of the absence of punishment. There is no intention, or indeed possibility, of this leading to the “legal abandonment” of intra-uterine life. At this point, we are involved in the realms of criminal liability, where the principle of the need for punishment prevails; it is no longer a simple argument about the recognition of values, or as to what deserves legal protection.

A “No” vote would prevent legislative changes to the present system, so that abortion would not be a criminal offence during the first ten weeks of pregnancy, subject to the conditions mentioned in the question. This would not be unconstitutional either, as a 'no' to decriminalisation would not affect the current system. It permits a comparison of values which exclude criminal proceedings in the event of serious violation of the rights of the pregnant woman, such as her right to life and health, her personal dignity (moral abortion) or even the moral and material conditions of her maternity (eugenic abortion). Not to acknowledge such exclusions from liability might affect such constitutional principles as fault and the need for punishment. Furthermore, the criminal law system provides, *inter alia*, for excuses which prevent punishment for deeds which are not reprehensible because of a serious existential conflict. Neither would a negative answer rule out a broader solution tending towards exclusion from liability, which might be chosen by Parliament in accordance with constitutional principles.

Summary:

The President of the Republic requested a preventive review of the constitutionality and the legality of the proposal for a referendum approved by the Parliament, on the question: “Are you in favour of the decriminalisation of abortion if it is carried out at the request of the woman, in the first ten weeks of pregnancy, in a legally authorised health care establishment?”

The Constitutional Court had already ruled on this question, in its Decision 288/98 [POR-1998-1-001], but there are reasons which make it necessary to take into account today certain factors that were not considered at the time. For example, there is still a tendency, in the field of comparative law, to confirm legal solutions which decriminalise, or provide for diminished responsibility in certain circumstances. Also, during the legal and political debate, stances against the decriminalisation of abortion been maintained and developed, but other positions have been taken which tend to acknowledge the moral difficulties involved in prosecuting women who have illegal abortions; and the debate on the decriminalisation of abortion within a certain time limit and under certain conditions has been considered as a separate issue from the pure and abstract manifestation of such values as life or freedom.

Current legal conditions require that other factors be taken into account. Three fundamental questions are submitted to the Court:

a. the conformity of the question with the provisions of the Constitution and the law, with particular attention to the clarity and objectivity of the wording and its dilemmatic or binary character;
b. the composition of the electorate;
c. whether either of the possible answers to the dilemma raised by the question could be incompatible with the Constitution or the law.

The Court held that the proposed referendum was in conformity both with the Constitution and with the law. All of the technical and institutional conditions had been met, including those concerning the electorate, in keeping with the main provisions of the Portuguese Constitution and the law governing referendums. In terms of content, the Court considered that whether the answer to the referendum question was "yes" or "no", it would not necessarily result in a legal solution incompatible with the Constitution.

Supplementary information:

The question to be posed in the proposed referendum is identical to the one which was reviewed for constitutionality and legality in Decision 288/98, published in *Bulletin* 1998/1 [POR-1998-1-001]. In 1998 the Portuguese people were consulted by referendum on this question. However, although the majority of those who voted answered "no", the result is not legally binding under Article 115.11 of the Constitution (of those who voted, 50.9% voted "no" and 49.1% "yes", but 68.1% of the registered electorate abstained). The same question was again proposed for a referendum in 2005, but the Constitutional Court, in Decision 578/2005, held that the requirements of Article 115.10 of the Constitution had not been fulfilled. It did not examine the content of the question on this occasion.

Although the question is the same, there were reasons why the Constitutional Court did not simply refer to the merits of Decision 288/98. Firstly, there are several new members of the Court. In addition, account must be taken of the legal, political, social and criminal justice background that evolved between 1998 and 2006. Also, at an international level, both in comparative and European law, important contributions to the debate have been made. In respect of the debate on punishment and criminal policy, new factors have emerged which must be taken into account. In the public sphere, the fact that there has already been a referendum on the same question which has been declared constitutional and legal is particularly important. The public debate about the punishment of women who undergo illegal abortion has changed in certain essential ways, and new ideas and proposals have emerged. Lastly, when the previous decision was taken, the dissenting judges gave reasoned opinions, which is justification for some of the arguments put forward by the majority to be re-examined.

The Court's decision was reached by a majority of seven judges to six, the latter having expressed dissenting opinions.

Languages:

Portuguese.

Identification: POR-2006-3-003

a) Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 21.11.2006 / **e)** 633/06 / **f)** / **g)** *Diário da República* (Official Gazette), 2 (Series II), 03.01.2007, 120-123 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

3.17 **General Principles** – Weighing of interests.
3.20 **General Principles** – Reasonableness.
5.2 **Fundamental Rights** – Equality.
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.
5.3.23 **Fundamental Rights** – Civil and political rights – Rights in respect of the audiovisual media and other means of mass communication.
5.3.39 **Fundamental Rights** – Civil and political rights – Right to property.
5.4.7 **Fundamental Rights** – Economic, social and cultural rights – Consumer protection.
5.4.20 **Fundamental Rights** – Economic, social and cultural rights – Right to culture.

Keywords of the alphabetical index:

Gambling, advertising / Advertising, ban / Advertising, restriction.

Headnotes:

The Portuguese Constitution may not define the concept of advertising, but it does not leave the subject entirely up to the law. From the outset, it bans all forms of concealed, indirect or misleading advertising. In examining any restrictions on advertising, it must be borne in mind that advertising is a complex subject where several fundamental rights protected by the Constitution converge.

In order to consider whether the legislation relating to advertising complies with the Constitution, one has to consider how this relates to freedom of expression and information, freedom of the press and the media, freedom of culture, freedom to choose one's profession, and the right to property and individual freedom in general. In the case in point, constitutional rights in favour of gambling which could be breached by legal restrictions on advertising must be balanced against the constitutional rights or values the law is trying to protect by imposing the restrictions.

The advertising of gambling is not directly prohibited by the Constitution. The general rules and regulations applicable to advertising are a matter for the ordinary law. As far as gambling is concerned, the solution adopted at the discretion of the Parliament was a general ban on advertising.

Summary:

The *Provedor de Justiça* (the Ombudsman) applied for the law exempting betting on horse racing from the ban on advertising to be declared unconstitutional, with general binding force. He argued that the Advertising Code places restrictions on advertising, including the advertising of gambling, apart from "games promoted by the *Santa Casa da Misericórdia de Lisboa*", which is a centre serving social needs, this being an exception the impugned law extends to betting on horse races. As a result, two different sets of rules govern the advertising of gambling; the general, restrictive rule and a subsequent special rule applying to betting on horse racing.

According to the Court, the reasoning behind the general ban on advertising which promotes gambling is that authorities do not wish gambling to be encouraged because of its consequences, but would not go as far as to ban it outright, unless reasons of public interest happen to change the balance of values. In the case of gambling on horse racing, however, it was considered that advertising was a means of encouraging it and, in so doing, of achieving the aims of horse racing. This would include the advantages inherent in horse racing – such as encouraging horse breeding and riding sports. There are economic benefits too, jobs are created, tourists are attracted to the area and exports are increased. These should be considered as the effects, albeit indirect, of betting on horse racing.

In short, the Court did not consider the differentiation to be fundamentally unreasonable or arbitrary, and therefore it did not breach the principle of equality. Accordingly, any comparative axiological evaluation of the interests at issue and of those which would justify the application of the same rules to advertising in favour of the games of chance promoted by the Santa Casa da Misericórdia de Lisboa is pointless. The Court accordingly decided not to declare the law in question unconstitutional.

Languages:

Portuguese.

Identification: POR-2006-3-004

a) Portugal / **b)** Constitutional Court / **c)** Second Chamber / **d)** 28.11.2006 / **e)** 660/06 / **f)** / **g)** *Diário da República* (Official Gazette), 7 (Series II), 10.01.2007, 745-758 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Telephone, tapping, evidence, destruction / Telephone, tapping, necessary guarantees / Evidence, destruction, risk / Telephone, tapping, evidence, proof / Evidence, right of the defence / Evidence, use.

Headnotes:

If items of evidence obtained by telephone tapping (of which only the police and Public Prosecutor's Office

are aware) are destroyed by order of the investigating judge, and the accused might want to use them in his defence, this results in an unacceptable and unnecessary reduction in the guarantees enjoyed by the defence. This reduction is particularly pronounced when one compares the position of the accused with that of the prosecution.

The accused (already limited in the exercise of his fundamental rights because his telephone was tapped) was not informed of the content of the communications and was consequently not even able to determine their importance, as the recordings were destroyed, while the prosecution had access to the full, intact content of the communications and was able (and obliged) to select and indicate the excerpts deemed important. The intervention of the prosecution prior to the judge's appraisal was therefore material.

Summary:

At issue here are the standards set by the Code of Criminal Procedure concerning the destruction of recordings of communications by decision of a judge, based solely on the evaluation of their importance as evidence. The question is: can the judge order the destruction of the recordings without the content of the communications being transmitted in full, immediately or subsequently, to the defendant, so that he can at least determine to the best of his ability the importance for the trial of the conversations which the judge deemed irrelevant. His view is likely to differ from that of the judge.

It is true that the intervention of the judge represents an additional guarantee compared with a system where the prosecution alone decides what passages to select and their relative importance. However, it cannot be considered sufficient as a guarantee for the following reasons. Firstly, the criminal police and the public prosecutor may influence the judge's decision, as it is their duty to point out the parts of the conversation they consider important before the judge reaches a decision, while the accused is not informed of the content of the communications, and is therefore in a position of inferiority or inequality. Secondly, when the accused is preparing his or her defence, he or she needs access to the content of the conversations in order to determine their importance.

Moreover, one cannot rule out the possibility that the assessment made by the investigating judge may not be strictly correct, and that this may be brought to light in subsequent proceedings or by other events. In any event destroying the recordings makes it impossible to know.

The Court pronounced unconstitutional that part of the Code of Criminal Procedure authorising the destruction of evidence obtained by intercepting mail or tapping telephone conversations, to which the criminal police and the prosecution have had access and which the investigating judge has dismissed as irrelevant without the accused having seen or heard the evidence or been able to decide on its importance. The Court considered that this violated the guarantees concerning criminal procedure enshrined in Article 32.1 of the Constitution.

Supplementary information:

The destruction of recordings of intercepted communications has already been declared unconstitutional in Decisions 426/05 and 4/06. In this last decision, based on the vast case-law of the European Court of Human Rights, it had already been established that depriving the defence of the possibility of requesting the transcription of excerpts not selected by the judge and not transmitted intact and in full to the defence for examination, by immediately destroying the recordings the judge considered irrelevant, weakened the guarantees of the defence (published in *Bulletin* 2006/1, [POR-2006-1-001]).

Languages:

Portuguese.

Romania
Constitutional Court

Important decisions

Identification: ROM-2006-3-003

a) Romania / **b)** Constitutional Court / **c)** / **d)** 05.10.2006 / **e)** 647/2006 / **f)** Decision on a plea of unconstitutionality in respect of Section 4.3 of Act no. 554/2004 on administrative proceedings / **g)** *Monitorul Oficial al României* (Official Gazette), 921/14.11.2006 / **h)** CODICES (Romanian, French).

Keywords of the systematic thesaurus:

1.6.5 **Constitutional Justice** – Effects – Temporal effect.
3.12 **General Principles** – Clarity and precision of legal provisions.
5.3.13.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.

Keywords of the alphabetical index:

Appeal, deadline, precision / Decision, judicial, effect / Decision, judicial, notification.

Headnotes:

Procedural rules must be clear and describe precisely the conditions and time-limits that apply to citizens wishing to exercise their procedural rights and their right to appeal against judicial decisions.

Section 4.3 of the Administrative Proceedings Act is contrary to Articles 21 and 24 of the Constitution and to Article 6 ECHR because of its inaccuracy and ambiguity, the shortness of the time given to appeal and the arrangements for summons to appear in court.

Summary:

I. An application was made to the Constitutional Court challenging the constitutionality of Section 4.3 of Act no. 544/2004, which sets the dates from which the time limits for lodging and ruling on appeals against decisions by the administrative court on the lawfulness of a unilateral administrative decision begin running. This section also contains information on the subject of issuing summons to parties through public announcements.

The applicant suggested that this statutory provision infringed Article 21.3 of the Constitution and Article 6 ECHR.

II. The Court noted that these provisions did not mention under what conditions and with respect to which party the time-limit for appealing applied – whether from the delivery or the notification of the judgment. Yet, the principle of free access to the courts set out in Article 21 of the Constitution implied among other things the introduction of legislation containing clear procedural rules describing precisely the conditions under which and time limits within which the public were expected to exercise their procedural rights, including those relating to appeals against judicial decisions. As the parties did not know for certain how much time they had to appeal against the decision of the Administrative Court at first instance, their access to the courts through the exercise of the right to appeal prescribed by the law was uncertain and unreliable.

Consequently, there had been a violation of Articles 21 and 24 of the Constitution and of Article 6 ECHR.

Supplementary information:

Under Article 147.1 of the Constitution, the legal effects of the provisions of laws, ordinances and regulations in force which are found to be unconstitutional cease within 45 days of the publication of the decision of the Constitutional Court if, in the meantime, the parliament or the government, as the case may be, does not bring the unconstitutional provisions into line with the provisions of the Constitution. For this limited length of time the provisions found to be unconstitutional shall be suspended *de jure*.

Languages:

Romanian.

Identification: ROM-2006-3-004

a) Romania / **b)** Constitutional Court / **c)** / **d)** 28.11.2006 / **e)** 866/2006 / **f)** Decision on a plea of unconstitutionality in respect of Section 52.1 of Act no. 303/2004 on the status of judges and public prosecutors / **g)** *Monitorul Oficial al României* (Official Gazette), 5/04.01.2007 / **h)** CODICES (Romanian, French).

Keywords of the systematic thesaurus:

4.7.4.1.2 **Institutions** – Judicial bodies – Organisation – Members – Appointment.
4.7.4.1.6 **Institutions** – Judicial bodies – Organisation – Members – Status.
4.7.4.3.6 **Institutions** – Judicial bodies – Organisation – Prosecutors / State counsel – Status.
4.7.7 **Institutions** – Judicial bodies – Supreme court.
5.2.2 **Fundamental Rights** – Equality – Criteria of distinction.

Keywords of the alphabetical index:

Judge, appointment / Judge, status / Prosecutor, judge, equality / Prosecutor, promotion as judge.

Headnotes:

The conditions for promotion to the office of judge at the High Court of Cassation and Justice, including the requirement to have been a judge for the past two years, constitute discriminatory treatment in favour of judges and an infringement of the constitutional principle of equality before the law.

Summary:

I. An application was made to the Constitutional Court challenging the constitutionality of Section 51.1 of Act no. 303/2004 on the status of judges and public prosecutors. Under this provision, promotion to the office of judge in the High Court of Cassation and Justice is ordered by the High Judicial Council, which selects from persons who have been serving as appeal court judges for the past two years, were classified as “very good” in their last professional appraisal, have never been given a disciplinary sanction, have made a good impression in their professional activities and have been serving as a judge or a public prosecutor for at least twelve years.

II. The Court found these provisions to be unconstitutional for the following reasons: Under Article 131 of the Constitution, the public prosecution service was conceived as a national legal service forming a public authority; public prosecutors have the same constitutional status as judges, as expressly provided for in Article 133.1 of the Constitution; like judges, public prosecutors are appointed to their posts on a recommendation from the High Judicial Council, which acts as the decision-making authority in disciplinary proceedings involving both judges and public prosecutors; the constitutional status of public prosecutors is identical to that of judges as far as incompatibilities are concerned; Act no. 303/2004 on the status of judges and public prosecutors applies identical or similar standards as regards the incompatibilities and prohibitions that apply to the functions of public prosecutor and judge, access to the legal service and to professional training, the appointment of judges and public prosecutors, access for public prosecutors to the office of judge and vice-versa, and the rights, duties and legal liability of judges and prosecutors.

In addition to the existing constitutional and statutory provisions, Section 52.1 of Act no. 303/2004 stipulates that in order to be promoted to the office of judge at the High Court of Cassation and Justice, candidates are required to have served as an appeal court judge for the last two years. The effect of this requirement in the instant case was to allow only judges but not prosecutors to be promoted, on the sole ground that, on the date of the application, the applicant had not been serving as an appeal court judge for the last two years.

Pursuant to the constitutional principle of equal rights before the law, the Court found that judges and prosecutors were in the same legal situation, with the result that the requirement to have served as a judge for the last two years, and hence to be serving as a judge on the date of the application for promotion, constituted discrimination contrary to the Constitution.

Languages:

Romanian.

Slovakia
Constitutional Court

Statistical data
1 September 2006 – 31 December 2006

Number of decisions taken:

- Decisions on the merits by the plenum of the Court: 4
- Decisions on the merits by the Court panels: 159
- Number of other decisions by the plenum: 6
- Number of other decisions by the panels: 231

Slovenia
Constitutional Court

Statistical data
1 September 2006 − 31 December 2006

The Constitutional Court held 24 sessions (13 plenary and 11 in chambers: 4 civil chamber, 4 penal chamber, 3 administrative chamber) during this period. There were 535 unresolved cases in the field of the protection of constitutionality and legality (denoted U- in the Constitutional Court Register) and 2168 unresolved cases in the field of human rights protection (denoted Up- in the Constitutional Court Register) from the previous year at the start of the period (1 September 2006). The Constitutional Court accepted 114 new U- and 905 Up- new cases in the period covered by this report.

In the same period, the Constitutional Court decided:

- 132 cases (U-) in the field of the protection of constitutionality and legality, in which the Plenary Court made:
  - 59 decisions and
  - 32 rulings;

- 187 cases (U-) cases joined to the above-mentioned for joint treatment and adjudication.

Accordingly, total number of U- cases resolved was 319.

The Constitutional Court also resolved 462 (Up-) cases in the field of the protection of human rights and fundamental freedoms (24 decisions issued by the Plenary Court and 438 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-2006-3-003

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 11.10.2006 / **e)** U-I-40/06 / **f)** / **g)** *Uradni list RS* (Official Gazette), 112/06 / **h)** *Pravna praksa*, Ljubljana, Slovenia (abstract); CODICES (Slovenian, English).

Keywords of the systematic thesaurus:

3.9 **General Principles** – Rule of law.
3.16 **General Principles** – Proportionality.
3.18 **General Principles** – General interest.
5.1.4 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.39.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.
5.5.1 **Fundamental Rights** – Collective rights – Right to the environment.

Keywords of the alphabetical index:

Environment, protection / Hunting, right / Land, ownership, limitation / Resource, natural, use, sustainable.

Headnotes:

Under current Slovenian legislation, game is considered to be part of the natural environment, which has to be respected in such a way as to safeguard the physical and mental well-being and the quality of life of the general public. It has been accorded the status of a natural resource in law; its purpose is not that of a commercial asset for the agricultural and forestry spheres. When it decreed that game belongs to the state and is not the property of any person in particular, Parliament acted in conformity with the Constitution, and did not breach the constitutional right to private property.

Land owners must not only allow hunting on their land, but must also permit measures associated with it, such as sustainable game management. In this regard, a balance has to be struck between the rights and obligations of owners of forests and the public right to health and quality of life. Game management is not possible without the use of land and forests. Numerous professional tasks are involved, which can only be carried out by those with expert knowledge of game.

In the view of the Constitutional Court, the obligation of land owners to allow qualified people to use their land in order to facilitate hunting and game management is a necessary and appropriate measure for achieving constitutionally protected aims. The benefits resulting from the exercise of hunting rights in the manner prescribed by legislation outweighs the severity of the interference with the property right of the owners of land and forests.

Summary:

According to the petitioner, Article 163.2 of the Environmental Protection Act infringes the property rights of owners of forests insofar as it determines that game is owned by the state. In her opinion, game which is based on a specific piece of land is connected with that land. When it is killed, it becomes the property of the owner of the land on which it was killed. There are two types of forestry management – one relates to wood and the other to hunting. The petitioner suggested that the regulation according to which free living game is owned by the state interferes with the right determined in Article 33 of the Constitution.

The petitioner questioned the compliance of Article 5.1.3 of the Forests Act with Article 33 of the Constitution, on the basis that limitations on property entitlements result in a reduction in the value of a property and its yield. According to the petitioner, a statutory provision which bestows on the public at large the right to hunt in a forest that they do not own infringes the right to private property and is also at odds with Article 33 of the Constitution.

The Court dealt first with the petitioner's suggestion that the provision in question infringes the right to private property. It was noted that, historically, game has not been regarded as belonging to anybody in particular, and that the hunting and management of game form intrinsic elements of property rights over forests. The Court placed emphasis on the importance of a healthy living environment and biological diversity for society as a whole, and also took into consideration the economic and social function of game, as well as its ecological function (the preservation of biological diversity and the balance of nature). The nature conservation aspect of game has traditionally been more significant than its importance for the individual. Its basic function is no longer to satisfy the economic interests of agriculture and forestry, rather it forms part of the environment and must be protected so as to safeguard the physical and mental well-being and quality of life of society as a whole. It is vital to preserve biological diversity. Game has now acquired the status of a natural resource. The Court also examined the powers Parliament has under the Constitution to balance property rights with natural resources and their economic, social, and environmental functions. In conclusion, it ruled that Parliament, in stating in Article 163.2 of the Environmental Protection Act that game is owned by the state, rather than being "ownerless", had acted in accordance with Articles 5 and 70 of the Constitution. The statutory provision in question was, therefore, in conformity with the right to private property determined in Article 33 of the Constitution.

The petitioner had also suggested that Article 5.1.3 of the Forests Act, under which forest owners must allow hunting in their forests, interfered with the right to private property under Article 33. The Court, however, took the view that the obligations and limitations of forest owners are such that there is already interference with the constitutional right to private property. It arrived at this conclusion by applying the test of proportionality.

Interference with the right to private property is allowed in certain restricted circumstances, under Article 15.3 of the Constitution. Human rights may be limited where they are themselves limited by the rights of others. According to established case law, a human right or fundamental freedom may be limited if the legislature has followed a constitutionally admissible goal and if the limitation is in conformity with the principles of a state governed by the rule of law (Article 2 of the Constitution), i.e. with one of such principles which prohibit excessive interference by the state (the general principle of proportionality).

The Court noted that Articles 5 and 70 of the Constitution oblige Parliament to determine by law the conditions under which natural resources may be exploited, the conditions for the use of land, the conditions and the manner of carrying out economic and other activities with the intention to fulfil its obligation to promote a healthy living environment. In this instance, Parliament had to determine by law conditions for the management of game so as to safeguard a healthy living environment. Parliament therefore had a constitutionally admissible goal when it fettered the right to private property.

Although Parliament had a constitutionally admissible goal, it was necessary to evaluate whether the limitation was in conformity with the general principle of proportionality. In order to assess whether or not the interference is excessive, the Constitutional Court applies the test of proportionality. Three aspects of the interference will be examined:

1. whether it was necessary in order to reach the pursued goal;
2. whether it was appropriate for reaching the goal in the sense that it was actually possible to achieve it by the interference; and
3. whether, when the consequences of the interference are balanced against the affected human right, this is in proportion to the value of the goal or the benefits which will ensue due to the interference (the principle of proportionality in the narrow sense).

The interference must pass all three aspects of the test in order to be constitutionally admissible (Decision no. U-I-18/02, dated 24 October 2003, Official Gazette RS, no. 108/03 and OdlUS XII, 86).

Having established that the first two elements of the proportionality test were met, the Court reasoned that the exercise of broader hunting rights entails numerous professional tasks for which special knowledge of game is needed. Game cannot be managed effectively without input from qualified people with appropriate knowledge about game and the environment. The Constitutional Court ruled that the obligations of owners of land to allow the use of their land to enable qualified people to exercise broader rights associated with hunting and the limitations imposed on owners in the use of their land

and forests for the exercise of such rights were a necessary and appropriate measure for achieving constitutionally protected goals.

Furthermore, in the review of proportionality in the narrow sense the Constitutional Court balanced the need to exercise hunting rights in the broader sense in order to preserve natural resources against the impact of the interference with the right to private property. Under Article 72.2 of the Constitution, the state is obliged to promote a healthy living environment. It must encourage social development in such a way as to enhance, for society as a whole, physical and mental well being, quality of life, and to preserve biological diversity. One of the goals of environmental protection is to ensure the sustainable use of natural resources. According to the principle of sustainable development determined in Article 4 of the Environmental Protection Act, the state is obliged to encourage economic and social development within society which will not only satisfy the needs of the present generation, but also the needs of generations to come. The exercise of hunting rights in the broader sense serves to ensure a healthy living environment by protecting game, which is a natural resource. The protection of game has to be given priority as against the private property rights of land owners.

In the review of proportionality in the narrow sense, the Constitutional Court established that the benefits brought by the exercise of hunting rights in the manner determined by the Game and Hunting Act, by which the protection of natural resources is assured, outweighed the interference with the right of the owners of land and forests.

Supplementary information:

Legislation referred to:

- Articles 2, 33, 67, 70, 72, 73 of the Constitution;
- Article 21 of the Constitutional Court Act.

Languages:

Slovenian, English (translation by the Court).

South Africa
Constitutional Court

Important decisions

Identification: RSA-2006-3-011

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 21.09.2006 / **e)** CCT 58/06 / **f)** South African Broadcasting Corporation Limited v. National Director of Public Prosecutions and Others / **g)** http://www.constitutionalcourt.org.za/Archimages/J-CCT58-06 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

2.2.2.1.1 **Sources** – Hierarchy – Hierarchy as between national sources – Hierarchy emerging from the Constitution – Hierarchy attributed to rights and freedoms.
3.16 **General Principles** – Proportionality.
3.17 **General Principles** – Weighing of interests.
4.7.2 **Institutions** – Judicial bodies – Procedure.
5.1.1 **Fundamental Rights** – General questions – Entitlement to rights.
5.1.4 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.13.1.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – Criminal proceedings.
5.3.21 **Fundamental Rights** – Civil and political rights – Freedom of expression.
5.3.23 **Fundamental Rights** – Civil and political rights – Rights in respect of the audiovisual media and other means of mass communication.
5.3.24 **Fundamental Rights** – Civil and political rights – Right to information.

Keywords of the alphabetical index:

Freedom of expression, holder of rights / Fundamental right, conflict / Fundamental right, restriction, justification / Fundamental right, hierarchy / Information, access / Media, broadcasting / Media, information, dissemination, standard of care / Media, press, role in a democratic society / Media, television broadcaster, state-owned, duty / Media, television, freedom of broadcasting / Open court, principle / Proceedings, publicity.

Headnotes:

The media plays a crucial role in protecting freedom of expression. They are not only beneficiaries of the right to freedom of expression but also bearers of constitutional obligations. The public is the main beneficiary of the freedom of expression as it is the receiver of the information.

When exercising its powers in terms of Section 173 of the Constitution a court must ensure that if any rights in the Bill of Rights are impinged the impairment must be proportional to the purpose that the court seeks to achieve. Appellate courts will be to hesitant to interfere with another court's regulation of its own process.

Although the Constitution does not postulate a hierarchy of rights there are circumstances in which one right will take precedence over another. In light of a court's obligation to ensure that proceedings before it are fair, the right to a fair trial will ordinarily be given greater consideration when exercising its Section 173 discretion.

There is no absolute right to broadcast court proceedings. Each case will have to be evaluated on its own merits and the right to freedom of expression weighed against the need to ensure the proceedings are fair.

Summary:

I. The South African Broadcasting Corporation Limited (SABC) appealed against the decision of the Supreme Court of Appeal (SCA) which denied them the right to broadcast television footage, including visuals and sound, of an appeal against the criminal conviction of Mr Shaik (the Shaik appeal) on several charges relating to corruption.

The SCA held that the SABC's rights collided squarely with the respondents' right to a fair trial. It was not prepared to allow the broadcast unless it was convinced that the broadcast would not interfere with the respondents' fair trial rights. It concluded that it was not convinced that a live broadcast would not interfere with the trial because the trial was a long and complex one and the added pressure of live recording with sound would inhibit counsel's ability to engage with the judges. The SCA's concern in respect of the upcoming trial of Mr Shaik's alleged co-conspirator, Mr Zuma, was that witnesses who had testified in Mr Shaik's trial were also scheduled to testify in the Zuma trial and that live broadcast may deter the witnesses from testifying in the Zuma trial. The SCA therefore held that live broadcastings of the Shaik appeal would also negatively impact on Mr Zuma's right to a fair trial.

II. The majority of the Constitutional Court held that the case raised important constitutional issues concerning the ambit of freedom of the press and the right to receive and impart information under Section 16 of the Constitution and the potential implications of broadcasting on fair trial rights, under Section 35 of the Constitution. It also concerned the power of the Supreme Court of Appeal to regulate its own processes in terms of Section 173 of the Constitution.

The majority emphasised the importance of the right to freedom of expression in a democratic society. It also noted that more important than the SABC's right to broadcast, was the South African public's right to receive information. The Court did not decide if the right to freedom of expression was limited in this case, but assumed in favour of the SABC that it was. The Court also held that in general courts should welcome public exposure which often acts to enhance the fairness of trials through public scrutiny. However, this case concerned whether the Constitutional Court should interfere with the specific decision taken by the SCA in this case.

The Court then considered the extent to which the Constitutional Court could interfere with the Supreme Court of Appeal's regulation of its own process. The Court stated that the power that courts have to regulate their own processes in terms of Section 173 of the Constitution is a key tool that is necessary for courts to ensure their independence and impartiality. The Court held that the approach to the review of Section 173 powers might vary but that in the circumstances of this case the Court should only interfere if the discretion was not exercised judicially, was based on a wrong principle of law or a misdirection on the material facts.

The Court held that when exercising its powers in terms of Section 173 of the Constitution a court must ensure that if any rights in the Bill of Rights are infringed the impairment must be proportional to the purpose that the court seeks to achieve. The Court declined to decide whether this amounts to a Section 36 of the Constitution limitations analysis.

The Court then considered the test applied by the SCA. The Court was satisfied that, while it may not have adopted an identical test, the test adopted was not a 'demonstrable blunder' on the part of the SCA. It had to be kept in mind that the applicants were requesting a live broadcast that had never been done in the history of the SCA.

The majority concluded that though the Constitution does not postulate a hierarchy of rights there are circumstances in which one right will take precedence over another. In light of a court's obligation to ensure that proceedings before it are fair, the right to a fair trial will ordinarily be given greater consideration when exercising the Section 173 of the Constitution discretion.

The Court held that the SCA was correct to find that broadcast might inhibit judges and counsel in the Schaik trial and that it could interfere with the fairness of Zuma's trial as even though witnesses could be subpoenaed, they would be reluctant witnesses. Even though the Court held that it might have come to a different conclusion, it upheld the SCA's decision.

III. Moseneke DCJ, in a dissenting judgment, held that there was no real likelihood that Mr Shaik's rights to a fair trial would be infringed by the live broadcast of the proceedings. He held that experienced judges and counsel would in all probability not be inhibited by the live broadcast of the proceedings and also that it was unlikely that witnesses would be intimidated. He would have upheld the appeal.

Mokgoro J wrote a separate judgment concurring with the judgment of Moseneke DCJ and emphasised that the SABC was merely seeking to extend what is already permitted, by allowing citizens, who have the right to be present in the courtroom, to have a virtual presence in the courtroom.

Sachs J wrote a separate judgment in which he concurred with the majority and found that, as a general rule, appellate courts do not have a general discretion to exclude live coverage and are duty bound to facilitate the widest possible public access to the proceedings. He dismissed the appeal on the basis that the SABC did not raise the matter timeously allowing proper negotiation as to how the proceedings ought to be broadcast.

Cross-references:

- *Canadian Broadcasting Corp. v. New Brunswick (Attorney General*) [1996] 3 *Supreme Court Reports* 480;
- *Courtroom Television Network v. State of New York* 5 NY 3d 222; 833 NE 2d 1197;
- *Laugh It Off Promotions CC v. SAB International (Finance) BV t/a SabMark International (Freedom of Expression Institute as Amicus Curiae)* 2006 (1) SA 144 (CC); 2005 (8) BCLR 743 (CC);
- *McCartan Turkington Breen (A Firm) v. Times Newspapers Ltd* [2000] 4 *All England Reports* 913 (HL);
- *Phillips and Others v. National Director of Public Prosecutions* 2006 (1) SA 505 (CC); 2006 (1) SACR 78 (CC);
- *S v. Basson* 2005 (12) BCLR 1192 (CC);
- *S v. Pennington and Another* 1997 (4) SA 1076 (CC); 1997 (10) BCLR 1413 (CC);
- *SA Broadcasting Corporation Ltd v. Thatcher and Others* [2005] 4 *All South African Law Reports* 353 (C);
- *Trevor B Giddey NO v. JC Barnard and Partners* CCT65/05, 01.09.2006, as yet unreported.

Languages:

English.

Identification: RSA-2006-3-012

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 28.09.2006 / **e)** CCT 71/05 / **f)** Steenkamp v. Provincial Tender Board of the Eastern Cape / **g)** http://www.constitutionalcourt.org.za/uhtbin/hyperion-image/J-CCT71-05 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

4.6.10.1.2 **Institutions** – Executive bodies – Liability – Legal liability – Civil liability.
5.3.25 **Fundamental Rights** – Civil and political rights – Right to administrative transparency.

Keywords of the alphabetical index:

Accountability, principle / Action, damages / Care, duty to exercise / Damage, compensation, limitation / Good administration, principle, fundamental right / Liability, civil / Liability, state / Negligence.

Headnotes:

A state tender board should not be held liable in delict for loss suffered by a successful tenderer as a result of reliance on a tender, and steps to fulfil obligations in terms of that tender, when the tender is subsequently set aside on review by a court due to the tender board's negligence in performing its administrative duties.

Whether or not a legal duty to prevent loss should be recognised calls for a value judgment embracing all the relevant facts and involving what is reasonable and consistent with the common convictions of society.

Summary:

I. On 22 March 1996 the national state Tender Board awarded Balraz Technologies (Pty) Ltd (Balraz) a contract to supply equipment and services to the Eastern Cape. A year later a dissatisfied tenderer approached the High Court for an order to review and set aside the tender awarded to Balraz on the basis that the decision-making process of the Tender Board had been irregular. The High Court held that the decision of the Tender Board had been irregular and administratively unfair and set aside the tender awards. The Tender Board invited fresh tenders could not embrace as it had been placed under final liquidation.

Balraz approached the Bisho High Court with a contractual claim for damages on the basis that the contract it had concluded had been wrongfully breached. In the alternative, Balraz sought delictual damages from the Tender Board on the basis that Balraz had incurred out-of-pocket losses as a result of relying on its success in obtaining the tender award. Balraz argued that the expenses were incurred after Balraz had been awarded the tender in order to place itself in a position to fulfil its obligations and that the expenses were wasted when the tender was set aside as a result of the negligent failure of the Tender Board to properly perform its statutory functions. It was argued that the Tender Board acted wrongfully and breached a duty owed to Balraz.

The High Court dismissed both the contractual and the delictual claim on the basis that when Balraz submitted its tender it was not properly registered as a company and had no capacity to act. Balraz appealed the delictual claim to the Supreme Court of Appeal.

The Supreme Court of Appeal dismissed the appeal on two bases. First, it held that policy considerations precluded a disappointed tenderer like Balraz from recovering delictual damages that were purely economic in nature. Neither statute nor common law imposed a legal duty on the Tender Board to compensate for damages where it had *bona fide* but negligently failed to comply with the requirements of administrative justice. Second, the Court held that it was unnecessary to address the validity of the tender – but for the sake of completeness stated that the tender was a nullity because Balraz had not been properly incorporated. The Supreme Court of Appeal, like the High Court, did not decide whether the Tender Board had acted negligently.

Balraz then appealed to the Constitutional Court. Balraz argued that the Tender Board had a legal duty to ensure that the tender process was administratively just and that its failure to do so was not consonant with the values and rights contained in the Constitution including transparency, accountability and the right to just administrative action. Balraz also contended that it would be in the public interest for the Court to develop the common law to include delictual liability of tender boards that cause loss to successful tenderers due to their failure to ensure administrative justice. The Tender Board opposed the application for leave to appeal and argued that it owed no legal duty of care toward Balraz. In addition, Balraz contended that the tender was valid at its inception and that the right moment to assess the validity of a tender is not when it is submitted but when it is decided upon.

II. Moseneke DCJ, writing for the majority of the Court, granted the application for leave to appeal but dismissed the appeal itself. He noted that ordinarily a breach of administrative justice attracts public not private law remedies. In South Africa's constitutional dispensation, every failure of administrative justice amounts to a breach of a constitutional duty, but this breach of duty is not equivalent to unlawfulness in a delictual liability sense. An administrative act that constitutes a breach of a statutory duty is not for that reason alone wrongful. Moseneke DCJ noted that nothing in the constitutional and legislative scheme explicitly or by implication contemplates that an improper but honest exercise by a tender board of its discretion attracts a delictual right of action in favour of a disappointed tenderer.

Moseneke DCJ also noted that when a tender is nullified by a court on review, both the successful and disappointed tenderers have a renewed opportunity to tender. In addition, a prudent successful tenderer may, after winning the tender, negotiate the right to restitution of out-of-pocket expenses should the tender award be set aside. Moreover, if as a matter of public policy courts have been slow to recompense the financial loss of disappointed tenderers, this should not change simply because of the name the financial loss bears. The Court accordingly held that the Tender Board had acted lawfully. It did not consider whether the tender had in fact been valid at the time.

Sachs J wrote a separate judgment but concurred in Moseneke DCJ's judgment on the basis that compensation could be claimed under the interim Constitution and there was therefore no need to hybridise constitutional and delictual remedies.

Langa CJ and O'Regan J filed a dissenting judgment that was concurred in by Mokgoro J in which they found that in the circumstances the successful tenderer should be able to claim damages from the Tender Board. They emphasised that, unlike an unsuccessful tenderer, a successful tenderer has no alternative remedies and is required to fulfil its contractual obligations. Compensating a tenderer for the money it has spent in fulfilment of those obligations was held to be normatively appropriate in the light of the provisions of the Constitution, specifically the right to just administrative action and the value of accountability.

Supplementary information:

- Section 33 of the Constitution;
- Section 39.2 of the Constitution;
- Section 195 of the Constitution;
- The Promotion of Administrative Justice Act 3 of 2000.

Cross-references:

- *Bato Star Fishing (Pty) Ltd v. Minister of Environmental Affairs and Tourism* 2004 (7) *BCLR* 687 (CC); 2004 (4) *SA* 490 (CC);
- *Minister of Health and Another v. New Clicks South Africa (Pty) Ltd and Others* (Treatment Action Campaign and Another as Amicus Curiae) *2006 (1) BCLR 1 (CC);* 2006 (2) SA 311 (CC);
- *Knop v. Johannesburg City Council* 1995 (2) SA 1 (A);
- *Olitzki Property Holdings v. State Tender Board and Another* 2001 (8) *BCLR* 779 (SCA); 2001 (3) SA 1247 (SCA);
- *Premier Western Cape v. Faircape Property Developers (Pty) Ltd* 2003 (6) SA 13 (SCA);
- *Minister of Safety and Security v. Van Duivenboden* 2002 (6) *SA* 431 (SCA); [2002] 3 *SA* 741 (SCA);
- *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v. Advertising Standards Authority SA* 2006 (1) *SA* 461 (SCA).

Languages:

English.

Identification: RSA-2006-3-013

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 29.09.2006 / **e)** CCT 56/05 / **f)** Simon Prophet v. National Director of Public Prosecutions / **g)** http://www.constitutionalcourt.org.za/uhtbin/hyperion-image/J-CCT56-05 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
3.22 **General Principles** – Prohibition of arbitrariness.
5.3.39.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.

Keywords of the alphabetical index:

Property, private, use in crime, forfeiture / Crime, prevention, means, permissible / Crime, organised, special measure / Drug, fight against / Forfeiture, property, used for crime / Offence, place of commission / House, forfeiture.

Headnotes:

Property may be subjected to a civil forfeiture order if it is found to be an instrumentality of an offence. A link between the property and the offence is required, so that the property is substantively involved in the commission of the offence. It is not necessary for there to have been a criminal conviction for forfeiture to occur.

Once it is established that property is an instrumentality of an offence, it will be forfeited unless a court decides that forfeiture would be disproportionate. This requires a weighing up of the severity of the interference with individual property rights against a number of other factors, including the nature of the offence.

Summary:

I. The property in question was a residential house owned by the applicant, Simon Prophet. In December 2000, the police searched the property on the strength of a warrant on the basis that the property was suspected to be a venue for drug manufacturing and dealing. Several rooms in the house were found to have been used for what appeared to be the manufacture of methamphetamine, a drug prohibited under the Drugs and Drug Trafficking Act 140 of 1992. Chemical substances and equipment use in the manufacture of this drug were found. The applicant and two others were arrested on charges of dealing in and manufacturing prohibited substances. They were subsequently acquitted on the basis that the search

warrant had been defective and all the evidence stemming therefrom had to be excluded.

The respondent applied to the Cape High Court for a civil forfeiture order in terms of the Prevention of Organised Crime Act 121 of 1998 (POCA), on the basis that the property was the instrumentality of an offence. The order was granted, and the applicant appealed unsuccessfully to the Supreme Court of Appeal. The applicant therefore applied to the Constitutional Court for leave to appeal.

II. Writing for the full Court, Nkabinde J considered the two issues of instrumentality and proportionality. With regard to instrumentality, Nkabinde J held that there should be a reasonably direct connection between the property and the crime, and that the property must in some way facilitate or make possible the commission of the offence.

On the facts before the Court, Nkabinde J held that the property had been appointed, arranged, organised, furnished, adapted and equipped for the purposes of manufacturing drugs. The property was therefore not incidental to the offence, but that it was closely concerned in its commission. The property was therefore an instrumentality of the offence.

Turning to the question of proportionality, Nkabinde J held that the enquiry relates to the question whether deprivation of the property would amount to an 'arbitrary deprivation' under Section 25.1 of the Constitution. It was held that in order to determine this it is necessary to weigh the severity of the interference with individual property rights against the extent to which the property was used in the commission of the offence. This test protects against the unrestrained application of the forfeiture provisions, which has the potential to infringe constitutional rights, especially the right not to be arbitrarily deprived of property.

The relevant factors in assessing proportionality include, but are not limited to, whether the property is integral to the commission of the crime; the nature of the crime; whether forfeiture of the property would prevent the further commission of the offence; whether the applicant would be able to rely on the so-called "innocent owner" defence; the nature and use of the property; and the effect of forfeiture on the applicant.

In this case, virtually the whole house had been adapted for the manufacture of drugs, and the property was therefore held to be integral to the commission of the offence. Forfeiture would therefore prevent the further manufacture of drugs and, in the circumstances, would not leave the applicant destitute. Nkabinde J also considered the grave social problems arising out of manufacturing and use of drugs. She held that, on the facts, forfeiture of the property was not disproportionate.

Cross-references:

- *First National Bank of SA Ltd t/a Wesbank v. Commissioner*, *South African Revenue Service and Another; First National Bank t/a Wesbank v. Minister of Finance* 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC); *Bulletin* 2002/2 [RSA-2002-2-006];
- *National Director of Public Prosecutions v. (1) R O Cook Properties (Pty) Ltd*; (2) 37 *Gillespie Street Durban (Pty) Ltd and another*; (3) *Seevnarayan* 2004 (8) BCLR 844 (SCA);
- *National director of Public Prosecutions v. Prophet* 2003 (6) SA 154 (C); 2003 (8) BCLR 906 (C);
- *Prophet v. National Director of Public Prosecutions* 2006 (1) SA 38 (SCA).

Languages:

English.

Identification: RSA-2006-3-014

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 23.11.2006 / **e)** CCT 28/06 / **f)** Mark Gory v. Daniel Gerhardus Kolver NO and Others (Erilda Starke and Others Intervening) / **g)** http://www.constitutionalcourt.org.za/uhtbin/hyperion-image/J-CCT28-06 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

1.6.5.2 **Constitutional Justice** – Effects – Temporal effect – Retrospective effect (*ex tunc*).
3.17 **General Principles** – Weighing of interests.
5.2.2.11 **Fundamental Rights** – Equality – Criteria of distinction – Sexual orientation.
5.3.33.2 **Fundamental Rights** – Civil and political rights – Right to family life – Succession.
5.3.38.2 **Fundamental Rights** – Civil and political rights – Non-retrospective effect of law – Civil law.

Keywords of the alphabetical index:

Constitutional Court, judgment, declaration of unconstitutionality, effects / Couple, same-sex / Deceased estate, administration / Deceased, intestacy / Discrimination, list, prohibited grounds / Homosexual, partnership / Homosexuality, couple, reciprocal duties / Inheritance, right.

Headnotes:

Conferring rights of reciprocal intestate succession on heterosexual spouses but not on permanent same-sex life partners constitutes unfair discrimination on the ground of sexual orientation. It is inconsistent with the rights to equality and dignity in terms of Sections 9 and 10 of the Constitution.

It is the task of the legislature to enact legislation that deals with the whole gamut of different types of marital and non-marital domestic partnerships in a sufficiently detailed and comprehensive manner. The primary responsibility of this Court in the present matter was to cure the existing and historical unconstitutionality of a statute.

The retrospective operation of an order of reading-in will not, of itself, affect the validity of the appointment of an executor. In circumstances where a surviving same-sex life partner can persuade a court to remove an executor under Section 54 of the Administration of Estates Act 66 of 1965, it would be contrary to the interests of justice to allow that executor to continue in his or her office.

Where a litigant does establish that an infringement of an entrenched right has occurred, he or she should as far as possible be given effective relief so that the right in question is properly vindicated.

Summary:

I. The case involved an application for confirmation of an order made by the Pretoria High Court declaring Section 1.1 of the Intestate Succession Act 81 of 1987 (the Act) to be unconstitutional in so far as it does not provide for a permanent same-sex life partner to inherit, when his or her partner dies intestate.

Henry Harrison Brooks (the deceased) and Mark Gory (the applicant) were, at the time of Brooks' death, partners in a permanent, same-sex life partnership. When Brooks died intestate, his parents nominated the first respondent (Daniel Kolver) to be appointed by the Master as the executor of their son's estate, entitling them to Brooks' assets as his intestate heir. This resulted in a dispute with the applicant as to who the lawful intestate heir was.

The High Court found that the deceased and the applicant had indeed been involved in a permanent same-sex life partnership and had assumed reciprocal duties of support. It found the exclusion of same-sex life partners from the provisions of Section 1.1 of the Act to be unconstitutional and ordered the reading of the words "or partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support" after the word "spouse", wherever it appears in the section. The High Court's order came before the Constitutional Court to determine whether it should be confirmed.

An application to intervene in the matter was initiated by Elrida Starke and her three sisters whose late brother was allegedly a partner in another same-sex life partnership. There was a dispute between the four sisters and their late brother's alleged same-sex life partner as to the lawful heir of the intestate estate. They argued that, should the High Court order be confirmed, they be deprived of their vested rights as intestate heirs. They contended that "reading-in" was not the appropriate remedy, and any order made by this Court should apply only to the estates of people who die after the order is made. Their late brother's alleged same-sex life partner, Bobby Lee Bell, also applied to intervene should the sisters' application be granted. He submitted that the High Court order should be confirmed as is.

II. Writing for a unanimous court, Van Heerden AJ granted the applications to intervene by the Starke sisters and Bobby Lee Bell, on the basis that the intervening parties had a direct and substantial interest in the confirmation application, and it was in the interests of justice to allow the intervention.

Van Heerden AJ found Section 1.1 of the Act to be unconstitutional and invalid as it conferred rights of intestate succession on heterosexual spouses but not on permanent same-sex life partners. She held this constituted unfair discrimination on the listed ground of sexual orientation, and to be inconsistent with Gory's rights to equality and dignity in terms of Sections 9 and 10 of the Constitution.

In regard to an appropriate remedy, this Court held it had a primary responsibility in the present matter to cure the unconstitutionality of Section 1.1 of the Act, and the fulfilment of this responsibility clearly required the reading-in after the word "spouse" wherever it appears in Section 1.1, the words "or partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support" as ordered by the High Court.

The Court held that the retrospectivity of the reading-in order would not affect the validity of the appointment of an executor. Any residual concerns about potential dislocation that may be caused by the retrospective effect of the order can be accommodated by making provision for variation of the order on application by any interested party who can show that serious administrative or practical difficulties necessitate any variation. It was held to be necessary to balance the potentially disruptive effects of an order of retrospective invalidity of Section 1.1 of the Act and the effect of such an order on the vested rights of third parties, on the one hand, with the need to give effective relief to Gory and similarly situated persons, on the other.

The Court also dealt with the ancillary orders made by the High Court on the basis that they were issues connected with a decision on a constitutional matter.

Supplementary information:

The master is the Master of the High Court who is by virtue of his office in charge of all deceased estates where an executor has not been specifically appointed in a will or testamentary document. Where a lay person is appointed as a executor, the Master usually oversees the administration of the deceased estate together with the lay executor.

Cross-references:

- *Gory v. Kolver NO and Others* 2006 (7) BCLR 775 (T);
- *Minister of Home Affairs and Another v. Fourie and Another (Doctors for Life International and Others, Amici Curiae);*
- *Lesbian and Gay Equality Project and Others v. Minister of Home Affairs and Others* 2006 (1) SA 524 (CC); 2006 (3) BCLR 355 (CC);
- *National Coalition for Gay and Lesbian Equality and Others v. Minister of Home Affairs and Others* 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC);
- *Satchwell v. President of the Republic of South Africa and Another* 2002 (6) SA 1 (CC); 2002 (9) BCLR 986 (CC); *Bulletin* 2002/2 [RSA-2002-2-014];
- *Du Toit and Another v. Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 (2) SA 198 (CC); 2002 (10) BCLR 1006 (CC); *Bulletin* 2002/3 [RSA-2002-3-017];
- *Bhe and Others v. Magistrate, Khayelitsha, and Others (Commission for Gender Equality as Amicus Curiae)*, *Bulletin* 2004/3 [RSA-2004-3-011].

Languages:

English.

Identification: RSA-2006-3-015

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 30.11.2006 / **e)** CCT 45/04 / **f)** Sibiya and Others v. Director of Public Prosecutions (Witwatersrand Local Division) and others / **g)** http://www.constitutionalcourt.org.za/uhtbin/hyperion-image/J-CCT45-04 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

1.6.6 **Constitutional Justice** – Effects – Execution.
4.6.6 **Institutions** – Executive bodies – Relations with judicial bodies.
5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
5.3.2 **Fundamental Rights** – Civil and political rights – Right to life.
5.3.3 **Fundamental Rights** – Civil and political rights – Prohibition of torture and inhuman and degrading treatment.

Keywords of the alphabetical index:

Court, supervisory powers / Death penalty, abolition / Mandamus, remedy / Sentence, alternative form / Sentence, commuting / Sentence, revision.

Headnotes:

The abolition of the death penalty could only be practically realised when all those on death row had had their sentences properly replaced.

Supervisory orders require detailed information to be placed before the Court which must be carefully analysed as well as flexibility in conducting the process. Supervisory orders can only succeed with full co-operation from the parties to the case.

Summary:

The Constitutional Court declared the death penalty unconstitutional in 1995 in *S v. Makwanyane*. In that case the Constitutional Court also ordered that all death sentences already imposed but not yet carried out had to be replaced with alternative punishments. Two years after the decision in *S v. Makwanyane, Bulletin* 2005/3 [RSA-2005-3-002] Parliament passed the Criminal Law Amendment Act 105 of 1997 which prescribed the procedure for the replacement of death sentences with appropriate alternative sentences. Eight years later Mr Willy Sibiya, an inmate whose sentence had not yet been altered, challenged part of the Act in the High Court on the basis that it infringed his right to a fair trial. The High Court agreed with him and declared that part of the Act unconstitutional. The Constitutional Court however refused to confirm the order of invalidity and found that the procedure prescribed in the Act was consistent with the Constitution.

While considering the order of invalidity by the High Court the Constitutional Court discovered that there were still 62 people on death row whose sentences had still not been substituted by lawful sentences. The Court then concluded that it was appropriate to grant a mandamus compelling the government to replace the sentences and a supervisory order requiring the government to report on its progress so that the Court could monitor the process of substitution.

The Minister of Justice and Constitutional Development and the President of the Republic filed the first report on 15 September 2005. That report indicated that there were still 40 people whose sentences were not yet replaced by alternative punishments, that 24 cases had already been considered by a court but waited finalisation by the Office of the President and that the remaining 16 cases had not yet been considered by a court. After considering the first report this Court ordered that another report be filed by 7 November 2005 setting out the progress made in relation to the outstanding sentences.

A second report was filed covering the period up to and including 31 October 2005 which found that only 28 sentences had still to be converted. The Court ordered that the supervision should continue. A third report was filed on 15 February 2006. According to the report there were only nine people whose sentences had not yet been substituted. A judicial recommendation had been made in respect of eight people while the ninth person had not yet been considered by a court. In those circumstances, the Court decided that supervision had to continue.

The final report was filed on 15 May 2006 and it showed that sentences of all the people who had been subjected to capital punishment had been substituted except for one person, Mr Zacharia Machaisa. The Court ordered the government to replace Mr Machaisa's sentence and report back to it.

On 28 July 2006 the Minister and the President reported that the sentence of Mr Machaisa had been substituted. The Constitutional Court in a unanimous judgment of Yacoob J found that the order made in *S v. Makwanyane* had at last been fulfilled and that the unconstitutionality of the death penalty can now be said to have been realised in practice. It also noted that successful supervision requires that detailed information be placed at the disposal of a court and that supervision entails a careful analysis and evaluation of the details provided. It also commented that supervision could not succeed without the full co-operation of others in the process and that courts should exercise flexibility in the supervisory process.

Cross-references:

- *S v. Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC), *Bulletin* 1995/3 [RSA-1995-3-002];
- *Sibiya and Others v. Director of Public Prosecutions and Others* [2005] *All South African Law Reports* 105 (W), *Bulletin* 2005/1 [RSA-2005-1-004];
- *Sibiya v. Director of Public Prosecutions, Johannesburg* 2005 (5) SA 315 (CC); 2005 (8) BCLR 812 (CC);
- *Sibiya and Others v. Director of Public Prosecutions, Johannesburg High Court and Others* 2006 (2) BCLR 293 (CC), *Bulletin* 2005/3 [2005-3-010].

Languages:

English.

Identification: RSA-2006-3-016

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 30.11.2006 / **e)** CCT 23/06 / **f)** Minister of Safety and Security v. Luiters / **g)** http://www.constitutionalcourt.org.za/uhtbin/hyperion-image/J-CCT23-06 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

2.1.1.1.1 **Sources** – Categories – Written rules – National rules – Constitution.
4.6.10.1.2 **Institutions** – Executive bodies – Liability – Legal liability – Civil liability.
4.11.2 **Institutions** – Armed forces, police forces and secret services – Police forces.
5.3.12 **Fundamental Rights** – Civil and political rights – Security of the person.

Keywords of the alphabetical index:

Accountability, principle / Common law, constitutional application / Common law, development / Constitution, application to common law / Constitution, application to pre-constitutional period / Constitution, entry into force / Constitution, effect, retrospective / Constitution, provision, transitional / Liability, civil / Liability, state, principle / Police, defective exercise of duty / Police, firearm, use / Police, officer, deviation from duty / Police, officer, liability / Employer, vicarious liability.

Headnotes:

In order to avoid unnecessary costs and delays, it is in the interests of justice to apply the 1996 Constitution to matters where the Constitutional Court is required to develop the common law, even if the facts arose during the operation of the 1993 Constitution.

The alteration or extension of a common law test in light of the Bill of Rights constitutes a constitutional matter within the jurisdiction of the Constitutional Court, but the simple re-examination of factual issues does not.

The test to determine vicarious liability of an off-duty policeman who places himself on duty is the same as that for policemen ordinarily on-duty.

Summary:

I. The case concerns the liability of the State for the actions of off-duty policemen who put themselves on duty and then cause harm. In October 1995 the respondent, Mr Allister Luiters, was shot by Constable Lionel Siljeur, an off-duty policeman, as a result of which Mr Luiters is now a tetraplegic. Constable Siljeur opened fire on a group of people, allegedly because he thought they were responsible for attempting to rob him. He was later convicted in the Parow Regional Court on eight counts of attempted murder and was sentenced to an effective 11 years' imprisonment.

Mr Luiters sued the applicant, the Minister of Safety and Security, in the Cape High Court for damages arising from his injuries. The basis of the claim was that the Minister was vicariously liable for the unlawful conduct of Constable Siljeur. The High Court held that Constable Siljeur had subjectively intended to act as a policeman in apprehending suspected robbers and that the Minister was therefore vicariously liable. The Minister appealed to the Supreme Court of Appeal. That Court relied on the test for vicarious liability set by the Constitutional Court in *K v. Minister of Safety and Security*. The test requires either that the employee subjectively intended to act in the course of her employment or that there is an objective link between the employee's conduct and the interests of the employer. The Supreme Court of Appeal confirmed the findings of the High Court and dismissed the appeal.

In a further appeal to the Constitutional Court, the Minister argued that he should only be vicariously liable for the actions of off-duty police officers if they subjectively intended to act as police officers and, in addition, if their conduct was objectively sufficiently closely related to the interests of the Minister. In the alternative, the Minister argued that the Court should extend the current test to off-duty police officers and reconsider the Supreme Court of Appeal's factual conclusions which gave rise to the finding that the Minister was vicariously liable.

II. In a unanimous judgment delivered by Chief Justice Langa, the Constitutional Court dismissed the application for leave to appeal. As the incident occurred while the 1993 Constitution was still in operation, the Court had to determine which Constitution was applicable. The question was particularly important as under the 1993 Constitution the Constitutional Court had much more limited powers to develop the common law than under the 1996 Constitution. Item 17 of Schedule 6 of the 1996 Constitution provides that the 1993 Constitution should apply unless it is in the interests of justice to apply the 1996 Constitution. The Court held that applying the 1993 Constitution would, potentially, require the matter to be referred back to the Supreme Court of Appeal causing further delays and additional costs. In addition, the relevant provisions of the two constitutions were found to be materially

identical. The Court therefore held that it was in the interests of justice to decide the matter under the 1996 Constitution.

Section 167.3 of the Constitution limits the Constitutional Court's jurisdiction to constitutional matters. The Court held that it could not reconsider the determination of the factual issues by the High Court or the Supreme Court of Appeal as this did not by itself raise a constitutional matter. However, the submissions relating to the alteration or extension of the test for vicarious liability did raise constitutional issues as they required the Court to consider the impact of human rights, particularly the right to freedom and security of the person enshrined in Section 12 of the Constitution and the right to dignity in Section 10 of the Constitution, on the common law.

The Court further held that it was, however, not in the interests of justice to grant leave to appeal as there were no prospects of success. The Minister did not provide any reasons why off-duty police officers who have placed themselves on duty should be subject to a different level of scrutiny than police officers ordinarily on-duty. The different level of control exercised over the two categories was already a relevant consideration and should not be elevated to a decisive factor. In addition, adopting the Minister's proposal would undermine the constitutional principle of accountability as it would lessen the responsibility on the Minister to properly train police officers and screen potential applicants to avoid abuses of police power. There was also no need to "extend" the test as the Constitutional Court had already made it clear in *K v. Minister of Safety and Security* that the test applies to all police officers, whether on or off duty.

Cross-references:

- *K v. Minister of Safety and Security* 2005 (6) SA 419 (CC), 2005 (9) BCLR 835 (CC), *Bulletin* 2005/1 [RSA-2005-1-006];
- *Minister of Police v. Rabie* 1986 (1) SA 117 (A);
- *S v. Boesak* 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC);
- *Du Plessis and Others v. De Klerk and Another* 1996 (3) SA 850 (CC); 1996 (5) BCLR 658 (CC), *Bulletin* 1996/1 [RSA-1996-1-008];
- *Fedsure Life Assurance Ltd and Others v. Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA374 (CC); 1998 (12) BCLR 1458 (CC), *Bulletin* 1999/1 [RSA-1999-1-001].

Languages:

English.

Identification: RSA-2006-3-017

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 12.12.2006 / **e)** CCT 39/06 / **f)** Union of Refugee Women and Others v. The Private Security Industry Regulatory Authority and Others / **g)** http://www.constitutional court.org.za/uhtbin/hyperion-image/J-CCT39-06A / **h)** CODICES (English).

Keywords of the systematic thesaurus:

2.1.1.4.5 **Sources** – Categories – Written rules – International instruments – Geneva Convention on the Status of Refugees of 1951.
2.2.1.2 **Sources** – Hierarchy – Hierarchy as between national and non-national sources – Treaties and legislative acts.
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.
5.4.3 **Fundamental Rights** – Economic, social and cultural rights – Right to work.
5.4.4 **Fundamental Rights** – Economic, social and cultural rights – Freedom to choose one's profession.

Keywords of the alphabetical index:

Citizenship, profession / Refugee, right to work / Security service, access.

Headnotes:

Denying recognised refugees the right to work as security guards in the private security industry does not amount to unfair discrimination.

Summary:

I. The Private Security Industry Regulation Act 56 of 2001 (the Security Act) requires security service providers to register with the Private Security Industry Regulatory Authority (the Authority). Section 23.1.a of

the Security Act lists citizenship or permanent residence as a requirement for registration. Despite the provisions of Section 23.1.a, Section 23.6 confers upon the Authority the discretion to register any applicant as a security service provider, on good cause shown and on grounds which are not in conflict with the purpose of the Security Act and the objects of the Authority. The applicants, all of whom were refugees recognised by the South African government, challenged Section 23.1.a on the basis that it constitutes a violation of the right to equality, and discriminates against them on the basis that they are not citizens or permanent residents. Alternatively, they challenged the validity of the decisions of the Authority. All of the respondents opposed the application.

The applicants in this case are the Union of Refugee Women, a voluntary association, and twelve refugees whose registrations as security service providers were withdrawn or whose applications for registration were refused by the Authority. Several of those denied registration appealed unsuccessfully to the Private Security Industry Appeals Committee. The respondents are the authorities responsible for the regulation of the private security industry, as well as the Minister of Safety and Security.

II. Writing for the majority, Kondile AJ acknowledged that refugees are a vulnerable group in our society and stressed that foreign nationals, including refugees, are not inherently less trustworthy than South Africans, but the reality is that citizens and permanent residents will be able to prove their trustworthiness more easily in terms of the Security Act.

Section 27.f of the Refugees Act grants refugees the right to seek employment. Section 23.1.a of the Security Act limits the refugees' right to choose employment only to the extent that they may not work in the private security industry. They may also enter this single excluded industry if they successfully invoke the provisions of Section 23.6 of the Security Act or if they acquire permanent resident status. Kondile AJ held that while refugees are fully entitled to work in South Africa, Section 22 of the Constitution limits the right to choose a vocation to citizens only. The right to equality was held not to be violated by Section 23.1.a. In essence, the regulatory scheme was found to be narrowly tailored to the purpose of screening entrants to the private security industry rather than constituting a blanket ban on the registration of refugees as private security service providers.

Kondile AJ did however express concern at the lack of assistance provided to refugees by the Authority. In particular, he expressed the view that the Authority should, at the very least, provide refugee applicants with information on the possibility of exemption in terms of Section 23.6 of the Security Act, as well as on how to apply for it. He concluded that an application for exemption to the Authority is an internal remedy still available to the applicants. It is only fair now that the applicants are aware of what is expected as regards an application for exemption, and the Authority has the guidance of the judgment at its disposal when considering exemption applications, that they are given an opportunity to so apply.

Sachs J, in a separate concurring judgment, held that the provision does not discriminate against refugees. He also agreed that the matter should be sent back for consideration by the relevant officials on the basis of properly prepared papers and in the light of the principles enunciated by this Court. He highlighted a number of considerations that strongly favour the notion that being an accredited refugee in itself goes a long way to establishing good cause for exemption. Both international law and the Refugees Act provide special status to refugees in South Africa which has to be taken into account when considering exemption.

Mokgoro J and O'Regan J wrote a joint dissenting judgment with which Langa CJ and Van der Westhuizen J concurred. They held that Section 23.1.a of the Private Security Industry Regulation Act does discriminate unfairly on the basis of refugee status. They are not persuaded that the purpose identified by the Minister – to ensure that security service employees are trustworthy – is really served by the section. In this regard, they note that even if a refugee can establish that he or she has not committed a crime for the previous ten years, Section 23.1.a still bars the refugee from being registered as a security service provider. They note the vulnerable status of refugees as a group in South Africa and the need to ensure that legislation does not promote xenophobia. They also point to South Africa's international law obligations in terms of the 1951 UN Geneva Convention relating to the status of refugees which requires signatory states to accord recognised refugees the most favourable treatment accorded to foreign nationals in the same circumstances in respect of wage-earning employment. Refugees were identified as being in a situation most similar to permanent residents. The order they would propose would provide that refugees who can meet the other requirements of the Act should not be barred from registration as security service providers. Those refugees who cannot meet those requirements should seek to establish that "good cause" exists for them to be registered as contemplated by Section 23.6.

Cross-references:

- *Harksen v. Lane NO and Others* 1998 (1) SA 300 (CC) para 54; 1997 (11) BCLR 1489 (CC), *Bulletin* 1997/3 [RSA-1997-3-011];
- *Prinsloo v. Van der Linde and Another* 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC), *Bulletin* 1997/1 [RSA-1997-1-003];
- *Probe Security CC v. The Security Officers' Board and Another WLD,* case no. 98/13943, 17.08.1998, unreported;
- *Private Security Industry Regulatory Authority and Others v. Association of Independent Contractors and Another* 2005 (5) SA 416 (SCA);
- *Brink v. Kitshoff* NO 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC), *Bulletin* 1996/1 [RSA-1996-1-009];
- *Minister of Home Affairs and Others v. Watchenuka and Another* 2004 (4) SA 326 (SCA); 2004 (2) BCLR 120 (SCA);
- *Affordable Medicines Trust and Others v. Minister of Health and Others* 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC), *Bulletin* 2005/1 [RSA-2005-1-002];
- *Larbi-Odam and Others v. Member of the Executive Council for Education (North-West Province) and Another* 1998 (1) SA 745 (CC); 1997 (12) BCLR 1655 (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), *Bulletin* 2004/1 [RSA-2004-1-002];
- *Law Society of British Columbia et al. v. Andrews et al.* (1989) 56 *Dominion Law Reports* (4d).

Languages:

English.

Sweden
Supreme Administrative Court

Important decisions

Identification: SWE-2006-3-002

a) Sweden / **b)** Supreme Administrative Court / **c)** Grand Chamber / **d)** 17.11.2006 / **e)** 3985-06 / **f)** / **g)** *Regeringsrättens Årsbok* / **h)** CODICES (Swedish).

Keywords of the systematic thesaurus:

1.3.5.10 **Constitutional Justice** – Jurisdiction – The subject of review – Rules issued by the executive.
4.6.9 **Institutions** – Executive bodies – The civil service.
5.3.13.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.

Keywords of the alphabetical index:

Civil servant, recruitment / Civil right, employment in civil service.

Headnotes:

A government decision on an employment matter has a bearing on civil rights, because of the nature of the employee's duties and responsibilities, for the purposes of Article 6.1 ECHR.

Summary:

I. A decision made by the Swedish Government is final. In certain cases, when a decision has a bearing on "civil rights" for the purpose of Article 6.1 ECHR, a decision may be the subject of a special review with the Supreme Administrative Court.

The applicant applied – unsuccessfully – for a position as "team leader" at the Swedish Social Insurance Agency. He appealed to the Government (specifically to the Ministry of Health and Social Affairs) and claimed that his references were better than those of the person they had employed. The government rejected his appeal. He then appealed to the Supreme Administrative Court for a ruling.

II. The Supreme Administrative Court referred to a leading case from the European Court of Human Rights – the *Pellegrin* case of 8 December 1999 (*Pellegrin v. France*, no. 28541/95, *Reports of Judgments and Decisions* 1999-VIII; *Bulletin* 1999/3 [ECH-1999-3-009]) concerning the applicability of Article 6.1 ECHR to public servants. The European Court of Human Rights decided in *Pellegrin* that the only disputes excluded from the scope of Article 6.1 ECHR are those raised by public servants whose duties typify the specific activities of the public service in so far as the latter is acting as the depositary of public authority responsible for protecting the general interests of the State or other public authorities. One obvious example of such activities is provided by the armed forces and the police.

The Supreme Administrative Court began by considering whether the position as team leader at the Swedish Social Insurance Agency at issue here entailed participation in activities designed to safeguard national interests, on account of the nature of the duties and the level of the responsibilities (see *Pellegrin*). The team leader position was described as "involving responsibility for staff and results". Due to the description of the position, the Supreme Administrative Court ruled that the Government's decision had a bearing on "civil rights" for the purpose of Article 6.1 ECHR and the decision was therefore subject to judicial review. The Supreme Administrative Court found no reason to overturn the government's decision.

Languages:

Swedish.

Identification: SWE-2006-3-003

a) Sweden / **b)** Supreme Administrative Court / **c)** Grand Chamber / **d)** 27.11.2006 / **e)** 7516-05 / **f)** / **g)** *Regeringsrättens Årsbok* / **h)** CODICES (Swedish).

Keywords of the systematic thesaurus:

2.1.1.4.4 **Sources** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
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.
5.3.32.1 **Fundamental Rights** – Civil and political rights – Right to private life – Protection of personal data.

Keywords of the alphabetical index:

Document, access, restriction.

Headnotes:

According to Chapter 7, Article 11 of the Secrecy Act, there is no restriction on the right of access to official documents containing matters of a personal nature in the recruitment process. Restriction of the right of access to official documents in such matters cannot be based on Article 8 ECHR.

Summary:

I. The National Audit Bureau turned down AA's request for access to documents on personality tests and test results from the recent recruitment of a high-ranking civil servant and an auditor, referring in its decision to Article 8 ECHR. AA applied to the Supreme Administrative Court, seeking access to the documents in question.

There is no restriction on the right of access to official documents emanating from the recruitment process containing information of a personal nature (see Chapter 7, Article 11 of the Secrecy Act). The National Audit Bureau argued that such restrictions may be possible, on the basis of Article 8 ECHR.

II. The Supreme Administrative Court established that the Swedish principle of public access to official documents has been incorporated into one of the fundamental laws, the Freedom of the Press Act. According to Chapter 2, Article 2 of this Act, specific provision for any restriction on the right of access to official documents must be made in specific legislation on the subject, or, if this is deemed more appropriate in a particular case, in another act of law to which the special legislation refers. The special legislation in this instance refers to the Secrecy Act. The Secrecy Act makes no reference to the Convention. As a result, restriction on the right of access to official documents in recruitment matters cannot be based upon Article 8 ECHR. Due to other circumstances concerning another article in the Secrecy Act, the Supreme Administrative Court overturned the National Audit Bureau's decision for a new review there.

Languages:

Swedish.

"The former Yugoslav Republic of Macedonia"
Constitutional Court

Important decisions

Identification: MKD-2006-3-004

a) "The former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 13.09.2006 / **e)** U.br.35/2006 / **f)** / **g)** / **h)** CODICES (Macedonian, English).

Keywords of the systematic thesaurus:

2.1.1.4.4 **Sources** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
2.1.3.2.1 **Sources** – Categories – Case-law – International case-law – European Court of Human Rights.
4.7.2 **Institutions** – Judicial bodies – Procedure.
4.7.3 **Institutions** – Judicial bodies – Decisions.
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.
5.3.13.4 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Double degree of jurisdiction.

Keywords of the alphabetical index:

Civil proceedings / European Court of Human Rights, judgment, effects in national law / Judgment, review.

Headnotes:

The case concerned the impact on the right to appeal, when a legal provision is adopted which rules out the possibility of a special appeal against a court's decision to reject the plaintiff's request for judgment in default.

It is not unconstitutional for a legislator to provide the possibility for parties to apply for revisions to a judgment by the second instance court, irrespective of the value of the dispute, where this is in the interests of the party with a view to a uniform implementation of the law and it is relevant to overall decision-making in the dispute in point.

Where breaches of human rights or fundamental freedoms are identified in the Court's judgment, the proceedings do not have to be repeated in every instance, irrespective of whether or not the litigant has addressed petitions to the European Court of Human Rights in Strasbourg.

Summary:

An individual petitioned the Court to assess the constitutionality of three articles of the Law on Contentious Proceedings.

The Court examined the constitutional provisions guaranteeing the right to an appeal as well as the Law on Contentious Proceedings. It also scrutinised the provision preventing a special appeal against a decision rejecting the plaintiff's request for the entry of judgment in default. The suggestion was made that this provision was in contravention of the right to appeal. The Court did not agree. The exercise of the right to an appeal is postponed until the moment the Court makes its final decision, so that the case can be conducted without delay, costs are kept to a minimum, and the rights of the parties to the proceedings are safeguarded.

It went on to examine Article 372.4 of the Law, which sets out the general rule for filing for a revision as an extraordinary legal remedy. This provision allows for revisions against second instance judgments, even where the sum in dispute is less than 500,000 denars, if the dispute to be decided hinges on a material point of law, and in order to ensure uniform implementation of the law and harmonisation of case law. The Court held that the legislator could provide for extraordinary legal remedies, in addition to appeal. It could therefore allow parties to apply for revision where certain pre-conditions were met.

In the Court's view, Article 372.4 of the Law on Contentious Proceedings could not be described as unconstitutional. The Supreme Court of the Republic of Macedonia is the highest court in the Republic and it ensures uniform implementation of law. The ability of parties to file for revision of judgments from the Second Instance Court, irrespective of the amount in dispute, is in the interest of litigants, with a view to uniform implementation of the law and resolution of material point of law. It guarantees the highest possible protection of the freedoms and rights of individuals and citizens, as fundamental values of the constitutional order.

The Constitutional Court examined Article 400 of the Law on Contentious Proceedings. The subtitle "Repetition of proceedings following a final decision by the European Court of Human Rights in Strasbourg" provides that where the Strasbourg Court has established a breach of one of the human rights or fundamental freedoms set out in the European Convention for the Protection of Human Rights and Fundamental Freedoms and in the Additional Protocols to the Convention, which the Republic of Macedonia has ratified, a party may, within 30 days from the date the judgment of the European Court of Human Rights became final, file a request with the Court in the Republic of Macedonia which presided over the first instance proceedings where the disputed decision was made, with a view to changing that decision. In such repeated proceedings, the courts must observe the legal standpoint expressed in the final judgment of the European Court of Human Rights which found that a right or freedom had been breached.

A review of constitutional articles and articles of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Protocols thereto showed that the judgment of the European Court of Human Rights does not alter the domestic judgment, it does not require the case to be reopened, nor does it impose an obligation on the state which has breached certain rights to stop doing so.

The rationale behind the introduction of this extraordinary remedy is that parties to proceedings should not have to suffer consequences because of a violation of Convention provisions. The Court accordingly ruled that Article 400 of the Law on Contentious Proceedings was not unconstitutional, especially when viewed in the context of Article 9 of the Constitution.

This is because the provision in question refers to citizens in an equal legal position, that is to say, those whose applications to the European Court of Human Rights have resulted in judgments to the effect that human rights or fundamental freedoms have been violated, which are grounds for the proceedings to be repeated. It does not apply to all citizens, irrespective of whether they have applied to the Court in Strasbourg. Also, the petitioner had suggested that judgments of the European Court of Human Rights should be transposed straight into the domestic legal order, without the need to repeat the proceedings before a domestic court. He or she had also argued that the judgment of the European Court of Human Rights should be the source of law, applicable to all cases stemming from the same set of facts. The Court did not accept these arguments. Courts dispense justice based on the Constitution, national legislation and international agreements ratified in accordance with the Constitution. For this reason as well, Article 400 could not be described as unconstitutional.

With regard to Article 372.4 the Court passed its resolution by majority vote.

Languages:

Macedonian, English.

Identification: MKD-2006-3-005

a) "The former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 13.09.2006 / **e)** U.br.85/2006 / **f)** / **g)** *Sluzben vesnik na Republika Makedonija* (Official Gazette), 101/2006, 26.09.2006 / **h)** CODICES (Macedonian, English).

Keywords of the systematic thesaurus:

3.9 **General Principles** – Rule of law.
3.10 **General Principles** – Certainty of the law.
5.3.38 **Fundamental Rights** – Civil and political rights – Non-retrospective effect of law.

Keywords of the alphabetical index:

Member of Parliament, remuneration.

Headnotes:

The principle of the rule of law is violated when a decision with retroactive effect enters into force before its publication in the Official Gazette. A breach will also occur if there are two decisions by the same legal body, between the implementation of the contested decision and the termination of validity of the previous decision.

Summary:

An individual asked the Court to assess the compliance with the Constitution of Item 6 of a decision by the Commission on Issues of Elections and Appointments of the Assembly of the Republic of Macedonia. It related to the level of remuneration of

representatives to the Assembly for the use of their private cars for official purposes and remuneration of the cost of pay tolls. The Court noted that the decision was made on 13 April 2006 and entered under reference 14-1650/1.

Under Item 6, the decision enters into force on the date of its adoption, and will be implemented with effect from 15 March 2006.

Analysis of Article 31 of the Law on Representatives shows that the legislator defined the personal incomes and remuneration of expenses to which representatives are entitled. It also provides that the Assembly is authorised to regulate the way in which representatives' personal income is to be determined, as well as remuneration for expenses.

The Court took into consideration various provisions of the Constitution and other legislation, the Rules of Procedure of the Assembly of the Republic of Macedonia and the decision on setting up permanent working bodies of the Assembly of the Republic of Macedonia. It observed that the Commission for Issues of Elections and Appointments was a permanent working body of the Assembly, competent to determine the level of remuneration of expenses. As such, it was a competent body to adopt the decision in point.

The Court did not accept the petitioner's arguments to the effect that the Commission had no constitutional and procedural competence to adopt the contested decision. The Commission's sphere of work is defined by the decision on setting up permanent working bodies of the Assembly of the Republic of Macedonia. It does not derive from the name of the Commission. Further statements in the petition to the effect that the name of the Commission meant that it was not competent to make the decision were also dismissed.

However, the Court noted that under Item 6 of the decision, it will enter into force on the day of its adoption (13 April 2006), and will be implemented as of 15 March 2006. The decision effectively prescribed its implementation prior to its publication in the "Official Gazette of the Republic of Macedonia". The Court held that Item 6 of the decision was out of line with Article 52.1 of the Constitution.

The Court also observed that the decision in this case does not have a retroactive effect which will be favourable for citizens as a whole, as defined in Article 52.4 of the Constitution. Rather, it has a retroactive effect which will favour a smaller, more narrowly-defined group of people – representatives. Item 6 of the decision is not, therefore, in line with this constitutional provision.

Pursuant to Item 5 of the decision, the decision as to the level of remuneration for representatives for the use of private cars on official business and remuneration of the transport costs of other elected appointed persons in the Republic ceases to be valid on the day this decision enters into force. Under item 6, the decision has a retroactive effect. It will remain in force for a certain period of time, from the implementation of the contested decision until the previous one ceases to be valid. This means that there are two decisions legally in force by the same body, governing the same rights of representatives. This contravenes the principle of the rule of law. The Court therefore ruled that Item 6 of the decision contravened Article 8.1.3 of the Constitution.

The Court repealed the challenged part of the decision.

Languages:

Macedonian, English.

Identification: MKD-2006-3-006

a) "The former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 01.11.2006 / **e)** U.br.31/2006 / **f)** / **g)** *Sluzben vesnik na Republika Makedonija* (Official Gazette), 119/2006, 17.11.2006 / **h)** CODICES (Macedonian, English).

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
3.17 **General Principles** – Weighing of interests.
3.18 **General Principles** – General interest.
5.1.4 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.28 **Fundamental Rights** – Civil and political rights – Freedom of assembly.

Keywords of the alphabetical index:

Assembly, traffic, obstruction / Assembly, purpose, message, clear.

Headnotes:

Obstruction of the traffic in one street for several hours, whether in the form of a static assembly or in the form of a procession, does not necessarily constitute a restriction on the freedom of movement, if the assembly is seeking to put a clear message across, or if, for example, there are other streets in the city along which one can pass.

Summary:

A political party asked the Court to assess the constitutionality of part of Article 1.a of the Law on Public Assemblies (see "Official Gazette of the Republic of Macedonia", nos. 55/1995 and 19/2006). It protects the constitutionally-defined rights, such as freedom of movement, of those not taking part in the demonstration. The Court held that Article 1.a envisages that citizens will exercise their right to peaceful protest in such a way that it will not restrict the right to free movement, and other constitutionally defined rights, of those not taking part.

The Court takes as a starting point the fundamental character of this right in the articles of the Constitution and in international law, and concluded that:

The right to peaceful assembly should be observed in the context of other fundamental human rights and freedoms and the public interest. This is particularly important because interference with the exercise of freedom of assembly may jeopardise the constitutionally guaranteed freedom of conviction and expression, but the exercise of the right to peaceful assembly might impede the exercise of the constitutionally guaranteed rights of others. This "interweaving" of rights shows that there is often a very thin line between what is a necessary restriction of the right to public assembly in the function of protecting the human rights of others, and what is a violation of the right to public assembly and expression.

For these reasons, the Court took the view that each restriction of the exercise of the freedom of public assembly must pass the test of proportionality; there must be a fair balance between the right of citizens exercising the freedom to assemble peacefully and the rights and interests of other citizens. In effect, the other values and protected public interest are a legitimate goal of the restriction.

Public assemblies almost inevitably cause inconvenience for those not taking part. However, limitation of the right to peaceful assembly is justified only when it is necessary to protect a defined and stipulated public interest, that is, when this inconvenience turns into a serious violation of public interest, and the freedoms and rights of others.

In the light of the above, the Court examined the question of whether the standpoint adopted in Article 1.a on the right to peaceful assembly was, in fact, a restriction on the right to peaceful assembly, as guaranteed in Article 21 of the Constitution.

Article 1.a defines the manner in which citizens may exercise the right to assemble peacefully. Article 1 of the Law on Public Assemblies, to which it is attached, governs the way in which citizens should exercise their right to peaceful assembly, in order to express their views and to protest in a peaceful manner in public. It also sets out the circumstances in which the staging of a public protest may be interrupted. The Court ruled that, in fact, Article 1.a is not a provision restricting citizens' rights to peaceful assembly; rather it is a general provision defining a general principle for holding peaceful public assemblies, to the effect that the rights of those not taking part in the public assembly should be heeded.

Analysis of Article 1.a shows that when the legislators drafted the Law on Public Assemblies, they intended the constitutional right of citizens to public assembly to be exercised in such a way as to enable the protection of the right to freedom of movement, which is also guaranteed by the Constitution. The fact that they did not word the provision in the form of "obligation" or put sanctions in place for possible violation is a strong indication that they did not intend to restrict the right to peaceful assembly.

Nevertheless, the wording of Article 1.a differs significantly from that of Article 11.1 ECHR. The Court therefore examined the question of whether the legislator had managed in an understandable way to determine the intensity of the restriction of other freedoms, notably the freedom of movement, as a ground for "dispersing" the assembly. Article 11.2 ECHR insists on establishing a "necessity" for restricting the right to assemble peacefully for the protection of other values and rights, which implies that the assembly has seriously endangered those other rights. The Court took the view that Article 1.a did not contain such quality and direction for the competent authorities, but a general premise that public assembly should not restrict the freedoms and rights of others, especially the freedom of movement.

The Court observed that obstruction of the traffic in one street for several hours, whether in the form of a static assembly or in the form of a procession, does not necessarily constitute a restriction on the freedom of movement, if the assembly is seeking to put a clear

message across, or if, for example, there are other streets in the city along which one can pass. There is a danger that the competent authorities could use Article 1.a to justify restriction of freedom of movement due to traffic regulations, even when the traffic is only slightly obstructed, precisely because this norm does not contain a qualitative criterion or a directive about the necessity to restrict the demonstration. This is a clear indicator that the legislators intended demonstrations to be successful, not to be impeded.

The Court observed that the contested provision at first sight appears to be a simple description of what an assembly should look like. However, the second part of the provision contains grounds of too general a nature which the authorities can easily call upon. These grounds for restriction of assembly, in the absence of balancing criteria, present the right of assembly as something dangerous. In the Court's view, there is no justification for this.

The Court therefore ruled that the disputed part of the provision was not in conformity with the Constitution and the European Convention for the Protection of Human Rights and Fundamental Freedoms. It directed that it should be repealed.

Languages:

Macedonian, English.

Turkey
Constitutional Court

Important decisions

Identification: TUR-2006-3-008

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 26.10.2005 / **e)** E.2005/74, K.2005/73 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 21.09.2006, 26326 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

3.3 **General Principles** – Democracy.
4.5.6 **Institutions** – Legislative bodies – Law-making procedure.

Keywords of the alphabetical index:

Parliament, work / Bill, parliament, discussion, method.

Headnotes:

Specific regulations may apply to the debating of draft bills and proposals on important points of law. Time limits may be imposed on debates. Parliament may debate legislation chapter by chapter rather than article by article. Where this is the case, the information must be accessible. There should be no restrictions on motions by members of parliament, nor should there be any limitation on amendments by the principal commission and by government. Provided that there is an opportunity for members of parliament to voice their opinion during debates, constitutional requirements will be satisfied, if draft bills and proposals are debated chapter by chapter, rather than article by article.

Summary:

I. The case concerns the procedure governing the introduction and debating of legislation before the Turkish Grand National Assembly.

On 30 June 2005, the Procedural Rules of the Turkish Grand National Assembly were amended by Resolution 855. Several members of parliament asked the Constitutional Court to assess the compliance with the Constitution of some of the amended provisions of Article 91 of the Rules.

The Court began by examining the amended first sentence of the first paragraph of Article 91a. This allows for the debate of certain draft bills or proposals on a chapter by chapter basis, rather than article by article. The draft bills in question are either aimed at amending existing legislation or the Procedural Rules of the Turkish Grand National Assembly or they are introducing new legislation. Chapters must not exceed thirty articles. The Plenary of the Assembly may decide upon such a measure, acting upon a proposal by the government, commissions or political party groups and upon a unanimous proposal by the advisory board.

A chapter by chapter debate is only possible if:

- the draft bills contain principles which make fundamental changes to a particular branch of the law;
- they contain significant constitutional concepts relating to a particular branch of law;
- they correlate to specific legislation already in force;
- there is a need for continuity between the articles already in force and the points being introduced by the proposed legislation;
- the proposed legislation has already been subject to such requirements in the past.

The applicants argued that the provisions lacked clarity and accuracy and would prevent participation by members of parliament in debates at parliamentary level. The principle of the rule of law ensures that political power remains within the parameters of the law, and creates an infrastructure in which necessary public activities can be carried out. It also preserves national stability, due to the requirement for clarity and precision of the law. In this regard, members of parliament are under a duty to perform their duties and use their powers as set out in Article 87 of the Constitution. There may be special debating and voting procedures at the Plenary of the Assembly where draft bills and proposals pertaining to comprehensive legal regulations are under discussion. The number of articles to be debated is likely to be high.

II. It was held that the provision under dispute was in compliance with the constitutional requirement of clarity, precision and certainty of the law, and that it did not prevent members of parliament from exercising their powers, under Article 87 of the Constitution. The provision was also in line with an earlier judgment by the Constitutional Court, of 29 April 2003, E.2003/30, K.2003/38. The complaint was accordingly rejected.

The Court went on to examine the second sentence of the first paragraph of Article 91a. This states that if the decision is made to debate draft bills and proposals as chapters rather than articles, chapters will be debated separately under the same procedure which applies to articles, although the articles themselves will not be read.

The applicants suggested that this provision could hinder democratic participation. They warned of the danger that the will of the Assembly might not be reflected in legislation, if chapters containing thirty articles are discussed in the time span which would normally be allotted to one article, and if time limits are to be imposed on debates on laws of significant constitutional importance.

The Court observed that under the provision, each article would be voted upon separately. This would satisfy the requirement of democratic participation in the legislative process. The fact that articles were not read out separately did not mean that democratic principles would be breached, particularly if access was available prior to the debate. Avoiding repetition is desirable in terms of economic use of time. Members of parliament would have the chance to voice their opinions on any provision within draft legislation during the debate on the chapters. This part of the provision was found to be compliant with the Constitution and the complaint was rejected.

The Court studied the second sentence of the second paragraph of Article 91a. This states that members of parliament, primary commissions or the government may put forward motions for amendment. Only two motions for amendment are allowed for each article where these are put forward by members of parliament due to concerns over the constitutionality of the draft bills and proposals. The application is only limited to the second sentence.

The applicants' criticism of this part of the provision was that members of parliament would be limited as to the amount of motions for amendment they could put forward. No such limitation applies to motions for amendment by the principal commission and by the government. They could see no justifiable grounds for such differentiation.

The Court noted that, under Article 68 of the Constitution, political parties are indispensable elements of democratic political life. Article 95 of the Constitution requires that the Procedural Rules of the Turkish Grand National Assembly should be drafted in such a way as to ensure the participation of each political party group in all the activities of the Assembly in proportion to its number of members. The enactment, amendment, and repeal of laws are

the principal powers of parliament. Participation of political party groups in proportion to their seats at parliament is a constitutional requirement. There was no scope in this part of the provision for motions for amendment by political groups, and it also restricts members of parliaments' powers to propose changes. It was therefore deemed unconstitutional, and repealed.

Next, the Court turned its attention to the third paragraph of Article 91a, which imposes a time limit of fifteen minutes on replies in debates on the chapters. The applicants contended that the fifteen minute limitation was contrary to the principle of the rule of law. However, the Court found that this limit was acceptable, in view of the fact that the rules on draft bills and proposals were meant to speed up parliamentary debate. The demand was rejected.

The Court then examined the fourth paragraph of Article 91a, which states that "the provisions of Article 81 of the Rules of Procedures are reserved." Article 81 of the Rules of Procedures covers the principles relating to parliamentary debate on draft bills and proposals. Political party groups, commissions and the government may make speeches of no more than twenty minutes on the whole of the draft bill or proposal, or ten minutes on an individual article. Members of parliament can only make speeches of ten minutes on the bill or proposal as a whole, or five minutes on an article.

One of the general principles of the law is that general rules are applied in the absence of specific rules. The Court held that the fourth paragraph did not restrict the power to enact legislation; neither did it contravene the principle of democratic participation.

Languages:

Turkish.

Identification: TUR-2006-3-009

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 05.01.2006 / **e)** E.2002/47, K.2006/1 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 07.10.2006, 26312 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

4.5.2 **Institutions** – Legislative bodies – Powers.
4.15 **Institutions** – Exercise of public functions by private bodies.
5.2 **Fundamental Rights** – Equality.

Keywords of the alphabetical index:

Privatisation, evaluation methods / Concession, attribution, criteria.

Headnotes:

Parliament has the power to determine which investments and services carried out by the State, State Economic Enterprises and other public corporate bodies are to be delegated to and performed by real or corporate bodies through private law contracts. A provision of Turkish law which defined those production activities of public bodies which could be described as "concessions" was constitutional.

Summary:

I. Law no. 4006 regulates privatisation and makes amendment to various laws. Article 15/2 of the Law indicates those public sector activities which are to be recognised as concessions. This definition includes the production of goods and services under a monopoly by those administrations which fall within the general and subsidiary budget and by revolving funds linked to those administrations, as well as the production of goods and services under the auspices and within the aims of Public Economic Institutions. Other activities will not be regarded as concessions. Agreements and contracts fulfilled under Article 15/2 relating to the activities described above will be regarded as concession agreements and contracts. The article does not affect specific provision in other legislation for these issues.

The Tenth Chamber of the Council of State asked the Constitutional Court to rule upon the conformity with the Constitution of Article 15/2. The Chamber pointed out that the production of goods and services by Public Economic Institutions are regarded as concessions under the contested provision while production by Economic State Institutions is not. Public Economic Institutions in Turkey are defined as those institutions whose entire capital belongs to the State. By contrast, the entire capital of Economic State Institutions belongs to the State, but they operate according to the rules of commerce. The Chamber argued that Article 15/2 creates inequality

between Public Economic Institutions and Economic State Institutions, which is against the Constitution.

II. The Court in its judgment indicated that a State governed by the principle of the rule of law, under Article 2 of the Constitution, is one which respects human rights and strengthens those rights and freedoms. Its acts and actions must be open to judicial review and the legislator must be aware that there are fundamental principles governing the laws and those principles have to be respected. Nonetheless, under Article 47/4 (as amended by Law no. 4446) investments and services carried out by the State, State Economic Enterprises and other public corporate bodies which could be performed by or delegated to real or corporate bodies through private law contracts shall be determined by law. This means that it is within the State's powers that investments and services carried out by the State, State Economic Enterprises and other public corporate bodies are delegated or performed by real or corporate bodies through private law contracts. Article 15 of the Law no. 4046 envisages that some goods and services are to be regarded as concessions. It is within parliament's discretion not to accept that the production of other goods and services is excluded from concession.

The contested provision was not found to be in breach of Articles 2 and 47 of the Constitution. Justice Kantarcioglu put forward a dissenting opinion on the reasoning of the judgment. The Court also ruled that the contested provision was not related to Article 10 of the Constitution.

Languages:

Turkish.

Identification: TUR-2006-3-010

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 15.02.2006 / **e)** E.2002/48, K.2006/22 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 10.11.2006, 26342 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Powers of attorney, fee, payment, deadline / Fee, amount, purpose / Lawyer, trainee, social security, financing.

Headnotes:

A requirement for a fee to be paid when a power of attorney is presented to public authorities, including courts, is not unconstitutional. The fact that such a fee is not paid once the document has been stamped, allowing for a ten day period for completion, does not have a significant impact on the trial period, when other requirements are taken into consideration.

Summary:

I. Emirdag Peace Court asked the Constitutional Court to assess the compliance with the Constitution of Article 27.3 of Law no. 1136 on Lawyers (as amended by Law no. 4667).

Article 27 of Law no. 1136 stipulates that a fee is payable, when a power of attorney is presented to public authorities. The fee is charged by placing a stamp on the paper presented. Under Article 27, if a power of attorney is presented with no stamp, the authorities do not have to accept it. Ten days will be allowed for payment and if this is not forthcoming, the power of attorney will not be processed. The Emirdag Court suggested that this procedure would slow down court trials, and lengthen trial periods.

II. The Court found that in the Turkish legal system, representation by advocate is optional apart from certain exceptional cases. A power of attorney is a legal act that may be realised by the unilateral will of a client. In this way, the client confers powers of representation upon his attorney. Moreover, Article 396 of the Law of Obligations allows for the removal or resignation of an attorney, both at the client's behest or that the attorney's.

The last paragraph of Article 141 of the Constitution states that it is the duty of the judiciary to conclude trials as quickly as possible and at minimum cost. The ten day period required by Article 27 is not a condition

which has to be satisfied before a case is submitted; rather, it is proof that a fee has been paid. If it is viewed against the background of the other conditions which have to be fulfilled to bring a case to court, the ten day period is in line with the Constitution, and does not have a significant impact on the trial period.

In addition, the requirement for a stamp on powers of attorney was introduced in order to fund the expenses of trainee advocates. This has ensured a balance between individual and public interest, which is a condition of the rule of law. The contended provision was also designed to ensure the social security of trainee advocates. It was not found to be unconstitutional in this regard, and the case was unanimously rejected.

Languages:

Turkish.

Identification: TUR-2006-3-011

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 22.02.2006 / **e)** E.2003/23, K.2006/26 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 02.11.2006, 26334 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

1.4.3 **Constitutional Justice** – Procedure – Time-limits for instituting proceedings.
1.6.9 **Constitutional Justice** – Effects – Consequences for other cases.
4.6.9 **Institutions** – Executive bodies – The civil service.

Keywords of the alphabetical index:

Civil service, promotion / Merit, condition of access.

Headnotes:

Assessment for promotion to the higher echelons of the Security Organisation should be carried out with regard to the principle of merit. If the Constitutional Court dismisses an application on substantive grounds, no allegation of unconstitutionality shall be made with regard to the same legal provision until the expiry of ten years from the publication of the Constitutional Court's decision in the Official Gazette.

Summary:

Article 55 of Law no. 3201 on Security Organisation sets out procedures for promotion to the higher echelons of the Security Organisation. Article 155.2 states that promotion will be carried out on merit, with regard to examination and education achievements. The seventh paragraph of this article provides for the establishment of a High Evaluation Board of General Directorate, to determine whether security directors who are candidates for promotion meet the merit criteria, and evaluate and to suggest staff to be appointed to higher posts. The paragraph also states that the President of the High Board will be the General Director of the Security Organisation, and it will comprise Deputy General Directors, the Head of Inspection Unit, the President of the Police Academy and three first rank Security Directors, chosen from Research, Planning and Coordination Unit directors.

Konya Administrative Court asked the Constitutional Court to rule upon the conformity with the Constitution of the phrase "according to merit" in Article 55.2. The Administrative Court suggested that this provision indicated that promotion to higher ranks would be made according to merit, but it did not mention any abstract or objective criteria in order to determine the degree of merit. As it has the potential to cause uncertainty and introduce an element of arbitrariness to the Security Organisation, it is contrary to the Constitution.

Under Article 55 of Law no. 3201, the seniority and merit of candidates for promotion will be taken into account, with a view also to examinations and educational background. However, Article 70/2 of the Constitution provides that "Criteria other than the qualifications for the office concerned will not be taken into account when recruitment is being carried out for the public service". Article 128/2 of the Constitution provides that "qualifications of public servants and other public employees, the procedure governing their appointment, duties and powers, their rights and responsibilities, salaries and allowances, and other matters relating to their status will be regulated by law."

Parallel regulations to Articles 70 and 128 of the Constitution may be found in some articles of Law no. 657 on State Officials. Article 109 of Law no. 657, for instance, stipulates that a personnel file shall be kept for every state official. Article 110 states that a record will be kept on every official. Reports generated by officials from the higher echelons,

inspection reports and declarations of assets shall be placed in those files. Article 111 of the Law no. 657 envisages that personnel and record files will form the basis for the determination of officials' merits, for their horizontal and vertical promotions and for retirement or dismissal procedures. Other provisions of Law no. 657 provide that appraisal records and disciplinary sanctions are to be recorded on officials' record files. It is clear that the phrase "according to merit" in Article 155/2 shall be taken into account within the framework of the provisions in Law no. 657, when security organisation personnel are to be promoted. It cannot therefore be argued that it is unconstitutional to promote security organisation staff according to merit. The complaint was rejected.

The Constitutional Court then examined the phrase "to determine merit conditions" in the seventh paragraph of Article 155. Under Article 152 of the Constitution and Article 28 of Law no. 2949 on The Organisation and Trial Procedures of the Constitutional Court, if the Constitutional Court dismisses a case on substantive grounds, no allegation of unconstitutionality can be made with regard to the same legal provision until ten years have elapsed since publication of the decision of the Constitutional Court in the Official Gazette. The phrase "to determine merit conditions" was reviewed and the case was dismissed by the Constitutional Court on 11 June 2003. The decision was published in the Official Gazette no. 25283 dated 8 November 2003. The applicant's argument was not examined on its merits and was rejected.

Languages:

Turkish.

United States of America
Supreme Court

Important decisions

Identification: USA-2006-3-006

a) United States of America / **b)** Supreme Court / **c)** / **d)** 11.12.2006 / **e)** 05-785 / **f)** Carey v. Musladin / **g)** 127 *Supreme Court Reporter* 649 (2006) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Jury, influence, improper.

Headnotes:

A criminal defendant's protection against inherently prejudicial courtroom practices, guaranteed under the constitutional right to a fair trial, extends only to state-sponsored practices and not to the conduct of private spectators.

Summary:

I. A lay jury in California State Court found Mathew Musladin guilty of murdering Tom Studer. At the trial, Musladin admitted having killed Studer, but argued that he acted in self-defence. The jury rejected his self-defence argument.

The trial lasted fourteen days. On at least some of those days, various members of Studer's family wore buttons with a photograph of Studer on them. The trial court record did not state precisely how many family members wore the buttons or for how many days of the trial they wore them. When the trial started, Musladin's attorney asked the trial judge to

order the Studer family members not to wear the buttons during the trial. According to the motion, the buttons would prejudice the members of the jury against the defendant. In *Holbrook v. Flynn*, a 1986 decision, the U.S. Supreme Court recognised that certain courtroom practices are so inherently prejudicial that they deprive the defendant of a fair trial. The trial judge denied Musladin's motion, stating that it was not possible to envisage any "possible prejudice to the defendant."

The California state Court of Appeal upheld Musladin's conviction, and in doing so declined to overturn the trial judge's denial of Musladin's motion. The Court of Appeal concluded that the buttons had not branded the defendant with an "unmistakable mark of guilt" in the eyes of the jury because the photograph of the victim was unlikely to be viewed as anything other than a normal expression of grief by a family member.

Having exhausted the state appellate process, Musladin sought protection in the federal courts, filing an application for a writ of *habeas corpus* in federal district court. He claimed that the wearing of the buttons deprived him of a fair trial, guaranteed under the Sixth Amendment to the U.S. Constitution. The district court denied the application, but the federal Court of Appeals for the Ninth Circuit reversed that decision. Applying the standard in the federal statute applicable to issuance of writs of *habeas corpus* (the Antiterrorism and Effective Death Penalty Act of 1996), the Court of Appeals ruled that the state court decision was "contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States." Under precedents of the U.S. Supreme Court, "clearly established Federal law" for purposes of the 1996 Act refers to holdings in the Supreme Court's decisions. According to the Court of Appeals, the Supreme Court's decisions in *Holbrook v. Flynn* and *Estelle v. Williams* (1976) clearly established a rule of federal law applicable to Musladin's case. The Court of Appeals also cited its own precedent in a 1990 decision in support of this conclusion that the two Supreme Court cases clearly established the test for inherent prejudice applicable to spectators' courtroom conduct. Therefore, the Court of Appeals determined that the buttons were inherently prejudicial and had deprived Musladin of the right to a fair trial. It ordered that he be granted a new trial.

II. In a unanimous 9-0 decision, the U.S. Supreme Court reversed the federal Court of Appeal's decision. In the Court's view, the Court of Appeals had erred in two ways, first by relying on a judicial precedent that was not the Supreme Court's own and secondly by concluding that the *Holbrook v. Flynn* and *Estelle v. Williams* decisions served as "clearly established Federal law." On the latter point, the Supreme Court distinguished its two decisions from the instant case by noting that they dealt with "government-sponsored practices." In *Estelle v. Williams*, the Supreme Court ruled that criminal defendants must not be forced to wear prison clothes in the jury's presence. In *Holbrook v. Flynn*, the Court considered the question of whether the presence of four uniformed state troopers, seated immediately behind the defendant, deprived the defendant of the right to a fair trial. In contrast, in the case in point, private individuals had made a private choice to wear the buttons. The test in its two decisions for determining whether an inherently prejudicial practice is constitutionally valid, the Supreme Court observed, was whether that practice furthers an essential state interest. Thus, the holdings in those decisions are applicable only to state-sponsored practices. Because the two decisions did not clearly establish federal law regarding private conduct, the Court ruled that the federal Court of Appeals was precluded from invoking the Anti-terrorism and Effective Death Penalty Act of 1996 to grant Musladin a new trial.

Cross-references:

- *Estelle v. Williams*, 425 U.S. 501, 96 S.Ct. 1691, 58 L.Ed. 2d 126 (1976);
- *Holbrook v. Flynn*, 475 U. S. 560, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986).

Languages:

English.

Inter-American Court of Human Rights

Important decisions

Identification: IAC-2006-3-009

a) Organisation of American States / **b)** Inter-American Court of Human Rights / **c)** / **d)** 01.07.2006 / **e)** Series C 148 / **f)** The Ituango Massacre v. Colombia / **g)** Secretariat of the Court / **h)** CODICES (Spanish, English).

Keywords of the systematic thesaurus:

5.3.2 **Fundamental Rights** – Civil and political rights – Right to life.
5.3.3 **Fundamental Rights** – Civil and political rights – Prohibition of torture and inhuman and degrading treatment.
5.3.5 **Fundamental Rights** – Civil and political rights – Individual liberty.
5.3.13.2 **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.
5.3.17 **Fundamental Rights** – Civil and political rights – Right to compensation for damage caused by the State.

Keywords of the alphabetical index:

Damage, psychological, concept / Disappearance, forced / Displaced person / Integrity, physical, right / Obligation, international, state / Right to rehabilitation and compensation.

Headnotes:

States must ensure that the necessary conditions are put in place, to prevent violations of the right to life. They must also make sure their agents, or private individuals, do not violate this right.

Human rights treaties are living instruments. Any interpretation of them must take into account changes over time and current conditions.

There are two elements to forced or compulsory labour. Firstly, the work or service is exacted "under the menace of a penalty"; secondly, it is not performed voluntarily. For there to be a violation of rights under the American Convention on Human Rights, the alleged violation must be attributable to state agents, either because they played a direct role or they acquiesced to the facts.

The "menace of a penalty" is defined as the real and actual presence of a threat. This can assume different forms, the most extreme of which are those that imply coercion, physical violence, isolation or confinement, or the threat to kill the victim or his next of kin.

"Unwillingness to perform the work or service" consists of the absence of consent or free choice when the situation of forced labour begins or continues. This can occur for different reasons, such as illegal deprivation of liberty, deception, or psychological coercion.

The sphere of privacy is characterised by being exempt from, and immune to, abusive and arbitrary invasion or attack by third parties or public authorities.

The destruction of private homes and possessions by a paramilitary group, with the collaboration of state military forces, is not only a violation of the right to the use and enjoyment of property, but also constitutes a grave, unjustified and abusive interference in citizens' private lives and homes.

Freedom of movement and residence is an essential condition for the free development of a person. A vital element is the right of those who are legally within a State to move freely within it and to choose their place of residence. Article 22.1 ACHR protects the right not to be forcibly displaced.

States must grant preferential treatment to displaced persons and adopt positive measures to reverse the effects of their situation of vulnerability and defencelessness, including the acts and practices of individual third parties.

Official registration by governmental agencies does not establish an individual's status as a displaced person, rather the mere fact of having been forced to abandon his usual place of residence.

Article 19 ACHR should be understood as a complementary right that the ACHR establishes for individuals who need special protective measures, because of their stage of physical and emotional development.

Creating a threatening situation or threatening an individual with torture may, in some circumstances, constitute inhumane treatment.

The destruction of homes during a massacre by State security forces may constitute cruel, inhuman or degrading treatment.

By implementing or tolerating actions aimed at carrying out extrajudicial executions, failing to investigate them adequately and failing to punish the perpetrators effectively, the State violates its obligation to respect and ensure the rights established in the American Convention. Here, the State had also failed to guarantee their free and full exercise, both in respect of the alleged victims and their next of kin. The state had concealed these occurrences from society, and reproduced the conditions of impunity that allow such actions to be repeated.

Administrative proceedings can complement, but not totally substitute, the function of the criminal jurisdiction in cases of serious human rights violations.

Summary:

On 1 July 2006, the Inter-American Commission on Human Rights asked the Court to decide whether the State of Colombia had violated various articles of the American Convention on Human Rights. These were Article 4 ACHR (right to life), Article 5 ACHR (right to humane treatment), Article 7 ACHR (right to personal liberty), Article 19 ACHR (rights of the child), Article 21 ACHR (right to property), Article 8 ACHR (Right to a Fair Trial) and Article 25 ACHR (right to Judicial Protection). They were to be reviewed in the context of Article 1.1 ACHR (obligation to respect rights), in connection with various inhabitants of the villages of La Granja and El Aro in Ituango, Colombia.

The State's responsibility arose from acts of omission, acquiescence and collaboration by members of law enforcement bodies based in the Municipality of Ituango with paramilitary groups belonging to the United Self-Defense Forces of Colombia (AUC), which perpetrated successive armed raids on June 1996 and, as of October 1997, in the municipal districts of La Granja and El Aro, killing 19 defenceless civilians, robbing others of their property and causing terror and forced displacement. Furthermore, the Colombian State had still not complied significantly with its obligation to clarify the facts, prosecute all those responsible effectively, and provide adequate recompense to the victims and their next of kin.

In its Judgment of 1 July 2006, the Court found that Colombia was responsible for several violations of Convention rights. These included the right to life and to humane treatment (Articles 4 and 5 ACHR), the right not to be required to perform forced or compulsory labor (Article 6.2 ACHR), the right to personal liberty (Article 7 ACHR), the prohibition of arbitrary or abusive interference in a person's private life and home (Article 11.2 ACHR) the right to property (Article 21 ACHR), the right to freedom of movement and residence (Article 22 ACHR) and the rights to a fair trial and to judicial protection under Articles 8 and 25 ACHR. They were all to be viewed in the context of the obligation to respect rights, under Article 1.1 ACHR.

The Court ordered the State inter alia, to take the necessary measures to provide justice in this case; provide, free of charge, and through the national health service, the appropriate treatment required by the next of kin of the victims executed in this case; take the necessary measures to guarantee safe conditions for the former inhabitants of El Aro and La Granja, who were forcibly displaced, to return to El Aro or La Granja; organise a public act to acknowledge international responsibility for the facts of this case; implement a housing programme; erect a monument in commemoration of the victims; implement permanent training programs on human rights and international humanitarian law for the Colombian Armed Forces; publish the judgment, and pay compensation for pecuniary and non-pecuniary damages, as well as costs and expenses.

Languages:

Spanish.

Identification: IAC-2006-3-010

a) Organisation of American States / **b)** Inter-American Court of Human Rights / **c)** / **d)** 05.07.2006 / **e)** Series C 150 / **f)** Montero-Aranguren et al (Catia Detention Center) v. The Bolivarian Republic of Venezuela / **g)** Secretariat of the Court / **h)** CODICES (Spanish, English).

Keywords of the systematic thesaurus:

4.7.1.1 **Institutions** – Judicial bodies – Jurisdiction – Exclusive jurisdiction.
4.7.4.3.1 **Institutions** – Judicial bodies – Organisation – Prosecutors / State counsel – Powers.
4.7.11 **Institutions** – Judicial bodies – Military courts.
5.1.1.4.3 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Prisoners.
5.1.5 **Fundamental Rights** – General questions – Emergency situations.
5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
5.3.2 **Fundamental Rights** – Civil and political rights – Right to life.
5.3.3 **Fundamental Rights** – Civil and political rights – Prohibition of torture and inhuman and degrading treatment.
5.3.13.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Trial/decision within reasonable time.
5.3.17 **Fundamental Rights** – Civil and political rights – Right to compensation for damage caused by the State.
5.4.19 **Fundamental Rights** – Economic, social and cultural rights – Right to health.

Keywords of the alphabetical index:

Detainee, right / Detention, conditions / Detention, unlawful / Integrity, physical, right / Investigation, effective, requirement / Obligation, international, state / Right to rehabilitation and compensation / Torture, in police custody / Treatment or punishment, cruel and unusual / State, duty to protect fundamental rights and freedoms.

Headnotes:

Government security forces should only use force in exceptional circumstances, in a limited and proportionate manner, once all other methods of control have been exhausted and failed.

The use of firearms and lethal force against people by law enforcement officers − which must be generally forbidden − is only justified in extraordinary cases. Such exceptional circumstances shall be determined by law and restrictively construed, so that firearms and lethal force are used to the minimum extent possible in all cases, but never exceeding that use which is “absolutely necessary” in relation to the force or threat to be repelled. Where excessive force is used, any deprivation of life is arbitrary.

If it discovers that members of the security forces have used firearms with lethal consequences, the State must immediately launch a rigorous, impartial and effective investigation *ex officio*.

States cannot invoke economic hardship to justify prison conditions that do not respect the inherent dignity of human beings. The impairment of rights arising from the deprivation of liberty, or as its collateral effect, must be strictly minimised. The State is in a special position as guarantor of the rights of persons deprived of their liberty.

Solitary confinement cells must be used as a disciplinary measure or for the protection of persons only for the time necessary and in strict compliance with the criteria of reasonableness, necessity and legality. Confinement in a dark cell with no means of communication is forbidden.

Poor physical and sanitary conditions existing in detention centres, as well as insufficient lighting and ventilation, are *per se* violations of the right to humane treatment. The intensity, length of detention and the inmate’s personal circumstances must be considered, as they can cause hardship which is in excess of the unavoidable level of suffering inherent in detention, and because they involve humiliation and feelings of inferiority.

Inadequate medical assistance could be considered *per se* a violation of Articles 5.1 and 5.2 ACHR depending on the specific circumstances of the person, the type of disease or ailment, the time spent without medical attention, and its cumulative effects.

Summary:

On 24 February 2005, the Inter-American Commission on Human Rights asked the Court to decide whether the Bolivarian Republic of Venezuela had violated the rights to life and to humane treatment, under Articles 4 and 5 ACHR, in relation to Article 1.1 ACHR (obligation to respect rights). The case arose from detainees who allegedly died in an operation carried out on 27 November 1992 in the Flores de Catia Judicial Detention Centre. The Commission also asked the Court to assess whether the State breached the rights to fair trial and judicial protection, under Articles 8 and 25 ACHR, in the context of Article 1.1 ACHR, to the detriment of the alleged victims and their next of kin. Finally, the Commission asked the Court to declare Venezuela responsible for failure to comply with the general obligation set forth in Article 2 ACHR (domestic legal effects), failure to repeal those parts of its legislation which empowered military courts to investigate violations of human rights, and failure to develop policies to reform the penitentiary system.

In 1992, the situation at Catia Detention Centre was characterised by hunger strikes, poor prison conditions, deaths and disappearances of prisoners, breakouts and riots resulting in many injuries. Multiple violations of the prisoners' rights resulted from severe overcrowding. The prisoners held at the centre were subject to malnutrition, poor sanitary conditions and inadequate health care.

During the police operation of 27 November 1992 at Catia Detention Centre, the National Guard and the Metropolitan Police shot indiscriminately at prisoners, using firearms and tear gas. Approximately 63 prisoners died, including the 37 victims in the instant case, 52 were injured and 28 disappeared. Investigations carried out by the authorities to date have not yet established the total number of victims. Those reports which are available are incomplete, confusing and contradictory. The National Guard denied authorities from the Public Prosecutor's Office access to the Centre, due to alleged safety concerns.

Between 28 and 29 November 1992, scores of prisoners were transferred from Catia Detention Center to other prisons. The next of kin of the prisoners who were transferred had no knowledge of their whereabouts or fate. Before their transfer, authorities kept prisoners in the yards for many hours, forcing them to be naked and in uncomfortable positions.

In its Judgment of 5 July 2006, the Court ordered the State *inter alia*, to adapt its domestic laws to the provisions of the American Convention so that they:

a. adequately conform to international legal standards on the use of force by law enforcement officers;
b. are aimed at the creation of a penitentiary service, open to scrutiny and of a non-military nature;
c. secure an efficient procedure or system to file petitions before competent, impartial and independent authorities for the investigation of complaints on human rights violations filed by inmates, in particular, on illegal use of force by state agents;
d. ensure that investigations of human rights violations are carried out by ordinary prosecutors and judges instead of military prosecutors and judges;
e. adopt the necessary measures to bring prison conditions in line with internationally accepted standards.

These standards include:

a. bed space that meets minimum standards;
b. accommodation which is ventilated and naturally lit;
c. regular access to clean toilets and showers;
d. adequate, timely and sufficient food and health care; and
e. access to educational, employment and other opportunities to assist inmates towards a law-abiding and self-supporting life.

Languages:

Spanish.

European Court of Human Rights

Important decisions

Identification: ECH-2006-3-005

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 11.07.2006 / **e)** 54810/00 / **f)** Jalloh v. Germany / **g)** *Reports of Judgments and Decisions of the Court* / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

5.3.3 **Fundamental Rights** – Civil and political rights – Prohibition of torture and inhuman and degrading treatment.
5.3.4.1 **Fundamental Rights** – Civil and political rights – Right to physical and psychological integrity – Scientific and medical treatment and experiments.
5.3.13.1.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – Criminal proceedings.
5.3.13.17 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Rules of evidence.
5.3.13.23.1 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to remain silent – Right not to incriminate oneself.

Keywords of the alphabetical index:

Ill-treatment / Medication, forced / Evidence, obtained illegally.

Headnotes:

The Convention does not, in principle, prohibit recourse to a forcible medical intervention which would assist in the investigation of a criminal offence. However, any interference with a person's physical integrity carried out with the aim of obtaining evidence must be the subject of rigorous scrutiny, taking into account the manner in which it takes place, the adequacy of the medical supervision and the degree of risk to the person's health. In particular, if the forcible intervention is not indispensable to obtaining the evidence at issue, it may amount to inhuman and degrading treatment.

The right to a fair trial is violated where evidence which is decisive in securing a conviction was obtained by a measure which breached one of the core rights guaranteed by the Convention. Moreover, the right not to incriminate oneself may be violated if the use of a forcible medical intervention to obtain decisive physical evidence amounted to inhuman and degrading treatment.

Summary:

I. Plain-clothes police officers observed the applicant on several occasions taking tiny plastic bags out of his mouth and handing them over for money. Suspecting that the bags contained drugs, the police officers went over to arrest the applicant. While they were doing, so he swallowed another tiny bag he still had in his mouth. As no drugs were found on him, the competent public prosecutor ordered that he be given an emetic to force him to regurgitate the bag. The applicant was taken to hospital, where he saw a doctor. As he refused to take medication to induce vomiting, four police officers held him down while the doctor inserted a tube through his nose and administered a salt solution and Ipecacuanha syrup by force. The doctor also injected him with apomorphine, a morphine derivative which acts as an emetic. As a result the applicant regurgitated a small bag of cocaine. A short while later he was examined by a doctor who declared him fit for detention. When police officers arrived to question the applicant about two hours after he had been given the emetics, he told them in broken English – it then becoming apparent that he could not speak German – that he was too tired to make a statement.

The following day the applicant was charged with drug trafficking and placed in detention on remand. His lawyer alleged that the evidence against him had been obtained illegally and so could not be used in the criminal proceedings. He further contended that the police officers and the doctor who had participated in the operation were guilty of causing bodily harm in the exercise of official duties. Finally, he argued that the administration of toxic substances was prohibited by the Code of Criminal Procedure and that the measure was also disproportionate under the Code, as it would have been possible to obtain the same result by waiting until the bag had been excreted naturally. The District Court convicted the applicant of drug trafficking and gave him a one-year suspended prison sentence. His appeal against conviction was unsuccessful, although his prison sentence was reduced to six months, suspended. An appeal on points of law was also dismissed. The Federal Constitutional Court declared the applicant's constitutional complaint inadmissible, finding that he had not made use of all available remedies before the

German criminal courts. It also found that the measure in question did not give rise to any constitutional objections concerning the protection of human dignity or prevention of self-incrimination, as guaranteed under the German Basic Law.

In his application to the Court, the applicant complained that he had been subjected to inhuman and degrading treatment and that the use of evidence obtained illegally had deprived him of a fair trial. He relied, in particular, on Articles 3 and 6.1 ECHR.

II. The Court observed that the Convention did not, in principle, prohibit recourse to a forcible medical intervention that would assist in the investigation of an offence. However, any interference with a person's physical integrity carried out with the aim of obtaining evidence had to be the subject of rigorous scrutiny. True, account needed to be taken of the problems confronting States in their efforts to combat the harm caused to their societies through the supply of drugs. However, in the instant case, it had been clear before the impugned measure was ordered and implemented that the street dealer on whom it was imposed had been storing the drugs in his mouth and could not, therefore, have been offering drugs for sale on a large scale. That had also been reflected in the sentence. The Court was therefore not satisfied that the forcible administration of emetics had been indispensable to obtain the evidence. The prosecuting authorities could simply have waited for the drugs to pass out of the applicant's system naturally, that being the method used by many other member States of the Council of Europe to investigate drugs offences. Neither the parties nor the experts could agree on whether the administration of emetics was dangerous. It was impossible to assert that the method, which had already resulted in the deaths of two people in Germany, entailed merely negligible health risks. Moreover, in the majority of the German *Länder* and in at least a large majority of the other member States of the Council of Europe the authorities refrained from forcibly administering emetics, a fact that tended to suggest that the measure was considered to pose health risks.

As to the manner in which the emetics had been administered, the applicant had been held down by four police officers, which suggested a use of force verging on brutality. A tube had been fed through the applicant's nose into his stomach to overcome his physical and mental resistance. This must have caused him pain and anxiety. He had then been subjected to a further bodily intrusion against his will through the injection of another emetic. Account also had to be taken of the applicant's mental suffering while he waited for the emetic substance to take effect and of the fact that during that period he was restrained and kept under observation. Being forced to regurgitate under such conditions must have been humiliating for him, certainly far more so than waiting for the drugs to pass out of the body naturally.

As regards the medical supervision, the impugned measure had been carried out by a doctor in a hospital. However, since the applicant had violently resisted the administration of the emetics and spoke no German and only broken English, the assumption had to be that he was either unable or unwilling to answer any questions that were put by the doctor or to submit to a medical examination. As to the effects of the impugned measure on the applicant's health, it had not been established that either his treatment for stomach troubles in the prison hospital two and a half months after his arrest or any subsequent medical treatment he received had been necessitated by the forcible administration of the emetics.

In conclusion, the German authorities had subjected the applicant to a grave interference with his physical and mental integrity against his will. They had forced him to regurgitate, not for therapeutic reasons, but in order to retrieve evidence they could equally have obtained by less intrusive methods. The manner in which the impugned measure was carried out had been liable to arouse in the applicant feelings of fear, anxiety and inferiority that were capable of humiliating and debasing him. Furthermore, the procedure had entailed risks to the applicant's health, not least because of the failure to obtain a proper anamnesis beforehand. Although this had not been the intention, the measure was implemented in a way which had caused the applicant both physical pain and mental suffering. He had therefore been subjected to inhuman and degrading treatment and there had been a violation of Article 3 ECHR.

With regard to Article 6.1 ECHR, even if it had not been the authorities' intention to inflict pain and suffering on the applicant, the evidence had nevertheless been obtained by a measure which breached one of the core rights guaranteed by the Convention. Furthermore, the drugs obtained by the impugned measure had proved the decisive element in securing the applicant's conviction. Lastly, the public interest in securing the applicant's conviction could not justify allowing evidence obtained in that way to be used at the trial. Accordingly, the use in evidence of the drugs obtained by the forcible administration of emetics to the applicant had rendered his trial as a whole unfair.

As to the applicant's argument that the manner in which the evidence had been obtained and the use that had been made of it had undermined his right not to incriminate himself, what was at issue was the use

at the trial of "real" evidence – as opposed to a confession – obtained by forcible interference with the applicant's bodily integrity. While the privilege against self-incrimination was primarily concerned with respecting the will of the defendant to remain silent in the face of questioning and not to be compelled to provide a statement, the Court had on occasion given the principle a broader meaning so as to encompass cases in which coercion to hand over real evidence to the authorities was at issue. Consequently, the principle against self-incrimination was applicable to the present proceedings. In order to determine whether the applicant's right not to incriminate himself had been violated, several factors had to be taken into account. As regards the nature and degree of compulsion that had been used to obtain the evidence, the Court reiterated that the administration of the emetics amounted to inhuman and degrading treatment. The public interest in securing the applicant's conviction could not justify recourse to such a grave interference with his physical and mental integrity. Further, although German law afforded safeguards against arbitrary or improper use of the measure, the applicant, relying on his right to remain silent, had refused to submit to a prior medical examination and had been subjected to the procedure without a full examination of his physical aptitude to withstand it. Lastly, the drugs thereby obtained had been the decisive evidence supporting his conviction. Consequently, the Court would also have been prepared to find that allowing the use at the applicant's trial of evidence obtained by the forcible administration of emetics had infringed his right not to incriminate himself and therefore rendered his trial as a whole unfair. There had therefore been a violation of Article 6.1 ECHR.

Cross-references:

- *Denmark, Norway, Sweden and the Netherlands v. Greece* ("the Greek case"), no. 3321/67 *et al.*, Commission's report of 05.11.1969, Yearbook 12;
- *Ireland v. the United Kingdom*, Judgment of 18.01.1978, Series A, no. 25, *Special Bulletin ECHR* [ECH-1978-S-001];
- *X. v. the Netherlands*, no. 8239/78, Commission decision of 04.12.1978, *Decisions and Reports* (DR) 16;
- *Schenk v. Switzerland*, Judgment of 12.07.1988, Series A, no. 140;
- *Hurtado v. Switzerland*, Commission's report of 08.07.1993, Series A, no. 280;
- *Klaas v. Germany*, Judgment of 22.09.1993, Series A, no. 269, *Special Bulletin ECHR* [ECH-1993-S-006];
- *Peters v. the Netherlands*, no. 21132/93, Commission decision of 06.04.1994;
- *Chahal v. the United Kingdom*, Judgment of 15.11.1996, *Reports of Judgments and Decisions* 1996-V, *Special Bulletin ECHR* [ECH-1996-3-015];
- *Saunders v. the United Kingdom*, Judgment of 17.12.1996, *Reports of Judgments and Decisions* 1996-VI, *Bulletin* 1997/1 [ECH-1997-1-001];
- *D. v. the United Kingdom*, Judgment of 02.05.1997, *Reports of Judgments and Decisions* 1997-III, *Bulletin* 1997/2 [ECH-1997-2-011];
- *Ilijkov v. Bulgaria*, no. 33977/96, Commission Decision of 20.10.1997;
- *Raninen v. Finland*, Judgment of 16.12.1997, *Reports of Judgments and Decisions* 1997-VIII;
- *Teixeira de Castro v. Portugal*, Judgment of 09.06.1998, *Reports of Judgments and Decisions* 1998-IV;
- *Choudhary v. the United Kingdom* (dec.), no. 40084/98, 04.05.1999;
- *Selmouni v. France* [GC], no. 25803/94, *Reports of Judgments and Decisions* 1999-V, *Bulletin* 1999/2 [ECH-1999-2-008];
- *Tirado Ortiz and Lozano Martin v. Spain* (dec.), no. 43486/98, *Reports of Judgments and Decisions* 1999-V;
- *Labita v. Italy* [GC], no. 26772/95, *Reports of Judgments and Decisions* 2000-IV, *Bulletin* 2000/1 [ECH-2000-1-002];
- *Khan v. the United Kingdom*, no. 35394/97, *Reports of Judgments and Decisions* 2000-V;
- *Heaney and McGuinness v. Ireland*, no. 34720/97, *Reports of Judgments and Decisions* 2000-XII;
- *Keenan v. the United Kingdom*, no. 27229/95, *Reports of Judgments and Decisions* 2001-III, *Bulletin* 2001/1 [ECH-2001-1-003];
- *J.B. v. Switzerland*, no. 31827/96, *Reports of Judgments and Decisions* 2001-III;
- *Peers v. Greece*, no. 28524/95, *Reports of Judgments and Decisions* 2001-III;
- *Price v. the United Kingdom*, no. 33394/96, *Reports of Judgments and Decisions* 2001-VII;
- *P.G. and J.H. v. the United Kingdom*, no. 44787/98, *Reports of Judgments and Decisions* 2001-IX;
- *Mouisel v. France*, no. 67263/01, *Reports of Judgments and Decisions* 2002-IX;
- *Allan v. the United Kingdom*, no. 48539/99, *Reports of Judgments and Decisions* 2002-IX;
- *İçöz v. Turkey* (dec.), no. 54919/00, 09.01.2003;
- *Koç v. Turkey* (dec.), no. 32580/96, 23.09.2003;
- *Gennadi Naoumenko v. Ukraine*, no. 42023/98, 10.02.2004;
- *Krastanov v. Bulgaria*, no. 50222/99, 30.09.2004;
- *Nevmerzhitsky v. Ukraine*, no. 54825/00, 05.04.2005;
- *Schmidt v. Germany* (dec.), no. 32352/02, 05.01.2006.

Languages:

English, French.

Identification: ECH-2006-3-006

a) Council of Europe / **b)** European Court of Human Rights / **c)** Chamber / **d)** 05.10.2006 / **e)** 72881/01 / **f)** Moscow Branch of the Salvation Army v. Russia / **g)** *Reports of Judgments and Decisions of the Court* / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.22 **General Principles** – Prohibition of arbitrariness.
5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of worship.
5.3.27 **Fundamental Rights** – Civil and political rights – Freedom of association.

Keywords of the alphabetical index:

Association, religious / Association, registration / Association, statute, validity / Religion, association, registration.

Headnotes:

It is not for the State to determine whether religious beliefs or the means used to express them are legitimate.

There is no reasonable and objective justification for a difference in treatment of foreign nationals as regards their ability to exercise the right to freedom of religion through participation in the life of organised religious communities.

Where courts consider that the documentation submitted in connection with a request for registration of an association is insufficient, it is their task to elucidate the applicable legal requirements and give clear notice as to how to prepare the documents required.

Where the findings of courts are devoid of any factual basis, the refusal to register a religious association will constitute an unjustified interference with its right to freedom of religion and association.

Summary:

I. In 1997 a new law was enacted (the Religions Act) which required that religious associations established before 1997 bring their articles of association in compliance with it and re-submit them for registration. Failure to do so within the time-limit entailed the termination of the organisation's status as a legal entity. In 1999 the applicant branch was denied re-registration. The Moscow Justice Department based its refusal on the fact that the number of founding members was insufficient and that there were no documents to prove that the members were lawfully resident in Russia. It also held that since it had the word "branch" in its name and the founders were foreign nationals, the organisation was ineligible for re-registration as a religious organisation under Russian law. The applicant challenged that refusal before a district court, where the Justice Department argued that the applicant branch should be denied registration as it was a "paramilitary organisation". The Justice Department also contended that it was not legitimate to use the word "army" in the name of a religious organisation. The District Court endorsed that argument and held, in particular, that the applicant's articles of association failed to describe adequately the organisation's faith and objectives. A city court upheld that judgment on appeal. The applicant lodged applications for supervisory review with the City Court and the Supreme Court which were refused. In the meantime the time-limit for re-registration of religious organisations had expired and in 2001 a district court had struck off the applicant from the State Register of Legal Entities.

In its application to the European Court of Human Rights, the applicant complained that the refusal to grant it status as a legal entity violated its right to freedom of religion and freedom of association. It relied on Articles 9 and 11 ECHR.

II. The Court examined the two main arguments advanced by the domestic authorities for refusing the applicant's re-registration, namely its "foreign origin" and its internal structure and religious activities. The Court found no reasonable and objective justification for a difference in treatment of Russian and foreign nationals as regards their ability to exercise the right to freedom of religion through participation in the life of organised religious communities. Moreover, that ground for refusal had no legal foundation.

As to the applicant's faith and objectives, it had been the national courts' task to elucidate the applicable legal requirements and give the applicant clear notice

how to prepare the documents in order to be able to obtain re-registration. That had not been done. Accordingly, the courts could not rely on that ground for refusing registration. Moreover, it was not for the State to determine whether religious beliefs or the means used to express them were legitimate.

Although the applicant branch was organised using ranks similar to those used in the army and their members wore uniforms, it could not seriously be maintained that the applicant branch advocated a violent change of constitutional foundations or undermined the integrity or security of the State. The domestic findings on this point were devoid of factual basis. Nor was there any evidence to show that the applicant had contravened any Russian law or pursued objectives other than those listed in its articles of association. The domestic courts' finding in this regard lacked evidentiary basis and was arbitrary. To sum up, in denying the applicant's re-registration the authorities had not acted in good faith and had neglected their duty of neutrality and impartiality vis-à-vis the applicant's religious community. Accordingly, there had been an unjustified interference with its right to freedom of religion and association. There had therefore been a violation of Article 11 ECHR read in the light of Article 9 ECHR.

Cross-references:

- *Manoussakis and Others v. Greece*, Judgment of 26.09.1996, *Reports of Judgments and Decisions* 1996-IV;
- *United Communist Party of Turkey and Others v. Turkey,* Judgment of 30.01.1998, *Reports of Judgments and Decisions* 1998-I;
- *Sidiropoulos and Others v. Greece*, Judgment of 10.07.1998, *Reports of Judgments and Decisions* 1998-IV;
- *Hasan and Chaush v. Bulgaria* [GC], no. 30985/96, *Reports of Judgments and Decisions* 2000-XI;
- *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, nos. 29221/95 and 29225/95, *Reports of Judgments and Decisions* 2001-IX;
- *Metropolitan Church of Bessarabia and Others v. Moldova,* no. 45701/99, *Reports of Judgments and Decisions* 2001-XII;
- *Refah Partisi (Welfare Party) and Others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, *Reports of Judgments and Decisions* 2003-II;
- *Gorzelik and Others v. Poland* [GC], no. 44158/98, *Reports of Judgments and Decisions* 2004-I;
- *Church of Scientology Moscow and Others v. Russia* (dec.), no. 18147/02, 28.10.2004;
- *Partidul Comunistilor (Nepeceristi) and Ungureanu v. Romania*, no. 46626/99, *Reports of Judgments and Decisions* 2005-I;
- *Christian Democratic People's Party v. Moldova* (dec.), no. 28793/02, 22.03.2005;
- *Kimlya, Sultanov and Church of Scientology of Nizhnekamsk v. Russia* (dec.), nos. 76836/01 and 32782/03, 09.06.2005;
- *Tsonev v. Bulgaria,* no. 45963/99, 13.04.2006.

Languages:

English, French.

Systematic thesaurus (V18) *

* Page numbers of the systematic thesaurus refer to the page showing the identification of the decision rather than the keyword itself.

1 This chapter – as the Systematic Thesaurus in general – should be used restrictively, as the keywords in it should only be used if a relevant question is raised. This chapter is thus not used to establish statistical data; rather, the *Bulletin* reader or user of the CODICES database should only find decisions under this chapter when the subject of the keyword is an issue in the case.

2 Constitutional Court or equivalent body (constitutional tribunal or council, supreme court, etc.).

3 For example, rules of procedure.

4 For example, 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 For example, State Counsel, prosecutors, etc.

9 (Deputy) Registrars, Secretaries General, legal advisers, assistants, researchers, etc.

10 For example, assessors, office members.
11 (Deputy) Registrars, Secretaries General, legal advisers, assistants, researchers, etc.
12 Including questions on the interim exercise of the functions of the Head of State.
13 Referrals of preliminary questions in particular.
14 Enactment required by law to be reviewed by the Court.
15 Review *ultra petita*.
16 Horizontal distribution of powers.
17 Vertical distribution of powers, particularly in respect of states of a federal or regionalised nature.
18 Decentralised authorities (municipalities, provinces, etc.).

19 This keyword concerns questions of jurisdiction relating to the procedure and results of referenda and other consultations. For questions other than jurisdiction, see 4.9.2.1.
20 This keyword concerns decisions preceding the referendum including its admissibility.
21 Examination of procedural and formal aspects of laws and regulations, particularly in respect of the composition of parliaments, the validity of votes, the competence of law-making authorities, etc. (questions relating to the distribution of powers as between the State and federal or regional entities) are the subject of another keyword 1.3.4.3.
22 As understood in private international law.
23 Including constitutional laws.
24 For example, organic laws.
25 Local authorities, municipalities, provinces, departments, etc.
26 Or: functional decentralisation (public bodies exercising delegated powers).
27 Political questions.
28 Unconstitutionality by omission.
29 Including language issues relating to procedure, deliberations, decisions, etc.

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.

[34] Comprises court fees, postage costs, advance of expenses and lawyers' fees.
[35] For questions of constitutionality dependent on a specified interpretation, use 2.3.2.

[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.

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.
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.

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      - 4.4.4.1.1.2 Civil liability
      - 4.4.4.1.1.3 Criminal liability
    - 4.4.4.1.2 Political responsibility

4.5 **Legislative bodies**[56]
- 4.5.1 Structure[57]

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52 Including the body responsible for revising or amending the Constitution.
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.
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.
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.
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.
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 For example, 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 For example, signatures on electoral rolls, stamps, crossing out of names on list.
92 For example, in person, proxy vote, postal vote, electronic vote.
93 For example, *Panachage*, voting for whole list or part of list, blank votes.
94 For example, Auditor-General.

95 Parliamentary Commissioner, Public Defender, Human Rights Commission, etc.
96 For example, 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.

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.
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.
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.
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.

Page numbers of the alphabetical index refer to the page showing the identification of the decision rather than the keyword itself.

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