THE BULLETIN

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

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

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

The decisions are presented in the following way:

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

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

THE VENICE COMMISSION

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

Initially conceived as an instrument of emergency constitutional engineering against a background of transition towards democracy, the Commission since has gradually evolved into an internationally recognised independent legal think-tank. It acts in the constitutional field understood in a broad sense, which includes, for example, laws on constitutional courts, laws governing national minorities and electoral law.

Established in 1990 as a partial agreement of 18 member states of the Council of Europe, the Commission in February 2002 became an enlarged agreement, comprising all 47 member States of the organisation and working with some other 14 countries from Africa, America, Asia and Europe.

Secretariat of the Venice Commission
Council of Europe
F-67075 STRASBOURG CEDEX
Tel: (33) 3 88413908 - Fax: (33) 3 88413738
Venice@coe.int

Editors:

Sc. R. Dürr, T. Gerwin, D. Jones

A. Gorey, M.-L. Wigishoff

Liaison officers:

Albania ..... S. Sadushi / L. Pirdeni
Andorra ..... M. Tomàs Baldrich
Argentina ..... R. E. Gialdino
Armenia ..... G. Vahanian
Austria ..... R. Huppmann
Azerbaijan ..... R. Guliyev
Belarus ..... R. Filipchik / V. Shuklin
Belgium ..... A. Rasson Roland / R. Ryckeboer
Bosnia and Herzegovina ..... D. Kalember
Bulgaria ..... M. Panayotova
Canada ..... C. Marquis
Croatia ..... M. Stresec
Cyprus ..... N. Papanicolaou / M. Nicolatos
Czech Republic ..... E. Wagnerova
...../ S. Matochová / V. Göttinger / P. Novackova
Denmark ..... A.-M. Røddik Christensen
Estonia ..... K. Saaremaël-Stoilov
Finland ..... A. Niemi / G. Möller
France ..... M.-C. Meininger
Georgia ..... K. Kipiani
Germany ..... B.-O. Bryde / M. Böckel
Greece ..... T. Ziamou / O. Papadopoulou
Hungary ..... P. Paczolay / K. Kovács
Iceland ..... H. Torfason
Ireland ..... J. O'Grady
Israel ..... Y. Mersel
Italy ..... G. Cattarino
Japan ..... A. Takano
Kazakhstan ..... M. Berkaliyeva
Republic of Korea ..... B.-Y. Bae
Kyrgyzstan ..... K. E. Esenkanov
Latvia ..... L. Jurcena
Liechtenstein ..... I. Elkuch
Lithuania ..... E. Spruogis
Luxembourg ..... J. Jentgen
Malta ..... A. Ellul
Mexico ..... E. Ferrer Mac-Gregor Poisot
..... / C. Bolivar Galindo
Moldova ..... V. Sterbet
Monaco ..... D. Chagnollaud
Montenegro ..... S. Budisavljević
Netherlands ..... J. Spaans / M. van Roosmalen
Norway ..... C. Ostensen Noss
Poland ..... J. Królikowski
Portugal ..... A. Duarte Silva
Romania ..... G. Dragomirescu
Russia ..... E. Pyrickov
Serbia ..... N. Plavsic
Slovakia ..... G. Fet'kova
Slovenia ..... A. Mavčič
South Africa ..... O'Regan / J. Rycoft / A. Price
Spain ..... I. Borrajo Iniesta
Sweden ..... A. Blader / K. Dunnington
Switzerland ..... P. Tschümperlin / J. Alberini-Boillat
"The former Yugoslav Republic of Macedonia" .....
..... T. Janjic Todorova
Turkey ..... B. Sözen
Ukraine ..... V. Ivaschenko / O. Kravchenko
United Kingdom ..... A. Clarke / J. Sorabji
United States of America ..... P. Krug / C. Vasil
..... / J. Minear

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

Strasbourg, December 2007

CONTENTS

There was no relevant constitutional case-law during the reference period 1 January 2007 – 30 April 2007 for the following countries:

Republic of Korea, Luxembourg, Norway, Sweden (Supreme Administrative Court), Ukraine.

Précis of important decisions of the reference period 1 January 2007 – 30 April 2007 will be published in the next edition, *Bulletin* 2007/2, for the following country:

Latvia.

Armenia
Constitutional Court

Statistical data
1 January 2007 − 30 April 2007

- 146 applications have been filed, including:
  - 19 applications, filed by the President;
  - 1 application, filed by one-fifth of the total number of deputies;
  - 126 applications, filed by individuals.
- 89 individual applications were rejected as inadmissible, as the issues they raised did not fall within the Constitutional Court's jurisdiction;
- 27 cases heard and 27 decisions delivered, including 6 cases concerning the compliance of domestic law with the Constitution and 21 cases concerning the compliance with the Constitution of obligations set out in international treaties;
- 11 cases are currently under review.

Important decisions

Identification: ARM-2007-1-001

a) Armenia / **b)** Constitutional Court / **c)** Plenary / **d)** 22.12.2006 / **e)** DCC-669 / **f)** On the compliance of Article 31.2 and 31.3 of the RA Law on Political Parties with the Constitution of the Republic of Armenia / **g)** *Tegekagir* (Official Gazette) / **h)**.

Keywords of the systematic thesaurus:

2.1.3.2.1 **Sources** – Categories – Case-law – International case-law – European Court of Human Rights.
3.3.1 **General Principles** – Democracy – Representative democracy.
4.5.10.4 **Institutions** – Legislative bodies – Political parties – Prohibition.
4.9.3 **Institutions** – Elections and instruments of direct democracy – Electoral system.
5.2.1.4 **Fundamental Rights** – Equality – Scope of application – Elections.
5.3.27 **Fundamental Rights** – Civil and political rights – Freedom of association.
5.3.29.1 **Fundamental Rights** – Civil and political rights – Right to participate in public affairs – Right to participate in political activity.
5.3.39 **Fundamental Rights** – Civil and political rights – Right to property.
5.3.41.2 **Fundamental Rights** – Civil and political rights – Electoral rights – Right to stand for election.

Keywords of the alphabetical index:

Political party, participation in elections, right / Political party, dissolution / Political party, asset / Political activity.

Headnotes:

Political parties are free to decide on the format of their activities. They participate in elections to state representative bodies. It is the right of a political party, rather than an obligation, to put forward deputies as candidates for the National Assembly and Presidency.

Summary:

I. The Human Rights Defender asked the Constitutional Court to review the compliance of Article 31.2 and 31.3 of the Armenian Law on Political Parties with the Constitution. Under these provisions, if a political party has not participated in the National Assembly in any two successive elections, it will be wound up and its assets will pass to the State. The applicant suggested that these provisions were out of line with Articles 28.2 and 43.1 of the Constitution.

He argued that these provisions of the Law on Political Parties contradict Article 7.2 of the Constitution, under which political parties are formed freely and assist "the formation and expression of the political will of the nation". Even though a political party might not have received enough votes at the elections under the proportional system, its continued activity could still "assist the formation and expression of the political will of the nation".

The respondent countered that the right to form and to join a political party is not absolute. It may be restricted by law and the limitations within Article 5. Also, under Article 3, the *raison d'être* of a political party is to participate in the political life of the state and society.

II. The Constitutional Court enumerated the guarantees within the Constitution for political parties. Article 7 of the Constitution envisages that they are freely formed and that they promote the formulation and expression of the political will of the people. Their

activities may not contravene the Constitution and legislation nor may their practices contravene the principles of democracy.

Article 28 of the Constitution bestows on every citizen the right to freedom of association. This includes the right to form and to join trade unions and political parties. There are certain legal restrictions on membership of trade unions and political parties for those employed by the armed forces, police, national security, the Prosecutor's Office and the judiciary. Restrictions also apply to members of the Constitutional Court. The activities of associations can only be suspended or prohibited through judicial proceedings and in cases prescribed by the law.

The Constitutional Court pointed out that the legislation in question goes further than suspending or prohibiting political party activities. It provides for the winding up of the political party. This is not mentioned in the Constitution. There are a number of reasons justifying winding up of political parties. If the political party in question is wound up as a result of a decision by the Constitutional Court, then the logics of Article 31 of the Constitution dictate that the prohibition of political party activity is the result of the winding-up. Winding up is realised by the state body and courts of general jurisdiction. A logical interpretation of Article 31 of the Constitution also dictates that participation in the political life of society and state consists simply of obligatory participation in elections to the National Assembly by the proportional list. The other problem with the legislation is that the property of the political party passes to the Republic of Armenia. This is deprivation of property and does not comply with the requirements of Article 31 of the Constitution, as it makes no reference to prohibition of the activities of a political party and any judicial proceedings.

The Constitutional Court found that the relevant provisions of the Law on Political Parties were not in accordance with the Constitution. They have made the process of prohibiting political parties' activities easier, by bypassing the Constitutional Court. The limitations on freedom of association envisaged by the Constitution have been transformed, in the Law on Political Parties, into measures, which effectively freeze that freedom, by the winding-up procedure. This becomes even more significant when the provisions of the law and its amendments are called upon in the case of re-registration. Even if a political party is wound up, it still continues to exist as a legal entity, under international practice. It will then continue in existence as a general association; it still keeps its property.

Subparagraphs 1, 2 and 3 of Article 31.2 do not conform to the requirements of Articles 10 and 11 ECHR. Limitation of freedom of association does not meet the requirements of the case-law of the European Court of Human Rights. This provides that a political party's activities may only be cancelled in furtherance of a legal objective and where this is necessary for democratic society. No such objective can be discerned here.

Under Articles 8, 20 and 21 of the Law on Political Parties, the parties are free to define their modus operandi. They also participate in elections to state representative bodies; the nomination of candidates to the National Assembly and the Armenian Presidency is RA President is a party's right, not an obligation.

If, as subparagraphs 1, 2 and 3 of Article 31.2 envisage, parties which do not participate in the National Assembly as the result of elections carried out under the proportional system end up being wound up, this results in contradictory principles and regulation of legal relationships. This not only means that the law is disproportionate, but also jeopardises the right of freedom of association.

Jurisprudence from the European Court of Human Rights shows that cancellation and prohibition of party activities is possible only in exceptional cases, where the fundamental rights of citizens are in under threat. Encroachment on party activity must be in proportion to the goal which is to be achieved. Cancellation must be carried out by judicial process, within the framework of constitutional guarantees.

Analysis of Subparagraph 9, Article 15.2, Article 19.2, Article 5.5, as well as that of the other provisions mentioned above, demonstrates that winding up is based on the principle of free-will. It is not to become a tool to stamp out political party activity, without permission from the Constitutional Court.

Languages:

Armenian.

Identification: ARM-2007-1-002

a) Armenia / **b)** Constitutional Court / **c)** Plenary / **d)** 16.02.2007 / **e)** DCC-678 / **f)** On the compliance of the last sentences of Article 35.3 and 35.4, Article 49.e.2, the last sentence of Article 112.4 and 112.5 of the RA Law on Rules of Procedure of the National Assembly of the Republic of Armenia with the Constitution of the Republic of Armenia / **g)** *Tegekagir* (Official Gazette) / **h)**.

Keywords of the systematic thesaurus:

2.1.3.2.1 **Sources** – Categories – Case-law – International case-law – European Court of Human Rights.
3.3 **General Principles** – Democracy.
4.5.2 **Institutions** – Legislative bodies – Powers.
5.3.21 **Fundamental Rights** – Civil and political rights – Freedom of expression.
5.3.23 **Fundamental Rights** – Civil and political rights – Rights in respect of the audiovisual media and other means of mass communication.
5.3.24 **Fundamental Rights** – Civil and political rights – Right to information.

Keywords of the alphabetical index:

Media, television / Media, broadcasting, public broadcasting company / Parliament, power, nature / Parliament, session, broadcasting, obligatory.

Headnotes:

The Constitution contains exhaustive provision for decision-making powers on the part of the National Assembly, in terms of its relationships with other bodies. The phrase “issues of organising its activities” cannot and must not allow the Assembly to impose obligations on the Public Television and Radio Company, or to relieve it of them.

Summary:

I. The President of the Republic requested a review of the compliance with the Constitution of various provisions set out in the Law on the Rules of Procedure of the National Assembly. He suggested that these provisions were out of line with the Constitution, as they did not fully guarantee the independence of the Public Broadcaster. Under the Constitution, the state must guarantee the existence and activities of an independent public radio and television service offering a variety of informational, cultural and entertaining programmes.

The President emphasised that Article 62 of the Constitution requires the powers of the National Assembly to be defined by the Constitution. As a result, the National Assembly has no constitutional power to make a binding decision requiring the broadcast of its sessions by the Public TV and Radio Company, whether live or recorded. Moreover, Article 62 of the Constitution clearly defines the scope of issues to be regulated by the Law on Rules of Procedure of the National Assembly. The Rules of Procedure shall define the procedures of the activities of the National Assembly and its bodies. No other relationships are to be regulated by the Rules of Procedure.

The President observed that the independence of the Public Broadcaster is largely based on editorial independence, including the freedom to define programme policy and schedule. It is also based on the prohibition of state and political influence over these processes.

The respondent explained that Constitutional Amendments in this area required certain changes to the law, aimed at harmonising the provisions of the Law on Rules of Procedure of the National Assembly and the regulations on public telecommunications with the Constitutional Amendments and with the international obligations of the Republic of Armenia.

The respondent also emphasised that guaranteed publicity of the activities of the National Assembly is a democratic achievement and should not be abolished. The Assembly did not define in legislation the dates and times for the broadcasting of its sessions, but it did have the power to make decisions on the time of the broadcast and how much should be included.

The respondent contended that the freedom of this particular section of the media ought not to be absolute, as this would collide with other parties’ absolute rights in this sphere, which would result in conflicts of interest. The right of the public to receive information and opinions through the auspices of the Public TV and Radio Company is not absolute; certain restrictions apply, for the purposes set out in Article 43 of the Constitution. Article 27.3 of the Constitution guarantees freedom of media and broadcast, but this has to be viewed against the right of every individual to receive information on the coverage of Parliament’s activities.

II. The Constitutional Court noted that Article 27 of the Constitution on the one hand guarantees universal right to freedom of speech, and on the other hand attaches importance to the freedom of mass media and other means of information as a guarantee for

the fulfilment of these rights. It drew particular attention to the sentence “The state shall guarantee the existence and activities of an independent and public radio and television service offering a variety of informational, cultural and entertaining programmes”.

The Court emphasised that the freedom of mass media in particular implies independence and freedom to define programming policy, content and direction, as well as the exclusion of state or political influence over those processes. For these reasons, and also to meet Armenian international obligations, amendments to the Constitution introduced the regulation of mass media as a Constitutional Function. Article 83.2 of the Constitution states that “To ensure the goals of freedom, independence and plurality of broadcasting media, an independent regulatory body shall be established by the law…”

Article 27 of the Constitution and Recommendation R(96)10 on the Guarantee of the Independence of Public Service Broadcasting of the Committee of Ministers of the Council of Europe covers the issue of freedom of information and freedom of public broadcasting. Recommendation R(96)10 emphasises the importance of freedom of mass media within a democratic society. It recommends that Council of Europe member states put in place legislation, to secure the independence of public broadcasting. The independence of public service broadcasters is crucial. State funding should not prejudice their independence in programming matters.

The Constitutional Court also drew attention to the approach adopted by Recommendation 1641 (2004) 1 of the Parliamentary Assembly of the Council of Europe. This recommendation draws a distinction between public service broadcasting and broadcasting for purely commercial or political reasons, due to public service broadcasting’s specific remit, to operate independently of those holding economic and political power.

The Court emphasised the legal status of public television in Armenia, which is stipulated by Article 28 of the Law on Television and Radio Broadcasting. This defines the public television service as a state enterprise with a special status, provided by the State in order to guarantee the constitutional rights of people to receive political economic, educational, cultural, children’s, teenagers’, scientific, Armenian language and history, sport, entertainment and other popular information. Clearly, this provision is aimed at ensuring the rights of the individual to receive information freely and the means of achieving this purpose is to endow a television and radio company with a special status. The Constitutional Court noted, however, that the above law was enacted on 9 October 2000 and the National Assembly has not yet brought its provisions into compliance with the requirements of the Constitutional Amendments.

The Constitutional Court pointed out that the issue of the constitutionality of the disputed provisions is not connected with either the public significance of the object of legal regulation or with the expedience of broadcasting as such – the importance of these is not argued – it is rather connected with the legitimacy of regulation of legal relations between different entities. The legislature has, in this instance, interpreted the term “issues of organising its activities” − stipulated by part 1 of Article 62 of the Constitution − with the help of a provision of a law. If this interpretation is scrutinised in the light of Article 5, Article 6 Part 2, and Article 62 of the Constitution, it is demonstrably not legitimate, as the National Assembly’s decision-making powers in terms of its relationships with other bodies is covered exhaustively in the Constitution. The phrase “issues of organising its activities” cannot and must not allow it to impose obligations on the Public Television and Radio Company, or to relieve it of them.

The Constitutional Court noted the special role of the legislature within the democratic development of every country. The culture of parliamentarianism is one of civilised pluralism and dialogue, manifested when governance is exercised through representative bodies. Approaches towards the regulation of social relations and the legislature’s open and public implementation of its supervisory powers are vital guarantees for the establishment of the civil society. However, the European Court of Human Rights has emphasised several times that the activities of the authorities in democratic systems must be open to public scrutiny.

Over the past fifteen years, transparency of the legislature has also been established as a stable tradition of the Republic of Armenia. Guaranteeing such wide transparency is a principle of a democratic state under the rule of law, and shall be provided for on legal and organisational grounds. These grounds must be legitimate and in line with the doctrine of separation of powers. They must not violate the requirement for functional and structural independence of Constitutional institutions. Meanwhile, amendments to the Armenian Constitution set out new requirements for guaranteeing the freedom and independence of mass media. The National Assembly must now comply with them, by bringing its media legislation in line with the Constitution. The relevant laws are the Law on Television and Radio, adopted on 9 October 2000, the Law on Mass Information, adopted on 13 December 2003, the Law on Rules of Procedure of the National Assembly and relevant provisions within other legislation.

The Constitutional Court stated that the establishment of public service television and radio was not yet sufficient, under Armenia's international obligations. The issue needs swift resolution, as the problem is not fully solved by constitutional review of this or the other provisions. International practice shows that the way forward is to provide maximum publicity to parliamentary activities, whilst carefully preserving the independence of the media. It is up to the legislature to determine the way to achieve this.

Languages:

Armenian.

Azerbaijan
Constitutional Court

Important decisions

Identification: AZE-2007-1-001

a) Azerbaijan / **b)** Constitutional Court / **c)** / **d)** 27.12.2006 / **e)** / **f)** / **g)** *Azerbaijan*, *Respublika*, *Khalg gazeti*, *Bakinski rabochiy* (Official Newspapers); *Azerbaycan Respublikasi Konstitusiya Mehkemesinin Melumati* (Official Digest) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.14 **General Principles** – *Nullum crimen, nulla poena sine lege*.
5.3.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial.

Keywords of the alphabetical index:

Limitation period / Convictions, repeated.

Headnotes:

The Azerbaijan Criminal Code defines repeated and serial crimes. However, there is insufficient provision within the legislation for the inter-relationship between certain crimes. Questions arising from the statute of limitation have also been left open, giving rise to some difficulties in practice.

Summary:

At the request of the Prosecutor's Office, a review was carried out of Article 74.2 of the Criminal Code. It was found that the provision contained insufficient definition of the inter-relationship between certain crimes committed in Azerbaijan. Questions arising from the statute of limitations were also left open, giving rise to some difficulties in practice.

A request was made, in view of the above, for the interpretation of Article 75 of the Criminal Code in connection with the crimes enumerated in Article 74.2 of the Code.

The main purpose of the Criminal Code is to provide peaceful, secure living conditions, to protect human rights and freedoms, property rights, economic activity, public order and security, the environment and constitutional order of the Azerbaijan Republic. Its purpose is also crime prevention. To this end, the Code defines the basic principles of criminal responsibility and determines whether certain activities which pose a danger to individuals, the community or the state should be considered as crimes. It also determines the type of penalty such activities will incur, as well as other measures of a criminal and legal nature.

One such measure is set out in Article 75 of the Code. It deals with the issue of release from responsibility for crime, and other related matters. Specifically, a person will be deemed to be released from responsibility:

- Two years after the perpetration of a crime which does not represent a great danger to the public;
- Seven years after the perpetration of a crime of lesser importance;
- Twelve years after the perpetration of a serious crime;
- Fifteen years after the perpetration of an especially grave crime.

The limitation period begins to run from when the crime is committed until the time the court sentence comes into force. If the person then commits another crime, the limitation period for each crime will be calculated independently (see Article 75.2 of the Code).

If sufficient facts are available, criminal proceedings can be set in motion. If the limitation period has elapsed, a criminal prosecution cannot take place, and indeed any criminal prosecution or proceedings currently under way will have to be discontinued (see Article 39).

If the suspect is missing, the criminal prosecution may be suspended by the investigating authority, under Article 277 of the Criminal Code, so that it can try to trace him or her. If the circumstances justifying suspension of the proceedings no longer exist, they may be resumed by a decision by the investigating authorities, under Article 279. The limitation period will start to run again from the point of detention, appearance or confession of the suspect (see Article 75.3).

It should be noted that Article 75.2 deals with repeated or serial offences, which do not end with perpetration of one crime. The doctrine of serial offences is well-known, and does not necessarily belong within Article 74.2 of the Criminal Code. However, the failure to provide regulations to cover such conduct results in uncertainty in calculating the limitation period. As a result, such crimes are not dealt with in accordance with normative legal acts. This is out of line with various constitutional principles, including the judicial guarantee of rights and freedoms under Article 60 of Constitution.

The European Court of Human Rights attaches particular importance to limitation periods. In its decision in *Coeme and others v. Belgium*, regarding Article 7 ECHR (no punishment without law), the European Court noted that limitation may be defined as the statutory right of an offender not to be prosecuted or tried after the lapse of a certain period of time since the offence was committed. Limitation periods, which are a common feature of the domestic legal systems of the Contracting States, serve several purposes, which include ensuring legal certainty and finality and preventing infringements of the rights of defendants, which might be impaired if courts were required to decide on the basis of evidence which might have become incomplete because of the passage of time (see §146 of the decision).

The Plenum of the Constitutional Court decided that application of Article 75 of the Criminal Code to continuous and serial offences within the Criminal Code is in line with the Constitution.

Languages:

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

Belgium
Court of Arbitration

Important decisions

Identification: BEL-2007-1-001

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 30.01.2007 / **e)** 26/2007 / **f)** / **g)** *Moniteur belge* (Official Gazette), 13.04.2007 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Tax, dependent child / Child, dependent, tax allowance, discrimination / Family, tax concession / Divorce, tax, discrimination / Tax, income, allowance, child of divorced parent.

Headnotes:

The provision whereby the personal income tax allowance is increased in the case of widowers and widows who have not remarried and single parents if they have one or more dependent children is contrary to the principle of equality and non-discrimination (Articles 10 and 11 of the Constitution), in that divorced parents, even if they have not remarried, with one or more dependent children do not benefit from such an increase.

Summary:

I. The Brussels Court of Appeal sought clarification from the Court of Arbitration as to the compatibility of Section 6.2.1 of the law of 7 December 1988 reforming income tax and amending taxes treated as stamp duty with the principle of equality and non-discrimination (Articles 10 and 11 of the Constitution). The suggestion was made that it established a difference in treatment between widowers and widows who had not remarried and single parents with one or more dependent children, who enjoyed a higher personal income tax allowance and divorced parents, even if they had not remarried, with one or more dependent children, who did not benefit from the higher allowance.

II. The Court of Arbitration observed that this difference in treatment was based on an objective criterion, namely the civil status of the taxpayer.

The contested provision was designed to afford tax relief to beneficiaries on the grounds that they were bringing up their children alone. Because of the distinguishing criterion, it applied solely to taxpayers whose spouses were deceased or who had never married.

The Court noted, however, that the distinguishing criterion was such as to deprive some taxpayers of the benefit of the increased personal tax allowance solely on the grounds that they had been married. Yet there was no reason to rule out the possibility that a divorced taxpaying parent might have sole responsibility for a child. The Court pointed out in this connection that the drafting history of the contested provision did not reveal − and the Court itself did not see − any reason why this benefit should be refused to parents who, having to bring up a child on their own, might find themselves in a situation comparable to that of the categories of taxpayers who benefited from the increased allowance. It therefore concluded that the distinguishing criterion was not such as to justify the difference in treatment in question.

Languages:

French, Dutch, German.

Identification: BEL-2007-1-002

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 21.02.2007 / **e)** 28/2007 / **f)** / **g)** *Moniteur belge* (Official Gazette), 09.03.2007 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

2.1.1.4.9 **Sources** – Categories – Written rules – International instruments – International Covenant on Economic, Social and Cultural Rights of 1966.
3.13 **General Principles** – Legality.
3.16 **General Principles** – Proportionality.
5.4.2 **Fundamental Rights** – Economic, social and cultural rights – Right to education.

Keywords of the alphabetical index:

Treaty, standstill obligation / Education, school, funding, necessary / Education, fee / Education, higher, fee, progressive abolition / Education, free, limits.

Headnotes:

Articles 2.1 and 13.2 of the International Covenant on Economic, Social and Cultural Rights, read together, indicate that equal access to secondary education and higher education must progressively be introduced in the Contracting States with due regard for economic feasibility and the public finance situation specific to each State, and no longer in accordance with a strictly uniform timescale.

Article 13.2.b and 13.2.c of the Covenant do not therefore give rise to a right to free access to education other than primary education. These provisions mean, however, that once the Covenant is in force in respect of Belgium, i.e. with effect from 21 July 1983, Belgium may not introduce measures that run counter to the objective of equal access to higher education, which should be achieved, in particular, by progressively making such education free of charge.

Summary:

I. The non-profit-making association *"Fédération des Etudiant(e)s Francophones"* (Federation of French-Speaking Students) and two students at higher education establishments affected by the contested decree of 20 July 2005 applied to the Court to have the decree set aside. This French-Speaking Community decree "concerning additional fees charged for non-university higher education" validates the fees charged in addition to the enrolment fee by non-university higher education establishments.

The applicants claimed that Article 1 of the contested decree undermined the progressive introduction of free education imposed by Articles 2.1 and 13 of the International Covenant on Economic, Social and Cultural Rights and contravened the rule prohibiting the introduction of legislation less favourable than that which already existed (standstill obligation). They also contended that this article was at variance with the principle of equality (Articles 10, 11 and 24.4 of the Constitution), in that the validation of the fees in question concerned additional fees, the amount of which varied from one educational establishment to another, and provided for a ceiling below which these additional fees were no longer refundable. Furthermore, they argued that the rule requiring that education conform to the law (Article 24.5 of the Constitution) had been violated.

Article 2.c of the decree of 20 July 2005 allowed the educational establishments it covered to charge (as well as additional fees), at actual cost, for materials and services provided to the student The applicants suggested that this violated the rule prohibiting the introduction of legislation less favourable than that which already existed (standstill obligation), the principle of equality and the rule requiring conformity with the law.

II. The Court began by observing that the validation effected by Article 1 of the decree implied, retrospectively, the validation of the measures taken by the educational establishments that had charged additional fees. It pointed out that the rule that laws do not have a retrospective effect was a safeguard designed to prevent uncertainty of the law and that it could be justified only when it was essential to the achievement of an objective that was in the public interest. The Court observed that the drafting history of the decree showed that the aim behind it was to prevent educational establishments from having to refund the additional fees charged, because if they had to do so many of them would be forced to close, which would be detrimental to the quality of education. The survival of the schools was therefore the public interest objective pursued by the decree.

In the light of the constitutional safeguards concerning the right to education and to free education up to the school-leaving age (Article 24.3 of the Constitution) and Article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Court held that, in the case of primary education, in contrast to secondary and higher education, the objective of ensuring that it was free of charge must be achieved immediately.

The Court inferred from Articles 2.1 and 13.2 ICESCR, taken together, that equal access to secondary education and higher education must be progressively introduced in the Contracting Parties with due regard for economic feasibility and the public finance situation specific to each State, and not in accordance with a strictly uniform timetable.

The Court went on to observe that sub-paragraphs b and c of Article 13.2 ICESCR did not therefore give rise to a right to free access to education other than primary education. These provisions meant, however, that Belgium could not introduce measures that ran counter to the objective of fully equal access to higher education, which should be achieved, *inter alia*, by progressively making such education free of charge.

The rule prohibiting the introduction of legislation less favourable than that which already existed (standstill obligation), deriving from the Covenant, did not imply that fees charged in addition to the enrolment fee could not be increased after the entry into force of the Covenant (1983). Such an increase could be envisaged in the light, in particular, of the rise in the cost of living, the gross national product and average per capita income, and also on public-interest grounds. The Court went on to specify that the validation measure did not unjustifiably undermine the rule prohibiting the introduction of legislation less favourable than that which already existed (standstill obligation), because of the public-interest objective pursued by those who had drafted it. Putting schools in serious financial difficulty constituted a much greater obstacle to the right to education than the hindrance which Article 1 of the contested decree placed in the way of the aim of progressively ensuring that such education became free of charge.

Furthermore, the Court observed that the validation measure was accompanied both by safeguards designed to prevent disproportionate effects and by provisions intended, in the future, progressively to limit the level of the additional fees charged, until they were purely and simply abolished.

As for Article 2 Protocol 1 ECHR, also relied on by the applicants, the Court considered that this provision in no way established the principle that education should be free of charge.

With regard to the alleged violation of the principle of equality (Articles 10, 11 and 24.4 of the Constitution), the Court held that, through a concern not to endanger the survival of schools, those who had drafted the decree had prevented reimbursement of the fees charged. In so far as these fees were charged by the establishments concerned in the light of their own financial needs, the decree, in validating these fees within the limits laid down, had not introduced a measure that disproportionately affected the rights of the persons concerned.

The Court went on to specify that the ceiling established by the contested provision could not be considered to have been determined in a completely arbitrary manner. It held that those drafting the decree, observing that some establishments charged both supplementary enrolment fees and administrative expenses, might justifiably have considered it necessary to provide for a maximum sum total.

The fourth complaint, concerning the rule that education must conform to the law (Article 24.5 of the Constitution) was dismissed by the Court on the grounds that the contested provision itself set criteria making it possible to establish the extent to which additional fees could not be refunded.

For similar reasons, the Court rejected the complaint concerning Article 2.c, stating that the sums payable pursuant to this provision were designed to enable educational establishments to cover specific expenses incurred for the benefit of the students and did not therefore concern access to higher education. This provision was not therefore incompatible with Article 24.3 of the Constitution, taken together with Article 13 ICESCR and with the above-mentioned rule prohibiting the introduction of legislation less favourable than that which already existed (standstill obligation).

With regard to violation of the rule of conformity with the law (Article 24.5 of the Constitution), the Court stated that those who had drafted the decree had expressed themselves with sufficient clarity and that, in view of the nature of these expenses and the need to adapt quickly to changing requirements, they were entitled to instruct the government to draw up a list of such expenses. In response to the complaint that the constitutional principle of equality (Articles 10, 11 and 24.4 of the Constitution) had not been observed, the Court stated that it was only natural that the extent to which schools defrayed costs should vary, in so far as the cost of materials and services provided to students was not necessarily uniform, since the tuition provided, the courses and the teaching materials could vary from one establishment to another.

Languages:

French, Dutch, German.

Identification: BEL-2007-1-003

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 07.03.2007 / **e)** 33/2006 / **f)** / **g)** *Moniteur belge* (Official Gazette), 15.03.2007 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Expropriation for the benefit of a private individual / Expropriation, compensation, amount, calculation, market value / Housing, social, right to purchase / Housing, tenant, right to purchase a private flat.

Headnotes:

Article 16 of the Constitution provides a general safeguard against loss of enjoyment of property, regardless of the legal status of the party deprived of the property. When, however, as in the instant case, that party has special characteristics, the Court may take account of these in assessing whether the obligation to provide fair compensation has been met.

In principle, fair compensation, within the meaning of Article 16 of the Constitution, requires full compensation for the loss suffered. Compensation equal to the monetary value of the property, which is equal to its sale or market value, may be deemed to constitute fair compensation.

Summary:

The non-profit-making association "*Vereniging van Vlaamse Huisvestingsmaatschappijen"* and others applied to have Articles 3 and 4 of the Flemish Region's Decree of 15 July 2005, amending the decree of 15 July 1997 containing the Flemish Housing Code, set aside.

The contested provisions allow tenants of social housing (housing provided by virtue of government intervention and rented out on favourable terms to less-well-off sections of the population) to purchase the dwelling they rent, subject to compliance with a number of conditions. The contested decree provides that the price of the dwelling is equal to the monetary value of the property, which is itself equal to the sale or market value, as determined by a special official.

According to the applicants, these rules are *(inter alia)* at variance with the right of ownership provided for in Article 16 of the Constitution and, more particularly, the right to fair, prior compensation provided for therein.

The interest of the case lies mainly in the fact that Article 16 of the Constitution is considered largely as a safeguard in the event of expropriation by the public authorities, whereas this case concerns a forced sale benefiting private individuals.

The Court observed, firstly, that Article 16 of the Constitution provided a general safeguard against loss of enjoyment property, regardless of the legal status of the party deprived of the property. When, however, as in the instant case, that party had special characteristics, the Court could take account of these in assessing whether the obligation to provide fair, prior compensation had been met.

The Court then drew attention to the characteristics specific to social housing associations, which were associations with a social objective, their principal purpose being to improve the housing conditions of isolated, badly housed households. They were financed mainly by the Flemish Region and had to be approved by the Flemish Housing Society.

With regard to the question of fair compensation within the meaning of Article 16 of the Constitution, the Court considered that compensation equal to the market value was justified on the grounds that social housing associations, by virtue of their specific features, were in a different situation with regard to their property from a private owner, with the result that certain forms of harm or loss of amenity, such as inconvenience, harm stemming from the existence of a sentimental attachment and removal expenses, could be considered irrelevant in their case. The Court further took account of the fact that the decree also provided for a special compensation system, with housing associations taking part in a government investment programme.

With regard to the question of prior compensation, the Court considered that the seller enjoyed safeguards similar to those attached to compensation in the event of expropriation, given the particular nature of the forced sale and the fact that the transfer of ownership took place only once the tenant was prepared to pay, to that end, a price equal to the market value of the dwelling, as defined in the decree.

The applicants also contended that the proportionality requirement laid down in Article 16 of the Constitution and Article 1 Protocol 1 ECHR had been violated.

The Court held that any interference in the right of ownership must strike a fair balance between public-interest requirements and the need to protect the right to respect for property. The means used had to be proportionate to the end. In the case of housing policy, which was a central plank of the social and economic policies of modern societies, the Court, when checking that the right to decent housing (Article 23.3.3 of the Constitution) had been observed, was bound to respect the assessment of the public interest made by those who drafted regional laws, unless that assessment was manifestly unreasonable.

After establishing the circumstances in which the measure had been taken and the conditions attached to the social housing tenant's right to buy, and taking account of the guarantee of fair compensation afforded to the social housing association, the Court concluded that the contested provision did not disproportionately undermine the right of ownership of the applicants and dismissed the application to have it set aside.

Cross-references:

Cf. the virtually identically worded Judgment no. 62/2007 of 18.04.2007 (www.const-court.be).

Languages:

French, Dutch, German.

Bosnia and Herzegovina
Constitutional Court

Important decisions

Identification: BIH-2007-1-001

a) Bosnia and Herzegovina / **b)** Constitutional Court / **c)** Plenary session / **d)** 08.07.2006 / **e)** AP-953/05 / **f)** / **g)** *Službeni glasnik Bosne i Hercegovine* (Official Gazette), 20/07 / **h)** CODICES (Bosnian, English).

Keywords of the systematic thesaurus:

1.3.5.15 **Constitutional Justice** – Jurisdiction – The subject of review – Failure to act or to pass legislation.
2.1.1.1.1 **Sources** – Categories – Written rules – National rules – Constitution.
2.1.1.4.4 **Sources** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
2.1.3.2.1 **Sources** – Categories – Case-law – International case-law – European Court of Human Rights.
4.16.1 **Institutions** – International relations – Transfer of powers to international institutions.
5.1.3 **Fundamental Rights** – General questions – Positive obligation of the state.
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.
5.3.29.1 **Fundamental Rights** – Civil and political rights – Right to participate in public affairs – Right to participate in political activity.
5.3.41.2 **Fundamental Rights** – Civil and political rights – Electoral rights – Right to stand for election.

Keywords of the alphabetical index:

Constitutional right, violation, remedy, lack / Effective remedy, right, scope / High Representative for Bosnia and Herzegovina / High Representative for Bosnia and Herzegovina, competence / High Representative for Bosnia and Herzegovina, decision.

Headnotes:

Bosnia and Herzegovina failed to take sufficient steps to secure an effective legal remedy against decisions by the High Representative. It therefore did not comply with its obligation to ensure respect for human rights, which is enshrined in the Constitution and international treaties.

Summary:

I. Two appellants lodged appeals with the Constitutional Court against rulings by the Court of Bosnia and Herzegovina and the Supreme Court of Republika Srpska. In both cases, the courts had dismissed lawsuits filed by the appellants against decisions of the High Representative resulting in their removal from their posts which were respectively Deputy Head Operative for Administration in the Intelligence and Security Agency/Chairman of the National Assembly of Republika Srpska and President of the Serb Democratic Party. It was stated in the reasoning that decisions by the High Representative are not subject to review by courts in Bosnia and Herzegovina as they do not possess the characteristics of an administrative act within the meaning of domestic law.

The appellants alleged that their rights to fair trial and effective legal remedy had been breached, and that the legal remedies they had sought against the High Representative's decisions did not meet the criteria of effectiveness as prescribed by the European Convention on Human Rights. The domestic law currently in force makes no provision for the rectification of decisions by the High Representative or for the adoption of measures which might remedy breaches of these rights.

II. The Constitutional Court began by observing that the Office of the High Representative (OHR) is a high profile organisation charged under the Dayton Peace Agreement of 1995 with civilian implementation of the peace process in Bosnia and Herzegovina on behalf of the international community. The High Representative is in charge of coordinating the activities of international and civilian organisations and agencies operating in the country. He or she is nominated by the Peace Implementation Council and his or her appointment is confirmed by the Security Council of the United Nations, which also approved the Dayton Peace Agreement and authorised deployment of international troops in Bosnia and Herzegovina. Pursuant to Article 5 of Annex X of the General Framework Agreement for Peace in Bosnia and Herzegovina, the High Representative is the final authority regarding the interpretation of the Agreement on the Civilian Implementation of the Peace Settlement. Article 2.1.d of this Agreement accords the High Representative the discretion to resolve problems by taking binding decisions.

Pursuant to Paragraph XI.2 of the Conclusions of the Peace Implementation Conference held in Bonn on 9 and 10 December 1997, the Peace Implementation Council welcomed the High Representative's intention to use his final authority in theatre regarding interpretation of the Agreement on the Civilian Implementation of the Peace Settlement by making binding decisions on certain issues including (under sub-paragraph (c) thereof) measures to secure the Peace Agreement throughout Bosnia and Herzegovina and its Entities which "may include actions against persons holding public office".

In Paragraph X.4 of the Annex to the Declaration of the Peace Implementation Council reached in Madrid on 16 December 1998, it was stated that the Council acknowledged that leaders whom the High Representative bars from official office "may also be barred from running in elections and from any other elective or appointed public office and from office within political parties until further notice".

However, the Constitutional Court noted the Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative adopted at the 62nd plenary session (Venice, 11-12 March 2005), CDL-AD (2005) 004. Here, the European Commission for Democracy through Law (Venice Commission) stated that: "The main concern is however that the High Representative does not act as an independent court and that there is no possibility of appeal. The High Representative is not an independent judge and he has no democratic legitimacy deriving from the people of BiH. He pursues a political agenda, agreed by the international community, which serves the best interests of the country and contributes to the realisation of the Council of Europe standards. As a matter of principle, it seems unacceptable that decisions directly affecting the rights of individuals taken by a political body are not subject to a fair hearing or at least the minimum of due process and scrutiny by an independent court".

Having regard to the powers of the High Representative, described overleaf, and the Opinion of the Venice Commission, as well as the decisions of ordinary courts adopted in the proceedings initiated by the appellants against the High Representative's decisions, it follows that there is no effective legal remedy against the decisions of the High Representative available within the existing legal system of Bosnia and Herzegovina.

The Constitutional Court concluded that Article 1 ECHR obliges Member States "secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention". Article 1 makes no distinction between the type of rule or measure concerned, and does not exclude any part of the member States' "jurisdiction" from scrutiny under the Convention. The European Convention on Human Rights does not exclude the transfer of competences to international organisations provided that Convention rights continue to be "secured". Member States' responsibility therefore continues even after such a transfer (see, *mutatis mutandis*, judgment of the European Court of Human Rights, *Matthews vs. United Kingdom*, no. 24833/94 of 18 February 1999, paragraphs 29 and 32).

The state has a positive obligation to ensure the protection of individual rights and freedoms, as safeguarded in Section I of the Convention, even where the state has transferred competencies to international organisations.

However, the Constitutional Court had to decide whether the special status of the High Representative or the sources of his authority in the General Framework Agreement for Peace and various resolutions of the United Nations Security Council deprived the claimants of rights under the Constitution or prevented positive obligations attaching to Bosnia and Herzegovina to protect any such rights.

In the Constitutional Court's opinion, Bosnia and Herzegovina's public international law obligations to co-operate with the High Representative and to act in conformity with decisions of the UN Security Council cannot determine the constitutional rights of people within the jurisdiction of Bosnia and Herzegovina. Article II of the Constitution guarantees people in the territory of Bosnia and Herzegovina the highest level of internationally recognised human rights. It also provides that the European Convention on Human Rights is of direct application in Bosnia and Herzegovina and has priority over all other law. This does not, however, mean that the constitutional rights of people in the territory of the State are subject to limitations arising under public international law pursuant to other treaties such as the Charter of the United Nations. The reference in Article II of the Constitution to internationally recognised human rights is not to be interpreted as a limitation of rights. The rights under Article II depend on the Constitution and its interpretation. Many of the rights are derived from those formulated in international treaties, and the Constitutional Court has drawn extensively on the case-law of the European Commission and the Court of Human Rights when interpreting rights derived from the European Convention on Human Rights. Nonetheless, the rights themselves, as given effect in Bosnia and Herzegovina, owe their authority to the Constitution as a national constitution, not to international treaties. The constitutional source of the authority of the rights explains why the authorities of the Entities and other public institutions which have no legal personality in public international law are required to act in conformity with the rights as interpreted by the Constitutional Court, and also explains why the Constitutional Court is able to make final and conclusive determinations of the scope of constitutional rights when exercising its function of upholding "this Constitution" under Article VI of the Constitution.

The State has a positive obligation to ensure respect for human rights enshrined in the Constitution or arising from international treaties. The source of their legal force is in the Constitution, as, in the present case, is the individual's right to an effective legal remedy. Therefore, a question is raised as to whether Bosnia and Herzegovina has taken sufficient steps aimed at securing an effective legal remedy against individual decisions of the High Representative to comply with that aspect of its positive obligation. The reply of the Public Attorney's Office of Bosnia and Herzegovina did not convince the Constitutional Court that Bosnia and Herzegovina had undertaken any activities aimed at the protection of individuals' rights against the individual decisions by the High Representative.

The Constitutional Court was of the opinion that Bosnia and Herzegovina ought to have tried to draw attention to the alleged violations of constitutional rights, on the grounds of non-existence of an effective legal remedy, and thus seek to ensure the protection of constitutional rights of its citizens through the Steering Board of the Peace Implementation Council and Security Council of the United Nations, the bodies responsible for nominating and confirming the appointment of the High Representative.

Supplementary information:

As a consequence of this decision, the High Representative issued an Order on the Implementation of the Decision of the Constitutional Court of Bosnia and Herzegovina in the Appeal of Milorad Bilbija atal, no. AP953/05.

Languages:

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

Identification: BIH-2007-1-002

a) Bosnia and Herzegovina / **b)** Constitutional Court / **c)** Chamber / **d)** 21.12.2006 / **e)** AP-2271/05 / **f)** / **g)** *Službeni glasnik Bosne i Hercegovine* (Official Gazette), 38/07 / **h)** CODICES (Bosnian, English).

Keywords of the systematic thesaurus:

3.10 **General Principles** – Certainty of the law.
3.12 **General Principles** – Clarity and precision of legal provisions.
5.1.1.4.2 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Incapacitated.
5.3.5.1.2 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty – Non-penal measures.

Keywords of the alphabetical index:

Detention, lawfulness / Detention, psychiatric hospital / Mentally incapacitated, detention, preventative.

Headnotes:

There is a violation of the right to liberty and security in cases where persons who have committed a criminal offence in a state of mental incapacity are deprived of their liberty in a way which fails to meet the requirement of "lawfulness" under the European Convention on Human Rights, and where the legislation in force is imprecise, which may give rise to the arbitrary application of law.

Summary:

I. The appellants lodged appeals with the Constitutional Court claiming infringements of their rights to liberty and security under Article II.3.d of the Constitution and Article 5.1.e and 5.4 ECHR. The appellants had all been subject to security measures of compulsory psychiatric treatment and placement in a health-service institution, and had been placed in the Forensic Ward of the Correctional Institution of Zenica ("the Forensic Ward"). They argued that the requirements necessary to secure their freedom had been met by the adoption of new criminal legislation, that they could undergo medical treatment once they were discharged, and that the FBiH Criminal Procedure Code (CPC), which entered into force in 2003, contained no provisions to justify any further extension of their confinement. They suggested that the Forensic Ward was not an appropriate place to implement the security measures. They asked to be released, to continue their medical treatment once they were discharged, and to be placed under the supervision of a competent social welfare centre.

The lower courts had imposed measures of compulsory medical treatment and placement in institutions, which were in place under the former CPC, on the basis that they had committed various criminal offences in a state of mental incapacity. Proper medical examinations had been undertaken, to establish that they were all suffering from serious mental disorders which posed a threat to public safety, and they therefore had to be medically treated and confined in medical facilities. The new FBiH Criminal Code (the CC) entered into force in 2003. It stipulates that measures of compulsory psychiatric treatment can only be imposed on persons who committed criminal offences in a state of substantially diminished mental capacity or in a state of diminished mental capacity if there is a danger that this mental state might push the perpetrator into committing further criminal offences. The new CC no longer imposes the security measures described above on those who commit criminal offences in a state of mental incapacity. The appellants based their request for discharge on precisely these grounds.

II. The Constitutional Court observed that when new legislation was adopted, the case-law pertaining to the extension of the measures was viewed differently in the Federation of BiH. Since the adoption of the new CC and CPC, some courts have held that the persons concerned are no longer within their jurisdiction, but rather within the jurisdiction of social welfare centres. The courts have been imposing detention orders of up to thirty days in custody, under the new CPC, and then referring cases to the appropriate social welfare centre. The problem with the social welfare centres is that they have insufficient space and inadequate conditions for these persons. No procedure is set down. Consequently, mentally ill persons have been detained in the Forensics Ward in the absence of an official decision to justify it. Other courts have been adopting decisions on the extension of security measures already imposed in accordance with the former CPC and the Law on Protection of Persons with Mental Disabilities and the Law on Execution of Criminal Sanctions. The Constitutional Court observed that imprecise laws create scope for arbitrariness, which is demonstrated by the emergence of different case-law dealing with similar situations.

If courts consider that they have no jurisdiction, and the social welfare centres cannot cater for the persons being referred by the courts and have no set procedures, there is a danger that detention measures will extend to persons who committed criminal offences in a state of mental incapacity. This is inconsistent with the requirements that must be satisfied for the deprivation of liberty to be "in accordance with the law" as referred to in Article 5.1.e ECHR. This is accentuated because the other provisions, i.e. the Law on Protection of Persons with Mental Disabilities and Law on Execution of Criminal Sanctions have not been brought into accord with the new criminal legislation and they only refer to the former CPC which is no longer in force.

The Constitutional Court observed that where detention has been imposed on those who have committed criminal acts whilst in a state of mental incapacity, this tended to be carried out in the Forensics Ward. This is still the case, even though new criminal legislation is now in force. They were usually placed on the prison ward, although when the security measure of compulsory medical treatment and placement in an institution was imposed on the appellants, the Law on Execution of Criminal Sanctions was in effect, which required the detention to be carried out in an institution designated for such patients or in a special ward of such an institution. Only in exceptional cases was the detention to be in a special ward of a correctional institution. However, the Constitutional Court noted that actual institution was not defined in the Law on Execution of Criminal Sanctions, and the appellants were assigned to the special ward of the prison in Zenica as a rule rather than an exception.

The Constitutional Court held that the assignment of mentally ill persons in a special ward is, to a certain extent, in accordance with the domestic law which provides for such a possibility in exceptional circumstances. However, it is out of line with the European Convention on Human Rights which requires mentally ill persons to be detained in a hospital, clinic or other appropriate institution.

The appeals also raise the issue as to whether the appellants were afforded the possibility of having the court examine the period of detention at regular intervals, as envisaged by Article 5.4 ECHR. There are no procedural provisions in the new CPC regarding persons who carry out crimes in a state of mental incapacity. It only provides for the matter to be referred to a body in charge of social welfare issues for the purpose of initiating the relevant proceedings. Yet there is no definition of the expression "relevant proceedings". The Constitutional Court did not consider that the proceedings envisaged by the Law on Protection of Persons with Mental Disabilities could be "relevant proceedings" as mentioned in the new CPC. This law has never been updated or harmonised with the amendments to CPC. Its provisions simply refer to the procedure prescribed by the former CPC which is no longer in force, and thus the circle is closed.

One might assume that the procedural rules of administrative proceedings would apply to these persons, as they are applicable to cases handled by social welfare agencies. Alternatively, the procedural rules of non-contentious proceedings might apply, as they are applicable in cases of enforced detention of mentally ill persons who have not committed a criminal offence. See Law on Protection of Persons with Mental Disabilities. However, there is no explicit definition in any of the legal provisions currently in force of which "court" the appellants are supposed to address; the proceedings which should be conducted in order to review the legality of extended detention, the time limit for a review of any extension of the measure, the procedural guarantees at their disposal; and the time frame within which a decision must be taken.

The Constitutional Court observed that the competent authorities are obliged to undertake appropriate legislative and other measures to ensure that the deprivation of liberty of persons who committed criminal acts in a state of mental incapacity is carried out legally, as required by the European Convention on Human Rights. This includes placing them in an appropriate health institution, as well as measures to provide them with the right of access to a "court" within the meaning of Article 5.4 ECHR.

The Constitutional Court accordingly concluded that in the present case, the appellants' right to liberty and security under Article II.3.d of the Constitution and Article 5.1.e and 5.4 ECHR had been violated.

Languages:

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

Bulgaria
Constitutional Court

Statistical data
1 January 2007 – 30 April 2007

Number of decisions: 7

Important decisions

Identification: BUL-2007-1-001

a) Bulgaria / **b)** Constitutional Court / **c)** / **d)** 22.02.2007 / **e)** 12/06 / **f)** / **g)** *Darzhaven vestnik* (Official Gazette), 20, 06.03.2007 / **h)**.

Keywords of the systematic thesaurus:

1.1.4.4 **Constitutional Justice** – Constitutional jurisdiction – Relations with other institutions – Courts.
1.6 **Constitutional Justice** – Effects.
2.2.2.1 **Sources** – Hierarchy – Hierarchy as between national sources – Hierarchy emerging from the Constitution.
3.5 **General Principles** – Social State.
4.7.3 **Institutions** – Judicial bodies – Decisions.
4.10.2 **Institutions** – Public finances – Budget.
5.1.4 **Fundamental Rights** – General questions – Limits and restrictions.
5.4 **Fundamental Rights** – Economic, social and cultural rights.
5.4.19 **Fundamental Rights** – Economic, social and cultural rights – Right to health.

Keywords of the alphabetical index:

Social right, nature / Social right, direct enforceability / Medical assistance, right, enforceability / Case-law, discrepancy / Medical service, right, enforceability / Medical doctor, choice, free.

Headnotes:

When implementing social policy, the State may regulate social rights by law in accordance with the conditions provided for in the Constitution, when those rights are not universal, that is to say, when they do not apply to all citizens.

Summary:

A group of deputies from the 40th National Assembly alleged that Sections 4 and 5 of the Law on the Budget of the National Sickness Insurance Fund for 2007 were contrary to Article 52.1 of the Constitution.

In order to reach a decision, the Constitutional Court considered that it should take the following steps:

- it must interpret the Constitution, in particular Article 52.2 of the Constitution;
- it must interpret the content of the contested provisions of the law in question;
- it must rule as to the compliance of these provisions with the Constitution; and
- it must respond to the deputies' arguments concerning a decision of the Supreme Administrative Court.

1. Article 52.1 of the Constitution forms part of Chapter II, entitled "Fundamental rights and duties of citizens". It provides that citizens are entitled to sickness insurance and guarantees access to medical assistance and free medical services under the conditions and according to the procedures defined by law.

Chapter II of the Constitution sets out fundamental rights in various spheres. Interference by the state with some of them, such as the right to life, the right to individual freedom and to inviolability, the right to a private life, the right to freedom of thought and religion is inadmissible. In respect of other rights, however, such as the right to freedom and privacy of correspondence, the right to free choice of domicile or the right to the inviolability of the home, restrictions might be imposed under the conditions provided for in the Constitution. The right proclaimed in Article 52.1 of the Constitution differed from these rights in that it formed part of a category of social rights which were not universal and which did not apply to all citizens but, in appropriate cases, only to those in need of medical assistance. Those rights did not enjoy direct judicial protection.

It must therefore be borne in mind that the rights in question were not rights of the classic type. That particular feature of the rights in question necessarily required intervention on the part of the State. The Constitution itself stated that sickness insurance, and medical assistance in general, are to be provided according to the procedures defined by law.

2. Under Section 4 of the Law on the Budget of the National Sickness Insurance Fund for 2007, the National Fund was to define, each quarter, the number and the price of specialist medical activities prescribed.

The Law on the Budget of the National Fund encapsulated plans for the expenditure of the fund. It was in force for one year and indicated the amount of available financial resource, and the way the money was to be spent. Its nature did not correspond to the traditional definition of a law. It was accordingly necessary, when defining the meaning of the contested provisions, to take into account all the measures that regulated sickness insurance and how it related to the public.

That led the Court to examine the content of the principles and the general objectives set out in the Law on sickness insurance, of which the 2007 budget of the National Fund was only one function, in particular Section 4, which guaranteed insured persons free access to medical assistance within the framework of a package of medical services, the type, extent and volume of which were determined, and also the choice of a doctor who had entered into an agreement with the National Sickness Insurance Fund. The adjective "determined" indicated a reference to something precise and circumscribed.

3. Having analysed the above provisions of the Law on the Budget, in the context of various constitutional principles, the Court concluded that the provisions did not contravene the Constitution.

Firstly, the law did not interfere with the principles of sickness insurance and medical assistance in general, as referred to in Article 52.1 of the Constitution. Secondly, any budgetary legislation will necessarily reflect the country's economic situation. The Court could, not review alterations to those parts dealing with revenues or expenditure, which were the consequence of decisions by the executive powers. Thirdly, the law was supposed to be of general application and did not apply to distinct categories of sick persons or medical services.

Equality, in the legal sense of the word, meant that the law applied the same treatment to persons who were equal in law before the law in force in accordance with the objectives of the legal rules. None of the provisions of the Law on sickness insurance applied different treatment to persons needing medical care. On the contrary, Section 5.5 of the Law on sickness insurance proclaimed equality for anyone receiving medical assistance. Failure to comply with that rule did not mean that the legislation in question was unconstitutional.

The implementation of social rights was not an easy matter. The way in which the State fulfilled its commitments in respect of the organisation of sickness insurance, guaranteeing the provision of medical services and medical assistance, would determine whether its efforts in this sphere would attract praise or criticism.

In the light of the above, the Constitutional Court concluded that the application could not be granted.

4. The deputies who had made the reference referred in their application to a decision of the Supreme Administrative Court. This held that the fact that patients were no longer referred to a specialist by their general practitioner constituted a restriction of the constitutional principle of access to medical assistance for specialist treatment outside hospital, to consultations and examinations at medical centres and to diagnosis and medical assistance in hospital.

The divergence between the findings of the present decision and those of the decision of the Supreme Administrative Court is evident. The minor consideration on which the Constitutional Court based its finding of law consisted of Section 4 of the Law on sickness insurance, this, however, proved to be the major consideration on which the Supreme Administrative Court based its finding, since the two Courts provided different interpretations of that section.

The interpretations of the Constitutional Court and those of the Supreme Courts were acts of will. The will is the product of the spirit and cannot be true or false. Therein lay the difference between the interpretations provided by the courts and those provided by legal science. The latter interpretations were descriptive and their veracity might be a source of controversy, whereas the interpretations of the courts were mandatory; such interpretations "are what they are".

Last, it was a question of the relationship between the supremacy of a law and the supremacy of the Constitution. In such cases, the contradiction could be overcome by normative means.

The Constitutional Court accordingly dismissed the application. Three of the judges who signed the decision expressed dissenting opinions.

Languages:

Bulgarian.

Canada
Supreme Court

Important decisions

Identification: CAN-2007-1-001

a) Canada / **b)** Supreme Court / **c)** / **d)** 27.02.2007 / **e)** 30762 / **f)** Charkaoui v. Canada (Citizenship and Immigration) / **g)** *Canada Supreme Court Reports* (Official Digest), [2007] 1 S.C.R. xxx / **h)** Internet: http://scc.lexum.umontreal.ca/en/index/html; 268 *Dominion Law Reports* 1; 351; *National Reporter* 1; [2007] S.C.J. no. 9 *(Quicklaw)*; CODICES (English, French).

Keywords of the systematic thesaurus:

1.6.5.5 **Constitutional Justice** – Effects – Temporal effect – Postponement of temporal effect.
5.3.3 **Fundamental Rights** – Civil and political rights – Prohibition of torture and inhuman and degrading treatment.
5.3.13.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.
5.3.13.8 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right of access to the file.
5.3.13.24 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to be informed about the reasons of detention.
5.3.13.25 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to be informed about the charges.

Keywords of the alphabetical index:

Foreigner, detention / Foreigner, deportation / Foreigner, immigration, legislation / Immigration / Return on grounds of public security / Deportation, prior, detention, pending / Detention, judicial review / Detention, pending expulsion / Detention, length.

Headnotes:

The Immigration and Refugee Protection Act's procedure for the judicial confirmation of certificates and review of detention unjustifiably infringes Section 7 of the Canadian Charter of Rights and Freedoms because it allows for the use of evidence that is never disclosed to the person named in the certificate without providing adequate measures to compensate for this non-disclosure. The procedure also unjustifiably infringes Sections 9 and 10.c of the Canadian Charter of Rights and Freedoms because it denies a prompt hearing to foreign nationals by imposing a 120 day embargo, after confirmation of the certificate, on applications for release.

Summary:

I. The Immigration and Refugee Protection Act (IRPA) allows for the issuance of a certificate declaring that a foreign national or permanent resident is inadmissible to Canada on grounds, among others, of security, which leads to the detention of the person named in the certificate. The certificate and the detention are both subject to review by a judge of the Federal Court, in a process that may deprive the person of some or all of the information on the basis of which the certificate was issued or the detention ordered. Once a certificate is issued, a permanent resident may be detained, and the detention must be reviewed within 48 hours; in the case of a foreign national, the detention is automatic and that person cannot apply for review until 120 days after a judge determines that the certificate is reasonable. Both the Federal Court and the Federal Court of Appeal upheld the constitutional validity of the certificate scheme.

II. The Supreme Court unanimously found that the IRPA's procedure for the judicial approval of certificates was inconsistent with the Canadian Charter of Rights and Freedoms, and hence of no force or effect. This declaration was suspended for one year from the date of the judgment. However, Section 84.2 was struck and Section 83 modified so as to allow for review of the detention of a foreign national both before and after the certificate has been deemed reasonable.

While the deportation of a non-citizen in the immigration context may not in itself engage Section 7 of the Charter, features associated with deportation may do so. Here, Section 7 of the Charter is clearly engaged because the person named in a certificate faces detention pending the outcome of the proceedings and because the process may lead to the person's removal to a place where his or her life or freedom would be threatened. Further, the IRPA's impairment of the named person's right to life, liberty and security is not in accordance with the principles of fundamental justice. The procedure for determining whether a certificate is reasonable and the detention review procedure fail to assure the fair hearing that Section 7 of the Charter requires before the state

deprives a person of this right. While the IRPA procedures properly reflect the exigencies of the security context, security concerns cannot be used, at the Section 7 of the Charter stage of the analysis, to excuse procedures that do not conform to fundamental justice. The IRPA scheme includes a hearing and meets the requirement of independence and impartiality, but the secrecy required by the scheme denies the person named in a certificate the opportunity to know the case put against him or her, and hence to challenge the government's case. Similarly, without knowledge of the information put against him or her, the named person may not be in a position to raise legal objections relating to the evidence, or to develop legal arguments based on the evidence. This, in turn, undermines the judge's ability to come to a decision based on all the relevant facts and law. If Section 7 of the Charter is to be satisfied, either the person must be given the necessary information, or a substantial substitute for that information must be found. The IRPA provides neither. The infringement of Section 7 of the Charter is not saved by Section 1 of the Charter. The IRPA does not minimally impair the rights of persons named in certificates. Less intrusive alternatives developed in Canada and abroad, notably the use of special counsel to act on behalf of the named persons, illustrate that the government can do more to protect the individual while keeping critical information confidential.

The detention of foreign nationals without warrant does not infringe the Section 9 of the Charter guarantee against arbitrary detention. The triggering event for the detention of a foreign national is the signing of a certificate stating that the foreign national is inadmissible on grounds of security, violation of human or international rights, serious criminality or organised criminality. The security ground is based on the danger posed by the named person, and therefore provides a rational foundation for the detention. However, the lack of review of the detention of foreign nationals until 120 days after the reasonableness of the certificate has been judicially confirmed (Section 84.2) infringes the guarantee against arbitrary detention, which encompasses the right to prompt review of detention under Section 10.c of the Charter. The infringement of Sections 9 and 10.c of the Charter is not justified under Section 1 of the Charter. The IRPA provides permanent residents who pose a danger to national security with a mandatory detention review within 48 hours. It follows that denial of review for foreign nationals for 120 days after the certificate is confirmed does not minimally impair the rights guaranteed by Sections 9 and 10.c of the Charter.

The principles of fundamental justice and Section 12 of the Charter guarantee against cruel and unusual treatment require that, where a person is detained or is subject to onerous conditions of release for an extended period under immigration law, the detention or the conditions must be accompanied by a meaningful process of ongoing review that takes into account the context and circumstances of the individual case. Extended periods of detention pending deportation under the certificate provisions of the IRPA do not violate Sections 7 and 12 of the Charter if accompanied by a process that provides regular opportunities for review of detention, taking into account all of the relevant factors. However, this does not preclude the possibility of a judge concluding at a certain point that a particular detention constitutes cruel and unusual treatment or is inconsistent with the principles of fundamental justice.

Languages:

English, French (translation by the Court).

Croatia
Constitutional Court

Important decisions

Identification: CRO-2007-1-001

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 22.11.2006 / **e)** U-I-4497/2005 / **f)** / **g)** *Narodne novine* (Official Gazette), 2/07 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

4.11.2 **Institutions** – Armed forces, police forces and secret services – Police forces.
5.3.13.17 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Rules of evidence.
5.3.35 **Fundamental Rights** – Civil and political rights – Inviolability of the home.

Keywords of the alphabetical index:

Investigation, criminal / Search, warrant, exception / Police, powers.

Headnotes:

When the police enter a house without a search warrant, they are not simply seeking to apprehend somebody in order to secure their presence at a criminal trial. They are also looking to gather evidence, which shows grounds for suspecting or accusing that person of a criminal offence. The Croatian Constitution and national legislation both lay down strict conditions for such searches, including the probability that the home of the person being apprehended contains evidence, and that witnesses are present during the search. Only if the police comply with these conditions are citizens protected from excessive encroachment into the constitutionally guaranteed inviolability of the home, while the authorities are able to restrict rights, in proportion to the requirements of criminal proceedings.

Summary:

The Constitutional Court rejected a proposal for the constitutional review of Article 216.1.1 of the Criminal Procedure Act (*Narodne novine*, nos. 110/97, 27/98, 58/99, 112/99, 58/02 and 143/02; hereinafter: ZKP). The complainant argued that this provision contravened Article 34 of the Constitution, on the basis that the legislator had extended police powers to search a dwelling or other premises without a search warrant beyond the limits set by the Constitution. The provision in question fundamentally violated the inviolability of the home, a basic human right, under the Constitution. The Constitution explicitly defines the conditions under which the police authorities may enter a suspect's home or other premises without a warrant. The law cannot change or extend these conditions.

Under Article 216.1.1 ZKP, the police may carry out a search of a dwelling or other premises without a search warrant where a special law authorises them to do so, provided that the conditions in Article 211.1 ZKP exist. Under this article, searches are carried out of premises, movable goods or persons in order to trace perpetrators of crimes, or objects which are of relevance to the proceedings, or which may be located at certain premises or with a certain person.

Article 34 of the Constitution states that homes are inviolable, and that the courts alone are empowered to order the search of a home or other premises. A search warrant is necessary, along with a valid written statement of reasons. The tenant or his representative are entitled to be present when the search is conducted, and there must also be two witnesses. The police may, however, enter somebody's home or premises to conduct a search, without the occupier's consent, a warrant or witnesses, where this is indispensable in order to pursue a warrant for arrest or to apprehend an offender, or to prevent serious danger to public life and health or buildings of public importance. A search with a view to finding or securing evidence which is probably to be found in the home of the perpetrator of a criminal offence may only be carried out in the presence of witnesses.

The Constitutional Court stated that the inviolability of the home is one of the basic rights and fundamental freedoms, protecting a home from the unauthorised entry of other people, and that of government bodies. Parliament usually regulates the protection of the home from entry by others while the Constitution and other legislation govern any derogation from the principle of inviolability of the home. Sometimes, derogations from this principle are unavoidable, in order to realise another purpose defined in the Constitution or law. However, appropriate regulations must be put in place in advance, to justify any such derogation. Where competent government authorities are authorised to enter the home of a person without

permission, such entry must be carried out in accordance with the law. The government authorities cannot themselves create an independent definition of the circumstances under which this is possible.

Given that there is provision under the Constitution for searches of homes or premises under certain conditions, when it is necessary to apprehend criminal offenders (where the probability exists that they broke the law and there is evidence to back up this submission) upon review of the disputed provision of the ZKP against the background of Article 34 of the Constitution, the Constitutional Court found that the provision conformed to the Constitution.

Where the Constitution allows the constitutional rights of suspects to be restricted so that they can be apprehended, it cannot be considered a breach of the Constitution to regulate, under the same conditions, the gathering of evidence about the crime for which they are under suspicion. The disputed provision does not bestow any extra powers upon the police beyond those in Article 34 of the Constitution. It allows the police, during permitted entry into a home or other premises, to apprehend an offender and to gather other evidence about the crime in question.

When the police authorities enter property without a search warrant, they will not only be looking to secure an arrest, but also to gather evidence about the crime. The Constitution and national legislation lay down additional restrictive conditions for the conduct of these searches, including the likelihood that the evidence is in the home of the person being arrested or apprehended, and that there are witnesses present during the search. Only if the police act in accordance with these conditions are citizens protected from excessive encroachment into the inviolability of their homes, whilst the authorities may, at the same time, restrict rights and freedoms on a temporary basis, so that proceedings can go ahead, against the perpetrator of the crime.

Languages:

Croatian, English.

Identification: CRO-2007-1-002

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 20.12.2006 / **e)** U-I-1569/2004 and others / **f)** / **g)** *Narodne novine* (Official Gazette), 2/07 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

1.2.2.1 **Constitutional Justice** – Types of claim – Claim by a private body or individual – Natural person.
1.2.4 **Constitutional Justice** – Types of claim – Initiation *ex officio* by the body of constitutional jurisdiction.
1.3.2.2 **Constitutional Justice** – Jurisdiction – Type of review – Abstract / concrete review.
3.9 **General Principles** – Rule of law.
3.10 **General Principles** – Certainty of the law.
4.7.1.1 **Institutions** – Judicial bodies – Jurisdiction – Exclusive jurisdiction.
4.7.7 **Institutions** – Judicial bodies – Supreme Court.

Keywords of the alphabetical index:

Supreme Court, jurisdiction / Law, uniform application / Judgment, revision, extraordinary.

Headnotes:

The current legal regulation of the grounds for filing a revision on points of law (an extraordinary legal remedy) is not acceptable in constitutional law, as it precludes the Supreme Court from realising its constitutional task of ensuring the uniform application of law and equality of citizens (Article 118.1 of the Constitution). It also disrupts the constitutional jurisdiction between the Supreme Court and the Constitutional Court.

Summary:

The Constitutional Court instituted proceedings for the constitutional review of Articles 382.1.1, 382.1.2, 382.2, 382.3 and 497 of the Civil Procedure Act (see *Narodne novine*, nos. 53/91, 91/92, 112/99, 88/01 – Article 50 of the Arbitration Act, 117/03, hereinafter: ZPP). It directed the repeal of the above provisions, by 15 July 2008 at the latest.

Several individuals asked the Court to review the conformity with the Constitution of Article 382.1.1 ZKP, on the basis that this provision limited the possibility of equal judicial protection before the Supreme Court of the Republic of Croatia for all citizens. This would mean that it infringed Articles 14 and 26 of the Constitution.

The Constitutional Court noted that it had reviewed the conformity of the Constitution in earlier proceedings, and had not accepted the arguments (see Decisions nos. U-I-1016/2000 of 22 November 2000, and U-I-396/2002 and others dated 10th March 2004).

On this occasion, the Constitutional Court considered the petitioners' proposal for the constitutional review of Article 382.1.1. It also launched proceedings of its own volition, for the constitutional review of Articles 382.1.1, 382.1.2, 382.2, 382.3 and 497 ZPP. In reviewing the petition, it had found that the grounds for the unacceptability in constitutional law of the legal regulation of the revision of points of law are wider and somewhat different from those the petitioners had put forward.

Under Article 382, parties may file a motion for the revision on a point of law against a judgment at second instance if:

- the amount in the part of the judgment at issue exceeds 100.00 kunas;
- the judgment in question was delivered in proceedings arising from a petition filed by an employee against a decision to terminate his or her contract of employment.

Where Article 382 precludes parties from filing a motion on points of law, they may still be able to file one if the possibility of a motion for revision was specified in the order for judgment by the second instance court. A second instance court may allow this if the dispute raises issues of substantive or procedural law of importance in guaranteeing the uniform application of law and the equality of citizens. In the statement of reasons for its decision, the second-instance court must indicate the legal grounds and points of law on the basis of which it allowed the revision, and explain the importance of the decision in terms of securing the uniform application of the law and equality of citizens. Under Article 497, a motion for revision on points of law will only be admissible before the commercial courts if the amount in dispute exceeds 500,000.00 kunas.

The provisions of ZPP set out various procedural rules, on the basis of which courts take decisions about fundamental rights and obligations, personal and family relationships, employment and commercial and property law.

Revision on points of law differs from ordinary legal remedies in that it is only available in cases stipulated by law. It is the Supreme Court which takes the decision, as the highest court in the land. Parties to the proceedings may use revision on points of law to dispute second-instance judgments delivered in appeal proceedings against judgments by first-instance courts, and to dispute rulings of second-instance courts which determine judicial proceedings. Revision on points of law must be requested within thirty days from the date the second-instance judgment was handed down.

The traditional legal connection between revision on points of law and the Supreme Court has established the status of this remedy as an extraordinary legal one, used by the Supreme Court to fulfil its constitutional task of ensuring the uniform application of law and equality of citizens in Croatia. See Article 118.1 of the Constitution.

The Constitutional Court noted that the legal requirements for filing a motion for revision on points of law in civil proceedings have been changed several times. As a result, they are less stringent in their requirements. Between 1991 and 1999, the legal grounds were defined very loosely. From 1999 until the present decision by the Constitutional Court, the grounds were pared down even further, partly because of controversy and partly because it was no longer possible to file such a motion in some cases, including commercial disputes. The Constitutional Court observed that "extraordinary revision" is a new legal concept, introduced by Article 382.2 ZPP. As such, it cannot be considered to be an effective legal remedy, guaranteeing the uniform application of laws and equality of citizens, being dependent upon the second instance court's decision. The Supreme Court has no influence on whether the motion will be filed.

The Constitutional Court stated that the reduction of the legal grounds for filing a motion for revision on points of law resulted in a narrowing of the Court's jurisdiction to decide on constitutional complaints against individual court judgments that violate human rights and fundamental freedoms, once all other legal remedies have been exhausted. See Article 128.4 of the Constitution, and Article 62 of the Constitutional Act on the Croatian Constitutional Court. This has hampered the jurisdiction of the Supreme Court to secure uniform application of laws and equality of citizens.

Since 2000, most constitutional complaints have been filed against second-instance judgments in civil law matters, where revision on points of law is not permitted. The Constitutional Court found that constitutional complaint, rather than revision, had become the legal remedy ensuring the uniform application of laws and equality of citizens. In some cases, the second instance courts were taking different legal stances in the same or similar factual or legal situations. Such a state of affairs is in contravention of Articles 118.1 and 128.4 of the Constitution.

The Constitutional Court also discussed a new remedy within the legal order with a view to ensuring the uniform application of laws – a request for the uniform application of laws. This is provided for in Article 59 of the Judicial Act (*Narodne novine* no. 150/05) and falls under the jurisdiction of the Supreme Court. The remedy does not solve the problem, because it does not result in full revision and there are limited rights of appeal. It empowers the Supreme Court to give a legal opinion on the uniform application of a certain act which is binding for courts in all proceedings to which the legal opinion refers, and in which no legally effective judicial decision has hitherto been made.

The Constitutional Court emphasised that the revision and cassation powers vested in the Supreme Court in proceedings of revision on points of law undoubtedly confirm revision on points of law as the fundamental and most important legal remedy of the Supreme Court in ensuring the uniform application of law and equality of citizens. The current system of legal regulation of the grounds for filing for revision on points of law precludes the Supreme Court from realising its constitutional task within the meaning of Article 118.1 of the Constitution.

Cross-references:

- Former Report to the Croatian Parliament on the monitored disruption of jurisdiction between the Supreme Court and the Constitutional Court of the Republic of Croatia “Report U-X-835/2005 of 24.02.2005, *Bulletin* 2005/1 [CRO-2005-1-005]”.

Languages:

Croatian, English.

Identification: CRO-2007-1-003

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 20.12.2006 / **e)** U-I-1706/2004 / **f)** / **g)** *Narodne novine* (Official Gazette), 3/07 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
5.1.4 **Fundamental Rights** – General questions – Limits and restrictions.
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:

Employment, contract / Social justice, value.

Headnotes:

Entrepreneurial and market freedom cannot be achieved by complete freedom of contract and in the absence of any employment regulations. Parliament may restrict freedom of contract, in order to protect the employee, who is the weaker party to the employment contract.

Summary:

I. The Constitutional Court rejected a proposal for the constitutional review of Articles 8.2 and 10 of the Labour Act (see *Narodne novine*, nos. 38/95, 54/96, 65/95, 17/01, 82/01, 114/03, 123/03, 142/03 and 30/04).

The petitioner, a stock company from Zagreb, suggested that the above provisions of the Labour Act infringed the right to entrepreneurial freedom, guaranteed in Article 49.1 of the Constitution. Their interpretation of this right was that it was entirely up to entrepreneurs to decide as to how to achieve maximum profit. They argued that profit is achieved by increasing income “through the interdependence and full control of expenses”. In their opinion, the various requirements and contractual rules contained in the disputed provisions of the Labour Act constituted attempts to coerce an employer into accepting new employees, which curbs entrepreneurial freedom.

Article 8 of the Labour Act states that where an employer enters into a contract with an employee which has the characteristics of a contract of employment (taking into account the nature of the work), then such a contract will be treated as such, unless the employer can prove otherwise.

Article 10 provides for the possibility of employment contracts covering a specific time period, where the termination of the contract will have been determined in advance by such factors as a deadline, the completion of a particular task or by the occurrence of

a specific event. It precludes the employer from making a series of consecutive contracts of employment covering the same job, for a continuous period of three years, unless this is necessary to provide temporary cover for an absent worker or by collective agreement. The article also provides that:

- Termination in less than two months shall not be considered as termination of the three-year period under paragraph 2.
- A contract of employment for a definite period shall terminate upon the expiry of the term stipulated therein.
- If a contract of employment made for a definite period contravenes the provisions of this Act or if the worker continues to work for the employer after the expiry of the term for which the contract was made, the employee will be deemed to have entered into a contract for an indefinite period of time.
- The employer shall inform those employees on fixed term contracts about the possibility of work which would enable them to enter into contracts with him for an indefinite period. He must also offer them the same opportunities for further education and training as employees with employment contracts for an indefinite period."

II. The Constitutional Court observed that Article 2.4.1 of the Constitution gave the legislator the authority to regulate economic, legal and political relationships. In carrying out such regulation, however, the legislator must respect the demands placed upon him by the Constitution, especially those stemming from the principle of the rule of law and those that protect specific constitutional benefits and values (such as freedom, equality and social justice). The Constitutional Court found that Articles 3, 16 and 49.1 of the Constitution were of particular relevance in terms of the constitutional review of the disputed provisions.

In the Republic of Croatia, the legal basis for employment relations under Article 8.1 of the Labour Act is the contract of employment. Business relationships are also possible, between individuals, which are work-related but which are not in fact employment relationships. However, if an employer enters into a contract which is in the nature of a job giving rise to an employment situation, under Article 8.2, the employer will be deemed to have entered into a contract of employment with that person, unless the employer can prove otherwise.

As a rule, contracts of employment are made for an indefinite period, and only for a fixed term in exceptional circumstances (see Article 10.1 of the Labour Act). The Labour Act also contains several presumptions as to when a contract of employment will be deemed to have been made for an indefinite period (see Article 10.5). The Act stipulates the circumstances when a fixed term contract is not possible (see Article 10.2), and sets out employers' obligations under fixed term contracts (see Article 10.6).

The petitioner was disputing the constitutionality of various articles of the Labour Act on the basis that entrepreneurial and market freedoms were absolute values, guaranteed under the Constitution. The various negotiations and obligations required under the Labour Act contravened the freedom of contract in employment matters. The Constitutional Court did not, however, concur with the petitioner's view, as Article 16 of the Constitution allows for the restriction of rights and freedoms in certain circumstances. Constitutionally guaranteed rights and freedoms are limited by the rights of others and the interests of society as a whole. The legislator may accordingly restrict rights and freedoms, but there has to be a legitimate purpose and the restriction must be in proportion to the purpose that the restriction is meant to achieve (see Article 16 of the Constitution). The non-absolute character of entrepreneurial freedom derives from the provisions of Article 49.2 and 49.3 of the Constitution ("The state shall ensure all entrepreneurs an equal legal position on the market. Abuse of monopoly position defined by law shall be forbidden. The state shall encourage the economic progress and social welfare of citizens and shall care for the economic development of all its regions."). Besides, Croatia is, according to Article 1 of the Constitution, a social state in which social justice is one of the highest values of the constitutional order.

The Constitutional Court therefore held that the legislator was empowered to set out principles of employment relationships, of which a contract of employment is an example. The Labour Act accepts that free will, manifested in the freedom of contract and the formation of contracts of employment, is an important characteristic of the contract of employment. Nonetheless, the legislator may impose certain restrictions on the freedom to contract, particularly in order to protect the employee, on the basis that he or she is usually economically the weaker party to the transaction. Entrepreneurial and market freedom cannot be construed in such a way that they can only be achieved under conditions of complete freedom of contract.

Languages:

Croatian, English.

Identification: CRO-2007-1-004

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 20.12.2006 / **e)** U-I-4585/2005 and others / **f)** / **g)** *Narodne novine* (Official Gazette), 2/07 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

4.6.8.1 **Institutions** – Executive bodies – Sectoral decentralisation – Universities.
5.2.2 **Fundamental Rights** – Equality – Criteria of distinction.
5.4.2 **Fundamental Rights** – Economic, social and cultural rights – Right to education.

Keywords of the alphabetical index:

University, admission, equality / University, autonomy / Veteran, privilege.

Headnotes:

It is not acceptable under constitutional law for the legislator to have the final say over access to secondary and higher education. The Constitution does not recognise derogation from the guarantee of equal accessibility of secondary and higher education for all. Neither does it recognise or acknowledge the possibility of priority in admission to secondary and higher education institutions on grounds which are not linked with the applicants' abilities. The Constitution prevents the legislator from acknowledging priority in admission for any group of applicants on grounds that are not linked to their abilities.

The determination of rules for students' admission is at the basis of academic self-government. The university's powers are not to be fettered by state control in these areas, although it is true that the state has founded and supported the university and carries out professional supervision of its work. Any attempt by Parliament at state control over university admissions would constitute an encroachment into academic self-government in a way which would jeopardise university autonomy, which is prescribed by the Constitution.

Summary:

I. Acting upon submissions made by the Independent Union of Research and Higher Education, the Croatian Helsinki Committee for Human Rights, Zagreb University and one individual, the Constitutional Court instituted proceedings for the constitutional review of Article 53 of the Rights of the Croatian Homeland War Veterans and Members of their Families Act (see *Narodne novine* no. 174/04, hereinafter: the Act). It directed the repeal of this Act.

Article 53 of the Act allows for the direct admission to secondary schools and institutions of higher education for the children of Croatian Homeland War veterans who have been killed, injured, are missing or in captivity, or who were themselves veterans or volunteers. Such applicants would need to cross a certain "points threshold" and to achieve satisfactory results in examinations at those institutions which have entrance examinations.

The suggestion was made that Article 53 of the Act contravened the principles of equality and the rule of law laid down in Article 3 of the Constitution, the principle of equality of all under Article 14.2 of the Constitution, the principle of proportionality in Article 16.2 of the Constitution, the principle of equal access to secondary and higher education in Article 65.2 of the Constitution, and the principle of autonomy for universities under Article 67 of the Constitution.

II. The Constitutional Court found that Articles 65.2 and 67 of the Constitution were of direct relevance in terms of the constitutional review of Article 53 of the Act. It observed that the notion of equal access for all under the same conditions to secondary schools and higher education entails two requirements for applicants. The first is objective by nature and relates to the fulfilment of certain legal conditions and criteria, stipulated by legislation and by acts by competent state authorities, which must be equally applicable to all. The second is subjective in nature and concerns the applicants' ability. This must be evaluated under equal criteria for all.

The Constitutional Court stressed that the Constitution does not recognise derogation from the principle of universal equal access to secondary and higher education neither does it and it also does not recognise or acknowledge the possibility of priority in admission to secondary and higher education institutions on any grounds which are not linked with the applicants' abilities within the meaning of Article 65.2 of the Constitution. This constitutional provision prevents the legislator from acknowledging priority in admission for any group of applicants on

any other grounds than ability; this includes applicants who themselves or whose parents have the legally recognised status of Croatian veteran of the Homeland War, including those killed, captured or missing, as well as volunteers and volunteers' children.

Article 53 of the Act only gives the right of direct admission to secondary schools and higher education institutions to applicants with Croatian veteran status or associates of veterans who are able to cross the "points" threshold. Nonetheless, it contravenes Article 65.2 of the Constitution by making access easier for some groups than others. The court also found that applicants associated with the "veterans group" could gain admission more readily than other applicants, because they acquired the right of "direct admission" simply by crossing the "points threshold". For other applicants, this would not necessarily be enough to guarantee admission – somebody with a higher "points score" (calculated on the basis of previous examination results) would be admitted in priority, until all the vacancies were filled.

The Constitutional Court ruled that as Article 53 of the Act created differing accessibility for applicants to secondary and higher education, this was unacceptable in constitutional law and in breach of Article 65.2 of the Constitution.

The Constitutional Court acknowledged the legislator's authority, derived from Article 2.4.1 of the Constitution, to decide independently as to the regulation of economic, legal and political relationships within Croatia. This includes the discretion to accord special rights to certain groups with the status of veteran or those with connections to these groups. However, in so doing, the legislator must comply with the requirements set out in the Constitution, with particular regard to rights stemming from the principle of the rule of law and those protecting certain constitutional values and benefits. In the specific case, the legislator, whilst acknowledging the special rights of applicants with the status of veteran or with close connections to veterans, was required to respect the principle of university autonomy, as guaranteed in Article 67 of the Constitution.

The Constitutional Court referred to its earlier decision, Decision no. U-I-902/1999 of 26 January 2000 (*Narodne novine* no. 14/2000), *Bulletin* 2000/1 [CRO-2000-1-002]. There, it had ruled that university autonomy is necessary for the very existence of a university, that a university's decision-making powers falls within the scope of academic self-government by virtue of the Constitution, that the provisions of the Research and Higher Education Act setting out principles of academic self-government (see *Narodne novine* nos. 123/03, 198/03 – Decree nos. 105/04 and 174/04) are of great importance for the legal development of university autonomy, and that the powers set out in the above Act are pivotal to university autonomy. They cannot be limited by law or by the university's founders or supporters, or the body charged with supervision of the university's work.

Article 4.4.1 of the Research and Higher Education Act determining the rules for students' admission is a fundamental element of academic self-government. Restrictions may not be introduced by allowing state control, even though it is the state which has founded the university, supports it and supervises its work. Universities alone may determine the rules for students' admission to higher education institutions. The Constitutional Court therefore held that Article 53 of the Act represented an encroachment into academic self-government which posed a threat to university autonomy as guaranteed in Article 67 of the Constitution.

Languages:

Croatian, English.

Cyprus
Supreme Court

Important decisions

Identification: CYP-2007-1-001

a) Cyprus / **b)** The Supreme Council of Judicature / **c)** / **d)** 22.02.2007 / **e)** 7858, 7860 / **f)** Economides v. Republic / **g)** to be distributed upon request / **h)** CODICES (Greek).

Keywords of the systematic thesaurus:

3.18 **General Principles** – General interest.
5.1.4 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.13.9 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Public hearings.

Keywords of the alphabetical index:

Victim, protection, hearing *in camera* / Sexual case, hearing *in camera*.

Headnotes:

Both the Cypriot Constitution and the Convention for the Protection of Human Rights and Fundamental Freedoms stipulate that everyone is entitled to a fair and public hearing. The right, however, is not absolute.

Summary:

The appellant was convicted by the Assize Court of the offences of rape and abduction and was sentenced to 6 years imprisonment. He appealed to the Supreme Court against his conviction and sentence. He argued that Article 30.2 of the Constitution had been infringed, as the complainant's evidence was heard *in camera*.

The prosecution applied for the proceedings to be held *in camera*. The Assize Court ruled that there would only be adequate protection for the complainant if her evidence was given *in camera*. The appellant argued that the application should have been dismissed.

The Supreme Court, dismissing the appeals, held that the right to a public trial is safeguarded by Article 30.2 of the Constitution and Article 6 ECHR. It noted, however, that there might be restrictions on this right; it is not absolute. Under Article 30, "the press and the public may be excluded from all or any part of the trial upon a decision of the Court where this is in the interests of the security of the Republic, the constitutional order, public order or safety or public morals, or where the interests of juveniles, or the protection of the private life of the parties so require, or, in special circumstances where, in the opinion of the Court, publicity would prejudice the interests of justice".

The Supreme Court also held that the evidence adduced by the prosecution had been received and considered by the Assize Court, with the special care required by long established and generally followed judicial practice, when dealing with evidence in sexual cases.

The appeals were dismissed.

Languages:

Greek.

Identification: CYP-2007-1-002

a) Cyprus / **b)** The Supreme Council of Judicature / **c)** / **d)** 26.02.2007 / **e)** 7802, 7803, 7804, 7805 / **f)** Papakyriacou v. Police / **g)** to be distributed upon request / **h)** CODICES (Greek).

Keywords of the systematic thesaurus:

1.6.2 **Constitutional Justice** – Effects – Determination of effects by the court.
5.3.13.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Trial/decision within reasonable time.
5.3.13.14 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Independence.
5.3.13.15 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Impartiality.

Keywords of the alphabetical index:

Criminal proceedings, evidence, received out of court / Judge, impartiality, perception / Judge, witness, out of court contact.

Headnotes:

The Supreme Court, in overturning the decision, held that the test for bias is not subjective but objective. The notion of impartiality of the courts is enshrined and safeguarded by Article 30.2 of the Constitution. This embodies the maxim that “justice must not only be done, it must also be seen to be done”.

Summary:

I. The appellants, who were doctors, had been convicted of criminal negligence that led to the death of a young boy. Upon appeal to the Supreme Court, the appellants raised the issue of prejudice and lack of impartiality by the trial judge. They also alleged unreasonable delay in filing and prosecuting the case.

The argument about bias focused on the fact that the trial judge had met the father of the deceased outside his office. They talked, and the deceased’s father gave him a design related to the case. The judge did not disclose this fact immediately in open court. One of the key witnesses in the case had also visited the judge’s office on several occasions, and had conversations with him.

II. The Supreme Court found the judge’s conduct, in allowing a key witness into his office during the trial and to consider him, a priori as a witness of the truth, as well as not mentioning in court the encounter he had with the child’s father, to be reprehensible.

The Supreme Court noted that the trial judge’s conduct was such that justice did not appear to be done. His actions had given the impression to all parties to the proceedings (particularly the defendants and their lawyers), that he paid no heed to the high level of objective impartiality, which is always expected of judges.

The Supreme Court took into consideration the length of time which had elapsed since the time of the event, the costs and the distress that the appellants had suffered. It ruled that it would not be just and fair to order a retrial of the case.

The appeals were allowed.

Languages:

Greek.

Czech Republic
Constitutional Court

Important decisions

Identification: CZE-2007-1-001

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 15.02.2007 / **e)** Pl. US 77/06 / **f)** / **g)** *Sbírka zákonů* (Official Gazette), 37/2007 / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

3.10 **General Principles** – Certainty of the law.
4.5.6.4 **Institutions** – Legislative bodies – Law-making procedure – Right of amendment.
4.6.2 **Institutions** – Executive bodies – Powers.

Keywords of the alphabetical index:

Amendment, legislative, germaneness test / Bill, government, right to express view / Rider, legislative / Rider, wild.

Headnotes:

There are certain requirements pertaining to proposals for changes to legislation. If one strays too far from them, there is a danger of missing the whole point of the bill in question, or radically altering its subject matter. The kind of amendment described in American doctrine as "legislative riders" has to be distinguished from the type known as "wild riders". This is a continuation of the criteria of the test applied under the "germaneness" rule, that is, the rule of close relationship. There was a suggestion that in the case in point, the proposed amendment was not a proper one, but one which Czech terminology describes as a "limpet" (where amendments are proposed to a bill which seek to introduce rules from completely different legislation).

Parliament did not view this particular proposal in those terms. Under the Constitution, the provisions governing the right to introduce amendments to a bill only in fact require that the proposed amendment should modify the regulations submitted. Here, this requirement was not met. As a result, there was a breach of the doctrine of separation of powers, which in turn had an impact on the principle of certainty of law, which the Constitutional Court had already identified as an attribute of a democratic state under the rule of law. It also resulted in the circumvention of legislative initiative under the Constitution, and violated the Government's constitutional right to express its view on bills.

The Constitutional Court considered the content and scope of the original bill and the proposed amendments. It held that they were fundamentally different. That alone meant that the proposed amendment had strayed from the provisions prescribed for amendments to legislation.

In a democratic state under the rule of law, a statute cannot simply be perceived as the catalyst for a variety of changes to the legal order. It has to be a predictable, consistent source of law, both in form and substance.

The requirement for certainty of law ceases to be met as soon as an amendment to a statute is contained in a completely different statute, which is not connected to the amended statute. This results in law becoming totally unpredictable.

Summary:

Twenty three Senators sought the partial repeal of the temporary provisions of Act no. 443/2006 of the Czech Republic Digest of Laws, referred to here as "Sb", which amends Act no. 319/2001 Sb., which in turn amends Act no. 21/1992 Sb., on Banks. They pointed out that the State had set out general rules for recompense for clients of bankrupt banks; subsequently, however, funds handed over by private persons were not handled in accordance with these rules. This had disadvantageous effects for certain citizens. These rules had been incorporated, by means of a proposed amendment, into an act with no direct relation to the subject matter of the rule in question.

Both the Assembly of Deputies and the Senate, as parties to the proceedings, put forward their opinions on the petition, in which they gave detailed descriptions of the procedure for adopting the act at issue. The Senate also pointed out that the Constitution in no way restricted members of parliament from proposing amendments to bills.

The Constitutional Court pointed out firstly that the relevant legal principles against which this petition should be viewed were those of a democratic state under the rule of law and democratic legislative process. It should also be adjudged according to the principle of the constitutionally conforming

interpretation of sources of law governing the legislative process, and according to particular safeguards for the proper conduct of the legislative process.

In reviewing the case on the merits, the Constitutional Court made an assessment as to whether this particular proposed amendment strayed from the provisions governing proposed amendments. The Constitutional Court concluded that it had done so. Its content and scope bore no relation to that of the original bill.

Having concluded that the Assembly of Deputies had not adopted the contested provisions of Act no. 443/2006 Sb. in a constitutionally-compliant manner, the Constitutional Court granted the Senators' petition and annulled the provisions.

Languages:

Czech.

Identification: CZE-2007-1-002

a) Czech Republic / **b)** Constitutional Court / **c)** Second Chamber / **d)** 20.02.2007 / **e)** II. US 568/06 / **f)** / **g)** *Sbírka zákonů* (Official Gazette), 94/2007 / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

2.1.3.2.1 **Sources** – Categories – Case-law – International case-law – European Court of Human Rights.
5.3.33 **Fundamental Rights** – Civil and political rights – Right to family life.

Keywords of the alphabetical index:

Child, right of access / Child, custody, biological parent / Child, custody, spouse of mother / Family, blood relation / Family, notion / Fundamental right, core right / Parental rights / Social right, nature / Soft law.

Headnotes:

Under the Charter of Fundamental Rights and Basic Freedoms, parenthood and the family enjoy the protection of the law. Children and adolescents enjoy special protection. Parliament has to respect this. These provisions do not themselves contain a fundamental right. They are subject to the reservation of a statute; the Charter provides that such rights can only be asserted within the confines of the laws implementing them. The provisions are also classified as social rights, which are considered to be part of constitutional "soft law", in contrast to classic fundamental rights ("core rights").

The Charter and the European Convention mention the protection of and respect for family life in general terms, but do not define the term, "family life". The interpretation of these provisions must, therefore, proceed from the fact that the family represents, firstly a biological tie, then a social institution, which is only subsequently enshrined within legislation. When interpreting these concepts, it is necessary to take biological ties into account, as well as the social reality of the family and family life, which has undergone radical changes over the past century.

"Family" can be defined as a community of close persons, with close ties of kinship, as well as psycho-social, emotional, economic, and other ties. The concept of family life within today's society is unsettled and continues to evolve. All the same, one cannot ignore the fact that at the basis of family ties are the traditional biological bonds linking family members.

Those who live outside the institution of marriage or who are not blood relations, but who have emotional and other bonds (examples are common law spouses, those living with children born to one of the partners from another relationship) may also enjoy legal protection as a family. This is underlined by jurisprudence from the European Court of Human Rights.

Summary:

The case concerned custody rights to a four year old girl who was left an orphan by the death of her mother and biological father, who were never married. Her mother, both at the time of the girl's birth and her own death, was married to another man. He was therefore presumed to be her father (he is referred to here as "the presumed father") and was granted temporary custody of the girl following her biological parents' death. The girl's grandmother (the mother of her biological father) sought custody of her.

She was declared the girl's guardian following paternity proceedings which demonstrated that the girl's presumed father was not her biological father and which confirmed the paternity of her biological father. However, the court decided that the presumed father, who had had custody of the girl between the time of her mother's death and the end of the paternity proceedings, could have custody for two days per week. The grandmother lodged a constitutional complaint contesting these decisions as being in breach of Article 32.1 of the Charter, under which the family enjoys the protection of the law and children and adolescents have special protection.

Consideration was given to jurisprudence from the European Court of Human Rights regarding biological ties as opposed to emotional and social ones. In the judgment it handed down in *Kroon and others v. The Netherlands*, the European Court gave preference to biological ties between children and their father, and denied the paternity of the mother's husband: on the basis that "Respect for family life requires that biological and social reality prevail over a legal presumption". See paragraph 40 of *Kroon.*

The Constitutional Court did not find an infringement of Article 32 of the Charter. Nonetheless, it upheld the constitutional complaint on other grounds. The court decisions in question had violated the right to the protection of family life as guaranteed by Article 10.2 of the Charter and Article 8 ECHR.

The Court's decision was based on the following considerations. The complainant was the biological and, following the decision determining paternity, the legally recognised grandmother of the girl. However, the interests of the presumed father, husband of the girl's deceased mother, who was awarded custody of the girl for a period of time, first as her legal representative then on the basis of the court's provisional measure, were also considered.

From the perspective of the protection of family life, relations between grandparents and grandchildren enjoy comparable protection to relations between parents and children. All of the biological bonds exist between the complainant and the girl, which in the aggregate form the basis of family life. At the present time, the relations between the girl and her presumed father can only be based on emotional ties. Naturally, greater weight must be given to the provision a child's biological family can make than to the upbringing and care which can be provided by a person who is not a blood relation, even if they have established emotional and social bonds with the child. As soon as the existence of a family relationship is proven, the state must act to allow this relationship to develop, it must adopt suitable measures aimed at uniting the child's biological family, and it has the duty to accord such relationships specific protection. The State is not permitted, by means of legal instruments, to create a situation where the quality, and even the integrity, of a child's family life are weakened and the child's relationships with its family are disturbed. The regional court adopted just such an approach by ordering regular access visits with the girl's presumed father.

Cross-references:

- *Kroon and others v. The Netherlands*, *Bulletin* 1994/3 [ECH-1994-3-016]; Series A of the Publications of the Court, no. 297-C.

Languages:

Czech.

Identification: CZE-2007-1-003

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 01.03.2007 / **e)** Pl. US 8/06 / **f)** / **g)** *Sbírka zákonů* (Official Gazette), 94/2007 / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

3.10 **General Principles** – Certainty of the law.
3.16 **General Principles** – Proportionality.
5.3.38.2 **Fundamental Rights** – Civil and political rights – Non-retrospective effect of law – Civil law.
5.3.39 **Fundamental Rights** – Civil and political rights – Right to property.

Keywords of the alphabetical index:

Execution of judgment / Judgment, payment of debt before enforcement, commission, reduced.

Headnotes:

Under the principle of legal certainty, new legal rules will, of necessity, have some impact on the existing legal order. Certain provisions of some government orders violated this principle, because they applied new principles for the formation of basic commission

for enforcement officers to proceedings initiated before the changes came into effect. This undoubtedly shook confidence within the existing legal order. As a result, enforcement officers' commissions for certain enforcement actions were governed by legal rules which did not come into effect until the officer had taken the steps which were necessary in the collection of claims.

Where an enforcement officer's base commission includes mandatory reimbursement of a sum, even though he did not take the proceedings himself, this will be viewed by the Constitutional Court as unjustified preferential treatment as against officers who actually carried out enforcement. The other problem with the rules was that they lacked certain elements; the fact that the debtor met the obligations without the need for enforcement action, albeit at the last minute, was not taken into account. If a debtor has satisfied a debt but has not paid the enforcement officer's commission in full, according to the literal wording of the law, enforcement still has to proceed and the officer is still entitled to commission in full. The Constitutional Court held that the transitional provisions were in conflict with the Constitution. The establishment of conditions for the application of reduced-rate commission, which cannot in fact be complied with, infringes the principle of a democratic state based on the rule of law. Such an arrangement also encroaches upon a debtor's right to the protection of his property, as enshrined within the Charter of Fundamental Rights and Basic Freedoms.

In order to comply with the Constitution, the rules governing enforcement officer's commissions should not be based solely on a direct correlation between the commission and the value of the case. Rather, they should also reflect the complexity and varied nature of the officers' duties, and the way they are carried out, as well as their responsibilities and the amount of work involved.

Summary:

Two separate constitutional complaints were lodged with the Constitutional Court's First Panel. Both sought clarification relating to § 5.1.2 of Government Order no. 330/2001 of the Czech Republic Digest of Laws, referred to here as "Sb"., on the Commissions and Reimbursement of Court Enforcement Officers. The two complaints were joined and the matter was referred to the Constitutional Court Plenum for a decision on constitutionality. The complainants argued that the provision breached debtors' constitutional rights, in that it meant that they had to pay the enforcement officer's commission in full, even if they had already paid the debt off before enforcement proceedings were needed. Previous rules allowed them to collect half of it in those circumstances. The Plenum also considered the constitutionality of the transitional provisions in Government Orders nos. 233/2004 Sb. and 291/2006 Sb.

During the course of the proceeding in this matter, further alterations were made to the legislation under dispute. The Constitutional Court did not dismiss the proceedings, because the contested provision was replaced by one on exactly the same terms.

In its jurisprudence, the Constitutional Court has pointed out on numerous occasions the connection between the principle of predictability of law and the principle of a democratic state under the rule of law. Parliament must, when amending legislation, have regard to the existing legal order. This also applies to derived legislation. The Court also emphasised the principle of proportionality. Under this principle, where an enforcement officer's base commission includes mandatory reimbursement of an amount, even if they did not actually carry out enforcement, this must be considered as unjustified preferential treatment as against enforcement officers who actually carried out enforcement. A reduced-rate commission can, therefore, be considered as equivalent to the amount of work the enforcement officer has had to do; this option also complies with the principle of proportionality. It would not be acceptable if the commission charged against one group of debtors was substantially increased, simply because, in the case of other debtors, (who are not in any way related to the first group of debtors), enforcement had to be discontinued due to insufficient assets.

The Constitutional Court found that the transitional provisions also violate the principle of legal certainty, as the "problem" provision (that the basis for enforcement officer's commission is established without regard to the enforcement proceedings themselves) applied to proceedings initiated before the changes came into effect.

The Constitutional Court accordingly repealed § 5.1.2 of Government Order no. 330/2001 Sb., as well as the transitional provisions in Government Orders nos. 233/2004 Sb. and 291/2006 Sb.

Languages:

Czech.

Identification: CZE-2007-1-004

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 08.03.2007 / **e)** Pl. US 69/04 / **f)** / **g)** *Sbírka zákonů* (Official Gazette) / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

2.1.1.4 **Sources** – Categories – Written rules – International instruments.
2.2.1.3 **Sources** – Hierarchy – Hierarchy as between national and non-national sources – Treaties and other domestic legal instruments.
3.16 **General Principles** – Proportionality.
3.17 **General Principles** – Weighing of interests.
3.18 **General Principles** – General interest.
4.8.3 **Institutions** – Federalism, regionalism and local self-government – Municipalities.
4.8.4.1 **Institutions** – Federalism, regionalism and local self-government – Basic principles – Autonomy.
5.4.4 **Fundamental Rights** – Economic, social and cultural rights – Freedom to choose one's profession.

Keywords of the alphabetical index:

Municipality, ordinance, legal basis / Public order / Prostitution, soliciting in public place.

Headnotes:

Public authorities are obliged to protect individuals' liberty and health and property, and to protect public order and good morals. This conclusion must also be applied to the prohibition of activities disrupting these values. If the activity at issue can be carried out in certain public areas without disrupting public order or public decency, municipalities cannot prohibit them in all of their public areas. By contrast, where such activities might be contrary to the interests of society as a whole, if carried out in a municipality's public areas, the municipality is justified in banning such activities in its public areas. It is always necessary to weigh up the significance of the public good under threat, and the gravity of the infringement, against the importance of the activity being prohibited.

Summary:

The Minister of the Interior asked the Constitutional Court for a ruling to repeal a municipal ordinance on the protection of local public order, on the basis that the ordinance was in conflict with the Act on Municipalities, in that it prescribed obligations and prohibitions, with no basis in the Act. This meant that it contravened both the Charter and the Constitution. The Constitutional Court found that the municipal ordinance conformed to the Act on Municipalities. It therefore rejected the petition on the merits.

1. There are no explicit rules within Section 10 of the Act on Municipalities which would prevent a municipality from imposing a ban in all public areas on activities which could disrupt public order in the city or conflict with morality or the protection of safety, health and property. When it enacted this legislation, Parliament sought to strike a balance between individual liberty (protected under the Constitution) and an individual's right to entrepreneurship on the one hand, and, on the other, the protection of the public interest and the municipalities' right of self-government. It resolved the conflict by allowing municipalities to restrict certain activities, rather than banning them outright. This approach does, however, give rise to problems in the case of the protection of such constitutionally protected public benefits as health and life. There is no rational reason why a municipality should have to tolerate activities which threaten these fundamental values. It would conflict with the principle of protection of the inviolability of the person (Article 7 of the Constitution), if municipalities had to designate the public areas where it does not prohibit activities which might conflict with public health. The same applies to activities which conflict with the protection of property (cf. Article 11 of the Constitution). Section 10 of the Municipalities Act must, therefore, be interpreted in such a way that when activities which disrupt the protection of health, property or safety, or other constitutionally protected public interests only take place in certain public areas, municipalities may not prohibit them everywhere within the city limits. The above provision must be understood as a concrete example of the general principle of proportionality.

2. In its municipal ordinance on the protection of local public order, the municipality in question had banned prostitution in all public areas. Such activities are not regulated by statute. The offer of such services is a threat to morality and also poses a serious threat to the moral upbringing of children and young people, and to ethical values. If prostitution services are offered in front of children and young people, they may come away with the idea that this is something normal and permissible. A very high priority must be accorded to the moral upbringing of children and young people. The values and public interest under threat must be balanced against the encroachment upon individual freedom to provide sexual services; however, the protection of the freedom to do so in the public gaze cannot prevail over the protection of children and young people.

3. Section 10 of the Act has to be interpreted in the light of Article 1.2 of the Constitution, under which the Czech Republic shall observe its obligations under international law. The Czech Republic is bound by the Convention on the Suppression of Trafficking in Persons and the Prostitution of Others ("New York Convention"). This Convention considers prostitution to be an evil, consisting of traffic in persons and their human dignity, which endangers the welfare of individuals, the family unit and the community. One of the purposes of the Convention is to stop prostitution becoming regulated, which would effectively grant it official recognition and approval (cf. Article 6 of the New York Convention). Under Article 10 of the Constitution, promulgated treaties, to the ratification of which Parliament has given its consent and by which the Czech Republic is bound, form part of the legal order. Where a treaty provision is in conflict with a statutory provision, the treaty shall apply.

This international agreement was not published in the Collection of Laws, which means that it is not a treaty in the sense of Article 10 of the Constitution; neither does it form part of the legal order. However, in view of Article 1.2 of the Constitution, it cannot be overlooked in the interpretation of ordinary law. Ordinary law which is open to several interpretations must be interpreted in accordance with the Czech Republic's international obligations. As stated above, Article 10 of the Act on Municipalities does not contain an unequivocal resolution of the issue as to whether municipalities may impose an absolute ban on prostitution in all their public areas. An interpretation to the effect that it can ban prostitution in all (not just some) public areas, is more compatible with the Czech Republic's obligations under the New York Convention. If prostitution is restricted to a few municipal public areas, this is in effect a regulation of it, which the New York Convention prevents. The legislation currently in force offers municipalities the choice not to regulate prostitution at all, to impose an absolute ban in all public areas, or to designate certain public areas in which prostitution can be offered.

4. The Constitutional Court concluded that, since prostitution is not regulated by parliamentary statute, a municipality would not be acting *ultra vires,* if it issued a municipal ordinance outlawing the offer of sexual services in public areas anywhere within the city limits, effectively forcing prostitution behind closed doors.

Languages:

Czech.

Identification: CZE-2007-1-005

a) Czech Republic / **b)** Constitutional Court / **c)** Fourth Chamber / **d)** 08.04.2007 / **e)** IV. US 613/06 / **f)** / **g)** *Sbírka zákonů* (Official Gazette) / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.
1.3.5.12 **Constitutional Justice** – Jurisdiction – The subject of review – Court decisions.
3.10 **General Principles** – Certainty of the law.
4.7.1.3 **Institutions** – Judicial bodies – Jurisdiction – Conflicts of jurisdiction.
5.3.13.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.
5.3.13.18 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Reasoning.

Keywords of the alphabetical index:

Case-law, development / *Stare decisis*, principle / Court, predictability, principle.

Headnotes:

Case-law necessarily entails evolution and there is always the possibility that it might be supplemented by new interpretive conclusions, and even completely changed. Modifications of judicial decisional practice are not desirable, especially in the higher courts, which are case of practice of the authorised to unify the jurisprudence of lower courts, because they infringe the principle of the rule of law, namely, the principle of the predictability of judicial decision-making. That is precisely why current legal rules prescribe for courts of the highest instance, just as for the Constitutional Court, special and binding rules for adopting decisions in situations where it has to depart from existing case law. Even if there was no such procedure under the law for the case in point, courts would still have the duty to deal with any modifications of case law with caution and restraint, only in specific cases justifying a departure from the principle of predictability. Such steps also need clear reasoning; this should necessarily include a convincing explanation as to why, despite the

expectation that existing decisional practice will be respected, the Court decided differently.

This principle must be observed all the more thoroughly where alterations to case law result in the denial of court review for administrative decisions which had, in the past, been reviewed by the courts and where the decision results in a denial of the right of access to the courts (that is, to the administrative branch of the judiciary), even if this is expressed only to be temporary.

Constitutional protection must be achieved with a minimum of interference with the authority of ordinary courts, as well as that of state administrative bodies.

Summary:

The complainant, a mining mechanic, received a medical opinion declaring him unfit to continue his work in the mine. He contested this decision before the courts. The regional court concluded that this was an administrative matter that fell within its jurisdiction, but the Supreme Administrative Court decided that it was a matter which fell outside the jurisdiction of the administrative judiciary. The complainant contested this decision on the grounds that it violated his right to a fair trial.

The Constitutional Court found the Supreme Administrative Court's decision to be unconstitutional, but on other grounds than those cited by the complainant, namely as a violation of the right to have one's case considered by a court. Its ruling was based on the fact that in a previous judgment about a contested medical opinion, the Supreme Court had held that the matter was within the jurisdiction of the administrative judiciary. In the present case, the Supreme Court had reached the opposite conclusion, that a contested medical opinion did not fall within the jurisdiction of the administrative judiciary.

Before the decision was adopted, Article 17.1 of the Code of Administrative Justice should have been applied in the proceedings before the Supreme Administrative Court. As the panel presiding over the case had reached a different legal conclusion from another panel in a previous case, it should have suspended the proceedings and referred them to an extended panel. Instead, it decided the case on the merits itself, thereby effectively exercising state power in a way which contradicted the Constitution and the Charter on Fundamental Rights and Basic Freedoms. It heard the proceedings with an improperly composed court, which represents a violation of the right to have one's case considered by a court, as laid down in Article 38 of the Charter. This stems from the requirement to satisfy the requirement of a democratic state under the rule of law (see Article 1 of the Constitution). Failure to respect the law – here the Code of Administrative Justice – as to the composition of the panel hearing the matter also infringes Articles 90 and 94.1 of the Constitution.

Guided by the principle of the subsidiary of substantive law review to procedural law review, the Constitutional Court did not proceed to consider the correctness of the contested decision on the merits. It is not within the Constitutional Court's competence in proceedings arising from a constitutional complaint which has already been submitted to intrude upon the Supreme Administrative Court's authority by giving its views on the interpretation of ordinary law.

Languages:

Czech.

Estonia
Supreme Court

Important decisions

Identification: EST-2007-1-001

a) Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 16.01.2007 / **e)** 3-4-1-9-06 / **f)** Petition of Johvi Municipality Council to review the constitutionality of Section 13 of the Building Act / **g)** *Riigi Teataja III (RTI)* (Official Gazette), 2007, 3, 19 / **h)** http://www.riigikohus.ee; CODICES (Estonian, English).

Keywords of the systematic thesaurus:

1.3.2.2 **Constitutional Justice** – Jurisdiction – Type of review – Abstract / concrete review.
3.16 **General Principles** – Proportionality.
3.18 **General Principles** – General interest.
4.8.4.1 **Institutions** – Federalism, regionalism and local self-government – Basic principles – Autonomy.
4.8.4.2 **Institutions** – Federalism, regionalism and local self-government – Basic principles – Subsidiarity.

Keywords of the alphabetical index:

Autonomy, regional / Finance, municipal / Local self-government, competence.

Headnotes:

At the root of the right of municipal autonomy is the right of local government to exercise discretion in decision-making over local issues. If local government can exercise discretion in implementing the duty conferred by Parliament to organize public roads, green zones, street lighting and rainwater pipes, this does not constitute a disproportionate infringement on municipal autonomy.

Summary:

In 2002, the Estonian Parliament passed the Building Act, Section 13 of which requires local government authorities to organise the construction of public roads, green zones, street lighting and rainwater pipes. This is to be done on the basis of a detailed plan up to the boundary of a land unit specified in a building permit, unless the local authority and the person requiring the plan to be drawn or the applicant for the building permit agree otherwise. In August 2006, the Jõhvi Municipality Council asked the Supreme Court to review the constitutionality of this provision, claiming that it violated the right of local government to independently resolve and manage local issues. The Constitutional Review Chamber of the Supreme Court declared the application admissible, as it concerned municipal autonomy, enshrined in Section 154.1 of the Constitution. At the root of the right of municipal autonomy is the right of local government to exercise discretion in decision-making about local issues. In Section 13, the legislator restricted the decision-making powers of local government authorities.

The right to autonomy may be restricted by law, under Section 154.1 of the Constitution, if this is proportionate. The Building Act came about due to a compelling public interest − the creation of a sound physical and social environment for local inhabitants. In the Court's view, the means chosen were appropriate for the achievement of the aim. The restriction is necessary for the protection of the public good, as local government authorities are best suited to managing local issues. The Court also noted the principle of subsidiarity, enshrined in Article 4.3 of the European Charter of Local Self-Government. The duty Section 13 imposes to organise public roads, green zones, street lighting and rainwater pipes is proportionate, in that the municipal authorities have scope for discretion in implementing this duty. They can decide whether to adopt a detailed plan, whether to issue a building permit or to finance their projects either in co-operation with developers or from public resources. An important tool in this regard is a development plan, to be drawn up to cover at least three budgetary years, according to Section 37.3 of the Local Government Management Act. In abstract review proceedings, the conclusion cannot be drawn that Section 13 of the Building Act is unconstitutional. The Jõhvi Municipality Council's was therefore dismissed.

Languages:

Estonian, English.

Identification: EST-2007-1-002

a) Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 31.01.2007 / **e)** 3-4-1-14-06 / **f)** Petition of the President of the Republic for the declaration of unconstitutionality of the Act Repealing Section 7.3 of the Principles of Ownership Reform Act of the Republic of Estonia / **g)** *Riigi Teataja III (RTI)* (Official Gazette), 2007, 5, 36 / **h)** http://www.riigikohus.ee; CODICES (Estonian, English).

Keywords of the systematic thesaurus:

1.2.1.1 **Constitutional Justice** – Types of claim – Claim by a public body – Head of State.
1.3.5.15 **Constitutional Justice** – Jurisdiction – The subject of review – Failure to act or to pass legislation.
1.5.4.3 **Constitutional Justice** – Decisions – Types – Finding of constitutionality or unconstitutionality.
3.12 **General Principles** – Clarity and precision of legal provisions.
5.2 **Fundamental Rights** – Equality.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Effective remedy.
5.3.39.1 **Fundamental Rights** – Civil and political rights – Right to property – Expropriation.

Keywords of the alphabetical index:

Ownership, reform / Expropriation, compensation.

Headnotes:

The President of the Republic may contest legislative omission on the basis of earlier decisions by the Court if the norms which have not been enacted should form part of the contested legislation.

A piece of legislation which only affords a general right to protection to one group of persons is incompatible with the principle of equal treatment and unconstitutional, in the absence of any coherent arguments to support the enactment of such legislation.

Summary:

I. Under Section 7.3 of the Principles of Ownership Reform Act of the Republic of Estonia (PORA), applications for the return of or compensation for unlawfully expropriated property, previously owned by persons who left Estonia on the basis of agreements entered into with the German State and located in the Republic of Estonia, (referred to here as “resettlers”) shall be resolved by means of an international agreement. In October 2002, the Supreme Court pronounced this provision to be in contravention of Sections 13.2 and 14 of the Constitution, as it infringed the principle of legal clarity and the right to organisation and procedure of the applicants. The Court found it impossible to decide on the return or privatisation of, or compensation for the property in the ownership of the resettlers until PORA was brought into line with the principle of legal clarity.

In April 2006, the General Assembly of the Supreme Court declared Section 7.3 of PORA void and decided that the relevant part of the judgment would enter into force on 12 October 2006 unless Parliament had adopted and promulgated an Act amending or repealing Section 7.3 of PORA. On 14 September 2006 Parliament passed an act to repeal Section 7.3 of PORA. However, the President of the Republic refused to proclaim the Act and filed a petition with the Supreme Court on 4 October 2006, when Parliament refused to bring the Act into conformity with the Constitution. On 12 October 2006, Section 7.3 of PORA became invalid, as the above Supreme Court judgment became effective. The President of the Republic argued that the act repealing Section 7.3 of PORA was unconstitutional because it violated the principle of legal clarity.

II. The Supreme Court deemed it possible to review the constitutionality of the act repealing Section 7.3, despite Section 7.3 being null and void as of 12 October 2006, because Section 2 of the contested Act contains provisions relating to the repeal which could be applicable once the provision became invalid. The President may contest legislative omission on the basis of earlier court decisions if the norms which have not been enacted should form part of the contested legislation or are in some way related to it.

The allegations of the President of the Republic that the general right to protection is not sufficiently guaranteed for persons with legitimate expectation to the return or privatisation of and compensation for unlawfully expropriated property raise the question of the principle of equal treatment. The legislation in question guarantees the right to proceedings for those resettlers whose applications have been denied on procedural grounds, but not to those whose applications have been dismissed on substantive grounds. This runs counter to the general right to equality, as only one group is afforded protection. The Court could deduce no reasons from parliamentary discussions in the period leading up to the enactment of this legislation which could justify fettering the right to procedure and organisation, equality, and protection by state and by law. The restrictions are, accordingly, disproportionate and unconstitutional.

The Court also pointed out that PORA might contain other problems, in connection with the different treatment of those entitled to return, privatisation and compensation. The rules within the disputed Act did not solve the legal issues surrounding the repeal of Section 7.3; rather, they created more problems, due to the unequal treatment of different groups of resettlers.

Parliament had failed to adopt measures after the repeal of Section 7.3 of PORA which would enable the resettlers to exercise their rights. The contested Act conflicts with Sections 13, 14 and 12.1 of the Constitution and is unconstitutional. The Court upheld the petition.

Cross-references:

- Decision 3-4-1-5-02 of 28.10.2002 of the Supreme Court of Estonia, *Bulletin* 2002/3 [EST-2002-3-007];
- Decision 3-3-1-63-05 of 12.04.2006 of the Supreme Court of Estonia, *Bulletin* 2006/1 [EST-2006-1-001].

Languages:

Estonian, English.

France
Constitutional Council

Important decisions

Identification: FRA-2007-1-001

a) France / **b)** Constitutional Council / **c)** / **d)** 15.02.2007 / **e)** 2007-547 DC / **f)** Institutional act laying down statutory and institutional provisions relating to overseas territories / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 22.02.2007, 3252 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

3.8 **General Principles** – Territorial principles.
4.1 **Institutions** – Constituent assembly or equivalent body.
4.5.2 **Institutions** – Legislative bodies – Powers.
4.8.2 **Institutions** – Federalism, regionalism and local self-government – Regions and provinces.
4.8.7 **Institutions** – Federalism, regionalism and local self-government – Budgetary and financial aspects.
5.2.1.1 **Fundamental Rights** – Equality – Scope of application – Public burdens.
5.5.4 **Fundamental Rights** – Collective rights – Right to self-determination.

Keywords of the alphabetical index:

Constituent power, powers / Tax, power to impose / Independence, territory / Overseas territory.

Headnotes:

Article 53.3 of the Constitution provides that “no cession, exchange or adjunction of territory shall be valid without the consent of the populations concerned.” By providing that Mayotte could not cease to belong to the French Republic “without the consent of its population and without a revision of the Constitution”, the authors of the institutional act wished to draw attention to the fact that the Constitution made consent of the population of Mayotte an essential precondition for the territory’s independence. Nonetheless, they could not add a requirement that the Constitution should first be revised without infringing the powers of the constitution-making body.

The provisions concerning sharing of tax powers between the state and the territorial authorities of Mayotte, Saint-Barthélemy, Saint-Martin and Saint-Pierre-et-Miquelon cannot prevent the state from obtaining, through the introduction of taxes, at least part of the resources necessary for the performance of the tasks for which it remains responsible in these territories. The fact that the cost of performing these tasks is borne solely by taxpayers who are not residents of the territories concerned constitutes a flagrant breach of the principle of equality in matters of public expenditure and must be censured.

Summary:

The purpose of the institutional act laying down statutory and institutional provisions relating to overseas territories is to give full effect to the provisions of the constitutional reform of 28 March 2003. The Constitutional Council, before which the matter was brought pursuant to Article 46 of the Constitution (providing for mandatory review of institutional acts), had to examine hundreds of articles dealing, *inter alia*, with the legislative powers of the overseas départements and regions, the updating of the statutes of Mayotte and Saint-Pierre-et-Miquelon and the establishment of the overseas territorial authorities of Saint-Barthélemy and Saint-Martin.

Among its many provisions, the institutional act addressed the possibility that Mayotte might become autonomous. Article 53.3 of the Constitution provides "No cession, exchange or adjunction of territory shall be valid without the consent of the populations concerned." This provision concerns in particular the possibility that a territory may cease to belong to the French Republic and become an independent state or be attached to such a state.

The institutional act stated, "Mayotte is part of the Republic. It cannot cease to belong to the Republic without the consent of its population and without a revision of the Constitution." However, although the consent of the population of Mayotte is, in accordance with the very same Article 53 of the Constitution, an essential precondition for this territory's autonomy, to which the institutional act merely drew attention, those drafting the act could not make revision of the Constitution another requirement for such autonomy without infringing the constitution-making body's powers. The words "and without a revision of the Constitution" must accordingly be held to be unconstitutional for lack of competence.

The institutional act also raised the sensitive issue of the state's tax powers in an overseas territory. As the *Conseil d'État* had recently held with regard to French Polynesia, the responsibilities still vested in the state entail that it should be able to legislate to ensure the availability of the necessary resources, in particular by introducing taxes to help finance the performance of its public-interest tasks. The institutional act under consideration restricted to air security and electronic communications the fields in which taxes could be introduced to help fund performance of the state's tasks in Mayotte, Saint-Barthélemy, Saint-Martin and Saint-Pierre-et-Miquelon. As a result, those drafting the legislation prevented the state from obtaining, through the introduction of taxes, at least part of the resources necessary for the performance of the tasks for which it remained responsible in these territories. This meant that the cost of the performance of these tasks had to be borne in full by taxpayers who did not reside in those territories. It resulted in a flagrant breach of the principle of equality in matters of public expenditure in violation of Article 13 of the Declaration of the Rights of Man and of the Citizen of 1789. These restrictions were held to be unconstitutional.

Languages:

French.

Identification: FRA-2007-1-002

a) France / **b)** Constitutional Council / **c)** / **d)** 27.02.2007 / **e)** 2007-550 DC / **f)** Law on modernisation of audiovisual broadcasting and the television of the future / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 07.03.2007, 4368 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

3.11 **General Principles** – Vested and/or acquired rights.
3.16 **General Principles** – Proportionality.
5.2 **Fundamental Rights** – Equality.
5.3.23 **Fundamental Rights** – Civil and political rights – Rights in respect of the audiovisual media and other means of mass communication.
5.3.24 **Fundamental Rights** – Civil and political rights – Right to information.

Keywords of the alphabetical index:

Media, television, pluralism / Media, television, terrestrial, analogue / Media, television, digital, terrestrial / Media, pluralism, principle / Competition, freedom / Proviso, effects.

Headnotes:

Parliament, when passing legislation within its area of competence, is always free to amend earlier legislation or to repeal it, possibly replacing it with other provisions. However, it cannot leave constitutional requirements devoid of legal guarantees. To do so would be to disregard the duty of observance of the law proclaimed in Article 16 of the Declaration of the Rights of Man and of the Citizen of 1789, if it interfered with legally established situations without sufficient public-interest justification.

Article 13 of the Declaration of 1789 does not rule out the possibility of certain categories of person bearing specific types of expenditure on public-interest grounds. However, this must not result in a flagrant breach of the principle of equality in matters of public expenditure.

There has been an extension for five years of the terrestrial digital broadcasting licences of the national television services previously broadcast in analogue mode. This is conditional, subject to the supervision of the Higher Audiovisual Council *(Conseil supérieur de l'audiovisuel)*, on the participation of the distributors concerned in the public-interest group responsible for implementing support and assistance measures to guarantee that disadvantaged households continue to receive television broadcasts free of charge. This extension is accordingly based on sufficient public-interest grounds.

By phasing out in advance, as from 2008, terrestrial analogue broadcasting of the national television services (reducing the duration of the licences previously granted); the law interferes with legally established situations. In relation to the advance elimination of this broadcasting method, the distributors concerned are in a different situation from those broadcasting solely in digital mode.

Those drafting the law authors sought to compensate them for the resulting damage by allocating each of them another national television channel. Other forms of compensation were excluded.

These three digital television channels allocated as compensation can be proposed to the public only when analogue broadcasting finally ends. The distributors will also have to enter into more stringent commitments regarding the broadcasting and production of original French and European programmes. Under these conditions, the compensation awarded by the law to the distributors concerned is not clearly disproportionate.

When digital broadcasting comes into general use, access to varied programmes will be facilitated for the majority of the population. Far from being detrimental to freedom of expression or pluralism of opinion, the general tenor of the new provisions is such as to foster them.

It will be for the competent authorities, when allocating the three compensatory channels, to ensure that the constitutional objective of pluralism of opinion is upheld, in the light of the radio-electrical resources available at the time (proviso constituting an injunction).

Summary:

The principal purpose of the law on modernisation of audiovisual broadcasting and the television of the future is the definitive switchover from analogue to digital mode for terrestrial broadcasting of audiovisual programmes. It puts an end to terrestrial broadcasting of television programmes in analogue mode as from 30 November 2011.

On the date of elimination of terrestrial analogue broadcasting, the private distributors of such services (in practice TF1, M6 and Canal Plus) will have to ensure digital broadcasting coverage for virtually the entire population. In exchange, the terrestrial digital broadcasting licences previously granted to these three historical distributors are extended for five years, as an exception to the rules on competitive tendering.

The resulting difference in treatment is subject to the condition that these distributors remain members of the public-interest grouping established by law to ensure they contribute financially to facilitating the switchover without penalising the least well-off households. Therefore, it is based on a public-interest ground directly linked to the objective of the law.

A compensatory or "bonus" channel, broadcast in terrestrial digital mode, has been allocated, without competitive tendering, to the firms on which the early termination of the former analogue broadcasting licences is imposed (TF1, M6 and Canal Plus).

The applicants argued that this constituted an anomalous advantage, pointing out that nearly one-third of the available channels would be pre-empted by audiovisual communication groups already in a

dominant position. They argued that this breached the principles of equality, free competition, freedom of expression and pluralism of opinion.

The Constitutional Council has long held that freedom of communication belongs not solely to broadcasters but also to those receiving broadcasts. In this field, the principle of equality between operators is approached from the standpoint of the public interest, taking into account the shortage of broadcasting resources.

In the case under consideration, the specific situation of the three operators concerned and the interference with a legally established situation could not be denied. The early elimination of analogue broadcasting would generate additional costs and a decline in audience share for the companies concerned, resulting in a loss of advertising revenues.

The challenged provisions also made allocation of the compensatory channels subject to conditions and restrictions: specific obligations regarding broadcasting and production of original French and European programmes; bringing into service postponed to 2011 in order to safeguard the new distributors' position.

The Constitutional Council accordingly considered allocation of a bonus channel to be a means of flat-rate compensation not disproportionate to the aim pursued and not harmful to pluralism, in the light of the broadcasting resources available. However, it issued a proviso that when analogue broadcasting ends, the competent authorities, on licensing new digital television services and allocating the three compensatory channels must ensure that pluralism of opinion is upheld, in the light of the radio- electrical resources available at the time.

Cross-references:

- Decision no. 2000-433 DC of 27.07.2000, *Bulletin* 2000/2 [FRA-2000-2-011];
- Decision no. 2001-450 DC of 11.07.2001;
- Decision no. 2004-497 DC of 01.07.2004, *Bulletin* 2004/2 [FRA-2004-2-005];
- Decision no. 88-248 DC of 17.01.1989;
- Decision no. 93-333 DC of 21.01.1994, *Bulletin* 1994/1 [FRA-1994-1-002];
- Decision no. 2001-450 DC of 11.07.2001;
- Decision no. 84-181 DC of 10 and 11.10.1984, *Special Bulletin Freedom of religion and beliefs* [FRA-1984-R-001].

Languages:

French.

Identification: FRA-2007-1-003

a) France / **b)** Constitutional Council / **c)** / **d)** 01.03.2007 / **e)** 2007-551 DC / **f)** Institutional act on the recruitment, training and liability of judges / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 06.03.2007, 4230 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

3.4 **General Principles** – Separation of powers.
4.6.6 **Institutions** – Executive bodies – Relations with judicial bodies.
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.
4.7.16.2 **Institutions** – Judicial bodies – Liability – Liability of judges.
4.12 **Institutions** – Ombudsman.
4.12.9 **Institutions** – Ombudsman – Relations with judicial bodies.
5.3.13.14 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Independence.

Keywords of the alphabetical index:

Judge, discipline.

Headnotes:

Article 64 of the Constitution guarantees the independence of the judiciary. The principle of separation of powers is set out in Article 16 of the Declaration of the Rights of Man and of the Citizen of 1789. Neither principle rules out the possibility of legislation extending judges' disciplinary liability to their judicial activity, by providing that they may be liable for a serious, deliberate violation of a procedural rule constituting an essential guarantee of the rights of parties to proceedings. However, these principles do prevent the institution of disciplinary proceedings where a violation has not previously been recognised by a final judicial decision.

Article 16 of the Declaration of 1789 and Article 64 of the Constitution guarantee the independence of the courts and the specific nature of their functions.

These cannot be interfered with by parliament, government or any administrative authority.

In the case under consideration the authors of the institutional act had made the Mediator of the Republic, assisted by a committee, responsible for hearing complaints lodged by parties to proceedings. The legislation did not allow the mediator to express opinions on judicial decisions. It did, however, entitle him to "seek all relevant information" from the heads of the courts of appeal and the higher courts. It also provided that, where the mediator considered that the impugned acts qualified as a disciplinary offence, he or she could transmit the complaint to the Minister of Justice for referral to the High Judicial Council *(Conseil supérieur de la magistrature)*. The Minister of Justice was then obliged to ask the competent bodies to conduct an inquiry; in cases where the minister was not legally bound to bring disciplinary proceedings, he must inform the mediator thereof by a reasoned decision, and the mediator could then issue a special report published in the official gazette. In granting all these powers to the mediator, the authors of the institutional act had breached both the principle of separation of powers and that of independence of the judiciary.

Summary:

The organic law on the recruitment, training and disciplinary liability of judges was brought before the Constitutional Council pursuant to Articles 46.5 and 61.1 of the Constitution. This law was based *inter alia* on the recommendations of the National Assembly's board of inquiry established following the "Outreau affair". It modified the conditions under which judges might incur disciplinary liability for their acts.

Article 14 of the organic law sought to broaden the scope of judges' liability by giving a new definition of a disciplinary offence. According to established precedents, the guarantee of judges' independence banned the High Judicial Council, which has disciplinary authority over judges, from expressing "any kind of opinion on judges' judicial acts"; the latter "could be censured only through recourse to the remedies provided by law for parties to proceedings."

This concept was called into question by the institutional act, Article 14 of which gave a much broader definition of a disciplinary offence. A "serious, deliberate violation of a procedural rule constituting an essential guarantee of the rights of parties to proceedings" was henceforth considered to constitute such an offence.

This provision violated two constitutional principles: the independence of the judiciary, as guaranteed by Article 64 of the Constitution, and the separation of powers, laid down in Article 16 of the Declaration of the Rights of Man and of the Citizen of 1789. It was true that these principles did not preclude the authors of the institutional act from extending judges' disciplinary liability to their judicial activity, by providing that they may be held liable for a serious, deliberate violation of a procedural rule constituting an essential guarantee of the rights of parties to proceedings. However, the institution of disciplinary proceedings against a judge, by reason of the manner of performance of his or her judicial tasks, must be based on a breach of the duties of the office previously recognised by a final judicial decision. The far broader terms of Article 14 merely required that the impugned breach should have occurred "in the course of proceedings terminated by a final judicial decision". The Constitutional Council's finding of a violation was accordingly inevitable.

Article 21 of the organic law entitled all parties who considered that a judge's conduct in judicial proceedings concerning them constituted a disciplinary offence to lodge a complaint with the Mediator of the Republic. The parliamentary board of inquiry into the "Outreau affair" had recommended that parties to proceedings who considered that their interests had been harmed by a failing of the judicial system or the conduct of a judge should be able to petition the mediator in this way so that the latter could refer the matter to the High Judicial Council.

The procedure established by the institutional act was indeed surrounded by guarantees, which ruled out any possibility for the mediator to express an opinion on judicial decisions. However, the Constitutional Council considered that these guarantees could not override the ban on entrusting a judicial procedure to an administrative body, which followed from the principle of separation of powers.

The institutional act indeed entitled the mediator to "seek all relevant information" from the heads of the courts of appeal or higher appeal courts and to forward the complaint to the Minister of Justice. If the latter considered that he need not bring disciplinary proceedings he was required to inform the mediator by a reasoned decision.

The involvement of the Mediator of the Republic, an administrative authority, in disciplinary proceedings against a judge constituted interference by the executive with a judicial activity and confused different branches of power. In view of all the powers thus conferred on the mediator, the Constitutional Council held Article 21 of the institutional act to be in breach of the independence of the judiciary and the separation of powers.

Cross-references:

- Decision no. 2001-445 DC of 19.06.2001, *Bulletin* 2001/2 [FRA-2001-2-005];
- Decision no. 89-271 DC of 11.01.1990.

Languages:

French.

Identification: FRA-2007-1-004

a) France / **b)** Constitutional Council / **c)** / **d)** 03.03.2007 / **e)** 2007-553 DC / **f)** Crime prevention act / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 07.03.2007, 4356 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

5.1.1.4.1 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Minors.
5.3.5.1.2 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty – Non-penal measures.
5.3.5.1.3 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty – Detention pending trial.
5.3.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial.
5.3.32.1 **Fundamental Rights** – Civil and political rights – Right to private life – Protection of personal data.

Keywords of the alphabetical index:

Trial, immediate summary / Punishment, adaptation to personal circumstances of offender / Minor, criminal liability, diminished / Minor, protection / Recidivism, minor.

Headnotes:

It is for parliament to reconcile the exercise of constitutionally guaranteed freedoms, which include the right to privacy, with the solidarity requirements that follow from the tenth and eleventh paragraphs of the Preamble to the Constitution of 1946.

Parliament provided that, in certain instances, professional social workers might be released from their duty of professional secrecy. This was in order to take greater account of the social, educational or material hardships that an individual or a family may be facing and to reinforce the effectiveness of social support measures, to which enhanced coordination between the various players contributes. Such authorised exchanges of information were subject to restrictions and precautions, to reconcile the right to respect for one's private life with the above-mentioned solidarity requirements.

At the same time, in view of the seriousness of the offences in question and the role that judicial supervision can play in the educational and moral rehabilitation of under-age offenders, parliament could, without breaching the constitutional principles specific to the juvenile justice system, provide that in criminal matters a minor between the ages of thirteen and sixteen could be made subject to judicial supervision where he or she was liable to a penalty of seven years' imprisonment or more, without applying an additional condition linked to the relevant individual's history of offending.

The Crime Prevention Act authorises the provisional detention of under-age offenders between the ages of thirteen and sixteen only where the minor fails to comply with the obligations resulting from the judicial supervision measure of placement in an enclosed educational centre. It extends the possibility of being placed in such a centre only to cases where the minor has failed to comply with other judicial supervision requirements to which he or she was initially subject.

Under the Act, the juvenile courts are exempt from the duty to give reasons for a decision against reducing criminal liability solely in the case of minors over the age of sixteen who are accused of an offence constituting murder or assault and have a prior conviction for such an offence. In such cases the nature of the offence and the earlier conviction for the same offence justify the juvenile court's decision to rule out diminished liability.

Lastly, parliament preserved the principle that, except where justified by the circumstances of the case, minors over the age of sixteen benefit from a reduction of criminal liability. The Act does not prevent the Court from continuing to apply this reduction, not least in cases where a minor has already been convicted for a similar offence.

Summary:

1. The Crime Prevention Act provides that, where a professional social worker notes that the social, educational or material hardships faced by an individual or a family have worsened or that a minor is in danger, he or she shall be permitted to disclose confidential information to the Mayor or the President of the General Council. The social worker is thus released from his or her duty of professional secrecy within the limits strictly necessary to the performance of his or her social assistance role. If the information disclosed is revealed to third parties, criminal penalties will be incurred.

The applicants argued that this provision entailed a breach of privacy. However, according to well-established precedents, parliament may provide for the exchange or sharing of personal data between public bodies, even without the consent of the individuals concerned, provided this serves a public-interest aim and the arrangements made are accompanied by restrictions and precautions such as to reconcile the pursuit of this aim and the right to respect for one's privacy.

In view of the precautions taken regarding the purposes for which this confidential information could be disclosed and the strict conditions under which the duty of professional secrecy was waived, the Council deemed that parliament had not disregarded the need to reconcile, firstly, constitutional requirements concerning social solidarity and, secondly, the exercise of constitutionally guaranteed freedoms, which include the right to privacy, guaranteed by Article 2 of the Declaration of the Rights of Man and of the Citizen of 1789.

2. A number of articles concerning under-age offenders were also challenged. Here the constitutional principles, which since 2002 have been given the form of a "fundamental principle recognised by the law of the Republic", include in particular the law's recognition of the diminished liability of minors.

New procedural rules governed immediate summary trial in the juvenile courts. A minor could now be brought to trial at the first juvenile court hearing following his or her appearance before the public prosecutor, without applying the ten-day time-limit that must in principle be observed between the appearance before the prosecutor and the hearing. This procedure concerned under-age offenders liable to a prison sentence of one year or more where caught in the act of commission of an offence, or three years or more in other cases. The applicants contended that these provisions introduced an expedited trial procedure "almost identical" to immediate summary trial of adult offenders.

This argument was rejected for a number of reasons. It remained possible for the juvenile court to postpone hearing the case. The procedure was subject to certain conditions: the sentences were longer than those permitting immediate summary trial of adult offenders; the express consent of the minor and his/her counsel must be obtained; and the minor's legal representatives, having been duly invited to attend the trial, must not object to the procedure.

The law broadened the possibilities of applying judicial supervision to under-age offenders between the ages of thirteen and sixteen. This measure was now possible not only where the penalty incurred was five years' prison or more and the minor had already been subject to educational measures or had a prior conviction, but also where the minor was liable to a penalty of seven years' prison or more. Where a minor failed to comply with the judicial supervision requirements, he or she could be placed in provisional detention.

The applicants maintained that these provisions constituted a denial of the "specificity of juvenile law". However, the judicial supervision requirements were progressive, and the law permitted the provisional detention of a minor under the age of sixteen only where he or she had failed to comply with a measure of placement in an enclosed educational centre.

In view of the seriousness of the offences in question, the positive role that judicial supervision, as provided for, can play in the educational and moral rehabilitation of under-age offenders and the progressive nature of the arrangements, the Council held that parliament could, without breaching the constitutional principles specific to the juvenile justice system, make such supervision subject to the sole condition that a seven year prison sentence must be incurred.

Lastly, the law made it possible, in the case of minors over the age of sixteen, to rule out diminished criminal liability not only "in view of the circumstances of the case and the minor's personality", as before, but also "because the offence of murder or assault is constituted and the minor has already been convicted for a similar offence". Specific grounds must be given for the decision, except where based on the fact that the minor has already been convicted for a similar offence.

The applicants argued that this provision disregarded the constitutional principles applicable to minors, the principle of individualisation of the penalty and the

rights conferred on defendants. However, parliament had not called into question the principle that minors over the age of sixteen benefited from a reduction of criminal liability except where justified by the circumstances of the case. For minors between the ages of sixteen and eighteen the ground of excuse that the accused was under age remained the rule, which only a specific decision, of an optional nature, could set aside, not least where the minor had already been convicted for a similar offence.

In these circumstances there was no constitutional reason why a decision to rule out diminished criminal liability should have to be based on grounds other than the juvenile court's finding that the offence of murder or assault was constituted and the accused had already been convicted for a similar offence.

Cross-references:

- Decision no. 93-325 of 13.08.1993, *Bulletin* 1993/2 [FRA-1993-2-007];
- Decision no. 2002-461 DC of 29.08.2002, *Bulletin* 2002/2 [FRA-2002-2-006];
- Decision no. 2004-504 DC of 12.08.2004, *Bulletin* 2004/2 [FRA-2004-2-009];
- Decision no. 2005-532 DC of 19.01.2006, *Bulletin* 2006/1 [FRA-2006-1-001];
- Decision no. 2005-520 DC of 22.07.2005, *Bulletin* 2005/2 [FRA-2005-2-005];
- Decision no. 2005-532 DC of 19.01.2006, *Bulletin* 2006/1 [FRA-2006-1-001].

Languages:

French.

Germany
Federal Constitutional Court

Important decisions

Identification: GER-2007-1-001

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 24.05.2006 / **e)** 2 BvR 669/04 / **f)** Naturalisation obtained by deception / **g)** / **h)** *Neue Zeitschrift für Verwaltungsrecht* 2006, 807-815*; Deutsches Verwaltungsblatt* 2006, 910-919*; Zeitschrift für Ausländerrecht und Ausländerpolitik* 2006, 246-253; *Das Standesamt* 2006, 200-211; *Informationsbrief Ausländerrecht* 2006, 335-341; *Ausländer- und asylrechtlicher Rechtsprechungsdienst* 2006, 173-175; *Europäische Grundrechte-Zeitschrift* 2006, 435-448; *Die öffentliche Verwaltung* 2006, 738-740; *Entscheidungssammlung zum Zuwanderungs-, Asyl- und Freizügigkeitsrecht* 78, no. 1; CODICES (German).

Keywords of the systematic thesaurus:

3.10 **General Principles** – Certainty of the law.
4.8.8 **Institutions** – Federalism, regionalism and local self-government – Distribution of powers.
5.3.8 **Fundamental Rights** – Civil and political rights – Right to citizenship or nationality.

Keywords of the alphabetical index:

Citizenship, deprivation / Citizenship, loss / Naturalisation, revocation / Act, administrative, revocation.

Headnotes:

Article 16.1.1 of the Basic Law does not in principle exclude the revocation of a naturalisation obtained by deception.

An interpretation of Article 16.1.2 of the Basic Law according to which the prohibition of the acceptance of statelessness also covers a case where citizenship has been obtained by deception does not correspond with the intention of the authors of the constitution; such an interpretation is outside the protective purpose of the provision.

§ 48 of the Administrative Procedures Act of Baden-Württemberg provides an adequate basis of authority for the revocation of naturalisation within a short period of time where the naturalised person has himself or herself been deceptive as to the existence of the prerequisites for such naturalisation.

Summary:

I. The complainant, who comes from Nigeria, applied for German citizenship in November 1999. At the time of doing so, he stated he had a job in Germany and submitted a certificate issued in his name confirming that he was in an employment relationship. On 9 February 2000, he was naturalised.

It emerged in criminal investigation proceedings later instituted against the complainant that he was not known to the employer he had named and that there was another person employed by the employer under that name. In February 2002, the competent authority revoked the naturalisation and in doing so relied on § 48 of the Land Administrative Procedure Act. This provision is the general legal basis for the revocation of favourable administrative acts that are unlawful.

The action brought by the complainant against this act was unsuccessful before the competent courts. Thereupon the complainant lodged a constitutional complaint before the Federal Constitutional Court alleging that his rights pursuant to Article 16.1.1 and 16.1.2 of the Basic Law had been violated.

The wording of Article 16.1 of the Basic Law reads as follows: “No German may be deprived of his or her citizenship. Citizenship may only be lost pursuant to a law and only against the will of the person affected if, as a result thereof, such person does not become stateless.”

II. The Second Panel of the Federal Constitutional Court rejected the constitutional complaint as unfounded. It is of the opinion that the acts complained of by the complainant do not violate his fundamental rights.

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

1. The prohibition of the deprivation of German citizenship in Article 16.1.1 of the Basic Law does not prevent the revocation of an unlawful naturalisation obtained through deception.

Through the prohibition of the deprivation of German citizenship, the constitution distances itself from the historical abuses of citizenship law, in particular during the Nazi era. Article 16.1.1 of the Basic Law was intended by the authors of the Constitution to guarantee protection against those abuses that robbed citizenship of its significance as a reliable basis for national belonging founded on equal rights and turned it into a means of exclusion rather than integration. Accordingly, deprivation of citizenship is every kind of imposition of loss that impairs the function of citizenship as a reliable basis for national belonging founded on equal rights. The reliability of citizenship status also includes foreseeability of its loss and thus a sufficient measure of legal certainty and legal clarity in the rules on loss of citizenship.

Accordingly, Article 16.1.1 of the Basic Law does not in principle exclude the revocation of a naturalisation obtained by deception. If a person has obtained an unlawful naturalisation by deception or comparable misconduct and such person is not allowed to retain the legal position improperly acquired, this will not impair his or her legitimate expectations. Furthermore, the expectations of others – who have not done anything wrong in their naturalisation proceedings – that their citizenship will continue to exist will not be disappointed.

2. Nor does the protection against statelessness anchored in Article 16.1.2 of the Basic Law stand in the way of the revocation of the naturalisation to the complainant.

Allowing the revocation of citizenship obtained by deception to fail because it would possibly result in the person affected becoming stateless is so clearly outside the spirit and intention of the provision that the wording of the statute, which is excessive as concerns the case at hand, cannot be decisive for the interpretation of the provision. In creating Article 16.1.2 of the Basic Law, the drafters intended to join international legal efforts to combat statelessness and to distance themselves from the Nazi expatriation policy and the expatriations which affected Germans during the expulsions. The acceptance of statelessness in the event of a revocation of a naturalisation obtained by deception is compatible with this goal. There have not been any general principles of public international law or international agreements binding on the Federal Republic of Germany which exclude the acceptance of statelessness in such a case. Nor do such principles or agreements now exist. Statelessness is expressly accepted in international agreements precisely in the event that a naturalisation obtained by deception is revoked. Six judges concurred on this point of the decision whilst there were two dissenting votes.

3. The general provision on the revocation of favourable administrative acts laid down in § 48 of the Administrative Procedures Act of the Land Baden-Württemberg (hereinafter: the Act) is sufficient in this case as a statutory basis for the revocation of a naturalisation obtained by deception.

The provision satisfies the requirement of the enactment of a specific statute which is contained in Article 16.1.2 of the Basic Law; at all events, if the person affected has obtained a naturalisation by deception. Its application is not excluded because the Land Baden-Württemberg lacks legislative power. The parliamentary legislature was also not obliged to make special provision under a citizenship law for cases where naturalisations are obtained by deception.

Article 16.1 of the Basic Law calls for a statutory regulation of the grant and cancellation of citizenship as well as of the loss of citizenship which is commensurate with the importance of citizenship status. Whether or not these prerequisites have been satisfied cannot be decided solely by reference to a provision's inclusion within a specific statute, but must be decided above all on the basis of whether consideration has been paid to the constitutional requirements which are placed on its content. In the present case, due to the fact that it could be proved that the person affected had himself procured the naturalisation through deception and because naturalisation was revoked within a short period of time, the legal certainty and the clarity of statutes required by the Basic Law is satisfied if the person affected is able to foresee that revocation could be a consequence of his action on the basis of a general statutory provision which is an administrative procedural provision. In such a case, the deceiver is not entitled to a legitimate expectation worthy of protection so that the interest of the state under the rule of law in the retroactive restoration of lawful circumstances always prevails. § 48 of the Act is a provision in which the public administration's discretion is limited by a weighing of the importance under rule of law principles of the protection of legitimate expectations versus the legality of administrative acts.

Nevertheless, situations are possible in which § 48 of the Act would not provide an adequate statutory basis for authority. The need to regulate the cancellation of naturalisations and the invalidity of acts of naturalisation is particularly apparent in situations (that are not relevant in the present case) in which the lawfulness of the naturalisation to relatives, especially children, is in the foreground. The question of what effects misconduct during proceedings for a naturalisation can have on the retention of citizenship by third parties who were not involved in the misconduct must be answered by the legislature.

Four judges concurred on this point of the decision whilst there were four dissenting votes.

Since the votes of the Panel were equally divided on point 3, no violation of the Basic Law can be established (§ 15.4.3 of the Federal Constitutional Court Act).

Languages:

German.

Identification: GER-2007-1-002

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 18.07.2006 / **e)** 1 BvL 1/04; 1 BvL 12/04 / **f)** Foreign transsexual/change of first name / **g)** / **h)** *Das Standesamt* 2007, 9-17; *Zeitschrift für das gesamte Familienrecht* 2006, 1818-1822; CODICES (German).

Keywords of the systematic thesaurus:

5.2.2.4 **Fundamental Rights** – Equality – Criteria of distinction – Citizenship or nationality.
5.3.32 **Fundamental Rights** – Civil and political rights – Right to private life.

Keywords of the alphabetical index:

Transsexuality, first name, change / Name, first name, change / Gender identity, determination / Private international law / Nationality, principle.

Headnotes:

§ 1.1.1 of the Transsexuals Act violates the equal treatment requirement (Article 3.1 of the Basic Law) in conjunction with the fundamental right to protection of the personality (Article 2.1 in conjunction with Article 1.1 of the Basic Law) insofar as it excludes foreign transsexuals who are present in Germany lawfully and not merely temporarily from the entitlement to apply for a change of their first name and to determine their gender under § 8.1.1 of the Transsexuals Act, to the extent that their *lex patriae* does not contain comparable provisions.

Summary:

I. The Transsexuals Act (hereinafter referred to as the Act) provides for the first name of a transsexual to be changed on the transsexual's application, even if the transsexual does not undergo an operation first. However, the entitlement to make an application under § 1 of the Act is restricted to Germans and persons governed by German law (stateless or displaced aliens whose habitual residence is in Germany, persons entitled to asylum, foreign refugees with their residence in the area of application of the Act).

The entitlement to apply for a determination of change of gender identity after gender reassignment surgery is also restricted to this category of persons (§ 8 of the Act).

This exclusion has the effect of referring foreign transsexuals indirectly to the law of their home state and leading them to make an application in their home state to obtain what they seek. But if the *lex patriae* contains no provision comparable to the provision in German law, then, in the present legal situation, they are permanently denied legal recognition of the gender identity they feel is theirs.

The decision of the Federal Constitutional Court was made in proceedings for the concrete review of a statute. The cases involved were those of a Thai citizen and an Ethiopian citizen. Both had had sex-change operations and had applied for legal recognition of their female and male gender identity respectively. The courts dealing with the cases rejected the applications for lack of entitlement to apply.

Thereupon, appeals were made to the higher courts (Bavarian Highest Regional Court and Frankfurt on Main Higher Regional Court), and these courts submitted the following question to the Federal Constitutional Court:

Is the restriction of the entitlement to apply to Germans or to persons governed by German law in § 1 and § 8 of the Act compatible with Article 3.1 and 3.3 of the Basic Law (equal treatment requirement) in the cases in which the *lex patriae* does not provide equivalent proceedings for change of name to determine gender identity?

II. The First Panel of the Federal Constitutional Court held that § 1.1.1 of the Transsexuals Act violates the equal treatment requirement (Article 3.1 of the Basic Law) in conjunction with the fundamental right to protection of the personality (Article 2.1 in conjunction with Article 1.1 of the Basic Law) insofar as it excludes foreign transsexuals who are present in Germany lawfully and not merely temporarily from the entitlement to apply for a change of their first name and to determine their gender identity, to the extent that their *lex patriae* does not contain comparable provisions. The legislature was instructed to pass a new constitutional provision by 30 June 2007. Until then, § 1.1.1 of the Act remains in force.

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

In restricting the category of persons entitled to apply to Germans and persons governed by German law, the legislature was following a legitimate purpose geared to the principle of nationality. It reserves to the individual state of origin the decision on the name and gender identity of foreign transsexuals. This is based on respect for the legal systems of the states of which the persons affected are citizens.

But the principle of referring foreign transsexuals who are present lawfully and not merely temporarily in Germany without exception to the law of the state of which they are nationals disadvantages those whose *lex patriae* does not contain comparable provisions on changing the first name and changing gender identity as against Germans and persons governed by German law. This unfavourable treatment is not objectively justified. The exclusion of foreigners in § 1.1.1 of the Basic Law is intended to give unrestricted validity to the principle of nationality in changing a first name or changing gender identity; this is not a sufficiently good reason.

There may be reasons that make it necessary to deviate from the principle of nationality in particular legal relationships. This applies above all if the foreign law in question, from the point of view of German constitutional law, withholds constitutionally relevant rights or has made provisions the application of which is detrimental to the fundamental rights of the persons affected. In German private international law, Article 6 of the Introductory Act to the German Civil Code takes account of this. This provision is an expression of public policy and determines that foreign law is not applicable if this would lead to a result that would be manifestly incompatible with essential principles of German law. In this way, this provision makes it possible, in particular in connection with violations of constitutional law associated with the application of foreign law, to have recourse to German law in order to prevent such violations.

§ 1.1.1 of the Act deprives foreigners from the outset of the possibility of German courts reviewing the substance of their application, for on the one hand the provision states that the law contained in § 1 and § 8 of the Act is not available for foreigners and on the

other hand it contains no order for the law to be applied in accordance with the *lex patriae* of the persons in question. This creates a situation where, in the case of foreign applicants, the courts cannot confer the rights contained in the German Transsexuals Act. In addition, however, they are also prevented from applying the relevant foreign law and from examining in doing so whether the application of the *lex patriae* in question would contravene public policy. In this way it is impossible for German law to be applied by virtue of Article 6 of the Introductory Act to the German Civil Code. The provision submitted for review thus results in a complete exclusion of the protection of fundamental rights granted under Article 6 of the Introductory Act to the German Civil Code for foreign transsexuals whose *lex patriae* contains no provision for change of first name or of gender identity. This has the effect that the persons affected suffer serious detriment to their right to free development of the personality and protection of their privacy.

In the case of those who are only present in Germany for a short time and presumably only temporarily, this detriment to the rights of those affected may be justified by the legitimate concern of the legislature, which wishes to prevent foreigners entering Germany with the sole purpose of making applications under the Transsexuals Act. But this concern does not apply to those who are present in Germany lawfully and not merely temporarily. For them, the withholding of the rights under the Transsexuals Act constitutes unfavourable treatment that affects them in the long term, concurrently with permanent detriment to their right of personality.

Languages:

German.

Identification: GER-2007-1-003

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 19.10.2006 / **e)** 2 BvF 3/03 / **f)** Berlin budget; Berlin judgment / **g)** / **h)** *Höchstrichterliche Finanzrechtsprechung* 2006, 1264-1272; *Verwaltungsrundschau* 2007, 31-34; *Deutsches Verwaltungsblatt* 2007, 39-47; *Die öffentliche Verwaltung* 2007, 30-34; *Neue Zeitschrift für Verwaltungsrecht* 2007, 67-77; CODICES (German).

Keywords of the systematic thesaurus:

3.6.3 **General Principles** – Structure of the State – Federal State.
4.8.4.1 **Institutions** – Federalism, regionalism and local self-government – Basic principles – Autonomy.
4.8.7.1 **Institutions** – Federalism, regionalism and local self-government – Budgetary and financial aspects – Finance.
4.8.7.4 **Institutions** – Federalism, regionalism and local self-government – Budgetary and financial aspects – Mutual support arrangements.
4.10.2 **Institutions** – Public finances – Budget.

Keywords of the alphabetical index:

Region, financial rescue / Region, budgetary crisis / Region, assistance, federal.

Headnotes:

Supplementary grants by the Federation pursuant to Article 107.2.3 of the Basic Law are the final steps in a multi-level system for the distribution of fiscal revenues within a federal state. All in all, the purpose of this distribution is to provide the Federation and the *Länder* (states) with the financial means to be self-reliant and independent in order to fulfil their constitutional tasks.

An obligation on the part of the Federation to come to the financial rescue of *Länder* in need and a corresponding right on their part to be rescued, are alien to the applicable federal financial equalisation scheme according to the purpose and methodology of Article 107.2.3 of the Basic Law. Supplementary grants for the purpose of consolidating a Land (state) in need's budget are subject to a strict *ultima ratio* principle.

Financial rescue is only permitted and required under constitutional law where the budgetary crisis of a Land is considered to be severe in relative terms, i.e. in comparison with the budgets of other *Länder*, and where the crisis has reached such a severe level in absolute terms, i.e. on the basis of the tasks allocated to the Land under constitutional law, that it has led to a *bundesstaatlicher Notstand* (state of emergency).

A *bundesstaatlicher Notstand* in the sense of a threat to the existence of a Land which it – as a body charged with state tasks that it must be capable of carrying out in accordance with constitutional law – cannot ward off without third-party help, presupposes that the Land has exhausted all of the avenues of help available to it so that federal assistance is its last remaining option.

Summary:

I. The proceedings concerning the abstract review of a statute relate to the question of whether the Land Berlin has a right, as from 2002 pursuant to Article 107.2.3 of the Basic Law in conjunction with the principle of a federative state, to the allocation of supplementary grants for special requirements in order to consolidate its budget.

The allocation of supplementary grants (Article 107.2.3 of the Basic Law) presupposes that the recipient Land is financially weak. Financial weakness must be determined by considering the relationship that fiscal revenues bear to expenditure burdens.

The Federation may generally increase the financial strength of financially weak *Länder* (general supplementary grants) and share in the financing of special burdens of financially weak *Länder* (supplementary grants for special requirements).

The allocation of supplementary grants for special requirements presupposes that the special burdens can be identified and justified. Special burdens may only be taken into account for special reasons. The purpose of supplementary grants for special requirements is not to finance current plans or to reduce financial weaknesses which are a direct and foreseeable consequence of the political decisions of a Land.

To the extent that supplementary grants for special requirements can, on the basis of a Land's severe budgetary crisis, be considered an instrument for consolidating its budget, their allocation presupposes additionally that the Land concerned has made sufficient efforts of its own to ward off the threat of a budgetary crisis or to free itself from one. This is presupposed due to the fact that the Federation and other *Länder* only have an obligation to provide assistance in exceptional circumstances.

The exceptional situation of the *Länder* of Berlin, Brandenburg, Mecklenburg-Western Pomerania, Saxony, Saxony-Anhalt and Thuringia after the German re-unification justified the allocation of supplementary grants for special requirements. These grants were allocated to cover the special burdens resulting from the huge backlog demand for infrastructure development and to balance their disproportionately low municipal financial capacities.

The Berlin Senate asserts, in its application for the review of a statute, that the Land Berlin should also have been allocated supplementary grants for the years since 2002 so that it could consolidate its budget. The Berlin Senate is of the opinion that the Land Berlin has a constitutional right to financial rescue vis-à-vis the other *Länder* since it is suffering a severe budgetary crisis. It alleges that the relevant federal statutes do not make provision for corresponding supplementary grants and that they are thus unconstitutional.

The Federal Government and the governments of the *Länder* of Hamburg, Mecklenburg-Western Pomerania, Lower Saxony, Rhineland-Palatinate, Saxony-Anhalt, Schleswig-Holstein and Thuringia take the view – in part for different reasons – that the application for the review of a statute is inadmissible. For a variety of reasons, the Federal Government and the majority of *Länder* consider the application by the Berlin Senate for the review of a statute to also be unfounded.

II. The Second Panel of the Federal Constitutional Court found in relation to the application for the review of a statute that the challenged federal provisions (§ 11.6 of the Act on Financial Equalisation between the Federation and the *Länder* and Article 5.11 of the Act on the Continuation of the Solidarity Pact, on the Reform of the Federal Financial Equalisation Scheme and the Winding-up of the Fund "German Unity") were compatible with Article 107.2.3 of the Basic Law and the principle of a federal state in Article 20.1 of the Basic Law to the extent that Berlin was not allocated supplementary grants for the years from 2002 so that it could consolidate its budget.

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

Financial rescue by the Federation in the form of supplementary grants is subject to a strict *ultima ratio* principle. It is only permitted and required under constitutional law where the budgetary crisis of a Land is not only considered to be as severe in relative terms, i.e. in comparison with the budgets in the other *Länder*, but has also reached such a severe level in absolute terms, i.e. on the basis of the tasks allocated to the Land under constitutional law, that it has led to a *bundesstaatlicher Notstand*, in the sense that the Land – as a body charged with state tasks that it must be capable of carrying out in accordance with constitutional law – is unable to ward off a threat to its existence without third-party help. This presupposes that the Land has exhausted all of the avenues of help available to it so that federal assistance is its last remaining option.

Supplementary grants pursuant to Article 107.2.3 of the Basic Law are the final steps in a multi-level system for the distribution of fiscal revenues within a federal state. All in all, the purpose of this distribution is to provide the Federation and the *Länder* with the

financial means to be self-reliant and independent in order to fulfil their constitutional tasks. In this connection, the purpose of supplementary grants is not in principle to reduce financial weaknesses which are the direct and foreseeable consequence of the political decisions of a Land that it took itself in the performance of its tasks. Self-reliance and political autonomy entail the *Länder* being themselves responsible for the budgetary consequences of such decisions.

A severe budgetary crisis not just in absolute, but also in relative terms is a prerequisite for financial rescue. The budgetary crisis must be absolute in the sense that the existence of the Land in need is under threat in comparison to other *Länder*.

The financial weakness of a Land as a prerequisite for possible supplementary grants within the meaning of Article 107.2.3 of the Basic Law is a relative condition, which cannot be defined in absolute terms. The relation between the average funds of all of the *Länder* and the funds of the Land that may potentially require help is decisive. Thus it follows that in order for supplementary grants to be available for financial rescue, the prerequisites for a "relative" budgetary crisis (based on a comparison with the circumstances of other *Länder*) and an "absolute" budgetary crisis (based on the ability of the Land to fulfil the tasks assigned to it by constitutional law) must be fulfilled cumulatively.

With its restriction of rescue rights and obligations to situations where a *bundesstaatlicher Notstand* exists, the strict *ultima ratio* principle that applies to rescue grants requires, in particular, that the Land's options for action be exhausted. In this context, the Land has a duty to present facts and the burden of proving them. Whether or not options for action are still available and what those options might be can only be answered by comparing the past conduct of the Land concerned with that of other *Länder*.

It is currently not possible to find that the Land Berlin is experiencing a *bundesstaatlicher Notstand*. It is not undergoing a severe budgetary crisis. There are definite indications based on reliable data showing that the Land Berlin's budgetary situation is simply tight and that it will in all probability be able to master its problems on its own.

Languages:

German.

Identification: GER-2007-1-004

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 07.11.2006 / **e)** 1 BvL 10/02 / **f)** Inheritance tax / **g)** / **h)** *Deutsches Steuerrecht* 2007, 235-251; *Zeitschrift für Steuern und Recht* 2007, R127; *Zeitschrift für Erbrecht und Vermögensnachfolge*, 76-92; *Wertpapiermitteilungen*, 316-324; *Aktuelles Steuerrecht* 2007, supplement 1, 1-9; *Deutsches Steuerrecht* 2007, 45-46; *Zeitschrift für das gesamte Familienrecht* 2007, 473-586; *Neue Juristische Wochenschrift* 2007, 573-586; *Deutsche Wohnungswirtschaft* 2007, 74-80; *Zeitschrift für die gesamte erbrechtliche Praxis* 2007, 53-68; *GmbH-Rundschau* 2007, 320-334; *Sammlung der Entscheidungen des Bundesfinanzhofs*, supplement 4, 237-256; *Zeitschrift für die Steuer- und Erbschaftspraxis* 2007, 65-87; *Finanz-Rundschau* 2007, 338-351; *Zeitschrift für die Notarpraxis* 2007, 135-147; *Höchstrichterliche Finanzrechtsprechung* 2007, 386-394; CODICES (German).

Keywords of the systematic thesaurus:

5.2.1.1 **Fundamental Rights** – Equality – Scope of application – Public burdens.
5.3.42 **Fundamental Rights** – Civil and political rights – Rights in respect of taxation.

Keywords of the alphabetical index:

Company, fiscal evaluation / Inheritance, assets, fiscal evaluation / Inheritance, tax / Land, fiscal evaluation.

Headnotes:

1. The levying of inheritance tax on the value of the acquisition at uniform tax rates, which is ordered by § 19.1 of the Inheritance Tax and Gift Tax Act, is incompatible with the Basic Law because it pertains to tax values for major groups of assets (operating assets, real assets, shares in corporations and farms and forestry establishments) ascertained by using methods which do not meet the requirements of the principle of equality under Article 3.1 of the Basic Law.

2.a. Because of the legislature's decision to impose taxes, on which the applicable inheritance tax law is based, to tax asset growth accruing by virtue of an inheritance or a gift, the evaluation of the assets

acquired must be orientated as standard (in ascertaining the inheritance tax assessment base) to the fair market value as the relevant goal of evaluation. The evaluation methods must guarantee that all assets are covered by a value which is approximated to the fair market value.

b. With the further steps taken to determine the tax burden ensuing from the evaluation, the legislature may base itself on the value of the asset growth thus ascertained in pursuance of its fiscal policies, for example in the shape of pinpoint tax relief arrangements which are transparent in terms of their legislative intent.

Summary:

I. § 19.1 of the Inheritance Tax and Gift Tax Act (hereinafter: The Act) uniformly determines as a tax tariff a percentage of the acquisition for all taxable acquisitions, regardless of the types of asset of which the estate or gift is composed. This tariff is progressive as to the value of the acquisitions, and is sub-divided into three tax classes by degrees of relationship. In order to use this tariff to reach a tax amount payable in money, the assets included in the taxable acquisitions must be shown in a monetary amount. For those tax objects that do not exist as an amount of money, conversion to a monetary value using an evaluation method is therefore required in order to obtain an assessment base for the tax owed. The Act determines that the evaluation is performed pursuant to the provisions of the Evaluation Act. The values of the individual assets are accordingly ascertained by different methods. The Act invokes as a standard case the fair market value, in other words the current value. In evaluating domestic real assets, a value appraisal method is used in important sub-areas to ascertain the value of the real assets. The value of the operational part of farms and forestry assets is calculated by their capitalised value. Over and above this, inheritance tax law uses the fiscal balance sheet value in the evaluation of operating assets.

The decision of the Federal Constitutional Court was handed down in proceedings on the constitutionality of a specific statute in response to a submission made by the Federal Finance Court. The submission relates to the question of whether the application of the uniform tax tariff to all acquisitions in accordance with § 19.1 of the Act is unconstitutional with regard to the different types of asset because of the unequal ascertainment of the tax assessment base.

II. The First Panel of the Federal Constitutional Court ruled that the levying of inheritance tax ordered by § 19.1 of the Act is incompatible with the Basic Law due to a violation of the principle of equality (Article 3.1 of the Basic Law). The legislature is obliged to enact a new regulation by 31 December 2008 at the latest. The previous law continues to apply until the new regulation comes into force.

The ruling is essentially based on the following considerations:

The applicable inheritance tax law is based on the legislature's decision to impose taxes on the asset growth accruing to the respective recipient in the event of an inheritance. The consistent taxation of the taxpayer depends on finding bases for assessment for the individual economic units and assets belonging to an inheritance which realistically portray their values in their ratio. Inheritance taxation is only guaranteed to do justice to this principle if the Act is consistently aligned at the evaluation level with the fair market value, this being the relevant evaluation goal. Only this correctly portrays the increase in ability to pay and permits the decision to impose tax to be applied consistently in accordance with the principle of equality. The legislature is, in principle, free in its choice of value ascertainment method. The evaluation methods must, however, guarantee that all assets are covered by a value that is approximated to the fair market value.

With the further steps taken to determine the tax burden ensuing from the evaluation, the legislature may take, as a basis, the value of the asset growth thus ascertained in pursuance of its fiscal policies, for example, in the shape of pinpoint tax relief arrangements, the legislative content of which are transparent. The evaluation level, by contrast, is unsuited for constitutional reasons to pursue non-fiscal promotion and steering goals in inheritance tax law.

The applicable inheritance and gift tax law does not do justice to these constitutional requirements. For major groups of assets the inheritance tax evaluation provisions do not lead to tax values that are approximated to the fair market value. They do not spread the tax burden sufficiently equally or consistently. In detail:

With operating assets, the extensive use made of the fiscal balance sheet values constitutes a structural obstacle to their approximation with the fair market value. This leads to taxation results which are incompatible with the principle of equality. In accordance with the statutory provision (§ 109.1 of the Evaluation Act), the assets belonging to the operating assets are estimated at their fiscal balance sheet value. However, only in exceptional cases does this agree with the respective current value of the

asset. As a rule, the fiscal balance sheet value of highly profitable companies in particular is far below the fair market value because the profit is not accounted for. Over and above this, the advantageous impact is completely uneven, and hence arbitrary. Using the fiscal balance sheet value approach means that the inheritance tax assessment base depends on whether and to what degree the testator or donor was able to and did take balance sheet measures.

Also with real assets, even at evaluation level the inheritance tax ascertainment of the assessment base does not meet the requirements of the principle of equality.

The simplified value appraisal procedure, which is ordered by law (§ 146.2.1 of the Evaluation Act) as a rule prevents built-up plots of land being evaluated at their fair market value. According to the statutory material, the legislature wished with the simplified value appraisal procedure to bring about an evaluation averaging approximately 50 % of the purchase price – in other words half of the fair market value –, and to create an incentive to invest in real assets through low inheritance taxation, as well as to exert a positive influence on the construction and housing industry. This implementation of fiscal policy at evaluation level is however irreversibly counter to the constitutional requirements ensuing from the principle of equality.

The evaluation of building leases and of plots of land which are encumbered with building leases governed by § 148 of the Evaluation Act – in the version applicable up to 31 December 2006 – also does not realistically portray the value relationships in their ratio. The value of the land and buildings constituted by the encumbered plot of land is rigidly determined in schematic terms without the remaining term of the building lease or further factors being taken into account. This leads to a situation, in many cases, in which the evaluation, both of the plot of land and of the building lease, considerably deviates from the fair market value.

Also, the ascertainment of the value of vacant plots of land (§ 145 of the Evaluation Act) does not satisfy the requirement for portraying the values in their ratio realistically, at least not any more. This is because the values were fixed by law as of 1 January 1996, applicable until the end of 2006. Price trends on the land market lead to a situation in which the past-related values do not realistically reflect the values within the group of vacant plots as to their ratio, nor do they correspond any more to the present values of other assets. Hence, the value ascertainment, in accordance with the law applicable until 31 December 2006, leads to unconstitutional taxation results.

Also, inheritance taxation of the recipients of shares in corporations is carried out in a manner which cannot be brought into line with the principle of equality. With unlisted shares which are to be estimated, the fiscal balance sheet value approach ordered by the legislature leads to taxation values which are, as a rule, far below the partial evaluation. What is more, the transfer of the fiscal balance sheet values – in turn parallel to operating assets – has quite differing effects on shares in corporations.

Also, the evaluation of farms and forestry assets violates the requirements emerging from the principle of equality. For the operational part, the capitalised value is prescribed as an evaluation goal. In structural terms this already fails to cover the increase arising from the asset growth in the ability of the *legatee* or *donee* to pay. Because of the statutory conception on which inheritance tax is based, the growth in the ability to pay results particularly from the price obtainable on sale under objective conditions, but not however solely from the profit achievable using the asset substance. The evaluation of the residential section and of company housing is aligned with the fair market value as a value category. In this sense, what was said with regard to real assets applies *mutatis mutandis*.

Despite the declaration of incompatibility with the principle of equality, it is necessary to permit, by way of exception, the further application of the inheritance tax law until a new statutory regulation is introduced. The legislature is constitutionally obliged to take, as a standard orientation for the new regulation, the fair market value at the evaluation level. If there are sufficient reasons of the common good, it is free to favour the acquisition of certain assets in the assessment base ascertainment in a second step using exemption regulations. The favouring effects must sufficiently pinpoint specific objectives, and must occur as evenly as possible within the group of beneficiaries. Finally, the legislature can also pursue fiscal policy aims using differentiated tax rates.

Languages:

German.

Identification: GER-2007-1-005

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 08.11.2006 / **e)** 2 BvR 578/02; 2 BvR 796/02 / **f)** / **g)** / **h)** *Europäische Grundrechte Zeitschrift* 2007, 66-82; CODICES (German).

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
5.3.5.1.4 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty – Conditional release.
5.3.13.1.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – Criminal proceedings.
5.3.13.6 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to a hearing.

Keywords of the alphabetical index:

Criminal, dangerousness / Sentence, life imprisonment / Sentence, remainder, suspension.

Headnotes:

The execution of a life imprisonment sentence beyond the term determined by the high degree of the criminal's guilt because of his or her dangerousness does not violate the guarantee of human dignity (Article 1.1 of the Basic Law) or the fundamental right to freedom in Article 2.2.2 of the Basic Law. In decisions on whether to suspend a life imprisonment sentence, the convicted person's concrete and in principle also realisable chance of regaining his or her freedom must be safeguarded through strict compliance with the proportionality principle.

Summary:

I. The constitutional complaints of two complainants, which have been consolidated for joint adjudication, concern the question of whether the statutory regulation of the suspension of the remainder of a life imprisonment sentence and its application by the courts are compatible with the Basic Law where the high degree of guilt no longer requires continued execution.

The first complainant was sentenced in 1974 by a Düsseldorf court, sitting with three professional and two lay judges, to life imprisonment for murder in conjunction with attempted rape. The court assumed that the complainant's mental state was such that he could be held criminally responsible in full. The complainant has disputed up until the present day having committed the offence.

The Regional Court decided in 1992 that the high degree of his guilt no longer required the continued execution of the life imprisonment sentence; it also decided, however, that the dangerousness evidenced by the offence continued to exist. The courts responsible for all matters pertaining to the execution of sentences, refused to suspend the execution of the remainder of his life imprisonment sentence and grant parole. In their view, there was a residual risk that the complainant could again commit a homicide. Most recently, in its order made in 2005, the Penal Execution Division of the competent court rejected a new application by the complainant for a conditional suspension of penal execution.

The second complainant, who was born in 1944, is serving a life sentence for two counts of murder. He was convicted in 1972 by a Mainz court sitting with three professional and two lay judges.

The second complainant broke into a house in Mainz on the night of 12 April 1970 for the purpose of having sexual intercourse with the daughter of the family. In the further course of events, he killed both the daughter of the family as well as her mother. The Mainz court sitting with three professional and two lay judges found that the perpetrator had "base motives" in the case of both murders. A psychiatric expert certified that the complainant's mental state was such that he was fully responsible for committing the criminal offence.

The Penal Execution Division of the competent court decided in 1997 that the high degree of his guilt no longer required continued execution. At the same time, it rejected the application for a suspension of his imprisonment sentence and a grant of parole, which was being made by him for the first time. In the view of all of the experts, there was a residual risk that the complainant could again commit homicide.

The complainant last applied for a conditional release in 1998 on the basis that in his case, only a theoretical residual risk had been forecast. The Penal Execution Division of the competent court rejected his application in an order made in 2002. In the court's opinion, it was true that the complainant had proven himself to be reliable during the previous eight years as a prisoner entitled to temporary release with a right to leave prison and to take holidays, and that he had been working for a long time as an independent contractor. Nonetheless, this had to be weighed against the residual risk of his dangerousness which could not be excluded. The court also stated that since the complainant denied his offence, it was not possible for him to deal with the specific motivational structures behind it.

Both complainants lodged constitutional complaints against the orders of the courts responsible for all matters pertaining to the execution of sentences, which had refused to suspend the remainder of their life imprisonment sentences.

II. The Second Panel of the Federal Constitutional Court found in response to the constitutional complaints that to the extent that the challenged orders concerned the execution of life imprisonment sentences beyond the term determined by the high degree of the criminal's guilt because of the dangerousness of the criminal, they did not violate the guarantee of human dignity or the fundamental right to freedom.

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

The rules governing the suspension of the remainder of a life imprisonment sentence in those cases where the high degree of guilt does not require continued execution are, taking into account the principles of interpretation set out below, compatible with the Basic Law. The execution of a life imprisonment sentence beyond the term determined by the high degree of the criminal's guilt because of his or her dangerousness does not violate the guarantee of human dignity (Article 1.1 of the Basic Law) or the fundamental right to freedom (Article 2.2.2 of the Basic Law).

Human dignity is the highest legal value within the constitutional order. No person may be deprived of it. Respect for and protection of human dignity belong to the constituting principles of the Basic Law. In light of the content of Article 1.1 of the Basic Law, the execution of a life imprisonment sentence is in principle also compatible with the Basic Law from the point of view that its purpose is to safeguard the protection of the general public. Nothing prevents a polity from safeguarding itself, even through long lasting penal detention, against a criminal who is dangerous to the public.

In addition, the execution of a life imprisonment sentence after the point in time determined by the high degree of the criminal's guilt, does not violate the principle derived from Articles 1.1 and 2.1 of the Basic Law or the *nulla poena sine culpa* principle, which is derived from the rule of law principle and which has been given constitutional status.

To the extent that the statutory provisions regulating the suspension of the remainder of a life imprisonment sentence provide, under certain circumstances, for the continued execution of a sentence although this is no longer required by the high degree of guilt involved, this does not amount to allowing penal execution which does not depend on guilt or which is no longer covered by the requirement that the punishment be proportionate to the guilt.

The guarantee of human dignity and the rule of law principle require, however, that the convicted person has a concrete and in principle also realisable chance of regaining his or her freedom at a later time. In view of the fundamental right to freedom in Article 2.2 of the Basic Law, this chance to regain one's freedom is safeguarded by strict compliance with the proportionality principle in decisions on whether to continue penal detention. The statutory provisions on the suspension of life imprisonment sentences are not constitutionally objectionable to the extent that they require for the suspension of the remainder of a sentence that the safety interests of the general public be taken into account and thereby serve to protect the general public from dangerous criminals. It is constitutionally unobjectionable if the legislature makes the suspension of the execution of a life imprisonment sentence and the grant of parole dependent on a forecast of the convicted person's dangerousness in order to obtain the desired protection. This applies also in view of the uncertainties involved in using a prognosis as the basis for a long-lasting penal detention.

However, constitutional limits, in particular those based on the prohibition of excessiveness, arise from the particularly serious encroachment of possible lifelong penal detention. Accordingly, the tension between the right to freedom of the individual concerned and the need to safeguard the general public against expected, serious injury to legal interests demands that a just and tenable balancing take place. The longer the penal detention lasts, the stricter the conditions imposed on its proportionality. However, the sustained influence of the increasingly important right to freedom reaches its limits where it appears untenable that the person concerned should be set free. Where it can be determined that the convicted person continues to be dangerous, it is necessary for the life imprisonment sentence to continue to be executed in order to protect the general public.

Due to the temporal lack of definiteness the further execution of a life imprisonment sentence must be regularly examined. However, the requirement that an act may only be punished if it was clearly defined by law as a criminal offence before it was committed does not make a statutory regulation providing for a maximum term for the execution of life imprisonment sentences necessary.

To the extent that the second complainant alleges that the general principle of equality before the law is violated by the fact that, in connection with the making of a prognosis for the question of whether or not to suspend a sentence, the law treats a criminal who denies his or her offence less favourably than a repentant criminal, his constitutional complaint is also unsuccessful. The degree to which the wrong perpetrated is understood and the convicted person's reappraisal of his or her offence must be taken into account in the making of the prognosis. The necessity for this is not placed in question by the person concerned's denial of the offence due to the fact that the convicted person's commission of the offence or their participation in it and their guilt have been ascertained in a non-appealable criminal judgment.

The orders challenged by the complainants meet the constitutional requirements described. They do not violate their human dignity, they comply with the proportionality principle and satisfy the procedural requirements which must be complied with in decisions on whether to suspend a life imprisonment sentence.

Languages:

German.

Identification: GER-2007-1-006

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 12.12.2006 / **e)** 1 BvR 2576/04 / **f)** / **g)** / **h)** *Betriebsberater* 2007, 617-624; *Neue Juristische Wochenschrift* 2007, 979-986; *Die Information für Steuerberater und Wirtschaftsprüfer* 2007, 242-243; *Recht der Internationalen Wirtschaft*, supplement 2007, 304-310; *Zeitschrift für das gesamte Familienrecht* 2007, 615-622; CODICES (German).

Keywords of the systematic thesaurus:

4.7.15.1.3 **Institutions** – Judicial bodies – Legal assistance and representation of parties – The Bar – Role of members of the Bar.
4.7.15.1.5 **Institutions** – Judicial bodies – Legal assistance and representation of parties – The Bar – Discipline.
5.4.4 **Fundamental Rights** – Economic, social and cultural rights – Freedom to choose one's profession.
5.4.8 **Fundamental Rights** – Economic, social and cultural rights – Freedom of contract.

Keywords of the alphabetical index:

Lawyer, contingency fee, statutory prohibition / Lawyer, duties / Lawyer, independence.

Headnotes:

The prohibition of contingency fees for lawyers, including the prohibition of *"pactum de quota litis"* (§ 49.b.2 of the Federal Lawyers' Act, old version, § 49.b.2.1 of the Federal Lawyers' Act) is incompatible with Article 12.1 of the Basic law insofar as it permits no exception for the case where the lawyer, in agreeing a fee based on results, takes into account particular circumstances in the person of the client which would otherwise deter the client from pursuing his or her rights.

Summary:

I. The Federal Lawyers' Act prohibits lawyers from making agreements under which a payment or the amount of a payment is made dependent on the result of the matter or on the success of the lawyer's activity, or under which the lawyer receives, as a fee, part of the sum awarded.

The complainant, a lawyer, asserts in her constitutional complaint that this prohibition of contingency fees for lawyers is unconstitutional. In 1990, she was instructed by two persons living in the USA to enforce claims for land which had belonged to their grandfather and which had been expropriated by the National Socialist dictatorship. It was agreed that one-third of the amount awarded should be paid as a fee. In the following period, the complainant obtained compensation in the total amount of DM 312,000 for her clients. Of this, she received, as agreed, DM 104,000. The lawyers' disciplinary court held that the payment of the contingency fee was a violation of the fundamental duties of a lawyer. It therefore reprimanded the complainant and ordered her to pay a fine in the amount of EUR 25,000; the lawyers' disciplinary appeal court, as the next instance, reduced this to EUR 5,000.

II. The constitutional complaint was successful in part. The First Panel of the Federal Constitutional Court held that the statutory prohibition of contingency fees for lawyers is not compatible with the fundamental right to the free practice of an occupation or a profession (Article 12.1 of the Basic

Law) to the extent that the statute provides for no exceptions and therefore the prohibition is to be observed even if the lawyer, in agreeing a fee based on results, takes into account particular circumstances in the person of the client which would otherwise deter the client from pursuing his or her rights. The legislature must pass a new provision by 30 June 2008. Until then, however, the statutory prohibition of contingency fees for lawyers continues to apply. For this reason, the Federal Constitutional Court did not criticise the judgments of the lawyers' disciplinary courts against the complainant from a constitutional point of view.

The decision is essentially based on the following considerations:

In prohibiting contingency fees for lawyers, the legislature is pursuing public welfare goals that are based on rational considerations and therefore are capable of legitimising the restriction of lawyers' practice of their profession.

On the one hand, the prohibition serves to protect the independence of lawyers, which is the indispensable requirement for a functioning administration of justice. It is not constitutionally objectionable that the legislature regards the agreement of a contingency fee as a threat to the independence of lawyers. For example, to remain independent, a lawyer needs critical distance from a client's concern, and this critical distance may be harmed if a lawyer has agreed to share in the risk of a legal matter. But above all, it is not completely misplaced to fear that the agreement of a fee based on results may create an additional incentive for dishonest lawyers to aim at success "at any price", including the use of dishonest means. Another legitimate purpose of the prohibition of contingency fees is to be seen in the protection of those seeking justice against being cheated on the basis of excessive fee rates. It is possible for a dishonest lawyer to induce the client, by incorrect representation of the chances of success or exaggerated description of the amount of work to be expected, to agree to an unreasonably high fee. Finally, it is unobjectionable under constitutional law if the legislature regards the admissibility of a contingency fee as endangering procedural equality of arms because the defendant – in contrast to the plaintiff – does not have the possibility of shifting his or her costs risk in a comparable way. In order to pursue these goals for the common welfare, the prohibition of contingency fees for lawyers may also be regarded as suitable and necessary.

The prohibition of contingency fees is, however, unreasonable to the extent that it permits no exceptions and therefore is to be observed even if the lawyer, in agreeing a fee based on results, takes into account particular circumstances in the person of the client which would otherwise deter the client from pursuing his or her rights. When persons seeking justice make a decision on using the services of lawyers, the questions of costs is of vital importance. Persons seeking justice who by reason of their income and financial circumstances have no claim to state assistance for litigation or legal advice may similarly be confronted with the decision whether their own financial situation reasonably permits them to take the financial risks that are entailed by calling on qualified legal assistance and support, in view of the uncertain outcome of the matter. A considerable number of persons affected will, on the basis of rational deliberations, not wish to take the risk as to costs, and will therefore refrain from pursuing their rights. For these persons seeking justice, recognition should be given to their need to shift the above risk at least in part onto the lawyer representing them, by agreeing on a fee based on results. In such cases, the prohibition of contingency fees for lawyers does not promote the granting of legal protection, but instead makes the path to it more difficult.

The legislature can remove this deficiency in the law by retaining the prohibition as a general rule, but creating an exception for the above group of cases. In addition, to protect the financial interests of the persons seeking justice and to protect confidence in the legal profession, the validity of the agreement of a contingency fee may be made dependent on the lawyer performing his or her duties of information towards the client with regard to fees. Finally, the legislature is not prevented from removing the basis from the unconstitutional deficiency in the law by completely abandoning the prohibition of contingency fees for lawyers or retaining it only subject to strict requirements, for example where the client has been inadequately informed.

Languages:

German.

Identification: GER-2007-1-007

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 13.02.2007 / **e)** 1 BvR 421/05 / **f)** / **g)** / **h)** *Neue Juristische Wochenschrift* 2007, 753-758; *Das Jugendamt* 2007, 92-99; *Europäische Grundrechte-Zeitschrift* 2007, 54-61; *Deutsches Verwaltungsblatt* 2007, 381-388; *Zeitschrift für das gesamte Familienrecht* 2007, 441-448; CODICES (German).

Keywords of the systematic thesaurus:

1.3.5.15 **Constitutional Justice** – Jurisdiction – The subject of review – Failure to act or to pass legislation.
5.3.13.17 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Rules of evidence.
5.3.32.1 **Fundamental Rights** – Civil and political rights – Right to private life – Protection of personal data.
5.3.33.1 **Fundamental Rights** – Civil and political rights – Right to family life – Descent.

Keywords of the alphabetical index:

Paternity, determination, secret, use as evidence / Paternity, right to know / Paternity, contestation, proceedings / Informational self-determination / DNA analysis, secretly obtained, use as evidence / Genetic data.

Headnotes:

In order to put into effect the right of a legal father to know whether his child is biologically his (Article 2.1 in conjunction with Article 1.1 of the Basic Law), the legislature must make available a suitable procedure to determine paternity.

It is in conformity with the Basic Law if the courts, on the ground of violation of the right of informational self-determination of the child affected, protected by Article 2.1 in conjunction with Article 1.1 of the Basic Law, refuse to recognise secretly obtained genetic paternity test results as evidence.

Summary:

I. The constitutional complaint relates to whether it is possible to use a secretly obtained DNA test results as evidence in judicial proceedings contesting paternity to clarify the paternity status. At the same time, it relates to the question as to whether applicable the law gives the legal father of a child an adequate possibility of obtaining knowledge and determining whether the child is biologically his.

The complainant had recognised, before the Youth Welfare Office, his paternity of a child with whose mother he was not married. Years later, without the knowledge of the child and of the mother, he obtained a genetic test from a private laboratory, based on samples consisting of his saliva and a piece of chewing gum which he claimed the child had chewed. The result of the test was that the donor of the saliva sample could not be the biological father of the child from whom the other sample was claimed to come.

The action contesting paternity, which was based on the test result, was unsuccessful before the Higher Regional Court and before the Federal Court of Justice. The secretly obtained DNA paternity test had not been accepted as evidence by the courts. In his constitutional complaint, directed against these court rulings, the complainant challenged a violation of his general right of personality.

II. The constitutional complaint was successful in part. The First Panel of the Federal Constitutional Court held that it is commensurate with the Basic Law if the courts refuse to use secretly obtained genetic paternity test results as evidence because this would violate the right of informational self-determination of the child affected. In order to implement the right of a legal father to know whether his child is also biologically his, the legislature must make available a suitable procedure (apart from proceedings contesting paternity) solely to determine paternity. The legislature was instructed to do so by 31 March 2008. To the extent that the constitutional complaint challenged the judgments of the Higher Regional Court and the Federal Court of Justice, it was rejected as unfounded.

The decision is essentially based on the following considerations:

The general right of personality (Article 2.1 in conjunction with Article 1.1 of the Basic Law) guarantees not only the right of a man to know the parentage of the child legally attributed to him, but also the possibility for him to exercise this right. The legislature has failed to make an appropriate procedure available by which the right to knowledge of paternity can be asserted and enforced and therefore violated the protection of this fundamental right.

The possibility of obtaining a paternity test privately exists, with the consent of the child or of its mother who has custody, relying on genetic samples from the child, and in this way attaining knowledge as to paternity. However, this approach is unlawful if the required consent has not been obtained. For a paternity test obtained secretly with the help of

genetic material is based on an unjustifiable violation of the right of informational self-determination of the child affected. The government institutions must offer protection against such violation. The mother having custody must also be protected against undesired access to the genetic material of her child. Parental custody also includes making the decision, in the interests of the child, as to whether a person may collect genetic material from the child and use it.

The right of a man to know whether a child is biologically his requires a procedure to be made available for cases in which doubts as to his paternity exist and without incurring further legal consequences. In making such a procedure available, the legislature admittedly restricts the child's right of informational self-determination by granting access to the child's genetic material. Since the latter may be related to that of the man who is the legal father of the child, the right of the child not to disclose this information is less important than that of the man to know. Nor do fundamental rights of the mother run counter to the provision of a procedure to clarify and determine that a child is the biological child of a particular man. Admittedly, the mother's right of personality gives her the right to decide for herself whether, and if so to whom, she permits access to her privacy and to information on her sexual life. However, the determination of the child's parentage does not give rise to an unlawful encroachment into the mother's private life. The encroachment's primary goal is to clarify whether the child is the product of her relationship with his/her legal father, who in turn has a constitutionally protected right to know whether the child is his biological child.

The proceedings contesting paternity, which are provided under the Civil Code, are not proceedings that constitutionally take into account the father's right solely to know that the child is biologically his. They end legal paternity if it transpires in the proceedings that the child is not the biological child of his/her father. Admittedly, paternity is also clarified in the course of such proceedings. But because of their further-reaching goal of legally separating the legal father from the child, the proceedings contesting paternity do not do justice to the right of a man to mere knowledge as to whether a child is his biological child. The desire of a legal father may be solely directed to knowing whether the child is really his biologically, without at the same time wanting to give up his legal paternity. Also, the statutory requirements subject to which paternity can be contested are disproportionate in relation to a father's pursuit of the interest in obtaining knowledge of paternity of his child. Where the only purpose is to pursue this goal, there is no interest of the child and mother equally important and worthy of protection to be weighed up against the father's right to knowledge of paternity. It would therefore not be justified to subject a procedure for clarification and determination of paternity to the same onus of presentation and time-limits as those for the proceedings contesting paternity. To make a procedure available, it would be sufficient, in this case, if the legal father submitted doubts as to whether the child is his biological child.

The decisions challenged by the constitutional complaint are, however, constitutionally unobjectionable. It is commensurate with the constitution if the courts refuse to use secretly obtained genetic paternity test results as evidence because this would violate the right of informational self-determination of the child affected. Nor does the circumstance that, to date, no procedure is available that makes it possible for a man to have the paternity of a child that is legally attributed to himself clarified and determined, make it possible to recognise such an interest of the complainant that is particularly worthy of protection.

The legislature has latitude with regard to the way in which it complies with its duty to make available a procedure solely to determine paternity. However, the legislature has a duty to ensure that in the proceedings contesting paternity, the constitutionally protected interest of the child in retaining its legal and social family attribution where appropriate, continues to be taken into account. For example, it can ensure that the knowledge of the legal father that he is not the biological father, which is now easier to obtain, does not, in specific cases, immediately lead to the annulment of legal paternity in the proceedings contesting paternity.

To the extent that it confirms the decisions challenged by the constitutional complaint, the judgment was passed by 6-2 votes; in other respects it was unanimous.

Languages:

German.

Identification: GER-2007-1-008

a) Germany / **b)** Federal Constitutional Court / **c)** / **d)** 27.02.2007 / **e)** 1 BvR 538/06; 1 BvR 2045/06 / **f)** / **g)** / **h)** *Neue Juristische Wochenschrift* 2007, 1117-1121; CODICES (German).

Keywords of the systematic thesaurus:

5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Effective remedy.
5.3.22 **Fundamental Rights** – Civil and political rights – Freedom of the written press.

Keywords of the alphabetical index:

Media, press, editorial offices, search / Search and seizure / Media, press, editorial material, confidentiality / Media, press, protection of informants / Secret, official, disclosure.

Headnotes:

Searches and seizures in investigation proceedings against members of the press are not permitted under constitutional law if they exclusively or predominantly serve the purpose of identifying an informant.

The mere disclosure of an official secret within the meaning of § 353.b of the Criminal Code by a journalist is in view of Article 5.1.2 of the Basic Law insufficient to establish suspicion that the journalist has aided and abetted the betrayal of an official secret and that the search and seizure can be authorised under criminal procedural law.

On the guarantee of effective legal protection against the seizure of editorial material.

Summary:

I. The complainant is the editor-in-chief and responsible person within the meaning of the Press Act of a political magazine called CICERO, which appears monthly. In April 2005, CICERO published an article written by a freelance journalist about a terrorist. The article cites extensively from an internal, classified report of the Federal Criminal Police Office. Following the institution of criminal investigation proceedings by the public prosecutor's office against the complainant and the freelance journalist, the Potsdam Local Court ordered a search of the journalist's home and office as well as of CICERO's editorial offices. As justification for its order, the Local Court stated that the accused had, as a journalist, disclosed a secret within the meaning of § 353.b of the Criminal Code and, in doing so, had aided and abetted the disclosure of an official secret. The Local Court was of the opinion that he had known that the intention of the employee of the Federal Criminal Office in leaking the report to him was so that its secret content would be published in the press. The same was also true of the complainant as editor-in-chief and responsible person for CICERO since he was familiar with the article's content and it was published with his knowledge.

During the search of the editorial offices, various data carriers were impounded and a copy was made of the hard disk drive of the computer, which had been used by the member of the editorial staff in charge of the article at the time.

The complaint by the editor-in-chief against the search and seizure order was dismissed by the Potsdam Regional Court. The seizure of the data copy of the computer hard disk drive was confirmed by another order by the Potsdam Local Court. The appeal by the editor-in-chief against this order was rejected by the Potsdam Regional Court on the basis that the appeal was procedurally moot since the data copy had been deleted in the meantime. In February 2006, the investigation proceedings against the complainant were discontinued after he paid a fine of 1,000 EUR.

In his constitutional complaint, the complainant alleges that his fundamental rights under Article 5.1.2 of the Basic Law (freedom of the press) and Article 19.4 of the Basic Law (right to effective legal protection) have been violated.

II. The constitutional complaint was successful. The decision by the First Panel of the Federal Constitutional Court is based in essence on the following considerations:

The order to search the editorial department and the seizure of the evidence found there violate the complainant's fundamental right to freedom of the press.

The search of magazine offices amounts to an impairment of the freedom of the press due to the associated interruption to editorial work. Through the order to seize data carriers for the purpose of evaluating them, the investigation authorities were in addition given the opportunity of accessing editorial data material. This interferes to a particularly high degree with the confidentiality of editorial work, which is covered by the fundamental right to freedom of the press, as well as interfering with any bond of trust with the informant.

This intervention is not justified under the constitution. The courts did not sufficiently take into account the protection of informants required by constitutional law when interpreting and applying the laws authorising searches and seizures. The suspicion underlying the court order that the complainant had committed a crime was not sufficient for the search of editorial offices and the seizure of evidentiary material.

§ 353.b of the Criminal Code makes the unauthorised disclosure of an official secret punishable. However, the publication alone of a secret in the press does not necessarily mean that this kind of underlying offence has been committed by the holder of classified information. For example, the statutory definition of an offence pursuant to § 353.b of the Criminal Code is not satisfied, and therefore aiding and abetting its commission is not possible, if documents or files containing official secrets become public inadvertently or via an intermediary who is not subject to a duty of confidentiality. If the holder of classified information only wants to provide the journalist with background information and if it is then published contrary to his or her agreement, the crime is already committed upon the disclosure of the secret; subsequent publication can no longer amount to aiding and abetting the commission of a crime. In such cases search and seizure cannot be ordered for the purpose of clarifying whether the journalist has aided and abetted in its commission.

Searches and seizures in investigation proceedings into members of the press are not permitted under constitutional law if they exclusively or predominantly serve the purpose of identifying an informant. Where the members of the press concerned are themselves accused, it is of course permissible to order searches and seizures in proceedings to investigate their suspected aiding and abetting the betrayal of official secrets if this is for the purpose of solving the crime of which they are accused. However, it is not permissible to do this for the purpose of establishing grounds for suspicion, in particular, against the informant. The risk of violating the protection of informants required by the constitution is particularly large if the suspicion of aiding and abetting a crime is only based on the fact that an official secret has been published in the press and the decisive document appears to have found its way into the hands of the journalist without authorisation. In this kind of situation, the public prosecutor's office is indeed permitted by the constitution to bring charges against the journalist concerned by instituting investigation proceedings against him or her. However, if every suspicion were also sufficient for a search and seizure order against members of the press and radio, the public prosecutor's office would be in the position in which it could destroy the special constitutional protection of members of the media by deciding to institute investigation proceedings. Therefore, the criminal procedure rules on search and seizure must be construed in such a way that the mere publication of an official secret by a journalist is not adequate to establish sufficient suspicion pursuant to this provision that the journalist has aided and abetted the disclosure of an official secret. Instead what is necessary are specific factual circumstances indicating that the holder of classified information intends to disclose a secret and thus there is an underlying offence in respect of which there could be aiding and abetting.

According to these standards, the search and seizure ordered in this case violated the protection of editorial work guaranteed by the freedom of the press as well as the protection of informants. The order was made in a situation in which there were no other reasons besides the publication of a report in a magazine for suspecting that there could be a betrayal of confidence by a holder of classified information. All investigations along these lines had been, until then, unsuccessful. Thus, in the end, the search was predominantly for making it possible to identify the suspected informant at the Federal Criminal Police Office.

In addition, the order by the Regional Court determining that the appeal directed against the order confirming the seizure was procedurally moot and thus settled had violated the complainant's right to an effective legal protection. In view of the serious impairment of the freedom of the press, it had to be possible for the complainant to have the order confirming the seizure of editorial material subject to judicial review.

Cross-references:

This decision expressly confirms the landmark decision of the Federal Constitutional Court of 5 August 1966, *Official Collection of Decisions*, Volume 20, pages 162 *et seq. ("Spiegel Judgment")*.

Languages:

German.

Hungary
Constitutional Court

Statistical data
1 January 2007 – 30 April 2007

Number of decisions:

- Decisions by the Plenary Court published in the Official Gazette: 21
- Decisions in chambers published in the Official Gazette: 5
- Other decisions by the Plenary Court: 42
- Other decisions in chambers: 20
- Number of other procedural orders: 31

Total number of decisions: 119

Important decisions

Identification: HUN-2007-1-001

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 18.01.2007 / **e)** 1/2007 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 2007/5 / **h)**.

Keywords of the systematic thesaurus:

5.1.4 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.21 **Fundamental Rights** – Civil and political rights – Freedom of expression.
5.3.23 **Fundamental Rights** – Civil and political rights – Rights in respect of the audiovisual media and other means of mass communication.

Keywords of the alphabetical index:

Media, broadcasting, freedom / Media, Audiovisual Council, National / Media, self-censure / Information, pluralism.

Headnotes:

The Hungarian Constitution requires the Complaints Committee to carry out an assessment as to whether balanced information is being provided in the programmes being broadcasted.

Summary:

I. The petitioners argued that the Complaints Committee were singling out certain programmes for criticism, that is to say, they were only checking certain programmes for compliance with the requirement to provide balanced information. The petitioners suggested that this was because the Act on Radio and Television (Act on Media) did not directly exclude the possibility of such assessments. They also contended that the paragraph within the Act dealing with other types of complaints was incompatible with Article 61 of the Constitution.

II. The Constitutional Court observed that, from the broadcaster's point of view, the existence of the Complaints Committee was a serious restriction of the freedom of press. It accordingly went on to determine whether there was any legislative purpose behind the restriction on freedom of broadcast arising from the Committee's activities.

The rationale behind Article 61.4 of the Constitution is the prevention of monopolies on information. The rapid development of broadcasting technology has given rise to the threat of monopolies of opinion. The Constitutional Court therefore accepted the maintenance of diversity of opinion as a legitimate objective. This can only be achieved by restricting the freedom of broadcast.

Parliament has set up a unique procedure, operating over a number of levels, with a view to the dissemination of balanced information. Article 49.1 of the Act on Media states that if the broadcaster provides information on social issues which is presented in a one-sided way, or if the programme only affords the opportunity of presenting one side of the debate on a controversial issue, or if the broadcaster has committed any other breach of the requirement to provide balanced information, the person whose opinion was not presented or the prejudiced party can take their grievances up with the broadcaster. The broadcaster then has forty eight hours to decide whether to accept or reject this complaint. The aggrieved party would then need to lodge a written complaint to the Complaints Committee, which assesses complaints suggesting infringements of the requirement to provide balanced information.

The Constitutional Court pointed out that, under Article 49 of the Act on Media, there is no reason why broadcasters should not be able to convey relevant views on a particular topic on programmes which are broadcasted regularly. If it was only possible to satisfy

the requirement to provide balanced information on one specific programme, this would constitute a very serious violation, not only of the freedom of press but also of the freedom of broadcast, which could not be justified by the legislative purpose, that is, the achievement of the pluralism of opinion. It would force broadcasters to make fewer informative programmes and it would not be possible to raise questions on more controversial social issues. This would result in self-censure by broadcasters, which would seriously impede the goal of achieving an interesting and varied information service. Programme schedules would become very monotonous and it would not be possible to debate public issues.

It was held that the Complaints Committee should examine the requirement to provide balanced information, whether this was in regard to one particular programme, to a series of programmes or to programmes which appear regularly.

The Constitutional Court then proceeded to examine the constitutionality of Article 48.3 of the Act on Media. This deals with the power to make by-laws about other types of complaint. By-laws are determined by the National Radio and Television Board. The Act on Media does not specify the type of breach which would trigger a referral to the Complaints Committee, the procedure is not set out, neither are legal remedies identified. Consequently, there is no legal framework for the National Radio and Television Board's role in regulating the complaints procedure.

The Constitutional Court held that the so-called "other complaints procedure", which governs cases which do not fall into a precise category, over the freedom to broadcast, has no constitutional purpose. It therefore directed the repeal of Article 48.3 of the Act on Media.

Supplementary information:

In his concurring opinion, Constitutional Judge Péter Kovács emphasised that the so-called "other complaints procedure" constituted an obstacle to the freedom of opinion which is important in terms of Hungary's international legal duties.

Languages:

Hungarian.

Identification: HUN-2007-1-002

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 24.01.2007 / **e)** 2/2007 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 2007/7 / **h)**.

Keywords of the systematic thesaurus:

3.10 **General Principles** – Certainty of the law.
3.12 **General Principles** – Clarity and precision of legal provisions.
3.16 **General Principles** – Proportionality.
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.
5.3.13.8 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right of access to the file.
5.3.13.17 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Rules of evidence.
5.3.32 **Fundamental Rights** – Civil and political rights – Right to private life.

Keywords of the alphabetical index:

Data, personal, treatment / Information, confidential / Data, collection, secret / Informational self-determination, right.

Headnotes:

The use of secret data collection poses a serious interference with individual life and liberty. It should, accordingly, only be carried out in exceptional circumstances, on a temporary basis and as a last resort. More stringent regulation is needed of such secret methods than is needed for public procedures.

Summary:

I. The Constitutional Court examined the provisions of the Act on Criminal Procedure, the Act on Police and the Act on Excise Taxes and Special Regulations on the Marketing of Excise Goods (hereinafter: Excise Act) relating to secret data collection.

The petitioners suggested that some of the concepts in the Act on Criminal Procedure and the Act on Police relating to the conditions under which secret data collection should be used are ambiguous and hard to understand. This is not compatible with principle of certainty of law, under Article 2.1 of the Constitution. There is also too much scope for permission being given by judges for secret data

collection. It is almost impossible for a trial judge to check documentation gathered from secret data collection and deployed in the preliminary proceedings. This is difficult to justify, under the Constitution. The accused and his or her counsel are denied access to the documents. As a result, it is the public prosecutor who decides whether the documents can be used, and the defence team and Court have no way of verifying his or her reasoning. The petitioners contended that this infringes a wide range of rights, including fair trial, right to defence, right to reputation, inviolability of the home, and protection of confidential matters and data.

II. A judicial assessment was launched of the relevant provisions of the Excise Act on secret data collection because they enabled the customs authorities to use secret data collection methods for which, under the Code on Criminal Procedure, leave is normally needed from the Court.

The Constitutional Court observed that there is a necessity for secret data collection in the course of state criminal proceedings. However, the protection of the rule of law and fundamental rights requires that such investigatory methods should be the subject of detailed legal regulation. The interference they bring to the lives of individuals mean that they can only be deployed in exceptional circumstances, on a temporary basis and as a last resort. A stricter form of regulation is needed than would be the case where the procedure is not a clandestine one.

The Act on Police does not define necessity in this context but simply lists the general objectives of criminal prosecution as conditions justifying secret data collection. It gives authorities leeway to deploy such methods in a wide range of circumstances, from the prevention of crime to the identification of perpetrators, as well as the protection of those participating in the administration of justice.

The Act on Criminal Procedure allows for deployment of these methods in a narrower range of circumstances. For instance, secret data collection can be used to confirm the identity and residence of the perpetrator, to assist in their capture and in the exploration of the evidence to be evinced. Both Acts state that clandestine methods can be used where the offence is a more serious one, and both also list other types of crime where this is possible (irrespective of the sentence it carries). The lists in both Acts contain several ambiguous concepts, which are difficult to interpret. This gives rise to excessive legislative subjectivity. A general procedure for the deployment of clandestine methods is lacking, and this infringes the principle of legal certainty.

Secret data collection violates the right to privacy. Sometimes, states need to restrict fundamental rights, in order to carry out effective criminal prosecutions. However, safeguards should exist within the laws on procedure. This is not the case here. The Constitutional Court accordingly directed the repeal of these legal provisions.

The Constitutional Court then examined provisions of the Act on Criminal Procedure, which make it possible to use the results of secret data collection without leave from the Court and in a manner which is almost free of restriction. Judges should evaluate evidence, the legality of its acquisition and the weight it should be accorded without unwarranted restrictions on the rights of parties to the case. Judicial procedure cannot be a mere formality, with effective decision-making taking place outside the court's remit. The above Act makes no provision for an assessment of the necessity and proportionality of secret data collection, which is an infringement of the right to informational self-determination under Article 59.1 of the Constitution. The Constitutional Court pronounced the provisions of the Act on procedure unconstitutional.

Finally, the Constitutional Court examined the Excise Act, under which customs services may examine postal packages without court leave and based on mere supposition. The state can justify this, due to the requirement for fair and proportionate taxation. The rules allowing the revenue authorities to search various locations, premises and means of transportation are not necessarily unconstitutional. Using clandestine methods to achieve this aim, however, for which court leave would normally be needed, results in an unnecessary and disproportionate restriction of fundamental rights. The Constitutional Court directed the repeal of these provisions too.

Languages:

Hungarian.

Identification: HUN-2007-1-003

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 13.02.2007 / **e)** 3/2007 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 2007/16 / **h)**.

Keywords of the systematic thesaurus:

4.7.3 **Institutions** – Judicial bodies – Decisions.
5.3.5.1 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Effective remedy.
5.3.13.3.1 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts – *Habeas corpus*.

Keywords of the alphabetical index:

Detention, maximum length.

Headnotes:

Legislation which allows for detention for seventy two hours for a minor offence, with no legal remedy available, is incompatible with the guarantees contained in the Hungarian Constitution.

Summary:

I. The petitioner argued that the Act on Misdemeanours is unconstitutional, as there is no provision for legal remedy in relation to custody. Article 55.2 of the Constitution states that somebody suspected of having committed a criminal offence and who is under arrest, must either be released promptly or be brought before a judge. The judge is required to hear the suspect, and to make a prompt decision in a ruling containing written reasons as to the release or detention of the suspect.

II. The Constitutional Court observed that Article 55.2 of the Constitution shifts emphasis onto judicial authorities in cases of pre-trial detention. The requirement of promptness is crucial. An individual's right to liberty and security under the Constitution is effective only if the duration of the proceedings is within the legal limits and is appropriate to the circumstances of the case.

Article 57.5 sets out a universal right to seek legal redress against court decisions, the public administration or other authorities, which infringe their rights or interests. The availability of rectification for legal injury is essential.

The Act on Misdemeanours provides that custody can be imposed until the Court has arrived at a decision on the merits or for a maximum of seventy two hours. If somebody is caught carrying out a crime which carries a custodial sentence, their personal freedom is restricted by the police. There is a possibility for complaint, arising from the arrest. The police authorities will take somebody into custody after an arrest. In this case, there is no guarantee of legal remedy under the Act. A complaint can be lodged following the court's decision on the merits. Before the trial, the Court will decide whether custody is justified. If this is not the case, the matter is referred to the police. The Court will then make a decision on the basis of general rules. This decision is open to legal remedy.

The Constitutional Court noted that the Act contained no effective legal remedy in respect of custody. Although the time limit of seventy two hours custody was not, per se, unconstitutional, it was not compatible with the requirement of promptness or access to courts.

The Constitutional Court also noted that, under Article 57.5 of the Constitution, rights of recourse against decisions by public administration and other authorities are only available at the end of the proceedings, at the stage of appealing against the decision. There can be no justification for the lack of legal remedy in the case of custody, at the time it is being imposed. Parliament will have to decide how best to tackle this problem, whether by extending the opportunity for legal recourse or by shortening the time limit.

Because of the lack of guarantees in Articles 55.2 and 57.5 of the Constitution, the Constitutional Court found unconstitutionality arising from omission. It called on Parliament to fulfil its legislative duties.

Judge András Bragyova's concurring opinion stated that the ruling on unconstitutionality manifested in omission should have been based entirely on Article 55.2 of the Constitution *(habeas corpus)*.

The current custody regulations do not restrict the right to legal remedy, but they do restrict personal freedom, protected by Article 55 of the Constitution. By comparison, the restriction of the right to legal remedy is of secondary importance. The seventy two hour deadline in the Act on Misdemeanours is unconstitutionally long.

Article 55.2 of the Constitution further provides that where there is to be removal or restrictions on individual liberty, this should be for "the shortest possible duration" and a judge should take that decision, with written reasons. The current situation is

manifestly unconstitutional in that it is seventy two hours before a judicial decision is made on the restriction of the personal freedom of an individual in custody. Elemér Balogh and Péter Paczolay joined the concurring opinion.

Judge Péter Kovács also gave a concurring opinion, in which he expounded the relevant case-law from the European Court of Human Rights.

Languages:

Hungarian.

Identification: HUN-2007-1-004

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 27.02.2007 / **e)** 6/2007 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 2007/22 / **h)**.

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
4.9.8 **Institutions** – Elections and instruments of direct democracy – Electoral campaign and campaign material.
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.
5.3.41 **Fundamental Rights** – Civil and political rights – Electoral rights.

Keywords of the alphabetical index:

Election, campaign, media coverage / Election, opinion poll, prohibition to publish.

Headnotes:

The Hungarian law on electoral procedure prevents the publication of public opinion polls for an eight day period before the elections. This was held to be a disproportionate restriction on the right to free expression.

Summary:

The petitioner argued that the provision of the Act on Electoral Procedure, which prevents publication of public opinion polls from the eighth day before the vote to the termination of voting, was an unnecessary restriction on freedom of expression and the freedom of the press, as guaranteed in Article 61 of the Constitution.

The Constitutional Court had already decided upon the constitutionality of this “silence period” in Decision no. 39/2002. The Court observed then that the protection of the right to vote and the requirement of a democratic state under the rule of law sometimes necessitated a period of silence during the campaign, and therefore restrictions on the freedom of expression and the freedom of press. Article 40.2 prohibits any election campaign from midnight on the day before the election to the termination of voting. Election campaigns can sometimes last for eighty four days or more; the campaign silence period only lasts for eighty six hours which is a small proportion of the campaign period. The limitation on fundamental rights was deemed to be proportionate to the aim to be achieved.

However, the Constitutional Judges were of the view that the rule banning publication of opinion polls restricted the freedom of expression. The Court accordingly proceeded to assess whether such restriction passed the necessity and proportionality test. In the Judges’ opinion, undisturbed process of elections is a legitimate aim for the necessity of the restriction of a fundamental right; however, the ban was disproportionate. In short, the provision was not an unnecessary restriction on the freedom of expression and the freedom of the press, but it was out of proportion. The Constitutional Court directed its repeal.

Judge Péter Kovács gave a dissenting opinion. He warned that public opinion polls serve political aims. There are even stricter restrictions on their publication in other European countries. He also pointed out that Recommendation no. 15 of the Committee of Ministers of the Council of Europe supported the necessity of tightening up these rules. Judge Kovács did not agree that the restriction under discussion was disproportionate.

Languages:

Hungarian.

Ireland
Supreme Court

Important decisions

Identification: IRL-2007-1-001

a) Ireland / **b)** High Court / **c)** / **d)** 13.10.2006 / **e)** 2006/273 & 2006/283 / **f)** N. & anor. v. Health Service Executive & ors. / **g)** / **h)** CODICES (English).

Keywords of the systematic thesaurus:

5.3.13.3.1 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts – *Habeas corpus*.
5.3.33 **Fundamental Rights** – Civil and political rights – Right to family life.
5.3.44 **Fundamental Rights** – Civil and political rights – Rights of the child.

Keywords of the alphabetical index:

Adoption, against parents' will, grounds / Custody, joint, by parents / Child, best interest / Child, guardian, designation / Child, parents, duties / Child-raising, time / Family ties / Family, protection, constitutional / Family, bringing in, right.

Headnotes:

There is a strict constitutional presumption that the best interests of the child are protected by its natural parents. In the context of an *habeas corpus* application by the plaintiffs claiming custody of their child pursuant to Article 40.4.2 of the Constitution, which provides that where a complaint is made to the High Court alleging that a person is being unlawfully detained, the Court shall inquire into such complaint and may order the person in whose custody such person is detained, producing this person before the Court and certifying in writing the grounds of his detention, upon the hearing of which, the Court may order the release of this person from such detention, unless satisfied that he is being detained in accordance with the law.

Summary:

I. The applicants met in March 2002. In October 2003, the applicants discovered the pregnancy, at which time they were unmarried, cohabiting students. They both attended a medical social worker together and decided on the option of adoption. They were referred to the Health Service Executive (HSE) and a senior social worker, with whom they and the medical social worker had a meeting to discuss and plan the adoption. The child was born in July 2004 and the applicants agreed to place the child in pre-adoptive foster care. Before and after the birth of the child the applicants attended counselling and during the period up to placement for adoption visited the child on a regular basis, including overnight stays. The trial judge was satisfied that during the duration of the child's placement in foster care the applicants were informed that they could change their mind and resume caring for the child and were in fact encouraged that they could do so by the HSE social worker. In September 2004, the applicants signed a consent form to the child being adopted by the second and third named respondents, the adoption having been arranged by the first named respondent. The applicants met with the respondents in October and agreed on their suitability as adoptive parents. In November the child was placed in the custody of the respondents with a view to adoption. It is clear that on occasion, the applicants did express some doubt about the adoption, yet the mother proceeded to sign the final consent form in July 2005. The applicants claimed that these forms were signed on advice given them that to not do so would be "morally wrong", based on the issue of visitation rights, and based on a failure to communicate their dissatisfaction with the process to either the social worker or the respondents.

Until an adoption order is actually made by the Adoption Board, it is open to the natural mother to withdraw her consent and seek the return of her child. This may be met by an application by the prospective adopters pursuant to Section 3 of the Adoption Act 1974, which provides that where the High Court is satisfied that it is in the best interests of the child, it may make an order giving custody of the child to the applicant for such period as it may determine or may authorise the Board to dispense with the requirement of consent, where such consent has been revoked or neglected.

In September 2005, the applicants revoked their consent. While the adoption order had not yet been made, the child was not returned to the applicants as the respondents had initiated proceedings pursuant to Section 3 of the 1974 Act.

The applicants married in January 2006, reregistered the child's birth, and, therefore, constituting members

of a family within the meaning of Article 41 of the Constitution, sought custody of the child. The applicants instituted proceedings under Article 40.4.2 of the Constitution claiming custody of the child and seeking her production to them on the basis, *inter alia*, that the constitutional presumption that the appropriate place for the upbringing and education of a child is with the family unit. They asserted that there was no lawful basis for the child to remain in the custody of the respondents, who in turn certified grounds for the detention of the child.

The question therefore was whether the respondent's continued custody of the child was lawful based on the "inalienable and imprescriptible rights" of the applicants as a family, the natural primary and fundamental group of society, and based on the constitutional provision that the family is "the primary and natural educator of the child", as provided for in articles 41 and 42 of the Constitution. Under these provisions there is a constitutional presumption that the welfare of the child is best protected by the parents, as part of the family based on marriage. This presumption may be rebutted in two ways, either under Article 42.5 of the Constitution where the parents for "moral or physical" reasons have failed in their duty towards their children or under the "compelling reasons" test laid down in *In Re J.H.* (an infant) [1985] I.R. 375.

The High Court held that the child was in the lawful custody of the respondents notwithstanding explicit acceptance by the trial judge that the applicants were motivated by the best interests of the child and were being "brave and generous" in their decision. McMenamin J. concluded that the presumption had been rebutted successfully under both tests and that the plaintiffs were guilty of "a failure of duty" based on a number of factors "taken together" including abandonment of the child, by placing her for adoption, ceasing to carry out parental duties and their failure to claim her at an early stage. There were "compelling reasons" why her best interests were to remain with the respondents. The trial judge rejected the submission that there can be a failure by a parent or parents to provide for the needs of a child by reason of his or her placement for adoption.

McMenamin J. relied heavily on expert evidence on the issues of attachment and bonding, which agreed by all of the experts, was very strong between the child and the respondents. The experts also agreed that any transfer of custody would have to be carried out on a phased basis to prevent long term effects on the child. However, based on a "lack of trust" between the parties, the High Court accepted that a correctly phased transfer of custody could not be envisaged and therefore the child's best interests were to remain with the respondents.

Accordingly, a conditional order for the inquiry under Article 40 of the Constitution was discharged. The respondents successfully resisted the application for the making of an absolute order on the basis, *inter alia*, that the child had developed emotional attachment to them and that removing her from them would breach the child's constitutional right to the preservation of her welfare. The Court directed that the child be taken into the wardship of the Court and the respondents should have day-to-day custody, care and control of her. The applicants appealed to the Supreme Court against the decision of the High Court.

II. The Supreme Court unanimously held in favour of the strict constitutional presumption that the best interests of the child are protected by its natural parents as the presumption had not been rebutted under either the "failure of duty" test or the "compelling reasons" test. The Court directed the release of the child from the custody of the respondents and her return to the applicants.

The Court held that the placement for adoption should not be taken into consideration in any assessment of a failure of duty. Fennelly J. described this as "a quite dangerous approach, since it raises the possibility in every case of placement for adoption that failure of duty is involved". The Court also did not accept that that it was only one of a number of factors leading to this conclusion. Fennelly J. considered that "there must be a clearly demonstrated failure of duty before the State may exercise its power to supply the role of parents", such as a failure for "physical or moral reasons." The Court held that the threshold for Article 42.5 of the Constitution to apply is a high one and should only apply "in exceptional cases". The Court referred to the case of *North Western Health Board v. HW and CW* 3 IR 635 where a majority of the Supreme Court found that an exceptional case had not been made out, where the parents of a fourteen-month old child had refused to permit the administration to their child of a P.K.U. screening test even though the medical case for the administration of the test was overwhelming.

The constitutional presumption in favour of the family was also considered by the Supreme Court in the light of the "compelling reasons" test as stated by Finlay C.J. *In Re J.H.:*

> "the welfare of the child … is to be found within the family, unless the court is satisfied on the evidence that there are compelling reasons why this cannot be achieved."

Hardiman J. stated that the adoption of a child who is part of the natural and constitutional family can only take place under very restrictive conditions set out in the Adoption Act, 1988. He stated that, based on the test set out by Finlay C.J., there must be "coercive or strong reason to believe that the proper nurturing of the child in the natural family is not possible." However, he stated that given that this test is "so exacting that it would be difficult to see it being met other than in the most extreme circumstances".

Hardiman J. stated that by virtue of Article 42 of the Constitution, whereby the family is the "primary and natural educator of the child", the parents are entitled to have custody and society of the child on a day to day basis. Although rights may be ascribed to a child, these rights will actually empower whoever is in a position to assert them and not the child himself or herself, who by virtue of natural and constitutional order is the child's natural parents. He relied on *North Western Health Board v. HW and CW* and on *Attorney General v. X and Ors*., [1992] IR 1, as well as an English decision, *Re G. (Children)* [2006] 4 AER 241 to support these arguments. However, the Supreme Court rejected the view that the constitutional position puts the rights of parents before those of children, although McGuinness J. noted that she had voiced criticism of the position of the child in the Constitution. Hardiman J. stated that:

> "[The court] fully acknowledges the "natural and imprescriptible rights" and the human dignity, of children, but equally recognises the inescapable fact that a young child cannot exercise his or her own rights ... the preference the Constitution gives is this: it prefers parents to third parties, official or private, priest or social worker, as the enablers and guardians of the child's rights."

The Court noted the factual similarity between this case and the case of *In Re. J.H*. and accepted that a very high degree of bonding was proven in both. The Court stated that neither the respondent's inability to cooperate with a phased transfer nor the delay in transferring custody were relevant. Though evidence from experts on the issues of bonding and attachment and on the danger to the child inherent in separating her from those whom she naturally regarded as her mother and father and with whom she had bonded, would cause serious immediate and lasting damage, these concerns were not sufficient to rebut the constitutional presumption in favour of the family. Geoghegan J. noted that "transfers for many different reasons do have to take place and that what is important is that it be done with as much care as possible and with expert advice".

Accordingly, the release of the child from the custody of the respondents and her return to the applicants was directed.

Languages:

English.

Identification: IRL-2007-1-002

a) Ireland / **b)** High Court / **c)** / **d)** 17.10.2006 / **e)** 2003/13349 P / **f)** O'Shea and O'Shea v. Ireland and the Attorney General / **g)** / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
5.1.4 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.34 **Fundamental Rights** – Civil and political rights – Right to marriage.

Keywords of the alphabetical index:

Family, protection, constitutional / Marriage, impediment / Marriage, right, restriction / Marriage, remarriage, temporary prohibition.

Headnotes:

A provision which prohibits the plaintiff's marriage to each other during the lifetime of the first plaintiff's former husband by rendering it unlawful constitutes a restriction on the constitutional right to marry and such restriction is not justified as necessary to support the constitutional protection of the family, the institution of marriage or the requirements of the common good.

Summary:

I. This judgment concerns the issue of the constitutionality of law prohibiting the plaintiffs' marriage to one other. The facts are as follows. The first named plaintiff was previously married to the second named plaintiff's brother. However, a few months after the separation of the first named plaintiff and her husband, the first named plaintiff commenced

a relationship with the second named plaintiff and they have co-habited since then. The first named plaintiff subsequently obtained a decree of divorce pursuant to Section 5.1 of the Family Law (Divorce) Act 1996 and, following this, the plaintiffs decided to get married. Having learned that they were prohibited by law from marrying each other, the plaintiffs instituted proceedings seeking a declaration that Section 3.2 of the Deceased Wife's Sister's Marriage Act 1907, as amended by Section 1.2.b of the Deceased Brother's Widow's Marriage Act 1921, which declares unlawful the marriage of a man with a divorced wife of his brother or half brother, and any rule of law which prohibits their marriage to one another, were repugnant to the provisions of the Constitution of Ireland. The plaintiffs also argued, *inter alia*, that there was a breach of their right to re-marry pursuant to Section 10.1 of the Divorce Act 1996. Laffoy J. found that this did not apply as it did not expressly or implicitly repeal the impugned provision and affirmed only that the effect of a decree of divorce is to free the former spouses to contract a marriage which is not prohibited by law. Therefore, the only issue for the court was whether Section 3.2 was inconsistent with the Constitution. The plaintiffs also sought a declaration that a marriage entered into by them to each other would be lawful and valid and that registration of this marriage would also be valid.

The plaintiffs submitted that Section 3.2, as amended, which prohibited them from marrying each other was rendered inoperable and void by reason of the operation of Article 50 of the Constitution and is no longer in force because it is inconsistent with the Constitution. Article 50 of the Constitution provides that, subject to the Constitution and to the extent to which they are not inconsistent therewith, the laws in force in Saorstát Éireann immediately prior to the date of the coming into operation of the Constitution, shall continue to be of full force and effect until the same or any of them shall have been repealed or amended by enactment of the parliament *(Oireachtas)*.

II. Laffoy J. held that, on a construction of Article 50 of the Constitution, the real issue was whether Section 3.2, as amended, was inconsistent with the Constitution as now in force, as amended in 1937 and, in particular, in 1996, when it was amended to provide for dissolution of marriage in certain specified circumstances. She noted that the onus lies on the plaintiff to establish that this is the case. Therefore, the plaintiffs had to show that Section 3.2 infringed one or more of the rights which the Constitution confers on them and that the impugned provision was not within the constitutionally permitted bounds of the limitation of such a right.

Laffoy J. considered the extent to which the right to marry, which she believed subsumes the right to form a constitutionally recognised family, is protected by the Constitution and whether Section 3.2 infringes that right. She referred to the decision of Kingsmill Moore J. in *Donovan v. Minister for Justice* (1951) 85 I.L.T.R. 134 and noted that the constitutional jurisprudence which has developed over the last four decades recognises not only the right to marry but also gives guidance on the extent to which freedom to marry may be constitutionally circumscribed by law.

She referred to the case of *Ryan v. The Attorney General* [1965] I.R. 294, applied in the sphere of marriage regulation in the case of *T.F. v. Ireland* [1995] 1 I.R. 321. In the former, Kenny J. identified the right to marry as an example of a personal right protected by Article 40.3.1 of the Constitution, although not enumerated in Article 40. He stated that the jurisdiction of the Court to declare an Act of the parliament unconstitutional where it is found not to respect, defend and vindicate the personal rights of the citizen, including those rights arising from the Christian and democratic nature of the State, is one to be exercised with caution. Rights may only be limited by the parliament where the common good so requires and any reconciliation of the parliament between personal rights and the common good should prevail unless it is oppressive to all or some citizens or unless the benefit conferred is not proportionate to the interference with the personal rights of the citizen. This was accepted by the plaintiffs. They argued that any restriction on the right to marry must, however, be reasonable.

Laffoy J. noted that the right to marry as it concerns the right to marry one's brother-in-law or sister-in-law following divorce, has never been directly regulated by the Parliament, although regulated indirectly by it's non-interference with Section 3.2. This, itself, was unnecessary until the constitutional amendment to Article 41 of the Constitution in 1996 which provided for dissolution of marriage.

In considering whether restricting a person's choice of marriage partner in the manner provided for in Section 3.2 is or is not required in the interests of the common good, Laffoy J. considered two documents put before the Court by the plaintiffs which consider whether prohibitions on marriage based on affinity should be retained or repealed. The Law Reform Commission "Report on the Nullity of Marriage" (LRC 9-1984) concludes that the best approach would be for the law to abolish all prohibitions based on affinity, subject to the provisio that no religious denomination be required to marry any persons within the degrees of relationship which are prohibited by the denomination in question. There was no

justification for such a prohibition based on the constitutional protection of the family or the institution of marriage or the common good.

Discussion Paper no. 5, September 2004, of the Interdepartmental Committee on Reform of Marriage Law, comments that the prohibition may be construed as unduly restrictive or may be construed as discriminatory. The paper also refers to an earlier decision of the High Court which held that a marriage between a woman and her deceased aunt's husband was lawful and validly registered. Laffoy J. noted that this paper was published after the outright constitutional ban on dissolution of marriage was removed, such that a court may grant dissolution of marriage where the four conditions set out in Article 41.3.2 of the Constitution are satisfied.

Laffoy J. found persuasive the European Court of Human Rights case relied on by Counsel for the plaintiffs, *B. & L. v. United Kingdom*, 13 December 2005. This case concerned a prohibition on marriage between a former father-in-law and daughter-in-law, except in cases where, at the time of the marriage, both parties were aged 21 and the marriage was solemnised after the death of both the son and the mother of the son. Such a marriage could also be procured by private Act of Parliament. The European Court of Human Rights concluded that the ban violated Article 12 ECHR, which provides for the right to marry according to national laws governing the right. The Court stated that the limitations imposed by the state "must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired ….". An important factor was that under the U.K. law there was not an absolute prohibition in that an exemption could be procured by private Act of Parliament. The European Court of Human Rights was of the view that the inconsistency between the stated aims of the incapacity and the waiver applied in some cases undermined the rationality and logic of the prohibition.

By analogy with this case the plaintiffs argued that the prohibition on their marriage was also not absolute but was a temporal prohibition of indefinite duration ceasing on the death of the former husband.

The defendants argued two grounds based on constitutional imperatives, namely, the State's obligation to promote the common good and the guarantee to protect the family and to guard the institution of marriage as provided for in Article 41 of the Constitution.

Laffoy J. held in favour of the plaintiffs and found that the restriction was an impairment of the essence of the right to marry. The plaintiffs established that the prohibition contained in Section 3.2, which would render their marriage to each other during the lifetime of the first plaintiff's former husband, unlawful constituted a restriction on their constitutional right to marry and further that that restriction was not justified as being necessary to support the constitutional protection of the family, the institution of marriage or the requirements of the common good. Consequently, the impugned provision was inconsistent with the plaintiffs' right to marry under Article 40.3.1 of the Constitution and they were entitled to a declaration to the effect that the section was inconsistent with the Constitution.

Languages:

English.

Identification: IRL-2007-1-003

a) Ireland / **b)** High Court / **c)** / **d)** 15.11.2006 **/ e)** 2004/9792 P / **f)** R.(M.) v. R.(T.) and Others / **g)** / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Embryo, implantation / *In vitro* fertilisation, consent, withdrawal / Embryo, frozen, legal status / Gamete, implantation, consent, withdrawal / Foetus, legal status.

Headnotes:

Frozen embryos are not 'unborn' within the meaning of Article 40.3.3 of the Constitution *(Bunreacht na hÉireann)* and their legal status is a matter for the parliament *(Oireachtas)* to decide.

Summary:

I. The plaintiff and the first defendant had been married to each other. During the course of their marriage, the parties had sought and obtained the services of the second and third defendants who

operated a clinic specialising in the provision of fertility treatments. As a result of that treatment, six embryos were created, three of which were implanted, resulting in the birth of one child. The first defendant consented to the fertilisation of the embryos and to the implantation. The remaining three embryos were frozen. The relationship between the parties subsequently broke down and they separated under the terms of a decree of Judicial Separation.

The plaintiff later sought to have the remaining embryos implanted and the first defendant refused to consent to this. The plaintiff unsuccessfully claimed that the consent given by the first defendant to the fertilisation and implantation of the embryos extended to the implantation of the three remaining embryos. In a separate ruling on that issue, the High Court stated that the first defendant's consent applied only to the implantation of the first three embryos.

The High Court was subsequently asked to determine two issues. Firstly, whether the remaining embryos were included in the definition of 'unborn' for the purposes of Article 40.3.3 of the Constitution *(Bunreacht na hÉireann)* which provides that '[t]he State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right', and secondly, whether the plaintiff was entitled under that article or under Article 41 of the Constitution, which protects the institution of the family, to the return of the remaining embryos to her.

II. The High Court heard conflicting evidence on the issue of when human life can be said to begin and stated that it was not possible to decide definitively the point at which that occurred. This fact notwithstanding, the Court still had to decide whether the three frozen embryos were 'unborn' as that term is understood in Article 40.3.3. In so doing, the Court examined the Irish and English texts of the Constitution, the views of the Constitution Review Group contained in a report published in 1996, the legislative history of the amendment to Article 40.3 which inserted the term 'unborn' into the text of the Constitution and the jurisprudence of the Irish courts on this and analogous issues.

The Court took the view that the term 'unborn' as used in Article 40.3.3 has been taken to mean the foetus *in utero* and that the purpose of Article 40.3.3 was to copper-fasten the prohibition on abortion. The issue of whether the term could be taken to encompass embryos *in vitro* was, in the Court's view, a matter for the legislature and not for the Courts to decide. Further, the onus of proving that the term 'unborn' could mean anything other than a foetus *in utero* lay on the plaintiff, who had not provided the Court with any evidence upon which it could decide this issue in her favour. That being so, the Court held that the term 'unborn' as used in Article 40.3.3 does not include embryos *in vitro* or outside the womb and by extension could not include the three frozen embryos the subject of the instant proceedings.

Having decided that the three frozen embryos are not considered 'unborn' in the context of Article 40.3.3, the Court then looked at the issue of what, if any, protection exists for them. The Court asserted that the embryos by their very nature are deserving of respect but that the absence of any express legislative provision governing the position of embryos outside the womb leaves them in a very precarious situation.

In the instant case, the Court considered it most unlikely that the parties could come to any agreement on the matter and that this being the case, the embryos would be very likely to remain frozen indefinitely. The Court recognised that there would come a point in time when the embryos could no longer be implanted in the plaintiff's uterus with any expectation that a baby would be born to her, given the plaintiff's age. This, however did not, in the Court's view, provide it with any real basis upon which to intervene. The first defendant argued that the implantation of the embryos in the plaintiff's uterus, would, if successful, render him a parent against his express wishes and in the absence of his consent. The plaintiff argued that the defendant, in consenting to the creation of the embryos and the implantation of the first three embryos, by extension consented to the implantation of these three embryos. The Court held that the issue of enforced paternity did not and could not arise, since it had held that the embryos were not 'unborn' for the purposes of Article 40.3.3. The plaintiff had earlier conceded that if the embryos were not 'unborn', the first defendant could not be forced into a situation of paternity.

The Court also dealt with the issue raised by the plaintiff that she had an entitlement to have the frozen embryos returned to her uterus under the terms of Article 41 of the Constitution. Article 41 protects the family and *inter alia* recognises that the family as being 'the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law'. The Article has the effect of prohibiting any interference by the courts or by legislation, except in very limited circumstances, into the realm of decision making by families as understood in the context of *Bunreacht na hÉireann*. In the instant case, the Court held that it didn't have to decide any issue arising under Article 41, given that it had already held that the frozen embryos were

not 'unborn' within the meaning of Article 40.3.3 and that the issue of the precise time at which human life could be said to begin was not something that the Court could decide.

Arguments were also put forward on the issue of the attrition rate of embryos *in vitro*. Evidence was given that the attrition rate was significant in the case of such embryos. The Court stated that insofar as this issue was pertinent to the question of when human life begins, it did not have to form a view on it and that further, the attrition rate of embryos *in vitro* did not appear relevant to the question of whether such embryos were 'unborn' for the purposes of Article 40.3.3. The Court stated that all it had to decide was whether the three frozen embryos are protected by the Constitution or by the law and held that it was for the parliament to amend the law, not for the courts. This being so, the Court ruled that the three frozen embryos are not 'unborn' within the meaning of Article 40.3.3 and that their legal status was a matter for the parliament.

This decision is under appeal to the Supreme Court.

Cross-references:

On this subject, see in the same *Bulletin* [ECH-2007-1-002].

Languages:

English.

Identification: IRL-2007-1-004

a) Ireland / **b)** High Court / **c)** / **d)** 14.12.2006 / **e)** 2004/196 16P / **f)** Zappone and Gilligan v. Revenue Commissioners, Ireland and the Attorney General / **g)** / **h)** CODICES (English).

Keywords of the systematic thesaurus:

2.1.1.4.4 **Sources** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
3.19 **General Principles** – Margin of appreciation.
5.2.2.1 **Fundamental Rights** – Equality – Criteria of distinction – Gender.
5.2.2.12 **Fundamental Rights** – Equality – Criteria of distinction – Civil status.
5.3.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial.
5.3.34 **Fundamental Rights** – Civil and political rights – Right to marriage.

Keywords of the alphabetical index:

Lesbian orientation / Homosexuality, same-sex couple, right to marriage / Tax, couple, married / Discrimination, married / Marriage, definition.

Headnotes:

The Constitution *(Bunreacht na hÉireann)* explicitly protects the institution of marriage and implicitly guarantees the right to marry. The right to marry in Irish law is confined to couples who are of opposite sexes. A marriage entered into in Canada by two women is not valid under the terms of the Constitution. Consequently, same-sex couples married in other jurisdictions cannot avail of the benefits under Irish tax legislation afforded to married couples.

Summary:

I. The plaintiffs are Irish citizens who are both domiciled in Ireland. They have lived together in a lesbian relationship since 1981 and have lived together in that capacity in Ireland since 1983. In 2003, the plaintiffs married each other in British Colombia, Canada, where recognition is given to marriages between same-sex partners. The plaintiffs instituted proceedings in Ireland wherein they sought the recognition of their marriage as valid in Irish law and in particular, the plaintiffs sought a declaration that sections of the Taxes Consolidation Acts unjustifiably discriminated against them on grounds of gender and sexual orientation and in contravention of their rights under Articles 40, 41 and 43 of the Constitution in that the tax benefits contained in the tax legislation were confined to married heterosexual couples. The plaintiffs alternatively claimed that the relevant statutory provisions violated their rights under Articles 8, 12 and 14 ECHR.

II. The Court noted that although the issue of same-sex marriage had been the subject of considerable litigation in various jurisdictions, it was clear that no consensus had been achieved on the issue. Some jurisdictions had provided for same-sex marriage, others for civil partnerships and many have no special arrangements in place.

In the instant case, the Court was asked to determine whether the right to marry, inherent in the Constitution, extended to same-sex couples and if not, whether this was incompatible with the provisions of the European Convention on Human Rights. The plaintiffs accepted that at common law, same-sex couples were deemed to lack capacity to enter into a marriage and that the Civil Registration Act, 2004 contains a statutory prohibition on the same grounds, which had not been challenged or impugned by the plaintiffs. The plaintiffs also accepted that in terms of constitutions, marriage had always been understood in terms of heterosexual couples, but relied on U.S. and Canadian authorities to argue that a constitution was a living document and that, accordingly, the right to marry should now be considered in light of prevailing ideas and norms. Having considered the authorities, the Court held that they were of only limited assistance, given the specific constitutional framework applicable in Ireland. Further, the Court stated that the constitutional definition of marriage had been reiterated in numerous decisions since the enactment of the Constitution and as recently as 2003.

This being so, the Court held that it could not redefine marriage to encompass same-sex relationships, notwithstanding the fact that other major changes have been made to the institution of marriage, the most fundamental of which has been the introduction of divorce. The Court declined to accept that there was what the plaintiffs described as a 'changing consensus' in relation to same-sex marriages, stating that there was little evidence of it. In this, the Court pointed out that relatively few countries have permitted same-sex marriages. The Court also held that read together, Articles 41 and 42 of the Constitution could not, having regard to the ordinary language used, relate to a same-sex couple.

The Court accepted the arguments made by the defendants on the issue of discrimination, where it was argued that the right to marry a person of the opposite sex is derived from the Constitution and that this being the case, the discrimination in favour of married couples as regards the tax legislation was justified. In the instant case, the plaintiffs were compared with a cohabiting, unmarried, heterosexual couple, and were found to be treated no less favourably. The plaintiffs also advanced arguments based on a number of Articles of the European Convention on Human Rights. Article 8 ECHR protects the right to respect for private and family life, Article 12 ECHR protects the right of a man and a woman to marry and found a family and Article 14 ECHR prohibits discrimination on any ground. The Court could find no violation of any of the Convention rights asserted and stated that in regard to Article 12 ECHR, '[i]t is necessary to remember the clear terms in which Article 12 is expressed'. The Court found that Article 12 ECHR specifically stated that the right to marry is 'according to the national laws governing the exercise of this right'.

This being the case, the Court held that under the European Convention on Human Rights, Ireland had a wide margin appreciation in the area of marriage, particularly where, as with the instant case, there was no consensus across Europe regarding the issue. With regard to the alleged discrimination under the terms of Article 14 ECHR, the Court held that the lack of legislation providing for civil partnership in this jurisdiction did not amount to discrimination. The Court also declined to hold that the plaintiffs' rights under Article 8 ECHR had been breached. In coming to this conclusion, the Court evaluated the jurisprudence of the European Court of Human Rights on the issue of marriage and held that the plaintiffs could not avail of the protection of Article 8 ECHR given the approach of the European Court of Human Rights in previous, analogous cases. The Court expressed the opinion that it hoped that legislative changes would soon come about to ameliorate the difficulties inherent in the plaintiffs' situation, but that ultimately, the question of legislation was for the legislature.

Accordingly, the Court held that the plaintiffs had no right under either of the Constitution or the European Convention on Human Rights to have their marriage recognised and consequently, their challenge to the validity of the impugned provisions of the Tax Code must fail.

This decision is under appeal to the Supreme Court.

Languages:

English.

Italy
Constitutional Court

Important decisions

Identification: ITA-2007-1-001

a) Italy / **b)** Constitutional Court / **c)** / **d)** 10.01.2007 / **e)** 12/2007 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), 31.01.2007 / **h)**.

Keywords of the systematic thesaurus:

2.2.1.6.4 **Sources** – Hierarchy – Hierarchy as between national and non-national sources – Community law and domestic law – Secondary Community legislation and domestic non-constitutional instruments.
2.2.2 **Sources** – Hierarchy – Hierarchy as between national sources.
4.8.8.2.1 **Institutions** – Federalism, regionalism and local self-government – Distribution of powers – Implementation – Distribution *ratione materiae*.

Keywords of the alphabetical index:

Waste, disposal, from other regions / Powers, concurrent / Law, incompatibility with superior law, manifest / European Community, directive, implementation.

Headnotes:

The general prohibition on the treatment of all types of waste from outside the region contained in the legislation under dispute is not consistent with the principles laid down by the State rules. These rules prohibit the treatment of non-hazardous urban waste other than on the territory of the region in which it is produced (based on the principle that each region must be self-sufficient). However, they allow other types of waste to be treated in specialist facilities that, because of the conditions, which they must satisfy, cannot be present in each region.

Summary:

A business that specialised in the treatment of special hazardous sanitary waste situated in Sardinia had lodged an action before the Regional Administrative Court for the repeal of an act of the Sardinian regional administration. This authorised the undertaking to pursue its activity in compliance with a regional law prohibiting the transport, storage, treatment or discharge on the territory of Sardinia of any type of waste originating outside the region. The Regional Court raised the question of the constitutional legitimacy of the regional law, which might contravene the fundamental principles in the national law implementing Community Directives no. 91/156/EEC on waste, no. 91/689/EEC on hazardous waste and no. 94/62/EC on packaging and packaging waste and which might therefore indirectly contravene the Statute of the Region of Sardinia. That Statute is a law of constitutional rank which recognises that in the field of “hygiene and health” the Region has “concurrent” legislative powers, that is to say, powers shared with the State. The Region was therefore required to act in compliance with the fundamental principles of national laws and, in this specific case, in compliance with the principle contained in the law implementing those directives, according to which, although non-hazardous urban waste must be treated in the region in which it was produced, that rule did not apply to hazardous waste, which must be treated in specially equipped centres which might be situated in a region other than that in which the waste was produced.

The Court considered that the legislative power exercised in this case came within the field of “hygiene and health”, for which the Region of Sardinia, under its Statute approved by the constitutional law, had “concurrent” powers which required observance of the “fundamental principles” established by the State in those matters, as interpreted by the Constitutional Court in numerous judgments.

The Court therefore declared the Law of the Region of Sardinia unconstitutional.

Supplementary information:

In its decision to refer the law to the Constitutional Court, the Administrative Court observed that it did not adopt the solution which the Constitutional Court had recommended in its *Granital* Judgment of 1984 (that directly applicable Community law should be applied where the domestic law is incompatible with Community law, without there being any need to refer the domestic law to the Constitutional Court),

because the present case did not involve incompatibility between the law of the Sardinian Region and the Community directives, but rather the incompatibility of that law with the principles set out in the domestic law implementing those directives. The Court cited, as precedents, Judgments no. 281 of 2000, *Bulletin* 2000/2 [ITA-2000-2-005], no. 335 of 2001 and no. 505 of 2002.

Languages:

Italian.

Japan
Supreme Court

Important decisions

Identification: JPN-2007-1-001

a) Japan / **b)** Supreme Court / **c)** Third Petty Bench / **d)** 03.10.2006 / **e)** 19/2006 / **f)** Decision on the witness's refusal to testify / **g)** *Minshu* (Official Collection of the decisions of the Supreme Court of Japan on civil cases), 60-8 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.17 **General Principles** – Weighing of interests.
3.18 **General Principles** – General interest.
5.3.21 **Fundamental Rights** – Civil and political rights – Freedom of expression.
5.3.23 **Fundamental Rights** – Civil and political rights – Rights in respect of the audiovisual media and other means of mass communication.

Keywords of the alphabetical index:

Journalist, information, source / Journalist, refusal to give evidence, right.

Headnotes:

The Code of Civil Procedure provides that any person shall be obliged to testify as a witness (Article 190), and that a witness may refuse to testify only in exceptional cases including "where the witness is examined with regard to the matters concerning technical or professional secrets" (Article 197.1.3). Furthermore, it should be construed that refusal to testify is allowed only when the professional secret is worthy of protection.

Summary:

I. Japan Broadcasting Corporation (NHK) broadcasted a news report that the Japanese and the United States tax authorities ordered company A in Japan to pay a penalty tax on its hidden earnings. Its affiliated company in the US filed a lawsuit against the US with the US District Court arguing that the US tax authorities disclosed to the Japanese tax authorities confidential information on tax collection,

which was used as a source of the report and caused a drop in A's share price.

During the discovery procedure, the US District Court requested the Japanese courts to examine a NHK journalist engaged in the report as a witness under the bilateral agreement on mutual legal assistance. Acting on the request, the Court of First Instance summoned and examined the journalist as a witness. The journalist, however, refused to testify about the source of the report on the grounds that this fell within the scope of professional secrets prescribed by the law. The Court found that there were justifiable reasons for the refusal and the Court of the Second Instance dismissed the appeal.

The Supreme Court also dismissed the appeal.

II. Firstly, the confidentiality of journalistic sources should be deemed to fall under the scope of professional secrets, as the disclosure of the source would undermine the mutual confidence between journalists and informants, and hinder journalists' news gathering activities in the future. Secondly, whether or not the confidentiality of journalistic sources is worthy of protection should be determined by balancing various factors, including the content of the report, the manner in which the news was gathered, future disadvantages for news gathering activities by compelling testimony, the content of the civil case, and the necessity of the witness's testimony. In such evaluation, the role of the press in fulfilling the public's right to know in a democratic society should be taken into consideration. Freedom of the press is guaranteed by Article 21 of the Constitution which stipulates freedom of expression. In order to ensure accurate reports, freedom of news gathering should also be respected in the light of Article 21 of the Constitution.

Given the significance of the freedom of news gathering, the confidentiality of journalistic sources should be deemed to have an important value as a requisite for securing freedom of news gathering. Consequently, the confidentiality of journalistic sources should be construed to be worthy of protection in cases where the report relates to the public interest, there are no special circumstances where the means for news gathering are illegal or the informant has given consent to the disclosure, nor are there any circumstances where the witness's testimony on the source is indispensable for a fair trial because of the social significance of the case.

In the present case, it is obvious that the NHK Report relates to public interest, and there seem to be no circumstances where the means for news gathering are illegal or the informant has consented to the disclosure. Furthermore, considering that the case in the US District Court is still in the process of discovery, it is impossible to find any circumstances where the witness's testimony on the source is indispensable for a fair trial. Therefore, in accordance with Article 197.1.3 of the Code of Civil Procedure, the journalist may refuse to testify about the source, and justifiable reasons can be found for the refusal.

Languages:

Japanese, English (translation by the Court).

Liechtenstein
State Council

Important decisions

Identification: LIE-2007-1-001

a) Liechtenstein / **b)** State Council / **c)** / **d)** 02.10.2006 / **e)** StGH 2006/48, StGH 2006/49, StGH 2006/50, StGH 2006/55 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

3.10 **General Principles** – Certainty of the law.
3.12 **General Principles** – Clarity and precision of legal provisions.
3.13 **General Principles** – Legality.
3.14 **General Principles** – *Nullum crimen, nulla poena sine lege*.

Keywords of the alphabetical index:

Bankruptcy, negligence, criminal offence, exact definition / Offence, criminal, exact definition / Criminal offence, essential elements.

Headnotes:

The principle of *"nulla poena sine lege"* (no punishment without law) must apply fully when determining whether or not an act, which forms the substance of a complaint, constitutes an offence, the essential elements of which are laid down by law.

Citizens must be able to deduce from a legal provision that a given form of conduct is subject to censure. Only then, can they determine the freedom of action afforded them by the legal order, avail themselves of it and act in conformity with the law.

Summary:

I. In proceedings to verify compliance with the Constitution, in accordance with Section 18.1.a of the State Council Law (StGHG), the Regional Court requested abrogation of Article 159 of the Criminal Code (StGB). This provision governs the offence of bankruptcy through negligence, by means of provisions initially adopted in 1914 and taken from Austria, when they were adapted several years ago due to their indeterminate nature having attracted criticism from the legal community.

The purpose of Article 159.1 (StGB) is the protection of creditors' interests. This remains topical today but the current wording is no longer applicable to the requirements of the modern economy. This has radically changed since the provision came into force. The essential elements of the offence described in Article 159.1 StGB are not expressed with sufficient clarity to identify whether an individual's conduct falls within the ambit of this offence as laid down by law. The vast scope of Article 159.1 StGB, from the point of view of the objective essential elements of the offence, contravenes the principle of legality, and cannot be reconciled with the principle established in Article 33.2 of the Constitution and Article 7 ECHR. Similarly, from the point of view of the subjective essential elements of the offence, the ambiguous criteria relating to the obligation of diligence no longer afford adequate protection to individuals from an arbitrary interpretation of the provision. Nevertheless, such protection is one of the principal duties of a system of fundamental freedoms based on the rule of law.

II. The State Council accordingly repealed Article 159 StGB as being unconstitutional because of its incompatibility with the legality principle contained in Article 33.2 of the Constitution and Article 7 ECHR.

Languages:

German.

Lithuania
Constitutional Court

Important decisions

Identification: LTU-2007-1-001

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 21.09.2006 / **e)** 35/03-11/06 / **f)** On drawing up and announcing the reasoning in court decisions, appeal procedures and decisions *in absentia* / **g)** *Valstybės Žinios* (Official Gazette), 102-3957, 26.09.2006 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.18 **General Principles** – General interest.
4.7.1.1 **Institutions** – Judicial bodies – Jurisdiction – Exclusive jurisdiction.
4.7.2 **Institutions** – Judicial bodies – Procedure.
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:

Appeal, procedure / Judgment, *in absentia*.

Headnotes:

The constitutional imperatives, that only the courts dispense justice, that law must be transparent, and that cases must receive fair consideration, also imply that all court judgments must be based on reasoned legal arguments. The judgments must set out in full the arguments on which they are based. Once a judgment has been published, further arguments from the case cannot be submitted and the court cannot alter the judgment.

It is not possible to establish a definitive list of cases where courts (including appeal courts) are allowed to overstep the limits of the case or appeal in order to defend the public interest. Sometimes, decisions are necessary, as to whether a particular interest is a public one, and to be defended and protected as such. Where this is the case, the reasoning behind the decision must be set out in any corresponding acts by the Court. Otherwise, doubts could arise as to whether the interest the court has upheld is a public one.

The Lithuanian Constitution does not prohibit the concept of decisions issued *in absentia*.

Summary:

I. Two petitions were joined. One was lodged by the Vilnius Regional Court, the other by a group of members of parliament.

The Vilnius Regional Court asked the Constitutional Court to examine Article 320.2 of the Code of Civil Procedure of the Republic of Lithuania (« the CCP »). This provides that the Court of Appeal shall consider cases without overstepping the limits established in the appeal, except where this is necessary in the public interest, when considering cases from the categories set out in Chapters XIX and XX of Part IV and in Part V of the CCP. The petitioner suggested that this was in breach of the Constitution.

The petition by the members of the Lithuanian Parliament requested an assessment of the compliance with the Constitution of various provisions of the Law on the Proceedings of Administrative Cases, the Code of Criminal Procedure, the Code of Civil Procedure, the Law on Courts and two presidential decrees. The petitioners questioned the rules governing the drawing up and the announcement of the introductory and “resolution parts” of the decision. This usually happens on the day the case is considered. Those parts of the decision comprising the recital and the reasoning are to be drawn up within seven working days of the announcement of the decision. The point was made that these rules emanated from several pieces of legislation. The members of parliament also questioned the compliance with the Constitution of Article 285.2 of the CCP, to the extent that when the Court adopts a decision *in absentia*, it performs a formal assessment of the evidence submitted in the case.

II. The Constitutional Court stressed that the drawing up of any final court act, such as a decision, judgment or ruling is not conclusive until it has been formally adopted (when the judges have voted and signed it off). Rather, it is a way of ensuring that all the circumstances that are important to a particular case are clearly established before the corresponding final court act is officially adopted and publicly announced; that all important arguments are assessed and accorded correct evidential weight. Equally, drawing up a final court act before its official adoption and announcement is a way of ensuring that all judges on the panel have an equal understanding of the arguments substantiating the final court act (even if they interpret and deal with these arguments differently).

It also allows any mistakes or contradictions in the reasoning to be put right before the decision is officially adopted and announced.

The Constitutional Court found that several provisions of the Law on the Proceedings of Administrative Cases, the Code of Criminal Procedure and the Code of Civil Procedure were in contravention of the Constitution, to the extent that they allowed courts to submit arguments after the official publication of court decisions.

The Constitutional Court also found that Article 320.2 of the Code of Civil Procedure was out of line with the Constitution. This prohibits the Court of Appeal from overstepping the limits established in the appeal (except in the category of case provided for in Chapters XIX and XX of Part IV and in Part V of the CCP). This prohibition would also apply where the overstepping was necessary in the public interest, and not doing so might result in an unjust decision and a violation of the Constitution.

With regard to the Code of Civil Procedure, the Constitutional Court observed that the Constitution requires civil law relationships to be regulated in such a way that courts can investigate all relevant circumstances and adopt a fair decision. It is not permissible to pass legislation which would prevent this happening. This would result in the powers of the court to administer justice, which arise from Article 109 of the Constitution, being limited or even denied. It would also be at odds with the constitutional concept of the court as the institution which administers justice in the name of the Republic of Lithuania, as well as with the constitutional principles of a state under the rule of law.

The Code of Civil Procedure requires courts to heed the principles and norms of civil procedure law. Courts must not construe them in such a way that they are elevated above the Constitution, or so that constitutional principles are distorted or ignored. Certain provisions of the Civil Procedure Code prevent a court from adopting decisions *in absentia*, even if the court has received evidence to the effect that the decision is unfair or has resulted in a breach of somebody's constitutional rights. The Constitutional Court held that these provisions contravened the Constitution. This also applies to cases where the court has been informed that a mistake had occurred during the proceedings.

Languages:

Lithuanian, English (translation by the Court).

Identification: LTU-2007-1-002

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 26.09.2006 / **e)** 29/04 / **f)** On the powers of the minister of finance to establish the size of fines / **g)** *Valstybės Žinios* (Official Gazette), 104-3985, 28.09.2006 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.9 **General Principles** – Rule of law.
3.19 **General Principles** – Margin of appreciation.
4.6.3.2 **Institutions** – Executive bodies – Application of laws – Delegated rule-making powers.
4.10.7.1 **Institutions** – Public finances – Taxation – Principles.

Keywords of the alphabetical index:

Tax, fine, calculation.

Headnotes:

The legislator has a certain amount of discretion when implementing coercive measures for failure to comply with fiscal obligations. For example, they may provide a fixed penalty for taxes which are not paid at all or paid late, or they may impose varying levels of fines, depending on certain indicators. Such fines would be subject to alteration. If the legislator chooses to impose varying fines subject to certain indicators, they must determine clearly within the legislation who is responsible for levying these fines and the criteria under which they are to do this.

Summary:

I. The Siauliai Regional Administrative Court asked the Constitutional Court to assess whether Article 39 of the Law on Tax Administration complied with the Constitution. Under this article, the Minister of Finance determines the size of fine for late or unpaid taxes and the procedures for calculation and payment of the fine. He or she will need to take into account the leveraged indicator of the average fine rate of the last calendar quarter of the Republic of Lithuania, paid on Government bonds issued for a term for one year, in litas. The size of fine will also be determined by increasing the average fine rate by up to 10 points. An assessment was also requested, of the constitutional compliance of Article 18 of the Law on

Customs Tariffs, to the extent that it bestows the same powers on the Minister of Finance.

The petitioner pointed out that under Articles 67.15 and 127.3 of the Constitution, the basic tenets of state taxes and other compulsory payments must be set out in legislation. This includes the taxpayer, the income or property being taxed, the amount of tax to be levied, any exceptions and concessions, and penalties and fines. The petitioner argued that the Lithuanian Parliament could not delegate its powers in this regard to any other institution. Thus, the Government could not accept such powers and neither could any other institution. The petitioner also identified another problem with the Law on Tax Administration and the Law on Customs Tariffs, in that it bestowed powers on the Ministry of Finance enabling it to interfere with the Parliament's competence in this area.

II. The Constitutional Court held that the legislator has a certain amount of discretion when implementing coercive measures for failure to comply with fiscal obligations. For example, they may provide a fixed penalty for taxes which are not paid at all or paid late, or they may impose varying levels of fines, depending on certain indicators. Such fines would be subject to alteration. The identity of the person who is to determine the size of the fine and the procedure to be deployed must be set out very clearly in legislation.

The Constitutional Court examined Article 39.3 of the Law on Tax Administration under which the Minister of Finance establishes the size of fine, taking into account the leveraged indicator of the average fine rate of the last calendar quarter of the Republic of Lithuania, paid on Government bonds issued for a term of one year, in litas. He or she only has the power to give the numerical expression of the indicator mentioned in the legislation, as it appears in the financial markets.

The Court held that Article 39.3 was not in conflict with the Constitution. In fact, the leveraged indicator of the average fine rate of the last calendar quarter of the Republic of Lithuania, paid on Government bonds issued for a term of one year, in litas, as specified in this paragraph, is an indicator which depends on economic factors, which fluctuate constantly, including the financial markets. The relationship between the size of the fine and this particular indicator is a matter for state economic policy. There are no persuasive arguments that a relationship between the size of the fine and the leveraged indicator of the average fine rate would infringe constitutional values.

The Constitutional Court also observed that there was no requirement in the Law on Tax Administration, or other legislation for the Minister of Finance to follow any particular criteria when establishing the size of fine by reference to the leveraged indicator of the average fine rate of the last calendar quarter of the Republic of Lithuania. He was also able to increase the amount of fine, at his own discretion, provided that he did not exceed the 10 point limit. The Court accordingly concluded that Article 39.3 of the Law on Tax Administration was in conflict with Articles 67.15 and 127.3 of the Constitution and with the constitutional principle of a state under the rule of law.

The same applied to Article 18.3 of the Law on Customs Tariffs.

Languages:

Lithuanian, English (translation by the Court).

Identification: LTU-2007-1-003

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 21.12.2006 / **e)** 30/03 / **f)** On Lithuanian Radio and Television funding and radio frequencies / **g)** *Valstybės Žinios* (Official Gazette), 141-5430, 28.12.2006 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.18 **General Principles** – General interest.
5.2 **Fundamental Rights** – Equality.
5.3.23 **Fundamental Rights** – Civil and political rights – Rights in respect of the audiovisual media and other means of mass communication.
5.3.24 **Fundamental Rights** – Civil and political rights – Right to information.
5.4.6 **Fundamental Rights** – Economic, social and cultural rights – Commercial and industrial freedom.

Keywords of the alphabetical index:

Media, broadcasting, public broadcasting company / Media, broadcasting, advertising.

Headnotes:

The activity of the public broadcaster cannot be commercialised. Its programmes and broadcasts should not be aimed at attracting the biggest audience possible, or to achieving commercial success. Public broadcasters must not tailor their output to suit the audience or the market, neither must they flatter consumer tastes. Rather, they should inform and educate society, and seek to disseminate the cultural attributes entrusted to the public broadcasting service by the Constitution. To decide otherwise would not only harm, the constitutional mission of the public broadcaster, but would also negate the raison d'être of the public broadcaster.

There is no problem, however, with the public broadcaster broadcasting or receiving funds from advertisements, whether commercial or otherwise.

Summary:

I. A group of members of the Lithuanian Parliament asked the Constitutional Court to determine whether Articles 6.1, 6.3, 6.4 and 15.1 of the Law on Lithuanian National Radio and Television complied with the Constitution. Under Article 15.1, Lithuanian National Radio and Television (or LRT), which is the public broadcaster in Lithuania, is funded from the receipts obtained for advertising and from commercial activity. Article 15.2 of the same law requires the LRT to implement commercial activity independently. The petitioners suggested that these provisions infringed Article 46.2, 46.3 and 46.4 of the Constitution.

Article 5.5 of the Law on Lithuanian National Radio and Television allows the LRT priority rights to newly co-ordinated electronic communication channels or radio frequencies. Under Article 10.1.3 of the above law and Article 31.4 of the Law on Provision of Information to the Public, channels (radio frequencies) for LRT broadcasts are assigned without a tender. It was suggested that that this was at odds with Articles 29.1, 46.2, 46.3 and 46.4 of the Constitution. In the petitioners' opinion, commercial advertising distorts the activity of the LRT as a public broadcaster and hinders the implementation of the purposes and tasks of the LRT. If the state supports one economic entity when others are carrying out the same activities without state support, this is constitutionally unjustifiable. The petitioners contended that because, under the Law on Lithuanian National Radio and Television, the LRT can implement both economic and commercial profit-making activity independently, this is at odds with the status of the LRT as a public non-profit institution established by the state. The petitioners argued that the Law on the Lithuanian National Radio and Television does not prevent the direct and indirect use of state support rendered to the LRT as the national broadcaster for development of LRT commercial activity.

II. The Constitutional Court observed that the nature and constitutional mission of the public broadcaster imply a duty on the part of the state not simply to establish the public broadcaster, but also to ensure that it has sufficient funding to carry out its mission and deliver appropriate public broadcasting services. The Court held that in formulating and implementing cultural policy (including creative activities), one must pay heed to the material and financial resources of the state and society, as well as other important factors, such as expediency.

The Constitutional Court stated that no constitutional grounds existed to prevent the LRT, as the national public broadcaster, broadcasting and receiving funds from advertisements, whether commercial or otherwise. There was nothing to stop the LRT receiving funding from the broadcasting of non-advertising content material from other customers. Any regulations that allow the LRT to broadcast advertisements and receive funding from them do not necessarily violate the constitutional principles of fair competition, and equality.

The Constitutional Court also pointed out if the LRT could only fund itself through advertising, this would be neither desirable nor constitutional. It would become exposed and vulnerable, and subject to commercial or political pressure. It would have to tailor its output to attract the largest possible audience and to flatter prevailing consumer tastes, instead of acting in the public interest. Such broadcasts and programmes would be neither informative nor educational. Moreover, such a situation would jeopardise or even negate the special constitutional mission of the national public broadcaster.

The legislator may, however, impose a complete ban on advertising on national radio and television. This only happens very rarely, where there are sufficient resources within society to fund the public broadcaster and where this does not encroach on the constitutional mission of the national public broadcaster.

The Constitutional Court held that there were no constitutional arguments to prevent the LRT from being allocated priority rights, in the absence of a tender, to channels and radio frequencies under Article 5.5 of the Law on Lithuanian National Radio and Television and Article 31.4 of the Law on Provision of Information to the Public. This did not breach the constitutional principle of equality and fair competition.

The provisions mentioned from the Law on Lithuanian National Radio and Television and the Law on Provision of Information to the Public were not contrary to the Constitution.

Languages:

Lithuanian, English (translation by the Court).

Identification: LTU-2007-1-004

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 22.12.2006 / **e)** 47/03 / **f)** On the Provisional Law on Income Tax of Natural Persons / **g)** *Valstybės Žinios* (Official Gazette), 141-5431, 28.12.2006 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.19 **General Principles** – Margin of appreciation.
5.2.1.1 **Fundamental Rights** – Equality – Scope of application – Public burdens.
5.2.1.3 **Fundamental Rights** – Equality – Scope of application – Social security.
5.3.42 **Fundamental Rights** – Civil and political rights – Rights in respect of taxation.

Keywords of the alphabetical index:

Pension, tax exemption.

Headnotes:

Lithuanian residents may be in receipt of pensions and other benefits from other states. However, if no reciprocal agreement exists, these benefits are not deemed to be benefits paid in fulfilment of Lithuania's duties under its Constitution. The basis for granting such benefits is established by the legal acts of the other states. Pensions received from other states may already have been taxed in those countries.

Summary:

I. The Supreme Administrative Court of Lithuania suspended its hearing of an administrative case and referred it to the Constitutional Court, with a request for an assessment of the compliance with the Constitution of Article 2.1 of the Provisional Law on Income Tax on Natural Persons, which stated that income tax was not to be imposed on pensions being paid by foreign states, which had already been taxed in those countries. The Supreme Administrative Court suggested that it might contravene Article 29 of the Constitution.

The question had arisen because pensions paid by the Lithuanian state social insurance funds and state and municipal budgets are not taxed. Pensions derived from foreign states only escape taxation in Lithuania if they have already been taxed in those countries. Yet the old age pensions received by both categories of pensioner constitute the same type of income. They are intended to bring about the minimum standard of living for those no longer able to work due to their advanced age. If some of them have to pay tax and others do not, groups of people with the same characteristics find themselves in differing positions. The petitioner suggested that the above provision discriminated against recipients of pensions from foreign states in comparison with those whose pensions derive from Lithuania, and accordingly breached Article 29.1 of the Constitution, which establishes the equality of all before the law, the courts, and other state institutions and officials.

II. The Constitutional Court found that Article 52 of the Constitution obliges the state to guarantee to citizens the right to receive old age and disability pensions as well as social assistance in the event of unemployment, sickness, widowhood, loss of the breadwinner, and other cases set out in legislation. Lithuanian residents may receive pensions and various other benefits from other states. Where no reciprocal agreement exists between the state and Lithuania, these are not considered benefits paid under Article 52 of the Constitution; they are viewed as a different type of benefit, from the standpoint of the Constitution. The basis for granting such benefits is established by the legal act of other states.

The Court pointed out that the legislator's powers to impose taxes derive from Articles 67 and 127 of the Constitution. It has a wide discretion as to the type of income upon which it might levy tax, and this includes pensions and other benefits received from foreign states. It is also entitled to amend existing fiscal legislation. It must heed constitutional norms and principles, including justice, reasonableness and proportionality. The legislator must also have regard to Lithuania's international obligations, under various international treaties, as well as the obligations stemming from Lithuanian membership of the European Union.

Because pensions and other benefits paid by foreign states are viewed differently from a constitutional perspective from those paid by the Republic of Lithuania, and because the legislator has the discretion to decide whether or not to tax pensions from foreign states, the Constitutional Court held that the provisions under dispute were not in breach of the Constitution.

Languages:

Lithuanian, English (translation by the Court).

Identification: LTU-2007-1-005

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 16.01.2007 / **e)** 10/04-12/04-18/04 / **f)** On the decree of the President of the Republic by which judges D. Japertas, P. Linkevičienė and A. Gudas were dismissed from office / **g)** *Valstybės Žinios* (Official Gazette), 7-287, 18.01.2007 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

4.4.1.3 **Institutions** – Head of State – Powers – Relations with judicial bodies.
4.7.4.1.5 **Institutions** – Judicial bodies – Organisation – Members – End of office.
5.3.13.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.
5.3.13.22 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Presumption of innocence.

Keywords of the alphabetical index:

Judge, dismissal, procedure.

Headnotes:

The Lithuanian Constitution provides that judges whose conduct brings the judiciary into disrepute may be dismissed from office. This is so, irrespective of whether a court subsequently finds that their behaviour constituted a criminal act, and irrespective of whether their behaviour results in a criminal conviction.

Summary:

I. The Vilnius Regional Court suspended various civil cases which it had been considering, and asked the Constitutional Court to assess the compliance with the Constitution of certain provisions of the Decree of the President of the Republic no. 164 "On the Dismissal of Judges of Local Courts and Presidents of Courts" of 22 July 2003. It also asked for an assessment of their compliance with various articles and paragraphs of the Law on Courts and the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The Vilnius Regional Court made the following points in its petition:

1. The Law on Courts sets out the procedure for the dismissal of judges of local courts. If a judge is to be dismissed on the grounds set out in Article 115.5 of the Constitution, namely that his or her behaviour has brought the office of the judiciary into disrepute, disciplinary proceedings must be set in motion. The Judicial Court of Honour must adopt a decision to invite the President of the Republic to dismiss the judge from office. In the absence of such a proposal, the President of the Republic cannot dismiss the judge from office on the above grounds.

2. Under the disputed decree of the President of the Republic of 22 July 2003, D. Japertas was dismissed from judicial office at the Panevėžys City Local Court as well as from the office of the president of the same court. A. Gudas was dismissed from judicial office at the Lazdijai District Local Court as well as from the office of the president of the same court. P. Linkevičienė was dismissed from judicial office at the Biržai District Local Court and from the office of the president of the same court. No disciplinary cases had taken place against the above individuals, neither had a decision been adopted by the Judicial Court of Honour inviting the President of the Republic to dismiss them from office. This gave rise to a question as to whether the President of the Republic may have made an exception when he issued the decree and dismissed D. Japertas, A. Gudas and P. Linkevičienė from office. In so doing, he may have infringed the procedure for dismissal of judges from office established in the Law on Courts. He may also have violated the presumption of innocence as regards P. Linkevičienė.

II. The Constitutional Court held that the Law of Courts does not in fact require disciplinary proceedings to be launched against a judge who has brought the office of judiciary into disrepute by his or

her conduct; neither is it necessary for the Judicial Court of Honour to then invite the President of the Republic to dismiss that judge from office. The Law does not restrict or deny the President's powers to seek advice from the special institution of judges provided for under Article 112.5 of the Constitution over the dismissal of a judge from office where his or her conduct has besmirched the reputation of the judiciary, and, upon receipt of such advice, to dismiss the judge concerned.

The Constitutional Court also held that the President of the Republic was within his rights to issue the decree dismissing D. Japertas, P. Linkevičienė and A. Gudas from judicial office within their respective courts and from the office of presidency in these courts because their conduct had brought the office of the judiciary into disrepute. This was so, even though disciplinary cases had not been set in motion against any of the judges and the Judicial Court of Honour had not adopted a decision inviting the President to dismiss them from office.

The Constitutional Court observed that Article 115.5 of the Constitution establishes various grounds for dismissal of judges from office, where their conduct has tarnished the reputation of the judiciary and where court judges convicting them of an offence come into effect. The Constitutional Court stressed that these grounds could not be identified with one another, and that the behaviour bringing the judiciary into disrepute did not have to relate to the perpetration of a criminal offence.

The Constitutional Court rejected the petitioner's submission that, in the case of P. Linkevičienė, who had been dismissed from judicial office at the Biržai District Local Court and from the presidency of the same court, the principle of presumption of innocence had been violated. It also ruled that the disputed provisions were not contrary to the Constitution.

Languages:

Lithuanian, English (translation by the Court).

Identification: LTU-2007-1-006

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 09.02.2007 / **e)** 06/07 / **f)** On elections of municipal councils / **g)** *Valstybės Žinios* (Official Gazette), 19-722, 13.02.2007 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

4.9.7.3 **Institutions** – Elections and instruments of direct democracy – Preliminary procedures – Registration of parties and candidates.
5.2.1.4 **Fundamental Rights** – Equality – Scope of application – Elections.
5.3.41.2 **Fundamental Rights** – Civil and political rights – Electoral rights – Right to stand for election.

Keywords of the alphabetical index:

Election, candidate, party membership, obligatory.

Headnotes:

As the proportional system of election has been chosen in respect of municipal councils, members of territorial communities must be allowed to enjoy their passive electoral rights by being included in other lists, not simply those of political parties. Societies with the rights under the relevant legislation to draw up such lists may be formed for the period of specific elections to municipal councils, and on a permanent basis, where the legislation allows for this.

Summary:

I. The Supreme Administrative Court of Lithuania suspended an administrative case, which it had been considering, and asked the Constitutional Court to assess the compliance with the Constitution of Article 34.1 of the Law on Elections to Municipal Councils. It provides that "candidates to members of the municipal council may be nominated by a party". The petitioner suggested that it gave political parties exceptional rights to nominate candidates to membership of municipal councils and might therefore be at variance with Articles 35.2, 119.2 and 135.1 of the Constitution.

The Supreme Administrative Court made the following points in its petition.

1. Article 34.1 allows parties to nominate candidates for membership of municipal councils, provided that they are registered in accordance with the Law on Political Parties and they meet the requirements within that Law of the number of

members of the party. Nominations must be made no later than sixty five days before the election. Effectively, therefore, only political parties are entitled to nominate candidates. Voters do not elect members of municipal councils directly; they have to choose from a pool of candidates selected by political parties. This provision may be in breach of the principle of direct suffrage entrenched in Article 119.2 of the Constitution.

2. Political parties only put candidates forward for membership of the municipal councils who belong to their parties and who accept either the particular political party's mandate or carry out other tasks for it. Members of political parties have more of a chance of being elected to municipal councils than non-members. They therefore enjoy broader passive electoral rights than non-members. This state of affairs may be in breach of the principle of equal suffrage under Article 119.2 of the Constitution.

II. The Constitutional Court held that the Constitution allows for the proportional system of election to municipal councils. However, this does not mean that it is acceptable, under the Constitution, to limit the lists of candidates to those put forward by political parties.

The Constitutional Court analysed the content of the constitutional right to freely form political parties. It consists of the right to form societies, political parties and associations, the right to join them and participate in their activities. It also comprises the right not to belong to a political party, and the right to cancel one's membership. An individual may exercise his own free will in this regard. Individual free will is a fundamental principle of membership of political parties.

Under Article 35.2 of the Constitution, nobody may be forced to belong to any society, political party, or association. This constitutional guarantee also means that an individual cannot be directly or indirectly compelled to become related to any political party in any way other than by formal membership. Parliament, in enacting legislation governing elections to municipal councils, must heed the constitutional requirement not to bring about a situation whereby those wishing to exercise their passive electoral rights in municipal council elections would be compelled to seek membership of a political party, or to become associated with one in a less formal manner. The proportional system of election to municipal councils means that individuals who are not included in the lists of candidates cannot be nominated as candidates in such elections. Once this system is in place, the members of territorial communities (permanent residents of administrative units of the territory of the Republic of Lithuania, citizens of the Republic of Lithuania and other permanent residents) must have the opportunity to be elected to membership of one of the municipal councils, even if they do not have the support of a particular political party. Members of territorial communities must be given the opportunity of exercising their passive electoral rights by being included in other lists, not simply those of political parties.

The Constitutional Court ruled that to the extent that the 21 December 2006 wording of Article 34.1of the Law on Elections to Municipal Councils did not allow for members of territorial communities to be included in lists of candidates for council membership drawn up by entities other than political parties, it was in conflict with Article 119.2 of the Constitution.

Languages:

Lithuanian, English (translation by the Court).

Moldova
Constitutional Court

Important decisions

Identification: MDA-2007-1-001

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 13.02.2007 / **e)** 2 / **f)** Review of the constitutionality of Section 1 of Law no. 25-XVI of 16 February 2006 amending Section 24 of Law no. 64-XII of 31 May 1990 on the Government / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

3.6.2 **General Principles** – Structure of the State – Regional State.
4.6.7 **Institutions** – Executive bodies – Administrative decentralisation.
4.8.4.1 **Institutions** – Federalism, regionalism and local self-government – Basic principles – Autonomy.
4.8.8.3 **Institutions** – Federalism, regionalism and local self-government – Distribution of powers – Supervision.

Keywords of the alphabetical index:

Government, decentralised / Autonomy, regional / Unit, territorial administrative.

Headnotes:

Articles 66.c and 109 of the Constitution lay down the fundamental principles of local public administration. In the administrative and territorial units, public administration is based on the principle of local autonomy, the decentralisation of public services, the eligibility of local public administration authorities and consultation of citizens about local problems of particular interest.

Autonomy applies to the organisation and operation of local public administration and to municipal administration at community level.

Summary:

I. A member of parliament asked the Constitutional Court to review the constitutionality of Section 1 of Law no. 25-XVI of 16 February 2006 amending Section 24 of Law no. 64-XII of 31 May 1990 on the Government. The applicant claimed that the introduction of the phrase “the Ministry of local public administration” in Section 1 of that Law was contrary to Articles 107, 109 and 112 of the Constitution.

II. Upon examination of the case, the Court observed that, in conformity with constitutional norms and current legislation, the constitutional principle of local autonomy enabled local administrative and territorial units to be self-governing at a local level, provided that they did not encroach upon the autonomy of other local communities and the general interests of the nation and the State.

The Court emphasised that the designation of the authority of the central public administration responsible for ensuring the exercise of public interests in the territory corresponded with the constitutional principle of local autonomy.

Central government may direct the local authorities only in accordance with the conditions laid down in the Constitution.

According to Article 112 of the Constitution, the public administration authorities through which local autonomy is executed at village and town level are the elected local councils and the elected mayors. According to the wording of that article, the designated local authorities are not mere autonomous authorities but autonomous administrative authorities. The status of those autonomous administrative authorities presumes not only authority in decision-making but also a control on the legality of activities of the central public administration.

The Court found that the coordination by the legislator of the activities of the local public administration in certain spheres, in the general interests of the State, did not infringe the principle of local autonomy and represented a measure that was necessary in a democratic society. Prevention of abuse on the part of the authorities of the central and local public administration was in the interests of society.

The Court therefore concluded that the establishment of the Ministry of local public administration was consistent with the provisions of Article 112 of the Constitution.

Languages:

Romanian, Russian.

Identification: MDA-2007-1-002

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 27.03.2007 / **e)** 6 / **f)** Review of the constitutionality of the provisions of point 5 of the Regulation on the motorised carriage of passengers and luggage, approved by the Government Decree no. 854 of 28 July 2006 / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

3.13 **General Principles** – Legality.
3.18 **General Principles** – General interest.
5.3.39.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.
5.4.7 **Fundamental Rights** – Economic, social and cultural rights – Consumer protection.

Keywords of the alphabetical index:

Road safety / Transport, passengers, public.

Headnotes:

The right to property is enshrined in Articles 9, 46, 127 of the Constitution and the international treaties on human rights and fundamental freedoms. That right is considered a complex fundamental right, comprising obligations as well as rights.

Article 127.1-2 of the Constitution provides that the State protects property and guarantees the right to possess property in any form, if it does not conflict with the general interests of society.

Summary:

I. A member of parliament requested the Constitutional Court to review the constitutionality of the provisions of point 5 of the Regulation on the motorised carriage of passengers and luggage, approved by Government Decree no. 854 of 28 July 2006. This prohibits the use of refurbished commercial vehicles for the public carriage of passengers.

The applicant maintained that the provisions of point 5 restricted the right to property and thus contravened Articles 4, 15, 46 and 54 of the Constitution as well as Articles 14, 17 and 18 ECHR and Article 1 Protocol 1 ECHR.

When adopting these provisions, the Government failed to take account of Judgment no. 38 of the Constitutional Court of 15 December 1998 and thus infringed Article 140 of the Constitution.

The applicant cited Article 54.2 of the Constitution in support of his argument that an owner's right to use a refurbished vehicle for the public carriage of passengers could not be limited by a government decree, but only by law, and that any restriction of that right must observe the norms unanimously recognised by international law and could be imposed only where absolutely necessary in a democratic society.

II. Under Article 102 of the Constitution, government decrees are adopted in order to implement laws.

The Regulation on the motorised carriage of passengers and luggage was drawn up in conformity with Article 2 of the Code on motorised transport, adopted by Law no. 116-XIV of 29 July 1998. It set out the main implementing conditions, on the territory of the Republic of Moldova and outside the country, of the carriage of passengers and luggage by motorised transport. These were binding on all licensed transport agents and on undertakings, institutions, organisations and users of transport services.

Transport agents were required to use vehicles which met national standards and road traffic regulations, in order to convey passengers, luggage and goods. The conditions governing the technical use of vehicles are determined by national standards, Articles 7 and 8 of the Code on automobile transport and current legislation.

The government adopted that regulation in compliance with Article 102 of the Constitution, to facilitate the implementation of the provisions of the Code on motorised transport.

The exercise of the right to property must be lawful; it must not cause disproportionate material or non-material harm to other members of society and must not lead to irreparable consequences.

The provisions of point 5 of the regulation did not undermine the substance of the right to property, but

made the exercise of that right subject to certain conditions, one of which established the need to comply with vehicle technical and safety standards.

The contested provisions of the regulation did not deprive the owner of the right to his property. It only limited the exercise of the right to use a possession. The State is entitled to regulate the use of possessions where this is in the general interest.

The prohibition of the use of refurbished vehicles for the public carriage of passengers is also dictated by the need to implement the provisions of the EU/Moldova Action Plan relating to the Council's objective of reducing, over the next six years the number of road accidents and of victims of accidents.

The objective in question is set out in a series of legislative and normative acts including the Law on consumer protection, the government decree adopting the Action Plan with a view to redressing the road safety situation by 2009.

Section 5 of the Law on Consumer Protection entitles the consumer to protection against the risks associated with the acquisition of a product, such as harm to his life, health or safety or to his lawful rights and interests.

The Regulation was aimed at the protection of the lawful rights of passengers.

Under its power to exercise constitutional jurisdiction, the Constitutional Court declared constitutional the provisions of point 5 of the Regulation on the motorised carriage of passengers and luggage.

One judge took the view that the contested norm was unconstitutional and expressed a dissenting opinion. In his opinion, the Court had taken account only of the aim and the stages of the exclusion of the vehicles concerned, without indicating the reasons for the restriction imposed by the government decree.

Languages:

Romanian, Russian.

Identification: MDA-2007-1-003

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 12.04.2007 / **e)** 8 / **f)** Review of the constitutionality of Article 69^5 of the Tax Code of the Republic of Moldova / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

4.10.7.1 **Institutions** – Public finances – Taxation – Principles.
5.2.1.1 **Fundamental Rights** – Equality – Scope of application – Public burdens.
5.3.42 **Fundamental Rights** – Civil and political rights – Rights in respect of taxation.

Keywords of the alphabetical index:

Notary, taxation, equality / Tax, income, calculation.

Headnotes:

Article 132.1 of the Constitution provides that taxes, duties and other revenues of the State budget, the State social security budget and district, town and village budgets are to be determined by law, by the respective representative agencies.

In regulating budget, tax, financial and credit areas, the legislator is entitled to define both the status of the persons participating in relationships regulated by the tax legislation, the income or property to be taxed, the procedures for levying taxes and the frequency with which they are imposed.

Income tax forms part of the system of general taxes and is within the scope of the duties of the State.

The rate of income tax represents a decisive element for setting income tax and the law defines the amount by reference to the subject matter of the tax. In the present case, the subject matter of the tax was notary's income.

Article 6.8 of the Tax Code establishes the principles on which taxes and duties are based, including the principle of fiscal fairness. This means "equal treatment for the natural and legal persons who carry out an activity in similar conditions, in order to ensure the equality of fiscal commitments".

Summary:

I. A member of parliament requested the Constitutional Court to review the constitutionality of Article 69^5 of the Tax Code of the Republic of Moldova, pointing out that:

- Article 15 of the Tax Code did not cover private notaries.
- The rate of income tax payable by a private notary was 22% of his taxable monthly income.

The applicant considered that the exceptions to the general rule of the taxation of taxpayers, who are natural persons, laid down in Article 69^5, were discriminatory and constituted an unlawful additional tax on private notaries. The applicant maintained that they drew a distinction, as regards amount and the tax period, between private notaries and natural persons, which meant that the legislator had infringed the provisions of the Constitution which enshrine the principle that all persons are equal before the law and public authorities. There should be no distinction based on race, nationality, ethnic origin, language, religion, gender, opinion, political affiliation, assets or social origin. Article 2.2 of the International Covenant on Economic, Social and Cultural Rights of 1966 was also infringed.

II. The Court noted that Articles 58, 130 and 132 of the Constitution require the financial contributions of citizens to public expenditure, and in particular the constitution of the financial resources of the State and of the taxes, duties and all other revenues of the budget, to be fixed by law.

The Court observed that the contribution of citizens is not a right but an obligation, a provision laid down in Article 58.1 of the Constitution.

The distinguishing feature of tax is that it is compulsory for every taxpayer, including private notaries.

Under Section 2.1 of the Law on the notarial profession, the notarial profession is a public institution governed by law. Notaries are authorised to ensure, under conditions prescribed by law, the protection of the rights and legal interests of persons and of the State by preparing acts that are notarised on behalf of the Republic of Moldova.

The public nature of the activities of notaries entitles the legislator to regulate the legal relations of that activity differently. Consequently, it is not compulsory to tax private notaries in accordance with Article 15 of the Tax Code, which sets the rate of tax for natural persons.

Since notaries have a special status, the conditions of their activity differ from those of natural persons and the contribution does not represent a right but an obligation laid down in the Constitution. The provisions of Article 69^5 of the Tax Code therefore did not infringe the provisions of Article 16.2 of the Constitution and Article 2.2 of the International Covenant on Economic, Social and Cultural Rights.

The Court concluded that Article 69^5 of the Tax Code did not infringe the constitutional provisions of Article 58.2, since the constitutional norm laid down in Article 58.2 requires a fair allocation of the tax burdens and not equal taxation, contrary to the applicant's contention.

Under its power to exercise constitutional jurisdiction, the Constitutional Court declared constitutional the provisions of Article 69^5 of the Tax Code.

Languages:

Romanian, Russian.

Monaco
Supreme Court

Important decisions

Identification: MON-2007-1-001

a) Monaco / **b)** Supreme Court / **c)** / **d)** 19.03.2007 / **e)** TS n° 2005/18 / **f)** Application for annulment of the decision of the Minister of State of 7 March 2005 to refuse leave of stay on Monegasque territory to Mrs G. / **g)** / **h)** CODICES (French).

Keywords of the systematic thesaurus:

1.4.8.7 **Constitutional Justice** – Procedure – Preparation of the case for trial – Evidence.
1.4.9.4 **Constitutional Justice** – Procedure – Parties – Persons or entities authorised to intervene in proceedings.
4.7.4.3.6 **Institutions** – Judicial bodies – Organisation – Prosecutors / State counsel – Status.
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:

Prosecutor general, independence / Prosecutor general, declaration, evidence, admissibility.

Headnotes:

Under Article 70 of the law of 15 July 1965 on the organisation of the judiciary, “the prosecutor general is the head of the prosecutor’s office”. Under Article 28 of the above law, the prosecutor general is not subject to the authority of the Minister of State. Article 29 states that the functions of the prosecutor’s office are to be exercised in compliance with the codes, laws and orders in force by the prosecutor general. Article 31.2 of the sovereign order of 16 April 1963 on the organisation and the functioning of the Supreme Court states that “the Prosecutor General shall make submissions in the name of the law” and is consequently not party to the litigation, in which case the prosecutor general may not put forward evidence himself.

Summary:

I. The case concerns a measure refusing leave of stay on Monegasque territory to Mrs G. and Mr G. – by parallel decisions identical on the merits. In this case, the Supreme Court did not rule as a constitutional court but as the Supreme Administrative Court. The question was, on the one hand, whether the high court could accept the argument by the Administration that the imperative of secrecy justified the court not being given the material it needed to verify the lawfulness of the decisions it had taken. Also, if the Prosecutor submitted the materials, what was their evidential status?

Mrs G., of Hungarian nationality, applied to the Supreme Court for annulment of the Minister of State’s refusal to grant her leave to stay on Monegasque territory. This was taken by the Minister of State on 7 March 2005 and notified to her on 24 March 2005. In its decision of 5 December 2006, the Supreme Court called on the Minister of State to produce the material that would enable the Supreme Court to exercise its supervision of the lawfulness of the decision challenged.

After ordering an initial measure of inquiry, which met with no reply, the Supreme Court issued a second order, this time ordering the Minister of State to provide this material. By way of reply the Minister passed on the letter from the Prosecutor General reporting that requests for investigation had been lodged by foreign judicial authorities “which were covered by secrecy” and mentioning “elements based on serious information” from a money laundering investigation under way in Monaco.

II. In its decision, the Supreme Court noted that the Minister of State had submitted observations on 11 January 2007 which were admissible; in support of those observations, he had submitted a letter dated 9 January 2007 in which the Prosecutor general had stated that “the judicial authorities of Monaco have received requests for investigation from foreign judicial authorities concerning (Mr and Mrs G.)”, that “it emerged that Mr and Mrs G. had completed various formalities with a view to taking up residence on the territory of the Principality in suspicious circumstances, in particular by using several aliases (…) while (Mrs G.) was deliberately concealing the name of her husband” and that “these elements obtained on the basis of serious information prompted a money laundering investigation initiated by the Prosecutor General’s office”.

The Supreme Court held that the information provided by the Prosecutor general, supplementing and confirming the statements by the Minister of

State at the earlier stages of this procedure, had been debated within the framework of the adversarial proceedings. Mrs G. had provided no evidence establishing that it was incorrect. Thus, by using that information as a basis for the measure refusing leave of stay to Mrs G., the Minister of State had committed neither a mistake of fact nor a manifest error of appreciation.

Mrs G.'s application for annulment of the decision was therefore rejected. In parallel, a similar decision of rejection was handed down on the same day concerning an identical application by her husband, Mr G.

Languages:

French.

Montenegro
Constitutional Court

Important decisions

Identification: MNE-2007-1-001

a) Montenegro / **b)** Constitutional Court / **c)** / **d)** 28.02.2006 / **e)** U 21/05/g / **f)** Constitutionality of the Law on the High Council of Justice / **g)** Official Gazette of the Republic of Montenegro, 24/06 / **h)**.

Keywords of the systematic thesaurus:

4.5.6.3 **Institutions** – Legislative bodies – Law-making procedure – Majority required.
5.1.1.4.2 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Incapacitated.

Keywords of the alphabetical index:

Disabled person, right, law, adoption, qualified majority / Law, regulating fundamental rights, adoption, qualified majority.

Headnotes:

Laws regulating the manner in which freedoms and rights granted by the Constitution are exercised, must be adopted by a majority of votes of the total number of deputies of Parliament. A labour law prescribing, *inter alia*, the rights of disabled persons qualifies as such a law. Therefore, a vote by 33 out of the 75 deputies of the Parliament of Montenegro is not a sufficient majority of votes as prescribed by the provision of Article 83.2 of the Constitution and makes the Law unconstitutional in its entirety.

Summary:

The Constitution provides that: the means by which the freedoms and rights are exercised can be regulated, if necessary, by a law, in conformity with the Constitution (Article 12.1.1 of the Constitution); Parliament adopt laws, other regulations and general enactments (Article 81.1.2 of the Constitution); Parliament shall then decide, if the session is attended by more than half of the total

number of deputies, and the decisions shall be made by a majority of votes of the deputies present, if not otherwise prescribed by the Constitution; Parliament shall make decisions by a majority of votes of the total number of deputies, on laws regulating the manner in which the freedoms and rights are exercised, regulating the electoral system, establishing material obligations of citizens, on the state symbols, on the dismissal of the President of the State, on electing the members of government and on the vote of confidence to the government, on announcing a referendum, on shortening its term of office and on its rules of procedure (Article 83 of the Constitution). The law shall be in harmony with the Constitution, and other regulations and general acts shall be in harmony with the Constitution and law (Article 107 of the Constitution).

The impugned law governs, *inter alia,* the manner and procedure by which the freedoms and rights of employed disabled persons is exercised and the situation in which an employed disabled person is made compulsorarily redundant.

The freedoms and rights of citizens are exercised directly on the basis of the Constitution. The law, in conformity with the Constitution, provides the manner in which the freedoms and rights are exercised, if necessary. The right to work and the rights of employees belong to a corpus of economic, social and cultural freedoms and rights established by the Constitution. Starting from the fact that the impugned law regulated the manner in which freedoms and rights granted by the Constitution are exercised, the parliament, in the procedure of adopting this Law, was bound to adopt it by a majority of votes of the total number of deputies. The proceedings which examined the majority by which the impugned law was adopted found that 33 out of 75 deputies of the Parliament of Montenegro voted in favour of the draft law on changes and amendments to the labour law – it therefore has not been adopted by a majority of votes of the total number of deputies in the manner prescribed by the provision of Article 83.2 of the Constitution, which makes it unconstitutional, in its entirety.

Supplementary information:

Legal norms referred to:

- Articles 83.2, 113.1.1, 115, 116.3 of the Constitution;
- Article 56.1 of the Law on the Constitutional Court.

Languages:

Montenegrin, English (translation by the Court).

Netherlands
Supreme Court

Important decisions

Identification: NED-2007-1-001

a) Netherlands / **b)** Supreme Court / **c)** Third Chamber / **d)** 22.09.2006 / **e)** 41 178 / **f)** / **g)** *BNB* 2007, 55; www.rechtspraak.nl LJN AY8649 / **h)**.

Keywords of the systematic thesaurus:

1.3.5.5 **Constitutional Justice** – Jurisdiction – The subject of review – Laws and other rules having the force of law.
5.3.42 **Fundamental Rights** – Civil and political rights – Rights in respect of taxation.

Keywords of the alphabetical index:

Tax, car, import, depreciation, flat rate / Constitutionality, review, prohibition.

Headnotes:

A provision allowing to submit evidence on the actual depreciation of an imported vehicle is incompatible with Article 90 EC if it does not make it possible to discern all the specific criteria that play a role in establishing the definitive reduction percentage, in order to form a view as to the aspects about which evidence could be usefully submitted. The point at issue was whether car and motorcycle tax, which is a registration duty, could be levied when a second-hand car is imported.

Summary:

I. The interested party argued that Section 10 of the Car and Motorcycle Tax Act 1992 ("the Act"), which contains the depreciation table on the basis of which the amount of car and motorcycle tax payable is calculated, is incompatible with Article 90 EC. He argued that there is no way of discerning the grounds on which the percentage linked to the age of the vehicle is determined, since the criteria according to which the flat rate for the depreciation of vehicles is calculated have not been published.

Article 90 of the Treaty establishing the European Community reads as follows.

> "No Member State shall impose, directly or indirectly, on the products of other Member States, any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products.
>
> Furthermore, no Member State shall impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products."

II. The Supreme Court held firstly that according to the line of authority from the Court of Justice of the European Communities, the factors on the basis of which a reduction percentage is established should be published, and that a flat-rate table which reflects the general trend in the depreciation of vehicles, but is only approximate, is nevertheless compatible with Article 90 EC if it is possible for the owner of an imported vehicle to contest at law the application of the table to his vehicle.

The Supreme Court was being asked to rule on the validity of a statutory provision. However, Section 11 of the General Legislative Provisions Act prohibits the courts from ruling on the intrinsic value or fairness of an Act under any circumstances, while Article 120 of the Constitution explicitly states that the constitutionality of Acts of Parliament and treaties must not be reviewed by the courts. Nevertheless, courts may review national legislation in the light of treaties and resolutions of international institutions; they must in fact declare such legislation inapplicable if it is not compatible with provisions of treaties that are binding on all persons or with resolutions of international institutions (Article 94 of the Constitution). All the same, certain difficulties of alignment still exist, between the courts and the legislator.

After studying the text of Section 10 of the Car and Motorcycle Tax Act and the history of its passage through parliament, the Supreme Court held that it is not possible, on the basis of the statutory flat-rate depreciation table, to establish in the case of a specific vehicle whether and to what extent the table reflects the actual depreciation of that vehicle because the table contains no factors other than the vehicle's age, such as make, model, mileage, mechanical condition or whether the vehicle is well maintained. The mere fact that evidence to the contrary may be submitted is insufficient justification for the view that the system for levying car and motorcycle tax is compatible with Article 90 EC. For that to be the case, it would have to be possible for

somebody wishing to import a vehicle to discern all the specific criteria that play a role in establishing the definitive reduction percentage, in order to form a view as to the aspects about which they could usefully submit evidence to the contrary.

Languages:

Dutch.

Identification: NED-2007-1-002

a) Netherlands / **b)** Supreme Court / **c)** Second Chamber / **d)** 17.10.2006 / **e)** 00312/05 / **f)** / **g)** *Nederlandse Jurisprudentie (NJ)* 2007, 207; *Rechtspraak van de Week (RvdW)* 2006, 1003; www.rechtspraak.nl LJN AU6741 / **h)** *Nieuwsbrief Strafrecht (NS)* 2006, 412.

Keywords of the systematic thesaurus:

4.8.3 **Institutions** – Federalism, regionalism and local self-government – Municipalities.
4.8.8.2.4 **Institutions** – Federalism, regionalism and local self-government – Distribution of powers – Implementation – Distribution *ratione personae*.
4.11.2 **Institutions** – Armed forces, police forces and secret services – Police forces.
5.3.28 **Fundamental Rights** – Civil and political rights – Freedom of assembly.

Keywords of the alphabetical index:

Demonstration, prohibition, competence / Demonstration, notification, obligation.

Headnotes:

Article 10 of the Municipal By-Laws of The Hague, under which the organisers of a demonstration must give the mayor advance notice in writing, is of a binding nature. If no notification is received, the mayor may order the demonstration to cease immediately. This power is vested in the mayor and cannot be exercised by a police officer if the latter has received no instructions to this effect from the mayor.

Summary:

I. The Court of Appeal observed that it had been proved that on 25 June 2003 in The Hague the defendant deliberately failed to comply with an order issued under the opening sentence of Section 7.a of the Public Assemblies Act. Sergeant X of the Haaglanden regional police force issued the order; he was responsible for supervision and was responsible and competent to investigate criminal offences. On this particular occasion, the defendant had deliberately failed to comply with the order the officer had issued, to stop the demonstration.

One of the defendant's arguments was that the mere fact that no prior notification was given could not justify the order to terminate the activities in question. This is incompatible with Article 9 of the Constitution, Section 2 of the Public Assemblies Act and Articles 10 and 11 ECHR.

The Appeal Court held that the defendant was correct in stating that the Public Assemblies Act gives the mayor – and therefore the police who act in his or her name – discretion to allow a demonstration which has not been announced to go ahead. The court did not know whether the mayor had given the regional police force instructions on this point. It noted that clear and effective enforcement of the notification requirement laid down in the Public Assemblies Act – failure to comply with which is, in fact, an offence under Section 11 – is necessary to enable mayors to discharge their responsibilities as regards public order and public safety. The Court also noted that the measures the police officer took to end the demonstration, as described above, were proportionate. It did not, therefore, concur with the argument that the order in question was in conflict with the statutory, constitutional and treaty provisions cited by the defendant.

Before the Supreme Court, the defendant contested *inter alia* the Appeal Court's finding that the fact that no advance notification was given justified the order to stop the demonstration.

II. The Supreme Court held that the Appeal Court's decision was not incompatible with the law. The decision implies that a demonstration within the meaning of the Public Assemblies Act can be ended simply on the grounds that, in contravention of Section 4 of the Public Assemblies Act in conjunction with Article 10 of the General Municipal By-laws of The Hague, no prior notification was given to the mayor. The combination of the Act and the municipal by-laws means that in The Hague, the mayor must receive written notification before a demonstration is publicly announced, in order to protect health, to

facilitate the safe progress of traffic, and to combat or prevent disorders. Logically therefore, if the mayor does not receive such notification, he or she may exercise the power to order that the demonstration be immediately ended and that the participants disperse. Nevertheless, the mayor may decide to refrain from exercising that power if the interests involved do not militate against such a decision.

Languages:

Dutch.

Netherlands
Council of State

Important decisions

Identification: NED-2007-1-003

a) Netherlands / **b)** Council of State / **c)** Chamber 3 - Standard appeals / **d)** 28.02.2007 / **e)** 200603367/1 / **f)** Mayor of Uden in appeal against the Den Bosch District Court's judgment (number AWB 05/558) in the case of X (a citizen) v. the Mayor of Uden / **g)** *Nederlands Juristenblad* 2007, 607 / **h)** CODICES (Dutch).

Keywords of the systematic thesaurus:

5.1.4 **Fundamental Rights** – General questions – Limits and restrictions.
5.4.4 **Fundamental Rights** – Economic, social and cultural rights – Freedom to choose one's profession.

Keywords of the alphabetical index:

Sexbusiness, display, limitation / Profession, right to practice.

Headnotes:

The requirement in a general municipal ordinance that stipulates that owners and managers of sex establishments must not display reprehensible behaviour does not amount to a restriction of the freedom of choice of work, which is guaranteed in the Constitution.

Summary:

Article 19 of the Constitution provides:

1. It shall be the concern of the authorities to promote the provision of sufficient employment.

2. Rules concerning the legal status and protection of workers and co-determination shall be laid down by an Act of Parliament.

3. The right of every Dutch national to a free choice of work shall be recognised, without prejudice to the restrictions laid down by or pursuant to an Act of Parliament.

Article 151a.1 of the Municipalities Act *('Gemeentewet')* provides that a municipal council may make regulations with regard to the offering, in the course of one's business, of the opportunity to perform sexual acts with a third person for payment.

Article 3.2.1.1 of the General Municipal Ordinance *('Algemene Plaatselijke Verordening'*, referred to here as 'APV') prevents the opening of a sex establishment without permission from the relevant public authority.

Article 3.2.2.1 opening line and under b, of the APV provides that the owner and the manager will not display reprehensible (or bad) behaviour.

Article 3.3.2.1 opening line and under a, of the APV provides that without such permission, the owner or manager will not meet the requirements set out in Article 3.2.2 of the APV.

In a decision of 27 May 2004, the Mayor of Uden declined to grant permission to X to open a sex establishment in the town of Uden in the province of Noord-Brabant. X lodged as written objection, which the Mayor dismissed. X then appealed against the decision on the objection to a court of law, the Den Bosch District Court.

The administrative law section of the District Court held in favour of X According to the District Court, Article 3.2.2.1, opening line and under b, of the APV contains a restriction that is not laid down by or pursuant to an Act of Parliament as required in Article 19.3 of the Constitution. The Court therefore held that the APV-provision lacked binding force.

The Mayor appealed to the Administrative Jurisdiction Division of the Council of State, which upheld his appeal. It recalled the parliamentary history of the 1983 revision of the Constitution. Article 19.3 was included in the Bill after an amendment proposed by Member of Parliament Rietkerk had been approved. According to the relevant pages in the parliamentary documents, there was meant to be a difference between freedom of choice of work on the one hand and the requirement for quality of choice of work on the other hand. The requirement made in Article 3.2.2.1, opening line and under b, of the APV must not be considered as a restriction on freedom of choice of work, especially since this limitation goes no further than necessary to accomplish the intended purpose, which is socially responsible professional performance. However, when construing the relevant provision in concrete cases, it must be noted that there will be no talk of bad behaviour if this amounts to a disproportionate restriction to the freedom of choice of work.

Supplementary information:

Under Article 120 of the Constitution, courts do not have power to review the compatibility of primary legislation with the Constitution. This article is not applicable to the review of secondary legislation.

Languages:

Dutch.

Poland
Constitutional Tribunal

Statistical data
1 January 2007 – 30 April 2007

Number of decisions taken:

Judgments (decisions on the merits): 22

- Rulings:
  - in 14 judgments the Tribunal found some or all of the provisions under dispute to have contravened the Constitution (or other act of higher rank)
  - in 8 judgments the Tribunal found all challenged provisions to conform to the Constitution (or other act of higher rank)

- Proceedings:
  - 6 judgments were issued at the request of private individuals under the constitutional complaint procedure
  - 6 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)
  - 2 judgments were issued at the request of local authorities
  - 1 judgment was issued at the request of professional organisations
  - 1 judgment was issued at the request of trade unions

- Other:
  - 1 judgment was issued by the Tribunal in plenary session
  - 1 judgment was issued with dissenting opinions

Important decisions

Identification: POL-2007-1-001

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).

Keywords of the systematic thesaurus:

3.4 **General Principles** – Separation of powers.
3.9 **General Principles** – Rule of law.
3.10 **General Principles** – Certainty of the law.
3.12 **General Principles** – Clarity and precision of legal provisions.
3.16 **General Principles** – Proportionality.
4.5.2.2 **Institutions** – Legislative bodies – Powers – Powers of enquiry.
4.5.7 **Institutions** – Legislative bodies – Relations with the executive bodies.
4.6.10.2 **Institutions** – Executive bodies – Liability – Political responsibility.
4.7 **Institutions** – Judicial bodies.
4.10.5 **Institutions** – Public finances – Central bank.

Keywords of the alphabetical index:

Parliament, investigative committee, power, scope / Parliament, controlling function / Court, independence / Central bank, independence.

Headnotes:

Under the Polish Constitution of 1997, no state organ enjoys superiority over the others. The principle of socialist constitutionalism, whereby the *Sejm* was the supreme organ of State authority, ceased to have effect. Traces of this doctrine can still be found in the Polish *Sejm*. It constitutes one of the organs of State authority. Its powers are set out in the Constitution and statutes, and it enjoys considerable power, within these limits, in its legislative decision-making. The same applies to investigative committees.

Since investigative committees are internal organs of the *Sejm*, the matters they examine fall within the *Sejm's* remit. Therefore, under the Constitution, investigative committees may only examine the activities of public organs and institutions that are expressly subject to control by the *Sejm*. The *Sejm*'s

control may be defined as the power to obtain information on the activities of particular public organs and institutions, and to assess their activities. The information is necessary from a legislative point of view. Control by the *Sejm* also keeps the public informed of the functioning of organs of state administration and allows for public scrutiny of state administration.

When appointing an investigative committee the *Sejm* is bound by the principle of separation of powers. Therefore, the tasks conferred upon a committee may not impinge upon relationships with organs which are not subject to *Sejm*'s control. Not every organ is subject to direct control by an investigative committee. For example, the *Sejm* is not permitted to interfere in the running of the courts. The guarantee of independence also applies to the National Bank of Poland (NBP), which has exclusive right to issue money and to formulate and implement monetary policy, as well as responsibility for the value of Polish currency. The principle of independence for the NBP is not directly mentioned in the Constitution; however, the NBP requires a considerable degree of independence in order to fulfil its constitutional tasks.

An investigative committee has powers typical of those of prosecutors and the judiciary. Overstepping or improper use of these powers jeopardises constitutionally-protected values. The committee's values must be carefully defined.

The use of ambiguous concepts by the legislator is not, per se, impermissible and cannot always be avoided. The Constitution guarantees the independence of courts and judges. Court decisions are subject to review by higher courts and so court proceedings create conditions for uniform and precise interpretation of law. Proceedings before an investigative committee do not necessarily have these institutional and procedural guarantees. It is not, therefore, permissible to define the scope of the activity of committees in ambiguous terms.

The *Sejm* is not authorised to alter the constitutional and statutory status of the individual by way of a resolution.

Summary:

I. Article 111.1 of the Constitution empowers the *Sejm* (the first chamber of the Polish Parliament) to appoint an investigative committee to examine a particular matter. A commission may be appointed by resolution by the *Sejm.*

A group of *Sejm* Deputies requested the review of the *Sejm*'s resolution of 24 March 2006 "on the appointment of the Investigative Committee to examine decisions concerning capital and ownership changes in the banking sector, and the activities of banking supervision authorities from 4 June 1989 to 19 March 2006".

II. The Constitutional Tribunal ruled that the provision of the Resolution determining the investigative commission's scope of activity was inconsistent with various constitutional articles. These included Article 2 of the Constitution (rule of law), Article 7 of the Constitution (legality), Article 95.2 of the Constitution (the scope of *Sejm*'s controlling function), Article 111.1 of the Constitution (the *Sejm*'s competence to appoint investigative committees), and Article 227 of the Constitution (the status of the National Bank of Poland).

The "particular matter", within the meaning of Article 111 of the Constitution, shall comprise a set of circumstances which constitutes the object of interest of the *Sejm*. The set shall be specified in the *Sejm*'s resolution appointing an investigative committee. The object of committee activity must be comprehensible to all potential subjects obliged to appear before the committee or to provide appropriate information. Lack of specificity of the resolution in this respect may result in a significant weakening of the principle of legality of State organs, creating uncertainty for third parties as to the scope of their rights and duties.

The Resolution does not specify the "particular matter", but refers to situations encompassing hundreds or thousands of events (e.g. permissions with the nature of administrative decisions issued by the Commission for Banking Supervision), which are the subject of numerous lengthy economic, legal and political procedures.

The imprecise nature of the language used in the challenged Resolution makes it impossible to unambiguously determine the purpose for which the committee has been appointed. For that reason, the Resolution infringes Article 111.1 of the Constitution.

The *Sejm* will not have the power to appoint an investigative committee to examine the activity of the NBP or its President, or organs such as the Management Board of the NBP or the Council for Monetary Policy. The challenged Resolution of the *Sejm* on the appointment of the Investigative Committee could create a new relationship between the *Sejm* and the NBP, which would not be based on the Constitution or statutes.

Banks operating as joint-stock companies are not subject to parliamentary control. A minister carrying out ownership functions in companies whose shares are held by the State Treasury might be subject to such control.

It would be impermissible to include within the category of persons subject to control by an investigative committee, the President of the Republic of Poland or the President of the Constitutional Tribunal.

Private entities which do not perform any tasks within the scope of public administration and do not avail themselves of state aid are not within the scope of control exercised by the *Sejm*. The scope of control exercised by the *Sejm* is predominantly concerned with ministers and organs subordinated to them. However, a different problem arises with regard to the summoning of private persons and entrepreneurs before an investigative committee in order to give evidence, which is only permissible because activities on the part of ministers constitute the object of examination.

Appointing an investigative committee to achieve objectives that may be achieved by other means, such as parliamentary standing committees, infringes the principle of rationality and proportionality of public authority activities, under Article 2 of the Constitution (rule of law).

The principle of independence of the courts does not prohibit an investigative committee from undertaking the examination of a matter, even though the circumstances and events constituting the objective of the committee's examination are themselves under examination in court proceedings. In practice, this concerns predominantly criminal proceedings. The objectives of an investigative committee and court proceedings are different. The aim of court proceedings in a criminal case is to determine a given individual's criminal liability. The aim of an investigative committee is to examine the activity of a public body, with a view to determining the scope and background of irregularities in its activities.

Cross-references:

- Judgment K 8/99 of 14.04.1999, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest) 1999, no. 3, item 41; *Bulletin* 1999/1 [POL-1999-1-009];
- Judgment K 25/99 of 28.06.2000, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest) 2000, no. 5, item 141; *Bulletin* 2000/2 [POL-2000-2-017];
- Judgment U 3/00 of 27.11.2000, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest) 2000, no. 8, item 293;
- Judgment SK 1/01 of 12.07.2001, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest) 2001, no. 5, item 127; *Bulletin* 2001/3 [POL-2001-3-023];
- Judgment K 26/03 of 24.11.2003, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest) 2003, no. 9A, item 95;
- Judgment SK 30/05 of 16.01.2006, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest) 2006, no. 1A, item 2; *Bulletin* 2006/1 [POL-2006-1-002];
- Judgment K 4/06 of 23.03.2006, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest) 2006, no. 3A, item 32; *Bulletin* 2006/1 [POL-2006-1-006].

Languages:

Polish, English, German (summary).

Identification: POL-2007-1-002

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 19.12.2006 / **e)** P 37/05 (procedural decision) / **f)** / **g)** *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2006, no. 11A, item 177 / **h)** CODICES (English, Polish).

Keywords of the systematic thesaurus:

1.1.4.4 **Constitutional Justice** – Constitutional jurisdiction – Relations with other institutions – Courts.
1.2.3 **Constitutional Justice** – Types of claim – Referral by a court.
2.1.1.3 **Sources** – Categories – Written rules – Community law.
2.1.1.4 **Sources** – Categories – Written rules – International instruments.
2.1.3.2.2 **Sources** – Categories – Case-law – International case-law – Court of Justice of the European Communities.
2.2.1.2 **Sources** – Hierarchy – Hierarchy as between national and non-national sources – Treaties and legislative acts.

2.2.1.6 **Sources** – Hierarchy – Hierarchy as between national and non-national sources – Community law and domestic 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.
2.2.1.6.4 **Sources** – Hierarchy – Hierarchy as between national and non-national sources – Community law and domestic law – Secondary Community legislation and domestic non-constitutional instruments.
3.26.2 **General Principles** – Principles of Community law – Direct effect.
3.26.3 **General Principles** – Principles of Community law – Genuine co-operation between the institutions and the member states.
4.7.6 **Institutions** – Judicial bodies – Relations with bodies of international jurisdiction.
4.17.1.4 **Institutions** – European Union – Institutional structure – Court of Justice of the European Communities.

Keywords of the alphabetical index:

Court of Justice of the European Communities, preliminary ruling / European Community, loyalty.

Headnotes:

When applying the law, judges are subject to the Constitution and statutes. This rule is derived from the Constitution, under which courts must decline to apply Acts of Parliament in the event of a conflict with an international agreement ratified by statute. The analogical principle of precedence applies to secondary Community law, under the Constitution. If there are no questions as to the interpretation of a Community norm, the court should refuse to apply the conflicting statutory provision and directly apply the Community provision. If the latter cannot be directly applied, the Court should seek such interpretation of the domestic provision that conforms to Community law. If questions of interpretation of Community law have arisen, the national court should refer a question to the Court of Justice of the European Communities (ECJ) for a preliminary ruling, within the procedure laid down in the EC Treaty.

The very fact that, under the principle of precedence, a domestic provision will not be applied in a particular case does not prejudge the necessity to repeal such a provision, even though sometimes legislative amendment may be desirable. In each case it depends on the nature of the provision, its scope of application, and the nature of its conflict with Community law. Expectation that the Constitutional Tribunal will eliminate such domestic provisions would result in the Tribunal shouldering the task of ensuring the effectiveness of Community law. This particular field of application of law falls outside the Tribunal's scope of competence.

Under the Constitution, international agreements are superior to statutes. The Constitutional Tribunal does have competence to review the conformity of statutory provisions with ratified international agreements, where there is no other way of eliminating the conflict, where an international norm is not directly applicable or where the scope of application of an international norm fully overlaps with the scope of application of a statutory norm.

The procedure of the preliminary ruling under the EC Treaty is a very important mechanism of legal cooperation between national courts and the ECJ. That mechanism, which is based on recognition of the difference between the interpretation and the application of law, vests the interpretation of law in the ECJ, and the application in the national courts, which are bound by the ECJ's jurisprudence. The ECJ contributes to the ruling on a case, but does not actually rule on it. The above procedure is a form of "judicial cooperation" by means of which the national court and the ECJ directly and mutually contribute to reaching a particular decision. Pursuant to the principle of loyalty under the Treaty, the preliminary ruling is binding on the referring court, which must take the ruling into account when considering the case. Failure to do so constitutes infringement of Community law.

The Republic of Poland is required under the Constitution to respect international law. That principle applies *mutatis mutandis* to the Community law. As required by the Treaty, Member States shall take all appropriate measures to ensure fulfilment of their Treaty obligations or those resulting from actions taken by Community institutions. The judiciary's role is also spelt out in the Polish Constitution. Specifically, national courts are not only authorised, but also obliged to refuse to apply a domestic norm, which is in conflict with Community law. A national court does not, in such case, repeal a domestic norm; it simply refuses to apply it to the extent that is required to give precedence to the Community norm. The domestic norm in question is not deemed invalid and remains in force to the extent that is not encompassed by the Community norm. Where any doubts arise as to the relationship between domestic and Community law, it is necessary to invoke the preliminary ruling procedure.

Summary:

Under Article 193 of the Constitution any court may refer a question of law to the Constitutional Tribunal as to the conformity of a norm with the Constitution, ratified international agreements or statutes, if the answer to such question will determine an issue currently before the court. This means that the question of law may be examined on the merits only where the judgment the Constitutional Tribunal might hand down (on the question of the constitutionality or legality of a legal provision) might have an influence over the ruling of a case pending before the referring court.

Article 91 of the Constitution provides that a ratified international agreement will take precedence over statutes if this agreement cannot be reconciled with the provisions of such statutes. Where an agreement, ratified by the Republic of Poland, establishing an international organisation so provides, the laws established by it shall have direct effect and will take precedence in the event of a conflict of laws.

In the current case, the Regional Administrative Court in Olsztyn referred a question of law. It suggested that Article 80 of the Excise Duty Act 2004 (which stipulates that passenger cars not registered on Polish territory are subject to excise duty) contravened Article 90 of the EC Treaty (the prohibition for EU Member States to impose on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products).

In the event of a conflict between a domestic law norm and a Community norm the court is authorised and obliged to give precedence to the latter. For that reason, the prerequisite for admissibility of a question of law, set forth in Article 193 of the Constitution, is not fulfilled. The court should decide upon the solution to such a conflict on its own. In case of doubt as to the interpretation of Community law, the court should seek assistance from the ECJ, by means of the preliminary ruling procedure. Therefore, there is no need to refer to the Constitutional Tribunal questions of law regarding the conformity of domestic law with Community law – even in situations where the referring court intends to refuse to apply a domestic statute. The issue of solving conflicts in relation to domestic statutes falls outside the scope of jurisdiction of the Constitutional Tribunal, since deciding whether a statute remains in conflict with Community law is within the competence of the Supreme Court, administrative courts and common courts. The interpretation of Community law norms is provided by the ECJ by way of preliminary rulings.

The Constitutional Tribunal refused to issue a decision on the merits and discontinued the proceedings. According to the Tribunal, the conflict between Article 80 of the 2004 Act and Article 90 of the EC Treaty may be resolved by the referring court itself. For that reason, the adjudication by the Constitutional Tribunal on the merits of the case is superfluous, since the answer to the question of law would not determine an issue pending before the referring court. Accordingly, in the light of Article 193 of the Constitution, the question of law is inadmissible.

Cross-references:

Judgments of the Constitutional Tribunal:

- Judgment P 8/00 of 04.10.2000, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest) 2000, no. 6, item 189; *Bulletin* 2000/3 [POL-2000-3-021];
- Judgment P 4/99 of 31.01.2001, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest) 2001, no. 1A, item 5; *Bulletin* 2001/1 [POL-2001-1-006];
- Judgment K 18/04 of 11.05.2005, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest) 2005, no. 5A, item 49; *Bulletin* 2005/1 [POL-2005-1-006].

Judgments of the Court of Justice of the European Communities:

- Judgment 16/65 of 01.12.1965, *Schwarze v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, *ERC* 1965, p. 1081;
- Judgment C-213/89 of 19.06.1990, *The Queen v. Secretary of State for Transport, ex parte Factortame, ERC* 1990, p. I-2433;
- Judgment C-224/01 of 30.09.2003, Köbler, *ERC* 2003, p. I-10239, *Bulletin* 2005/2 [ECJ-2005-2-022];
- Judgment C-313/05 of 18.01.2007, *Maciej Brzeziński v. Dyrektor Izby Celnej w Warszawie*.

Other:

- Judgment of German Federal Constitutional Court 2 BvL 12, 13/88, 2 BvR 1436/87 of 31.05.1990;
- Judgment of Italian Constitutional Court 170/1984 of 05.06.1984.

Languages:

Polish, English, German (summary).

Portugal
Constitutional Court

Statistical data
1 January 2007 – 30 April 2007

Total: 265 judgments, of which:

- Prior review: 2 judgments
- Abstract *ex post facto* review: 3 judgments
- Appeals: 210 judgments
- Complaints: 35 judgments
- Electoral disputes: 3 judgments
- Political parties and coalitions: 3 judgments
- Declarations of inheritance and income: 1 judgment
- Political parties' accounts: 5 judgments
- Inappropriate activity by holders of political office: 3 judgments

Important decisions

Identification: POR-2007-1-001

a) Portugal / **b)** Constitutional Court / **c)** First Chamber / **d)** 30.01.2007 / **e)** 52/07 / **f)** / **g)** *Diário da República* (Official Gazette), 223 46 (Series II), 06.03.2007, 5987-5992 / **h)** CODICES (Portuguese).

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.
5.3.13.7 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to participate in the administration of justice.

Keywords of the alphabetical index:

Adoption, irregular / Family, protection / *Locus standi*, appeal / Paternity, biological father / Child, best interest.

Headnotes:

The rules setting out the requirements for exercise of parental authority are designed to govern proceedings in which the courts are empowered to further a particular interest in the most appropriate way, as if the matter were an essentially administrative one and legal only from a formal standpoint.

In determining the requirements for exercise of parental authority, the courts must have regard to the child's interests. All other interests are of secondary importance. The child's interests cannot determine who has *locus standi* in the proceedings.

In the present proceedings, the Court had ruled that a child be returned a child to her biological father, removing her from the couple who then had *de facto* responsibility for her and who wanted to adopt her. In that context, not allowing the couple to take part in the proceedings would effectively deny them any possibility of stating their claims and defending their interests on the same footing as the other parties to the case.

Summary:

I. The State Counsel's Office sought clarification of the requirements for exercise of parental authority, in a case where a mother had handed over her newborn child to a couple so that they would "fully adopt it and bring it up as a member of their family". The lower court had decided to award custody and parental authority over the child to the biological father. The couple had been refused leave to appeal against the decision on the grounds that this *de facto* tie, from which exercise of parental authority derived, did not concern them. As a result, they were not entitled to contest the decision laying down the requirements for exercise of that authority.

The procedure involved in setting the requirements for exercise of parental authority was expressly classed as non-contentious. The relevant rules in the code of civil procedure were those which gave the courts wider jurisdiction in matters of fact and evidence, empowered them to apply the criteria of usefulness and advisability in reaching their decisions and allowed them to amend measures when circumstances warranted it. In its decision the lower court had interpreted Article 680.2 of the code of civil procedure in such a way that the appellants had not "actually and directly" been injured by the decision laying down the requirements for apportioning parental authority between the biological parents. This was because their interests were not at issue here; rather, those of the child.

II. The Constitutional Court pronounced the relevant provision of the code of civil procedure to be unconstitutional. It prevented the person actually looking after a child from lodging an appeal in proceedings to determine how parental authority over the child was to be exercised. It contravened the right to the court protection, as guaranteed by Article 20.1 of the Constitution.

Languages:

Portuguese.

Identification: POR-2007-1-002

a) Portugal / **b)** Constitutional Court / **c)** Second Chamber / **d)** 06.02.2007 / **e)** 81/07 / **f)** / **g)** *Diário da República* (Official Gazette), 56 (Series II), 20.03.2007, 7534-7540 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

3.17 **General Principles** – Weighing of interests.
5.1.4 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.32 **Fundamental Rights** – Civil and political rights – Right to private life.

Keywords of the alphabetical index:

Image, right / Image, public person / Photograph, use without consent / Suspect, identification, evidence, use.

Headnotes:

In a criminal judicial investigation concerning homosexual acts with adolescents, keeping the appellant's picture on file against his will (having placed it there without his consent or at least without his knowledge) restricts his ability to check on the use made of it and thus curtails his right to his image.

Keeping an appellant's picture on file may infringe his right to his image, but it may be justified in the present case to protect the interests of the accused (especially those relating to the conduct of his defence), as the photograph was used as a means of identification. It also allows a check on any illegality in the establishing of identity or the bringing of evidence. This remains so until a final decision in the criminal proceedings where the photograph was adduced in evidence.

Summary

I. The question was posed as to whether Article 79.2 of the civil code could be interpreted in such a way as to allow pictures of public figures to be kept on file in criminal proceedings where a final decision has yet to be reached. The pictures were used without the subjects' consent, at the investigation stage, in order to identify subjects.

The case did not concern the legality of taking the photographs and using them, nor the means of identifying the accused, nor its use in evidence. The Constitutional Court was not required to express a view on the use, in criminal proceedings, of the particular means of identification and the item of evidence – a photograph of the appellant in an album of photographs of public figures. Nor was the Court required to assess the reasons for the particular method of identification and of finding evidence, which consisted in seeking out people in the public sphere identified by the victims. These were matters to be assessed in the context of the criminal proceedings in which the appellant's photographic image had been used.

The only issue was whether the photograph should have been removed from the file and returned, to protect the appellant's right to his image. The Court was required to consider the constitutionality of the interpretation of Article 79.2 of the civil code. This would mean that a photograph of a third party could be kept on file for police and judicial purposes when that third party was not a suspect and his picture and those of other public figures had been used without permission so that the victims could identify the persons charged in criminal proceedings still to produce a final judgment.

II. The Constitutional Court took the view that the use made of the appellant's picture could not be said to have disproportionately affected the right to control the taking and use of photographs, even in the case of third parties. Nor could it be said to disregard possible insult or indecency – notably in the context of the defence position and possible use of the photographs by the accused to defend themselves.

The Constitutional Court weighed up the appellant's right to his image against the interests that might justify keeping the photograph and which the Constitution likewise protected. It held that Article 79.2 of the civil code was not contrary to the

Constitution in circumstances where photographs had been kept on file of third parties, without permission, together with other photographs of public figures, so as to enable the victims to identify the persons charged in criminal proceedings which had not yet produced a final judgment.

One of the judges voted against the finding that the interpretation of the code complied with the Constitution. In his view, the restrictions on the right to one's image that were necessary for the purposes of the investigation were justifiable when set against the purposes and requirements of the investigation. However, keeping on file the picture of someone who was not under suspicion and had no direct connection with the facts giving rise to the charges raised a clear problem of necessity and proportionality. In the case at issue, the provision was unconstitutional.

Languages:

Portuguese.

Identification: POR-2007-1-003

a) Portugal / **b)** Constitutional Court / **c)** Third Chamber / **d)** 02.03.2007 / **e)** 154/07 / **f)** / **g)** *Diário da República* (Official Gazette), 86 (Series II), 04.05.2007, 11626-11629 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

4.6.10.1.2 **Institutions** – Executive bodies – Liability – Legal liability – Civil liability.
5.3.17 **Fundamental Rights** – Civil and political rights – Right to compensation for damage caused by the State.

Keywords of the alphabetical index:

Measure, administrative, annulment, damage, compensation / Damage, compensation / Liability, State, basis / Liability, non-contractual.

Headnotes:

Whilst acknowledging the difficulties of interpreting Article 22 of the Constitution (on the civil liability of the State and other public entities for acts or omissions infringing rights, freedoms or safeguards or causing injury to another), case law indicates that Article 22 has constitutionalised the principle of civil liability, in particular as regards liability of administrative authorities.

An interpretation of a legal provision to the effect that it rules out any liability in any circumstance by the State for injury caused by an administrative measure annulled for failure to give reasons is incompatible with Article 22 of the Constitution. The basis of the interpretation is that the illegality of the measure is not established until the annulment decision takes effect and the measure replaced by a new measure not containing the defect that caused the annulment. If damages are precluded, civil liability cannot perform its main function, to ensure that private individuals will receive compensation for damage caused by acts of members of State bodies, public servants or employees of the State or other public entities.

Summary:

I. A fish-farming company brought an action for damages against the Portuguese State for illegal acts of public administration. Works to set up a brill farm had been authorised and had already commenced. Work was suspended by decision of an administrative authority. The suspension decision had in turn been annulled for failure to give reasons. The company sought compensation for damage sustained because of the suspension of the work brought about by the cancelled decision. It had not been possible to resume the work.

The Supreme Administrative Court judgment challenged in the Constitutional Court found that a formal irregularity in general hardly ever constituted, and failure to give reasons never constituted, illegality (in terms of liability of administrative authorities). The purpose of the legal provision requiring it was not the protection of the interests of those at whom administrative measures were aimed. That interpretation of the provision at issue removed all possibility of compensation for injury sustained even if there was a causal link with a measure annulled for failure to give reasons and no step had ever been taken to execute the annulment decision. Moreover, it had not been shown that a lawful alternative course of action would have achieved the same effect as the cancelled measure. The interpretation likewise meant that it was possible for the administrative authorities to refuse illegally to execute the annulment decision.

II. The Constitutional Court held that, whether the right to compensation established by Article 22 of the Constitution was regarded as a right similar to rights,

freedoms and safeguards or simply as an "institutional guarantee", the same conclusion – that the provision at issue was unconstitutional – must be drawn, firstly, because it resulted in a restriction not authorised by Article 18 of the Constitution; and secondly because, in interfering with the principle of State liability, it exceeded the legislature's discretionary powers and weakened the core content of the guarantee.

The Court accordingly found the legislation at issue to be unconstitutional where it was interpreted as meaning that an administrative measure annulled for failure to give reasons could never, in any circumstances, be regarded as an illegal act for purposes of bringing an action against the State for non-contractual damages.

Supplementary information:

This is not the first time the Constitutional Court has dealt with a case involving an alleged breach of Article 22 of the Constitution.

In Judgment no. 153/90, the Constitutional Court examined Article 22 of the Constitution and concluded that it did not provide for contractual liability of the State. In Judgment no. 107/92 it found that Article 22 did in fact enshrine the principle of state liability for injury caused to the citizen, at least where the injury resulted from illegal measures. In Judgment no. 45/99 the conclusion was that Article 22 not only established the institutional guarantee of direct State liability but that it also recognised the right of the private individual to redress by way of indemnity and/or compensation in cases of breach of rights, freedoms or guarantees. More recently, in Judgments nos. 236/2004 and 5/2005 [POR-2005-1-001], published in *Bulletin* 2005/1), while pointing out the difficulties of interpretation posed by Article 22 of the Constitution, the Court held that Article 22 had constitutionalised the principle of civil liability of the State and other public entities, in particular liability of administrative authorities.

Legal doctrine regarding the precise meaning of enshrinement of this rule in the Constitution is similarly divided. Some writers take the view that the rule establishes a general principle that it remains for the ordinary legislator to put into effect, the legislature's freedom of discretion allowing it to determine in what circumstances indemnity is due. Other writers hold that implementation of the principle must stem from the interconnection of constitutional rules on the institutional status and operation of State organs, guaranteeing the "direct applicability" which Article 18.1 of the Constitution requires. Others expressly state that, in the absence of an implementing law, Article 22 is directly applicable. Yet another group of writers maintains that what is involved is a right similar to rights, freedoms and safeguards (Article 17 of the Constitution) and which is directly applicable (Article 18.1).

Languages:

Portuguese.

Identification: POR-2007-1-004

a) Portugal / **b)** Constitutional Court / **c)** Third Chamber / **d)** 02.03.2007 / **e)** 155/07 / **f)** / **g)** *Diário da República* (Official Gazette), 70 (Series II), 10.04.2007, 9088-9100 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

2.1.3.3 **Sources** – Categories – Case-law – Foreign case-law.
5.1.4 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.4 **Fundamental Rights** – Civil and political rights – Right to physical and psychological integrity.
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.
5.3.32 **Fundamental Rights** – Civil and political rights – Right to private life.

Keywords of the alphabetical index:

DNA, analysis, consent / DNA, analysis, right to private life, interference / Evidence, taking, forcibly / Evidence, legality / Evidence illegally obtained / Evidence, refusal to give.

Headnotes:

Various provisions of the Portuguese code of criminal procedure restrict certain fundamental rights, freedoms and safeguards. A decision was sought as to whether such restriction is compatible with the

Constitution. The Constitution does not completely prohibit legal restrictions on rights, freedoms and safeguards, but does require that they satisfy various strict conditions (both formal and substantive). A restriction on rights, freedoms or safeguards is constitutionally valid only if:

i. the Constitution allows it;
ii. it has sufficient basis in an act of parliament or an authorised legislative decree;
iii. its purpose is to protect another constitutionally protected right or interest;
iv. the restriction is necessary to protect that other right or interest, appropriate for that purpose and proportionate to it;
v. it is general and abstract in character, has no retroactive effect and diminishes neither the extent nor the scope of the core content of constitutional rules.

Placing an instrument in an accused's mouth in order to take a saliva sample against his express wishes, even if it is done without injuring him or her or affecting his or her health, is bound to be regarded as in itself a physical assault, contravening the constitutionally protected right to physical integrity.

Rules which provide for compulsory examination of an accused in order to take a saliva sample against his or her will and under threat of physical force may, however, contravene the general freedom to take action without prior permission from a court.

From the privacy standpoint, a compulsory examination performed against the accused's wishes and under threat of physical force in order to take a saliva sample for a genetic analysis may constitute an unauthorised interference with his or her private life in the absence of prior court permission.

From the information standpoint, and whether the right to self-determination is viewed as inherently involving a right, freedom and guarantee securing self-determination in matters of information, or as incorporating a right of *habeas data*, or as primarily a matter of confidentiality in connection with the right to respect for private life, the fact is that the action in question again clashes with rights, freedoms and safeguards.

In the Court's view, the right not to incriminate oneself embraces respect for an accused's wish to remain silent and not have forcibly obtained samples used against him or her in criminal proceedings, as in the case of taking a saliva sample for a DNA test. However, taking a sample is not the same thing as taking a statement and therefore does not breach the accused's right not to incriminate him or herself or admit guilt. Taking a sample merely allows an expert evaluation whose outcome is uncertain, and although it requires more than just passivity it cannot be described in terms of being made to incriminate oneself and therefore does not contravene the privilege concerned.

Summary:

I. The case arose from proceedings potentially involving two murders. Biological samples, some of them belonging to the culprits, were collected at the scene of the crime. It was considered essential to take biological samples from the accused so as to establish their genetic profile and compare it with the biological samples taken at the scene of the crime. The accused refused consent. However, as accused persons "may be compelled to undergo examination by decision of the competent judicial authority" they were ordered to attend the National Forensic Institute so that biological samples could be taken "in so far as strictly necessary, appropriate and indispensable and for use in accordance with the purpose for which they had been taken". The next day, however, one of the accused requested that the evidence obtained by compulsorily taking the saliva sample be treated as illegal.

The rules whose constitutionality was challenged were intended to safeguard constitutionally protected interests (including those inherent in criminal proceedings such as administration of justice and establishment of the truth). They were of a general and abstract character, did not have any retroactive force, did not do away with the rights, freedoms and safeguards at issue and therefore did not harm the entitlements with which the case was essentially concerned. In addition, the Constitution did not entirely prohibit the compulsory taking of biological samples (including saliva samples) or their subsequent genetic analysis. However, it was essential to check that the rules in question complied with the constitutional requirements of strict appropriateness, necessity and proportionality.

II. If they did so, in the Court's view, the resultant restrictions on fundamental rights did not contravene any of the secondary principles referred to as they were an appropriate means of pursuing the intended objectives, were necessary to attain them, did not stem from any manifestly mistaken course of action by the legislature and were not manifestly excessive or disproportionate. Nor, in the present case, did the absence of criteria for restriction of fundamental rights contravene the Constitution. The case involved a legal rule which allowed biological samples – saliva in this instance – to be compulsorily taken purely in order to establish the accused's genetic profile for purposes of comparison with other biological samples found at the scene of the crime. This meant that the

test was limited in scope and precluded treating the samples in such a way as to have access to sensitive information over and above what was indispensable for the intended purpose.

However, as the challenged procedure, crucially, ran counter to basic rights, freedoms and safeguards it was only permissible during the inquiry with prior authorisation from the investigating judge. Referring the matter to the investigating judge afterwards (as in the present case) was worthless as it could not remove the restrictions on certain rights (the right to physical integrity or the right to respect for private life) which had been irremediably breached.

The Court examined the interpretation of the code of criminal procedure which allowed the forcible taking of biological samples from an accused without judicial permission in order to produce a genetic sample when the accused had expressly refused to cooperate or to allow the sample to be taken. It held that this contravened Articles 25, 26 and 32.4 of the Constitution. It also held to be contrary to Article 32.4 of the Constitution the provision of the code of criminal procedure that evidence obtained from the sample taken in the manner described was valid and could therefore be used and assessed.

Supplementary information:

In this judgment the Court referred to extensive comparative case-law, including judgments of the Spanish Constitutional Court, Germany's Federal Constitutional Court and the European Court of Human Rights.

In particular regarding DNA data banks, the point was made that since the early 1990s various international institutions had advised using DNA analysis in the criminal justice system and even setting up internationally accessible data banks [Recommendation R (92) 1 adopted by the Committee of Ministers of the Council of Europe on 10 February 1992]. It was also pointed out that DNA data banks had been set up in dozens of countries worldwide; in Europe, most countries had drafted legislation on DNA data banks for use in criminal investigation and/or civil identification and the results were extremely positive in identification of missing persons, identification of offenders, clearing innocent people, establishing links between different types of criminal behaviour, and international co-operation in identification work.

Languages:

Portuguese.

Identification: POR-2007-1-005

a) Portugal / **b)** Constitutional Court / **c)** Third Chamber / **d)** 08.03.2007 / **e)** 181/07 / **f)** / **g)** *Diário da República* (Official Gazette), to be published (Series II) / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

1.2.3 **Constitutional Justice** – Types of claim – Referral by a court.
3.16 **General Principles** – Proportionality.
5.4.3 **Fundamental Rights** – Economic, social and cultural rights – Right to work.
5.4.5 **Fundamental Rights** – Economic, social and cultural rights – Freedom to work for remuneration.

Keywords of the alphabetical index:

Sport, tribunal, arbitration / Sportsperson, professional / Football, employment, change, compensation / Football, transfer to another club.

Headnotes:

When a football player signs on with a new club, provision for a compensation payment to his old club to cover its investment in professional development and enhancement does not contravene the right to employment. A rule allowing an unspecified and unlimited payment of compensation to the player's old club, with no reference to the reason for it or to its intended function, might be contrary to the basic right to freedom of employment. In the present case, however, the compensation is for "development and enhancement of the sportsperson". In relation to ordinary workers, the labour code refers to the collective agreement in many areas relating to fundamental rights. However, the special features of sportspeople's employment contracts do not seem to require particular precautions for the protection of their basic rights, as these are appropriately protected by the legal rules.

The legal rules at issue on "compensation" cannot be construed from the constitutional standpoint as intolerably restricting freedom of employment. The Constitution only prohibits arbitrary or unjustified restrictions on that fundamental right – for instance, a compensation payment so large as to deter all potentially interested clubs, leaving players little

choice but to stay with their original club or give up their occupation. The original employer has an interest in being compensated for its investment in training its employee and developing his or her skills. Such an interest, given the special features of this particular activity, and in particular the smallest clubs' expenditure on training, developing and enhancing their players' skills the players, is not in breach of the Constitution.

Rules exist which limit compensation. Under the general regulations of the Portuguese Professional Football League, it applies only if, at 31 December of the year in which the contract expires, the player is under the age of twenty-four to player transfers between Portuguese clubs headquartered in Portuguese territory. It must in no case unduly interfere with players' freedom of enterprise. In addition, the validity and operation of a new contract are not dependent on payment of the compensation, which can also be paid by the player himself.

Summary:

I. In proceedings before the arbitration committee of the Portuguese Professional Football League concerning transfer of a footballer, a set of rules had been alleged to be substantively unconstitutional and unlawful because, as interpreted and applied, they reduced or restricted a player's right to employment by unilaterally and arbitrarily providing for a sum of compensation to be paid by any club signing a player who had terminated his contract with his old club.

The arbitration committee established under the statutes of the Portuguese Professional Football League comprised a Chair, nine full members and three substitute members, who had to have law degrees and came under the code of civil procedure disqualification rules applying to judges. Its function was to settle disputes between the league and its member clubs, or between clubs provided they were league members. It was thus a proper tribunal for purposes of applying the constitutional justice machinery and the rules on constitutional appeals.

II. The appeal was solely concerned with the constitutionality of the legal rules as interpreted to allow a requirement that a professional footballer's new club pay his old club compensation for professional development and enhancement when the footballer terminated his contract with the old club. The Constitutional Court concluded that the rules were not unconstitutional.

Languages:

Portuguese.

Romania
Constitutional Court

Important decisions

Identification: ROM-2007-1-001

a) Romania / **b)** Constitutional Court / **c)** / **d)** 21.02.2007 / **e)** 147/2007 / **f)** Decision on the constitutionality of the Law amending and supplementing Law no. 3/2000 on the organisation and conduct of the referendum / **g)** *Monitorul Oficial al României* (Official Gazette), 162/07.03.2007 / **h)** CODICES (Romanian, French).

Keywords of the systematic thesaurus:

3.9 **General Principles** – Rule of law.
4.4.3.4 **Institutions** – Head of State – Term of office – End of office.
4.9.2 **Institutions** – Elections and instruments of direct democracy – Referenda and other instruments of direct democracy.
4.9.3 **Institutions** – Elections and instruments of direct democracy – Electoral system.
5.2 **Fundamental Rights** – Equality.

Keywords of the alphabetical index:

President, impeachment, majority required / Referendum, organisation / Referendum, conduct / *Ubi lex non distinguit*, *nec nos distinguere debemus*.

Headnotes:

The organisation and conduct of a referendum for the removal of the President of Romania may take place at any time during the year, but not at the same time as the presidential, parliamentary or local elections or the elections for the European Parliament.

The majority required for the validity of the results of a referendum held in order to remove the President of Romania must be established according to the same rules, whatever the number of votes obtained or the way in which that person came to office.

Summary:

I. Seventy-one deputies submitted a petition to the Constitutional Court regarding the Law amending and supplementing Law no. 3/2000 on the organisation and conduct of referendums.

They suggested that it was unconstitutional, because:

- Section 5.3 of Law no. 3/2000 prohibited the organisation of a referendum at the same time as presidential, parliamentary or local elections, or elections for the European Parliament, or within 6 months before the date of those elections, which was contrary to Articles 2.1, 90 and 95.3 of the Constitution;

- Section 10 infringed Articles 81, 95.3 and 95.99 of the Constitution because it distinguished two types of President, which gave rise to a difference in legitimacy between a President elected in the first ballot and one elected in the second ballot;

- the Bill infringed the principle of the non-retroactivity of laws laid down in Article 15.2 of the Constitution, in that it introduced a new procedure for the suspension of the President, different from that existing on the date on which he was elected to that office.

II. Having examined these arguments, the Court found that the reference claiming unconstitutionality was well founded and should be upheld for the following reasons:

1. Although Section 5.3 of the Law on the referendum did not contravene Article 2.1 of the Constitution, it did infringe Articles 90 and 95.3 of the Constitution, which on analysis showed that a referendum might be held at any time during the year, if Parliament had been consulted or had approved a proposal to suspend the President of Romania from office. There was no other rule under the Constitution which would prevent the organisation and conduct of a referendum at the same time as the presidential, parliamentary or local elections or the elections for the European Parliament, or during a specific period before or after those elections. Consequently, *ubi lex non distinguit*, *nec nos distinguere debemus*. The conditions set out in legislation for the conduct of a referendum were additional to the provisions of the Constitution, and were accordingly unconstitutional.

These “extra-constitutional requirements”, introduced by legislation, prevented the organisation of any referendum and might give rise to constitutional restrictions, as the date of the elections would be dependent on the date on which a referendum was held.

2. Moreover, suspension of the President of Romania by referendum represented a sanction for grave acts, which infringed the Constitution.

The current version of Law no. 3/2000, specifically Section 10 sets out different rules for the removal of the President of Romania by referendum, according to whether he took office after the first ballot, after the second ballot or as interim President. In the first case, the President should be removed by an absolute majority of registered electors and in the second case by a relative majority of citizens taking part in the ballot. Article 99 of the Constitution, which governed the responsibility of an unelected interim President, contained no provision on removal from office. Such an interpretation was contrary to Article 1.3 of the Constitution, which provided that Romania was a State subject to the rule of law. This would preclude the application of the same sanction to the President of Romania in a different way, according to the circumstances of his election to office. It also infringes Article 81.1, under which the candidate who received in the first ballot the votes of a majority of registered electors was declared elected. An absolute majority must be required in any referendum for the removal of the President of Romania, whatever the number of votes acquired or the manner in which he came to hold that office.

Finally, such an interpretation contravenes Article 95.1 of the Constitution. In cases of removal from office by referendum, this article required equal treatment for a President of Romania whether he was elected in the elected in the first ballot, the second ballot, or as interim President.

As the legislation in question set out different rules applying to the results of a referendum to remove the President from office, according to the way he was elected to that office, it infringed Articles 81.2 and 96 of the Constitution. Article 96 provided for termination of the office of the President of Romania where he was charged with high treason. In such a case, the Chamber of Deputies and the Senate would decide upon his or her removal, by a majority of two-thirds of the number of deputies and senators. It followed that, where those drafting the Constitution wished to establish a certain majority of votes, they did so by a reference text, which was understood to apply to subordinate situations, with the exception of cases in which such a majority was to be determined by law.

The constitutional provisions on the majority required for the election of the President in the first ballot permitted solutions for the removal of the Head of State to be established, in all cases, by analogy.

Nonetheless, the Court did not rule out the possibility that Parliament might opt for a relative majority of votes for the removal of the President of Romania in the three situations.

3. As regards the retroactive nature of the law, the Court found that, because the Law amending and supplementing Law no. 3/2000 was unconstitutional, there was no point in conducting an analysis of its temporal application.

Languages:

Romanian.

Russia
Constitutional Court

Statistical data
1 September 2006 – 30 April 2007

Total number of decisions: 7

Type of decision:
- Rulings: 7
- Opinions: 0

Categories of case:
- Interpretation of the Constitution: 0
- Conformity with the Constitution of actions by state institutions: 8
- Conformity with the Constitution of international treaties: 0
- Conflicts of jurisdiction: 0
- Observance of a prescribed procedure for charging the President with high treason or other grave offence: 0

Types of claim:
- Claims by state institution: 5
- Individual complaints: 5
- Referral by a court: 0
  (Some proceedings were joined with others and heard as one set of proceedings)

Important decisions

Identification: RUS-2007-1-001

a) Russia / **b)** Constitutional Court / **c)** / **d)** 05.02.2007 / **e)** 2 / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 14.02.2007 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

1.6.2 **Constitutional Justice** – Effects – Determination of effects by the court.
3.10 **General Principles** – Certainty of the law.
3.22 **General Principles** – Prohibition of arbitrariness.
4.7.2 **Institutions** – Judicial bodies – Procedure.
5.3.13.1.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – Civil proceedings.
5.3.13.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.
5.3.13.18 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Reasoning.
5.3.14 **Fundamental Rights** – Civil and political rights – *Ne bis in idem*.

Keywords of the alphabetical index:

Supervisory review, scope / Supervisory review, condition / Supervisory review, time-limit / Supervisory review, party, request / Supervisory control, reasoning / Judgment, final, revision.

Headnotes:

Unlike proceedings at first instance, in which the dispute between the parties is decided directly on the merits, and appeal and cassation proceedings, in which errors made in forming a judicial decision are rectified, supervisory review of civil cases is a procedure intended solely to remedy fundamental miscarriages of justice and represents an additional level of judicial recourse, especially within a national legal system functioning on a large scale and at a number of levels.

Given the current state of development of Russia's legal system, total elimination of supervisory review, the absence of which could not be offset through the constitutional appeal procedure, would engender a legal vacuum that might lead to mass human rights violations. The solution consists in implementing a legislative reform of the supervisory review procedure in civil matters and aligning it with international standards.

Summary:

Individual citizens, legal entities and the Cabinet of Ministers of the Republic of Tatarstan sought a decision on the constitutionality of the provisions of the Code of Civil Procedure governing the supervisory review procedure. These provisions contained no concrete time limit on the admissibility of the review of enforceable decisions, made it possible to dismiss an application for review without examining it on the merits and instituted a procedure for the preliminary consideration of review applications and the cases cited. The impugned provisions also empowered the Presidents of the Supreme Court and the Regional Courts and their deputies to agree, or not, on ruling an

application for supervisory review inadmissible and to take decisions concerning the citation of cases and their referral to the review authority for examination on the merits. In addition, the challenged provisions entitled the Presidents of the Supreme Court and the Regional Courts and their deputies to submit of their own initiative to the presidents of the relevant courts requests for the review of judgments. A number of applicants challenged the constitutionality of the supervisory review procedure itself, which they deemed incompatible with the state's international commitments.

Having acknowledged that the supervisory review procedure involved "a multiplicity of review authorities, the possibility of excessively lengthy appeal proceedings" and other "departures from the principle of legal certainty", the Court nonetheless refrained from recognising that the impugned provisions of the Code of Civil Procedure were unconstitutional. It asked the federal parliament to improve the procedure so as to bring it into conformity with the Constitution and international standards.

Pending a decision by parliament determining the procedure for examining supervisory review applications, the Court gave a constitutional and legal interpretation of all the challenged provisions, which is binding on all ordinary courts and rules out any other interpretation in applying the law.

The Court's interpretation in particular prevents a court examining an application for review to refuse arbitrarily, without giving reasons, to cite a case and refer it to the review authority.

Again according to the Court's interpretation, the fundamental miscarriages of justice constituting grounds for review are errors in the interpretation and application of substantive and procedural law such as to have influenced the outcome of a case, which, if not rectified, make it impossible to safeguard the rights at issue and the public interest.

In addition the Court ruled that the Presidents of the Supreme Court and the Regional Courts and their deputies could not, of their own initiative and without a review application being lodged, request the review of enforceable decisions. In other words, the parties concerned must appeal. Furthermore such requests must be made in accordance with the Code of Civil Procedure during the year following the entry into force of the first-instance court's judgment.

Languages:

Russian.

Identification: RUS-2007-1-002

a) Russia / **b)** Constitutional Court / **c)** / **d)** 21.03.2007 / **e)** 5 / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 30.03.2007 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

1.3.4.6 **Constitutional Justice** – Jurisdiction – Types of litigation – Admissibility of referenda and other consultations.
4.9.2.1 **Institutions** – Elections and instruments of direct democracy – Referenda and other instruments of direct democracy – Admissibility.
4.10.2 **Institutions** – Public finances – Budget.
5.3.29.1 **Fundamental Rights** – Civil and political rights – Right to participate in public affairs – Right to participate in political activity.

Keywords of the alphabetical index:

Referendum, right / Referendum, organisation / Referendum, restriction / Referendum, validity / Electoral Commission.

Headnotes:

Questions concerning the state's financial commitments cannot be submitted to a referendum if they require a revision of the budget already adopted. However, this does not entail a ban on questions which may result in changes to future expenditure commitments.

Like all disputes having a constitutional nature, character or implications, disputes concerning referendums can be settled only through proceedings in the Constitutional Court.

Summary:

I. A number of citizens, members of the Communist Party of the Russian Federation, complained that the provisions of the federal constitutional law "on the referendum of the Russian Federation" violated their constitutional rights. The applicants maintained that these provisions in fact deprived citizens of their right to settle issues of national significance by popular vote. They challenged, *inter alia*, the provisions prohibiting referendums on questions concerning budget financing and stipulating that decisions of the

Central Electoral Commission could be challenged in the Supreme Court.

II. The Constitutional Court first noted that the Constitution made no direct provision for a referendum procedure and did not determine which questions could be submitted to a referendum. Nor did it designate the state bodies responsible for carrying out a referendum. It merely stipulated that referendums should be held in accordance with constitutional principles under procedures established by a federal constitutional law laying down requirements as to the form and substance of questions submitted to a referendum, its organisation and its implementation.

The federal parliament had set out in the impugned law the questions which could not be submitted to a referendum, not least those concerning the adoption and revision of the federal budget. The restriction instituted by the law regarding referendums on questions concerning the adoption and revision of the federal budget was therefore based directly on the Constitution.

The Court recognised that the ban on holding referendums on questions concerning the revision of expenditure commitments in the current budget was in conformity with the Constitution. At the same time, it held that the referendum law did not prohibit referendums on questions entailing expenditure commitments in a budget yet to be adopted.

Regarding appeals against decisions by the Central Electoral Commission, the Court held that all disputes having a constitutional nature or implications must be settled through proceedings in the Constitutional Court. It recognised the Central Electoral Commission's right to perform a preliminary review of the constitutionality of questions submitted to a referendum. However, decisions on disputed issues must henceforth be taken by the Constitutional Court rather than the Supreme Court. It followed that it was for the "federal parliament to lay down in federal constitutional law the corresponding powers of constitutional review, taking into consideration both the legal nature and the character of constitutional disputes arising during the preparation and organisation of a referendum."

Languages:

Russian.

Identification: RUS-2007-1-003

a) Russia / **b)** Constitutional Court / **c)** / **d)** 22.03.2007 / **e)** 4 / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 30.03.2007 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

1.6.5.5 **Constitutional Justice** – Effects – Temporal effect – Postponement of temporal effect.
3.5 **General Principles** – Social State.
3.16 **General Principles** – Proportionality.
5.4.14 **Fundamental Rights** – Economic, social and cultural rights – Right to social security.
5.4.18 **Fundamental Rights** – Economic, social and cultural rights – Right to a sufficient standard of living.

Keywords of the alphabetical index:

Maternity, allowance, ceiling, proportionality / Maternity, protection / International Labour Organisation, Convention no. 183.

Headnotes:

Parliament is entitled to limit the amount of the maternity allowance, but must determine it taking into account, in a proportional manner, the beneficiary's salary and social insurance contributions paid.

Summary:

I. The applicant asked the Court to hold that a provision of the federal law on the social insurance fund budget, determining the maximum amount of the maternity allowance, was unconstitutional.

The First-Instance Court had considered that the amount of the allowance received by the applicant was considerably lower than her average salary and granted her application. However, this decision had been overturned by the higher court.

II. The Constitutional Court first noted that the principle of the social state obliged the public authorities to ensure the protection of individuals' employment and health and provide state support for families and maternity, not least in favour of a specific category of citizens, pregnant women. Pursuant to its constitutional obligation of maternity and child protection, the state guaranteed women an entitlement to pregnancy and child birth leave and a maternity allowance for their material support during this period.

Until the adoption of the impugned law in 2001 the amount of the maternity allowance and the amount of the salary used in calculating it were unlimited. The maternity allowance was paid at a rate equal to 100% of average salary.

In 2001, while retaining the rate of 100% of previous average salary for the maternity allowance, parliament nonetheless set a ceiling on this allowance. As a result the situation of women whose average salary considerably exceeded the maximum amount of the allowance deteriorated. The new rules, which resulted in a decline in living standards, excessively restricted the constitutional guarantees of the rights concerned. Nor were they consistent with the ILO's Maternity Protection Convention no. 183 and Recommendation no. 191.

The Court accordingly held that the impugned provision on the maximum amount of the maternity allowance was unconstitutional. This provision ceases to have force six months after the pronouncement of this judgment. It is for the federal parliament to introduce, during this six-month period, amendments to the legislation in force so as to ensure a more equitable proportionality of payments to the social insurance fund. This must be done taking due account of the salary and the insured amount, thereby making it possible to pay women a maximum allowance equal to the salary on which the calculation of the payments to the social insurance fund was based.

Languages:

Russian.

Slovakia
Constitutional Court

Statistical data
1 January 2007 – 30 April 2007

Number of decisions taken:

- Decisions on the merits by the plenum of the Court: 1
- Decisions on the merits by the Court panels: 113
- Number of other decisions by the plenum: 18
- Number of other decisions by the panels: 198

Important decisions

Identification: SVK-2007-1-001

a) Slovakia / **b)** Constitutional Court / **c)** Senate / **d)** 14.09.2006 / **e)** I. ÚS 80/06 / **f)** / **g)** *Zbierka nálezov a uznesení Ústavného súdu Slovenskej republiky* (Official Digest) / **h)** CODICES (Slovak).

Keywords of the systematic thesaurus:

1.6.6.2 **Constitutional Justice** – Effects – Execution – Penalty payment.
1.6.9.1 **Constitutional Justice** – Effects – Consequences for other cases – Ongoing cases.
2.1.3.2.1 **Sources** – Categories – Case-law – International case-law – European Court of Human Rights.
3.10 **General Principles** – Certainty of the law.
5.3.13.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.
5.3.13.13 **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:

Criminal proceedings / Compensation for damage / Length of proceedings, delay, excessive / Judicial protection, right, essence, endangered / Denial of justice, compensation.

Headnotes:

Proceedings for compensation for damage to an aggrieved person (adhézne konanie) within criminal proceedings which have been subject to delays of several years in the renewed proceedings, and which have lasted in total for more than 30 years, are incompatible with the right stipulated in the European Convention on Human Rights and in the Constitution of the Slovak Republic to have one's case tried within a reasonable time, or without unreasonable delay. The above-mentioned length of proceedings before the ordinary courts affects the state of legal certainty of an aggrieved person to such an extent that his/her right to judicial protection becomes illusory and is endangered in its essence.

Summary:

I. The Constitutional Court of the Slovak Republic heard the complaint of a natural person claiming the violation of her right to have her case heard without unreasonable delay (pursuant to Article 48.2 of the Constitution) and her right to have her case heard within a reasonable time (pursuant to Article 6.1 ECHR), as a result of the manner in which the Regional Court and the Supreme Court of the Slovak Republic proceeded (the former in two separate proceedings, the latter in criminal proceedings within which the applicant has the status of the aggrieved person). The aggrieved person is the mother of a student murdered in 1976. The proceedings in this case were commenced in 1981 and they have not as yet been finally adjudicated. The Regional Court rendered in the case a judgment of conviction in 1982 which was affirmed by a ruling of the Supreme Court of the Slovak Socialist Republic. The Supreme Court of the Czech and Slovak Federative Republic (deciding while the Czech and Slovak Federative Republic was still in existence) quashed the ruling of the Supreme Court of the Slovak Socialist Republic as it came to the conclusion that the ruling and proceedings prior to it constituted a violation of the law to the detriment of the accused persons. In December 1990 the case was remanded to the Regional Court to be heard and decided. From that date up to the day of the decision made by the Constitutional Court, the proceedings have not been finally adjudicated.

II. In its case-law, when deciding whether in a specific case there was a violation of the right to have one's case heard without unreasonable delay, as guaranteed under Article 48.2 of the Constitution, the Constitutional Court has established that it reviews, with regard to the specific circumstances of each case, three basic criteria: the complexity of the case, the behaviour of the party to the proceedings and the manner in which the Court conducted the case. In accordance with the case-law of the European Court of Human Rights, the Court also takes into account the subject of the dispute (nature of the case) in the reviewed proceedings and its importance for the complainant.

In the opinion of the Constitutional Court, an ordinary court is obliged to organise its procedure in such a way as to hear and decide the case as soon as possible and eliminate the state of legal uncertainty of parties to the proceedings, including the position of the aggrieved person.

The Constitutional Court acknowledged the complexity of the given case. It stated that rendering decisions on criminal matters are a complex matter, especially in the given case in connection with the scope of the necessary evidence (including expert evidence) and due to the interval of more than 30 years since the commission of the crime. The Constitutional Court, however, did not accept the unusually long procedure of the challenged proceedings even in the light of the complexity of the case under adjudication.

Regarding the conduct of the applicant, the Constitutional Court did not ascertain any relevant circumstances which could have an impact on the length of the challenged proceedings.

The Constitutional Court dealt with the manner in which the Regional Court and the Supreme Court proceeded in the case at issue. The Constitutional Court considered the issue of unreasonable delays as a whole in view of the total length of the proceedings and all the circumstances of the case concerned. It took into account the fact that the crime upon which the indictment was brought was committed in 1976, but also that the challenged proceedings were commenced before the Constitutional Court began to provide individual protection of fundamental rights and freedoms of natural and legal persons (15 February 1993) and before the European Court of Human Rights became binding for the Slovak Republic (18 March 1992), when the Czech and Slovak Federative Republic ratified the European Convention on Human Rights and acknowledged individual applications pursuant to Article 25 ECHR (the Slovak Republic as a successor assumed this obligation with effect from 1 January 1993).

The Constitutional Court emphasised that the proceedings, which, in consequence of the manner in which the Regional Court proceeded, have lasted more than 30 years (with a period of total inactivity within the first proceedings of at least 6 years and 6 months without the existence of any legal obstacles whatsoever, and a period within the

second proceedings when is was suspended for nearly 14 years), can be considered, upon reviewing the proceedings as a whole, as a state of legal uncertainty for the aggrieved person resulting exclusively from the manner in which the Court proceeded, to such an extent that her right to judicial protection has become illusory and endangered in its essence, and could be considered a denial of justice *(denegatio iustitiae)*. The Constitutional Court found that the Regional Court in both proceedings violated the right of the applicant pursuant to Article 48.2 of the Constitution and Article 6.1 ECHR. The Constitutional Court took into consideration that in its Decision no. II. ÚS 32/03, in which it decided on the complaints of the accused persons in criminal proceedings in the first case, it ordered the Regional Court to hear and decide the case. Even despite that fact, subsequent proceedings in the given case were not organised in such a way that the case could be heard and decided as soon as possible.

The Constitutional Court mentioned that the fact that the Supreme Court took two years to order the case to be heard, in such factually complex proceedings, would not in itself entail a violation of the fundamental right of the applicant, but it considered the delay to be inappropriate in the context of the overall length of these proceedings, lasting almost 16 years after the quashing of the judgment on the merits of the case. It therefore declared that the Supreme Court had violated the right guaranteed under Article 48.2 of the Constitution and Article 6.1 ECHR. The Constitutional Court ordered the Regional Court to take action in the case without unreasonable delay.

The Constitutional Court awarded the applicant appropriate financial satisfaction amounting to 650,000 SKK (approximately 19,000 EUR) and ordered the Regional Court to pay the fees of her legal representatives.

Supplementary information:

It should be stated that the compensation awarded in this case is the highest that has ever been awarded by the Constitutional Court in its decision-making activity to date.

It is necessary to add, in this case, that the Constitutional Court had never before this case reviewed any proceedings in which the applicants claimed a violation of their fundamental right pursuant to Article 48.2 of the Constitution and Article 6.1 ECHR when the same applicants were in the position of aggrieved persons, a circumstance for which it has also been criticised by the European Court of Human Rights. In this instance it also reacted to that court's decision in the case of *Krumpel and Krumpelová v. Slovakia* (Application no. 56195/00).

Languages:

Slovak.

Slovenia
Constitutional Court

Statistical data
1 January 2007 − 30 April 2007

The Constitutional Court held 28 sessions (13 plenary and 15 in chambers: 6 civil chamber, 4 penal chamber, 5 administrative chamber) during this period. There were 374 unresolved cases in the field of the protection of constitutionality and legality (denoted U- in the Constitutional Court Register) and 2608 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 January 2007). The Constitutional Court accepted 153 new U- and 1596 Up- new cases in the period covered by this report.

In the same period, the Constitutional Court decided:

- 109 cases (U-) in the field of the protection of constitutionality and legality, in which the Plenary Court made:
  - 32 decisions and
  - 77 rulings;

- 55 cases (U-) cases joined to the above-mentioned for joint treatment and adjudication.

Accordingly the total number of U- cases resolved was 164.

The Constitutional Court also resolved 372 (Up-) cases in the field of the protection of human rights and fundamental freedoms (22 decisions issued by the Plenary Court and 350 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 *Pravna praksa* (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-2007-1-001

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 15.03.2007 / **e)** Up-1299/06 / **f)** / **g)** *Uradni list RS* (Official Gazette), 31/07 / **h)** *Pravna praksa*, Ljubljana, Slovenia (abstract); CODICES (Slovenian, English).

Keywords of the systematic thesaurus:

3.23 **General Principles** – Equity.
4.11 **Institutions** – Armed forces, police forces and secret services.
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.
5.3.17 **Fundamental Rights** – Civil and political rights – Right to compensation for damage caused by the State.

Keywords of the alphabetical index:

Military service, damage, compensation / State succession, damages, liability of successor state.

Headnotes:

The citizenship of an injured person cannot be a sound reason for a differentiation when deciding on the liability of the Republic of Slovenia for damage which occurred on its territory and for which its legal predecessor was liable until independence was declared. It also cannot be relevant that in some cases, courts have imposed on the Republic of Slovenia liability for damages for injuries to Slovene citizens during military service outside the country. Because the succession states did not resolve this issue by treaty, a different approach could result in injured persons not being eligible for compensation simply because the state had broken up during the lengthy court proceedings. This would be inconsistent with the principle of fairness.

Summary:

The right to equality before the law binds courts to treat similar situations in a similar fashion when interpreting the law. A different treatment is only justifiable constitutionally where there is a sound reason.

The case concerned the nature of the liability of the state for damage sustained by conscripts during their military service. Reference was made to the Legal Opinion of the Supreme Court, dated 19 June 1997. It was found that the fact that states were able to conscript their citizens for military duties meant that they had to compensate them for any injuries that happened during the period of military service.

The liability of the Socialist Federal Republic of Yugoslavia (SFRY) for damage caused by the military personnel of the Yugoslavia People's Army (YPA) was governed by the Service in Armed Forces Act. Under Article 222.1, the SFRY is liable for damages, in accordance with general regulations, for any damages caused by military personnel of the YPA in the course of unlawful and wrongful performance of their duties. The second paragraph of this article *mutatis mutandis* refers to the application of general regulations regulating damages regarding liability for "other damage" arising from the performance of military duties. This provision includes cases where one member of the YPA has injured another (i.e. a conscript).

Under the general regulations on damages contained in the Obligations Act (Official Gazette SFRY, no. 29/78 et seq. [hereinafter referred to as OA]), the SFRY was liable either because the injury was caused by culpable conduct or omission on the part of a member of the YPA (the first paragraph of Article 154 of OA), or on the basis of causality in cases where the damage resulted from objects or activities which posed a significant danger to the surrounding area (the second paragraph of Article 154 of OA). The liability of the SFRY for damage was based on the same presumptions, whether it was a third party suffering injury or a member of the YPA. Therefore, the liability for damages was not based on the fact that citizens had been forced into military service.

In the case under review, the complainant had sustained the alleged damage as a member of the YPA on Slovenian territory prior to Slovenian independence, having taken part in the defence of the former common state in this territory as a citizen of the SFRY in the army which was at that time also the army of the [Federative] Republic of Slovenia. In accordance with Article 61 of the Civil Procedure Act then in force (Official Gazette SFRY, no. 4/77 et seq.), a court on whose territory a command of the military unit is based has exclusive territorial jurisdiction over disputes with the SFRY arising from relations with military units. He accordingly filed the action before the Court in Murska Sobota. The complainant had to file the action before a court in the Republic of Slovenia with territorial jurisdiction, irrespective of his republic citizenship at that time or his permanent residency. The republic affiliation of the municipal administrative authority which assigned the complainant as a conscript to military service was irrelevant to the complainant's position with regard to the alleged damage.

During the court proceedings, the former state broke up, and the state consequently ceased to exist. With regard to all the above circumstances, the complainant was in an identical position to injured persons who suffered injury during their military

service in the territory of the Republic of Slovenia as Slovene citizens. Therefore, the citizenship of an injured person cannot be a sound reason for differentiation when deciding on the liability of the Republic of Slovenia for damage which occurred in its territory and for which its legal predecessor was liable until independence was declared. It cannot also be relevant that courts sometimes impose on the Republic of Slovenia the liability for damages suffered by Slovene citizens outside its territory during their military service. As the succession states did not regulate this issue by treaty, a different approach might result in injured persons becoming ineligible for compensation simply because the state broke up during lengthy court proceedings. This would be inconsistent with the principle of fairness.

The courts had infringed the complainant's right to equal protection of rights, under Article 22 of the Constitution. The judgments they had handed down were accordingly overturned, and the case referred to the Court of First Instance for a new trial. It was not necessary for the Constitutional Court to review the existence of other alleged violations. In the new trial, the Court will need to make its decision against the background of the reasons behind the current decision.

Supplementary information:

Concurring opinion of the constitutional judge.

Legal norms referred to:

- Articles 14.2 and 22 of the Constitution (URS);
- Article 59.1 of the Constitutional Court Act (ZUstS).

Languages:

Slovenian, English (translation by the Court).

South Africa
Constitutional Court

Important decisions

Identification: RSA-2007-1-001

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 06.03.2007 / **e)** CCT 57/06 / **f)** Renier Albertus Hermanus Engelbrecht v. The Road Accident Fund and the Minister of Transport / **g)** http://www.constitutionalcourt.org.za/uhtbin/hyperion-image/J-CCT57-06 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Accident, road traffic / Affidavit, evidence / Compensation, claim, time-limit / Time-limit, observance / Time-limit, element of right / Time-limit, right, condition.

Headnotes:

Regulation no. 2.1.c requires a person claiming compensation from the Road Accident Fund for injury in a hit-and-run motor accident case to submit to the police, if reasonably possible, within 14 days of being in a position to do so, an affidavit of the details of the accident. This is not a "real and fair" opportunity to exercise the right of access to courts as enshrined in Section 34 of the Constitution.

Summary:

I. This application for leave to appeal concerned Regulation no. 2.1.c of the regulations in terms of the Road Accident Fund Act 56 of 1996. The Act establishes the Road Accident Fund, the object of which is the payment of compensation to persons (third parties) for personal injury caused by the negligent driving of motor vehicles. Section 17 of the Act provides that people involved in hit-and-run cases have a claim against the Fund.

Regulation no. 2.1.c requires anyone claiming compensation for injury in a hit-and-run case to submit, if reasonably possible, within 14 days of being in a position to do so, an affidavit to the police in which the details of the accident in question are fully set out.

The applicant, Mr Engelbrecht, was involved in a motor vehicle collision with a truck on 22 February 2002. As the truck did not stop, he was not able to establish the identity of its owner or driver. He was injured in the collision, was hospitalised, and only thereafter claimed compensation from the Fund. However, his affidavit in terms of Regulation no. 2.1.c was not submitted within the stated period of time. The Fund refused to pay because Mr Engelbrecht had failed to comply with Regulation no. 2.1.c.

Mr Engelbrecht contended that Regulation no. 2.1.c is in conflict with the provisions of Section 34 of the Constitution and therefore invalid in that it imposes an unreasonable and unjustifiable limitation on his right of access to court.

II. Writing for a unanimous court, Kondile AJ held that the 14-day period stipulated by the regulation is too short and does not amount to a "real and fair" opportunity to exercise the right of access to courts as enshrined in Section 34 of the Constitution. The Court accordingly declared Regulation no. 2.1.c invalid.

Cross-references:

- *Fedsure Life Assurance Ltd and Others v. Greater Johannesburg Transitional Metropolitan Council and Others*, *Bulletin* 1999/1 [RSA-1999-1-001];
- *Moise v. Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development intervening* (Women's Legal Centre as *Amicus Curiae*), *Bulletin* 2001/2 [RSA-2001-2-009];
- *Mohlomi v. Minister of Defence, Bulletin* 1996/3 [RSA-1996-3-018];
- *S v. Makwanyane and Another, Bulletin* 1995/3 [RSA-1995-3-002];
- *S v. Bhulwana*; *S v. Gwadiso* 1996, *Bulletin* 1995/3 [RSA-1995-3-008].

Languages:

English.

Identification: RSA-2007-1-002

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 08.03.2007 / **e)** CCT 56/06; CCT 80/06 / **f)** S v. Shinga; S v. O'Connell and Others / **g)** http://www.constitutionalcourt.org.za/uhtbin/hyperion-image/J-CCT73-05 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

4.7.4.1 **Institutions** – Judicial bodies – Organisation – Members.
5.3.13.1.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – Criminal proceedings.
5.3.13.4 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Double degree of jurisdiction.
5.3.13.6 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to a hearing.
5.3.13.9 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Public hearings.

Keywords of the alphabetical index:

Appeal Court, procedure / Appeal procedure / Hearing, *in camera* / Open court, principle / Record, production / Right to appeal.

Headnotes:

A person seeking leave to appeal an order of conviction or sentence has a right to have the full record from the trial court sent to the appellate court. An application for leave to appeal in the appellate court should be considered by two judges. Once leave to appeal is granted, argument should be heard in open court in the High Court. This forms an important aspect of the right to a fair trial as required by the South African Constitution.

Summary:

I. The issues before the Court concerned the constitutionality of certain sections of the Criminal Procedure Act 51 of 1977. The High Courts (the Pietermaritzburg High Court and the Cape Town High Court) referred the orders of constitutional invalidity of the sections for confirmation by this Court in terms of Section 172.2.a of the Constitution. The sections in question regulate the right of people convicted of criminal offences in a Magistrate Court to appeal to the High Court against their convictions or sentences.

II. The first section to be considered by the Constitutional Court was Section 309.3A. This section required the High Court to decide an appeal in chambers without oral argument unless the High Court is of the opinion that the interest of justice requires the appeal to be heard in open court. This section was challenged on the grounds that it violated the right to a fair trial. The Constitutional Court confirmed the order of the High Court that Section 309.3A violates the right of every accused person to a fair trial, including the right of appeal to or review by a higher court. It emphasised the importance of the principle of open justice to accused persons, victims of crime and the community at large.

The second section considered was Section 309C.4.c which concerned the application for leave to appeal to the High Court once the Magistrates' Court has refused leave to appeal. This section requires a High Court to be furnished with the trial record in the Magistrate Court except in certain circumstances. The Court held that the Court considering an application for leave from a Magistrate Court would not be able to reassess the matter adequately without a full record in all instances. Accordingly the Court found Section 309C.4.c to be inconsistent with the constitutional right to fair trial because it did not allow for the furnishing of trial record in every application. As a result, all the exceptions were severed from the section with the effect that a full record must now be furnished in all applications for leave to appeal under Section 309C.

The third issue before the Court concerned the number of judges who should consider an application for leave to appeal. The Act provided that only one judge would consider an application for leave to appeal instead of two judges except in special circumstances. The Court found that there are important reasons for requiring two judges to consider an application for leave to appeal. It was noted that a refusal for leave to appeal is the end of the road for the accused and that it is therefore important that the application for leave to appeal be adequately and fairly reappraised of. The Court declared Section 309C.5.a invalid to the extent that it requires only one judge to consider an application for leave to appeal. The declaration of an order of invalidity was coupled with an order reading the section as providing for two judges.

Lastly the Court had to consider the Pietermaritzburg High Court conclusion on the procedure for the application for leave to appeal. The High Court found that the entire procedure was bad. This conclusion was rejected by this Court, upholding the procedures except in the instances of the sections indicated above.

Cross-references:

- *S v. Ntuli* CCT 17/95, *Bulletin* 1995/3 [RSA-1995-3-011];
- *S v. Steyn* CCT19/2000, *Bulletin* 2000/3 [RSA-2000-3-018];
- *S v. Rens* CCT1/95, *Bulletin* 1995/3 [RSA-1995-3-012];
- *National Coalition for Gay and Lesbian Equality and Others v. Minister of Home Affairs and Others* CCT 10/99, 1999/12/02, *Bulletin* 2000/1 [RSA-2000-1-001].

Languages:

English.

Identification: RSA-2007-1-003

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 26.03.2007 / **e)** CCT 19/06 / **f)** Kumarnath Mohunram and Another v. The National Director of Public Prosecutions and Others / **g)** http://www.constitutionalcourt.org.za/uhtbin/hyperion-image/J-CCT19-06 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
5.3.39.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.

Keywords of the alphabetical index:

Property, private, confiscation / Confiscation, asset, penalty / Criminal procedure, civil action / Gambling, property, forfeiture / Penalty, proportionality / Property, immovable, forfeiture / Seizure, asset, proportionality.

Headnotes:

Where property is found to be the instrumentality of an offence, the Prevention of Organised Crime Act 121 of 1998 (POCA) allows for the civil forfeiture of the identified property. The premises in and on which gambling operations are carried out is an instrumentality of the offence of illegal gambling. The

main purpose of POCA is to remove the incentive for crime and deter would-be offenders and society at large from committing crime. For forfeiture under POCA to be proportionate a sufficient connection between the main purpose of POCA and the forfeiture must exist. The closer the criminal activities are to the primary objectives of POCA, the more readily a forfeiture order will be granted.

Summary:

I. This matter concerns the civil forfeiture of property alleged to be the instrumentality of an offence under the Prevention of Organised Crime Act 121 of 1998 (POCA).

The applicants legally operated a glass and aluminium plant. A portion of the premises was used as an illegal casino. Upon being arrested and charged for operating the casino without a licence, the first applicant pleaded guilty, paid admission of guilt fines and the cash and gambling machines found on the premises were confiscated by the police. Subsequently the National Director of Public Prosecutions (NDPP) unsuccessfully applied to the High Court for the civil forfeiture of the whole of the premises in terms of POCA, arguing that the property was an "instrumentality of an offence" as defined. The NDPP successfully appealed to the Supreme Court of Appeal, which held that the property was an instrumentality of the offence.

The applicants appealed against this judgment to the Constitutional Court, arguing that the property was not an "instrumentality of the offence" and that if it was, its forfeiture would be disproportionate in the light of, *inter alia*, the punishment the first applicant had already received.

II. The Court unanimously held that the property concerned was an instrumentality of the offence, but was divided six to five as to whether the forfeiture was proportionate in the circumstances.

Moseneke DCJ, with whom Mokgoro J and Nkabinde J concurred, held that it was not necessary to decide the issue whether the scope of POCA reached beyond "organised crime offences" so as to apply to cases of individual wrongdoing. He held that, for the forfeiture of property to be proportionate, the instrumentality of the crime must be shown to be sufficiently connected to the main purpose of POCA, that being to remove the incentive for crime and to serve as an adequate deterrent to the individual concerned and to society at large. Having been satisfied that no link was shown to exist, he concluded that, on the facts taken as a whole, the forfeiture order was disproportionate and the conduct of the first applicant did not warrant the forfeiture of the immovable property.

Sachs J, with whom O'Regan J and Kondile AJ concurred, supported the order of Moseneke DCJ, and agreed that the forfeiture of the property was disproportionate. In his view, the closer the criminal activities are to the primary objectives of POCA, the more readily should a court grant a forfeiture order. Conversely, the more remote the activities are from these objectives, the more compelling must the circumstances be in order to justify it. He added that POCA was not adopted with a view to providing either a substitute for or a top-up of ordinary forms of law enforcement, and pointed to the risk that if the Asset Forfeiture Unit spread its net too widely so as to catch the small fry, it could make it easier for the big fish to elude the law.

In a dissent concurred in by Langa CJ, Madala J, Van der Westhuizen J and Yacoob J, Van Heerden AJ held that POCA did not only apply to organised crimes like money laundering, racketeering, and criminal gang activity, but also covered gambling offences. She held that, in weighing the severity of the interference with the first applicant's rights to property against the extent to which the property was used to commit the offence, the forfeiture was proportionate, despite the fact that the first applicant already incurred criminal penalties.

Cross-references:

- *First National Bank of SA Ltd t/a Wesbank v. Commissioner, South African Revenue Service and Another*;
- *First National Bank of SA Ltd t/a Wesbank v. Minister of Finance, Bulletin* 2002/2 [RSA-2002-2-006];
- *Mkontwana v. Nelson Mandela Metropolitan Municipality and Another*, *Bulletin* 2004/2 [RSA-2004-2-009]*;*
- *Bissett and Others v. Buffalo City Municipality and Others*;
- *Transfer Rights Action Campaign and Others v. MEC for Local Government and Housing in the Province of Gauteng and Others* (KwaZulu-Natal Law Society and Msunduzi Municipality as *Amici Curiae*), *Bulletin* 2004/2 [RSA-2004-2-009];
- *National Director of Public Prosecutions and Another v. Mohamed NO and Others*, *Bulletin* 2003/1 [RSA-2003-1-004];
- *Prophet v. National Director of Public Prosecutions, Bulletin* 2006/3 [RSA-2006-3-013].

Languages:

English.

Identification: RSA-2007-1-004

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 28.03.2007 / **e)** CCT 69/05 / **f)** NM, SM and LH v. Charlene Smith, Patricia de Lille and New Africa Books (Pty) Ltd, and Freedom Of Expression Institute *(amicus curiae)* / **g)** http://www.constitutional court.org.za/uhtbin/hyperion-image/J-CCT69-05 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.17 **General Principles** – Weighing of interests.
5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
5.3.21 **Fundamental Rights** – Civil and political rights – Freedom of expression.
5.3.32.1 **Fundamental Rights** – Civil and political rights – Right to private life – Protection of personal data.

Keywords of the alphabetical index:

Media, information, confidential, disclosure, civil liability / Damage, individual assessment in judicial proceedings / Information, confidential, disclosure, negligence / Fundamental right, nature / HIV (AIDS).

Headnotes:

The public disclosure of private medical information or the HIV status of individuals without their express consent is a violation of the rights to privacy and dignity. The media bear a particular constitutional responsibility to ensure that the vital right of freedom of expression is not used in a manner that infringes on other constitutional rights.

Summary:

I. The applicants in this matter are three women who are HIV positive and reside in informal settlements around Atteridgeville, Pretoria. The first respondent is Ms Charlene Smith, a journalist and author of the authorised biography of the second respondent. The second respondent, Ms Patricia de Lille, is a Member of Parliament. The third respondent is the publisher of the book. The applicants claimed that the respondents violated their rights to privacy and dignity by publishing their names and HIV status in the authorised biography of Ms de Lille in March 2002.

The applicants participated in clinical trials testing certain drugs at the University of Pretoria that were aimed at easing the condition of HIV/AIDS sufferers. Soon after the trials, concerns were raised about illnesses and fatalities among the participants. Ms de Lille was contacted in order to help investigate the complaints. An inquiry into the allegations of misconduct was held and a report on the trials issued (Strauss Report). This report contained the applicants' names and HIV status. The report and materials relevant to the investigation were sent to a limited number of people, including Ms de Lille.

Ms Charlene Smith was commissioned by New Africa Books to write a biography of Ms de Lille. The book revealed the names and HIV status of the applicants. The applicants sued the respondents for damages in the sum of R200 000 each in the Johannesburg High Court. The High Court held that the disclosure of the applicants' names in the book was not unlawful as Ms Smith and Ms de Lille were not negligent in assuming that consent had been given to the University of Pretoria, and did not act with the requisite intent to reveal private medical facts. The High Court held that failure to stop the distribution of copies of the book after it had become apparent that consent had not been given violated the applicants' right to privacy and ordered the publisher to pay them R15 000 each in damages. The applicants unsuccessfully appealed to the Supreme Court of Appeal.

II. Madala J, with whom the majority of the Court concurred, set aside the High Court decision. The Court held that the respondents were aware that the applicants had not given their express consent or at least foresaw the possibility that the consent had not been given prior to the disclosure, but had gone ahead and published their names, violating their right to privacy and dignity. The use of pseudonyms instead of the applicants' real names would not have rendered the book any less authentic and nowhere could it be shown that the public interest demanded otherwise. The Court concluded that the respondents had not rebutted the presumption that the disclosure of private facts was done with the intention to harm the applicants. Madala J held that Ms Smith and Ms de Lille were liable for damages together with the publishers due to their infringement of the applicants' rights to privacy and dignity. He awarded R35 000 in damages to be paid by the three respondents to each of the applicants. Each party was ordered to pay its costs for the hearing in the Constitutional Court.

In a separate concurring judgment Sachs J added that there was no reason to doubt the genuineness of Ms Smith's belief (in fact erroneous) that the applicants had indeed placed their medical status in

the public domain. Nevertheless, given the extreme sensitivity of the information involved, she should have left no stone unturned in her pursuit of verification. Of even greater importance, if the slightest doubt existed, there was no need to publish the actual names of the applicants. Publishers should, unless overwhelming public interest pointed the other way, refrain from circulating private medical information identifying the HIV status of named individuals unless they had the clearest possible proof of consent to publication.

Langa CJ wrote a judgment partially dissenting with the judgment of Madala J. He found that the respondents did not act intentionally. He held that the first and third respondents do qualify as media defendants and as the Strauss Report cannot be regarded as a public document, they had acted negligently. He concluded that a reasonable journalist would have foreseen the possibility that there was no consent. Agreeing with Madala J's assessment of damages, he however held that the applicants were attempting to vindicate constitutional rights and should get all their costs.

In a dissenting judgment, O'Regan J held that the right to privacy protects citizens from the publication of private medical information without consent and that this right had to be balanced with the right to freedom of expression. On the facts of the case, the publication of the applicants' names and HIV status was neither intentional nor negligent. Ms Smith assumed that consent was generally given because the applicants' names and HIV status were published in the Strauss Report, a reputable publication, with no clear disclaimer regarding their consent to the contrary. The media has an obligation to act in an objectively appropriate fashion when publishing material that may infringe on a person's right to privacy. However, to hold that the respondents were under a further duty to contact either the University or the applicants to ensure that they had in fact consented to the original publication of their names would impose a significant burden on freedom of expression. O'Regan J found that the failure by the publisher to take steps to withdraw copies of the book once the lack of consent became clear was unlawful, and that the appeal lodged by them must fail. O'Regan J would have dismissed the appeal of the applicants.

Cross-references:

- *The State v. Makwanyane and Another* CCT 3/94, *Bulletin* 1995/3 [RSA-1995-3-002];
- *Mohlomi v. Minister of Defence* CCT 41/95, *Bulletin* 1996/3 [RSA-1996 -3-018];
- *Fose v. Minister of Safety and Security* CCT 4/96, *Bulletin* 1997/2 [RSA-1997-2-005];
- *Bernstein and Others v. Bester NNO and Others*, CCT 23/95, *Bulletin* 1996/1 [RSA-1996-1-002];
- *The Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government and Another v. Ngxuza and Others* CCT 29/99, *Bulletin* 1999/3 [RSA-1999-3-011];
- *Dawood & Another v. Minister of Home Affairs and Others, Shalabi & Another v. Minister of Home Affairs & Others, Thomas & Another v. Minister of Home Affairs* CCT 35/99, *Bulletin* 2000/2 [RSA-2000-2-007];
- *Khumalo & Others v. Holomisa* CCT 53/2001, *Bulletin* 2002/2 [RSA- 2002-2-012];
- *Whitney v. California* 274 US 357, 375-376 (1927).

Languages:

English.

Identification: RSA-2007-1-005

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 04.04.2007 / **e)** CCT 72/05 / **f)** Barend Petrus Barkhuizen v. Ronald Stuart Napier / **g)** http://www.constitutionalcourt.org.za/uhtbin/hyperion-image/J-CCT72-05 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

2.1.1.1.1 **Sources** – Categories – Written rules – National rules – Constitution.
3.20 **General Principles** – Reasonableness.
5.3.13.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.
5.4.8 **Fundamental Rights** – Economic, social and cultural rights – Freedom of contract.

Keywords of the alphabetical index:

Constitution, application to common law / Constitutional matter / Contract, parties, equal status / Contractual freedom, restriction / Contractual limitation, written form of right / Fairness, principle / Insurance, policy / Limitation / *Pacta sunt servanda* / Public policy / Access to court, scope / Time limit, for appeal / Time limit, reasonableness.

Headnotes:

Where there is a challenge to a limitation clause in a short-term insurance contract on the basis that it amounts to a violation of the right to approach a court for redress, the proper approach in making a determination is to determine whether the clause is contrary to public policy. What is contrary to public policy must be determined in light of the Constitution. In relation to limitation clauses, the question will be whether a claimant is given an adequate and fair opportunity to seek the assistance of the Court.

Summary:

I. The applicant and respondent entered into a short-term insurance contract. On 24 November 1999, the insured vehicle was damaged beyond economic repair. The applicant filed a claim with the respondent that was repudiated on 7 January 2000. On 8 January 2002, the applicant instituted legal action against the respondent. The respondent filed a special plea on the basis that the contract contained a time limitation according to which the claim had to be filed within 90 days of the repudiation of the claim by the insurance company. The applicant challenged the clause on the basis that it was contrary to public policy as it prescribed an unreasonably short period within which action had to be instituted and therefore infringed on his right to seek the assistance of the Court and inconsistent with Section 34 of the Constitution.

The High Court found the limitation clause to be inconsistent with the Constitution and dismissed the special plea with costs. The respondent appealed to the Supreme Court of Appeal. That court held that contractual terms are subject to the Constitution and that if a term is contrary to public policy, which flows from constitutional values, it is unenforceable. However, the Court held that the applicant had not established that the limitation clause was contrary to public policy. The appeal was upheld and the order of the High Court was set aside and the special plea was upheld with costs.

II. In hearing the appeal, a majority of the Constitutional Court held that public policy reflects the legal convictions and values of the community as reflected in the values of the Constitution. The proper approach to be adopted to determine if a contractual term is unconstitutional is to determine if it is contrary to public policy. In this way the principle of *pacta sunt servanda* is left intact as the contractual terms may be unenforceable if they are contrary to constitutional values even if there is consent between the parties to such terms. The appropriate test for determining whether a time limitation clause in a contract is contrary to public policy is whether in terms of the provision, a claimant is allowed an adequate and fair opportunity to seek judicial redress. A determination of fairness involves an assessment of whether the time limitation clause is unreasonable. In determining reasonableness, account must be taken of the principle that there should be compliance with contractual clauses that have been freely and voluntarily entered into by the parties. It was found that there was no manifest unfairness in the clause. On the basis of the evidence presented, it could not be established that the contract was not freely concluded; that there was unequal bargaining power between the parties or that the applicant was unaware of the clause.

The concept of public policy denotes fairness, justice and reasonableness. If non-compliance with the time limitation clause was due to factors beyond the claimant's control, enforcement of the clause would be unjust and contrary to public policy.

The need to extend the application of the common law legal principles that seek to achieve justice and fairness, to time limitation clauses was recognised. The principle that no one should be compelled to perform or comply with that which is impossible and the common law principle of good faith was also considered. On the facts of the case, it was held that it is not necessary to determine if these common law principles apply to the enforcement of the time limitation clause.

Ngcobo J (for the majority) held that the applicant did not furnish reasons for the non-compliance with the time limitation clause. A decision had to be made on the basis of stated facts, which provided insufficient detail. It was therefore impossible to determine if the enforcement of the clause would be unfair and contrary to public policy. Failure to enforce compliance with the clause in the circumstances would be contrary to the principle of *pacta sunt servanda* and unfair to the respondent. The appeal was dismissed and no order as to costs was made.

Langa CJ concurred with Ngcobo J but did not express a view on the direct application of the Bill of Rights to contracts.

O'Regan J concurred but disagreed that the defences of good faith and impossibility in the law of contract warrant consideration on the facts of this case. She concluded that it is unnecessary to contemplate the development of the common law as the defences were not in issue.

Sachs J dissented. He held that the time limitation clause should not be enforced as it was contrary to public policy. It was contained in a standard form contract, in small print and the effect of the clause on the insured was harsh and it did not constitute part of the actual contractual terms upon which reliance was placed when the agreement was concluded.

Moseneke DCJ wrote a dissenting judgment, with which Mokgoro J concurred. He agreed with Sachs J insofar as it was held that the clause was against public policy and unenforceable. Moseneke DCJ held that on the facts of this case an appropriate order would be to uphold the appeal, dismiss the special plea and remit the matter to the High Court to determine the applicant's claim. Moseneke DCJ held that the time clause was unreasonably short and inflexible and denied Mr Barkhuizen a reasonable opportunity to seek legal redress.

Cross-references:

- *Mohlomi v. Minister of Defence, Bulletin* 1996/3 [RSA-1996-3-016], 9/26/1996, CCT 41/95;
- *Carmichele v. Minister of Safety and Security and Another* (Centre for Applied Legal Studies Intervening), *Bulletin* 2001/2 [RSA-2001-2-010], 8/16/2001, CCT 48/2000;
- *Zondi v. MEC for Traditional and Local Government Affairs and Others, Bulletin* 2005/3 [RSA-2005-3-013], 11/29/2005, CCT 73/03;
- *Moise v. Greater Germiston Transitional Local Council*, *Bulletin* 2001/2 [RSA-2001-2-009], 7/4/2001, CCT 54/2000.

Languages:

English.

Switzerland
Federal Court

Important decisions

Identification: SUI-2007-1-001

a) Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 27.04.2006 / **e)** 1A.150/2004 / **f)** A. v. Federal Department of Foreign Affairs / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 132 I 229 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

1.3.5.13 **Constitutional Justice** – Jurisdiction – The subject of review – Administrative acts.
3.4 **General Principles** – Separation of powers.
3.13 **General Principles** – Legality.
3.16 **General Principles** – Proportionality.
3.17 **General Principles** – Weighing of interests.
3.18 **General Principles** – General interest.
4.16 **Institutions** – International relations.
5.3.13.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.
5.3.13.14 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Independence.

Keywords of the alphabetical index:

Asset, freezing / Judicial assistance, mutual, international / National interest / Judgment, execution, law.

Headnotes:

Freezing of the assets of a former President of an African state, founded on protection of the country's interests, preventing the execution of a judgment already in force; proportionality of the measure. Articles 5, 36 and 184.3 of the Federal Constitution (rule of law, restriction of fundamental rights, foreign relations, respectively); Article 6.1 ECHR.

A position adopted by a Federal department, making a person's assets subject to freezing ordered by the Federal Council (government), constitutes a decision within the meaning of Section 5 of the Federal Act on

Administrative Procedure (recital 4), concerning civil rights and obligations within the meaning of Article 6.1 ECHR (recital 6), open to challenge by an administrative law appeal.

In impeding execution by the competent authority, a decision does not violate the right to an independent tribunal or the principle of separation of powers (recital 9).

When it fulfils the requirements of Article 184.3 of the Federal Constitution, a measure founded on this provision constitutes an adequate legal basis for restricting fundamental freedoms, in so far as such restrictions are further justified by public interest and are proportionate to the aim sought (recital 10).

In the present case, the disputed freezing, in so far as it applies to assets claimed on the basis of a judgment already in force, violates the principle of proportionality if only by its excessive duration (recital 11).

Summary:

I. For many years A. conducted various activities in Switzerland on behalf of Joseph Désiré Mobutu Sese Seko (Mobutu), President of Zaire or the Democratic Republic of the Congo. Not having been remunerated, A. claimed to be owed over four million SF. In a judgment of 14 March 2001, the investigating judge of the Vaud Cantonal Court found the heirs of the late President Mobutu – who died in September 1997 – jointly liable to pay A. a total amount of 2.3 million SF.

In May 1997 the Democratic Republic of the Congo had requested Switzerland's judicial assistance for the purposes of criminal proceedings instituted against Mobutu. The Federal Police Office ordered the provisional registration of a restriction on the right to dispose of the buildings situated in the Canton of Vaud and the placing of official seals on the main building; the Federal Council ordered that, pending completion of the judicial assistance procedure, the accounts and deposit boxes held in the name of Mobutu be frozen. At the invitation of the Federal Justice Office, which had meanwhile acquired jurisdiction in the matter, the Cantonal Prosecutions Office liquidated the property and settled the debts owing to the cantonal insurance body, the Canton of Vaud and the Confederation; a dividend of 2.5 million SF was awarded to A. but placed on deposit pending a determination as to the release of the property from the custody imposed for the criminal proceedings.

Meanwhile, in 1997 the Federal Council issued an order on the preservation of the assets of the Republic of Zaire in Switzerland; on 15 December 2003, it ordered further freezing of Mobutu's assets for an initial period of three years. Upon the Federal Justice Office's finding that the mutual assistance procedure had been unsuccessful, the Federal Department of Foreign Affairs informed A. that the Federal Council would decide as to the final disposal of Mobutu's assets when informed of the outcome of talks with the Congolese Government and the individuals who had claims on those assets. The Department of Foreign Affairs on 14 May 2004 confirmed the Federal Council's decision of 15 December 2003 to freeze Mobutu's assets. It noted that the Federal Council had reached its decision on the basis of Article 184.3 of the Federal Constitution and that it considered unfreezing not to be in the country's interests. It added that there was no possibility of challenging the Federal Council's decision.

Acting through the administrative law appeal procedure, A. asked the Federal Court to set aside the decision of 14 May 2004 by the Department of Foreign Affairs in so far as the freezing ordered by the Federal Council on 15 December 2003 was not effective against him.

II. The Federal Court allowed the appeal.

The Department of Foreign Affairs communication of 14 May 2004 constitutes a decision within the meaning of the Federal Act on administrative procedure since it in effect established that the assets from which the appellant demanded the settlement of his claims remained frozen, pursuant to the Federal Council order of 15 December 2003. As such, the Department of Foreign Affairs decision may be challenged through an administrative law appeal to the Federal Court.

Section 100.1.a of the Federal Act on the judicial system excludes an administrative law appeal against decisions concerning the country's internal or external security, neutrality, development co-operation and humanitarian aid, together with other matters affecting foreign relations. However, this provision does not oppose an administrative law appeal when the decision concerns civil rights and obligations within the meaning of Article 6.1 ECHR and when a judicial review is necessary in the light of the requirements of treaty law. That is so in the present case: Mobutu's heirs were ordered by a judgment of 14 March 2001 to pay the appellant 2.3 million SF. Thus the Department of Foreign Affairs decision equates to attachment of the amount awarded or denial of the appellant's rights of property and therefore affects him directly and decisively in his civil rights. To the extent that the decision interferes with a fundamental right of the appellant, specifically the

guarantee of ownership, the constitutionality of this measure should be examined on the basis of Article 36 of the Federal Constitution.

Any restriction of a fundamental right must have a legal foundation. Article 184.3 of the Federal Constitution allows the Federal Council to take measures in the form of orders or decisions where the protection of the country's interests so requires, provided that they are necessary and limited in time. The asset-freezing measure of 15 December 2003 was designated as a decision. It is nevertheless of a general and abstract nature, applying to all property of Mobutu, multiple individuals, and different assets. Thus it is an order. Since it sought to protect the country's interests and was necessary in the circumstances, the order is consistent with the constitutional requirements and has a legal basis justifying restrictions on the guarantee of ownership.

It remains to be determined whether the Federal Department of Foreign Affairs decision that declared the freezing ordered by the Federal Council applicable to the appellant's assets complies with the principle of proportionality. To meet this requirement, it is necessary that the measure be capable of achieving the aim sought, that this cannot be achieved by a less drastic measure, and that the effects of the measure are in reasonable proportion to the expected result. In so far as it concerns the assets claimed by the appellant, the freezing does not appear capable of achieving the aim sought. Indeed, the appellant has the benefit of a final, enforceable judgment. How the public interest in maintaining the freezing can prevail over the appellant's private interest cannot be discerned. It is doubtful that Switzerland's image could be imperilled through forfeiture of the sum awarded to the appellant by a judgment delivered on completion of a procedure in keeping with the Constitution. Still less can it be discerned, considering that the Congolese authorities' interest in the mutual assistance procedure lapsed and the public debts were all paid. In conclusion, the disputed freezing violates the principle of proportionality in so far as it applies to the assets claimed by the appellant.

Languages:

German.

Identification: SUI-2007-1-002

a) Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 10.05.2006 / **e)** 1P.324/2005 / **f)** A. v. Canton of Basel Country's Parliament / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 132 I 167 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

5.2.2.6 **Fundamental Rights** – Equality – Criteria of distinction – Religion.
5.3.8 **Fundamental Rights** – Civil and political rights – Right to citizenship or nationality.
5.3.18 **Fundamental Rights** – Civil and political rights – Freedom of conscience.

Keywords of the alphabetical index:

Naturalisation, religion, obstacle / Religion, affiliation, obstacle to naturalisation.

Headnotes:

Discriminatory refusal of naturalisation?

Article 15 of the Federal Constitution (freedom of conscience and belief) and Article 9 ECHR do not have independent bearing on the complaint that naturalisation was refused on discriminatory grounds linked with religious affiliation (recital 3).

Owing to the appellant's insufficient integration, the refusal of naturalisation does not violate Article 8.2 of the Federal Constitution (recital 4).

Summary:

I. A. is of Turkish nationality and Muslim faith. She was born in Basel, attended primary school in Muttenz (Canton of Basel Country) and took religious instruction in Istanbul. She currently resides at Muttenz, gives lessons in religion at the Basel mosque and does a variety of casual work.

With her father and brother, A. undertook the necessary formalities to be naturalised in Muttenz. The municipality of Muttenz and the federal authorities accepted the application. In connection with the granting of cantonal citizenship, the appropriate committee of the Parliament of Basel Country considered the application, heard A. and finally proposed to the plenary parliament that the appellant be refused naturalisation, while approving it for her father and brother. After thorough discussion,

the parliament refused A.'s naturalisation by 46 votes to 34, while her father's and brother's were accepted.

Acting through the public law appeal procedure, A. asked the Federal Court to set aside the cantonal parliament's decision. She alleged an infringement of the guarantee of non-discrimination, together with violation of freedom of conscience and belief. She submitted in particular that she had been refused naturalisation on the ground that she wore a veil and lived by the customs of the Muslim religion.

II. The Federal Court dismissed her appeal.

According to Article 8.2 of the Federal Constitution, nobody may be discriminated against for their origin, way of life or religious, philosophical or political convictions; Article 15 of the Federal Constitution and Article 9 ECHR guarantee freedom of conscience and belief. In the present case, the complaints of violation of religious freedom are devoid of intrinsic materiality. The impugned decision in no way prevented the appellant from living by her religious convictions or from observing the customs of her religion. The point to be considered is whether the refusal of naturalisation was consistent with the prohibition of discrimination.

When her naturalisation was considered, the appellant was found to be living principally in the family circle, the society of her compatriots and the precincts of the mosque. She was thought to have few if any contacts with the residents of the canton and even to avoid coming into contact with them. These circumstances pointed to a lack of integration or of desire to fit in. Religion does not forbid contact with the local population. Thus the grounding of the refusal of naturalisation has nothing to do with the appellant's religious and philosophical convictions, and therefore is not contrary to the guarantee of non-discrimination. The impugned decision is far rather the expression of the desire to naturalise only persons showing a certain integration with the residents of the community or at the very least giving evidence of some resolve to attain it. In addition, the naturalisation of the appellant's father and brother – who in any case also lived by the principles of Islam – and of Muslim women wearing the veil shows that the refusal to naturalise the appellant was not founded on discriminatory motives. The cantonal parliament's decision was thus in accordance with the Constitution.

Languages:

German.

Identification: SUI-2007-1-003

a) Switzerland / **b)** Federal Court / **c)** Second Public Law Chamber / **d)** 03.11.2006 / **e)** 2A.48/2006 and 2A.66/2006 / **f)** X. v. Directorate of Health and Administrative Court of the Canton of Zurich and X. v. Federal Department of the Interior / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 133 I 58 / **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.
3.17 **General Principles** – Weighing of interests.
5.1.3 **Fundamental Rights** – General questions – Positive obligation of the state.
5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
5.3.2 **Fundamental Rights** – Civil and political rights – Right to life.
5.3.32 **Fundamental Rights** – Civil and political rights – Right to private life.

Keywords of the alphabetical index:

Right to die / Drug, supply, right / Suicide, assisted / Suicide, right.

Headnotes:

Article 8 ECHR, and Articles 10.2 and 13.1 of the Federal Constitution (personal freedom and protection of privacy); supply of sodium pentobarbital to assist the suicide of a mentally disturbed person.

Neither the legislation on drugs nor the legislation on therapeutic products permits the supply of sodium pentobarbital without a medical prescription to a person who wishes to end his life (recital 4).

Article 8 ECHR and Articles 10.2 and 13.1 of the Federal Constitution do not require the State to make provision for assisted suicide organisations or persons wishing to commit suicide to obtain sodium pentobarbital without a prescription (recital 5 to 6.3.6).

Summary:

I. X. suffered from a severe bipolar affective disease. He attempted suicide twice and was admitted to hospital several times. In 2004, he became a member of the association "Dignitas". He expressed the desire that that association should do what was necessary to terminate his life, as his condition and his incurable disease did not allow him to live a dignified life.

X. was unable to obtain the lethal dose of sodium pentobarbital without a medical prescription. He then contacted various authorities in an attempt to obtain that substance through "Dignitas" and invoked his right to end his life in a dignified manner, without risk and without danger to others. Both the Federal Office of Public Health and the Directorate of Health of the Canton of Zurich refused his request. X.'s appeals to the Federal Department of the Interior and the Administrative Court of the Canton of Zurich were dismissed.

II. X. lodged an administrative-law appeal and requested the Federal Court to annul the contested decisions and to allow him to obtain the sodium pentobarbital. The Federal Court dismissed the appeals.

Sodium pentobarbital is a psychotropic substance giving rise to dependence. It is obtainable only with a medical prescription from a licensed medical practitioner. Licensed medical practitioners may only prescribe such substances on condition that they comply with the medical and pharmaceutical ethical rules. Under the national legislation, it is therefore impossible to obtain the desired substance without a medical prescription. International law on such substances contains comparable rules. Contrary to the appellant's opinion, the applicable provisions allowed for no exception in situations like his.

The appellant invoked Article 8 ECHR and Articles 10.2 and 13.1 of the Federal Constitution and claimed that the law must be interpreted consistently with the Constitution and the Convention. He maintained that those provisions include the right to commit suicide and impose an obligation on the State to allow suicide without risk or pain.

Article 10.2 of the Federal Constitution guarantees personal freedom and the free development of the personality. Likewise, Article 8.1 ECHR gives the right to respect for private life, allowing the individual to develop his personality without intervention on the part of the State. While the individual has a right over his or her own death, that does not mean that he is entitled to the assistance of the State or of third parties to end his life. Such a right does not follow from the constitutional and Convention rights on which X. relied. The State's primary task is to protect life. There is no positive obligation to provide a person wishing to commit suicide with the substances and the instruments required for that purpose. The right to life within the meaning of Article 2 ECHR does not entail a corresponding negative freedom and Article 3 does not require States to grant immunity for assistance to suicide. The State was thus not required to make available the substances that would allow X. to end his or her life.

On the assumption that there was an interference with the guarantee laid down in Article 8.1 ECHR and Article 10.2 of the Federal Constitution, the obligation to be in possession of a medical prescription in order to obtain sodium pentobarbital would be covered by Article 8.2 ECHR and Article 36 of the Federal Constitution. When examining that question, it was necessary to strike a balance between public interests and private interests. The obligation to have a medical prescription is intended to protect the health and safety of people and to prevent ill-considered decisions. A lethal substance must not be supplied by a pharmacist without further formality, but requires an examination and a diagnosis by a doctor who is subject to ethical rules and who gives the appropriate and necessary information. Switzerland's rules on assisted suicide are relatively liberal; it is possible that, after carrying out an examination and in accordance with the ethical rules, a doctor will provide a person wishing to end his life with a prescription for sodium pentobarbital. Where the person is suffering from a psychiatric disease, then, according to the case law of the Federal Court, a prescription for the substance was possible only to a very limited extent.

In the light of those considerations, the legal requirement to be in possession of a medical prescription in order to obtain a lethal dose of sodium pentobarbital was compatible with constitutional and Convention law.

Languages:

German.

Identification: SUI-2007-1-004

a) Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 14.12.2006 / **e)** 1P.358/2006 / **f)** Diggelmann v. Town of Saint-Gallen, Department of Health and Administrative Court of the Canton of Saint-Gallen / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 133 I 77 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

1.3.5.5 **Constitutional Justice** – Jurisdiction – The subject of review – Laws and other rules having the force of law.
3.16 **General Principles** – Proportionality.
3.18 **General Principles** – General interest.
5.3.32.1 **Fundamental Rights** – Civil and political rights – Right to private life – Protection of personal data.

Keywords of the alphabetical index:

Recording, video, period of conservation / Video surveillance, period of conservation.

Headnotes:

Duration of conservation of recordings of video-surveillance of public places and highways; regulation on the police of the town of Saint-Gallen.

The recording of surveillance images taken in public places or highways, and the keeping of those recordings, are acts which come within the scope of the protection of Article 13.2 of the Federal Constitution (protection of the privacy) and Article 8.1 ECHR.

Types of surveillance and data-gathering (recital 4).

Proportionality of the practice of keeping recordings for 100 days, by reference to the aim of the surveillance, the gravity of the interference with fundamental rights and data protection (recital 5).

Summary:

I. The town of Saint-Gallen adopted new regulations on the police force, which were confirmed by popular vote. One provision envisaged the video surveillance of public places and highways. Specifically, it provided that limited video surveillance might be authorised in places at risk. This would allow the identification of persons on condition that public safety and public order so required and that passers-by were informed by notice. Those recordings were kept for 100 days and afterwards destroyed, unless they were used in criminal proceedings.

A resident of the town of Saint-Gallen challenged the duration of the period for which the recordings were kept. The competent cantonal department upheld his appeal and reduced the period to thirty days. Upon appeal by the town of Saint-Gallen, the Administrative Court reinstated the period of 100 days, as had been envisaged when the regulation on the police was adopted.

The resident concerned lodged a public law appeal and requested the Federal Court to set aside the decision of the Administrative Court. He relied on the guarantees of protection of privacy within the meaning of Article 13.2 of the Federal Constitution and Article 8.1 ECHR, claiming that a period of 100 days was not proportionate.

II. The Federal Court dismissed the appeal.

When dealing with an appeal in the context of the abstract review of norms, the Federal Court will annul a cantonal or municipal provision only if it cannot be applied or interpreted in accordance with the Constitution or the Convention. That does not apply to appeals against an act implementing the contested norm. In this case, it was not disputed that the video surveillance and the keeping of the recordings came within the scope of the protection afforded by Articles 13.2 of the Federal Constitution and Article 8.1 ECHR.

The surveillance of public places may be carried out in two different ways. Firstly, it is possible to monitor on a screen what is happening in public places so that the police can intervene where necessary. Secondly, it is possible to record the events and to keep the recordings as evidence in the event of a criminal complaint. The latter mode of surveillance was at issue here.

The public interest in that surveillance consisted in the prevention of disorder and the maintenance of public safety. Surveillance was intended to prevent offences because the recordings could be used as evidence and enable criminal proceedings to be brought. For the system to be effective, the recordings had to be made available to victims and kept for a certain time. Because a complaint is frequently not immediately lodged with the Court, especially in cases of sexual assault or offences against young persons, there was good reason to keep the recordings for more than 30 days. Furthermore, the municipal authorities were under an obligation to comply with the provisions on data protection as laid down in cantonal law and to prevent

any misuse of the recordings in question. Those recordings could be used only for the purposes of criminal proceedings. In the light of all those guarantees, the fact that the recordings were kept for 100 days was compatible with constitutional and Convention law.

Languages:

German.

Identification: SUI-2007-1-005

a) Switzerland / **b)** Federal Court / **c)** Second Civil Chamber / **d)** 13.02.2007 / **e)** 5P.3/2007 / **f)** Y. v. Cantonal Court of the Canton of Aargau / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 133 III 146 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

2.1.1.4 **Sources** – Categories – Written rules – International instruments.
5.3.13.6 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to a hearing.
5.3.44 **Fundamental Rights** – Civil and political rights – Rights of the child.

Keywords of the alphabetical index:

Child, hearing in person / Child, international abduction, civil aspects / Convention on the Civil Aspects of the International Abduction of Children, the Hague Convention.

Headnotes:

Article 13.2 of the Hague Convention of 25 October 1980 on the Civil Aspects of the International Abduction of Children; hearing the children.

In the context of the procedure for the return of children according to the Hague Convention on the Civil Aspects of the International Abduction of Children, the child must, in principle, be heard provided he or she has reached the age of 11 or 12 years (recital 2.6).

Summary:

I. The parties married in Switzerland in 1996 but lived in Brazil from 1997. Both their children were born there, in 1997 and 1999. The spouses separated in 2004, but remained in Brazil. The father returned to Switzerland with his children in May 2006 for one month's holiday, but failed to return to Brazil.

In September 2006, the mother requested that the two children be returned to Brazil. The cantonal courts granted that request in October and December 2006.

The father lodged a public law appeal and sought to have the decision of the Cantonal Court set aside. He relied in particular on the Convention on the Civil Aspects of the International Abduction of Children (the Hague Convention) and claimed that the cantonal authorities ought to have heard evidence from the children.

II. The Federal Court dismissed the appeal.

Under Article 13.2 of the Hague Convention, judicial or administrative authorities may refuse to order the return of a child if they find that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of his or her views. The question whether the children must be heard depends on their age and their maturity and on whether they are capable of understanding the meaning of and the problems involved in the decision to return them.

When hearing an application to order the return of a child in accordance with the Hague Convention, the court must, *inter alia*, consider whether the removal or non-return of a child is considered unlawful (cf. Article 3 of the Hague Convention). It is a question of restoring the *status quo ante*. In contrast, the question of custody did not form the subject matter of the present proceedings; it would be for the court of the country of origin to determine the parent with whom, and the country in which, the child would live.

The appraisal of those questions requires an emotive and cognitive maturity that a child only acquires from the age of eleven or twelve years. If the court hears the child, the current situation and relations with the parents may indeed be clarified; but they are not decisive for the court which determines whether the child is to be returned. Furthermore, the child is often under pressure vis-à-vis the parent who abducted him.

In the light of those circumstances, there had been no violation of the Hague Convention in the present case because the cantonal courts had not heard evidence from the children.

Languages:

German.

“The former Yugoslav Republic of Macedonia”
Constitutional Court

Important decisions

Identification: MKD-2007-1-001

a) “The former Yugoslav Republic of Macedonia” / **b)** Constitutional Court / **c)** / **d)** 10.01.2007 / **e)** U.br.99/2006 / **f)** / **g)** *Sluzben vesnik na Republika Makedonija* (Official Gazette), 7/2007, 22.01.2007 / **h)** CODICES (Macedonian, English).

Keywords of the systematic thesaurus:

3.4 **General Principles** – Separation of powers.
3.5 **General Principles** – Social State.
3.13 **General Principles** – Legality.
4.6.2 **Institutions** – Executive bodies – Powers.
4.6.3.2 **Institutions** – Executive bodies – Application of laws – Delegated rule-making powers.
5.4.14 **Fundamental Rights** – Economic, social and cultural rights – Right to social security.

Keywords of the alphabetical index:

Social assistance / Legislator, powers, delegation to government, excessive.

Headnotes:

The identification of those entitled to social financial assistance, the amounts to be paid and the framework under which this should be done are essential elements of the right to social assistance. Parliament alone can make such definition; this cannot be done by governmental act.

Summary:

I. The petitioner requested an assessment of the constitutionality of that part of Article 29.2 of the Law on Social Welfare dealing with “amount and criteria”. See “Official Gazette of the Republic of Macedonia”, nos. 50/1997, 16/2000, 17/2003, 65/2004, 62/2005 and 111/2005.

The petitioner argued that the controversial part of the article enabled the government and the Minister of Labour and Social Politics to regulate, by by-law, certain elements of the right to social assistance which should only be regulated by Parliament. This was incompatible with the principles of the rule of law and the separation of powers. These are fundamental values of the constitutional order of the Republic of Macedonia and are guaranteed by Article 8 of the Constitution.

The above provision of the Law on Social Welfare bestows the right to social pecuniary relief on those who are fit for work but not entitled to social security and, under other regulations, have no means of providing for themselves. Detailed conditions, sums, criteria and the way in which the right to social pecuniary relief can be exercised are defined by government in by-laws.

II. Having examined the Law on Social Welfare, the Constitutional Court observed that the legislator had defined the right to social relief as one of the measures for the social security and care of citizens. The various forms of social care available are set out in the Act. These include long-term financial support for persons unfit for work and without social security; financial support for relief and care; right to health care; compensation for those who need to work shorter hours (and hence draw a smaller salary) as they are caring for a handicapped child; one-off assistance, whether financial or in kind; the right to housing and financial support for somebody under eighteen but without parental care. The legislation defines those who are entitled to social relief in each instance, as well as the amount and the procedure for the exercise of the rights.

The Court found that the legislator had also defined the right to financial support for those who are fit for work but without social security, who have no other way of funding their existence. The legislation defined the group, but made no provision for the way in which the right could be exercised or how much they might receive. It was left to the government to fill this gap. This raised the possibility of an encroachment by the executive powers upon those of the legislature.

The Macedonian Constitution gives a clear and precise definition of the holders of legislative, executive and judicial power. Under the doctrine of separation of powers, one power must not encroach upon the sphere of another. Therefore, it was for Parliament, not government (as is envisaged in the article in question) to establish the criteria for the exercise of social pecuniary relief and the amounts payable.

Rights for those citizens who are fit for work but without other forms of social security or means to provide for themselves can only be guaranteed if the amounts and procedures are set out in legislation by Parliament. This is especially important because the right to social security, by the provision of social relief, is one of the fundamental rights and freedoms expounded in the Constitution. Without these definitions, the necessary conditions for the exercise of the right do not exist. This might jeopardise citizens' constitutionally guaranteed rights to social security.

The Court held that the authority of the Government of the Republic of Macedonia under Article 29.2 of the law, to define the criteria and the amount of the social pecuniary relief, in the absence of any legal framework for the exercise of this right, is an encroachment by the executive power upon the legislative power. As such, it is not compatible with the Constitution.

Languages:

Macedonian, English.

Identification: MKD-2007-1-002

a) "The former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 10.01.2007 / **e)** U.br.160/2006 / **f)** / **g)** *Sluzben vesnik na Republika Makedonija* (Official Gazette), 7/2007, 22.01.2007 / **h)** CODICES (Macedonian, English).

Keywords of the systematic thesaurus:

3.9 **General Principles** – Rule of law.
3.10 **General Principles** – Certainty of the law.
5.2.1.1 **Fundamental Rights** – Equality – Scope of application – Public burdens.
5.3.42 **Fundamental Rights** – Civil and political rights – Rights in respect of taxation.

Keywords of the alphabetical index:

Corruption, prevention / Income, declaration by state officials / Property, value / Tax, income, calculation.

Headnotes:

Macedonian legislation on the prevention of corruption deals with non-reporting of income and/or property by elected or appointed public officials. If, in the course of investigation of officials' property and/or income, it cannot be shown that the property was acquired or enhanced as a result of a regular income, which has been declared and taxed, the Public Revenues Bureau may adopt a resolution for taxation, taking as a base for taxation the difference between the established regular, reported and taxed incomes of the person and their family members, and the evaluated market value of the property. This provision is incompatible with the principle of equality. The elected or appointed public officials are not in an equal position, as the value of their property is not established according to its value at the time of acquisition, but rather, at the time their property status is being examined, and under the rules of market value.

Summary:

I. The petitioner requested an assessment of the constitutionality of that part of Article 36-a.1 of the Law on Preventing Corruption dealing with "the appraised market value of the property". See "Official Gazette of the Republic of Macedonia", nos. 28/2002 and 46/2004. The petitioner suggested that it violated the principle of equality.

Article 36-a.1 of the law provides that if, in the course of investigation of property and property status, it is not proved that the property has been acquired or enhanced by regular declared and taxed income, the Bureau of Public Revenues may adopt a resolution for taxation, taking as a base for taxation the difference between the established regular, reported and taxed incomes of the person and their family members, and the evaluated market value of the property. Calculated in this way, there is a tax rate of 70%, arising from the difference between the taxed and reported incomes that is the market value of the property.

II. The Court noted the provisions of the Law on Preventing Corruption, and in particular the provisions regarding the obligation of the public officials to report their property and any changes thereto. Article 34.1 of the Law requires elected or appointed public officials, officials or responsible persons in a public enterprise and those who manage state capital to report any increase in their property. This includes property in the name of a family member, the building of a house or other premises, the purchase of immovable properties, shares or motor vehicles to a value in excess of the amount of twenty average salaries from the preceding three-month period. If the elected or appointed persons defined above fail to report their property, the Public Revenues Bureau may initiate a procedure for examination of the property status.

The Court also took note of the provisions of the Law on Personal Income Tax ("Official Gazette of the Republic of Macedonia", nos. 80/1993, 3/1994, 70/1994, 44/2002, 96/2004 and 120/2005). This provides that if, in the course of investigation, it emerges that the official has property or means in excess of those which have been taxed, or that they are deriving an income which is insufficiently taxed or not taxed at all, the Public Revenues Bureau will adopt a resolution to determine the tax, taking as a base the difference between the value of the property and the proven amount of the funds for its acquisition.

Having compared the contested provision within Article 36-a of the Law on Preventing Corruption with the provisions of the Law on Personal Income Tax, the Court concluded that the Law on Personal Income Tax takes as the base for the calculation of the tax the difference between the value of the property and the proven amount of funds for its acquisition. The Law on Preventing Corruption takes as the base for taxation the difference between the established regular reported and taxed incomes of the person and their family members and the evaluated market value of the property.

The Court found that the provision in Article 36-a creates uncertainty. This runs counter to the principles of the rule of law and of equality.

The value of the property is not established according to its value at the time of acquisition, but according to its value at the time the official's property status is investigated, under the rules of market value. Property values will differ, between the point of their acquisition and the time the investigation is carried out.

If one takes as an example the building of a facility in different parts of the city, pursuant to the contested provision of the law, its value would be governed by the location of the building and its value would be determined according to the market rules, rather than the real value of the facility at the time it was built.

The Constitutional Court accordingly held that the part of the provision dealing with "evaluated market value" was incompatible with the principle of legal certainty. It meant that citizens and elected or appointed officials were in unequal positions with

regard to the obligation to pay tax. This also ran counter to the principle of the rule of law, defined in the Constitution as a fundamental value of the constitutional order.

Languages:

Macedonian, English.

Identification: MKD-2007-1-003

a) "The former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 17.01.2007 / **e)** U.br.185/2006 / **f)** / **g)** *Sluzben vesnik na Republika Makedonija* (Official Gazette), 20/2007, 20.02.2007 / **h)** CODICES (Macedonian, English).

Keywords of the systematic thesaurus:

3.9 **General Principles** – Rule of law.
5.3.13.4 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Double degree of jurisdiction.
5.3.13.13 **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:

Appeal, inadmissibility / Enforcement of judgment, appeal / Bailiff / Decision, affecting rights and obligations of citizens.

Headnotes:

An amendment to the Macedonian Constitution guarantees the right of appeal against decisions in first instance proceedings before the court. A provision of enforcement law which prohibits an appeal against a decision by the president of the court of first instance upon a complaint for irregularities during enforcement, was out of line with the Constitution.

Summary:

I. The petitioner asked the Constitutional Court to examine the constitutionality of Article 77.7 of the Law on Enforcement. See Official Gazette of the Republic of Macedonia, nos. 35/2005, 50/2006 and 129/2006. The petitioner suggested that it was incompatible with Amendment XXI to the Constitution, which guarantees the right to appeal against first instance court decisions.

Article 77.7 allows a party to enforcement proceedings who believes that there were irregularities in the enforcement to file a complaint with a view to the removal of the irregularities with the president of the appropriate local first instance court. However, under paragraph 7, there is no right of appeal against the president of the court's decision.

Amendment XXI, which replaced Article 15 of the Constitution, guarantees the right to an appeal against decisions made in first instance court proceedings. The right to appeal, or other legal remedies in respect of individual legal acts adopted in first instance proceedings before a body of state administration or an organisation or other body with a public mandate, is governed by law.

The Law on Enforcement determines the rules governing the conduct of enforcement agents when executing court decisions for the fulfilment of obligations. The provisions of this law also apply to the forced execution of an administrative decision for fulfilment of a pecuniary obligation. The enforcement is carried out by enforcement agents who, according to the law, are persons performing public mandates defined by law.

II. In the constitutional analysis of this case, a question arose before the Constitutional Court as to whether the decision of the president of the Court in complaints about irregularities in enforcement proceedings falls into the category of a decision affecting citizens' rights and obligations. If so, it is covered by item 1 of Amendment XXI of the Constitution. The Court found that the complaint against irregularities during enforcement is the only legal remedy available to parties, in case of irregularities and illegal conduct committed by enforcement agents when carrying out the enforcement. The Court noted that the violation of the legal provisions for the enforcement, and the unlawful carrying out of the enforcement, breaches the rights of the parties, whether creditor or debtor. Therefore, the court's decision upon a complaint for irregularities in enforcement proceedings, which is aimed at removing the irregularities and protecting the rights of the parties concerned, has the character of a decision which affects the rights and obligations of the parties.

It follows that a court decision upon a complaint seeking redress for irregularities in enforcement is a court decision in the sense of Amendment XXI of the Constitution, which guarantees the right to an appeal against decisions made in first instance proceedings before a Court.

The constitutional guarantee of the right to an appeal is based upon the premise that a first instance court decision may not necessarily be legal and correct. It is also based on the protection of the rights and freedoms of citizens against irregularities in the work of these bodies. Hence, the right to an appeal beyond any doubt applies to any case where the court is deciding upon the exercise of the rights and freedoms of citizens, that is, on the basis of a legally founded interest. In such cases, a higher body always decides on the appeal. The availability of two instances in the decision-making is one of the guarantees for ensuring and reinforcing legality in the exercise of the rights and freedoms of citizens.

The Court considered new features in the system of enforcement of court decisions introduced by the Law on Enforcement and Parliament's intention to speed up and streamline the execution of court decisions. The sphere of execution of court decisions is undoubtedly an integral part of the basic human right to a fair trial within a reasonable time. However, according to the Court, the efficient enforcement of justice may not be at the expense of the protection of human rights and freedoms, among which is the right to an appeal. The right to an appeal is not in conflict with the principle of a fair trial within a reasonable time. On the contrary, it protects these very principles and rights. Although Parliament has introduced a new system for enforcement proceedings, which is now carried out by enforcement agents rather than courts, the fact that the court has competence to decide upon a complaint presupposes that there is a right to appeal against the court's decision on the complaint. If it is not possible to appeal in these circumstances, such a situation is incompatible with Amendment XXI of the Constitution.

Languages:

Macedonian, English.

Identification: MKD-2007-1-004

a) "The former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 04.04.2007 / **e)** U.br.179/2006 / **f)** / **g)** *Sluzben vesnik na Republika Makedonija* (Official Gazette), 50/2007, 20.04.2007 / **h)** CODICES (Macedonian, English).

Keywords of the systematic thesaurus:

3.13 **General Principles** – Legality.
4.8.3 **Institutions** – Federalism, regionalism and local self-government – Municipalities.
4.8.6.1 **Institutions** – Federalism, regionalism and local self-government – Institutional aspects – Deliberative assembly.
5.3.45 **Fundamental Rights** – Civil and political rights – Protection of minorities and persons belonging to minorities.

Keywords of the alphabetical index:

Municipality, municipal council, composition, majority, decision, procedure of adoption / Municipality, statute, procedure for enactment.

Headnotes:

A statute which determines the coat of arms and flag for a municipality, and the way they can be used, as well as the use of languages and alphabets in the work of the municipal council which are spoken by less than 20% of the citizens in the municipality, should be adopted in a procedure which complies with rules as to quorum. It should be adopted by a majority vote of the current council members from the communities that are not the majority population in the municipality.

Summary:

I. Two individuals asked the Court to examine the constitutionality and legality of the decision to adopt the Statute of the Struga municipality (see "Official Gazette of the Struga municipality", no. 8/2006). The petitioners contended that the procedure for the adoption of the Statute contravened Amendment XVI of the Constitution and the Law on Local Self-Government.

Under Amendment XVI.1 of the Constitution, local self-government is regulated by a law that is adopted with a two-thirds majority vote of the total number of representatives. There must be a majority vote by representatives from communities that are not the majority in the Republic of Macedonia. This also

applies to laws on local finance, local elections, municipal boundaries, and on the City of Skopje.

Under Article 39.1 of the Law on Local-Self Government, sessions of the municipal council are held whenever necessary, but at least once every three months. Article 39.4 provides that the date, time and meeting place of the council, and the proposed agenda, must be circulated at least seven days before the date of the meeting, in the manner defined by the statute.

II. The Constitutional Court concurred with the suggestion that the Statute of the Struga municipality was adopted in a procedure which was at odds with the provisions of the Law on Local Self-Government. An example could be seen in the Resolution to schedule the fourteenth session of the Council of the Struga municipality. Here, the president of the Council of the Struga municipality announced where the meeting would be held and that it would take place on 3 August at 11 a.m. He also circulated the agenda, which was published on 28 July 2006. This contravened Article 39.4 of the Law on Local Self-Government because the calling of the meeting and the circulation of the agenda did not take place seven days before the meeting, but within the seven day period itself.

The Court also concurred with the petitioners' argument that the Statute of the municipality was adopted by a procedure which breached Article 41.3 of the Law on Local Self-Government, in that there was not a majority vote by the councillors representing communities which did not form the majority population in the municipality.

Under Article 41.1 of the Law on Local Self-Government, the council may proceed if the session is attended by the majority of the total number of members of the council. According to Article 41.2, the council decides by a majority vote of those members present, unless legislation and statute determine otherwise. Regulations with a bearing on culture, the use of languages and alphabets spoken by less than 20% of the citizens in the municipality, the municipal coat of arms and flag which are to be used must be adopted by a majority vote of the present members of the council. There must be a majority vote by those current members of the council from communities not forming part of the majority population in the municipality (see Article 41.3).

The Court observed that the Statute adopted at the 14th session of the Council of the Struga municipality was a regulation governing the use of languages and alphabets spoken by less than 20% of the citizens in the municipality and the municipal coat of arms and flag which are to be used. The Law on Local Self-Government clearly states that the Statute, being an act of the municipality, should be adopted in a procedure complying with rules about quorum as well as the requirement for a majority vote by those current members of the council from communities not forming part of the majority population.

The minutes from the 14th session of the Council of the Struga municipality show that eighteen councillors voted at the meeting. Seventeen voted for the proposal and one abstained. Members of the council from communities not forming part of the majority population in the municipality were not present. This contravened Article 41.3 of the Law on Local Self-Government.

The Constitutional Court held that in this instance, the Statute of the Struga municipality was not in conformity with Amendment XVI of the Constitution or with Articles 39.4 and 41.3 of the Law on Local Self-Government.

Languages:

Macedonian, English.

Turkey
Constitutional Court

Important decisions

Identification: TUR-2007-1-001

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 07.02.2007 / **e)** E.2007/5, K.2007/18 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 24.03.2007, 26472 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

2.1.1.1.1 **Sources** – Categories – Written rules – National rules – Constitution.
4.4.1.2 **Institutions** – Head of State – Powers – Relations with the executive powers.
4.6.8.1 **Institutions** – Executive bodies – Sectoral decentralisation – Universities.
5.4.21 **Fundamental Rights** – Economic, social and cultural rights – Scientific freedom.

Keywords of the alphabetical index:

University / University, autonomy / University, founding or recognition.

Headnotes:

The scientific autonomy of universities requires the intervention by the Higher Education Board in the process of nominating university rectors. If the Board cannot use its legal powers in an efficient and effective way, this is unconstitutional and runs counter to the scientific autonomy of universities.

Summary:

Law no. 5573, of 11 January 2007 amended a number of laws including the Law on Higher Education. Several new state universities were established under that law, and several provisions dealt with appointment procedures for the founding rectors of those universities. The case is mainly concerned with appointment procedures for rectors to new universities.

The President of the Republic and a group of deputies asked the Constitutional Court to assess the compliance of provisional Article 1 of Law no. 5573 with the Constitution. The provision in question stipulates that the founding rectors of universities set up under this Law are to be chosen and appointed by the President of the Republic for a two year term. He will choose from three candidates, in turn chosen by the Minister of Education, from six professorial candidates selected by the General Assembly of the Council of Higher Education by a three quarter majority within one month of the enactment of this legislation. If the General Assembly cannot select its candidates within one month, the Minister of Education will put three candidates forward to the President of the Republic.

The Constitutional Court had annulled a similar provision before the contested Law was introduced. See decision of the Constitutional Court: E.2006/51, K.2006/57 of 4 May 2006. The provision at issue there was Provisional Article 1 of Law no. 5467. This provided that founding rectors of the universities established by the Law would be appointed by the President of the Republic. He would select from three candidates submitted by the Minister of Education and by the Prime Minister for a two year term. After that decision, Parliament introduced Law no. 5573, Provisional Article 1.

Article 153.6 of the Constitution requires Constitutional Court decisions to be published immediately in the Official Gazette, and states that they are binding on legislative, executive, and judicial organs, on administrative authorities, and on persons and corporate bodies. When enacting new legislation, legislators must observe decisions made by the Constitutional Court on the same issues. They must not reintroduce provisions annulled by the Court. Legislators are bound by the reasoning in Constitutional Court decisions, not simply their results. Constitutional Court decisions comprise evaluation criteria for the legislative process, which is why it is important that new legal provisions with the same content or of the same type should not be introduced, even if the letter of the new Law differs from the old one.

Provisional Article 1 of the Law no. 5467, which was repealed by the Constitutional Court, differed from the provision of Law no. 5573, in that the Higher Education Council did not have a role in the appointment process for rectors to the newly established universities. Law no. 5573 gave the Council certain powers and duties. The new regulation accordingly differed from the repealed provisions both in form and in content. The Court did not find any contravention of Article 153 of the

Constitution within the provision. However, the court made reference to its decision of 4 May 2006, numbered E.2006/51, K.2006/57, and used mainly the same reasoning.

It examined Article 130.1 of the Constitution, which states that universities are to be established by law as public bodies, with autonomy over their teaching. Article 130.9 states that the establishment of universities, their duties, their senates and administrative bodies are to be regulated by law.

"Case-law and legal doctrine both demonstrate that scientific autonomy is regarded as indispensable to the performance of scientific studies within universities. Scientific autonomy is defined as the possibility of education, research, publication and other scientific activities by university staff without pressure and direction from legal or other bodies wielding economic and political power. University staff should not feel that they are under pressure to reach conclusions which match generally accepted ideas and perceptions within society.

Administrative functions and the decision-making powers of universities are pivotal to the determination of the extent of their scientific autonomy, particularly at the stages of education, research and publication. Autonomy within universities must be structured in such a way that the university administration is not influenced by political power.

The principles of scientific and administrative autonomy are clearly inter-dependent. That is why scientific autonomy is given prominence in Article 130 of the Constitution, and a measure of protection is given to universities, to ensure their administrative autonomy.

Under Article 104 of the Constitution, the President of the Republic may appoint University rectors. Article 130.6 of the Constitution requires him to select them in accordance with the procedures and provisions prescribed by law. Thus, the President of the Republic has the power to select university rectors as well as the power to appoint them. However, the Constitution does not specify whether he should appoint them directly or from a list suggested by another authority. The qualifications required by University Rectors are not mentioned in the Constitution either. Parliament has competence within this sphere, and it is clear that provisions related to the nomination of rectors are to be regulated by law. Any such regulation must, however, be drafted in such a way that the President of the Republic can exercise his power of appointment in the way which was intended and without infringing the scientific autonomy of the universities.

The principle of scientific autonomy and the provisions of Article 131 of the Constitution require that the Council of Higher Education should have influence over and involvement in the process of appointment of University Rectors. They represent the university as a whole and have prime responsibility for education, scientific research and publication activities, and university administration and inspection matters. As Law no. 5467 has set up new universities, the process of appointment of their rectors may be different from that stipulated in Law no. 2547 on Higher Education. This does not mean that the Council of Higher Education may be excluded from the nomination process in new universities."

The provision under dispute requires the General Assembly of the Council of Higher Education to put forward six candidates as rectors of the newly established universities by a three quarters majority within one month of the enactment of the legislation. If the Council is not able to designate a group of candidates within a month, then the Minister of National Education will do so.

However, an examination of Article 6.c of Law no. 2547 on Higher Education shows that the quorum of meetings of the General Assembly of the Higher Education Board is fourteen and decisions are to be taken by an absolute majority. In summary, the General Assembly which has twenty one members altogether may convene with fourteen members and take its decisions by a vote of eight members. However, Law no. 5537 requires a vote by sixteen members (a three quarter majority) in order to select candidates for founder rectors. This regulation makes it virtually impossible for candidates to be chosen by the General Assembly of the Higher Education Board. Where they are unable to do so, the Minister of National Education chooses the candidates. The Higher Education Board has not, therefore, been incorporated into the selection system in an efficient and effective way. If the Board struggles to use its powers, this cannot be reconciled with the principle of scientific autonomy. It is also contrary to the constitutional regulations on the duties and competence of the Higher Education Board.

The Court accordingly directed the repeal of the provisional Article 1 of the Law no. 5573.

Supplementary information:

The part of the précis in quotation marks is taken from the précis TUR-2006-2-007 in Codices, as the Court has in part used the same reasoning on this occasion.

Languages:

Turkish.

Identification: TUR-2007-1-002

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 22.02.2006 / **e)** E.2006/20, K.2006/25 / **f)** / **g)** Resmi Gazete (Official Gazette), 10.01.2007, 26399 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

1.5.4.1 **Constitutional Justice** – Decisions – Types – Procedural decisions.
2.1.1.1.1 **Sources** – Categories – Written rules – National rules – Constitution.
2.1.1.4.2 **Sources** – Categories – Written rules – International instruments – Universal Declaration of Human Rights of 1948.
4.7.9 **Institutions** – Judicial bodies – Administrative courts.
5.3.13.9 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Public hearings.

Keywords of the alphabetical index:

Procedure, administrative, fairness / Stay of execution in administrative cases / Right to take part in court proceedings.

Headnotes:

The Constitution sets out conditions for stay of execution orders in administrative cases. The legislature cannot delay the delivery of such orders by bringing in new procedural rules as to the hearing and presentation of submissions by administrative agencies in administrative cases. Where two conditions for a stay of execution exist in a specific administrative case, the Council of State should have the competence to deliver the stay of execution order.

Summary:

The Council of State requested a ruling from the Constitutional Court as to the compliance of Article 105.3 of the Banking Law, no. 5411, with the Constitution. This provision stipulates that separate hearings should be held for requests for stay of execution in administrative cases filed against decisions by the Banking Regulation and Supervision Board. The thirty-day period specified in Article 17.5 of the Administrative Procedures Law No. 2577 will not apply in these cases. Applications for stay of execution shall not be delivered until the Banking Regulation and Supervision Agency has presented its case to the Court. Parties are to present their submissions within seven days after the notification of the stay of execution request. Otherwise, the decision shall be delivered in default of a response from the defence.

Under the Administrative Procedures Law, it is not obligatory for a hearing to be held in order to deliver an order for stay of execution in administrative actions and parties may present their submissions within thirty days of the request for a stay. However, the Banking law brought in new rules for stay of execution requests in cases arising from decisions by the Banking Regulation and Supervision Board.

Article 36 of the Constitution provides that everyone has the right to litigate, either in the capacity of a plaintiff or a defendant, and the right to a fair trial before the courts through lawful means and procedures.

Freedom to assert one's rights is vital for strengthening social harmony, and it is a modern way to achieve justice, to have one's rights vindicated and to eradicate injustice. It has a unique place within international law, and is provided for in Articles 6-12 of the Universal Declaration of Human Rights. The freedom to assert one's rights is one of the criteria of the rule of law and it is a requirement of and an indispensable condition for modern democracy.

Article 142 of the Constitution provides that the organisation, functions and jurisdiction of the courts and their trial procedures shall be regulated by law. The precautionary measures taken by the courts before the final decision is one of the procedural rules to ensure the applicability and validity of final decisions. The rules on stay of execution of the administrative decisions may be freely regulated by the legislature, provided that those rules are not contrary to the Constitution.

However, Article 125.5 of the Constitution gives two preconditions for a decision on stay of execution. If the implementation of an administrative act results in damage for which it is difficult or impossible to provide compensation, and at the same time this act is clearly unlawful, then a stay may be ordered.

Reasons for the decision will be given. There are no other conditions in the Constitution on stay of execution orders.

The disputed provisions of Law no. 5411 prevent the Council of State from delivering an order for a stay until the Agency has presented its case to the Court. Even if the normal period for presenting submissions is shortened to seven days, there will still be a time lapse before the hearing is held. The delivery of the order to stay will be held up, and the provision could in fact give rise to damage for which it is difficult or impossible to provide compensation. The aim of stays of execution is to ensure individuals use their right of litigation in a more efficient way. It was held that the above provision had a negative impact on legal interests pursued by the constitutional condition, resulting in damages difficult or impossible to compensate if the administrative act was implemented. Article 105.3 of the Banking Law infringes the freedom to assert one's rights. It was held to be contrary to Articles 2, 36 and 125 of the Constitution and it was repealed. Justices H. Kilic, A. Akyalcin, S. Ozguldur and S. Kaleli put forward a dissenting opinion.

Languages:

Turkish.

United States of America
Supreme Court

Important decisions

Identification: USA-2007-1-001

a) United States of America / **b)** Supreme Court / **c)** / **d)** 18.04.2007 / **e)** 05-785 / **f)** Gonzales v. Carhart / **g)** 127 *Supreme Court Reporter* 1610 (2007) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

1.3.2.2 **Justice constitutionnelle** – Compétences – Types de contrôle – Contrôle abstrait / concret.
3.12 **General Principles** – Clarity and precision of legal provisions.
5.3.2 **Fundamental Rights** – Civil and political rights – Right to life.
5.3.32 **Fundamental Rights** – Civil and political rights – Right to private life.

Keywords of the alphabetical index:

Abortion, punishment, exception / Health, risk / Abortion, foetus, viability.

Headnotes:

A woman has a qualified constitutional right to choose to have an abortion.

The State has a legitimate interest in protecting the life of the fetus and may regulate the exercise of a woman's right to choose to have an abortion; however, in the case of a fetus incapable of surviving independently outside the womb, the State may not unduly interfere with the woman's right to choose.

A burden on a woman's previability right to choose to have an abortion will be undue if the regulation's purpose or effect is to impose a substantial obstacle to the woman's exercise of the right.

A prohibition of a particular abortion procedure does not require an exception for protection of a woman's health in order to be constitutionally valid.

Judicial review of the constitutionality of a legislative act does not extend to the invalidation of legislative choices in circumstances where expert authorities are not in consensus.

Summary:

I. Under the jurisprudence of the U.S. Supreme Court beginning with its 1973 decision in *Roe v. Wade* and refined in *Casey v. Planned Parenthood of Southeastern Pennsylvania* (1992), the right of privacy in the U.S. Constitution includes a woman's right to choose to have an abortion. The State, in advancing its legitimate interest in protecting the health of the woman and the life of the fetus, may regulate the exercise of this right. However, in the case of a pre-viable fetus (one incapable of surviving independently outside the womb), the State may not unduly interfere with the right to choose. In the Court's case-law, an undue burden on the previability right exists if the purpose or effect of a regulation is to impose a substantial obstacle to the woman's effective exercise of the right.

In 2003, the U.S. Congress enacted the "Partial Birth Abortion Act." The Act prohibits doctors from performing a method of abortion on pre-viable and viable fetuses known as "intact dilation and evacuation" (or "intact D&E"), except when necessary to save a woman's life. In an intact D&E, a doctor vaginally delivers a large part of a living fetus intact or largely intact for the purpose of performing an overt act to terminate the life of the partially-delivered fetus. Under the Act, a doctor who performs an intact D&E is subject to criminal prosecution, with sanctions including fines and up to two years in prison.

In two separate proceedings in the lower federal courts, the first instance and appellate courts upheld constitutional challenges to the text of the Act (so-called "facial" challenges to a legislative act, as distinct from challenges to an act's application) brought by a group of doctors and a coalition of abortion advocacy groups, respectively. The U.S. Supreme Court agreed to review the appellate court decisions and, in a judgment combining both cases, upheld the Act's constitutionality.

II. In rejecting the constitutional challenges to the Act, the Supreme Court ruled that the Act furthers the State's legitimate regulatory interest in protecting the life of the fetus. The Court cited three considerations in this regard: in addition to expressing respect for human life, the Court concluded, the Congress also was concerned with the intact D&E procedure's effects on the medical profession and its reputation, as well as the emotional trauma on women who learn with regret after an abortion about the details of the D&E procedure. The Court also cited the Congressional finding that this particular abortion procedure implicates additional ethical and moral concerns due to its "disturbing similarity to the killing of a newborn infact."

The Court also concluded that the Act does not pose a substantial obstacle to a woman's effective exercise of the right to choose and therefore is not an undue interference with the right. First, the Court rejected the claim that the Act's wording is impermissibly vague on its face. Under the void-for-vagueness doctrine, a criminal legislative act must define the criminal offense with sufficient precision so that ordinary people can understand what conduct is prohibited.

Secondly, the Court determined that prohibition of the intact D&E procedure does not pose significant health risks for women. The Act does not include an exception allowing performance of the D&E procedure when necessary to protect the health of the woman (in cases of potential injury that will not result in death, thereby not implicating the Act's exception for saving a woman's life), and in its 2000 decision in *Stenberg v. Carhart* the Court invalidated a state legislative act prohibiting the D&E procedure because it did not contain such a health exception. In the instant case, however, the Court ruled that a health exception is not constitutionally required. The Court based this determination on the existence of disagreement among medical experts on the question of whether the health of women might be endangered by the procedure's prohibition and the availability of effective alternative abortion procedures that do not pose ethical and moral concerns equivalent to those that intact D&E presents. As to the first of these considerations, the Court rejected the claim of the Act's opponents that the Act is invalid because of the existence of a certain number of medical authorities who maintain that intact D&E is necessary to protect the health of some women. To uphold this claim, the Court said, would impose too exacting a judicial standard for review of a legislative act's validity. As to the second consideration, the Court noted that the Act proscribes only one abortion procedure, and does not, for example, prohibit other methods of dilation and evacuation.

The Court also criticised the lower courts for having entertained the facial challenges to the Act. The proper means for consideration of exceptions, such as the health of the woman, would be by way of challenges to the application of the legislative act. In such challenges to application, the Court stated, the nature of the medical risk can be better quantified and balanced than in a facial attack on the text of the act itself.

Supplementary information:

Four of the Court's nine Justices dissented from the Court's decision. In their dissenting opinion, the four Justices criticised the decision on a number of grounds, including what they viewed as the Court's shift in the instant case from a close scrutiny approach to legislative regulation of the right to choose to a more relaxed approach that upholds an act's validity if the legislature had a rational basis for its action.

Cross-references:

- *Roe v. Wade*, 410 United States Reports 113, 93 *Supreme Court Reporter* 705, 35 *Lawyer's Edition Second* 147 (1973);
- *Casey v. Planned Parenthood of Southeastern Pennsylvania*, 505 *United States Reports* 833, 112 *Supreme Court Reporter* 2791, 120 *Lawyer's Edition Second* 674 (1992);
- *Stenberg v. Carhart*, 530 *United States Reports* 914, 120 *Supreme Court Reporter* 2597, 147 *Lawyer's Edition Second* 743 (2000).

Languages:

English.

Inter-American Court of Human Rights

Important decisions

Identification: IAC-2007-1-001

a) Organisation of American States / **b)** Inter-American Court of Human Rights / **c)** / **d)** 19.09.2006 / **e)** Series C 151 / **f)** Claude Reyes et al. v. Chile / **g)** Secretariat of the Court / **h)** CODICES (English, Spanish).

Keywords of the systematic thesaurus:

5.1.4 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Effective remedy.
5.3.21 **Fundamental Rights** – Civil and political rights – Freedom of expression.
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.

Keywords of the alphabetical index:

File, access, disclosure / Environment, impact / Forest, protection / *Jura novit curia*, application.

Headnotes:

The right to freedom of thought and expression protects the right of all individuals to request access to state-held information and obligates the state to provide it.

A state must provide a justification when, for any reason permitted by the American Convention on Human Rights, the state restricts access to information in a specific case.

A state's actions should be governed by the principles of disclosure and transparency in public administration that enable all persons subject to its jurisdiction to exercise the democratic control of those actions, and so that they can question, investigate and consider whether public functions are being performed adequately.

When state-held information is refused, the state must guarantee simple, prompt and effective recourse to determine whether there has been a violation of the right of the person requesting the information, and if applicable, order disclosure of the information.

Summary:

I. On 8 July 2005, the Inter-American Commission on Human Rights (hereinafter, the Commission) filed an application against the Republic of Chile to determine whether the State had violated Article 13 ACHR (Freedom of Thought and Expression) and Article 25 ACHR (Right to Judicial Protection) in relation to Article 1 ACHR (Obligation to Respect Rights) and Article 2 ACHR (Domestic Legal Effects) to the detriment of Marcel Claude Reyes, Sebastián Cox Urrejola, and Arturo Longton Guerrero.

In May 1998, Marcel Claude Reyes requested certain information concerning a proposed foreign investment project for forestry exploitation from the Foreign Investment Committee (hereinafter, FIC) of the Chilean Government. The project had caused considerable public debate owing to its potential environmental impact. When the FIC did not provide the full information requested, the alleged victims petitioned the Chilean courts to protect their right to information. The Chilean courts dismissed their petition.

II. In its judgment of 19 September 2006, the Inter-American Court of Human Rights first considered the standing of each alleged victim. The Court found that only Mr Reyes and Mr Guerrero had directly sought information from the FIC and therefore could maintain a complaint against the State under Article 13 ACHR (Freedom of Thought and Expression). Mr Urrejola joined Mr Reyes and Mr Guerrero in the petition to the Chilean Courts and therefore he could only maintain a complaint under Article 25 ACHR (Right to Judicial Protection). The Court then reviewed three questions: first, whether the State's restriction on petitioners Reyes and Guerrero's freedom to seek information under Article 13 ACHR was lawful; second, whether the administrative decision to refuse to disseminate the information to said petitioners was adopted in accordance with the guarantee of due justification protected under Article 8.1 ACHR; and third, whether the State guaranteed the right to a simple and prompt recourse embodied in Article 25.1 ACHR.

First, the Court reviewed the State's decision to reject the petitioners' request for information. The Court analysed permissible restrictions on the freedom of information allowed under Article 13 ACHR, namely, whether the restriction is based in law; whether the restriction corresponds to a purpose allowed in the American Convention; and whether the restriction was necessary in a democratic society. The Court found that, in this case, no law validated the restriction, but instead the decision entailed the complete discretion of public authorities. Further, the State's restriction did not correspond to any rationale found within the American Convention; specifically the restriction did not ensure respect for the rights or reputations of others nor protect national security, public order or public health or morals. Finally, the State failed to prove that such a restriction was necessary in a democratic society when the investment project concerned a debate that was in the public's interest. The Court held that the State had violated the right to freedom of thought and expression under Article 13 ACHR in connection with Articles 1.2 and 2 ACHR to the detriment of petitioners Reyes and Guerrero.

Next, the Court found, by *iura novit curia*, that the State had violated Article 8.1 ACHR (Right to a Fair Trial) in relation to Article 1.1 ACHR to the detriment of petitioners Reyes and Guerrero because the State administrative authority responsible for the information did not adopt a duly justified written decision that provided the reasons and norms for the rejection of the request. Article 8.1 ACHR applies to all procedural instances, whatsoever in nature, to ensure that the individual may defend himself or herself adequately with regard to any act of the State that may affect his or her rights. In this case, the administrative decision to restrict the dissemination of information adversely affected the exercise of the right to freedom of thought and expression.

Finally, the Court reviewed the Chilean court's decision to dismiss the petitioners' request for legal protection of their right to seek information. The Court found that the dismissal lacked sufficient justification because it did not explain the reason for its decision nor analyse the administrative decision to restrict access to the information. The Court thus held that the State had violated 25.1 ACHR (Right to Judicial Protection) in relation to Article 1.1 ACHR to the detriment of all the petitioners because it failed to guarantee a simple, prompt and effective recourse to protect their rights to seek information under Article 13 ACHR. The Court also found a violation of Article 8.1 ACHR (Right to a fair trial) in relation to Article 1.1 ACHR to the detriment of all petitioners because the Chilean Court did not duly justify its decision.

Consequently, the Court ordered the State, *inter alia*, to provide the information requested by the victims, if appropriate, or adopt a justified decision for a restriction. More generally, the Court also ordered the State to adopt necessary measures to guarantee the protection of the right of access to State-held information. Such measures must include an effective and appropriate administrative procedure to contemplate and process information requests. Among other forms of reparation, the Court ordered the State to publish the facts and operative paragraphs of its judgment in the Official Gazette and another newspaper of wide circulation and to provide training to public authorities responsible for attending to such information requests. Finally, the State was also ordered to pay costs and expenses.

Languages:

Spanish.

Identification: IAC-2007-1-002

a) Organisation of American States / **b)** Inter-American Court of Human Rights / **c)** / **d)** 22.09.2006 / **e)** Series C 153 / **f)** Case of Goiburú et al. v. Paraguay / **g)** Secretariat of the Court / **h)** CODICES (English, Spanish).

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

Keywords of the alphabetical index:

Burial, decent, right / Crime against humanity / Disappearance, of persons, forced / *Jus cogens, erga omnes effect* / Human right, violation, state, tolerance / Investigation, effective, requirement / Right to rehabilitation and compensation / State, responsibility, international / Treatment or punishment, cruel and unusual.

Headnotes:

The forced disappearance of persons is a crime against humanity and constitutes an illegal act that places the victim in a state of complete defencelessness, giving rise to multiple and continuing violations of several rights protected by the American Convention.

A state's international responsibility is increased when forced disappearances form part of a systematic pattern or practice applied or tolerated by the state, as well as by a state's failure to comply with the obligation to investigate such violations effectively.

The prohibition of the forced disappearance of persons and the corresponding obligation to investigate and punish those responsible has attained the status of a *jus cogens* norm of international law.

In cases of extrajudicial executions, forced disappearances and other grave human rights violations, the realisation of a prompt, serious, impartial and effective investigation, ex officio, is a fundamental element and a condition for the protection of certain rights that are affected or annulled by these situations, such as the right to personal liberty, humane treatment and life.

In cases involving the forced disappearance of persons, it can be understood that the violation of the right to mental and moral integrity of the victims' next of kin is a direct result of this phenomenon, which causes them severe anguish owing to the act itself, and which is increased, among other factors, by the constant refusal of State authorities to provide information on the whereabouts of the victim or to open an effective investigation to clarify what occurred.

In cases concerning violations to non-derogable provisions of international law, particularly the prohibition of torture and forced disappearance of persons, that take place within a context of systematic human rights violations, an obligation arises for the international community to ensure there is inter-State cooperation in relation to extradition requests, so as to eliminate impunity.

Summary:

I. On 8 June 2005 the Inter-American Commission on Human Rights (hereinafter, the Commission) filed an application against the State of Paraguay regarding

the alleged illegal and arbitrary detention, torture and forced disappearance of Agustín Goiburú Giménez, Carlos José Mancuello Bareiro and the brothers Rodolfo Feliciano and Benjamín de Jesús Ramírez Villalba, allegedly perpetrated by State agents as of 1974 and 1977, and also the partial impunity regarding these facts. Based on the above facts, the Commission requested the Court to decide whether Paraguay had incurred in the continuing violation of the rights embodied in Article 7 ACHR (Right to Personal Liberty), Article 5 ACHR (Right to Humane Treatment) and Article 4 ACHR (Right to Life), in relation to Article 1.1 ACHR, to the detriment of Agustín Goiburú Giménez, Carlos José Mancuello Bareiro, and the brothers Rodolfo and Benjamín Ramírez Villalba, the continuing violation of Article 5 ACHR (Right to Humane Treatment), in relation to Article 1.1 ACHR, to the detriment of the victims' next of kin, and the continuing violation of Article 8 ACHR (Right to a Fair Trial) and Article 25 ACHR (Judicial Protection), in relation to Article 1.1 ACHR, to the detriment of Agustín Goiburú Giménez, Carlos José Mancuello Bareiro and the brothers Rodolfo and Benjamín Ramírez Villalba, and their next of kin.

The forced disappearances of the victims had similar characteristics and occurred in the context of the systematic practice of arbitrary detention, torture, execution and disappearance perpetrated by the intelligence and security forces of the dictatorship of Alfredo Stroessner, under "Operation Condor", the code name given to the "alliance of security forces and intelligence services" of the Southern Cone dictatorships.

The courts of justice usually refused to receive and process applications for *habeas corpus* in relation to measures decreed by the Executive Power under the state of siege.

The preparation and execution of the detention and subsequent torture and disappearance of the victims could not have been perpetrated without the superior orders of the chiefs of police and intelligence, and the Head of State, or without the collaboration, acquiescence and tolerance of members of the police forces, intelligence services and even diplomatic services of the States concerned.

II. In its judgment of 22 September 2006, the Inter-American Court of Human Rights held that Paraguay had violated Article 4.1 ACHR (Right to Life), Article 5.1 and 5.2 ACHR (Right to Humane Treatment) and Article 7 ACHR (Right to Personal Liberty), to the detriment of Agustín Goiburú Giménez, Carlos José Mancuello Bareiro, Rodolfo Ramírez Villalba and Benjamín Ramírez Villalba. In addition, the Court held that the State violated Article 5.1 ACHR (Right to Humane Treatment), in relation to Article 1.1 ACHR, to the detriment of the victims' next of kin. Finally, the Court held Paraguay responsible for the violation of Article 8.1 ACHR (Right to a Fair Trial) and Article 25 ACHR (Right to Judicial Protection), in relation to Article 1.1 ACHR, to the detriment of Agustín Goiburú Giménez, Carlos José Mancuello Bareiro, Rodolfo Ramírez Villalba, Benjamín Ramírez Villalba, and also of their next of kin.

Consequently, the Court ordered the State to, *inter alia*, investigate the facts that gave rise to the violations in the instant case, and identify, prosecute and punish those responsible, including the masterminds and the perpetrators; seek and find the mortal remains of the four victims and cover the expenses of their burial; organise a public act to acknowledge its responsibility for the forced disappearance of the four victims and make a public apology to their next of kin; publish the judgement in the official gazette and in another newspaper of widespread national circulation; provide, free of charge and through the national health services, physical and psychological treatment for the next of kin; erect a monument in memory of the disappeared victims; implement permanent programs of human rights training for the Paraguayan police forces; and adapt the definition of the offences of "forced disappearance" and torture contained in the Criminal Code to the applicable provisions of international human rights law.

Supplementary information:

Judges García Ramírez and Cançado Trindade wrote separate opinions.

Languages:

Spanish.

Identification: IAC-2007-1-003

a) Organisation of American States / **b)** Inter-American Court of Human Rights / **c)** / **d)** 26.09.2006 / **e)** Series C 154 / **f)** Almonacid-Arellano et al. v. Chile / **g)** Secretariat of the Court / **h)** CODICES (English, Spanish).

Keywords of the systematic thesaurus:

1.3 **Constitutional Justice** – Jurisdiction.
2.2.1.2 **Sources** – Hierarchy – Hierarchy as between national and non-national sources – Treaties and legislative acts.
4.7.11 **Institutions** – Judicial bodies – Military courts.
4.11.1 **Institutions** – Armed forces, police forces and secret services – Armed forces.
5.3.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial.

Keywords of the alphabetical index:

Amnesty, date of effect / Crime against humanity, prosecution / Denial of justice / *Jus cogens, erga omnes effect* / Human right, violation, state / Impunity, duty of state to combat / Investigation, effective, requirement / Treaty, non-retrospective effect.

Headnotes:

It is not to be left to the will of states to decide which facts are excluded from jurisdiction of the Inter-American Court of Human Rights. This decision is a duty which is to be fulfilled by the Court in the exercise of its jurisdictional functions.

In a democratic state, the military criminal jurisdiction must have a restrictive scope, and must be exceptional and aimed at the protection of special legal interests related to the functions that the law assigns to the military. Therefore, it must only try military personnel for the commission of crimes or offences that due to their nature may affect military interests.

Crimes against humanity include the commission of inhuman acts, such as murder, committed in a context of generalised or systematic attacks against civilians. A single illegal act committed within this background would suffice for a crime against humanity.

As a norm of general international law *(jus cogens)*, states cannot neglect their duty to investigate, identify, and punish those persons responsible for crimes against humanity by enforcing amnesty laws or any other similar domestic provisions.

The judiciary is obligated to respect rights, as stated in Article 1.1 ACHR, even if the legislative power fails to set aside and/or adopts laws which are contrary to the American Convention. The judiciary therefore must exercise a sort of "conventionality control" between the domestic legal provisions, applied to specific cases, and the American Convention.

Summary:

I. On 11 July 2005, the Inter-American Commission on Human Rights (hereinafter, the Commission) filed an application against the Republic of Chile to determine whether the State had violated Article 8 ACHR (Judicial Guarantees) and Article 25 ACHR (Judicial Protection) in relation to Article 1.1 ACHR (Obligation to Respect Rights) to the detriment of Alfredo Almonacid-Arellano's next of kin. The Commission also requested that the Court declare the State in violation of Article 2 ACHR (Obligation to Adopt Domestic Legal Remedies).

On 16 September 1973, police forces arrested Mr Almonacid-Arellano at his home and then shot him as he climbed into the police truck. He died the following day. The persons responsible for his death received no sanction because a Chilean military court had dismissed the case due to an amnesty law that created limitations on criminal liability during the period of Mr Almonacid-Arellano's death. The Commission's application, therefore, related to the status of the State's amnesty provision in light of the State's alleged obligations under the American Convention to investigate and punish the persons responsible for Mr Almonacid-Arellano's death.

II. In its judgment of 26 September 2006, the Court determined that although it did not have jurisdiction *ratione temporis* to decide whether the detention and death of Mr Almonacid-Arellano violated the Convention, it did have jurisdiction to decide facts that pertained to the criminal investigation and prosecution of the alleged perpetrators of his death because such proceedings in this case constituted specific and independent violations that arose out of the denial of justice. Specifically, the Court found jurisdiction to consider three issues that pertained to the State's obligations under the American Convention: first, the transfer of the proceedings to a military court instead of a civil court, second, the enforcement of the amnesty law after the State ratified the Convention, and third, the application of such a law in this particular case.

First, the Court held that the State violated the right to judicial guarantees embodied in Article 8.1 ACHR in relation to Article 1.1 ACHR because it granted a military court jurisdiction to investigate and try the alleged perpetrators of Mr Almonacid-Arellano's murder. Such courts do not comply with the standards of competence, independence and impartiality necessary to obtain due process.

Second, the Court held that even though the amnesty law came into effect in 1978, before the Court's jurisdiction *ratione temporis*, the State bound itself to adapt its domestic legislation to the provisions of the

Convention from the moment the State ratified the Convention in August of 1990. The Court therefore specifically addressed the granting of amnesty for serious criminal acts contrary to international law by the military regime rather than the adoption of the amnesty law itself.

Third, the Court looked to the effects of the amnesty law as it pertained to the criminal investigation and prosecution of the alleged perpetrators. The Court found that at the time of Mr Almonacid-Arellano's death, such an act constituted a crime against humanity under international law because the murder occurred in the course of a generalised or systematic attack against certain sectors of the civil population. Namely, the State had developed a policy to attack sectors of the civilian population considered to be opponents of the regime. The Court held that international law, and specifically, Article 1.1 ACHR (Obligation to Respect Rights), obligates states to try and punish the perpetrators of crimes against humanity. Such crimes are therefore not subject to amnesty laws. Because the State applied the amnesty law to the criminal investigation of Mr Almonacid-Arellano's murder, the Court found the State in violation of Article 8 ACHR (Right to a Fair Trial) and Article 25 ACHR (Right to Judicial Protection) in relation to its obligations under Article 1.1 ACHR.

More generally, the Court determined that the State violated its obligation to modify its domestic legislation under Article 2 ACHR (Domestic Legal Effects) because it enforced and continues to keep in force the amnesty law which provides immunity from the prosecution of crimes against humanity.

The Court ordered the State, *inter alia*, to ensure that it does not continue to hinder the investigation, prosecution, and, as appropriate, punishment of those responsible for Mr Almonacid-Arellano's extra-legal execution and to ensure that the amnesty law does not hinder the criminal process for similar violations perpetrated in Chile. Likewise, the Court ordered the State to set aside domestic judgments that had impeded the prosecution of the case and to refer the case to a regular court. Among other forms of reparation, the Court ordered the State to publish the facts and operative paragraphs of its judgment in the Official Gazette and another newspaper of wide circulation. The State was also ordered to pay costs and expenses.

Languages:

Spanish.

European Court of Human Rights

Important decisions

Identification: ECH-2007-1-001

a) Council of Europe / **b)** European Court of Human Rights / **c)** Chamber / **d)** 13.02.2007 / **e)** 75252/01 / **f)** Evaldsson and others v. Sweden / **g)** *Reports of Judgments and Decisions of the Court* / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
3.18 **General Principles** – General interest.
3.19 **General Principles** – Margin of appreciation.
5.1.3 **Fundamental Rights** – General questions – Positive obligation of the state.
5.3.39.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.
5.4.11 **Fundamental Rights** – Economic, social and cultural rights – Freedom of trade unions.

Keywords of the alphabetical index:

Trade union, fee, deduction, mandatory / Labour relation / Employment, collective agreement.

Headnotes:

A system in which power to regulate important labour issues has been delegated to independent organisations requires that those organisations be held accountable for their activities, implying a positive obligation on the part of the State.

The levying of a fee on employees' wages for the purpose of financing a trade union's wage monitoring activities constitutes a deprivation of property. Such a levy may be regarded as pursuing a legitimate aim in the public interest, in so far as it is aimed at protecting the interests of employees in general.

It is not proportionate to the "public interest" to make deductions from the wages of employees who do not belong to any trade union to finance the wage monitoring activities of a union, without giving them a proper opportunity to check that the fees are not used to finance other activities which the individuals concerned would not support.

Summary:

I. The five applicants were employed in the construction industry by a company which was bound by a collective agreement concluded between the Swedish Building Workers' Union ("the Union") and the Swedish Construction Industries ("the Industries"). Under the agreement, the local branch of the Union had the right to inspect wage conditions and was entitled to reimbursement of the costs involved, by means of a 5% levy on employees' wages. At the request of the applicants, who were not members of any trade union, the company granted them exemption from the deduction. The Industries applied to the Labour Court for a declaratory judgment to the effect that the company was not obliged to levy the fees in question, submitting that since the inspection fees greatly exceeded the actual costs of the work involved and were thus used for the general activities of the Union – with whose political values the applicants did not agree – the deductions were tantamount to forced union membership. The Labour Court rejected the application.

II. In their application to the Court, the applicants complained that the levying of the monitoring fee violated their property rights, as well as, *inter alia*, their negative freedom of association They relied in particular on Article 1 Protocol 1 ECHR and Article 11 ECHR.

The Court found that the deductions in question had deprived the applicants of possessions. Taking into account the fact that no State authority oversaw compliance with collective agreements, this being left to the parties in the labour market, the Court accepted that the levying of the fee as such could be considered to pursue a legitimate aim in the public interest, since the inspection system aimed at protecting the interests of construction workers generally. As to proportionality, the Court accepted that workers not belonging to any trade union nevertheless received a certain service in return for the fee paid. The available financial information did not allow it to draw any completely reliable conclusion as to whether the fees had generated any surplus which was used to finance activities other than wage monitoring, but given that the collective agreement provided that only the actual cost of the monitoring was to be covered by the fees, the Court considered that the applicants were entitled to information which was sufficiently exhaustive for them to verify that the fees were not used for any other purpose, in particular since they did not support the Union's political agenda. However, the data available to them was not sufficient for that purpose. While the State had a wide margin of appreciation in the organisation of the labour market, a system which in reality delegated power to regulate important labour issues to independent organisations required that those organisations be held accountable for their activities. The State thus had a positive obligation to protect the applicants' interests. However, the Union's wage monitoring activities lacked the necessary transparency and, even having regard to the limited amounts of money involved, it was not proportionate to the "public interest" to make deductions from the applicants' wages without giving them a proper opportunity to check how that money was spent. There had therefore been a violation of Article 1 Protocol 1 ECHR. The Court did not consider it necessary to examine separately the applicants' other complaints.

Cross-references:

- *Sporrong and Lönnroth v. Sweden*, Judgment of 23.09.1982, Series A, no. 52; *Special Bulletin Leading Cases ECHR* [ECH-1982-S-002];
- *James and Others v. the United Kingdom*, Judgment of 21.02.1986, Series A, no. 98.

Languages:

English, French.

Identification: ECH-2007-1-002

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 10.04.2007 / **e)** 6339/05 / **f)** Evans v. the United Kingdom / **g)** *Reports of Judgments and Decisions of the Court* / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.17 **General Principles** – Weighing of interests.
3.19 **General Principles** – Margin of appreciation.
5.3.32 **Fundamental Rights** – Civil and political rights – Right to private life.

Keywords of the alphabetical index:

Motherhood, right / Procreation, medically assisted / Embryo, fertilised / Gamete, implantation, consent, withdrawal / *In vitro* fertilisation, consent, withdrawal.

Headnotes:

The notion of private life incorporates the right to respect for the decision to become or not to become a parent.

States have a wide margin of appreciation in deciding whether or not to enact legislation governing the use of *in vitro* fertilisation (IVF) treatment, as well as in determining the detailed rules in order to achieve a balance between the competing public and private interests.

The possibility conferred by legislation on a gamete provider to withdraw his consent to implantation of fertilised eggs in the uterus of his former partner, as a result of which she will be unable to have any children of her own, does not fail to strike a fair balance between the competing interests.

Summary:

I. In July 2000 the applicant and her partner J. started fertility treatment. In October 2000, during an appointment at the clinic, the applicant was diagnosed with a pre-cancerous condition of her ovaries and offered one cycle of *in vitro* fertilisation (IVF) treatment prior to the surgical removal of her ovaries. During the consultation she and J. were informed that they would each need to sign a form consenting to the treatment and that, in accordance with the provisions of the Human Fertilisation and Embryology Act 1990, it would be possible for either of them to withdraw consent at any time before the embryos were implanted in the applicant's uterus. The applicant considered whether she should explore other means of having her remaining eggs fertilised, to guard against the possibility of her relationship with J. ending but J. reassured her that that would not happen. In November 2001 the couple attended the clinic for treatment, resulting in the creation of six embryos which were placed in storage. Two weeks later the applicant underwent an operation to remove her ovaries. She was told she would need to wait for two years before the implantation of the embryos in her uterus. In May 2002 the relationship between the applicant and J. ended and subsequently he informed the clinic that he did not consent to her using the embryos alone or their continued storage. The applicant brought proceedings in the High Court seeking, among other things, an injunction to require J. to give his consent. Her application was refused in October 2003, J. having been found to have acted in good faith, as he had embarked on the treatment on the basis that his relationship with the applicant would continue. In October 2004 the Court of Appeal upheld the High Court's judgment. Leave to appeal was refused.

II. In her application to the Court the applicant complained that domestic law permitted her former partner to withdraw his consent to the storage and use of the embryos, thus preventing her from ever having a child to whom she was genetically related. She relied in particular on Article 8 ECHR.

The Court accepted that "private life" incorporated the right to respect for both the decisions to become and not to become a parent. However, the applicant had not complained that she was in any way prevented from becoming a mother in a social, legal, or even physical sense, since there was no rule of domestic law or practice to stop her from adopting a child or even giving birth to a child originally created *in vitro* from donated gametes. Her complaint was, more precisely, that the consent provisions of the 1990 Act had prevented her from using the embryos she and J. had created together, and thus, given her particular circumstances, from ever having a child to whom she was genetically related. That more limited issue, concerning the right to respect for the decision to become a parent in the genetic sense, fell within the scope of Article 8 ECHR. The dilemma central to the case was that it involved a conflict between the Article 8 ECHR rights of two private individuals: the applicant and J. Moreover, each person's interest was entirely irreconcilable with the other's, since if the applicant were permitted to use the embryos, J. would be forced to become a father, whereas if J.'s refusal or withdrawal of consent were upheld, the applicant would be denied the opportunity of becoming a genetic parent. In the difficult circumstances of the case, whatever solution the national authorities might adopt would result in the interests of one of the parties being wholly frustrated. The legislation also served a number of wider, public interests, such as upholding the principle of the primacy of consent and promoting legal clarity and certainty.

The Court considered that it was appropriate to analyse the case as one concerning positive obligations. The principal issue was whether the legislative provisions as applied in the case struck a fair balance between the competing public and private interests involved. In that regard, the findings of the domestic courts that J. had never consented to the applicant using the jointly created embryos alone were accepted.

The issues raised by the case were undoubtedly of a morally and ethically delicate nature. In addition, there was no uniform European approach in the field. Certain States had enacted primary or secondary legislation to control the use of IVF treatment, whereas in others that was a matter left to medical practice and guidelines. While the United Kingdom was not alone in permitting storage of embryos and in providing both gamete providers with the power freely and effectively to withdraw consent up until the

moment of implantation, different rules and practices were applied elsewhere in Europe. It could not be said that there was any consensus as to the stage in IVF treatment when the gamete providers' consent became irrevocable. While the applicant contended that her greater physical and emotional expenditure during the IVF process, and her subsequent infertility, entailed that her Article 8 ECHR rights should take precedence over J.'s, it did not appear that there was any clear consensus on that point either. In conclusion, therefore, since the use of IVF treatment gave rise to sensitive moral and ethical issues against a background of fast-moving medical and scientific developments, and since the questions raised by the case touched on areas where there was no clear common ground amongst the Member States, the margin of appreciation afforded to the respondent State had to be a wide one and extend in principle both to the State's decision whether or not to enact legislation governing the use of IVF treatment and, once having intervened, to the detailed rules it laid down in order to achieve a balance between the competing public and private interests.

The remaining question, therefore, was whether, in the special circumstances of the case, the application of a law which permitted J. effectively to withdraw or withhold his consent to the implantation in the applicant's uterus of the embryos created jointly by them struck a fair balance between the competing interests. The fact that it had become technically possible to keep human embryos in frozen storage gave rise to an essential difference between IVF and fertilisation through sexual intercourse, namely the possibility of allowing a lapse of time, which might be substantial, to intervene between the creation of the embryo and its implantation in the uterus. It was therefore legitimate and desirable for a State to set up a legal scheme which took that possibility of delay into account. The decision as to the principles and policies to be applied in this sensitive field was primarily for each State to determine. The 1990 Act was the culmination of an exceptionally detailed examination of the social, ethical and legal implications of developments in the field of human fertilisation and embryology, and the fruit of much reflection, consultation and debate. It placed a legal obligation on any clinic carrying out IVF treatment to explain the consent provisions to a person embarking on such treatment and to obtain his or her consent in writing. That had occurred in the applicant's case, and the applicant and J. had both signed the consent forms required by the law. However, the Act also permitted the gamete providers to withdraw their consent at any time until the embryo was implanted in the uterus. While the pressing nature of the applicant's medical condition had required her to make a decision quickly and under extreme stress, she had known, when she consented to have all her eggs fertilised with J.'s sperm, that they would be the last eggs available to her, that it would be some time before her cancer treatment was completed and any embryos could be implanted, and that, as a matter of law, J. would be free to withdraw his consent to implantation at any moment. While the applicant had criticised the national rules on consent for the fact that they could not be disapplied in any circumstances, the absolute nature of the law was not, in itself, necessarily inconsistent with Article 8 ECHR. Respect for human dignity and free will, as well as a desire to ensure a fair balance between the parties to IVF treatment, underlay the legislature's decision to enact provisions permitting of no exception to ensure that every person donating gametes for the purpose of IVF treatment would know in advance that no use could be made of his or her genetic material without his or her continuing consent. In addition to the principle at stake, the absolute nature of the rule served to promote legal certainty and to avoid the problems of arbitrariness and inconsistency inherent in weighing, on a case by case basis, what had been described by the domestic courts as "entirely incommensurable" interests. Those general interests were legitimate and consistent with Article 8 ECHR. Given these considerations, including the lack of any European consensus on the point, the Court did not consider that the applicant's right to respect for the decision to become a parent in the genetic sense should be accorded greater weight than J.'s right to respect for his decision not to have a genetically-related child with her. There had therefore been no violation of Article 8 ECHR.

Cross-references:

- *Dudgeon v. the United Kingdom*, Judgment of 22.10.1981, Series A, no. 45; *Special Bulletin Leading Cases ECHR* [ECH-1981-S-003];
- *X. and Y. v. the Netherlands*, Judgment of 26.03.1985, Series A, no. 91;
- *X., Y. and Z. v. the United Kingdom,* Judgment of 22.04.1997, *Reports of Judgments and Decisions* 1997-II;
- *Frette v. France,* no. 36515/97, *Reports of Judgments and Decisions* 2002-I;
- *Pretty v. the United Kingdom*, no. 2346/02, *Reports of Judgments and Decisions* 2002-III; *Bulletin* 2002/1 [ECH-2002-1-006];
- *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, *Reports of Judgments and Decisions* 2002-VI; *Bulletin* 2002/3 [ECH-2002-3-008];
- *Odièvre v. France*, no. 42326/98, *Reports of Judgments and Decisions* 2003-III.

On this subject, see in the same *Bulletin* [IRL-2007-1-003].

Languages:

English, French.

Identification: ECH-2007-1-003

a) Council of Europe / **b)** European Court of Human Rights / **c)** Chamber / **d)** 12.04.2007 / **e)** 52435/99 / **f)** Ivanova v. Bulgaria / **g)** *Reports of Judgments and Decisions of the Court* / **h)** CODICES (English).

Keywords of the systematic thesaurus:

5.2.2.6 **Fundamental Rights** – Equality – Criteria of distinction – Religion.
5.3.18 **Fundamental Rights** – Civil and political rights – Freedom of conscience.
5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of worship.

Keywords of the alphabetical index:

Employment, dismissal, religion.

Headnotes:

Dismissal from employment on account of the person's religious beliefs and adherence to a particular religious movement constitutes an unjustified interference with the right to freedom of religion.

Summary:

I. The applicant, employed as a non-academic member of staff at a school, was a member of a Christian Evangelical Group, known as "Word of Life", which had to carry out its activities clandestinely due to the authorities' refusal to register it. Its meetings were periodically thwarted by the police and the media waged a campaign against it, calling for the dismissal of its members from their employment and naming, among others, the applicant in this respect. Following inquiries by the Regional Prosecutor's Office and the National Security Service, the Regional Governor and a Member of Parliament threatened the educational inspector with dismissal unless he took radical measures to curb religious activities at the school and dismiss the principal. In October 1995 the principal was dismissed for, *inter alia*, not having dismissed members of staff who were followers of Word of Life and for tolerating its activities. Later on, the applicant was put under pressure to resign or renounce her faith, as the education inspector threatened her with dismissal, irrespective of her work performance. She refused. In a radio interview, the Member of Parliament singled out the applicant's post as still being occupied by a member of Word of Life. In December 1995 a new principal dismissed her on the ground that she did not meet the requirements for the post. A new roster of posts for the school was approved, effective as of January 1996, which transformed the applicant's post into a new one, with essentially the same duties and responsibilities, but requiring a university degree. The applicant brought proceedings in the District Court, claiming that her dismissal had been unlawful and had amounted to religious discrimination. The court dismissed her claims and her appeal was unsuccessful.

In her application to the Court, the applicant complained that she had been dismissed from her employment on account of her religious beliefs. She alleged that this constituted a violation of her right to freedom of religion. She relied on Article 9 ECHR.

II. The Court considered that at the heart of the case was the question whether the applicant's employment had been terminated solely as a result of the school's need to change the requirements for her post or whether she had been dismissed because of her religious beliefs. The Government's submissions on that point had been somewhat ambiguous and contradictory. By assessing the sequence of events in their entirety, the Court reached the conclusion that the applicant's employment had been terminated, in reality, because of her religious beliefs and affiliation to Word of Life. That constituted an interference with her right to freedom of religion which was at variance with Article 9 ECHR. The fact that the applicant's employment had been terminated in accordance with the applicable labour legislation – by introducing new requirements for her post which she failed to meet – did not eliminate the substantive motive for her dismissal. The Court considered that the State's responsibility was engaged by the fact that the applicant was employed as a non-academic staff member at the school, which was under the direct supervision of the Ministry. Moreover, it noted that there had been activities such as the breaking up of gatherings of Word of Life around the country and the involvement of other authorities and officials in these events, which hinted at a policy of intolerance on the part of the authorities during the relevant period towards Word of Life, its activities and followers. The dismissal of the applicant soon after the appointment

of a new principal appeared to have resulted directly from the implementation of that policy. There had therefore been a violation of Article 9 ECHR.

Cross-references:

- *Knudsen v. Norway*, no. 11045/84, Commission decision of 08.03.1985, *Decisions and Reports* 42;
- *Vogt v. Germany*, Judgment of 26.09.1995, Series A, no. 323; *Bulletin* 1995/3 [ECH-1995-3-014];
- *Konttinen v. Finland*, no. 24949/94, Commission decision of 03.12.1996, unreported;
- *Kokkinakis v. Greece*, Judgment of 25.05.1993, Series A, no. 260-A; *Special Bulletin Leading Cases ECHR* [ECH-1993-S-002].

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 **Constitutional Justice**[1]

1.1 **Constitutional jurisdiction**[2]
- 1.1.1 Statute and organisation
  - 1.1.1.1 Sources
    - 1.1.1.1.1 Constitution
    - 1.1.1.1.2 Institutional Acts
    - 1.1.1.1.3 Other legislation
    - 1.1.1.1.4 Rule issued by the executive
    - 1.1.1.1.5 Rule adopted by the Court[3]
  - 1.1.1.2 Independence
    - 1.1.1.2.1 Statutory independence
    - 1.1.1.2.2 Administrative independence
    - 1.1.1.2.3 Financial independence
- 1.1.2 Composition, recruitment and structure
  - 1.1.2.1 Necessary qualifications[4]
  - 1.1.2.2 Number of members
  - 1.1.2.3 Appointing authority
  - 1.1.2.4 Appointment of members[5]
  - 1.1.2.5 Appointment of the President[6]
  - 1.1.2.6 Functions of the President / Vice-President
  - 1.1.2.7 Subdivision into chambers or sections
  - 1.1.2.8 Relative position of members[7]
  - 1.1.2.9 Persons responsible for preparing cases for hearing[8]
  - 1.1.2.10 Staff[9]
    - 1.1.2.10.1 Functions of the Secretary General / Registrar
    - 1.1.2.10.2 Legal Advisers
- 1.1.3 Status of the members of the court
  - 1.1.3.1 Term of office of Members
  - 1.1.3.2 Term of office of the President
  - 1.1.3.3 Privileges and immunities
  - 1.1.3.4 Professional incompatibilities
  - 1.1.3.5 Disciplinary measures
  - 1.1.3.6 Remuneration
  - 1.1.3.7 Non-disciplinary suspension of functions
  - 1.1.3.8 End of office
  - 1.1.3.9 Members having a particular status[10]
  - 1.1.3.10 Status of staff[11]

---

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.

1.3.4.7 Restrictive proceedings
1.3.4.7.1 Banning of political parties
1.3.4.7.2 Withdrawal of civil rights
1.3.4.7.3 Removal from parliamentary office
1.3.4.7.4 Impeachment
1.3.4.8 Litigation in respect of jurisdictional conflict
1.3.4.9 Litigation in respect of the formal validity of enactments[21]
1.3.4.10 Litigation in respect of the constitutionality of enactments
1.3.4.10.1 Limits of the legislative competence
1.3.4.11 Litigation in respect of constitutional revision
1.3.4.12 Conflict of laws[22]
1.3.4.13 Universally binding interpretation of laws
1.3.4.14 Distribution of powers between Community and member states
1.3.4.15 Distribution of powers between institutions of the Community
1.3.5 The subject of review
1.3.5.1 International treaties
1.3.5.2 Community law
1.3.5.2.1 Primary legislation
1.3.5.2.2 Secondary legislation
1.3.5.3 Constitution[23]
1.3.5.4 Quasi-constitutional legislation[24]
1.3.5.5 Laws and other rules having the force of law....98, 136
1.3.5.5.1 Laws and other rules in force before the entry into force of the Constitution
1.3.5.6 Decrees of the Head of State
1.3.5.7 Quasi-legislative regulations
1.3.5.8 Rules issued by federal or regional entities
1.3.5.9 Parliamentary rules
1.3.5.10 Rules issued by the executive
1.3.5.11 Acts issued by decentralised bodies
1.3.5.11.1 Territorial decentralisation[25]
1.3.5.11.2 Sectoral decentralisation[26]
1.3.5.12 Court decisions 38
1.3.5.13 Administrative acts....131
1.3.5.14 Government acts[27]
1.3.5.15 Failure to act or to pass legislation[28] 15, 41, 62

1.4 **Procedure**
1.4.1 General characteristics[29]
1.4.2 Summary procedure
1.4.3 Time-limits for instituting proceedings
1.4.3.1 Ordinary time-limit
1.4.3.2 Special time-limits
1.4.3.3 Leave to appeal out of time
1.4.4 Exhaustion of remedies
1.4.5 Originating document
1.4.5.1 Decision to act[30]
1.4.5.2 Signature
1.4.5.3 Formal requirements

---

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.

2 Sources

2.1 Categories[36]

- 2.1.1 Written rules
  - 2.1.1.1 National rules
    - 2.1.1.1.1 Constitution....15, 129, 144, 146
    - 2.1.1.1.2 Quasi-constitutional enactments[37]
  - 2.1.1.2 National rules from other countries
  - 2.1.1.3 Community law 104
  - 2.1.1.4 International instruments....37, 104, 137
    - 2.1.1.4.1 United Nations Charter of 1945
    - 2.1.1.4.2 Universal Declaration of Human Rights of 1948....146
    - 2.1.1.4.3 Geneva Conventions of 1949
    - 2.1.1.4.4 European Convention on Human Rights of 1950[38] 15, 77, 134
    - 2.1.1.4.5 Geneva Convention on the Status of Refugees of 1951
    - 2.1.1.4.6 European Social Charter of 1961
    - 2.1.1.4.7 International Convention on Elimination of all Forms of Racial Discrimination of 1965
    - 2.1.1.4.8 International Covenant on Civil and Political Rights of 1966
    - 2.1.1.4.9 International Covenant on Economic, Social and Cultural Rights of 1966 11
    - 2.1.1.4.10 Vienna Convention on the Law of Treaties of 1969
    - 2.1.1.4.11 American Convention on Human Rights of 1969
    - 2.1.1.4.12 Convention on the Elimination of all Forms of Discrimination against Women of 1979
    - 2.1.1.4.13 African Charter on Human and Peoples' Rights of 1981
    - 2.1.1.4.14 European Charter of Local Self-Government of 1985
    - 2.1.1.4.15 Convention on the Rights of the Child of 1989
    - 2.1.1.4.16 Framework Convention for the Protection of National Minorities of 1995
    - 2.1.1.4.17 Statute of the International Criminal Court of 1998
    - 2.1.1.4.18 Charter of Fundamental Rights of the European Union of 2000
    - 2.1.1.4.19 International conventions regulating diplomatic and consular relations
- 2.1.2 Unwritten rules
  - 2.1.2.1 Constitutional custom
  - 2.1.2.2 General principles of law
  - 2.1.2.3 Natural law
- 2.1.3 Case-law
  - 2.1.3.1 Domestic case-law
  - 2.1.3.2 International case-law
    - 2.1.3.2.1 European Court of Human Rights 5, 7, 15, 34, 119
    - 2.1.3.2.2 Court of Justice of the European Communities....104
    - 2.1.3.2.3 Other international bodies
  - 2.1.3.3 Foreign case-law....110

2.2 Hierarchy

- 2.2.1 Hierarchy as between national and non-national sources
  - 2.2.1.1 Treaties and constitutions
  - 2.2.1.2 Treaties and legislative acts....104, 152
  - 2.2.1.3 Treaties and other domestic legal instruments 37
  - 2.2.1.4 European Convention on Human Rights and constitutions
  - 2.2.1.5 European Convention on Human Rights and non-constitutional domestic legal instruments
  - 2.2.1.6 Community law and domestic law....104
    - 2.2.1.6.1 Primary Community legislation and constitutions
    - 2.2.1.6.2 Primary Community legislation and domestic non-constitutional legal instruments

---

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.
52 Including the body responsible for revising or amending the Constitution.

4.4 **Head of State**
- 4.4.1 Powers
  - 4.4.1.1 Relations with legislative bodies[53]
  - 4.4.1.2 Relations with the executive powers[54] 144
  - 4.4.1.3 Relations with judicial bodies[55] 88
  - 4.4.1.4 Promulgation of laws
  - 4.4.1.5 International relations
  - 4.4.1.6 Powers with respect to the armed forces
  - 4.4.1.7 Mediating powers
- 4.4.2 Appointment
  - 4.4.2.1 Necessary qualifications
  - 4.4.2.2 Incompatibilities
  - 4.4.2.3 Direct election
  - 4.4.2.4 Indirect election
  - 4.4.2.5 Hereditary succession
- 4.4.3 Term of office
  - 4.4.3.1 Commencement of office
  - 4.4.3.2 Duration of office
  - 4.4.3.3 Incapacity
  - 4.4.3.4 End of office 114
  - 4.4.3.5 Limit on number of successive terms
- 4.4.4 Status
  - 4.4.4.1 Liability
    - 4.4.4.1.1 Legal liability
      - 4.4.4.1.1.1 Immunity
      - 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]
- 4.5.2 Powers[58] 7, 42
  - 4.5.2.1 Competences with respect to international agreements
  - 4.5.2.2 Powers of enquiry[59] 102
  - 4.5.2.3 Delegation to another legislative body[60]
  - 4.5.2.4 Negative incompetence[61]
- 4.5.3 Composition
  - 4.5.3.1 Election of members
  - 4.5.3.2 Appointment of members
  - 4.5.3.3 Term of office of the legislative body
    - 4.5.3.3.1 Duration
  - 4.5.3.4 Term of office of members
    - 4.5.3.4.1 Characteristics[62]
    - 4.5.3.4.2 Duration
    - 4.5.3.4.3 End
- 4.5.4 Organisation[63]
  - 4.5.4.1 Rules of procedure
  - 4.5.4.2 President/Speaker
  - 4.5.4.3 Sessions[64]

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.

Council of Europe Publishing
Editions du Conseil de l'Europe

Order Form/Bon de commande

Surname/Nom _____ Forename/Prénom _____

Institution _____

Address/Adresse _____

Town/Ville _____Postcode/Code postal _____ Country/Pays _____

Tel/Tél _____ Fax _____

Subscription formulas for the Bulletin on Constitutional Case-Law and the database CODICES (post and packing free):
Formules d'abonnement au Bulletin de jurisprudence constitutionnelle et à la base de données CODICES (franco de port):

Description	Prix (€) Europe Price (US$) rest of the world	Quantity Quantité	Total
3 Bulletins & Special Bulletins (one language) 3 Bulletins & Bulletins spéciaux (dans une langue)	€ 76,22/US$ 114		
3 CD-ROMs	€ 76,22/US$ 114		
3 Bulletins & Special Bulletins + 3 CD-ROMs 3 Bulletins & Bulletins spéciaux + 3 CD-ROMs	€ 121,95/US$ 182		
All previous Bulletins since 1993 (one language) Tous les Bulletins précédents depuis 1993 (dans une langue)	€ 304,89/US$ 457		
1 Bulletin or Special Bulletin (specify ……..) 1 Bulletin ou Bulletin spécial (spécifier ……)	€ 30,48/US$ 50		
☐ English-Anglais ☐ French-Français		Total	

VAT: Note to customers from the European Union: The services of the Council of Europe, which is an international organisation exempt from VAT and whose relations with member States come under the General Agreement on Privileges and Immunities of the Council of Europe, shall be likewise free from VAT.

TVA: Mention à l'attention des clients domiciliés dans l'Union européenne: les prestations du Conseil de l'Europe, organisation internationale non assujettie à la TVA, et dont les relations avec les États membres sont régies par l'Accord sur les privilèges et immunités du Conseil de l'Europe, sont exonérées de TVA.

Please make payment/Prière d'effectuer le paiement

- **Either by cheque to:**
  Council of Europe
  Finance Division
  F-67075 Strasbourg Cedex

- **Or by credit card**
  ☐ Visa ☐ Mastercard ☐ Eurocard
  Card No. |_|_|_|_|_|_|_|_|_|_|_|_|_|_|_|_|
  Expiry date |_|_|_|_| Signature:

- **Soit par chèque à l'ordre de:**
  Conseil de l'Europe
  Division des Finances
  F-67075 Strasbourg Cedex

- **Soit par carte de crédit**
  ☐ Visa ☐ Mastercard ☐ Eurocard
  Carte n° |_|_|_|_|_|_|_|_|_|_|_|_|_|_|_|_|
  Date d'expiration |_|_|_|_| Signature:

Council of Europe Publishing/Éditions du Conseil de l'Europe
F-67075 Strasbourg Cedex
Tel.: (33) 03 88 41 25 81 – Fax: (33) 03 88 41 39 10 – E-mail: publishing@coe.int – Web site: http://book.coe.int

Sales agents for publications of the Council of Europe
Agents de vente des publications du Conseil de l'Europe

BELGIUM/BELGIQUE
La Librairie Européenne
The European Bookshop
Rue de l'Orme, 1
B-1040 BRUXELLES 20
Tel.: 32 (0)2 231 0435
Fax: 32 (0)2 735 0860
E-mail: order@libeurop.be
http://www.libeurop.be

Jean de Lannoy
Avenue du Roi, 202 Koningslaan
B-1190 BRUXELLES
Tel.: 32 (0) 2 538 4308
Fax: 32 (0) 2 538 0841
E-mail: jean.de.lannoy@euronet.be
http://www.jean-de-lannoy.be

CANADA
Renouf Publishing Co. Ltd.
1-5369 Canotek Road
CDN-OTTAWA, Ontario, K1J 9J3
Tel.: 1 613 745 2665
Fax: 1 613 745 7660
E-mail: order.dept@renoufbooks.com
http://www.renoufbooks.com

CZECH REPUBLIC/RÉPUBLIQUE TCHÈQUE
Suweco CZ S.r.o
Klecakova 347
CZ - 18021 PRAHA 9
http://www.suweco.cz
Tél: 420 2 424 59204
Fax: 420 2 848 21 646
E-mail : import@suweco.cz
http://www.suweco.cz

DENMARK/DANEMARK
GAD, Vimmelskaftet 32
DK-1161 COPENHAGEN K
Tel.: +45 77 66 60 00
Fax: +45 77 66 60 014
E-mail : gad@gad.dk
http://www.gad.dk

FINLAND/FINLANDE
Akateeminen Kirjakauppa Keskuskatu 1
PO Box 218
FIN-00100 HELSINKI
Tel.: 358 (0) 9 121 4430
Fax: 358 (0) 9 121 4242
E-mail : akatilaus@akateeminen.com
http://www.akatilaus.akateeminen.com

FRANCE
La Documentation française
(Diffusion/distribution France entière)
124, rue Henri Barbusse
F-93308 AUBERVILLIERS Cedex
Tel.: 33 (0)1 40 15 70 00
Fax: 33 (0)1 40 15 68 00
comandes.vel@ladocfrancaise.gouv.fr
http://www.ladocfrancaise.gouv.fr

Librairie Kléber
Palais de l'Europe
F-67075 Strasbourg Cedex
Tel: 33 (0) 3 88 15 78 88
Fax: 33 (0)3 88 15 78 80
francois.wolfermann@librarie-kleber.fr
http:// www.librairie-kleber.com

GERMANY/ALLEMAGNE
UNO Verlag
Am Hofgarten 10
D-53113 BONN
Tel.: (49) 2 28 94 90 20
Fax: (49) 2 28 94 90 222
E-mail: bestellung@uno-verlag.de
http://www.uno-verlag.de

GREECE/GRÈCE
Librairie Kauffmann
Stadiou 28
GR-10564 ATHINAI
Tel.: (30) 210 32 55 321
Fax: (30) 210 32 30 320
E-mail: ord@otenet.gr
http://www.kauffmann.gr

HUNGARY/HONGRIE
Euro Info Service kft.
1137 Bp. Szent István krt. 12
H-1137 BUDAPEST
Tel.: 36 (06)1 329 2170
Fax: 36 (06)1 349 2053
E-mail: euroinfo@euroinfo.hu
http://www.euroinfo.hu

ITALY/ITALIE
Licosa SpA
Via Duca di Calabria 1/1,
I-50125 FIRENZE
Tel.: (39) 556 483215
Fax: (39) 556 41257
E-mail: licosa@licosa.com
http://www.licosa.com

MEXICO / MEXIQUE
Mundi-Prensa México
S.A. De C.V.
Rio Pánuco
141 Delegation Cuauhtémoc
06500 México, D.F.
Tel.: 52 (01) 55 55 33 56 58
Fax: 52 (01) 55 55 14 67 99

NETHERLANDS/PAYS-BAS
De Lindeboom Internationale Publikaties bv
MA de Ruyterstraat 20 A
NL-7480 AE HAAKSBERGEN
Tel.: (31) 53 574 0004
Fax: (31) 53 572 9296
E-mail: books@delindeboom.com
Http://www.delindeboom.com

NORWAY/NORVÈGE
Akademika,
Postboks 83
PO Box 84, Blindern
N-0314 OSLO
Tel.: 47 2 218 8100
Fax: 47 2 218 8103
E-mail: support@akademika.no
http://www.akademika.no

POLAND/POLOGNE
Ars Polona JSC
25 Obroncow Streeti
PL-03-933 WARSZAWA
Tel.: 48 (0) 22 509 86 00
Fax: 48 (0) 22 509 86 10
E-mail: arspolona@arspolona.com.pl
http://www.arspolona.com.pl

PORTUGAL
Livraria Portugal
(Dias & andrade,, Lda)
Rua do Carmo, 70
P-1200 LISBOA
Tel.: 351 21 347 49 82
Fax: 351 21 347 02 64
E-mail: info@livrariaportugal.pt
http://www.liraria portugal.pt

RUSSIAN FEDERATION / FÉDÉRATION DE RUSSIE
Ves Mir
9ª. Kolpacnhyi per.
RU – 101000 MOSCOW
Tel: +7 (8) 495 623 6839
Fax: +7 (8) 495 625 4269
E-mail: orders@vesmirbooks.ru
http://www.vesmirbooks.ru

SPAIN/ESPAGNE
Mundi-Prensa Libros SA
Castelló 37
E-28001 MADRID
Tel.: 34 914 36 37 00
Fax: 34 915 75 39 98
E-mail: libreria@mundiprensa.es
http://www.mundiprensa.com

SWITZERLAND/SUISSE
Van Diermen Editions - ADECO
Chemin du Lacuez 41
CH-1807 BLONAY
Tel.: 41 (0) 21 943 26 73
Fax: 41 (0) 21 943 36 05
E-mail: mvandier@worldcom.ch

UNITED KINGDOM/ROYAUME-UNI
The Stationery Office Ltd.
PO Box 29
GB-NORWICH NR3 1GN
Tel.: 44 (0) 870 6000 55 22
Fax: 44 (0) 870 6000 55 33
E-mail: book.enquiries@tso.co.uk
http://www.tsoshop.co.uk

UNITED STATES and CANADA/ ÉTATS-UNIS et CANADA
Manhattan Publishing Company
468 Albany Post Road
CROTON-ON-HUDSON,
NY 10520, USA
Tel.: 1 914 271 5194
Fax: 1 914 271 5856
E-mail: Info@manhattanpublishing.com
http://www.manhattanpublishing.com

Council of Europe Publishing/Editions du Conseil de l'Europe
F-67075 Strasbourg Cedex
Tel.: (33) 03 88 41 25 81 – Fax: (33) 03 88 41 39 10 – E-mail: publishing@coe.int – Web site: http://book.coe.int.