

THE BULLETIN

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

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

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

The decisions are presented in the following way:

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

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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.

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There was no relevant constitutional case-law during the reference period 1 January 2008 – 30 April 2008 for the following countries:

Bulgaria, Luxembourg, Norway, Slovakia.

Précis of important decisions of the reference period 1 January 2008 – 30 April 2008 will be published in the next edition, *Bulletin* 2008/2, for the following countries:

Latvia, Russia.

Argentina

Supreme Court of Justice of the Nation

Important decisions

Identification: ARG-2008-1-001

a) Argentina / **b)** Supreme Court of Justice of the Nation / **c)** / **d)** 04.09.2007 / **e)** R. 350. XLI / **f)** R. A., D. v. Estado Nacional / **g)** *Fallos de la Corte Suprema de Justicia de la Nación* (Official Digest), 330 / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

5.1.1.4.2 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Incapacitated.**

5.2.1.3 Fundamental Rights – Equality – Scope of application – **Social security.**

5.2.2.8 Fundamental Rights – Equality – Criteria of distinction – **Physical or mental disability.**

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

Keywords of the alphabetical index:

Disabled person, welfare benefit, urgent need / Welfare benefit, residence, condition.

Headnotes:

The obligation to have been resident for twenty years to qualify for disability benefit is inapplicable, being unconstitutional, in cases where all the other requirements stipulated by law are met, in so far as the need for subsistence brooks no delay, for that would cause an absolute denial of the right to social security.

Summary:

A foreign national who had obtained permanent residence in Argentina was afflicted from birth with total congenital disability. The administrative authorities refused to grant her the disability pension prescribed by Section 9 of Act no. 13.478 because she did not have proof of the twenty years' minimum

residence required of foreigners by Article 1.e of Appendix I to Decree no. 432/97. She lodged an application for “*amparo*” (constitutional redress), pleading the unconstitutionality of this provision, which allegedly infringed various rights protected by the Constitution and by international treaties.

This dispute should be considered in the light of Article XVI of the American Declaration of the Rights and Duties of Man (“Every person has the right to social security which will protect him from the consequences of [...] any disabilities arising from causes beyond his control that make it physically or mentally impossible for him to earn a living”), Article 25.1 of the Universal Declaration of Human Rights (“Everyone has the right to [...] security in the event of [...] disability [...] or other lack of livelihood in circumstances beyond his control”) and Article 9 of the International Covenant on Economic, Social and Cultural Rights (“The States Parties [...] recognise the right of everyone to social security, including social insurance”), moreover in close association with the right to life.

Considering the immediacy of the need for subsistence, the additional stipulation of twenty years' residence resulted in an absolute denial of the right to social security as prescribed by the aforementioned international instruments with constitutional status, to the extent of prejudicing the right to life, the primary human right, recognised and secured by the Constitution, which the public authorities had an “incontrovertible obligation” to secure by “positive action”.

The residence requirement laid down by Article 1.e of Decree no. 432/97 was inapplicable, being unconstitutional, in cases where all the other requirements of the decree for access to the disability benefit were met.

Supplementary information:

Two judges expressed dissenting opinions.

Languages:

Spanish.



Identification: ARG-2008-1-002

a) Argentina / **b)** Supreme Court of Justice of the Nation / **c)** / **d)** 18.09.2007 / **e)** D. 587. XLIII / **f)** Defensor del Pueblo de la Nación v. Estado Nacional y otra (Provincia de Chaco) s/ proceso de conocimiento / **g)** *Fallos de la Corte Suprema de Justicia de la Nación* (Official Digest), 330 / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

1.1.4.2 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Legislative bodies.**

1.1.4.3 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Executive bodies.**

4.8.8.3 Institutions – Federalism, regionalism and local self-government – Distribution of powers – **Supervision.**

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.**

5.5.5 Fundamental Rights – Collective rights – **Rights of aboriginal peoples, ancestral rights.**

Keywords of the alphabetical index:

Judicial review, over other state powers, necessity / Aboriginal people, rights, protection by the judiciary.

Headnotes:

The judiciary should exercise supervision over the activities of the other State powers where individuals' right to life and bodily integrity are at issue. This is not to be regarded as interference on the part of the judiciary, the sole aim being to endeavour to protect these rights, or to rectify their omission.

Summary:

The national defender of human rights (ombudsman) had requested that the State and the Province of Chaco be ordered to take the necessary steps to change the living conditions of the inhabitants of a region of that province, belonging mainly to the Toba aboriginal ethnic group. They were described as being in a situation of extreme precariousness since their most basic needs were not fulfilled owing to the State and provincial authorities' inaction and failure to discharge the duties imposed on them by the applicable laws, the national

Constitution, international treaties and the Constitution of the Province of Chaco.

The gravity and urgency of the reported facts warranted the exercise of the supervision assigned to justice over the activities of the other State powers and, in that context, over the adoption of measures which, without encroaching on the functions of the State, are conducive to the observance of the national Constitution, above and beyond the possible decision in the proceedings as to the court's competence to hear and determine the case by way of the appeal provided for in Article 117 of the Constitution.

The judiciary should seek avenues for ensuring the effectiveness of rights and averting their infringement, this being its fundamental and guiding aim in the administration of justice and the reaching of decisions on the disputes referred to it, especially where individuals' right to life and bodily integrity were at issue. This was not to be regarded as interference on the part of the judiciary, the sole aim being to endeavour to protect these rights, or to rectify their omission.

The State and the Province of Chaco were asked to submit, within thirty days a report on the measures to protect the indigenous community living in the region.

Supplementary information:

Two judges expressed dissenting opinions.

Languages:

Spanish.

*Identification:* ARG-2008-1-003

a) Argentina / **b)** Supreme Court of Justice of the Nation / **c)** / **d)** 19.02.2008 / **e)** C. 1195. XLII / **f)** R. M. J. s/ insania / **g)** *Fallos de la Corte Suprema de Justicia de la Nación* (Official Digest), 331 / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

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:

Patient, unsound mind, internment, judicial review / Patient, psychiatric hospital, rights.

Headnotes:

When an internment measure is ordered, it must not exceed an indispensable minimum period because it is stringent treatment to be adopted only as a last resort, the principle of the patient's freedom clearly being the rule.

Summary:

The legal system applicable to the mentally afflicted does not offer them sufficient protection, as it proves particularly prone to abuse. It makes them outright "risk groups" as regards free enjoyment of their fundamental rights, and this necessitates the establishment of effective statutory protection aimed at patients' rehabilitation and resettlement in their family and social environment. Nowadays, it is generally known that needlessly prolonged psychiatric internments are attended in many cases by social relegation, exclusion and ill-treatment and not infrequently give rise to a situation of "hospitalism" that could be avoided. That being so, the law must perform a function of prevention and of protecting the fundamental rights of mentally afflicted persons, with judicial activity performing a dominant role in this regard.

Any non-voluntary internment, in the various instances where a court may order enforced confinement, must be justified, in the light of the applicable rules, by the presence of mental illness subject to internment, whether the measure is intended to prevent the commission of immediate or imminent acts severely harmful to the patient or others, or whether the patient's isolation for a certain time is plainly necessary for therapeutic purposes.

Where an internment measure is ordered, it must not exceed an indispensable minimum period because this is stringent treatment, to be adopted only as a last resort, the principle of the patient's freedom clearly being the rule.

The measure depriving the patient of liberty must be reviewed by justice through simple, speedy procedures conducted with the greatest celerity and, should it need to be extended for therapeutic purposes, the grounds of internment must undergo mandatory periodical judicial review to ascertain whether the conditions that prompted the confinement persist or whether they have changed with time, always in accordance with constitutional principles and guarantees. If that were not so, the internment would in reality become a custodial penalty of unlimited duration.

It is imperative to insist that immediately the causes which led to internment have ceased, the patient is entitled to be released from it, without the need for his or her treatment to be completed.

Languages:

Spanish.



Armenia

Constitutional Court

Statistical data

1 January 2008 – 30 April 2008

- 79 applications have been filed, including:
 - 13 applications, filed by the President
 - 4 applications, filed by the Candidates for the President
 - 62 applications, filed by individuals
- 22 cases have been admitted for review, including:
 - 13 applications, concerning the compliance of obligations stipulated in international treaties with the Constitution,
 - 6 individual complaints, concerning the issue of constitutionality of certain provisions of laws,
 - 2 applications, concerning the dispute on the decision adopted on the results of the election of the President of the Republic of Armenia,
 - 1 application, concerning the issue on determining whether the obstacles for an effective campaigning for a presidential candidate are insurmountable or have been removed.
- 30 cases heard and 30 decisions delivered (including the decisions on the applications filed before the relevant period), including:
 - 6 decisions on individual complaints,
 - 20 decisions concerning the compliance of obligations stipulated in international treaties with the Constitution,
 - 2 decisions on applications of the Human Rights' Defender,
 - 1 decision, concerning the dispute on the decision adopted on the results of the election of the President of the Republic of Armenia (on 2 applications),
 - 1 decision, concerning the issue on determining whether the obstacles for an effective campaigning for a presidential candidate are insurmountable or have been removed.
- Examination of 4 cases is pending (on 4 individual complaints).

Important decisions

Identification: ARM-2008-1-001

a) Armenia / **b)** Constitutional Court / **c)** / **d)** 15.01.2008 / **e)** DCC-723 / **f)** On the conformity with the Constitution of Article 73.2 of the Law on State Pensions / **g)** *Tegekagir* (Official Gazette) / **h)**.

Keywords of the systematic thesaurus:

3.11 General Principles – **Vested and/or acquired rights**.

5.2.1.3 Fundamental Rights – Equality – Scope of application – **Social security**.

5.3.38.3 Fundamental Rights – Civil and political rights – Non-retrospective effect of law – **Social law**.

5.4.16 Fundamental Rights – Economic, social and cultural rights – **Right to a pension**.

Keywords of the alphabetical index:

Legitimate expectation, pension / Pension, recalculation, legitimate expectation / Pension, privilege for difficult and harmful working conditions.

Headnotes:

Under the principle of prohibition of the retrospective effect of a law making a person's legal status worse, it is inadmissible to restrict or eliminate rights that have been envisaged on the basis of norms previously in force. The above principle, in conjunction with the principle of legal security, aims to ensure respect towards legitimate expectations.

Summary:

The Human Rights' Defender has disputed the conformity of the provision of Article 73.2 of the Law on State Pensions with Article 42.3 of the Constitution. He pointed out that the disputed provision had worsened the legal status of citizens, and that it had been implemented with retrospective effect.

The Constitutional Court conducted a systematic analysis of the provisions of the above Law. It expressed concern over the requirement for additional documentation when recalculating pensions on the basis of the disputed provision, and the elimination of privileged pensions for those who have worked under particularly difficult and potentially harmful conditions.

Before the Law on State Pensions came into force, persons with particularly difficult and potentially harmful working conditions expected to receive a

privileged pension. The new legislation swept away this privilege, and failed to deal with the expectations of those who had worked under such conditions already to receive a privileged pension. The principle of prohibition of the retrospective effect of a law worsening the legal status of a person, coupled with the principle of legal security, aims to ensure respect of legitimate expectations.

The Constitutional Court also noted that the prescribed regulation of Article 73 of the Law could give rise to an issue over the principle of equality. The way in which the norm under dispute defines the order of recalculation, and the problem over the provision of additional documentation, constitutes a differentiated approach towards the order of calculation of the labour record gained in the same period and under the same conditions. A situation could arise where persons who worked under the same conditions and during the same time period can receive different amounts of pension. According to jurisprudence from the European Court of Human Rights, such a difference in approach is discriminatory in the absence of objective and reasoned justification.

In terms of “discriminatory approach”, a formal circumstance such as the need to provide additional documents to substantiate one’s labour record is not, in the Constitutional Court’s view, an objective, legitimate and reasonable justification. The Constitutional Court considered the disputed provision to be in contravention of the Constitution and invalid.

Languages:

Armenian.



Identification: ARM-2008-1-002

a) Armenia / **b)** Constitutional Court / **c)** / **d)** 29.01.2008 / **e)** DCC-731 / **f)** On the conformity with the Constitution of Article 47.2 and 47.3 of the Law on State Pensions / **g)** *Tegekagir* (Official Gazette) / **h)**

Keywords of the systematic thesaurus:

5.2.1.3 Fundamental Rights – Equality – Scope of application – **Social security**.

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

5.4.16 Fundamental Rights – Economic, social and cultural rights – **Right to a pension**.

Keywords of the alphabetical index:

Pension, labour record, judicial confirmation, impossibility.

Headnotes:

A person cannot be deprived, on a formal basis, of the opportunity to seek confirmation of a legal fact in a judicial manner where this is necessary for him or her to obtain a pension right.

Summary:

The applicant challenged a provision of the Law on State Pensions, under which it was only possible to obtain confirmation in a judicial manner of a ten year period of one’s labour record, although twenty five confirmed years were needed. The applicant suggested that this was out of line with Article 18 of the Constitution, which envisages the right of judicial protection.

The Constitutional Court observed that the logic behind the legislation dictated that the amount of a pension will depend upon insurance payments and insurance labour records. If somebody is deprived of the possibility of confirming their labour record, this logic is infringed. Somebody might in fact have made payments, but will not be able to prove it and will therefore not receive a complete pension.

The insurance labour record is the legal fact upon which the right to an insurance pension is based. The legislator preserved the competence of confirmation of the labour record to the court. At the same time, however, the new legislation had subjected the implementation of this competence to formal restrictions that effectively deprived a person from the possibility of applying to the court to seek confirmation of the legal facts that would guarantee their pension entitlement. Equally, the court was now unable to implement effectively and thoroughly its competence under the law.

The Constitutional Court found that the disputed provisions did not simply contravene Article 18 of the Constitution. They were out of step with Article 37 of the Constitution, insofar as they did not just impede workers in their quest for confirmation of their factual insurance labour records, but also the right to a pension, which forms part of social insurance rights. If somebody is unable to prove their labour record for a time exceeding the required period (twenty five years), this means that they cannot get a higher pension, as the years exceeding the required labour record play an essential role in determining the amount of pension payable.

The Constitutional Court found that the implementation of the disputed provision violates the principles of equality, prohibition of discrimination, and the constitutional principles of rule of law and legal certainty.

Languages:

Armenian.



Identification: ARM-2008-1-003

a) Armenia / **b)** Constitutional Court / **c)** / **d)** 05.02.2008 / **e)** DCC-733 / **f)** On the conformity with the Constitution of Article 5 of the Law on Amendments to the Criminal Procedure Code and Article 115 of the Criminal Executive Code / **g)** to be published in *Tegekagir* (Official Gazette) / **h)**.

Keywords of the systematic thesaurus:

5.3.5.1.4 Fundamental Rights – Civil and political rights – Individual liberty – Deprivation of liberty – **Conditional release.**

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:

Release, conditional, partial pardon / Release, conditional, refusal, appeal.

Headnotes:

The rationale behind the institution of conditional release from punishment is that it can be implemented where there are specific conditions and grounds. It is therefore of specific relevance to the convicted person.

Conditional early release from punishment can be defined as a legal opportunity given to a convicted person, which is a manifestation of humanity by the state. It should not be viewed as a right on the part of a convicted person to be released early.

Summary:

I. A citizen questioned the compliance with the Constitution of Article 5 of the Law on Amendments to the Criminal Procedure Code and Article 115 of the Criminal Executive Code. He argued that these might contravene Article 18.1 of the Constitution (legal protection), Article 19.1 of the Constitution (judicial protection) and Article 20.4 of the Constitution (the right of every convicted person to request pardon or mitigation of punishment). The applicant suggested that these norms had deprived the convicted of the opportunity to apply directly to the court for conditional early release. The applicant also disputed the constitutionality of Article 115, on the basis that it did not allow for appeal against decisions made by the independent commission dealing with issues of conditional early release.

II. The Constitutional Court proceeded to examine the content of the right to request pardon or mitigation of the punishment, enshrined in Clause 4 of Article 20 of the Constitution. It found that the content did not include the right to request conditional early release. The Constitutional Court gave the following reasons for its conclusions.

Under Article 20.4 of the Constitution, any convicted person has the right to request pardon or mitigation of punishment. The Constitution does not allow for any limitations on this right. Alongside the above constitutional provision, the domestic legislation does not allow for any precondition for the implementation of the right to request pardon. Every convicted person has the right to request it, irrespective of the type of crime he or she has committed, the gravity of the crime and other circumstances, such as the type of penalty or whether part of the penalty has already been discharged.

The Constitutional Court analysed the “constitutional-legal” contents of the institutions of pardon and conditional early release. It concluded that the main

difference between the two institutions is that there are specific conditions and grounds governing the implementation of conditional early release. This limits the opportunities convicted persons have of availing themselves of this institution.

The Constitutional Court examined the meaning of the concept of “mitigation of punishment” prescribed in Article 20.4 of the Constitution, according to which the latter also includes the institution of conditional early release from punishment. The Court found this to be incompatible with the essence of that norm, and completely out of the scope of its logic. The whole point of early release from punishment is that it could be implemented where there are specific conditions and grounds, so that it is of specific relevance to the convicted person. The institution of release from punishment and its special manifestations is incompatible with the norm prescribed by Article 20.4 of the Constitution, where the notion of “mitigation of the punishment” notion is used and has to be understood as a partial pardon.

The Constitutional Court also ruled that the opportunity to apply to court for early release is not related to the right to judicial protection and particularly with the right to access to court. Article 18 of the Constitution guarantees the right to judicial protection where there is an issue on protection of violated rights. The institution of conditional early release from punishment is a legal opportunity for a convicted person, which is a manifestation of humanity on the part of the state. It does not constitute the convicted person’s right to conditional early release from punishment.

The provision preventing appeal against decisions made by the independent commission on conditional early release was pronounced contrary to the Constitution. The Constitutional Court pointed out that only the courts can determine whether a legal act corresponds to law. However, the court cannot fulfil the authority granted to the independent commission by law. If the court concludes that the commission has acted contrary to the legislation, the operative part of the court’s judgment must define the commission’s responsibility to adopt its decision or to act on the basis of the court’s legal position, and to bring its decision into conformity with the demands of the law.

Languages:

Armenian.



Identification: ARM-2008-1-004

a) Armenia / **b)** Constitutional Court / **c)** / **d)** 25.02.2008 / **e)** DCC-735 / **f)** On the conformity with the Constitution of Article 3.2 and 3.2.B of the Law on Bankruptcy / **g)** to be published in *Tegekagir* (Official Gazette) / **h)**.

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Bankruptcy, conditions.

Headnotes:

Debtors must have the opportunity of bringing disputes over debts to court. Courts should only deal with the issue of the discharge of debts that are due and not in dispute, once the issue of disputed debts has been settled. There should be a clearer distinction in legislation between special proceedings of bankruptcy cases and proceedings of substantive disputes.

Summary:

I. Under Article 3.2 of the Law on Bankruptcy, a debtor may be declared bankrupt on a petition for compulsory bankruptcy if, after thirty days or more, his indisputable debts have exceeded the five-hundred-fold limit of minimum salary prescribed by law. This situation must pertain at the time the decision is made, even though the debtor is not insolvent.

The applicants expressed concerns over the expression “even though the debtor is not insolvent”. They suggested that it might result in solvent debtors being adjudicated bankrupt. A dispute had arisen over another norm of the same Law (Article 3.2.B). The point was raised that, due to the lack of clarity, substantive disputes on material debts were being moved to trial in bankruptcy cases.

II. The Constitutional Court took the view that Courts should only deal with the issue of the discharge of debts that are due and not in dispute, once the issue of disputed debts has been settled. Moreover, there should be a clearer distinction in legislation between special proceedings of bankruptcy cases and proceedings of substantive disputes.

The Constitutional Court accordingly declared that the expression “even if the debtor is not insolvent” within Article 3.2 of the Law on Bankruptcy was in breach of Article 31 of the Constitution (right to property) invalid. It pronounced Article 3.2.B to be in accordance with the Constitution.

Languages:

Armenian.



Identification: ARM-2008-1-005

a) Armenia / b) Constitutional Court / c) / d) 15.04.2008 / e) DCC-751 / f) On the conformity with the Constitution of Article 68.10.2 and 68.12 of the Law on Constitutional Court / g) to be published in *Tegekagir* (Official Gazette) / h).

Keywords of the systematic thesaurus:

1.2.2.1 Constitutional Justice – Types of claim – Claim by a private body or individual – **Natural person.**

1.4.3 Constitutional Justice – Procedure – **Time-limits for instituting proceedings.**

1.6.5.4 Constitutional Justice – Effects – Temporal effect – **Ex nunc effect.**

1.6.9 Constitutional Justice – Effects – **Consequences for other cases.**

5.2.1 Fundamental Rights – Equality – **Scope of application.**

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

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

Keywords of the alphabetical index:

Constitutional Court, access, individual.

Headnotes:

The Constitutional Court emphasised the necessity of effective implementation of the right to constitutional justice in order to protect one’s constitutional right through applying to the Constitutional Court. The realisation of this right should not depend on any circumstance beyond the will of the interested person. Consequently, each person must have the opportunity to enjoy the legal protection provided by the Constitutional Court.

Summary:

I. The applicants disputed the conformity of Article 68.10.2 and 68.12 of the Law on the Constitutional Court with the provisions of Articles 3, 6, 18 and 19 of the Constitution. Under Article 68.10 of the Law, administrative and judicial acts adopted and implemented prior to a decision by the Constitutional Court recognising an act fully or partially in contravention of the Constitution and null and void, on which the administrative or judicial act is based, are not subject to re-examination.

Article 68.12 provides an exception to the above provision. It allows the Constitutional Court to extend the influence of its decision over legal relations that started before the decision came into force, if the absence of a decision on extension would cause irretrievable consequences for the state or the public. It allows for re-examination of administrative and judicial acts that were adopted and implemented on the basis of acts that were found unconstitutional by the Constitutional Court’s decision within three years of the entry into force of the Constitutional Court decision.

Article 68.13 provides another exception to the general rule of Article 68.10, in that a decision by the Constitutional Court that a provision of the criminal code or legislation on administrative liability is invalid will have retrospective effect. Judicial and administrative acts adopted prior to the Constitutional Court’s decision are subject to re-examination on the basis of that decision.

II. The Constitutional Court explained as follows the logic behind the general rule stipulated in the disputed provision and for the exceptions outlined above. Decisions by the Constitutional Court will only have retrospective effect where this is necessary for the protection of essential interests. Whenever, its decision is to have retrospective effect, the Court

must adopt a grounded and reasoned decision, taking into account the necessity for protection of essential interests. The disputed provisions were considered to be in conformity with the Constitution.

The Court went on to examine the constitutionality of Article 69.12, which is linked systematically with the disputed provisions. This provision stipulates that if, following an individual complaint, the Constitutional Court recognises the disputed provision of law as in contravention of the Constitution and invalid, the final judicial act directed towards the applicant is subject to re-examination in the manner prescribed by law.

Analysis of the law enforcement practice of the above provision showed that courts only re-examine judicial acts adopted towards persons whose individual complaints have served as grounds for the Constitutional Court to adopt a decision recognising a particular legal provision as in breach of the Constitution and invalid. This practice has created a state of affairs whereby persons are deprived of the possibility of implementing judicial protection of their constitutional rights through appealing to the Constitutional Court, even though the six month deadline for Constitutional Court applications has not expired. The Constitutional Court stated that Article 101.6 of the Constitution ensures the right of citizens to appeal to the Constitutional Court. The legislation stipulates a six-month period, but it means that the application to the Constitutional Court by one person for protection of his or her rights prevents another person from realising his or her constitutional right to appeal to the Constitutional Court. Thus, the realisation of the right of a person is hindered by the realisation of the rights of another. This brings about an unequal situation.

The Constitutional Court emphasised the necessity of effective implementation of the right to constitutional justice in order to protect one's constitutional right through applying to the Constitutional Court. The realisation of this right should not depend on any circumstance beyond the will of the interested person. Consequently, each person must have the opportunity to enjoy the legal protection provided by the Constitutional Court within the six month term. Such an opportunity can only be guaranteed in cases where the six-month period is not exceeded.

The Constitutional Court stated that the legislator must also implicitly stipulate the legislative requirement for the re-examination of judicial acts of persons who have not appeared as parties to the Constitutional Court proceedings, but were deprived from the possibility of the consideration of their cases in the Constitutional Court because of Article 32.3 or 32.5 of the Law on the Constitutional Court. Under

these provisions, the Constitutional Court will reject the examination of an application, if there is a Constitutional Court's decision on the same issue, or proceedings arising from the same issue are under way at the Constitutional Court). Otherwise, the right to appeal to the Constitutional Court, and the right to legal protection through the Constitutional Court will become unrealistic and illusory, if they cannot practically be implemented.

The Constitutional Court pronounced Article 69.12 of the Law on the Constitutional Court to be in breach of Article 19 of the Constitution. It pronounced part of the provision void, in that persons are deprived of the possibility of implementing judicial protection of their constitutional rights through appealing to the Constitutional Court, even though the six-month deadline for Constitutional Court applications has not expired.

Languages:

Armenian.



Belgium

Constitutional Court

Important decisions

Identification: BEL-2008-1-001

a) Belgium / b) Constitutional Court / c) / d) 23.01.2008 / e) 10/2008 / f) / g) *Moniteur belge* (Official Gazette), 11.02.2008 / h) CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

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

5.3.13.23 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to remain silent.**

Keywords of the alphabetical index:

Lawyer, role / Lawyer, professional secrecy / Money laundering, prevention, lawyer, obligation to provide information / Terrorism, financing, fight.

Headnotes:

In the cases, and in the circumstances, in which lawyers are subject to the legislative measures taken in the context of the fight against money laundering and the financing of terrorism, and are required to report their clients' laundering activities to the responsible authority, they must nevertheless be exempted from this requirement in respect of information obtained when defending or representing in court clients who are making use of their services as legal advisers, even outside the context of judicial proceedings.

Summary:

I. A Belgian law of 11 January 1993 on preventing use of the financial system for purposes of laundering money transposes Council Directive no. 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering. When that directive was amended by Directive no. 2001/97/EC of the European Parliament and of the Council of 4 December 2001, the legislature in

turn amended the 1993 law by a law of 12 January 2004, which was the subject of an application to the Constitutional Court.

The aforementioned directives set down the principle of the prohibition of money laundering and require member States of the European Community to introduce a system of obligations to identify, inform of, and prevent dubious transactions. Whereas the initial directive was addressed to credit and financial institutions, the second expanded the target group to notaries and other independent legal professionals in the exercise of some of their activities.

Some bar associations complained to the Constitutional Court that this legislation obliged them *inter alia* to report evidence of money laundering to the Financial Intelligence Processing Unit (CTIF) when they were helping their clients to prepare or carry out a number of transactions (such as sales of property, opening of accounts, etc.), or when they were acting for their clients and on their behalf in any financial or property transactions. The complainants considered that the legislature, by targeting lawyers, had unjustifiably infringed the principles of professional secrecy and lawyers' independence, principles which were one component of the fundamental right of all members of the public to a fair trial and to respect for the rights of the defence.

Firstly, the Constitutional Court – at that time known as the Court of Arbitration – had, in Judgment no. 126/2005 of 13 July 2005, put to the Court of Justice of the European Communities a request for a preliminary ruling on the validity of Directive no. 2001/97/EC, which the legislature had just transposed through the impugned law (see already *Bulletin* 2005/2 [BEL-2005-2-013]).

In its judgment of 26 June 2007 issued in case C-305/05, the Court of Justice of the European Communities stated in response that the right to a fair trial guaranteed by Article 6 ECHR and Article 6.2 of the EU Treaty, was not violated by the obligation placed on lawyers to inform and to co-operate with the authorities responsible for combating money laundering, account being taken of the limits of these obligations imposed or permitted by Directive no. 91/308/EEC, as amended by Directive no. 2001/97/EC.

II. In Judgment no. 10/2008, the Constitutional Court dismissed the appeal, subject to the twofold proviso that the provision rendering the anti-money laundering legislation applicable to lawyers must be interpreted to mean that:

- the information of which the lawyer became aware during the exercise of the essential

activities of his or her profession, including those matters listed in Section 2.3 of the impugned law, namely the defence or representation in court of the client and the provision of legal advice, even outside the context of judicial proceedings, remained covered by professional secrecy and could not therefore be drawn to the attention of the authorities, and that:

- it was only when the lawyer was exercising an activity, in one of those matters listed in aforementioned Section 2.3, which went beyond his or her specific role of defence or representation in court and the provision of legal advice, that he or she could be subject to the obligation to communicate to the authorities the information of which he or she was aware.

The Court also added another reservation: all communications of information to the Financial Intelligence Processing Unit had to be effected through the intermediary of the chairman of the Bar.

Furthermore, the Court annulled the provision which allowed any employee or representative of a lawyer personally to forward information to the Unit.

Cross-references:

- See judgment of the Court of Justice of the European Communities, 26.06.2007, Case C-305/05;
- See *Bulletin* 2005/2 [BEL-2005-2-013].

Languages:

French, Dutch, German.



Identification: BEL-2008-1-002

a) Belgium / **b)** Constitutional Court / **c)** / **d)** 14.02.2008 / **e)** 12/2008 / **f)** / **g)** *Moniteur belge* (Official Gazette), 26.02.2008 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

1.4.10.7 Constitutional Justice – Procedure – Interlocutory proceedings – **Request for a preliminary ruling by the Court of Justice of the European Communities.**

3.26.1 General Principles – Principles of Community law – **Fundamental principles of the Common Market.**

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

5.2.2.4 Fundamental Rights – Equality – Criteria of distinction – **Citizenship or nationality.**

5.4.2 Fundamental Rights – Economic, social and cultural rights – **Right to education.**

Keywords of the alphabetical index:

Education, access, conditions, citizenship / Student, foreign / European Union, free movement of persons / International Covenant on Economic, Social and Cultural Rights, standstill effect / Foreigner, higher education, access, restriction.

Headnotes:

The Constitutional Court asked the Court of Justice of the European Communities whether the Treaty establishing the European Community prevented an autonomous community of a member State, responsible for higher education and facing an influx of students from a neighbouring member State into several training courses in the medical field which were mainly publicly funded, from taking measures restricting the enrolment of “non-resident” applicants, when the said community relied on valid reasons for stating that this situation might well impose an excessive burden on public finances and jeopardise the quality of the education provided.

Summary:

In the face of a considerable rise in the numbers of higher education students, many of them from the neighbouring country, France, the decree-making legislature of the French-speaking Community, which is responsible in respect of this federal entity of Belgium for organising education financed by limited amounts of public funds, adopted measures concerning the initial enrolment of students on certain courses of study at a college or university of the French-speaking Community, particularly courses leading to the award of bachelors’ degrees in several medical subjects (physiotherapy, speech therapy, veterinary medicine, etc.).

The Decree of 16 June 2006 makes a distinction between “resident” applicants who, at the time of their enrolment, have their main residence in Belgium and fulfil one of the conditions set in respect of residence or authorisation of residence in Belgium, and “non-resident” applicants. Provision is made for a mathematical mechanism which makes it possible to keep the enrolment of non-resident students within certain limits in relation to the previous year.

A good number of non-resident applicants for the aforementioned courses lodged an application for annulment and an application for suspension of this decree. Suspension was rejected by the Constitutional Court (at that time known as the Court of Arbitration) in Judgment no. 134/2006 of 29 August 2006 (www.const-court.be).

One of the arguments raised by the applicants is based on a violation of the constitutional principle of equality and non-discrimination (Articles 10 and 11 of the Constitution), taken in conjunction with several provisions of the Treaty establishing the European Community, *inter alia* Article 12 EC. This prohibits, in respect of the application of the Treaty, any distinction based on nationality, and according to the Court, is similar in scope to that of Articles 10, 11 and 191 of the Constitution.

The Court found that, although the criterion used to distinguish between the two categories of potential students was not nationality, the impugned provisions were likely to have more effect on citizens of the European Union who did not have Belgian nationality than on those who did have that nationality, since it would be more difficult for the former to be classified as resident students.

Referring to judgments of the Court of Justice of the European Communities (CJCE, 15 March 2005, C-209/03, *Bidar*, § 54; CJCE, 7 July 2005, C-147/03, *Commission v. Austria*, § 48), the Court found that such a difference in treatment could not be justified under Article 12.1 of the Treaty establishing the European Community unless it were based on objective considerations independent of the nationality of the persons concerned, and proportionate to the objective legitimately pursued by the impugned provisions.

The Court found that the increase in the number of students enrolled for the first time on the aforementioned courses of study was so great that it jeopardised the quality of that education (and therefore of public health), bearing in mind the budgetary, human and material resources available to the education establishments concerned. A number of circumstances encouraged many French students

to come to study, in their national language, in the French-speaking Community of Belgium. They returned to their state of origin at the end of their studies to engage in the profession for which they had been trained.

The legislature justified the compatibility of the impugned provision with European law by referring to the judgments of the Court of Justice of the European Communities already mentioned.

The Court pointed out that the Commission of the European Communities had taken the view that the decree of 16 June 2006 was incompatible, *inter alia*, with Article 12 of the Treaty establishing the European Community. Allowing for the fact that, without appropriate safeguards, the French-speaking Community of Belgium ran the risk of being unable to maintain adequate levels of geographical coverage and of quality in its public health system, the Commission had decided to suspend the proceedings started on the basis of Article 226 of the Treaty establishing the European Community for a five-year period, so as “to give the Belgian authorities the opportunity to provide supplementary data supporting their argument that the restrictive measures they have imposed are necessary and proportionate”.

The Court decided to ask the Court of Justice whether the applicable provisions of the Treaty establishing the European Community prevented an autonomous community of a member state, responsible for higher education and facing an influx of students from a neighbouring member state into several training courses in the medical field which were mainly publicly funded, as a result of a restrictive policy pursued in that neighbouring state, from taking such measures as those contained in the impugned decree, when the said Community relied on valid reasons for stating that this situation might well impose an excessive burden on public finances and jeopardise the quality of the education provided.

It also asked whether the reply to the first question would be influenced by the fact that there were too few students resident in the French-speaking Community graduating to provide a long-term supply of adequate numbers of qualified medical staff to guarantee the quality of the public health system within that Community, or by the fact that this Community, account being taken of Article 149.1, *in fine*, of the Treaty and Article 13.2.c of the International Covenant on Economic, Social and Cultural Rights, which contained a “standstill” obligation, had opted to maintain broad and democratic access to quality higher education for the population of that Community.

Cross-references:

Judgments of the Court of Justice of the European Communities:

- Judgment no. C-65/03 of 01.07.2004 (*Commission v. Belgium*);
- Judgment no. 147/03 of 07.07.2005 (*Commission v. Austria*);
- Judgment no. C-209/03 of 15.03.2005 (*Bidar*).

Languages:

French, Dutch, German.

*Identification:* BEL-2008-1-003

a) Belgium / b) Constitutional Court / c) / d) 19.03.2008 / e) 56/2008 / f) / g) *Moniteur belge* (Official Gazette), 02.04.2008 / h) CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

3.11 General Principles – **Vested and/or acquired rights**.

5.2 Fundamental Rights – **Equality**.

5.4.2 Fundamental Rights – Economic, social and cultural rights – **Right to education**.

Keywords of the alphabetical index:

International Covenant on Economic, Social and Cultural Rights, standstill obligation / Education, higher, costs / Education, free, limits.

Headnotes:

In pursuance of first sentence of Article 24.3.1 of the Constitution and Articles 2.1 and 13.2.c of the International Covenant on Economic, Social and Cultural Rights, equality of access to higher education must be progressively introduced, with account being taken of the economic possibilities and the public finance situation specific to each of the Contracting States. Article 13.2.c of the Covenant does not give rise to a right of free access to higher education. It nevertheless prevents Belgium, subsequent to the

entry into force of the Covenant in respect of Belgium (21 July 1983), from taking measures which would run counter to the objective of completely equal access to higher education, which has to be achieved, *inter alia*, through the progressive introduction of free access.

Summary:

An application was made to the Constitutional Court for the annulment of a provision of a decree of the French-speaking Community relating to the fees and costs charged in non-university higher education. This application was lodged by a non-profit-making association (ASBL), the *Fédération des Étudiants Francophones*, and by two students. The Court accepted the association's *locus standi*, and consequently issued no ruling on the *locus standi* of the other two applicants.

The applicants firstly claimed that the provision treats in the same manner those students who are following short courses of education and those who are following long courses of education.

The Court noted that the impugned provision was intended to ensure that students following non-university higher education would not, in principle, be obliged to pay a sum higher than the price of enrolment at the university. These charges must also be reiterated in official documents and correspond to the actual cost of the goods and services supplied to the student. The Court concluded that identical treatment was not without reasonable justification.

The Court also had to consider whether the provision contravened the constitutional and international provisions relied on, in that it prevented the progressive introduction of free access to this kind of education. The Court found that there was no right of free access to higher education, but that measures running counter to the objective of completely equal access to higher education were no longer allowed. Following a specific and quantified examination, the Court reached the conclusion that the impugned provision could not be considered to be a measure which ran counter to the objective of progressive introduction of free access.

The Court also found it necessary to examine in its judgment the constitutionality of transitional provisions. The application in its entirety was dismissed.

Languages:

French, Dutch, German.



Identification: BEL-2008-1-004

a) Belgium / **b)** Constitutional Court / **c)** / **d)** 13.03.2008 / **e)** 49/2008 / **f)** / **g)** *Moniteur belge* (Official Gazette), 14.04.2008 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

3.14 General Principles – **Nullum crimen, nulla poena sine lege.**

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

5.2.2.7 Fundamental Rights – Equality – Criteria of distinction – **Age.**

5.3.5.1 Fundamental Rights – Civil and political rights – Individual liberty – **Deprivation of liberty.**

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

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

5.3.13.27 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to counsel.**

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

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

5.3.44 Fundamental Rights – Civil and political rights – **Rights of the child.**

Keywords of the alphabetical index:

Juvenile, court / Youth, protection, compulsory parenting course / Juvenile, protection / Juvenile, criminal responsibility, jurisdiction, relinquishment / Parent, parenting course, compulsory.

Headnotes:

Compulsory parenting courses are likely to be a means enabling the youth court to call to order parents who have manifested a clear disinterest in their child. However, they present all the characteristics of a supportive, and not a criminal measure.

The principle of lawfulness in criminal matters (Article 12 of the Constitution) does not prevent the law from assigning discretion to the Court. Account must in fact be taken of the general nature of legislation, of the diversity of the situations to which it applies and of changes in the behaviour that it exists to punish.

Not having included provisions guaranteeing that a juvenile will be judged by a court comprising judges selected for their training or acknowledged experience in the field of the law as it relates to young people, the legislature deals differently with juveniles in respect of whom jurisdiction has been relinquished, according to whether they are suspected of having committed an offence or crime which may be reduced to a misdemeanour, or a crime which may not be reduced to a misdemeanour. While this difference in treatment is based on an objective criterion, insofar as the offences in the second category are more serious than those in the first, this criterion cannot, where juveniles are concerned, justify this different treatment.

Summary:

An application was made to the Court for the annulment of the law amending the legislation relating to the protection of young persons and to the treatment of juveniles who have committed an act classified as an offence. This application for annulment was lodged by two non-profit-making associations (ASBLs), *Défense des Enfants – Internationale – Belgique – Branche francophone*, and *Ligue des Droits de l'Homme*.

In Judgment no. 49/2008, the Court first examined the constitutionality of compulsory parenting courses. The youth court may order the persons who exercise parental authority over a juvenile to attend if they manifest a clear disinterest in that juvenile's delinquent behaviour, and if that disinterest is a contributory factor in the juvenile's problems.

The first argument is based on an infringement of the rules dividing responsibilities between the Federal State and its federal entities. The Court decided in this respect that compulsory parenting courses were a matter of federal responsibility, and noted that, moreover, there had been a co-operation agreement between the State and the communities.

In respect of the arguments based on an infringement of the rules on equality and non-discrimination (Articles 10 and 11 of the Constitution), in conjunction *inter alia* with Articles 6 and 7.1 ECHR and with the general legal principle that penalties should be applied only to the offender in person, the Court found that compulsory parenting courses were not to

be regarded as a penalty, but as a supportive measure. Where respect for the right to private and family life was concerned, the Court took the view that, although a measure supporting and assisting parents in their child-rearing role might be regarded as an interference in their private and family life, it would not be a disproportionate one, in the light of both the necessary social objective of instilling responsibility into certain parents and the particularly limited scope of the parenting course.

The Court further dismissed, where the parenting course was concerned, the arguments based on violation of the principal of lawfulness in criminal matters.

The applicants also challenged several provisions of the law which concern the measures that the youth court may take. During its examination, the Court decided to specify that, while the law did not specifically mention the interest of the juvenile among the criteria of which the youth court has to take account, this criterion must in any case be applied by the youth court, since another provision of the law stated that juveniles should enjoy the rights and freedoms set down in the Constitution and in the UN Convention on the Rights of the Child.

All the arguments set out in this part of the judgment were dismissed, but the Court made a reservation as to interpretation which was also included in the operative words concerning assistance measures in matters of mental health and dependence.

The final part of the judgment relates to the legislative provisions in respect of procedural guarantees. The Court issued a ruling on the lack of assistance of a lawyer before the examining judge, fines in the event of failure to appear, procedural guarantees in respect of interim measures, arrangements for outside visits and procedural guarantees relating to relinquishment of jurisdiction. The Court annulled several provisions.

For example, it annulled some provisions which specified that interim measures could be taken by the youth court when reasonable evidence of guilt existed. The power to take interim measures is not challenged, since such measures correspond to the objective of protecting young persons and may be in the interest of the juvenile concerned. The Court nevertheless took the view that annulment was necessary in order to preserve the role conferred by the law on the youth court judge, and to prevent him or her from accumulating incompatible duties.

The Court also annulled some provisions relating to the arrangements for outside visits, because these were within the legislative responsibility of the

communities. While the federal law certainly could provide for a placement measure and, if necessary, exclude or restrict the possibility of leaving the establishment concerned, once the measure had been taken, it was the community authorities' responsibility to enforce this measure and, when the placement measure had not excluded or restricted visits outside the establishment, to define the conditions in which the juveniles concerned were allowed to go out.

Finally, the Court annulled the provision which, in relation to relinquishment of jurisdiction, refers a case concerning a person suspected of having committed a crime which cannot be reduced to a misdemeanour to the public prosecution service, for the purposes of prosecution in the Court which has jurisdiction under the ordinary law, which is the Assize Court, whereas for less serious offences, juveniles appear before a specific chamber of the youth court comprising judges with training or acknowledged experience relating to youth law and criminal law. The Court criticised the law for requiring juveniles to appear before the Assize Court, and therefore to be judged by a jury, without the possibility of the membership of the Assize Court being adjusted to include judges selected for their training or experience in the youth sphere.

Languages:

French, Dutch, German.



Identification: BEL-2008-1-005

a) Belgium / **b)** Constitutional Court / **c)** / **d)** 13.03.2008 / **e)** 50/2008 / **f)** / **g)** *Moniteur belge* (Official Gazette), 14.04.2008 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

2.1.1.4 Sources – Categories – Written rules – **International instruments.**
 5.2 Fundamental Rights – **Equality.**
 5.2.2.7 Fundamental Rights – Equality – Criteria of distinction – **Age.**
 5.3.13 Fundamental Rights – Civil and political rights – **Procedural safeguards, rights of the defence and fair trial.**

5.3.13.6 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to a hearing.**

5.3.13.7 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to participate in the administration of justice.**

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

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

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

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

5.3.13.23 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to remain silent.**

5.3.13.27 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to counsel.**

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

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

5.3.44 Fundamental Rights – Civil and political rights – **Rights of the child.**

Keywords of the alphabetical index:

Minor, protection / Youth, protection, mediation / Minor, judicial guarantees / Minor, parental authority / Presumption of innocence, renunciation / Parental authority, responsibility.

Headnotes:

The Constitutional Court has no jurisdiction to determine compliance with the “minimum rules for the administration of juvenile justice”, set out in United Nations General Assembly Resolution 40/33 of 29 November 1985, because these rules are not embodied in a normative instrument with binding force.

It is inadmissible in the light of Article 6 ECHR for the presumption of innocence to be renounced except by free (i.e. unconstrained) consent.

The legislator has aptly considered it expedient that in order to protect the privacy of minors and their families, decisions and judgments delivered in open court be notified as a matter of course only to the

parties directly concerned by the protective measures, and not to the civil parties whose interest in the case is of a different kind. Such a measure does not disproportionately interfere with the right of the latter to publicity of judicial decisions, as they can obtain a copy of the decisions from the registry of the court concerned.

Summary:

The Constitutional Court had before it an application to set aside provisions of the laws of 15 May 2006 and 13 June 2006 amending provisions on the protection of youth. This application was brought by the non-profit association (ASBL) “Defence for Children International – Belgium – French-speaking branch (D.E.I. *Belgique*)” and the ASBL “*Ligue des Droits de l’Homme*”.

The impugned provisions lay down the conditions and procedure applicable to mediation and reparative group consultation in juvenile cases, arranged at the proposal of the juvenile court or the Crown Counsel. Mediation and group consultation enables a person suspected of an act classed as an offence to contemplate the possibilities for remedying the material and relational consequences of the act by engaging in a more or less extensive communication process conducted through an unbiased third party and associating in particular the victim and the persons who exercise parental authority over the suspect.

The applicants took as their single cause of action, comprising four heads, the violation of Articles 10 and 11 of the Constitution read on their own or in conjunction with Article 6.1 and 6.2 ECHR, with Article 14.1 and 14.2 of the International Covenant on Civil and Political Rights and with Article 40.2.b.ii of the Convention on the Rights of the Child.

The Court was moved to examine the difference of treatment between persons in mediation, depending whether they were amenable to the juvenile court or to ordinary criminal courts. It stated in this regard that mediation and reparative group consultation, whilst bearing resemblances to criminal mediation, were inspired by a different philosophy. They were aimed at organising a process of communication proposed in some cases by the Crown Counsel and in others by the juvenile judge or court, but conducted in a mediation service without their being present.

The impugned provisions made the possibility of participating in a mediation process subject to three conditions: the existence of serious evidence of guilt, the fact that the person concerned declares he/she does not deny the act classed as an offence, and the identification of the victim.

The Court pointed out that a person acquiescing in an offer of reparation renounced the presumption of innocence guaranteed by the international provisions relied upon in the single cause of action. Its renunciation was inadmissible, having regard to Article 6 ECHR, except by free (i.e. unconstrained) consent. After a substantive examination of the impugned provision, the Court concluded that renunciation of the presumption of innocence and of the right to remain silent, consented to in the manner prescribed by law, met the requirements of Article 6 ECHR. The Court went on to consider whether such renunciation, where it results in an agreement which is honoured, should bring about the termination of the prosecution, as stipulated by the provision in the Code of Criminal Investigation on mediation in criminal cases. This difference in treatment could be justified by the legislator's intention, regarding minors, to allow the use of methods of mediation and consultation even in respect of serious offences. However, the Court held that the legislator's choice was seriously flawed with regard to the impartiality of the court, respect for the presumption of innocence and the right to remain silent, and therefore set aside the provisions stipulating the existence of serious evidence of guilt as the condition for mediation.

The Court then considered whether it was compatible with constitutional and international principles to demand of a suspected juvenile offender an explicit admission of the suspected acts. It concluded from its examination that by compelling a minor to make a specific admission from which it might subsequently be inferred that he or she had necessarily admitted the acts charged, in a different setting from the one afforded by the offer of reparation, the legislator had taken a measure going beyond the aim pursued and treating minors who accept an offer of mediation or reparative group consultation otherwise than adults making a request for mediation founded on Article 553.1 of the Code of Criminal Investigation, without reasonable justification for this difference in treatment. Therefore the Court also set aside the obligation for the person concerned to declare that he or she does not deny involvement in the act classed as an offence.

Lastly, the Court made three reservations of interpretation, set out in the operative part of the judgment. The first concerned the confidential documents drawn up in connection with a youth mediation process, which must not enter into the oral proceedings. The second related to the irrefutable presumption of negligence against the persons exercising parental authority over minors, which those persons incurred only inasmuch as they had consented to the mediation agreement. The third was intended to allow assistance by a lawyer throughout the procedure of mediation or of reparative group consultation.

Languages:

French, Dutch, German.



Identification: BEL-2008-1-006

a) Belgium / **b)** Constitutional Court / **c)** / **d)** 17.04.2008 / **e)** 67/2008 / **f)** / **g)** *Moniteur belge* (Official Gazette), 14.05.2008 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

3.10 General Principles – **Certainty of the law.**
 3.11 General Principles – **Vested and/or acquired rights.**
 5.2 Fundamental Rights – **Equality.**
 5.2.2.1 Fundamental Rights – Equality – Criteria of distinction – **Gender.**
 5.2.2.7 Fundamental Rights – Equality – Criteria of distinction – **Age.**

Keywords of the alphabetical index:

Legitimate expectation / Pension, social security, equality men-women / Retirement, age, gender equality.

Headnotes:

If a change of policy is deemed imperative, the federal legislator may decide to give it immediate effect and in principle is not required to make transitional provisions. But the legislator may not interfere unduly with the principle of legitimate trust. There is such interference when the rightful expectations of a category of persons amenable to justice are frustrated without a compelling ground of public interest being capable of justifying the want of transitional provisions. That is the position in the instant case, because of a measure limiting to at least 65 years the age of eligibility for the lifetime retirement pension as from 1 January 2007, even for persons affiliated to optional old age insurance before 1 January 2007 and having contributed to the insurance for 20 years, whom the former law permitted to draw a retirement pension at 55 years of age.

Summary:

Apart from the ordinary statutory social security scheme founded on a distributive system for pensions, a law of 17 July 1963 set up an optional “overseas” social security scheme for persons working in certain foreign countries. The old age and survivors’ insurance scheme instituted by the aforementioned law was based on accrual of individual contributions for the calculation of retirement and survivors’ pensions, with a Belgian state guarantee.

According to Section 20 of that law, insured males received a lifetime retirement pension the amount of which was set according to a rate approved by the Crown. If the insured had a record of at least 20 years’ contribution to the insurance, the pension became payable on reaching the age of 55 years. If the contribution period was less than 20 years, the qualifying age for the pension was 56-65, depending on the years of affiliation.

By a law of 20 July 2006, the legislator amended the aforementioned Section 20 by providing that as from 1 January 2007 the pension would not be payable before the age of 65. The legislator’s intent was to achieve equal treatment between women and men in respect of pensions and to accommodate the current philosophy of keeping workers in the labour market for as long as possible.

A private citizen affiliated for old age insurance purposes to the overseas social security office asked the Constitutional Court to reverse this legislative amendment on the ground that it infringed the constitutional principle of equality and non-discrimination (Articles 10 and 11 of the Constitution). The applicant found that the impugned provision, without reasonable cause, aligned the age at which the retirement pension became payable to workers employed abroad, affiliated for old age insurance purposes to the overseas social security office (OSSOM), with the pensionable age of workers employed in Belgium (first head), and contended that the rightful expectations of the workers affiliated to the OSSOM were frustrated so as to discriminate against them by comparison with workers employed abroad and affiliated to a private insurance company (second head).

The Court pointed out firstly that the principle of equality and non-discrimination raised no objection to the legislator’s reconsidering its initial goals in order to pursue others. In general, the public authorities should moreover be able to adapt their policy to the changing circumstances of the public interest.

Next, in reply to the first head of the contentions, it was a matter of the legislator’s discretion to adapt the conditions and the terms of contribution to the insurance in question to the new social circumstances and to the policy options founded thereon. Therefore it was not contrary in principle to Articles 10 and 11 of the Constitution to defer the age at which the retirement pension became payable to workers employed abroad and affiliated to the OSSOM for old age insurance purposes and align it with the pensionable age for workers employed in Belgium.

In the Court’s view, the question nevertheless arose whether the impugned provision was discriminatory in affecting not only persons having contracted insurance as from 1 January 2007, but also those having done so earlier.

As the Court had consistently held, and reiterated in the present judgment, if a change of policy was deemed imperative, the federal legislator could decide to give it immediate effect, without being required in principle to make transitional provisions. The constitutional principle of equality and non-discrimination (Articles 10 and 11 of the Constitution) was not violated unless the transitional provisions or want of them caused a difference of treatment incapable of reasonable justification or if there was undue interference with the principle of legitimate trust. That was so where the rightful expectations of a category of persons amenable to justice were frustrated without the want of transitional provisions being justified by a compelling ground of public interest.

In the case before it, the Court held that in preventing the retirement pension from becoming payable at the age of 55 years to persons having subscribed to optional old age insurance before 1 January 2007 and having already contributed to it for 20 years, the impugned provision unduly frustrated their rightful expectations, without the want of transitional provisions being justified by a compelling ground of public interest.

The Court therefore set aside the contested provision in this measure.

Languages:

French, Dutch, German.



Identification: BEL-2008-1-007

a) Belgium / b) Constitutional Court / c) / d) 24.04.2008 / e) 73/2008 / f) / g) *Moniteur belge* (Official Gazette), 15.05.2008 / h) CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

5.2.2.4 Fundamental Rights – Equality – Criteria of distinction – **Citizenship or nationality.**

5.3.8 Fundamental Rights – Civil and political rights – **Right to citizenship or nationality.**

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

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

5.3.44 Fundamental Rights – Civil and political rights – **Rights of the child.**

Keywords of the alphabetical index:

Citizenship, child, stateless / Citizenship, right, refusal / Citizenship, refugee, recognised / Stateless person, citizenship, grant.

Headnotes:

No constitutional provision secures the right to obtain Belgian nationality. However, it is inimical to Article 22 of the Constitution, read in conjunction with Article 8 ECHR, for anyone to be arbitrarily deprived of Belgian nationality where this decision interferes with their private and family life.

Summary:

The Constitutional Court had before it an application for the repeal of a law amending the Code of Belgian Nationality. The application was brought by the non-profit association (ASBL) “Defence for Children International – Belgium – French-speaking branch (D.E.I. *Belgique*)”.

Under this particular law, Belgian nationality was granted to children born in Belgium who at any stage before turning eighteen or before their earlier emancipation would be stateless if they did not hold that nationality. However, it further stipulated that this principle would not be applicable where the child could obtain another nationality through an administrative application made by his or her legal representatives to the diplomatic or consular authorities of the country of one or both parents.

The applicant complained that the provision at issue violated the right to nationality of children born on Belgian territory to foreign parents, who were liable to be stateless failing conferment of Belgian nationality and to undergo a discriminatory difference in treatment. This would depend on whether their legal representatives completed the necessary administrative formality for the child to obtain the nationality of one or both parents.

The Constitutional Court verified whether or not the provision infringed Article 22 of the Constitution, read in conjunction with Article 8 ECHR. Its verification of compliance with the constitutional principle of equality and non-discrimination (Articles 10 and 11 of the Constitution) also took account of the child’s right to acquire a nationality, as enshrined in several international provisions invoked in the cause of action.

The Court noted from the preparatory documents to the law that the legislator’s intention had been to combat the wrongful practices of foreign parents seeking to divert from their original purpose the guarantees against statelessness afforded by the Code of Belgian Nationality. It then noted that the legislator did not place these children in a position of inability to have a nationality but merely prevented the automatic conferment of Belgian nationality on those who, by means of a simple administrative formality, could receive another nationality. The Court stressed that the impugned provision referred to the case of a child entitled to obtain the nationality of a given State. The effectiveness of the right to nationality would be threatened only if the conferment of the foreign nationality was subject to a discretionary assessment by the authorities representing the foreign State. This first reservation of interpretation was embodied in the operative part of the judgment dismissing the application.

The Court added a second reservation of interpretation. The exception to the standing rule embodied in the law was to be interpreted restrictively, with due regard to the goal pursued by the legislator. Thus, the provision would not be applicable where the child’s parents were unable to approach the diplomatic or consular authorities of their country of origin, particularly where parents were recognised as refugees.

For the remainder, the Court considered that the law did not raise an insuperable obstacle to the conferment on any child resident in Belgium of a given nationality and that the reasons invoked by the legislator formed grounds of public interest justifying the impugned provision.

Languages:

French, Dutch, German.



Bosnia and Herzegovina Constitutional Court

Important decisions

Identification: BIH-2008-1-001

a) Bosnia and Herzegovina / **b)** Constitutional Court / **c)** Plenary session / **d)** 25.01.2008 / **e)** U-1/08 / **f)** / **g)** *Službeni glasnik Bosne i Hercegovine* (Official Gazette), 27/08 / **h)** CODICES (Bosnian, English).

Keywords of the systematic thesaurus:

4.5.6 Institutions – Legislative bodies – **Law-making procedure.**

4.10.2 Institutions – Public finances – **Budget.**

Keywords of the alphabetical index:

Budget, adoption, control / Budget, adoption, obligation.

Headnotes:

The legislator has the authority to specify a deadline, to safeguard the efficient functioning of the state, within which a budget must be adopted, and during which temporary funding may be in place. In addition, measures prescribed by the legislator, in the event the deadline is not observed, must not entirely hinder the discharge of competencies of the state institutions. That would be contrary to the goal and spirit of the Constitution of Bosnia and Herzegovina.

Summary:

I. The Chairman of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina (referred to here as “the applicant”) asked the Constitutional Court to assess the constitutional compliance of Article 11.6 of the Law on the Financing of Institutions of Bosnia and Herzegovina with Article VIII.2 of the Constitution of Bosnia and Herzegovina.

Under Article 11.6 of the Law on the Financing of Institutions of Bosnia and Herzegovina, the budget must be adopted by 31st March each year. If it is not adopted by that date, no expenditures shall be approved after that date for any purpose other than paying unsettled debts until the budget is properly adopted.

Article VIII.2 of the Constitution provides that if a budget is not adopted in due time, the budget for the previous year shall be used on a provisional basis.

The applicant, *inter alia*, alleges that the application of the challenged provision of Article 11.6 of the Law on the Financing of Institutions of Bosnia and Herzegovina, in cases where the budget of Bosnia and Herzegovina is not adopted within a specified time limit, “may give rise to obstacles to the functioning of the country’s institutions”.

II. The Constitutional Court examined the compliance of the above provision with the meaning of Article VIII of the Constitution. It began by observing that the Constitution sets basic constitutional principles and goals for the functioning of Bosnia and Herzegovina. These include the discharging of the competences and obligations of state institutions. There is a positive constitutional obligation on the part of Bosnia and Herzegovina and its competent authorities to create a legal framework that specifies constitutional obligations. One such obligation is the adoption of a budget for each fiscal year. Without it, it would be practically impossible to discharge the competences of the state. The Constitution only sets out basic principles in this area, and it is up to the legislator to elaborate upon them.

The Constitutional Court held that the legislator had not acted contrary to the Bosnia and Herzegovina Constitution by making specific provision within the law for the general constitutional provision on temporary funding of state institutions where the budget has not been adopted on time, by setting a time limit for this type of temporary situation. The rationale behind Article VIII.2 of the Constitution of Bosnia and Herzegovina is to ensure the unhindered functioning of the state and its institutions, so that temporary funding is only possible for a specified time-period, during which the competent institutions are obliged to work more intensively and efficiently on adopting the budget. The Constitutional Court stated that the provision did not envisage that the temporary situation would last indefinitely. Such an interpretation would bring into question the effective functioning of the state and its institutions. The Constitution and laws enacted under it must allow for the effective functioning of public authority.

Therefore, the Constitutional Court ruled that the legislator could impose time limits on the length of time for which temporary funding may be in place and during which the budget must be adopted. The aim behind it is the effective discharge of the competences of the Bosnia and Herzegovina institutions. That part of the provision in question that stipulates, “The budget must be adopted no later than 31 March of each year” is therefore not contrary to Article VIII.2 of the Constitution.

The Constitutional Court also note of the point the applicant had raised, as to problems which might arise, because the legislator had imposed penalties if the budget was not adopted within the timeframe given subsequently. The applicant had warned of specific problems that might arise, if the budget was not adopted by 31 March 2008. However, in reviewing the constitutionality of certain legislation or its provisions, the task of the Constitutional Court was to carry out that review *in abstracto*, without considering a specific case. The Constitutional Court would only examine the constitutionality of the disputed legal solution in general terms.

The Constitutional Court held that legislator undoubtedly had the authority and competence to prescribe what should happen where a budget was not adopted upon the expiry of the deadline prescribed for temporary funding. However, the legislator could not prescribe measures that would completely obstruct the functioning of the state (and its institutions). This would be contrary to the goals, purpose and spirit of the Constitution of Bosnia and Herzegovina. The rationale behind the provision for the possibility of temporary funding under Article VIII.2 of the Constitution of Bosnia and Herzegovina was the efficient functioning rather than the hindering of the competences of the country’s institutions. The provision should not, therefore, be interpreted as granting authority to the legislator to place obstacles in the way of the operation of state institutions, irrespective of the issue at hand. The provision was designed to leave the legislator plenty of scope to seek out the best way of ensuring the smooth running of the state.

The Constitutional Court did not propose to examine the measures that the legislator had deemed most efficient. This should be left to the legislator. Nonetheless, the Constitutional Court pointed out that the legislator was under an obligation to take appropriate legislative measures as a matter of urgency, to resolve the issues of budget adoption and temporary funding in accordance with the Constitution of Bosnia and Herzegovina, as set out in this decision. This should not be done in such a way as to hamper the functioning of the state institutions.

In the Constitutional Court's view, that part of the provision of Article 11.6 of the Law on the Financing of Institutions of Bosnia and Herzegovina that states that if the Budget is not adopted by 31 March, no expenditures shall be approved after that date for any purpose apart from paying unsettled debt until the budget is properly adopted, is not in conformity with Article VIII.2 of the Constitution.

Languages:

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



Canada Supreme Court

Important decisions

Identification: CAN-2008-1-001

a) Canada / b) Supreme Court / c) / d) 25.04.2008 / e) 31598 / f) R. v. Kang-Brown / g) *Canada Supreme Court Reports* (Official Digest), [2008] x S.C.R. xxx / h) Internet: <http://scc.lexum.umontreal.ca/en/index.html>; [2008]; S.C.J. no. 18 (*Quicklaw*); CODICES (English, French).

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.**

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

Keywords of the alphabetical index:

Police, powers / Search and seizure, in public place, evidence, admissibility / Sniffer dog.

Headnotes:

The police possess a common law power to search using sniffer dogs on the basis of a standard of "reasonable suspicion" compliant with the Canadian Charter of Rights and Freedoms. A dog sniff of a passenger's bag at a bus station amounted to a search within the meaning of Section 8 of the Charter, which guaranteed to everyone a right to be secure against unreasonable search and seizure. In the circumstances of this case, the search was unreasonable and the evidence should be excluded pursuant to Section 24.2 of the Canadian Charter of Rights and Freedoms because its admission would bring the administration of justice into disrepute.

Summary:

I. An RCMP officer involved in a special operation designed to detect drug couriers at bus stations observed a bus arriving at the station and the accused getting off. The accused gave the officer an elongated stare and went into the station lobby. He then turned and looked back at the officer, who found this behaviour suspicious. The officer eventually approached the accused, identified himself and told him that he was not in any trouble and was free to go at any time. The officer asked the accused if he was carrying narcotics. The accused said no. The officer then asked to look in the accused's bag. The accused put his bag down and was unzipping it when the officer went to touch the bag. The accused pulled it away, looking nervous. At that point, the officer signalled another officer with a sniffer dog to approach. The dog sat down, indicating the presence of drugs in the bag. The accused was arrested for possession of and/or trafficking in drugs. The accused was searched and drugs were found on his person and in his bag. The trial judge found that the accused was lawfully searched and entered a conviction. The Court of Appeal upheld the conviction. In a majority decision, the Supreme Court allowed the accused's appeal and overturned the conviction.

II.1 On the issue of the police powers to investigate crime, a group of four judges held that the police possess a common law power to search using sniffer dogs on the basis of a Charter compliant standard of reasonable suspicion. "Suspicion" is an expectation that the targeted individual is possibly engaged in some criminal activity. A "reasonable" suspicion means something more than a mere suspicion and something less than a belief based upon reasonable and probable grounds. If the police have lawful authority to use sniffer dogs only when they already have reasonable grounds to believe contraband is present, sniffer dogs would be superfluous and unnecessary, because *ex hypothesi* the police already have the grounds to obtain a search warrant and would not require the confirmatory evidence of a dog. It is the duty of the courts, not Parliament, to resolve the issue of Charter compliance.

One judge found that, in this case, the "reasonable suspicion" standard was sufficient but that, in other circumstances, it could be appropriate for police to conduct random searches using sniffer dogs on the basis of a general suspicion.

Another group of four judges held that the threshold for the exercise of police powers should not be lowered to one of "reasonable suspicion" since, to do so, would impair the important safeguards found in

Section 8 of the Canadian Charter of Rights and Freedoms against unjustified state intrusion. They held that the existing and well-established standard of "reasonable and probable grounds" should be applied. When rights and interests as fundamental as personal privacy and autonomy are at stake, the constitutional role of the Court suggests that the creation of a new and more intrusive power of search and seizure should be left to Parliament to set up and justify under a proper statutory framework.

2. The Court found unanimously that, in the circumstances of this case, the dog sniff of the passenger's bag at the bus station amounted to a search within the meaning of Section 8 of the Canadian Charter of Rights and Freedoms.

3. A group of six judges held that the search was unreasonable. Four judges found that the search did not meet the standard of "reasonable and probable grounds" and, given the seriousness of the Charter breach, held that the evidence should be excluded under Section 24.2 of the Charter. The other two judges concluded that the police did not have grounds for reasonable suspicion at the time of the sniffer-dog search and that the action of the police was based on speculation. They also excluded the evidence under Section 24.2 of the Charter, because while the evidence obtained in the illegal search was non-conscriptive and was found by the trial judge to have been obtained by the police in good faith, the administration of justice would be brought into disrepute if the police, possessing an exceptional power to conduct a search on the condition of the existence of reasonable suspicion, and having acted in this case without having met the condition precedent, were in any event to succeed in adducing the evidence.

Three judges dissented, holding that the sniffer-dog search was reasonable and in full compliance with Section 8 of the Canadian Charter of Rights and Freedoms.

Supplementary information:

In the companion appeal, *R. v. A.M.*, [2008] x S.C.R. xxx, 2008 SCC 19, the police accepted a long-standing invitation by the principal of a high school to bring sniffer dogs into the school to search for drugs. The police had no knowledge that drugs were present in the school and would not have been able to obtain a warrant to search the school. The search took place while all the students were confined to their classrooms. In the gymnasium, the sniffer dog reacted to one of the unattended backpacks lined up against a wall. The police opened the backpack and found illicit drugs. They charged the student who

owned the backpack with possession of cannabis marihuana and psilocybin for the purpose of trafficking. At trial, the accused brought an application for exclusion of the evidence pursuant to Section 24.2 of the Charter, arguing that his rights under Section 8 of the Canadian Charter of Rights and Freedoms had been violated. The trial judge allowed the application, excluded the evidence and acquitted the accused. Both the Court of Appeal and a majority of the Supreme Court upheld the acquittal.

For the reasons set out in *R. v. Kang-Brown*, [2008] x S.C.R. xxx, 2008 SCC 18, the majority of the Supreme Court held that the search violated Section 8 of the Canadian Charter of Rights and Freedoms and that the evidence should be excluded pursuant to Section 24.2 of the Charter.

Three judges dissented. One judge concluded that, although the search of the student's backpack was unreasonable, the evidence should not be excluded pursuant to Section 24.2 of the Charter. The search, which was conducted in good faith and was non-intrusive in nature, occurred in an environment where the expectation of privacy was diminished. The evidence obtained was non-conscriptive in nature and did not affect the fairness of the trial. The two other judges found that, in this case, the student did not have a reasonable expectation of privacy that engaged Section 8 of the Canadian Charter of Rights and Freedoms.

Languages:

English, French (translation by the Court).



Croatia Constitutional Court

Important decisions

Identification: CRO-2008-1-001

a) Croatia / b) Constitutional Court / c) / d) 19.12.2007 / e) U-III-1925/2005 / f) / g) *Narodne novine* (Official Gazette), 11/08 / h) CODICES (Croatian, English).

Keywords of the systematic thesaurus:

5.2.2.13 Fundamental Rights – Equality – Criteria of distinction – **Differentiation *ratione temporis***.
5.4.13 Fundamental Rights – Economic, social and cultural rights – **Right to housing**.

Keywords of the alphabetical index:

Tenancy, specially protected, transformation in lease with secure rent / Housing, right / Housing, privatisation / Tenant, obligation to vacate apartment.

Headnotes:

Individual acts by a competent authority (such as a government body, a judicial body or a legal person vested with public rights) that decides on the rights and obligations of citizens must be rendered in accordance with the Constitution and legal provisions. It must also be in accordance with the purpose of the law that is applied to a particular case, which purpose emerges from the Constitution.

The scope and effects of the constitutional guarantee of equality are not determined by the mere mechanical application of the relevant legal provisions, but also by honouring the other highest values of the constitutional order of the Republic of Croatia such as social justice, respect for human rights and the inviolability of ownership. These values are the basis for interpreting the totality of the Constitution's text and its individual provisions. As such these values are superior to the relevant legal norms, so those values prevent the misuse of the legal norms.

Summary:

I. The applicant lodged a constitutional complaint against a second instance judgment upholding a first instance judgment. The first instance judgment rejected the applicant's claim for recognition of the existence of her acquired right to purchase a flat and to render a decision replacing the sales and purchase contract of this flat.

From 1984, the applicant held specially protected tenancy rights over the flat. On 22 October 1990, the competent administrative body issued an order to demolish the building in which the flat occupied by the applicant was located. The pronouncement of the order stated that demolition could not start until the tenant had been provided with another flat under the provisions of Article 107 of the Housing Relations Act then in force (hereinafter: ZSO). On 24 July 1991 a replacement flat was assigned to the applicant that essentially prejudiced her living conditions. Therefore, on 4 March 1994, the applicant submitted a request to purchase the old flat, pursuant to the Specially Protected Tenancies (Sale to Occupier) Act, referred to here as the Sale of Flats Act). This was rejected, as the flat was in a building designated for demolition (Article 3). A substitute flat was offered to the applicant in 1998, and on 6 July 1998, the applicant signed a lease of the flat with secure rent.

Pursuant to the provisions of Article 107.1 and 107.2 of the Sale of Flats Act, tenancy rights terminate if the building or the part of the building in which the flat is located has to be demolished. The tenant has to move out after he or she has been provided with another flat that does not essentially prejudice his or her living conditions. Article 107.3 of the Sale of Flats Act set out what would happen if a competent body found that the building needed to be demolished or rebuilt because it posed a danger to the life of people or property, or for other reasons given in a special law. Any specially protected tenancies in the flats in the building would terminate, and the tenants would be provided with alternative flats, that did not essentially prejudice their living conditions.

The courts found that the applicant lost the status of a specially protected tenant by virtue of the Sale of Flats Act, on the grounds of an order to demolish the building in accordance with Article 107.1. By the time the city authorities managed to provide the applicant with an appropriate flat, the Sale of Flats Act was no longer in force. It was no longer possible to provide her with a flat in which she would be a specially protected tenant with the option to purchase. Instead, she signed a lease with secure rent with the applicant under the Leasing of Flats Act that was then in force (*Narodne novine*, no. 91/96) and the Rules of

Procedure on Leasing Flats, under which it had fulfilled all its obligations in relation to the applicant. Under the Sale of Flats Act, only specially protected tenants had the right to purchase flats. Specially protected tenancies were no longer available after the entry into force of the Lease of Flats Act. The courts accordingly took the legal view that the applicant does not have the right to purchase a flat because she had lost the status of a specially protected tenant. They duly rejected her claim.

In her constitutional complaint, the applicant pointed out that she had lost her status of a specially protected tenant and the option of buying her flat only because the competent bodies failed to find and offer her an equivalent replacement flat, which she could purchase. As a result, they had violated her constitutional rights guaranteed in the provisions of Articles 14 and 19 of the Constitution.

II. The Constitutional Court examined various constitutional articles. Article 3 of the Constitution stipulates that equality and respect for human rights, inviolability of ownership and the rule of law...are the highest values of the constitutional order. Article 5 of the Constitution sets out the principle of constitutionality and legality and the universal obligation to comply with the Constitution and law and respect the legal order of the Republic of Croatia. Article 117.3 of the Constitution requires that courts administer justice according to the Constitution. The Constitutional Court emphasised that each individual act of a competent authority (a government body, a judicial body or a legal person vested with public rights) that decides on the rights and obligations of citizens must be passed in accordance with the Constitution and legal provisions. It must also be in harmony with the purpose of the law applicable to a particular case, which purpose emerges from the Constitution.

The Constitutional Court noted that the rationale behind the Sale of Flats Act was the establishment of clearly defined ownership of what used to be socially owned property. The idea was that these owners would, in the first place, be the former legal occupants of the flats. The legislation could not have intended that citizens would lose their rights because of the expiry of deadlines, preclusion and similar reasons. This would clearly contravene its purpose.

The Constitutional Court gave the following reasons for its opinion. The applicant lost the status of a specially protected tenant on the grounds of an order to demolish the building. Demolishing the building for any of the reasons provided for in special acts is an objective fact that occurred without the influence ("culpability") of the tenant. This was why those

drafting Article 107 ZSO included an obligation of recompense i.e. the obligation to find another flat for the tenants before demolition started, which does not essentially prejudice their living conditions.

The concept of living conditions does not simply cover physical and technical living conditions, such as location, surface area, number of rooms, facilities, light, dampness, and sanitary conditions. These must be the same in the second flat as in the earlier one, as far as is objectively possible. It also refers to living conditions in the legal sense. Unlike physical living conditions, legal living conditions objectively can and therefore must be equal to the earlier ones. This means that the person who is being provided with another flat must acquire the same kind and same scope of rights and obligations that he had in the earlier flat, specifically, the rights and obligations of a specially protected tenant in the meaning of the ZSO. This is a legal guarantee of the lowest acceptable level of rights in a given legal environment.

In the specific case, the procedure whereby the applicant was being assigned another equivalent flat and was becoming established as a specially protected tenant in the second flat was not completed while the ZSO was still in effect. However, Article 52.1 of the Lease of Flats Act stipulates that proceedings that had been instituted under the provisions of the ZSO before the Lease of Flats Act entered into force are to be completed under the provisions of the ZSO. This leads to the conclusion that rights inherent in specially protected tenancies that were the subject of proceedings launched before the repeal of the ZSO but not completed before the Lease of Flats Act came into force, continued to exist even after the ZSO went out of force. Otherwise the meaning and the purpose of Article 52.1 of the Lease of Flats Act would be brought into question.

Pursuant to the above, the Constitutional Court found there had been violation of the constitutional right guaranteed in the provision of Article 14.2 of the Constitution (equality before the law). It accordingly repealed the second and first instance judgments and referred the case to the First Instance Court for retrial.

Languages:

Croatian, English.



Identification: CRO-2008-1-002

a) Croatia / b) Constitutional Court / c) / d) 16.01.2008 / e) U-II-425/2002 / f) / g) *Narodne novine* (Official Gazette), 14/08 / h) CODICES (Croatian, English).

Keywords of the systematic thesaurus:

3.13 General Principles – **Legality.**

4.3.4 Institutions – Languages – **Minority language(s).**

5.2.2.3 Fundamental Rights – Equality – Criteria of distinction – **Ethnic origin.**

5.2.2.10 Fundamental Rights – Equality – Criteria of distinction – **Language.**

5.3.45 Fundamental Rights – Civil and political rights – **Protection of minorities and persons belonging to minorities.**

5.4.20 Fundamental Rights – Economic, social and cultural rights – **Right to culture.**

Keywords of the alphabetical index:

Language, minority, regional, official use by the administrative authorities / Minority, language, official use.

Headnotes:

The Constitution and other relevant legislation allows a county as a unit of local (regional) self-government to regulate in its statutes the equal official use of the language and the script of a national minority on its territory. A county may also regulate by statute the promotion and protection of its autochthonous, ethnical, cultural and other particularities. It can also foster traditional expressions of regional affiliation, provided that these do not provide for administrative regional affiliation or for discrimination against certain inhabitants of a county in relation to others. In addition, it is empowered to stipulate the bilingual inscription of a county's name on the stamp, seal, signboard and in the titles of acts. This does not equate to determining a county's name, but does provide for the equal official use of the national minority's language and script.

Summary:

The Constitutional Court did not accept the proposal submitted by six natural persons for the constitutional review of Articles 3.2, 6.3, 8, 9 and 10 of the Statute (revisions and amendments) of the County of Istria, referred to here as the ID Statute. It found that these provisions did not contravene the Constitution and relevant acts.

The disputed provisions of the ID Statute relate to the equal official use of the Croatian and Italian language, as languages used by national minorities members on the territory of the County of Istria (Articles 9 and 10). They also relate to the fostering of "Istrianism" as the traditional expression of regional affiliation (Article 8), to the protection of the autochthonous, ethnical, cultural and other characteristics of Istria (Article 6.3) and bilingual inscriptions of the name of a county on the stamp, the seal, the signboard and in the title of acts (Article 3.2).

According to the applicants, the county only has the power to regulate the use of minority languages in relation to the work of its representative and executive bodies in the self-governing domain (Articles 9 and 10). They contended that it is contrary to the Constitution to determine the right to have regional affiliation recognised. An example is "Istrianism" whereby certain inhabitants of the Istrian County were placed in a more favourable position than others (Article 8). The applicants also pointed out that the Istrian County has no power to contravene the Constitution or to assume the powers of the state regarding the protection of human rights (Article 6.3). According to their way, the state had no authority, either, to alter the name of a unit of local (regional) self-government by introducing into the official name a translation into any foreign language (Article 3.2).

The Constitutional Court proceeded to review the constitutionality and legality of the disputed provisions of the ID Statute against the background of various constitutional provisions. These included Article 3 of the Constitution (freedom, equal rights, national equality, respect for human right and the rule of law as the highest values of the constitutional order), and Article 5.1 of the Constitution (the laws shall be in conformity with the Constitution, and other regulations with the Constitution and the law). Other relevant provisions were Article 12.1 of the Constitution (the Croatian language and the Latin script shall be in official use) and Article 12.2 of the Constitution (in individual local units, another language and the Cyrillic or another script may be introduced into official use under conditions prescribed by law). In addition, the Court examined Article 14 of the Constitution (prohibition of discrimination and equality of all before the law) and Article 15.1 of the Constitution (guarantee of equality to members of all national minorities). Of relevance too were Article 15.2 of the Constitution (equality and protection of the rights of national minorities shall be regulated by the Constitutional Act); and Article 15.4 of the Constitution (members of all national minorities shall be guaranteed freedom to express their nationality, freedom to use their language and script,

and cultural autonomy). Another pertinent article was Article 133.2 of the Constitution (defining units of local self-government as counties whose area shall be determined in the way stipulated by law).

The Constitutional Court also looked at the provisions of Article 12.2 and 12.3 of the Constitutional Act on the Rights of National Minorities. These make explicit provision for the equal official use of a minority language and script in accordance with the Act on the Use of a National Minority Language and Script in the Republic of Croatia. Thus, it is possible to use the minority language and script in activities of representative and executive bodies of a county and its assemblies, in proceedings before the administrative bodies of a county and proceedings before legal persons vested with public authority (Articles 5.1, 8 and 11). The Constitutional Court found that the disputed provisions of Articles 9 and 10 of ID Statute are not in breach of the Constitution and law.

It also took note of a county's self-government jurisdiction as guaranteed in the Constitution and the Local and Regional Self-government Act. It found that a county is empowered, when regulating matters of local or regional significance, to make provision in its legislation for the promotion of ethnic, cultural and other particularities.

The Constitutional Court also stressed that Article 8 of ID Statute does not provide for, nor does it acknowledge, the "regional affiliation" of the county in the administrative sense. Such affiliation is, in fact, dealt with in specific law establishing the territories of counties in the Republic of Croatia. Likewise, this provision does not sanction any discrimination nor does it place certain inhabitants of the Istrian County in a more favourable position by comparison with other inhabitants of the County, given that the Croatian Constitution guarantees equal rights and equal legal protection to all citizens. The Court found no conflict between the regulation of the protection of autochthonous ethnical, cultural and other characteristics of the territory contained in the ID Statute and Article 7 of the Constitutional Act on the Rights of National Minorities, which lays down the obligation of a state to ensure realisation of special rights and freedoms for members of national minorities. These include cultural autonomy, by means of keeping, developing and expressing their own culture, and preserving and protecting their cultural heritage and tradition.

Finally, the Constitutional Court found that although Article 3.2 of the ID Statute did not determine the name of a County, it did allow for the bilingual inscription of the name of the County on the stamp,

seal, signboard and in the titles of acts. This was in line with the County's authority to regulate in legislation the use of two languages, provided that it has the national minority's language and script in official use (Article 12.2 and 12.3 of the Constitutional Act on the Rights of National Minorities). This, in turn, is in accordance with the Act on the Use of a National Minority Language and Script in the Republic of Croatia exercised in a county that has the national minority's language and script in official use also through bilingual inscriptions of names (Articles 4.1.4 and 8.2).

Languages:

Croatian, English.



Identification: CRO-2008-1-003

a) Croatia / b) Constitutional Court / c) / d) 13.02.2008 / e) U-III-1410/2007 / f) / g) *Narodne novine* (Official Gazette), 25/08 / h) CODICES (Croatian, English).

Keywords of the systematic thesaurus:

2.1.1.3 Sources – Categories – Written rules – **Community law.**

3.25 General Principles – **Market economy.**

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.**

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:

Monopoly, business / Competition, community law / Community law, application by European States / Standard, european / Legal gap.

Headnotes:

The case related to the obligation of the Republic of Croatia to harmonise its legislation, to include statutes regulating market competition, with the *acquis communautaire* of the European Union. When applying such harmonised legislation, state bodies are obliged to do so in the same way as the European Communities, that is in the sense and spirit of the legislation pursuant to which the harmonisation was carried out. Thus, the criteria, standards and interpretative instruments of the European Communities are not applied as the primary source of law, but only as an auxiliary instrument of interpretation.

The regulations on the protection of market competition are by their nature public laws. They protect a public good (free market competition) and aim towards the essential realisation of entrepreneurial and market freedoms. They prevent businesses from acting in a way that disregards the market and entrepreneurial freedoms of other entrepreneurs and consumers. The free market can only effectively be protected by restricting business activity that distorts free entrepreneurship.

Summary:

I. The applicant, a limited liability company, submitted a constitutional complaint against a decision by the Administrative Court which had rejected its appeal against the Croatian Competition Agency (referred to here as "the Agency") of 18 February 2003.

Proceedings in this administrative matter were initiated at the request of two firms on 15 May and 17 June 2002. The applicant was a general importer of Volkswagen motor vehicles on the territory of the Republic of Croatia, and he had terminated their cooperative business venture at this point.

During proceedings prior to the Constitutional Court proceedings, it emerged that the applicant, as a general importer of the above brand, enjoyed a monopolistic position in the relevant market of authorised distributors of VW passenger cars on the territory of the Republic of Croatia. See Article 14.2 and 14.3 of the Competition Act, hereinafter: ZZTN. His business activity disturbed free market competition by abuse of a dominant position in the relevant market because it terminated the letter of intent, i.e. further cooperation with both undertakings – authorised distributors of the stated brand motor vehicles (with one of them on 26 March 2001) without a *priori* determined business and qualitative criteria. See Articles 13, 14.1 and 20.1.3 of ZZTN. Certain measures were accordingly directed, with a view to curtailing this abuse.

The Administrative Court ruled that the Agency had not contravened the legislation (namely the ZZTN) at the applicant's expense. It stressed that the competent institutions, when assessing possible distortions of market competition, are authorised and required to apply the criteria arising from the application of the competition rules of the European Communities and from the interpretative instruments adopted by the Community institutions. The relevant instruments between the Republic of Croatia and the European Communities and their member states are the Stabilisation and Association Agreement, hereinafter: SSP), and the Interim Agreement on Trade and Trade-Related Matters, hereinafter: Interim Agreement). These instruments oblige the Croatian competition institutions to apply not only the Croatian market competition legislation but also to take account of the relevant law of the European Community.

The Interim Agreement entered into force on 1 May 2002, and was temporary applied as of 1 January 2002, while the SSP entered into force on 1 February 2005. The SSP regulates competition in the provisions of Articles 40, 69 and 70 and it stipulates that any practices contrary to the rules of free market competition shall be assessed on the basis of the criteria arising from the application of the competition rules applicable in the Community, in particular from Articles 81, 82, 86 and 87 EC and interpretative instruments adopted by the Community institutions. The provisions of Articles 40 and 70 of the SSP correspond in their content to the provisions of Articles 27 and 35 of the Interim Agreement. Practices contrary to the provisions of the SSP and the Interim Agreement are interpreted pursuant to the criteria arising from the application of the competition rules of the European Communities, and in particular, among others, Articles 81 and 82 EC and interpretative instruments adopted by the Community institutions (Article 70.2 SSP and Article 35.2 of the Interim Agreement).

The applicant argued that the disputed decision and judgment violated his constitutional rights guaranteed in Articles 14.2 and 49.1 of the Constitution (equality before the law and entrepreneurial and market freedom). The applicant reiterated statements presented during the proceedings before the Agency and the Administrative Court, that there were no legal conditions to determine its monopolistic position and its abuse. Furthermore, in the specific case for the review of its conduct as the importer of the stated brand motor vehicles, neither the Interim Agreement nor the SSP could have been applied because neither of them was in force on 26 February 2001, when the letter of intent with one of the undertakings was cancelled. The applicant also contested the application of the criteria, standards and instruments of interpretation of the European Community. The

applicant contended that the disputed judgment was based on regulations not valid or relevant for the assessment of the applicant's conduct as an importer of VW motor vehicles in the Republic of Croatia.

II. The Constitutional Court held that it was indisputable that the administrative bodies and the Administrative Court could apply the provisions of these agreements on the level of a principle, if they assessed the activities of the undertakings during the period when these international agreements were in force.

Regarding the issues of the application of the "criteria, standards and instruments of interpretation of the European Communities", to which both the SSP and the Interim Agreement refer, the Constitutional Court found that they are not applied as the primary source of law, but only as an auxiliary instrument of interpretation. The provisions of Article 70.2 of the SSP and Article 35.2 of the Interim Agreement should be seen in the context of the obligation of the Republic of Croatia to harmonise its legislation, (including market competition legislation), with the *acquis communautaire* of the European Union. When applying such harmonised legislation, government institutions are obliged to apply it in the same way as the European Communities, that is in the sense and spirit of the legislation pursuant to which the harmonisation was carried out.

The provision of Article 70.2 of the SSP stipulates that in any assessment as to whether certain business activities comply with competition rules, not only the Croatian law is relevant, but also the entire law of the European Communities related to market competition should be considered. The law of the European Communities is not formally introduced in the Croatian legal system on the grounds of the provision of the SSP as an international agreement. Nonetheless, it is stipulated that Croatian competition regulations should be applied and interpreted by taking into account the rules, standards and the principles of market competition.

In the specific case, the SSP and the Interim Agreement were not in force when the activity assessed as an abuse of market position took place. However, in assessing whether an activity could lead to the abuse of a monopolistic or dominant position on the market, the Agency and the Administrative Court started from the relevant provisions of the Competition Act (Articles 13 to 20), and they applied the criteria, standards and interpretative instruments of the European Communities only as the auxiliary instrument. This was a matter of filling in legal gaps in a manner that corresponds to the spirit of national law and which is not contrary to the specific solutions in the above Act, by the application of which this case was decided.

The decisive fact was only whether, in the specific case, a monopolistic or dominant position existed that could be abused in any manner enumerated in Article 20 ZZTN. Such a monopolistic activity, which was determined in the proceedings conducted, was certainly one of refusing to continue further cooperation, realised in cancelling a contract, provided that such cancellation is not grounded on predetermined, explicit and public business and qualitative measures.

Finally, the Constitutional Court emphasised that the provisions of Article 49.1 should be viewed in the context of the provisions of Article 49.2 (the State shall ensure all entrepreneurs an equal legal status on the market) and Article 50.2 (entrepreneurial freedom... may exceptionally be restricted by law for the purposes of protecting the interests of the Republic of Croatia). The ZZTN is also of relevance in the application of these constitutional provisions, as it regulates the rules of conduct and system of measures for the protection of free competition in the marketplace. The Constitutional Court took the view that regulations on the protection of market competition are by their nature public laws. They protect a public good (free market competition) and aim towards the essential realisation of entrepreneurial and market freedoms. They prevent businesses from acting in a way that disregards the market and entrepreneurial freedoms of other entrepreneurs and consumers. The free market can only effectively be protected by restricting business activity that distorts free entrepreneurship.

In view of the above, the Constitutional Court found that the applicant's constitutional rights stated in the constitutional complaint were not violated.

Languages:

Croatian, English.



Identification: CRO-2008-1-004

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 13.02.2008 / **e)** U-III-2808/2007 / **f)** / **g)** *Narodne novine* (Official Gazette), 26/08 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Appeal, time limit / Court, instruction, erroneous, consequences for party.

Headnotes:

Parties who act upon the erroneous instruction of legal remedy provided by courts should not suffer harmful consequences.

Summary:

I. The applicant lodged a constitutional complaint against a ruling by the Zagreb County Court of 29 May 2006, which dismissed its appeal against the ruling of the Zagreb Municipal Court of 24 October 1996 for untimely submission. In the 1996 case, the Zagreb Municipal Court had decided upon the registration of ownership rights relating to the real property described in the order for the ruling. It informed the applicant of its right to appeal against this ruling within thirty days of its delivery.

In the constitutional complaint, the applicant argued that the erroneous instruction of legal remedy should not result in dismissal of the appeal for untimely submission, if the appeal was lodged in accordance with the instructions on the available legal remedy provided by the Court.

II. Having examined the case-file, the Constitutional Court noted the following instructions on legal remedy within the Zagreb Municipal Court's ruling. An appeal may be submitted to the Zagreb County Court within thirty days of the delivery of this ruling. The appeal shall be submitted in two copies through this Court. The applicant was served with the stated ruling on 5 November 2004. It then followed the instructions provided by the first instance court and filed an appeal, by registered mail, on 3 December 2004, within the terms stated in the instruction of legal remedy.

Pursuant to Article 123.1 of the Land Registration Act (*Narodne novine* nos. 91/96, 68/98, 137/99, 114/01 and 100/04) an appeal against a ruling in land

registration proceedings shall be permitted, unless the law provides differently. Under Article 125.1, the time limit for an appeal is fifteen days.

The Zagreb County Court, in compliance with Article 125 of the Land Registration Act, dismissed the appeal filed against the Zagreb Municipal Court because the appeal was lodged on 3 December 2004, which was twelve days after the expiry of the term, and that therefore it should have been dismissed as untimely.

The Constitutional Court found that the ruling by the Zagreb Municipal Court was out of line with the Constitution. It breached the applicant's right to appeal guaranteed in Article 18.1 of the Constitution, and the right to a fair trial under that part of Article 29.1 of the Constitution relating to access to a court. Moreover, the erroneous instruction of legal remedy had damaged the applicant's guaranteed constitutional rights, since it prevented the applicant from accessing the court and thereby its constitutional right to have the competent court decide on its appeal.

Finally, the Constitutional Court emphasised the basic requirement of all democratic states based on the rule of law, under which courts must be fully conversant with the regulations they apply, and must provide for the legal and correct instruction of legal remedy. Therefore, parties who act upon the erroneous instruction of legal remedy provided by courts should not suffer harmful consequences.

Languages:

Croatian, English.



Identification: CRO-2008-1-005

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 12.03.2008 / **e)** U-I-3851/2004 / **f)** / **g)** *Narodne novine* (Official Gazette), 37/08 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

2.1.1.4.15 Sources – Categories – Written rules – International instruments – **Convention on the Rights of the Child of 1989.**

5.1.1.4.1 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Minors.**

5.3.44 Fundamental Rights – Civil and political rights – **Rights of the child.**

Keywords of the alphabetical index:

Child-raising, allowance, beneficiary / Child, best interest / Child, direct beneficiary of rights of the child.

Headnotes:

The children's allowance is state aid for supporting and bringing up children. Its primary beneficiary is, accordingly, a parent. Under conditions set out in legislation, however, it may also be somebody else, who actually takes care of and supports the child.

In certain cases, a foster carer has the right to children's allowance for grandchildren and other children whose parents are unable to support them for various reasons. If it is clear from the legal provisions that the allowance should be paid to the person who has assumed the duty of raising and supporting the children, there is no need for additional regulation. The fact that parental care is missing or that the parents have lost their parental rights because of child neglect cannot be decisive factors in withholding the right to children's allowance from the people who are really taking care of and supporting the children. This would be directly contrary to the interests and welfare of the child. Such a legal solution also contravenes the state's constitutional obligation to take special care of children neglected by their parents.

Summary:

The Constitutional Court accepted the proposal submitted by two natural persons for the review of the constitutionality of the provision of Article 8.2 of the Children's Allowance Act (*Narodne novine*, nos. 94/01, 138/06 and 107/07, referred to here as "the Act"). It repealed the legislation, and determined that it should lose its force on 31 December 2008.

Under Article 8.2 of the Act, a carer is entitled to a children's allowance for grandchildren and other children he or she is raising in certain circumstances, even when these children have parents. Examples are children who might have lost one parent and the other is doing military services; children whose parents are completely and permanently incapable of

earning; children whose parents are in prison or have been committed to security, educational or protective institutions in accordance with penal regulations; and children whose parents have lost their parental rights.

The applicants contended that the disputed legal provision contravenes the provisions of Articles 14.2, 26, 57.2, 62 and 63.5 of the Constitution. They pointed out that they were in fact their grandchildren's foster parents because the children's parents had neglected them. They had been receiving children's allowance until 1 March 2004, when their request for continued payment of the allowance was refused under the disputed legal provision because they were only the foster parents of children whose parents have not lost their parental rights. In the applicants' view, this was wrong; as a general condition for securing the right to children's allowance is that the child lives in the same household as the foster parent or guardian. This means that the foster parent or guardian has the right to children's allowance for a child living in his family, rather than the parent who is not actually raising the child.

The Constitutional Court found the following constitutional provisions relevant for the review of the constitutionality of the disputed provision of the Act. Article 14.2 of the Constitution (equality of all before the law); Article 62 of the Constitution (the State shall protect children and shall create social, cultural, educational, material and other conditions promoting the right to a decent life); Article 63.5 of the Constitution (the State shall take special care of parentally neglected children) and Article 64.1 of the Constitution (everyone shall have the right to protect children). The Court also took into account the provisions of the Convention on the Rights of the Child (*Narodne novine* no. 12/93; hereinafter: the Convention).

Having reviewed the provision in the context of the relevant provisions of the Constitution, the Constitutional Court found that it did not comply with the Constitution.

The Constitutional Court started from the premise that children's allowance is state aid to the person who is actually caring for, supporting, looking after and raising children. It noted that Article 6.1 of the Act sets out who can claim this allowance. This includes a parent, an adopted parent, a foster parent, stepfather, stepmother, grandfather, grandmother and somebody entrusted with the child's care and education by a decision of the competent body for affairs of social welfare. Article 8.1 of the Act prescribes the children for whom this allowance is paid, including natural children, stepchildren, grandchildren and parentless children.

The Constitutional Court found that there were no acceptable reasons in constitutional law, neither was there any need for additional regulation in the disputed provision of the Act of cases in which the foster carer has the right to the children's allowance for grandchildren and other children who have a parent. It is understandable and evident from Articles 6 and 8.1 of the Act that the children's allowance for children whose parents cannot care for them for various reasons shall be paid to the person who has assumed the duty of bringing up and supporting these children.

The Constitutional Court took the view that withholding the right to children's allowance from those who are caring for and supporting children whose parents are unable and unwilling to support them is directly contrary to the interests and welfare of the child. Such a legal solution also contravenes the constitutional obligation of the state to take special care of children neglected by their parents. Implementing this principle of constitutional law requires creating optimum conditions for protecting the rights of children, which means bringing the child up and ensuring his or her support, if this is not provided by the parents. The reason behind the lack of parental care cannot be a decisive factor in any case, neither is the fact that the parents have lost their parental rights because of child neglect. The Convention requires that the signatory states honour and ensure the rights of the child laid down in the Convention. Actions against the interest of the child cannot be allowed, and this would include not recognising pecuniary aid intended for supporting the child because the parents were unable or unwilling to take care of the child.

In her separate opinion Judge Agata Račan states that the essential characteristic of the rights of the child is that it is the child who is the beneficiary of the rights, and therefore also of the right to a children's allowance (a precondition is compliance with the conditions provided by law, property census). Because the law did not regulate the children's allowance as the right of the child, the right was not realised in the provision under dispute (and in other cases too). According to Judge Račan, the teleological interpretation of Articles 62, 63 and 64 of the Constitution should start from the premise that the right to the children's allowance belongs to the child and should follow the child. It should not matter whether he or she is living with the natural parents, in a foster family or in a guardian's family; neither should it matter whether parental care has been revoked. This view indisputably emerges from the provisions of the Convention too. Pursuant to the above, according to Judge Račan, the Constitutional Court should have expressed the view in its reasoning that children's allowance is the right of

the child, and the parents and guardians (representatives) have the duty to take action for the realisation of this right.

Languages:

Croatian, English.



Identification: CRO-2008-1-006

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 12.03.2008 / **e)** U-I-4892/2004 and U-I-3490/2006 / **f)** / **g)** *Narodne novine* (Official Gazette), 37/08 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

3.10 General Principles – **Certainty of the law.**

3.11 General Principles – **Vested and/or acquired rights.**

3.18 General Principles – **General interest.**

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

5.4.19 Fundamental Rights – Economic, social and cultural rights – **Right to health.**

Keywords of the alphabetical index:

Patient, right / Decision, discretionary, judicial review / Judicial review, meaning.

Headnotes:

In regulating the field of health care, in particular the protection of patients' rights, legislation must ensure a level of patients' rights that reflect the standards achieved in their protection, and should be based upon the principles of legal security, clarity, possibility of implementing the regulations and certainty in the realisation of people's legitimate expectations. Without doubt, this constitutional demand on the legislator becomes stronger the more important a particular right is for the patient's health. This also means that the legality of decisions made by the administrative body entrusted with the protection of these rights will be subject to judicial review.

The constitutionally guaranteed judicial control of the legality of individual acts of administrative authorities and bodies means:

- a. the right to seek this control cannot be completely subject to the free assessment of the administrative authorities and bodies vested with public authority (in this case the persons responsible for the work of health-care institutions);
- b. the legislator must ensure judicial control of legality at least for the individual acts of these bodies that have the nature of an administrative act;
- c. the legislator must provide at least a basic opportunity for the person who has been supplied with the legal remedy, to effectively protect his rights and legal interests before the court of law.

Summary:

Two natural persons asked the Constitutional Court for a constitutional review of the Patients' Rights Protection Act, hereinafter referred to as "the Act". One was supported by another eight natural persons, as well as the Croatian Association for Patients' Rights from Split. One of the applicants was the President of the association. The Constitutional Court repealed Article 35 of the Act. However, it did not accept the proposal for the review of constitutionality of the Act as a whole.

The applicants challenged the constitutionality of the Act as a whole. They were dissatisfied with the manner in which the legislator regulated the protection of patients' rights. They also disagreed with the content of the Act in the conceptual and normative sense. The other applicant made specific reference in his petition to the unconstitutionality of the provisions of Article 35.1 and 35.2 of the Act. He also pointed out that the prescribed legal remedies were not efficient, as no administrative enactment took place in the course of the procedure. Instead, the patient only had recourse to mediation and correspondence with various authorised persons who, without exception, belong to the health system.

The disputed Act sets out patients' rights and the ways of protecting and furthering them. (Article 1.1 of the Constitution). The Act guarantees to every patient general and equal rights to quality and continued health protection, appropriate to the state of his or her health, in accordance with generally accepted professional standards and ethical principles, in the patient's best interests, with respect for his or her personal views (Article 2 of the Constitution). The Act defines a patient as every person, ill or healthy, who requests or who is undergoing certain measures or

services with the purpose of preserving and advancing health, preventing illness, treatment, or nursing and rehabilitation (Article 1.2 of the Constitution). Patients' rights protection is carried out in accordance with the principles of humaneness and accessibility (Article 3 of the Constitution). The principle of humaneness means respect for the patient as a human being, his right to physical and mental integrity and protection of his personality, including respect for his privacy, world view, moral and religious views (Article 4 of the Constitution). The principle of accessibility in the protection of patients' rights means that all the patients on the territory of the Republic of Croatia shall enjoy equal possibilities for the protection of their rights (Article 5 of the Constitution). Further provisions establish particular patients' rights, and the manner of and requirements for realising them. The founding of commissions for protecting and furthering patients' rights, their composition and activities is recommended, in order to monitor the safeguarding of patients' rights. There are provisions in criminal law for fines for transgressions of patients' rights by a health-care institution and/or the responsible person in that institution, a health-care worker and other legal and natural persons determined by the Act.

Under Article 35 of the Act, a patient who believes that his or her rights under the Act have been infringed should make a verbal or written complaint, in accordance with the Health Care Act, to the head of the health-care institution, the management or the person in charge of running the health-care company, or to the private health-care worker (Article 35.1 of the Act). If these persons do not inform the patient about the measures taken in connection with the complaint within eight days from the day when it was lodged, or if the patient is not satisfied with the measures taken, the patient has the right to lodge a complaint with the Commission (Article 35.2 of the Act).

The Constitutional Court found the following provisions of the Constitution relevant for the constitutional review of the disputed provisions of the Act:

- Article 2.4.1 of the Constitution (the Croatian Parliament...shall, independently and in accordance with the Constitution and law, decide:
 - on the regulation of ... legal ... relations in the Republic of Croatia);
- Article 3 of the Constitution (freedom, equality of all...respect for human rights...are the highest values of the constitutional order);
- Article 5.1 of the Constitution (laws shall conform with the Constitution, and other regulations with the Constitution and the law);
- Article 14.2 of the Constitution (equality of all before the law);
- Article 19.2 of the Constitution (Judicial review of decisions made by administrative agencies and other bodies vested with public authority shall be guaranteed);
- Article 35 of the Constitution (everyone shall be guaranteed respect for and legal protection of ...dignity...);
- Article 58 of the Constitution (everyone shall be guaranteed the right to health care, in conformity with the law) and
- Article 69.3 of the Constitution (everyone shall be bound, within their powers and activities, to pay special attention to the protection of public health ...).

The Constitutional Court took the view that when the legislator passes legislation in the field of health care, these regulations are not simply grounded on the legislator's formal power to regulate the manner and conditions for the implementation of health care. Also of relevance are the rights and obligations of the uses of this protection and other issues connected to its realisation. The legislator must also comply with certain qualities that ensure the realisation of legal objectives, honour the organisational and functional distribution of operations among governmental bodies and bodies vested with public powers, and guarantee citizens and legal subjects legal remedies and effective protection of their constitutional and legal rights. In the sphere of patients' rights, the legislation must ensure a level of patients' rights that reflect the standards achieved in their protection, and should be based upon the principles of legal security, clarity, possibility of implementing the regulations and certainty in the realisation of people's legitimate expectations. Without doubt, this constitutional demand on the legislator becomes stronger the more important a particular right is for the patient's health. This also means that the legality of decisions made by the administrative body entrusted with the protection of these rights will be subject to judicial review.

The Constitutional Court observed that Article 35 of the Act gave the patient the option to make a verbal or written complaint to the competent person, about which the competent person, as well as the competent Commission would make a decision, using legally prescribed procedural rules. The problem was that the Article only presented a non-binding incentive for these persons to decide, at their discretion, to apply some measures for the protection of the patient's rights. Such imprecise discretionary powers of the responsible person to inform the patient about what has been done about his complaint could give rise to an arbitrary reaction that may lead to unjustified privileges for some patients, i.e. to the discrimination of other patients.

The Constitutional Court examined the identical provisions of the Health Care Act. These too failed to secure the patient's right to lodge a request concerning the use of the discretionary powers of the person responsible for proceedings in his treatment. The Constitutional Court held that the provisions of Article 35 of the Act, as the main law passed for the protection of patients' rights, violated the constitutional guarantee of judicial control of the legality of individual enactments of administrative authorities and bodies vested with public authorities. As a result:

- a. the right to seek this control cannot be completely subject to the free assessment of the administrative authorities and bodies vested with public authority (in this case the persons responsible for the work of health-care institutions);
- b. the legislator must ensure judicial control of legality;
- c. the legislator must provide for at least a basic opportunity for somebody who has been provided with a legal remedy to make effective use of it in order to protect his or her rights and legal interests before a legally determined court. There can be no guarantee of judicial control of the legality of individual acts of administrative bodies and bodies vested with public powers if the scope and contents of the legal remedy are so limited that their free evaluation is completely beyond its control.

The Constitutional Court found the legislator's omission to regulate Article 35 of the disputed Act in accordance with the demands of the Constitution especially grave, bearing in mind that at stake are persons especially in need of legal protection because they are so dependent on health-care institutions. During their treatment, those institutions decide on their rights under the disputed Act. Situations often arise where it is not only necessary to quickly ensure the protection of the anticipated rights of a patient who would be exposed to immediate and inevitable danger without the appropriate medical treatment, but also to take some lasting and irreversible measures to save the patient's life and health. Therefore, in regulating the protection of patients' rights, having proclaimed, listed and prescribed them, the legislator must enact clear, precise and complete procedures for such decision-making, rather than entrusting such matters to the unlimited discretion of the responsible persons or commissions.

Pursuant to the above the Constitutional Court found that the complaint, provided for in Article 35.1 and 35.2 of the disputed Act, is not an efficient legal

remedy that could be effectively and efficiently used to realise the constitutionally guaranteed right to health care. No individual act is brought, in accordance with the provisions of Article 19 of the Constitution, on the grounds of a complaint grounded in law (Article 19.1 of the Constitution), nor is any judicial control later ensured of the legality of the individual acts of bodies that are vested with public powers (Article 19.2 of the Constitution). The decision on the repeal also includes the provision of Article 35.3 (where a patient is unconscious, incapable of reasoning or under age, the patient's spouse, common-law spouse, child who is of age, parents, brother or sister who is of age, and legal representative or guardian may lodge a complaint). The Constitutional Court found the provision to be existentially connected with the unconstitutional provisions of paragraphs 1 and 2 of that article of the disputed Act.

Finally, the Constitutional Court found that the proposals for the repeal of the Act as a whole were not well founded. Despite their detailed nature, they did not contain reasons relevant in the constitutional law that would enable the Court to find the Act in breach of the Constitution.

Languages:

Croatian, English.



Czech Republic

Constitutional Court

Important decisions

Identification: CZE-2008-1-001

a) Czech Republic / **b)** Constitutional Court / **c)** Second Chamber / **d)** 29.02.2008 / **e)** II. US 2268/07 / **f)** The case of the minister J. Šimsa, signatory of Charter 77, convicted in 1978 for attacking a public official – a police officer / **g)** *Sbírka nálezů a usnesení* (Collection of decisions and judgments of the Constitutional Court); <http://www.nalus.usoud.cz> / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

- 3.9 General Principles – **Rule of law.**
- 3.22 General Principles – **Prohibition of arbitrariness.**
- 5.3.1 Fundamental Rights – Civil and political rights – **Right to dignity.**
- 5.3.17 Fundamental Rights – Civil and political rights – **Right to compensation for damage caused by the State.**
- 5.3.13.17 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Rules of evidence.**
- 5.3.30 Fundamental Rights – Civil and political rights – **Right of resistance.**
- 5.3.35 Fundamental Rights – Civil and political rights – **Inviolability of the home.**

Keywords of the alphabetical index:

House search, refusal / Totalitarian regime, dissident, penal condemnation, reversal.

Headnotes:

Implicit within the principle of a democratic state, based on the rule of law, is the principle of the sovereignty of law. This requires the absolute dominance of rights, rather than influence applied by an arbitrarily exercised power. This principle rules out the existence of arbitrariness, and, of course, of prerogatives. It also rules out broadly conceived authorisation on the part of executive bodies, when

performing the functions of state administration. This also includes the police.

A prerequisite for order in a law-based state is the state monopoly on force, the purpose of which is to promote citizens' rights to protection and to secure their liberty. In a law-based state, there must be legislation to legitimise the power behind a monopoly on force, and to impose limits on that power. Thus, state power can only be exercised with respect for the limits on it represented by the fundamental rights and freedoms of individuals.

Human dignity, as a value, is enshrined in the very foundations of a whole series of fundamental rights contained in the constitutional order. It is linked to the claim of each person to respect and recognition as a human being, which gives rise to the prohibition on making a person a mere object of the state's will, or the prohibition on exposing a person to the type of treatment that casts doubt upon his status as a subject.

Summary:

I. The plaintiff, J. Šimsa, belonged to the New Orientation (a group of clergy and laypeople in the Evangelical Church of the Czech Brethren, which, among other things, criticised the political situation at the time) and a signatory of Charter 77. In 1977, the plaintiff was prosecuted for the crime of subverting the state. A house search was ordered, during which the incident between the plaintiff and the police officer is said to have occurred. The incident between the plaintiff and the police officer arose because the plaintiff, his wife, and his son, did not want to give the police a letter from Professor J. P., stating that it was private correspondence. This incident was classified as the crime of attacking a public official, and prosecution of the plaintiff was opened.

The municipal court first referred the matter to the state's attorney for further investigation, referring to the fact that the witness testimony contained inconsistencies; it was not clear when the plaintiff was detained, and the Criminal Code provision on mandatory defence was violated. The plaintiff and the state's attorney filed complaints against that decision; the regional court reversed the decision of the municipal court and stated that the witness testimony justified filing an indictment. After that the municipal court, in its decision of 30 August 1978, found the plaintiff guilty of the crime of attacking a public official, and sentenced him to eight months in prison. Appeals by the plaintiff and the prosecutor were denied as unfounded. The plaintiff served his sentence.

In 2007, the Minister of Justice filed a complaint for violation of the law to the benefit of the plaintiff. He criticised the actions of the Court, which, in his opinion, did not adequately explain the matter. He also criticised the sentence imposed, and suggested there should be a ruling by the Supreme Court, that the regional court decision had violated the law to the detriment of the plaintiff. However, the Supreme Court denied the complaint for violation of the law, and stated that there were no defects to be found in the factual findings of the trial courts. They indicated that the plaintiff's conduct met the elements of the crime of attacking a public official. The Supreme Court repeated the arguments of the municipal court regarding circumstances increasing the degree of danger of the crime, and elements of general prevention in the sentence. In order to achieve the purpose of the sentence in the case of the accused, it was necessary to impose a non-suspended prison sentence.

II. The Constitutional Court began by observing that a fundamental condition for the existence of an independent judicial power is public confidence that when judges take decisions, they strive to do so fairly, on the basis of law, and that it is necessary constantly to build that confidence. The Constitutional Court also spoke of human dignity, which is a fundamental value of the entire system of fundamental rights within the constitutional order.

The Constitutional Court stated that the Supreme Court had erred in ruling on a complaint for violation of the law filed to the benefit of somebody convicted for the crime of attacking a public official – a police officer – that occurred in 1978. This was a time when opponents of the totalitarian regime were persecuted. The decision was reached only on the basis of the criminal file, a statement from the state prosecutor, and a statement from the plaintiff. It could not explain the matter in the wider historical context, taking into account other publicly available sources, e.g. a document from the Office of Documentation and Investigation of the Crimes of Communists – Dinuš, P.: *Československá církev evangelická v. agenturním rozpracování* StB, ÚDV 2004 [The Evangelical Church of the Czech Brethren in the Secret Police Analysis], ÚDV 2004. This indicates that all available means were to be used to restrict the plaintiff's personal freedom, in order to stop his activities. Thus, the plaintiff was supposed to be subject to repression by the state power regardless of his own culpability. Such actions were a massive attack on the plaintiff's human dignity, although the Constitution then in force did not guarantee it as a fundamental human right. Nonetheless, the state was obliged to respect this fundamental right.

The Supreme Court also overlooked the fact that the appeals court approved the fact that witnesses were questioned in the matter before the plaintiff selected defence counsel, although grounds for mandatory defence existed. The same applied to other defects in the manner in which the house search was conducted.

The Supreme Court's actions continued the interference in the plaintiff's human dignity, guaranteed by Article 10 of the Charter of Fundamental Rights and Freedoms, already committed against the plaintiff by the communist state power. Thus, it did not meet its obligation to protection fundamental rights, under Article 4 of the Constitution.

Languages:

Czech.



Identification: CZE-2008-1-002

a) Czech Republic / **b)** Constitutional Court / **c)** First Chamber / **d)** 29.02.2008 / **e)** I. US 3038/07 / **f)** Admissibility in criminal proceedings of telephone wiretap information obtained under intelligence laws / **g)** *Sbírka nálezů a usnesení* (Collection of decisions and judgments of the Constitutional Court); <http://www.nalus.usoud.cz/> / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

3.9 General Principles – **Rule of law**.
 3.13 General Principles – **Legality**.
 5.3.5 Fundamental Rights – Civil and political rights – **Individual liberty**.
 5.3.13.17 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Rules of evidence**.
 5.3.36.1 Fundamental Rights – Civil and political rights – Inviolability of communications – **Correspondence**.
 5.3.36.2 Fundamental Rights – Civil and political rights – Inviolability of communications – **Telephonic communications**.

Keywords of the alphabetical index:

Personal integrity / Secret service, privacy, infringement, tolerance / Privacy, personal, right / Telephone tapping, by secret service / Constitutional Court, interference in other state bodies activities, minimum, principle.

Headnotes:

The wiretapping of telephone calls by the public authorities is, like any other secret surveillance, a serious limitation on fundamental rights. The constitutional order condones limitation by the state power on personal integrity and privacy only in quite exceptional situations, and only if it is essential, and the aim pursued in the public interest cannot be achieved by other means. If any of these conditions is not met, the interference is unconstitutional.

The less stringent conditions imposed by the intelligence laws on invasion of privacy are tolerated because of a strict limitation on the purpose for which the information may be used and by the gravity of a particular imminent danger.

If a police body uses an intelligence services wiretap as evidence in criminal proceedings without observing the guarantees that the Criminal Code imposes on the use of telephone wiretaps in criminal proceedings, it violates the fundamental right to privacy guaranteed by Article 13 of the Charter of Fundamental Rights and Freedoms (the "Charter"). A state prosecutor who does not reflect the foregoing in his decision-making and supervisory activities violates the fundamental right of an individual to be prosecuted only in a manner provided by law, guaranteed by Article 8.2 of the Charter.

Summary:

A resolution by the Department for Investigating Corruption and Financial Crime CPIS (Criminal Police and Investigation Service) of the Police of the Czech Republic, Branch Office in the city XY (the "police body") opened the criminal prosecution of the plaintiff. This was in respect of several crimes that she was said to have committed as the director of the Military Housing and Building Administration in XY when contracting for reception services in military residences. The reasoning of the resolution stated that the conduct being prosecuted was proved by telephone wiretap recordings that were "officially provided" to the police body by Military Intelligence. In her complaint against the police body, the plaintiff pointed out that these recordings, although legally obtained, cannot be used as evidence in criminal

proceedings. The state prosecutor denied the objection as unfounded, with reference to § 89.2 of the Criminal Procedure Code, which emphasises the legality of obtained evidence. The Constitutional Court asked the high court to provide documentation of the legality of the telephone wiretaps. The high court's statement indicated that neither Military Defence Intelligence nor Military Intelligence applied for a permit to use intelligence techniques against the plaintiff, so such a permit was not issued.

The Constitutional Court first analysed the framework of the fundamental right to privacy guaranteed by Article 13 of the Charter and Article 8 ECHR. It also considered, in the framework of its own case law and that of the European Court of Human Rights, the possibility of interference with that right through government wiretapping of telephone calls. It stated that limitation of fundamental rights is possible only if guarantees against arbitrariness are observed, and pointed out that the conditions for admissibility of evidence obtained through invasion of privacy are strictly limited.

The Constitutional Court stated that intelligence wiretaps (under the Act on Military Defence Intelligence and the Act on Military Intelligence) have a completely different statutory regime and purpose from wiretaps under the Criminal Procedure Code. Neither the Criminal Procedure Code nor the Act on Military Intelligence anticipates the possibility of using military wiretaps as evidence in criminal proceedings. In this case the general clause on the use of evidence contained in § 89.2 of the Criminal Procedure Code cannot be used. Such an interpretation would completely rule out the guarantees contained in special provisions of the Criminal Procedure Code, which regulate the actions of bodies active in criminal proceedings when obtaining evidence admissible at trial in the form of secret surveillance.

The Constitutional Court concluded (although this was not an issue for review by the Constitutional Court), that Military Intelligence exceeded the bounds of the law when it provided bodies active in criminal proceedings with a highly specific, extensive file of information. The Act on the Intelligence Services of the Czech Republic authorises the intelligence services, as regards criminal proceedings, to provide at most summary information of an operative nature.

The actions of the police body violated the plaintiff's fundamental right to privacy guaranteed by Article 13 of the Charter, and therefore the Constitutional Court ordered it to remove from the file and destroy the relevant records of telephone conversations. Because the state prosecutor did not allow the plaintiff's objection against the resolution to open criminal

proceedings issued on the basis of wiretaps that are not admissible at trial in criminal proceedings, this violated the plaintiff's right to be prosecuted only in a manner provided by law, guaranteed by Article 8.2 of the Charter. In view of the principle of minimising the Constitutional Court's interference in the activities of other state bodies, the Constitutional Court denied as impermissible the plaintiff's complaint against the decision to open criminal prosecution.

Languages:

Czech.



Identification: CZE-2008-1-003

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 13.03.2008 / **e)** Pl. US 25/07 / **f)** Institute for the Study of Totalitarian Regimes – Petition to Annul Act no. 181/2007 Coll. / **g)** *Sbírka zákonů* (Official Gazette), 160/2008; *Sbírka nálezů a usnesení* (Collection of decisions and judgments of the Constitutional Court); <http://nalus.usoud.cz> / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

1.3.1 Constitutional Justice – Jurisdiction – **Scope of review.**
 3.10 General Principles – **Certainty of the law.**
 3.12 General Principles – **Clarity and precision of legal provisions.**
 3.18 General Principles – **General interest.**
 3.22 General Principles – **Prohibition of arbitrariness.**
 5.3.27 Fundamental Rights – Civil and political rights – **Freedom of association.**
 5.3.29 Fundamental Rights – Civil and political rights – **Right to participate in public affairs.**
 5.4.9 Fundamental Rights – Economic, social and cultural rights – **Right of access to the public service.**

Keywords of the alphabetical index:

Political party, membership / Totalitarian regime, values / Public office, access / Democracy, capable of defending itself.

Headnotes:

In view of the principle of separation of powers under Article 2.1 of the Constitution, it is not the role of the Constitutional Court to consider the purposefulness of the establishment of a state institution that is to study a particular segment of history; that question falls into the area of the legislature's political decision-making.

The statutory requirement that those serving as members of the Council of the Institute for the Study of Totalitarian Regimes or as managing employees of the Institute and the Archive of Security Services do not belong to any political party or movement is "legitimate". It is not inconsistent with the right to establish political parties and associate in them under Article 20.2 and 20.3 of the Charter of Fundamental Rights and Freedoms (the "Charter"), or with Article 44 of the Charter.

The condition of trustworthiness for serving as a member of the Council of the Institute for the Study of Totalitarian Regimes or a managing employee of the Institute and the Archive consists of the fact that a person was not a member of or candidate for the Communist Party of Czechoslovakia or the Communist Party of Slovakia between 25 February 1948 and 15 February 1990. This is not counter to the Constitution; in view of the concept of "a democracy capable of defending itself," the nature of that condition, and the significance and purpose of Act no. 181/2007 Coll., on the Institute for the Study of Totalitarian Regimes and on the Archive of Security Services, and Certain Amending Acts (hereinafter the Act).

The statutory authorisation of the Senate, as a political institution, to recall a member of the Institute Council in the event that – in the words of the statute – he or she "does not properly perform" his role, creates room for arbitrariness. In the context of the constitutional guarantee of the right to freedom of scholarly research under Article 15.2 of the Charter, this is unacceptable from a constitutional viewpoint for a scholarly institution built on the principle of autonomy, independence, and separation from the state power. In terms of the subjective, fundamental right of a Council member to perform his or her office without interference, this condition is also inconsistent with the right to equal access to elected and other public offices under Article 21.4 of the Charter.

Summary:

A group of deputies petitioned the Constitutional Court regarding the Act under Article 87.1 of the Constitution, on annulling statutes. The Constitutional Court annulled part of § 7.9 of the Act, specifically the

words “properly or.” The plenum denied the deputies’ petition calling for the repeal of the Act in its entirety, and various individual provisions. It also refused the petition to annul related provisions of other statutes.

The Act set up and regulates the Institute for the Study of Totalitarian Regimes and the Archive of the Security Services. The original wording of § 7.9 of the Act, with which the judgment was concerned, was, “The Senate may recall a member of the Council if he does not perform his office properly or for a period longer than six months.”

The petitioners objected to the very existence of the Institute and its mission. They questioned the constitutionality of its institutional framework, criticised the purpose of the Act, consisting of nationalising historical research on a particular segment of history, and the ideological and blanket evaluation of that segment of history by the legislature. The deputies argued that this violated the freedom of scholarly/scientific research guaranteed by the Charter. They criticised the Act as a whole, and a number of its individual provisions, because it was incomprehensible and imprecise. They challenged the condition of trustworthiness, under which somebody who was a member of or candidate for the Communist Party of Czechoslovakia (KSC) or the Communist Party of Slovakia (KSS) cannot join the Institute Council, arguing that this was inconsistent with equal access to public office. They pointed out that the condition of non-membership in a political party or movement is inconsistent with the right to establish political parties and associate with them, with the right to equal fundamental rights. It is also inconsistent with Article 44 of the Charter.

The Constitutional Court stated that the mere establishment of the Institute has no constitutional law dimension. The state has a legitimate right to establish such an institution. The Constitutional Court cannot review the purposefulness of an institution established by statute, because such consideration falls into the field of political decision-making.

The Constitutional Court concluded that the very designation of the historical period with the terms “the time of lack of freedom” and “the period of communist totalitarian power” cannot justify a straightforward conclusion that there is a restriction on scholarly research, because they merely define the historical segment of time that is to be the subject of researched. It is not a matter of evaluation of these historical periods, but only of a simplifying name. The Court pointed to Judgment Pl. ÚS 19/93, where it ruled on the repeal of Act no. 198/1993 Coll., on the Illegality of the Communist Regime and Resistance against it. The Constitutional Court commented that

the circumstances of that case resembled those of the present one, in that both concern a morally and legally political proclamation by Parliament.

As regards the condition of non-membership in a political party or movement, the Constitutional Court emphasised the aim pursued by the establishment of the Institute. The Constitutional Court noted that this aim arises particularly from the preamble to the Act. In this situation, the Institute Council has a profound influence on the operation of the institution, and the overriding will of the legislature is, given the means at its disposal, to achieve the greatest possible independence for that institution. The Constitutional Court took the view that it is completely “legitimate” to make “non-partisanship” a condition for membership.

Only those who had not been members of or candidates for the Communist Party of Czechoslovakia or the Communist Party of Slovakia between 1948 and 1990 could satisfy the condition of trustworthiness in this context. The Constitutional Court referred to the last judgment in the matter of the so-called “lustration Act,” Pl. ÚS 9/01. It emphasised that the promotion of the idea of “a democracy capable of defending itself” is a legitimate aim of the legislature of every democratic state, at any phase of its development. A democratic state may require an individual to fulfil certain conditions, in order to enter into the state administration and public services. The majority of the plenum was of the opinion that an individual’s close association with the regime of pre-November 1989, and its repressive elements, is a fact which could negatively affect the trustworthiness of a public office held by that individual in a democratic state. The Parliament of the Czech Democratic State, in Act no. 198/1993 Coll, described the communist regime as “criminal, illegitimate, and despicable.” In the Constitutional Court’s opinion, it is up to the legislature to set the prerequisites for holding office in a manner that corresponds to the purpose for which an office is established – it is not the Constitutional Court’s role to assess the suitability of the criteria specified. This was not a case of declaring the general untrustworthiness of persons who were members of or candidates for the Communist Party of Czechoslovakia or the Communist Party of Slovakia during the period, but more a matter of a form of bias *sui generis*. The Constitutional Court weighed up the proportionality between the right to access to public office under Article 21 of the Charter on the one hand, and the principle of protection of democracy on the other. It concluded that the public interest in protecting democracy is, at this time, i.e. at the time of the decision, stronger. The relevant majority of the members of the plenum took the view that if somebody belonged to or was a candidate for the

Communist Party of Czechoslovakia or the Communist Party of Slovakia, even briefly, in his case there are “grounds to doubt his freedom from bias”. At this time, without a historical analysis of the regime in question, any evidence that could be presented for or against such doubt can only be relative. The Constitutional Court also measured the intensity of the interest in protecting democracy and the interest in understanding the past against the right to access to a very narrowly defined public office, which is a point of concern for a diminishing circle of persons. It concluded that the public interest in protecting democracy is, at this time, i.e. at the time of the court’s decision, stronger.

The Constitutional Court only found § 7.9 of the Act to be unconstitutional. In the Constitutional Court’s opinion, under Article 21.4 of the Charter, members of the Council must be protected from arbitrariness on the part of the state during the entire period when they hold office, (i.e. included in the specification of grounds for their term in office to terminate). However, the wording of the statutory provision in question, which permits the Senate to recall a member of the Institute Council, if he does not “properly” perform his office, does not meet this requirement. The formulation, in the context of freedom of scholarly research, creates a risk of arbitrariness in recalling members of the Institute Council.

The original judge rapporteur was J. Nykodým; however his draft decision was not accepted, and Judge S. Balík was assigned to draft the judgment. A dissenting opinion to the reasoning of the judgment was filed by Judge V. Güttler. A dissenting opinion to the verdict of denial and the reasoning of the judgment was filed by Judges F. Duchon, V. Kůrka, J. Musil, J. Nykodým, P. Holländer, P. Rychetský and E. Wagnerová.

Languages:

Czech.



Identification: CZE-2008-1-004

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 27.03.2008 / **e)** Pl. US 56/05 / **f)** Squeeze-out – petition to annul § 183i to 183n of the Commercial Code / **g)** *Sbírka zákonů* (Official Gazette); *Sbírka nálezů a usnesení* (Collection of decisions and judgments of the Constitutional Court); <http://www.nalus.usoud.cz/> / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

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

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

3.10 General Principles – **Certainty of the law.**

3.13 General Principles – **Legality.**

3.16 General Principles – **Proportionality.**

3.18 General Principles – **General interest.**

5.2 Fundamental Rights – **Equality.**

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

Keywords of the alphabetical index:

Company, share holder, rights / Company, share, offer to buy, obligatory / Company, buy out, forced.

Headnotes:

Under Articles 87.1.a and 88.2 of the Constitution, the reference point for review of the constitutionality of statutes is the constitutional order. Article 1.2 of the Constitution also establishes the obligation of the Constitutional Court, as a state body of the Czech Republic, to interpret the constitutional order consistently with European law in relation to domestic law in areas where Community law and the legal order of the Czech Republic meet. Note the undertaking of loyalty under Article 10 of the Treaty establishing the European Community.

The legal framework for a forced share buy-out is in accordance with the Constitution. From the perspective of the proportionality principle, it is based on a decision by a “super-majority” of shareholders at a general meeting but the framework must observe other safeguards for the protection of property rights under Article 11 of the Charter of Fundamental Rights and Freedoms when regulating the procedures followed in a forced buy-out (commensurate compensation, legal protection).

Summary:

A group of senators lodged a petition under Article 87.1.a of the Constitution, on the repeal of statutes, for the repeal of § 183i to § 183n of Act no. 513/1991 Coll., the Commercial Code, as amended, which are included in the heading "Right to Buy Out Participating Securities." In a judgment of 27 March 2008, the plenum of the Constitutional Court denied the petition.

The Constitutional Court began by considering whether, during the passage of the amendment to the Commercial Code adding the disputed provisions, a sufficiently serious violation of the rules of parliamentary procedure had occurred to justify the repeal of the Act (with reference to Judgment Pl. ÚS 77/06, no. 37/2007 Coll.). The Constitutional Court found that this was not the case. The situation in these proceedings differed somewhat from the state of affairs before the Court in the above judgment. A request was made then to link review of the question of observance of legislative procedure with the proportionality test, in connection with the principle of protection of citizens' justified confidence in the law, legal certainty, and acquired rights, or in connection with other principles, including fundamental rights, freedoms, and public values protected by the legal order.

As regards the objection of the supposed inconsistency between the framework of the right to a forced buy-out with the Thirteenth Directive (Directive no. 004/25/ES), the Constitutional Court stated that the point of reference for review of the constitutionality of statutes under Articles 87.1.a and 88.2 of the Constitution is the constitutional order. The Constitutional Court is not competent, within such proceedings, to review the consistency of domestic law with community law. It is not the Constitutional Court's role to rule on objections aimed at defective transposition of community law. The same applies to the objection of not respecting international agreements on protection of investments.

The Constitutional Court began by stating that a corporation is of a different nature to a trade union, an association, a political party, or a religious society. The same criteria cannot, therefore, be used to evaluate whether such a company has met the constitutional requirements for its creation, operation, and termination. The status of shareholders can not be compared to membership rights in other types of associations and companies. For the Constitutional Court, it is fundamental, in the case of a forced buy-out, that this economically based procedure (rationality and appropriateness of interference) is established in a legal framework as is required by the conditions of a law-based state (the legality of interference). A forced

buy-out does not involve the usual decision-making at a shareholder meeting. It requires a super majority, one that is so high that it will practically suppress any possible objections about abuse of position. With a ratio of nine to one, we cannot speak of a realistic possibility for the minority shareholders to influence the company's decision-making; this would only complicate its operations in reality. In terms of the proportionality principle, given this ratio, it is difficult to raise any objections, if the other safeguards for the protection of property rights are observed in the framework for the actual procedure followed in a forced buy-out (commensurate compensation, legal protection).

As regards the general objection that this is a form of expropriation, the Constitutional Court noted that the entity depriving minority shareholders of their rights is not a public authority acting in the public interest. The Constitutional Court also stated that the legal framework for a forced buy-out of shares was not retroactive, and came into effect at a time when the Commercial Code already contained the analogous framework for a so-called false squeeze-out.

The Constitutional Court also rejected the argument that this violates equality. The nature of share ownership alone does not guarantee shareholders an unchanging status, or absolute equality, because the scope of their property rights is derived from the number of shares of the same nominal value, and the nature of a corporation creates the possible "risk" of a change in the status of shareholders, especially minority shareholders. The process of decision-making at a general meeting, based on the ownership of shares of a particular nominal value, is fully in accordance with the nature of this type of entrepreneurial association under Articles 11.1, 11.3, 20.1, 26.1 and 36.2 of the Charter. If the Commercial Code establishes different degrees of minority protection in a corporation, depending on the significance of the decision to be made (unanimity, nine-tenths, three-fourths, two-thirds, or simple majority) and links this with the ratio of the shareowners, this does not pose a problem from a constitutional viewpoint. Observance of the rule of Article 11.1 of the Charter on equal protection of property rights can be judged only by evaluating the position of owners in the same situation.

As regards the objection of an insufficient guarantee of an appropriate price for the bought-out shares, the Constitutional Court stated that this question could only be addressed within proceedings under § 183.i.5 of the Commercial Code (review by the Czech National Bank) and § 183.k of the Commercial Code (judicial protection for owners of participating securities). This issue could only be resolved as an individual case, not as part of an abstract review of the norm. Evaluating

whether compensation is commensurate is a matter for expert, impartial consideration. The selection of an expert by the primary shareholder, if this is balanced by other measures and guarantees on the part of the state, does not make the legal framework for establishing a price unconstitutional.

Finally, the Constitutional Court noted the separate case, dealing with register proceedings in connection with the exercise of a right to buy out securities, under file no. Pl. ÚS 43/05.

Languages:

Czech.



Identification: CZE-2008-1-005

a) Czech Republic / **b)** Constitutional Court / **c)** First Chamber / **d)** 09.04.2008 / **e)** I. US 1589/07 / **f)** On the obligation of general courts to deal with the parties' objections / **g)** *Sbírka nálezů a usnesení* (Collection of decisions and judgments of the Constitutional Court); <http://www.nalus.usoud.cz> / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

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:

Expert, evidence, duty to give / Court, obligation to deal with grounds raised by the parties.

Headnotes:

The general courts are required to provide proper reasoning for their decisions, and they must deal with objections raised by parties to the proceedings, in a manner appropriate to their seriousness. Not dealing with objections that are raised could be a violation of the right to a fair trial under Article 36.1 of the Charter of Fundamental Rights and Freedoms (the "Charter").

Summary:

A court expert asked the plaintiff, a physician in general practice, to lend him the medical records of the injured party, P. F., who was under his care, in the course of criminal proceedings. Under § 67.b.10.d of the Act on Care for the Health of the People, he refused to do so. That provision only permits a court expert to view the records. It cannot be interpreted to mean that it creates an obligation for the physician to issue the records.

By decision of the Police of the Czech Republic, the District Directorate in XY (the "police decision") the plaintiff was fined for having refused to deliver the relevant records. The plaintiff filed a complaint against the police decision with the district court, which denied the complaint, without discussing in detail the presented interpretation of the provision of the Act on Care for the Health of the People. The plaintiff, in his constitutional complaint, contested the police decision and the decision of the district court.

The Constitutional Court emphasised that the principle of the right to a fair trial corresponds to an obligation on the general courts to provide proper reasoning for the decisions. They must deal with the objections raised by parties to the proceedings, in a manner appropriate to their seriousness. In this matter the district court did not, in any manner, address the objection in which the plaintiff questioned the interpretation of the relevant provision of the Act on Care for the Health of the People. Yet, this was the plaintiff's primary and only objection, which was supported at a minimum by the literal interpretation of the provision in question. The general court's failure to deal with the objection violated the plaintiff's right to a fair trial under Article 36.1 of the Charter.

In its judgment of 9 April 2008, the Constitutional Court, under Article 87.1.d of the Constitution, in proceedings on constitutional complaints annulled the contested district court decision. As regards the police decision, it rejected the constitutional complaint as impermissible.

Languages:

Czech.



Estonia

Supreme Court

Important decisions

Identification: EST-2008-1-001

a) Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 03.12.2007 / **e)** 3-3-1-41-06 / **f)** Action of Sten Liebert for annulment of the Tallinn City Government order no. 1799-k of 15 September 2004 / **g)** *Riigi Teataja III (RTIII)* (Official Gazette), 2007, 44, 350 / **h)** <http://www.riigikohus.ee>; CODICES (Estonian, English).

Keywords of the systematic thesaurus:

- 3.3 General Principles – **Democracy.**
- 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.**
- 3.13 General Principles – **Legality.**
- 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.**
- 5.1.4 Fundamental Rights – General questions – **Limits and restrictions.**
- 5.3.39.3 Fundamental Rights – Civil and political rights – Right to property – **Other limitations.**

Keywords of the alphabetical index:

Plan, land-use, legality / Local government, powers.

Headnotes:

The requirement that restrictions are to be provided by law derives from the principles of the rule of law and democracy. Thus, where issues concerning fundamental rights are at stake, it is for the legislator to take the necessary decisions. The aim of the constitutional provisions concerning competence and formal requirements is to guarantee the observance of basic constitutional principles, including legal clarity, legal certainty, separation and balance of

powers, and the effective protection of fundamental rights.

Summary:

I. In May 2003, S. L. filed an application with the Tallinn Sustainable Development and Planning Board to initiate the preparation of a detailed plan for dividing registered immovable property at Põllu Street, Tallinn, into two residential plots and for the determination of the building rights of the plots created. In September 2004, the Tallinn City Government issued Order no. 1799-k “Refusal to initiate the preparation of detailed plan for registered immovable at ... Põllu Street”. The explanatory letter to the draft of the order indicated that the City Government had declined to initiate the preparation of the detailed plan, because the Tallinn Cultural Goods Board had not approved it. The reason was that the plan would have resulted in the creation of plots smaller than the minimum size established for small residential buildings in the Nõmme city district by regulation no. 17 of the Tallinn City Council of 27 June 1996. This, in turn, would compromise the cultural and environmental value of Nõmme district.

S. L. filed an action with the Tallinn Administrative Court, applying for the annulment of the Tallinn City Government’s order. In December 2004, the Tallinn Administrative Court satisfied the action of S. L., annulled the Tallinn City Government order no. 1799-k, and directed the Tallinn City Government to review SL’s application in compliance with the circumstances established in the judgment. In February 2006 the Tallinn Circuit Court satisfied the appeals of the Tallinn City Government and the Tallinn Cultural Goods Board. The circuit court annulled the judgment of the Tallinn Administrative Court and rendered a new judgment. S. L. filed an appeal in cassation against the Tallinn Circuit Court judgment, applying for the annulment of the Tallinn Circuit Court judgment and for the upholding of the Tallinn Administrative Court judgment. The Administrative Law Chamber of the Supreme Court transferred the case to the general assembly of the Supreme Court in May 2007, so that the general assembly could form an opinion on the conformity of the Tallinn City Council regulation no. 17 with Section 32 of the Constitution and could review the conformity of the regulation with the norms of the Planning Act and the Building Act delegating authority.

II. Under Section 32.2 of the Constitution, everyone has the right to freely possess, use, and dispose of his or her property, and restrictions on ownership shall be provided by law.

In previous judgments, the Supreme Court has emphasised the principle that, pursuant to the first sentence of Sections 3.1 and 11 of the Constitution, any restrictions on fundamental rights and freedoms may only be imposed by legislation having the force of law. The general assembly was of the opinion that although the restrictions of fundamental rights of certain intensity may be imposed only by laws in the formal sense, the principle is not an absolute one. It proceeds from the spirit and the letter of the Constitution that less intensive restrictions of fundamental rights may also be imposed by a regulation, on the basis of an authority-delegating norm that is precise, clear and proportional to the intensity of the restriction. Restrictions on the right of ownership may be imposed only by formal laws or on the basis of a norm delegating authority, meeting the referred requirements, included in the law, and restrictions may not be imposed by local government's legislation of general application. The purpose of this requirement is to ensure that restrictions on the right of ownership are established on the basis of the same criteria throughout the state. It would go against the principle of equal treatment and uniformity if the protection of the right of ownership were unequally guaranteed in different regions of the state.

The provisions of the Planning and Building Act (or the Building Act and Planning Act which succeeded it) were valid at the time of issue of the contested regulation, to which reference was made in the preamble of the regulation. They did not contain a norm delegating authority to establish the minimum size of plots of small residential houses on the whole or on the part of the territory of a local government unit.

Under Article 154.1 of the Constitution, all local issues shall be resolved and managed by local governments, which shall operate independently pursuant to law.

Section 6.1 of the Local Government Organisation Act enumerates physical planning as one of the issues that a local government authority must organise on its territory. The Supreme Court found that it proceeds from the hierarchy of plans and from the principle of gapless protection of fundamental rights, required by the Constitution, that the power to plan is within the shared competence of the state and of local governments. The division of state and local government functions upon the exercise of shared competences is determined by the principle of subsidiarity. Within the Estonian legal order, this originates from Article 4.3 of the European Charter of Local Self-Government ratified by Estonia. Consequently, a concrete function is fulfilled by the

level of power that, in the concrete situation, is in the best position to do it.

The general assembly was of the opinion that even if the establishment of the size of plots of residential buildings was regarded as a local issue, a local government could not do this by a regulation in the absence of a relevant norm delegating authority. The establishment of minimum sizes for residential building plots infringes upon the fundamental right of ownership, established in Section 32 of the Constitution. Under the Constitution the principle of legality is binding on a local government unit as regards the management of both the local and the national issues assigned to it. Therefore, any activities by local government that impinge on fundamental rights must always have a legal basis.

The general assembly decided that at the time of refusal to initiate the preparation of the detailed plan requested by S. L. and the refusal to divide the registered immovable property located in Põllu Street, Tallinn, the contested regulation was in conflict with the first sentence of Section 3.1 of the Constitution and with the second sentence of Section 32.2 of the Constitution. As the Tallinn City Council regulation of 27 June 1996, "Establishment of the minimum size of building plots in Nõmme", had been declared invalid by then, the general assembly declared that the regulation was unconstitutional during the period of its validity, i.e. from 27 June 1996 until 28 October 2004.

Cross-references:

- III-4/A-1/94 of 12.01.1994;
- III-4/A-2/94 of 12.01.1994, *Bulletin* 1994/1 (EST-1994-1-001);
- Decision 3-4-1-7-01 of 11.10.2001, *Bulletin* 2001/3 (EST-2001-3-005);
- Decision 3-4-1-10-02 of 24.12.2002, *Bulletin* 2002/3 (EST-2002-3-010).

Languages:

Estonian, English.



Identification: EST-2008-1-002

a) Estonia / **b)** Supreme Court / **c)** General Assembly (*En banc*) / **d)** 03.01.2008 / **e)** 3-3-1-101-06 / **f)** Action of Tatjana Gorjatšova for the annulment of the Government of the Republic Order no. 433 of 11 July 2005 / **g)** *Riigi Teataja III (RTIII)* (Official Gazette), 2008, 3, 23, 350 / **h)** <http://www.riigikohus.ee>; CODICES (Estonian, English).

Keywords of the systematic thesaurus:

3.24 General Principles – **Loyalty to the State.**

4.11.3 Institutions – Armed forces, police forces and secret services – **Secret services.**

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

5.3.8 Fundamental Rights – Civil and political rights – **Right to citizenship or nationality.**

Keywords of the alphabetical index:

Citizenship, acquisition, conditions / Citizenship, refusal / Equal treatment, unequal situations / Secret service, past co-operation.

Headnotes:

The right to acquire citizenship by naturalisation is not a fundamental right. However, when regulating the acquisition and loss of citizenship, the legislator must take into consideration the fundamental rights and freedoms established in the Constitution, in particular the fundamental right to equality and prohibition of discrimination.

This case dealt with the strict prohibition on the granting of citizenship to persons who have been employed by foreign security services, regardless of the nature of their employment. This was held not to be in breach of the fundamental right to equality. In the absence of evidence of any other possible violations of fundamental rights, the allegations of the violation of the principle of proportionality could not have been analysed. Therefore, the unconstitutionality of Section 21.1.5 of the Citizenship Act was not found.

Summary:

I. Mrs Tatjana Gorjatšova (T.G.) filed an action with the Tallinn Administrative Court for the annulment of the order of the Government of the Republic refusing her application for Estonian citizenship because she had been employed as executive secretary in the National Security Committee of the Estonian SSR from 1978 to 1979. The Government's order was based on Section 21.1.5 of the Citizenship Act, a

provision that forbids the granting of Estonian citizenship to persons who have been employed or are currently employed by foreign intelligence or security services.

The Administrative Court did not grant T.G.'s appeal, as the referred norm established a strict prohibition, with no right to discretion, on the granting of citizenship where the applicant for citizenship had been employed by foreign intelligence or security services. The court deemed that the Government had correctly ascertained the fact which served as the basis for refusal to grant citizenship, and had taken a lawful decision.

Mrs T.G. further filed an appeal with the Tallinn Circuit Court, arguing that she was only on the technical staff, not fulfilling the functions specific to security organisations, and was loyal to the Estonian Republic. She argued that the refusal to grant citizenship was unjustified, as it was disproportional and discriminatory.

The Circuit Court proceeded to interpret the norm (Section 21.1.5 of the Citizenship Act) by a material assessment of the danger T.G. might pose to the Estonian Republic. The Circuit Court held that in view of the specificity of her work, there was no reason to consider that she was any more dangerous to the Republic than persons who had not been employed by a security organisation of a state that had occupied Estonia. The Circuit Court therefore upheld her appeal.

This judgment was again contested by the Government of the Republic who filed an appeal in cassation with the Supreme Court, applying for the annulment of the Circuit Court judgment and for the upholding of the Administrative Court judgment. The Administrative Chamber of the Supreme Court had doubts as to whether Section 21.1.5 of the Citizenship Act was in conformity with the principle of equal treatment. It accordingly referred the matter for hearing to the General Assembly of the Supreme Court.

II. The General Assembly of the Supreme Court continued to take the view that as a rule, international law leaves the precise conditions for acquisition of citizenship to be decided by each state. The right to acquire citizenship by naturalisation is not a fundamental right. However, when regulating the acquisition and loss of citizenship, the legislator must take into consideration the fundamental rights and freedoms established in the Constitution, especially the fundamental right to equality and prohibition of discrimination.

The General Assembly found that there was no violation of the principle of equal treatment (Article 12.1 of the Constitution) in the Government's order of refusal to grant citizenship to Mrs T.G.

The prohibition on unequal treatment of equal persons can only be violated if two similar persons, groups of persons or situations are treated unequally in an arbitrary fashion, i.e. if there is no reasonable cause for it. In cases where there is reasonable and appropriate cause for unequal treatment in legislation, it is justified. But the issue of justification of an unequal treatment of persons, groups or situations can arise only if the groups who are treated differently are comparable, i.e. they are in an analogous situation from the aspect of concrete differentiation.

In the current case, the General Assembly found that the two groups of persons treated differently (those, who have performed support functions in intelligence and security services and those who have performed such functions outside these services) were not comparable as these groups of persons were not in analogous situations. Therefore, the question of unequal treatment of these groups could not be raised, and thus no infringement of the fundamental right to equality was found.

The General Assembly then assessed a possible violation of the principle of proportionality (Article 11.2 of the Constitution) in the Government's order.

Article 11 of the Constitution allows for restriction of rights and freedoms under three conditions. Firstly, rights and freedoms may be restricted "only in accordance with the Constitution"; secondly, the restrictions must be "necessary in a democratic society" and thirdly, the restrictions must not "distort the nature of the rights and freedoms restricted". As Article 11 of the Constitution itself only sets principles for interpretation and application of fundamental rights, without specifying any of these, the review of the observance of these principles requires that an infringement of a pertinent fundamental right be ascertained first.

In the current case, as established above, no violation of the right to equality was found. And, as the General Assembly could not see any other fundamental right that could be infringed by Section 21.1.5 of the Citizenship Act, the Supreme Court did not find it possible to analyse T.G.'s allegations of the violation of the principle of proportionality.

As in this case the unconstitutionality of Section 21.1.5 of the Citizenship Act did not become evident, the Supreme Court concluded that the Government was correct in relying on this norm when making its

decision. The Supreme Court satisfied the appeal in cassation of the Government of the Republic, annulled the judgment of the Circuit Court due to erroneous application of a substantive law provision, and upheld the initial judgment of the Tallinn Administrative Court.

Cross-references:

- Decision 3-3-1-47-03 of 10.12.2003 of the General Assembly, *Bulletin* 2004/1 [EST-2004-1-003];
- Decision 3-4-1-1-02 of 06.03.2002 of the Constitutional Review Chamber, *Bulletin* 2002/1 [EST-2002-1-001];
- Decision 3-4-1-2-02 of 03.04.2002 of the Constitutional Review Chamber, *Bulletin* 2002/1 [EST-2002-1-002];
- Decision 3-4-1-2-05 of 27.06.2005 of the General Assembly;
- Decision 3-4-1-7-01 of 11.10.2001 of the General Assembly, *Bulletin* 2001/3 [EST-2001-3-005];
- Decision 3-1-3-10-02 of 17.03.2003 of the General Assembly, *Bulletin* 2003/2 [EST-2003-2-003].

Languages:

Estonian, English.



Identification: EST-2008-1-003

a) Estonia / **b)** Supreme Court / **c)** / **d)** 05.02.2008 / **e)** 3-4-1-1-08 / **f)** Petition of Kreenholmi valduse Ltd for the declaration of unconstitutionality and invalidity of certain regulations of Narva City Council and Narva City Government / **g)** *Riigi Teataja III (RTIII)* (Official Gazette), 2008, 8, 52 / **h)** <http://www.riigikohus.ee>; CODICES (Estonian, English).

Keywords of the systematic thesaurus:

1.2.2.3 Constitutional Justice – Types of claim – Claim by a private body or individual – **Profit-making corporate body.**

1.3.1 Constitutional Justice – Jurisdiction – **Scope of review.**

1.4.9.1 Constitutional Justice – Procedure – Parties – **Locus standi.**

4.7.14 Institutions – Judicial bodies – **Arbitration.**

4.15 Institutions – **Exercise of public functions by private bodies.**

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

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

Keywords of the alphabetical index:

Arbitration, constitutional review, initiation / Constitutional complaint, admissibility / Constitutional Court, individual complaint, admissibility.

Headnotes:

Arbitration tribunals differ from the usual courts, in that they cannot initiate a constitutional review procedure. They cannot decline to apply relevant legislation if they deem it unconstitutional. Such divergence in arbitration proceedings is justifiable by the parties' voluntary waiver of the universal right to recourse to courts in cases of violation of rights and freedoms. When entering into an arbitration agreement, the parties must inevitably bear in mind that this will exclude, to a substantial extent, the review of constitutionality of applicable norms by the courts. Provided an arbitration agreement is valid, and the arbitration tribunal is competent to adjudicate the dispute, the parties have, in a manner permissible in relationships in private law, waived the possibility of adjudication of the dispute by a court. By doing this, they have, at least in part, waived methods of protection of fundamental rights that can be exercised solely in the courts. Nevertheless, in reviewing a petition for annulment of a decision by an arbitration tribunal, the Circuit Court can annul a decision of an arbitral tribunal, based on the request of a party or at the court's initiative, i.e. if the court establishes that the decision of the arbitration tribunal is contrary to Estonian public order or good morals.

Summary:

I. On 1 March 2002, the petitioner, Kreenholmi Valduse Ltd (a manufacturer) and PLC Narva Vesi (a water company) entered into a contract the object of which was the purchase of drinking water and provision of the service of waste-water treatment. The contract was valid until 31 December 2004. Although a new written contract has not been entered into, PLC Narva Vesi continued to provide the services to the petitioner and the latter paid for the services on the basis of earlier prices.

In 2006, Narva City Council and City Government issued several regulations. These were Narva City Council regulation no. 23 of 8 June 2006 "Approval of the price of water supply and waste-water disposal

service"; Narva City Government regulation no. 847 of 29 June 2006 "Determination of the price of water supply and waste-water disposal service"; Narva City Council regulations no. 30 of 3 August 2006 "Rules for use of public water supply and sewerage", and no. 31 of 3 August 2006 "Procedure for price regulation of water supply and waste-water disposal service". Under these regulations, the prices of water supply and waste-water disposal in the administrative territory of Narva City for PLC Narva Vesi were approved, and pollution groups exceeding limit values and corresponding fees were determined. The petitioner contested the regulations several times at administrative court level, but the courts refused to hear these actions and the proceedings were terminated, because the contested acts were of general application. As a result, the review of their constitutionality did not fall within the competence of administrative courts.

In 2007, PLC Narva Vesi filed an action with the Arbitration Court of the Estonian Chamber of Commerce and Industry, claiming from the petitioner the alleged arrears (ca 1.2 million €), a sum which basically consisted of the fees for water supply and discharge of waste-water as calculated on the basis of the above regulations, and a fine for delay. The petitioner Kreenholmi Valduse Ltd countered that the regulations were out of line with the Constitution as they disproportionately infringed the petitioner's general right to equality (Article 12 of the Constitution) and freedom to engage in enterprise (Article 31 of the Constitution). They were also in conflict with the principle of legal certainty. Because it appeared to have no other method of effective protection of its rights through the Arbitration Court procedure, the petitioner asked the Supreme Court to declare the regulations unconstitutional and invalid.

II. Article 15.1 of the Constitution recognises everyone's right to petition, while his or her case is before the court, for a constitutional review of any relevant law, other legislation or procedure. However, the Constitutional Review Court Procedure Act does not *expressis verbis* provide for a possibility of direct submission to the Supreme Court of individual complaints for the review of constitutionality of legislation of general application. Nevertheless, the General Assembly of the Supreme Court has previously held that the Supreme Court can only refuse to hear an individual complaint in constitutional review proceedings if the applicant can avail him or herself of some other effective remedy for the exercise of the judicial protection guaranteed by Article 15 of the Constitution. Therefore the Constitutional Review Chamber had to ascertain whether, in the current case, there were any possibilities available for the petitioner for the

protection of its fundamental rights, other than having recourse to the Supreme Court by way of constitutional review, which actually constituted the main essence of this ruling, determining whether the individual complaint was permissible or not.

Arbitration tribunals differ from the usual courts, in that they cannot initiate a constitutional review procedure. They cannot decline to apply relevant legislation if they deem it unconstitutional. Such divergence in arbitration proceedings is justifiable by the parties' voluntary waiver of the universal right to recourse to courts in cases of violation of rights and freedoms. When entering into an arbitration agreement, the parties must inevitably bear in mind that this will exclude, to a substantial extent, the review of constitutionality of applicable norms by the courts. Provided an arbitration agreement is valid and the arbitration tribunal is competent to adjudicate the dispute, the parties have, in a manner permissible in relationships in private law, waived the possibility of adjudication of the dispute by a court. By doing this, they have, at least in part, waived methods of protection of fundamental rights that can be exercised solely in the courts. Nevertheless, in reviewing a petition for annulment of a decision by an arbitration tribunal, the Circuit Court can annul a decision of an arbitral tribunal, based on the request of a party or at the court's initiative, i.e. if the court establishes that the decision of the arbitral tribunal is contrary to Estonian public order or good morals.

The Constitutional Review Chamber found that the petitioner had other options for the protection of its fundamental rights, than recourse to the Supreme Court by way of constitutional review. Consequently, the petition was deemed not permissible, not to be adjudicated on its merits, and was dismissed.

Cross-references:

- Decision 3-1-3-10-02 of 17.03.2003 of the General Assembly, *Bulletin* 2003/2 [EST-2003-2-003];
- Decision 3-4-1-4-03 of 14.04.2003 of the Constitutional Review Chamber, *Bulletin* 2003/2 [EST-2003-2-004].

Languages:

Estonian, English.



Identification: EST-2008-1-004

a) Estonia / **b)** Supreme Court / **c)** General Assembly / **d)** 10.03.2008 / **e)** 3-3-2-1-07 / **f)** Actions by Ivo Jurno, Meeri Konno, Pavel Žukovets, Vladimir Solovjov, Tõnu Eichler, Hele Mets, Vladimir Uik, Svetlana Gude, Jevgenia Nugis, Kiira Chagall, Asta Kortel, Janika Toompere, Lembit Nokkur, Valve Hääl and Rudolf Polman for declaration of illegality of CRCUEP decision no. 4032 of 24 October 1994 and of the Tallinn City Government order no. 244-k of 30 January 1995 / **g)** *Riigi Teataja III (RTIII)* (Official Gazette), 2008, 12, 85 / **h)** <http://www.riigikohus.ee>; CODICES (Estonian, English).

Keywords of the systematic thesaurus:

1.6.3 Constitutional Justice – Effects – **Effect erga omnes.**

1.6.5.2 Constitutional Justice – Effects – Temporal effect – **Retrospective effect (ex tunc).**

1.6.5.4 Constitutional Justice – Effects – Temporal effect – **Ex nunc effect.**

1.6.9.2 Constitutional Justice – Effects – Consequences for other cases – **Decided cases.**

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

Keywords of the alphabetical index:

Expropriation, restitution / Expropriation, compensation.

Headnotes:

Judgments in constitutional review proceedings do not only have *ex nunc* effect. The enactment of the ground for review does not mean that all judgments rendered in constitutional review proceedings automatically have retroactive force. If a petition for review is satisfied, total restitution of legal relationships in the case under review would not always be necessary.

Summary:

I. In December 2006 K. E. A. E. filed a petition for review, applying for the annulment of the Tallinn Circuit Court judgment of May 1999 and the Administrative Law Chamber of the Supreme Court ruling of March 1999, and for the upholding of the Tallinn Administrative Court judgment of August 1998 and the Tallinn Circuit Court judgment of November 1998. It also requested that the Tallinn City Government be directed to overturn the annulled judgments. K. E. A. E. found in the petition that pursuant to Section 702.2.7 of the Code of Civil Procedure (CCP), the ground for review in this case is the judgment of the general assembly of the

Supreme Court of 12 April 2006. This declared Section 7.3 of the Principles of Ownership Reform Act (PORA) invalid as of 12 October 2006, on the condition that an Act amending or repealing Section 7.3 of the PORA had not come into force by that date. In its judgment of 6 December 2006, the general assembly of the Supreme Court held that Section 7.3 of the PORA was invalid as of 12 October 2006. The circumstance, serving as the ground for review, became evident on 12 October 2006 when, proceeding from the general assembly of the Supreme Court judgment of 12 April 2006, Section 7.3 of the PORA was declared invalid. These judgments created a legal situation where K. E. A. E. is not an "entitled subject" for the purposes of the Principles of Ownership Reform Act and in regard to return of property.

II. The general assembly of the Supreme Court was of the opinion that the impermissibility of filing of a petition for review cannot be justified by the former judgments of the Supreme Court, in which it was found that judgments rendered in constitutional review proceedings have no retroactive force. At the time when the general assembly and the Constitutional Review Chamber rendered the judgments it was not provided by law that a judgment rendered in constitutional review proceedings constituted a ground for review of judgments rendered in administrative court proceedings. By establishing the possibility for review of judgments in administrative court proceedings, the legislator has clearly underlined that a judgment rendered in constitutional review proceedings may have retroactive force. The review of a judgment would not be possible if the judgments in constitutional review proceedings had only *ex nunc* effect. The enactment of the ground for review referred to in Section 702.2.7 of the CCP does not mean that all judgments rendered in constitutional review proceedings have retroactive force. Section 58.3 of the Constitutional Review Court Procedure Act allows rendering of such judgments in constitutional review proceedings that do not have *erga omnes* retroactive force. Neither does the establishment of the ground for review referred to in Section 702.2.7 of the CCP mean that if a petition for review is satisfied, total restitution of legal relationships in the case under review would always be necessary. The elimination of the consequences of an unlawful administrative act need not necessarily consist in the reversal of the act. Compensation for damage is also a possibility.

Section 7.3 of the PORA, in conjunction with the first sentence of Section 18.1 of the PORA, established the prohibition on the return of, compensation for or transfer of property which was in the ownership of resettlers, including private rental. The above

prohibition was a moratorium that was to remain in force until the entry into force of the international agreement referred to in Section 7.3 of the PORA or until the said section or the first sentence of Section 18.1 of the PORA became invalid.

In relation to Section 7.3 of the PORA, the general assembly of the Supreme Court has rendered three judgments (28 October 2002, 12 April 2006 and 6 December 2006). It proceeds from these judgments in their conjunction that the prohibition on the return of, compensation for or transfer of property that was in the ownership of re-settlers to Germany, including private rental, was in force until 12 October 2006, when paragraph 2 of the Supreme Court judgment of 12 April 2006 entered into force. Thus, in this case there was no ground for review and the Supreme Court dismissed the petition for review of K. E. A. E.

The Supreme Court went on to explain the legal situation as follows. Section 7.3 of the PORA had become invalid, yet the legislator had failed to enact legal regulation on how to proceed with applications submitted in regard to property which was in the possession of persons who resettled to Germany or the regulation that would enable or preclude the submission of new applications.

The right of persons to organisation and procedure, arising from Sections 13 and 14 of the Constitution, has to be guaranteed and the uncertainty of persons who have submitted applications in regard to property that was in the possession of persons, who resettled to Germany, has to be terminated. Also the applications submitted in connection with such property will have to be heard irrespective of whether these applications have previously been dismissed or denied under Section 7.3 of the PORA. The applications in regard to which administrative decisions were made, which were declared illegal or annulled by administrative court judgments on the basis of Section 7.3 of the PORA, must be heard, too.

Some parties had been expecting the conclusion of the international agreement referred to in Section 7.3 of the PORA, and have not submitted applications in regard to property which was in the ownership of persons who resettled to Germany. If such an application is submitted, it has to be decided whether the application was submitted within a reasonable time, and why it had not been submitted for over a year since 12 October 2006. The same applies to cases where an application, which was returned without hearing on the basis of Section 7.3 of the PORA, is re-submitted.

Supplementary information:

This judgment initiated activities by local governments and those who had resettled to Germany in 1941 (and whose property had been illegally expropriated) or their heirs with a view to a full and final settlement of these issues. The issue of unlawfully expropriated property and the return of or compensation for the said property has been a catalyst for lively discussion in Estonia and has given rise to various speculations and illegal transactions for fifteen years already.

Cross-references:

- Decision 3-4-1-5-00 of 12.05.2000, *Bulletin* 2000/2 (EST-2000-2-005);
- Decision 3-4-1-10-02 of 24.12.2002, *Bulletin* 2002/3 (EST-2002-3-010);
- Decision 3-4-1-5-02 of 28.10.2002, *Bulletin* 2002/3 (EST-2002-3-007);
- Decision 3-4-1-8-02 of 05.11.2002, *Bulletin* 2002/3 (EST-2002-3-008);
- Decision 3-3-1-63-05 of 12.04.2006, *Bulletin* 2006/1 (EST-2006-1-001);
- Decision 3-4-1-14-06 of 31.01.2007, *Bulletin* 2007/1 (EST-2007-1-002).

Languages:

Estonian, English.

*Identification:* EST-2008-1-005

a) Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 09.04.2008 / **e)** 3-4-1-20-07 / **f)** Petitions of the Harju County Court of 19 and 21 December 2007 to review the constitutionality of Article 390.1 of the Code of Civil Procedure / **g)** *Riigi Teataja III (RTIII)* (Official Gazette), 2008, 16, 105 / **h)** <http://www.riigikohus.ee>; CODICES (Estonian, English).

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.**

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

Keywords of the alphabetical index:

Right to appeal / Appeal, security, forfeiture / Judicial efficiency.

Headnotes:

The institution of the right to appeal is based on the assumption that it is necessary to guarantee the review of correctness of court judgments and rulings. The aim of ensuring the efficiency of the judicial system does not justify the deprivation of persons of the possibility of challenging rulings by which an action is not secured and, thus, the security is transferred into the public revenues, because this cannot be subsequently reviewed in any other proceedings, either.

Summary:

I. By its rulings of 31 October the Harju County Court dismissed the petition for securing the action of AK against KP (applying, *inter alia* for an order that the defendant pay 3 228 432 kroons) and transferred the security for securing the action (100 000 kroons) into the public revenues. In addition, by its ruling of 6 November 2007, the Harju County Court dismissed the petition for securing the action of BS against BH for ordering the payment of 1 096 675.10 kroons and transferred the security for securing the action (55 000) into the public revenues.

Both plaintiffs filed appeals against the rulings. The Harju County Court handed down rulings on 19 and 21 December 2007. In them, it did not apply Section 390.1 of the Code of Civil Procedure (hereinafter “the CCP”) to the extent that it precludes the filing of appeals against rulings on dismissal of petitions for securing actions, considering it unconstitutional. It upheld the appeal against the ruling, forwarded its ruling to the Supreme Court for constitutional review, and stayed the proceeding of the appeal against the ruling until the adjudication of the constitutional review matter by the Supreme Court. The county court was of the opinion that the consequence resulting from the dismissal of a petition for securing an action affects the rights of the petitioner to the extent that to avoid court errors it must be protected by the right of appeal.

II. There are two norms with decisive importance for the adjudication of the dispute. The first sentence of Section 390.1 of the CCP allows a party to file an appeal against a ruling by which a county court or

circuit court satisfies an application for securing an action, substitutes one measure for the securing of an action with another, or cancels the measures to secure an action. Section 660.1 of the CCP allows a party to proceedings to whom a ruling of a county court pertains may file an appeal against the ruling with a circuit court only if filing of an appeal against the ruling is permissible by law or the ruling hinders the further conduct of proceedings.

The Constitutional Review Chamber examined the conformity of the above provisions of the CCP with Article 24.5 of the Constitution. This bestows a universal right to appeal to a higher court pursuant to procedure provided by law. The Supreme Court has previously stated that "The institute of right of appeal, established in Article 24.5 of the Constitution, is based on the very assumption that it is necessary to guarantee the review of correctness of court judgments and rulings." The Chamber found that on the basis of the obligation to give broad interpretation to norms establishing fundamental rights and in order to ensure the protection of fundamental rights without gaps, a court ruling on refusal to secure an action, as a judgment in the broader sense, must be considered to fall within the sphere of protection of Article 24.5 of the Constitution.

A ruling on the dismissal of a petition for securing an action includes a decision to transfer, under the second sentence of Section 149.5 of the CCP, the security paid by the petitioner into the public revenues. According to Section 141.1 of the CCP a security for securing the action of 5 per cent of the value of the usual value of that which is claimed shall be paid. This shall, however, be no lower than 500 kroons and no higher than 100 000 kroons. Consequently, a ruling by which a court refuses to secure an action results in a substantial property consequence for a person – they forfeit the security they have paid. In the present case the securities in the civil cases were 55 000 and 100 000 kroons. The plaintiffs forfeited these sums because the court refused to secure the actions.

As it is not possible to contest a ruling on refusal to secure an action, a person is deprived of the right to contest the transfer of paid security into the public revenues. Irrespective of the content of the court judgment terminating the proceedings, the regulation does not allow for compensation for the security transferred into the public revenues from the opposing party either (see second sentence of Section 149.5 of the CCP). There is no possibility of appeal, i.e. control, and therefore this does not amount to an effective remedy. Furthermore, in the case of deciding on securing of an action, time is short, and there is wider scope for making mistakes.

The Chamber was of an opinion that persons should be allowed to appeal against a ruling by which, on the basis of Section 24.5 of the CCP, an action is not secured and the security paid is transferred into the public revenues. It would then be possible, through the control of the grounds for refusal to secure an action, to review the legality of transfer of security for securing an action into the public revenues. The aim of ensuring the efficiency of the judicial system does not justify depriving persons of the possibility of contesting rulings by which an action is not secured and, thus, the security is transferred into the public revenues, because this can not be subsequently reviewed in any other proceedings.

The Chamber found that the first sentence of Section 390.1 and Section 660.1 of the CCP were not in conformity with the right to appeal arising from Article 24.5 of the Constitution. It pronounced them unconstitutional and invalid to the extent that they do not permit an appeal against a ruling on dismissal of a petition for securing an action, where the security paid is transferred into the public revenues.

Cross-references:

- Decision 3-4-1-10-00 of 22.12.2000, *Bulletin* 2000/3 (EST-2000-3-009);
- Decision 3-1-3-10-02 of 17.03.2003, *Bulletin* 2003/2 (EST-2003-2-003);
- Decision 3-4-1-4-03 of 14.04.2003, *Bulletin* 2003/2 (EST-2003-2-004);
- Decision 3-4-1-1-04 of 25.03.2004.

Languages:

Estonian, English.



Germany

Federal Constitutional Court

Important decisions

Identification: GER-2008-1-001

a) Germany / **b)** Federal Constitutional Court / **c)** First Chamber of the Second Panel / **d)** 04.12.2007 / **e)** 2 BvR 38/06 / **f)** / **g)** / **h)** *Strafverteidigerforum* 2008, 151-154; CODICES (German).

Keywords of the systematic thesaurus:

2.1.2.2 Sources – Categories – Unwritten rules – **General principles of law**.
3.16 General Principles – **Proportionality**.
5.3.14 Fundamental Rights – Civil and political rights – **Ne bis in idem**.

Keywords of the alphabetical index:

Criminal offence, committed and punished abroad / *Ne bis in idem*, interstate application.

Headnotes:

The *ne bis in idem* principle only applies to domestic offences.

At the present time there is no general rule of public international law within the meaning of sentence 1 of Article 25 of the Basic Law according to which the *ne bis in idem* principle also applies between states.

The conduct of criminal proceedings and imposition of a sentence do not violate the proportionality principle simply because the offence was exclusively committed abroad or has already been punished there.

Summary:

I. The complainant, a German national, was convicted in both Switzerland and Germany of driving under the influence of alcohol while in Switzerland.

As a consequence of her driving under the influence of alcohol, a Swiss road traffic authority revoked her foreign licence to drive in Switzerland and

Liechtenstein for a period of two months, and she was sentenced in a non-appealable decision by a district authority to pay a fine for driving under the influence of alcohol.

A Local Court in Germany sentenced the complainant to pay a fine for negligent driving and driving under the influence of alcohol and suspended her driving licence. The German Local Court considered the fine imposed and collected in Switzerland a mitigating factor in its sentencing. Furthermore, it also set off the fine collected in Switzerland against the fine it imposed.

The complainant's appeal against the judgment of the Local Court was dismissed as unfounded by a Higher Regional Court. The complainant's constitutional complaint was directed against the judgment of the Local Court and the order of the Higher Regional Court.

II. The First Chamber of the Second Panel did not admit the constitutional complaint for decision. It held that the judgment of the Local Court did not violate the complainant's fundamental rights or her rights equivalent to fundamental rights.

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

There is no violation of Article 103.3 of the Basic Law. This legal provision grants an individual a constitutional right not to be punished twice for the same offence. However, this *ne bis in idem* principle, only applies in the case of first convictions by German, not foreign, courts. This is in keeping with the Federal Constitutional Court's established case-law which is based on the premise that the drafting history of Article 103.3 of the Basic Law must be attributed paramount importance in the provision's interpretation and application. According to the drafting history of the Article, the legal provision was only meant to make reference to the status of the procedural law applicable at the time the Basic Law entered into force and the *ne bis in idem* principle was only meant to be given constitutional status to the extent that it was recognised in non-constitutional law. The extent of its recognition was limited to domestic offences.

Nor does the judgment of the Local Court violate Article 2.1 of the Basic Law in conjunction with Article 25 of the Basic Law.

At the present time there is no general rule of public international law within the meaning of sentence 1 of Article 25 of the Basic Law according to which no person may be prosecuted or punished again for the

same offence in respect of which he or she has already been convicted or acquitted in a non-appealable decision in another state which also has criminal jurisdiction. A rule of public international law will be considered general within the meaning of Article 25 of the Basic Law if it is recognised by an overwhelming majority of states. General rules of public international law are rules of universally applicable customary international law that are complemented by general legal principles derived from national legal systems.

A *ne bis in idem* principle with interstate application has not become established either as international customary law or as a general legal principle. To this day no interstate prohibition against being tried or punished twice for the same offence has been embodied in a global public international law treaty or in central human rights institutions under public international law which apply universally or regionally.

Nor can the attempts detectable at the European level to incorporate a cross-border effect of the *ne bis in idem* principle in international treaties be regarded as an expression of the legal conviction of the states involved regarding the application of such a principle.

Nor does the judgment violate Article 2.1 of the Basic Law in conjunction with the proportionality principle derived from the rule of law principle.

Sentencing and prosecution also have to be examined to see whether they are proportionate, suitable and necessary in a more restricted sense for achieving the purposes of the punishment. If the recent criminal proceedings and the sentence imposed are measured by the above standards, they are not constitutionally objectionable.

Criminal proceedings for an offence committed abroad will only be suitable and necessary from the point of view of protecting legal interests, if the legal interest protected by a federal German criminal law is affected by conduct abroad. The non-constitutional courts need to clarify whether the area protected by a criminal law is affected by the conduct abroad by interpreting the respective law. The Federal Constitutional Court will review their interpretation only if there is a violation of a specific constitutional law. The fact that the Local Court regarded driving under the influence of alcohol as falling within the scope of § 316 of the Criminal Code is not constitutionally objectionable.

Nor does the fact that the offence had already been punished in Switzerland make the recently conducted criminal proceedings and the punishment imposed in connection therewith disproportionate.

Dispensing with domestic criminal proceedings because a foreign state has already prosecuted the offence or already punished the offender is not constitutionally required. The proportionality principle only obliges the legislature to ensure that the consequences for an offender of his or her criminal act (including also the effect of foreign criminal proceedings and any conviction abroad) are, all in all, still commensurate with the seriousness of his or her violation of a legal interest and his or her individual guilt. The legislature has fulfilled this obligation by prescribing in § 51.3 sentence 1 of the Criminal Code that it is mandatory for the courts to recognise in their sentencing a penalty that has been enforced abroad.

Languages:

German.



Identification: GER-2008-1-002

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 19.12.2007 / **e)** 1 BvR 620/07 / **f)** / **g)** / **h)** *Wettbewerb in Recht und Praxis*, 2008, 348-355; *Kommunikation und Recht* 2008, 172-176; *Neue Juristische Wochenschrift* 2008, 977-981; *Juristische Rundschau* 2008, 119; *Strafverteidigerforum* 2008, 110-114; *Zeitschrift für Urheber- und Medienrecht* 2008, 221-226; *MultiMedia und Recht* 2008, 231-235; *Strafrechtsreport* 2008, 143-144; CODICES (German).

Keywords of the systematic thesaurus:

- 3.17 General Principles – **Weighing of interests.**
- 4.7.2 Institutions – Judicial bodies – **Procedure.**
- 5.3.13 Fundamental Rights – Civil and political rights – **Procedural safeguards, rights of the defence and fair trial.**
- 5.3.23 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.**
- 5.3.32 Fundamental Rights – Civil and political rights – **Right to private life.**

Keywords of the alphabetical index:

Court proceedings, public awareness and monitoring / Criminal proceedings, recording, image, right.

Headnotes:

Decision regarding the question of the [presiding judge's] consideration of the broadcasting freedom contained in sentence 2 of Article 5.1 of the Basic Law when applying the rules governing order in the courtroom during a trial, to impose restrictions on audio and visual recording directly before and after oral hearings and during court recesses.

[Official Headnotes]

The presiding judge may order the imposition of restrictions on the basis of the rules governing order in the courtroom during a trial. He or she has discretion as to the details of the order and must exercise this discretion by taking into account the importance of broadcasting coverage for guaranteeing public awareness of court hearings and for monitoring such hearings. He or she must also take into account interests that conflict with such coverage and must ensure that the principle of proportionality is upheld. If the interest in audio and film coverage outweighs other interests that have to be taken into account, the presiding judge will be obliged to make same possible.

[Non official Headnotes]

Summary:

I. On 19 March 2007, the hearing of 18 army instructors who were alleged to have abused recruits at an army barrack began before the Muenster Regional Court. Before the hearing started the presiding judge of the Criminal Division ordered that camera and television crews be excluded from the courtroom for 15 minutes prior to the beginning of the trial and 10 minutes following its end. A German television network, *Zweites Deutsches Fernsehen* (hereinafter: ZDF), lodged a constitutional complaint against the order and motioned the Federal Constitutional Court for a temporary injunction ordering the removal of the time restrictions placed on the coverage of the trial.

The First Chamber of the First Panel of the Federal Constitutional Court issued an injunction on 15 March 2007, ordering the presiding judge to allow the ZDF television crew to film the parties to the proceedings in the courtroom and to ensure that the judges and the lay assessors were present at the same time. The order included the proviso that the faces of the accused who had not consented to their images being publicised would have to be concealed.

II. Both ZDF's motion for an injunction and its constitutional complaint were successful. The First Panel of the Federal Constitutional Court found that the order by the presiding judge of the Criminal Division had violated the complainant's fundamental right of broadcasting freedom. The vote on the decision was six in favour and one against.

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

The public monitoring of court hearings is in principle improved by the presence of the media and the coverage it provides. Similarly, it is in the judiciary's interest that the public be made aware of its proceedings and decisions and its conduct of oral hearings. The broadcasting of audiovisual reports affects the kind of public awareness of the judiciary and increases it. The provisions of the Judicature Act place a constitutionally valid ban on audio and visual recordings during oral hearings. Thus the public monitoring of court hearings occurs through public access to courtrooms and the coverage of hearings. Nevertheless, showing citizens the inside of a courtroom and its staff allows them to understand how court proceedings work and thereby satisfies their interest in receiving information. Accordingly, the non-constitutional courts proceed on the basis that, in principle, the period before and after an oral hearing as well as recesses should be open to the media and that it may then employ the technical means for recording and dissemination specifically used in broadcasting.

The respective subject-matter of the court proceedings is significant in weighing the public's interest in receiving information. In the case of criminal proceedings, the seriousness of the alleged crime must be considered as well as the public attention attracted by the case, for example, due to its sensational content. The public's interest in receiving information is, as a rule, also directed at persons who are members of the bench or contribute as representatives of the public prosecutor's office to the establishment of justice in the name of the people.

However, protected interests which may conflict with the recording and dissemination of audio and visual recordings must also be taken into account. The protected interests include personality rights, particularly a person's right to his or her own image. In this context, one has to take into account that at least some of the parties involved in proceedings regularly find themselves in a situation which is unusual and stressful for them and in respect of which their attendance is mandatory. Particularly in the case of the accused, one also needs to consider the possibility that they might be subject to severe

public criticism or that the presumption that they are innocent until proven guilty might be undermined; one also needs to take into account that their later resocialisation could be affected by their being identified in media coverage. As far as the witnesses are concerned, one has to pay special attention to the strain they are exposed to, for example, if they are the victims of a crime. However, the judges, public prosecutors, lawyers and court officials who are involved in proceedings are also entitled to protection which can outweigh the public interest, for example, where the publication of their pictures could cause them to be subject to considerable harassment or result in their safety being compromised. Furthermore, the protected interests that need to be considered include the right to a fair trial and the proper administration of justice, in particular, the establishment of truth and justice.

When exercising his or her discretion, the presiding judge must uphold the proportionality principle. There is no need to prohibit audio and visual recordings if the conflicting interests can be protected by a restrictive order, in particular one requiring that visual recordings of those persons who have a special claim to protection be rendered anonymous and one giving instructions regarding the time, place, duration and type of recordings. Interference with the conduct of the hearing, which can be caused for instance by a busy courtroom, can be counteracted by using a so-called pool solution instead of admitting several camera crews.

The challenged order made by the presiding judge does not do justice to these claims. He did not pay sufficient attention to the fact that the proceedings related to the much-discussed accusation of abuse of army recruits by the officers and sergeants in charge of their training and was clearly something out of the ordinary. There was significant public interest in getting to the bottom of what had happened. The presiding judge was not entitled to assume, as a matter of routine, that visual recordings of events in the courtroom while the trial was not going on would unsettle the accused to such an extent that decision-making would be difficult. On the basis of the subject-matter of the proceedings and the identity of the accused, who were without exception experienced officers and sergeants of the army, it was not apparent without additional information that there was reason for such concern. The public's interest in visual documentation of what was happening around the trial includes their interest in the judges involved together with the lay assessors and extends to the public prosecutors and lawyers as organs of the administration of justice. The problems listed by the presiding judge which could result from a busy courtroom could have been avoided by taking suitable precautions such as, for example, restricting the recording through the employment of a pool solution.

Languages:

German.



Identification: GER-2008-1-003

a) Germany / b) Federal Constitutional Court / c) Second Panel / d) 13.02.2008 / e) 2 BvK 1/07 / f) Five per cent barrier clause Schleswig-Holstein / g) / h) *Hessische Städte- und Gemeindezeitung* 2008, 97-108; *Deutsches Verwaltungsblatt* 2008, 443-448; *Zeitschrift für öffentliches Recht in Norddeutschland* 2008, 113-117; *Neue Zeitschrift für Verwaltungsrecht* 2008, 407-413; CODICES (German).

Keywords of the systematic thesaurus:

4.5.10 Institutions – Legislative bodies – **Political parties.**

4.8.6.1 Institutions – Federalism, regionalism and local self-government – Institutional aspects – **Deliberative assembly.**

4.9.3 Institutions – Elections and instruments of direct democracy – **Electoral system.**

4.9.11.1 Institutions – Elections and instruments of direct democracy – Determination of votes – **Counting of votes.**

Keywords of the alphabetical index:

Election, threshold / Election, local, law / Election, party, equal opportunity.

Headnotes:

The five per cent barrier clause can only be justified by an impairment of the viability of the local representative bodies which can be reasonably anticipated.

Summary:

I. The Land (state) *Organstreit* proceedings [proceedings between constitutional bodies of a state] related to the question of whether the Schleswig-Holstein *Landtag* (state parliament) violated the rights of the Schleswig-Holstein Land associations of the parties ALLIANCE 90/THE GREENS and DIE LINKE

(intervening party), by rejecting the draft bill of the ALLIANCE 90/THE GREENS parliamentary group to abolish the five per cent barrier clause in the Schleswig-Holstein Local Elections Act by a majority in a ballot held during its session on 13 December 2006.

II. The main motion was successful. The Second Panel of the Federal Constitutional Court found that the opponent had violated the rights of the applicant and of the intervening party under Article 3.1 of the Constitution of the Land Schleswig-Holstein (equality of elections) and under Article 21.1 of the Basic Law (constitutional status of parties) in its session held on 13 December 2006 by rejecting the draft bill of the ALLIANCE 90/THE GREENS parliamentary group to amend the Local and District Election Act (below: the Act) as to the five per cent clause contained in § 10.1 of the Act.

The ruling is essentially based on the following considerations:

The distribution of the seats in local elections in Schleswig-Holstein is regulated by §§ 7 *et seq.* of the Act. In accordance with sentence 1 of § 10.1 of the Act, each political party or group of voters takes part in the proportional equalisation for which a list proposal has been drafted or approved insofar as at least one direct representative has been elected for it, or insofar as they have achieved in total at least five per cent of the valid votes cast in the electoral area.

The main motion is admissible.

Regardless of whether the conduct of the opponent can be evaluated as a measure or an omission (§ 64.1 of the Federal Constitutional Court Act), certainly in the present case, the rejection of the statutory motion of the ALLIANCE 90/THE GREENS parliamentary group can be regarded as an admissible subject-matter in *Organstreit* proceedings after its content had been the subject of intensive discussion in the Committees on Internal Affairs and on Legal Affairs of the *Landtag*. In the case at hand, the rejection of the draft bill is equivalent to the issuance of a statute, which would be regarded as a measure.

The request of the applicant is successful.

The Federal Constitutional Court acts as a Land Constitutional Court for the Land Schleswig-Holstein in accordance with Articles 93.1.5 and 99 of the Basic Law. The standard for review is therefore the Land Constitution. A violation of the Basic Law can only be examined if certain provisions of the Basic Law exceptionally affect the Land Constitution as unwritten elements.

The principle of electoral equality emerges for local elections in Schleswig-Holstein from Article 3.1 of the Land Constitution, which repeats the principles governing the law of elections of Article 38.1 of the Basic Law, which are already binding in accordance with sentence 2 of Article 28.1 of the Basic Law.

The right of the parties to equal opportunities in elections follows at Land level from their constitutional status described in Article 21.1 of the Basic Law, which also applies directly to the *Länder* and is an element of the Land Constitutions. As with the principle of equality in elections, equality is to be demanded in this field in a strict, formal sense. A rigorous review is also necessary because the respective parliamentary majority acts in its own interest to a certain degree when it comes to provisions which affect the conditions of political competition.

Whilst the count of all voters' votes remains unaffected by the five per cent barrier clause, the voters' votes are treated unequally as to their contribution towards success, depending on whether the vote was submitted for a party which was able to win more than five per cent of the votes, or for a party which failed because of the five per cent barrier clause. At the same time, this barrier clause impairs the right of the applicant to equal opportunities in a manner that is not negligible.

In reviewing whether a distinction is justified within the equality of electoral rights, the Federal Constitutional Court has always presumed the requirement of "imperative grounds". However, "sufficient" "grounds emerging from the nature of the field of the election of the people's representatives" are also adequate in this context. These include ensuring the character of the election as an integration event in the forming of the political will of the people and the guarantee of the viability of the people's representation to be elected. The principles of equality in elections and of equal opportunities of the parties are violated if, with the provision, the legislature has pursued a goal which it may not pursue in shaping electoral law, or if the provision is not suitable and necessary in order to achieve the goals pursued in the respective election. The Federal Constitutional Court emphasised that the compatibility of a barrier clause in proportional representation with the principle of equality in elections and the equal opportunities of political parties cannot be evaluated abstractly once and for all. A provision of electoral law may be justified in one state at a certain time, and not in another state or at a different time. There may be a derogating constitutional evaluation with regard to a barrier clause if the circumstances change significantly within a state. The legislature handing

down the electoral law must take account of circumstances which have changed in this respect. Only the current circumstances are material for the further retention of the barrier clause.

The five per cent barrier clause cannot be justified by arguing that it serves the purpose of preventing anti-constitutional or (right-wing) extremist parties from participation in local representative bodies. The fight against political parties is an alien motive in this context.

Safeguarding the orientation of political forces towards the common good is also not an imperative reason for retaining the five per cent barrier clause. Even if, in particular in larger municipalities and districts, the formation of the will of the citizens is shaped largely by the political parties, it follows from the guarantee of local authority self-administration that it certainly must be possible to select candidates for the local representative bodies in accordance with specific particular goals. Such selection may not be exclusively reserved for the political parties, whose essence and structure is primarily orientated to the state as a whole.

One may not easily derive from the need to retain the five per cent barrier clause for *Bundestag* or *Landtag* elections the need to also have a barrier clause to safeguard the viability of local representative bodies. Whether a restriction of the principles of electoral equality and equal opportunities is necessary to maintain the viability of the local representative bodies can only be judged in relation to the concrete functions of the body to be elected. It must be taken into consideration here that local councils and district parliaments are not parliaments in the public law sense of the word.

For the reasons for which the shaping of electoral law is subject to strict constitutional control, the five per cent barrier clause can only be justified by an impairment of the viability of the local representative bodies which can be reasonably anticipated. The mere "alleviation" or "simplification" of the passing of resolutions is insufficient to justify the encroachment linked with the barrier clause.

The election of a full-time mayor or chief administrative officer of a district directly places one of the main personnel decisions in the hands of the people. Over and above this, a complete lack of viability and inability to take decisions is alien in view of the local authority and district regulations. They ensure in particular the ability of local representations to decide even if the customary quorum cannot be achieved. A risk to the work of the committees is also not a serious concern. Finally, the provisions on

provisional budgeting and on excess and extrabudgetary expenditure ensure the maintenance of proper budget management.

It is material to the evaluation of the prediction that the viability of local representative bodies would be considerably restricted without the five per cent barrier clause that serious disturbances in the viability of the local representative bodies have not come to light in other *Länder*, which do not have a five per cent barrier clause.

What is more, the number of groups in the local representative bodies is influenced less by the five per cent barrier clause than by the size of the respective municipality or of the respective district.

Supplementary information:

Schleswig-Holstein is the only German Federal Land which as yet does not have a Land Constitutional Court. The Federal Constitutional Court hence acts in such cases as the instant one as a Land Constitutional Court.

Languages:

German.



Identification: GER-2008-1-004

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 26.02.2008 / **e)** 1 BvR 1602/07, 1 BvR 1606/07, 1 BvR 1626/07 / **f)** / **g)** / **h)** *Wettbewerb in Recht und Praxis* 2008, 645-659; *Europäische Grundrechte-Zeitschrift* 2008, 202-215; CODICES (German).

Keywords of the systematic thesaurus:

1.3.1 Constitutional Justice – Jurisdiction – **Scope of review.**

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.**

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

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

5.3.24 Fundamental Rights – Civil and political rights – **Right to information.**

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

Keywords of the alphabetical index:

Photojournalism, celebrity / Photojournalism, contemporary public figure / Image, right.

Headnotes:

Decision regarding the scope of the fundamental right to the protection of personality rights pursuant to Article 2.1 of the Basic Law in conjunction with Article 1.1 of the Basic Law in respect of photographs of celebrities within the context of entertaining media reports concerning their private and everyday life.
[Official Headnotes]

Even “mere entertainment” is protected by the right of freedom of the press. Freedom of the press includes the right of the mass media to decide themselves what they consider worthy of reporting. While assessing the weight to be attached to the public’s interest in information, the courts are to refrain from evaluating whether or not the portrayal is of value in terms of its content, and are to limit themselves to an examination and analysis of the extent to which the report may be expected to contribute to the process of forming public opinion. Unrestricted photographing of contemporary public figures for the purposes of media reporting, whenever they are not in situations of spatial seclusion is not safeguarded constitutionally.

The role of the Federal Constitutional Court is limited to examining retrospectively whether the other national courts, in interpreting and applying the provisions of ordinary statutory law, particularly when weighing conflicting legal rights, have sufficiently regarded the influence of fundamental rights, as well as the constitutionally relevant provisions of the European Convention on Human Rights. The fact that their assessment might have resulted in a different conclusion is not sufficient grounds for the Federal Constitutional Court to rectify a decision of such courts. Published images are justified only insofar as the public would otherwise be deprived of opportunities to form an opinion.

[Non official Headnotes]

Summary:

I. The complainants are Princess Caroline von Hannover and two publishers. The publisher of *Frau im Spiegel* magazine had reported on an illness affecting Prince Rainier of Monaco, on whether the complainant would be attending a society ball, and on a popular resort for winter sport, and had in each case added photographs showing the complainant on holiday with her husband. The publisher of *7 Tage* magazine had reported on the letting of a holiday villa belonging to the couple and had added a photographic image showing the complainant on holiday with her husband.

The applications for an injunction relief lodged by the complainant, Princess Caroline von Hannover in front of the civil courts were directed against the photographs. The Federal Court of Justice only allowed publication of the photo illustrating the article concerning the illness of the Prince of Monaco. Otherwise, it confirmed the prohibition issued by the lower courts, approving in particular the prohibition on publishing the photograph illustrating the report on the letting of the holiday villa.

II. The constitutional complaints lodged by the complainant, Princess Caroline von Hannover, and the publisher of *Frau im Spiegel* magazine failed, whereas the constitutional complaint lodged by the publishers of *7 Tage* magazine was successful.

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

The fundamental rights of freedom of the press (sentence 2 of Article 5.1 of the Basic Law) and protection of personality rights (Article 2.1 of the Basic Law in conjunction with Article 1.1 of the Basic Law) are not guaranteed without reservation. The general laws curtailing the right of freedom of the press include *inter alia* the provisions of §§ 22 *et seq.* of the Art Copyright Act and the legal concept of personality rights under civil law, but also the right to respect for private and family life as enshrined in Article 8 ECHR. On the other hand, the provisions contained in the Art Copyright Act, as well as the right to freedom of expression guaranteed by Article 10 ECHR, restrict the protection of personality rights as part of the constitutional order.

Even “mere entertainment” is protected by the right of freedom of the press. Entertainment can fulfil an important social function, such as when it conveys images of reality and proposes subjects for debate that spark off a process of discussion relating to philosophies of life, values and everyday behaviour. Protection of freedom of the press also includes

entertaining reports concerning the private and everyday life of celebrities and the social circles in which they move, in particular, concerning persons who are close to them.

To limit reporting on the lifestyle of this circle of persons only to reports concerning their exercise of official functions would mean restricting freedom of the press to an extent that is no longer compatible with Article 5.1 of the Basic Law. Press reports may bring to the attention of the public not only behaviour that is scandalous or morally or legally questionable, but also the normality of everyday life, as well as conduct of celebrities that is in no way objectionable if this serves to form public opinion on questions of general interest.

Freedom of the press includes the right of the mass media to decide themselves what they consider worthy of reporting. In so doing, they are to have regard to the personality rights of the persons concerned. However, in the event of a dispute it shall be for the courts to decide what weight should be attached to the public's interest in being informed when weighed against the conflicting interests of the persons concerned. While assessing the weight to be attached to the public's interest in information, the courts are to refrain, however, from evaluating whether or not the portrayal is of value in terms of its content, and are to limit themselves to an examination and analysis of the extent to which the report may be expected to contribute to the process of forming public opinion. In assessing the weight to be attached to the protection of personality rights, the situation in which the person concerned was photographed and how he or she is portrayed will also be taken into account in addition to the circumstances in which the image was obtained, such as by means of secrecy or continual harassment. The need to protect personality rights can thus acquire greater significance even outside situations of spatial seclusion, such as when media reports capture the person concerned during moments where he or she is in a relaxed setting outside professional obligations or those of everyday life. At such times, the person may be entitled to assume that he or she is not exposed to the view of photographers. The need for protection has increased as a result of developments in camera technology and the availability of small cameras.

Commentary in or via the press generally aims to contribute to the formation of public opinion. The fundamental right in Article 5.1 of the Basic Law does not, however, justify a general assumption that any and every visual portrayal of the private or everyday life of famous personalities is associated with contributing to the formation of public opinion. At no

time has the Federal Constitutional Court recognised unrestricted access by the press to contemporary public figures but has, rather, viewed published images as justified only insofar as the public would otherwise be deprived of opportunities to form an opinion. What is not safeguarded constitutionally, on the other hand, is unrestricted photographing of contemporary public figures for the purposes of media reporting, whenever they are not in situations of spatial seclusion.

It is the task of courts other than the Federal Constitutional Court to examine the informational value of reports and their illustrations on the basis of their relevance to the formation of public opinion and to weigh freedom of the press against the detriment to the protection of personality rights associated with obtaining and disseminating the photographs. The role of the Federal Constitutional Court is limited to examining retrospectively whether the other national courts, in interpreting and applying the provisions of ordinary statutory law, particularly when weighing conflicting legal rights, have sufficiently regarded the influence of fundamental rights, as well as the constitutionally relevant provisions of the European Convention on Human Rights. The fact that their assessment might have resulted in a different conclusion is not sufficient grounds for the Federal Constitutional Court to rectify a decision of such courts.

By reference to the above standards, the following applies in the instant case:

There were no constitutional objections, in principle, preventing the Federal Court of Justice from deviating from its previous case-law in judicially assessing the criteria for the admissibility of a piece of photojournalism and modifying its concept of protection by dispensing with the use of the legal concept of the contemporary public figure previously developed by reference to legal writing. As the concept of the contemporary public figure is not prescribed by constitutional law, the national courts are free under constitutional law not to use the term at all in future or to use it only in limited circumstances, and to decide instead by considering in each individual case whether the image concerned is part of the "sphere of contemporary history".

In accordance with the standards indicated, the constitutional complaints of the complainant Caroline von Hannover and of the publisher of *Frau im Spiegel* magazine are unfounded. The Federal Court of Justice properly assessed the relevant concerns of both parties in a manner that is constitutionally unobjectionable thereby taking into account the relevant standards laid down by the case-law of the

European Court of Human Rights. In particular, the Federal Court of Justice – even in accordance with the standards laid down by the case-law of the European Court of Justice – was permitted to view the report on the illness of the reigning Prince of Monaco as an event of general public interest manifesting a sufficient connection to the published image.

The right of freedom of the press was violated, however, when the publisher of *7 Tage* magazine was prohibited from adding a visual portrayal of the complainant to a report on the letting of a holiday villa in Kenya. The courts failed to recognise the informational content of the report which, in the magazine, opened with the words: “Even the rich and beautiful live economically. Many let their villas out to paying guests.” The report was not about a holiday scene as part of private life. Rather, it was a report on the letting of a holiday villa belonging to the couple and on similar undertakings by other celebrities and contained value judgments in the commentary which encourage readers to reflect socio-critically. There is no indication in the situation portrayed by the image used that Princess Caroline von Hannover had been portrayed in a pose which was particularly representative of the need to relax and therefore worthy of a higher level of protection from media attention and portrayal. The prohibition confirmed by the Federal Court of Justice was therefore to be revoked and must be examined anew on the basis of the standards laid down by the Panel.

Languages:

German.



Identification: GER-2008-1-005

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 26.02.2008 / **e)** 2 BvR 392/07 / **f)** / **g)** / **h)** *Neue Juristische Wochenschrift* 2008, 1137-1146; *Zeitschrift für das gesamte Familienrecht* 2008, 757-761; CODICES (German).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
5.3.32 Fundamental Rights – Civil and political rights – **Right to private life**.

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

Keywords of the alphabetical index:

Incest, sibling, criminal liability / Criminal law, sexual offence / Sexual self-determination, right / Marriage, family, protection by the legislature.

Headnotes:

The provision in sentence 2 of § 173.2 of the German Criminal Code, which threatens criminal punishment for sexual intercourse between siblings, is compatible with the Basic Law.

Summary:

I. The complainant was convicted of sexual intercourse with his natural sister pursuant to sentence 2 of § 173.2 of the German Criminal Code (hereinafter: “the Code”) and sentenced to several terms of imprisonment, most recently by the Leipzig Local Court on 10 November 2005.

In his constitutional complaint he directly challenges this conviction as well as the decision of the Dresden Higher Regional Court on an appeal that he filed on points of law. Indirectly he objects to sentence 2 of § 173.2 of the Code as unconstitutional. Pursuant to this provision, natural siblings who complete an act of sexual intercourse are punished with imprisonment of not more than two years or a fine.

II. The constitutional complaint was unsuccessful. The Second Panel of the Federal Constitutional Court decided that sentence 2 of § 173.2 of the Code is compatible with the Basic Law.

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

The decision of the legislature to impose criminal penalties on sibling incest, in accordance with the standard under Article 2.1 of the Basic Law in conjunction with Article 1.1 of the Basic Law (right to sexual self-determination) which are to be addressed in the first instance, are constitutionally unobjectionable.

1. The criminal provision at issue places limits on the right to sexual self-determination between natural siblings. In this way the conduct of one’s private life is limited, particularly in that certain forms of expressions of sexuality between persons close to one another are penalised. However, this is not an encroachment from the outset by the legislature upon the core area of

private life. Sexual intercourse between siblings does not affect them exclusively, but rather, can have effects on the family and society and consequences for children resulting from the relationship. Because the criminal law prohibition on incest only affects a narrowly defined behaviour and only selectively curtails possibilities for intimate communication, the parties concerned are also not placed in a hopeless position, incompatible with the respect for human dignity.

2. The legislature pursues objectives through the challenged provision that are not constitutionally objectionable and, in any event, in their totality legitimise the limitation on the right to sexual self-determination.

- a. The essential ground considered by the legislature as the reason for punishment in § 173 of the Code is the protection of marriage and the family. Empirical studies show that the legislature is not acting outside of its scope for assessment when it assumes that incestuous relationships between siblings can lead to serious consequences damaging the family and society, particularly in cases of overlapping familial relationships and social roles and, thus, can lead to interference in the system that provides structure in a family. This does not correspond with the image of a family based on Article 6.1 of the Basic Law. It seems that the children of an incestuous relationship have significant difficulties in finding their place in the family structure and in building a trusting relationship with their closest caregivers. The function of the family, which is of primary importance for the human community and which is the basis of Article 6.1 of the Basic Law, would be damaged if the required structures were shaken by incestuous relationships.
- b. To the extent that reference is made to the protection of sexual self-determination to justify the criminal provision this objective of the provision is also relevant between siblings. The objection that the protection of sexual self-determination is comprehensively and sufficiently protected by §§ 174 *et seq.* of the Code (crimes against sexual self-determination) and, therefore, does not justify sentence 2 of § 173.2 of the Code ignores the fact that § 173 of the Code addresses specific dependencies arising from the closeness in the family or rooted in family relations as well as difficulties of classification of, and defence against, encroachments.
- c. The legislature additionally based its decision on eugenic grounds and assumed that the risk of significant damage to children who are the product of an incestuous relationship cannot be excluded due to the increased possibility of an accumulation

of recessive hereditary dispositions. In both medical and anthropological literature, which are supported by empirical studies, reference is made to the particular risk of the occurrence of genetic defects.

- d. The challenged criminal provision is justified by the sum of the penal objectives against the background of current societal belief based on cultural history that incest should carry criminal penalties, which is also the practice of other countries. As an instrument for protecting sexual self-determination, public health, and especially the family, the criminal provision fulfils an appellative, law stabilising function and, thus, a general preventive function, which illustrates the values set by the legislature and, therefore, contributes to their maintenance.
3. The challenged provision is also sufficient in regard to the constitutional law requirements of suitability, necessity and proportionality for a rule that limits freedom.
- a. Criminalising sibling incest undeniably promotes the desired success. The objection that the challenged criminal provision fails its intended objectives because of fragmentary design and because of the grounds for exemption from penalty in § 173.3 of the German Criminal Code (no punishment for minors) fails to appreciate that through the prohibition on acts of sexual intercourse a central aspect of sexual relations between siblings is penalised. This has great significance regarding the incompatibility of sibling incest with the traditional family picture. A further objective justification is found in the ability, in principle, to cause further damaging consequences by producing descendants. That acts similar to sexual intercourse and sexual intercourse between same-sex siblings are not subject to criminal penalties, but on the other hand, sexual intercourse between natural siblings also fulfils the elements of the crime even in cases where pregnancy is excluded, does not place doubt on the basic achievability of the objectives of protecting sexual self-determination and preventing genetic disease. The same applies to the objection that the criminal provision is unsuitable for protecting the structure of the family because based on the grounds for exemption from punishment as to minors (§ 173.3 of the Code) the criminal provision first reaches siblings when they typically are leaving the family circle.
 - b. The challenged provision also raises no doubts with respect to the constitutional law requirement of necessity. It is true that in cases of sibling

incest, guardianship and youth welfare measures come into consideration. However, in comparison to criminal penalties, they are no less serious measures which have the same effect. Instead, they are aimed at preventing and redressing violations of provisions and their consequences in specific cases; as a rule they do not have any general preventive or law stabilising effect.

- c. Lastly, the threatened punishment is not disproportionate. The range of punishments provided for also allows consideration for suspension of proceedings in accordance with discretionary prosecution aspects, for refraining from punishment, or for special sentencing considerations, in certain cases in which the accused's guilt is minimal so that punishment seems unreasonable.

The legislature did not overstep its discretion in decision-making when it deemed protection of the family order from the damaging effects of incest, protection of the "inferior/weaker" partner in an incestuous relationship, as well as the avoidance of serious genetic diseases in children of incestuous relationships, sufficient to punish incest, which is taboo in our society, and punished by criminal law.

A member of the Panel attached a dissenting opinion to the decision. This, in essence, is based on the following considerations:

Sentence 2 of § 173.2 of the Code is incompatible with the principle of proportionality.

The provision is not aimed at establishing a rule that would be internally consistent and compatible with the elements of the crime. From the outset, consideration of eugenic aspects is not an objective of a criminal law provision that is in line with constitutional law. Likewise, neither the wording of the provision nor the statutory system indicate that the protective purpose of the provision or even just one such protective purpose could be the protection of the right to sexual self-determination. Lastly, the prohibition of sibling incest is also not constitutionally justified with regard to the protection of marriage and the family. Only sexual intercourse between natural siblings is a punishable offence, not, however, all other sexual acts. Sexual relationships between same-sex siblings and between unrelated siblings are not covered. If the criminal provision were actually aimed at protecting the family from sexual acts, it would also extend to these acts, which are likewise damaging to the family. The evidence seems to indicate that the provision in its existing version is solely aimed at attitudes to morality and not at a specific legally protected right. Building up or maintaining societal consensus

regarding values, however, cannot be the direct objective of a criminal provision.

In addition, the provision does not provide a suitable path for the objectives pursued by sentence 2 of § 173.2 of the Code. The elements of the crime, limiting punishability to acts of sexual intercourse between siblings of different gender, is not in a position to guarantee the protection of the family from damaging effects of sexual acts. It does not go far enough because it does not cover similarly damaging behaviour and, moreover, unrelated siblings as possible perpetrators. It goes too far because it encompasses behaviour that – based on the children having reached the age of majority and the attendant process of leaving the family – it cannot (any longer) have damaging effects on the family unit.

In addition, doubts are raised as to the constitutionality of the criminal liability for sibling incest based on the principle of proportionality in regard to the availability of other official measures that could similarly or even better guarantee the protection of the family, such as youth welfare measures and family court and guardianship measures.

Finally, the criminal provision at issue conflicts with the constitutional law prohibition on excessiveness. There is a lack of statutory limitation on criminal liability as to a behaviour that does not endanger any of the possible objects of protection.

Languages:

German.



Identification: GER-2008-1-006

a) Germany / b) Federal Constitutional Court / c) First Panel / d) 27.02.2008 / e) 1 BvR 370/07, 1 BvR 595/07 / f) Online search / g) / h) *Neue Juristische Wochenschrift* 2008, 822-837; *Wertpapier-Mitteilungen* 2008, 503-514; *Zeitschrift für Steuern und Recht* 2008 R205-R207; *Europäische Grundrechte-Zeitschrift* 2008, 164-186; *Zeitschrift für Urheber- und Medienrecht* 2008, 301-323; *StrafRechtsReport* 2008, 140-142; *Deutsches Verwaltungsblatt* 2008, 582-590; CODICES (German).

Keywords of the systematic thesaurus:

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.**

5.3.23 Fundamental Rights – Civil and political rights – **Rights in respect of the audiovisual media and other means of mass communication.**

5.3.32.1 Fundamental Rights – Civil and political rights – Right to private life – **Protection of personal data.**

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

Keywords of the alphabetical index:

Communication, content, public, state participation / Information technology, system, secret infiltration / Information technology, confidentiality and integrity, fundamental right / Informational self-determination, right / Online search.

Headnotes:

The general right of personality (Article 2.1 of the Basic Law in conjunction with Article 1.1 of the Basic Law) covers the fundamental right to the guarantee of the confidentiality and integrity of information technology systems.

The secret infiltration of an information technology system by means of which the use of the system can be monitored and its storage media can be read is constitutionally only permissible if factual indications exist of a concrete danger to a predominantly important legal interest.

The secret infiltration of an information technology system is in principle to be placed under the reservation of a judicial order.

If the state obtains knowledge of communication contents which are publicly accessible on the Internet, or if it participates in publicly accessible communication processes, in principle it does not encroach on fundamental rights.

Summary:

I. By the constitutional complaint, the five complainants – a journalist, an active member of the party DIE LINKE, two partners in a law firm and one of their freelancers – impugned provisions of the North-Rhine Westphalia Constitution Protection Act

regulating, firstly, the powers of the constitution protection authority regarding various instances of data collection, in particular from information technology systems, and secondly, the handling of the data collected.

II. The constitutional complaints were largely successful. The First Panel of the Federal Constitutional Court established that § 5.2.11 of the Act on the Protection of the Constitution in North-Rhine Westphalia in the version of the Act of 20 December 2006 (hereinafter: the Act) is incompatible with Article 2.1 of the Basic Law in conjunction with Article 1.1 of the Basic Law (fundamental right to the guarantee of the confidentiality and integrity of information technology systems), Article 10.1 of the Basic Law (secrecy of correspondence, post and telecommunication) and sentence 2 of Article 19.1 of the Basic Law (principle of referring to the fundamental right which is restricted), and is null and void. To the extent that the constitutional complaints had impugned other provisions, they were unsuccessful.

The ruling was essentially based on the following considerations:

Pursuant to § 5.2.11 of the Act, the Constitution Protection Authority may, in accordance with § 7, apply the following measures to acquire information: secret monitoring and other reconnaissance of the Internet, such as in particular concealed participation in its communication facilities and searching therefore as well as secret access to information technology systems also involving the deployment of technical means. Insofar as such measures constitute an encroachment on the secrecy of correspondence, post and telecommunication, which is protected by Article 10 of the Basic Law, or are equivalent to such encroachment in terms of their nature and seriousness, the latter shall be permissible only under the preconditions of the Act *re* Article 10 of the Basic Law.

Pursuant to the general preconditions for intelligence and data collection which emerge from § 5.2 of the Act in conjunction with § 7.1 and § 3.1 of the Act in principle information can be obtained by the means specified under § 5.2.11 of the Act for instance on activities that are relevant to the protection of the Constitution.

Insofar as they were admissible, the constitutional complaints were largely well-founded.

Sentence 1 alternative 2 of § 5.2.11 of the North-Rhine Westphalia Constitution Protection Act does not comply with the principle of the clarity of

provisions, and the requirements of the principle of proportionality are not met. The provision also does not contain sufficient precautions to protect the core area of private life.

Insofar as secret access to an information technology system serves to collect data also where Article 10.1 of the Basic Law does not provide protection against access, a loophole exists which is to be closed by the general right of personality which acts as a guardian of the confidentiality and integrity of information technology systems.

Article 13.1 of the Basic Law (inviolability of the home) also does not confer on the individual any across-the-board protection regardless of the access modalities against the infiltration of his or her information technology system. For the encroachment may take place regardless of location, so that "room-related" protection is unable to avert the specific danger to the information technology system.

The occurrences of the general right of personality recognised so far also do not comply sufficiently with the special need for protection of the information technology system user. A third party accessing such a system can obtain data stocks which are potentially extremely large and revealing without relying on further data collection and data processing measures. This access poses a potential threat to the personality right of the person concerned, which goes beyond individual data collections against which the right to informational self-determination provides protection.

The general right of personality as it is dealt with here provides in particular protection against secret access, by means of which the data available on the system can be spied on partially or entirely. An expectation of confidentiality and integrity to be recognised from the fundamental rights perspective however only exists insofar as the person concerned uses the information technology system as his or her own.

The individual must only accept restrictions of his or her right which are based on a statutory basis that is constitutional.

The impugned provision does not meet the principle of the clarity and precision of provisions. It is incompatible with this principle that sentence 2 of § 5.2.11 of the Act makes the reference to the Act *re* Article 10 of the Basic Law contingent on whether a measure encroaches on Article 10 of the Basic Law. The answer to this question can require complex assessments and evaluations. The reference also does not comply with the principle reviewed insofar as sentence 2 of § 5.2.11 of the Act largely leaves

unclear the parts of the Act *re* Article 10 of the Basic Law to which the reference is intended to be made.

The impugned provision also does not comply with the principle of proportionality in the narrow sense. Data collection by the state from complex information technology systems shows considerable potential for researching the personality of the person concerned. In view of its seriousness, the encroachment on fundamental rights caused by the secret access to an information technology system in the context of a preventive goal only satisfies the principle of appropriateness if certain facts indicate a danger posed to a predominantly important legal interest in the individual case. It is not required here that it can already be ascertained with sufficient probability that the danger will arise in the near future. What is more, the statute allowing such an encroachment must protect the fundamental rights of the person concerned also by means of suitable procedural precautions. If a provision provides for secret investigations on the part of the state which affect protected zones of privacy or represent a particularly serious encroachment, the weight of the encroachment on fundamental rights must be counter-balanced with suitable procedural precautions. In particular, access is in principle subject to a judicial order. Finally, there are no adequate statutory precautions to avoid encroachments on the absolutely protected core area of private life by measures in accordance with sentence 1 alternative 2 of § 5.2.11 of the Act.

The permission to carry out secret reconnaissance on the Internet contained in sentence 1 alternative 1 of § 5.2.11 of the Act violates, in particular, the secrecy of telecommunications guaranteed by Article 10.1 of the Basic Law.

If a state agency has access to the contents of telecommunications via the communication services of the Internet through the channel technically provided therefore, this shall only constitute an encroachment on Article 10.1 of the Basic Law if the state agency is not authorised to do so by those involved in the communication. For the reasons stated above, sentence 1 alternative 1 of § 5.2.11 of the Act does not comply with the principle of the clarity and precision of provisions. Insofar as the provision is to be measured against Article 10.1 of the Basic Law, it is furthermore not in compliance with the principle of proportionality in the narrower sense. Such a serious encroachment on fundamental rights, even if the protection of the Constitution is taken into account, is in principle at least also conditional on the provision of a qualified substantive encroachment threshold, which is not the case here. The Act also does not contain any precautions to protect the core area of private life.

Finally, sentence 1 alternative 1 of § 5.2.11 of the Act does not comply with the principle contained in sentence 2 of Article 19.1 of the Basic Law (*Zitiergebot*), which imposes a duty on the legislator, when limiting fundamental rights through a new law, to refer to the article that is affected. The provision does not comply insofar as it empowers encroachments on Article 10.1 of the Basic Law. This principle is only accounted for if the fundamental right is explicitly named in the text of the Act as being restricted.

Languages:

German.



Identification: GER-2008-1-007

a) Germany / b) Federal Constitutional Court / c) First Panel / d) 11.03.2008 / e) 1 BvR 2074/05, 1 BvR 1254/07 / f) / g) / h) *Europäische Grundrechte-Zeitschrift* 2008, 186-202; *Deutsches Verwaltungsblatt* 2008, 575-582; CODICES (German).

Keywords of the systematic thesaurus:

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

3.16 General Principles – **Proportionality.**

5.3.32.1 Fundamental Rights – Civil and political rights – Right to private life – **Protection of personal data.**

Keywords of the alphabetical index:

Informational self-determination, right / Recognition, automatic number plate / Data mining / Data matching / Surveillance, discreet / Car, movement, discreet checks / Video surveillance.

Headnotes:

1. Automatic number plate recognition for the purpose of data matching against tracing files interferes with the fundamental right to informational self-determination (Article 2.1 of the Basic Law in conjunction with Article 1.1 of the Basic Law) if matching does not take place promptly and the number plates are not immediately, and untraceably, deleted from record without further evaluation.

2. The constitutional requirements placed on the statutory basis for the authorisation are determined by the gravity of the restriction, which is influenced by the nature of the collected information, the cause and circumstances of its collection, the affected groups and the way the data will be used.

3. The mere determination of the purpose of matching the number plates against legally undefined tracing files does not meet the requirements placed on the clarity and precision of legal provisions.

4. Automatic number plate recognition may not take place nonincident-related or be carried out area-wide. Moreover, the principle of proportionality in a narrow sense is not complied with if the legal provisions forming the basis of the authorisation make automatic recognition and evaluation of number plates possible without the existence of concrete dangerous situations or generally increased risks of dangers to, or violations of, legally protected rights providing a cause for the establishment of number plate recognition. Spot checks can be permitted for interference of merely lesser intensity if necessary.

Summary:

I. The constitutional complaints challenge § 14.5 of the Hessian Act on Public Safety and Order and § 184.5 of the General Administrative Act for the *Land* (state) Schleswig-Holstein. These provisions authorise automatic number plate recognition on public roads and squares for the purpose of electronically matching the number plates against tracing files.

First, the vehicles are optically recognised by a camera. With the help of software, the sequence of letters and characters of the number plate is ascertained. Then the number plates are automatically matched against tracing files. When a number plate is contained in the tracing files, the relevant information will be retained. The measure is intended to serve the search for vehicles or number plates that have been reported as stolen or are being traced for other reasons.

The complainants are registered holders of vehicles that they regularly use for travel on public roads of the respective *Land*. They perceive their fundamental right to informational self-determination under Article 2.1 of the Basic Law in conjunction with Article 1.1 of the Basic Law as violated.

II. The First Panel of the Federal Constitutional Court has declared the challenged provisions void as they violate the complainants' general right of personality in the format of the fundamental right to informational self-determination.

The decision is essentially based on the following considerations:

A. Automatic number plate recognition interferes with the scope of protection of the fundamental right to informational self-determination if the number plates are not promptly matched against the tracing files and deleted without further evaluation.

1. The protection of the fundamental right is not eliminated just because the relevant information is publicly accessible. Even if individuals enter public places, the right to informational self-determination protects their interest in ensuring that the related personal information will not be recorded in the course of an automatic collection of information for the purpose of retaining such personal information with the possibility of further use.

2. There is no interference with the scope of protection of the right to informational self-determination in instances of electronic number plate recognition if matching against the tracing files is performed promptly and its result is negative. Additionally, it must be legally and technically ensured that the data remains anonymous and is immediately, and untraceably, deleted without the possibility of drawing a connection to the person whose data is recognised. In such cases, data recognition does not constitute an act of endangerment.

3. An interference with the fundamental right exists, however, where number plates that have been recognised are retained in storage and can become the basis for further measures. The focus of the measure applies to situations where a number plate is discovered in the tracing files. From this point, it is at the disposal of governmental entities for evaluation, and the specific risk this poses to the owner's personality right as regards his or her behavioural freedom and privacy sets in.

B. Interference with the fundamental right to informational self-determination must have a statutory basis that is constitutional. The challenged provisions do not meet this requirement.

1. The constitutional requirements for the authorisation depend on the gravity of the interference, which is particularly influenced by the nature of the collected information, the cause and the circumstances of collection, the affected groups and the way in which the data will be used.

Depending on the context in which it is used, automatic number plate recognition can lead to fundamental rights restrictions of differing magnitudes. Comparably little relevance to the personality rights of

those affected is exhibited by measures where the sole purpose of such data recognition is to locate stolen vehicles and "apprehend" their respective drivers, especially in order to avoid subsequent offences, or to prevent drivers without sufficient insurance cover from continuing to drive. The constitutional relevance of the measure changes if automatic number plate recognition serves, by contrast, to use the collected information for additional purposes, for instance to obtain information about the driver's travel patterns or other information about particular journeys that bears relevance to the driver's personality. Interference of considerable significance is possible through the performance of long-term or large-area number plate recognition.

2. The provisions contravene the principle of precision and clarity of legal provisions.

a. An adequate designation of the cause and the purpose of use of automatic data recognition that is sufficiently area-specific and clear is missing.

The challenged provisions allow the recognition of number plates "for the purpose" of matching them against tracing files. This, however, neither determines the cause nor the purpose of investigation which both recognition and matching are ultimately intended to serve.

The legal provisions forming the basis of the authorisation are so vaguely drafted that it cannot be ruled out that also alerts for police surveillance could be regarded as a component of tracing files so that police surveillance measures could be carried out with the aid of automatic number plate recognition. This makes a systematic, geographically expansive collection of information about vehicle travel patterns and, subsequently, of people, technically possible with relatively little effort. The interference thus acquires a different quality with increased seriousness, requiring a commensurate authorisation for interference.

The ban on the area-wide use of automatic number plate recognition under the law of the Land Schleswig-Holstein precludes neither a routine, non-incident-related recognition of number plates nor its targeted use to observe specific vehicles. Due to the association of the measure to the tracing files, with the simultaneous vagueness of its purpose of use, it cannot be inferred from the provisions under Land law whether number plate recognition may be employed for prosecutorial purposes. This includes making provision for the prosecution of criminal offences prior to suspicion.

Even if it is possible to eliminate some of the deficiencies as to precision by means of interpretation, the shortcomings, especially the lack of precision of the purpose of use, cannot be remedied by a restrictive interpretation in conformity with the Constitution. Such an interpretation assumes indications that the more narrowly drafted purpose shall be the decisive one. Evidence of this is missing here.

b. The lack of designation of the purpose of automatic number plate data recognition coincides with an unconstitutional lack of precision regarding collectable information. Both regulations leave open whether, or, if appropriate, which additional information beyond the order of, and symbols on, the number plates may be collected. The currently customary recognition of number plate data by video necessarily goes along with a recognition of all details recognisable from the image, as well as possibly of details about the passengers of the vehicle, although the provisions, if interpreted narrowly, allow the recognition of number plate data alone. As the purpose of use of the collected information is not regulated with sufficient clarity and precision, the scope of collectable information cannot be sufficiently limited by such an interpretation, which makes reference to the designation of the purpose of use.

3. In their undefined scope, the challenged provisions also do not meet the constitutional principle of proportionality.

They make serious interference with the affected parties' right to informational self-determination possible without sufficiently codifying the statutory thresholds which fundamental rights require for measures that constitute such serious interference. In particular, it is incompatible with the principle of proportionality that the challenged laws, due to their unlimited scope, make it possible to perform measures of automatic number plate recognition that are non-incident-related or, in Hesse in any event, comprehensive. Furthermore, the statutory authorisation makes the automatic recognition and evaluation of vehicle number plates possible without there being a concretely dangerous situation or generally increased risks of dangers to, or violations of, legally protected rights providing a cause for the establishment of number plate recognition. A limitation to spot checks, which would be permissible for interference of merely lesser intensity, such as the recognition of the number plates of stolen vehicles, has also not been provided.

C. The Land legislatures have different options at their disposal to develop an authorisation for interference which is sufficiently specific and reasonable and remains within their competence. For a regulation that preserves the proportionality of the automatic number plate recognition requirements, a broadly framed purpose of use is, for example, not ruled out if it is combined with a strict limitation of the conditions for interference, such as those provided in the regulation currently in force in the Land Brandenburg. Furthermore, it is possible to combine more narrowly framed designations of the purpose, which restrict number plate recognition to purposes of use that do not constitute an intensive interference, with correspondingly less restrictive conditions for entry in the tracing files and for the cause of the recognition of such data.

Languages:

German.



Hungary

Constitutional Court

Statistical data

1 January 2008 – 30 April 2008

Number of decisions:

- Decisions by the Plenary Court published in the Official Gazette: 57
- Decisions in chambers published in the Official Gazette: 9
- Other decisions by the Plenary Court: 44
- Other decisions in chambers: 24
- Number of other procedural orders: 170

Total number of decisions: 204

Important decisions

Identification: HUN-2008-1-001

a) Hungary / b) Constitutional Court / c) / d) 12.03.2008 / e) 32/2008 / f) / g) *Magyar Közlöny* (Official Gazette), 2008/40 / h).

Keywords of the systematic thesaurus:

1.3.5.1 Constitutional Justice – Jurisdiction – The subject of review – **International treaties**.

1.3.5.2 Constitutional Justice – Jurisdiction – The subject of review – **Community law**.

2.2.1.1 Sources – Hierarchy – Hierarchy as between national and non-national sources – **Treaties and constitutions**.

3.14 General Principles – **Nullum crimen, nulla poena sine lege**.

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

Keywords of the alphabetical index:

Double jeopardy / European Arrest Warrant / Treaty, international, ratification.

Headnotes:

Some provisions of the Act transposing into Hungarian law the EU treaty on the Surrender Procedure between EU member states, Iceland and Norway contravene the prohibition of double jeopardy. The Treaty cannot be ratified until either Parliament eliminates the unconstitutionality or Article 57.4 of the Constitution comes into force.

Summary:

I. On 11 June 2007 the Hungarian Parliament enacted the agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway (hereinafter referred to as “the Treaty”). The President of the Republic initiated a preliminary constitutional review of the legislation enacting the treaty, and the declaration made in Section 4 of the Act.

The President observed that under Article 3.2 of the Treaty, surrender is subject to the condition that the acts for which the arrest warrant was issued constitute an offence under the law of the executing State. However, this article does not require that the constituent elements and its descriptions shall be the same.

Furthermore, under Article 3.3, States can in no circumstances refuse to execute an arrest warrant issued in relation to the behaviour of any person who contributes to the commission by a group of persons acting with a common purpose of one or more offences in the field of terrorism.

Article 3.4 enables the Contracting Parties to make a declaration to the effect that, on the basis of reciprocity, the condition of double criminality referred to in paragraph 2 shall not be applied. Hungary made such a declaration in Article 4 of the Act.

The President suggested that the above provisions contravened Article 57.4 of the Constitution.

II.1. Under Article 36.1 of the Act on the Constitutional Court, before ratifying an international treaty, Parliament, the President of the Republic and the Government may request the examination of the constitutionality of provisions of the international treaty thought to be of concern.

The Treaty, as an external Community Treaty, is an international treaty for the purposes of Article 36.1 of the Act on the Constitutional Court. As a result, the Constitutional Court did have a competence to decide on the merit of the case.

2. According to Article 57.4 of the Constitution, no one shall be declared guilty and subjected to punishment for an act, which did not constitute a criminal offence under Hungarian law at the time it was committed. The expression “under Hungarian law” refers first of all to the Hungarian legislation and especially to the provisions of the Criminal Code. However, it also refers to the generally recognised rules of international law (Article 7.1 of the Constitution) and to the primary and secondary sources of the Community law (Article 2/A. of the Constitution).

3. Firstly, the Constitutional Court declared Article 3 unconstitutional, as, despite the intention of the EU legislator, the Hungarian translation of Article 3.2 of the Treaty could be interpreted in a way that precludes the executing State from determining whether the offence in question constitutes an offence under its national law.

4. Secondly, the Court pronounced that provision of the Act that refers to Article 3.3 of the Treaty to be unconstitutional. The part of the provision that refers to “the behaviour of any person who contributes” is not in conformity with the relevant provisions of the Hungarian Criminal Code. Therefore, Article 3.3. of the Treaty would result in arrest warrants being issued against persons who would not be charged under the Criminal Code currently in force.

5. Last but not least, the Court found Article 4 of the Act unconstitutional.

Under Article 38.2 of the Treaty, Contracting Parties may make notifications or declarations provided for in some of the Articles of the Treaty. Hungary made such a declaration concerning Article 3.4 of the Treaty in Article 4 of the Act. Hungary declared that she would not apply the condition in Article 3.2. in the case of offences listed in Article 3.4, if they are punishable by deprivation of liberty or a detention order of a maximum of at least three years under the law of the issuing State, provided that the issuing State made a similar declaration.

As a result of this declaration, the Court held Article 4 of the Act unconstitutional. The Hungarian Criminal Code has no provision for the prohibition of unlawful trafficking in narcotic drugs and psychotropic substances.

Consequently, the Treaty may not be ratified until Parliament eliminates the unconstitutionality or the amendment to Article 57.4 of the Constitution enters into force. However, the new Article 57.4 of the Constitution only comes into force together with the Lisbon Treaty. The new article states that nobody will

be pronounced guilty and subjected to punishment for an act, which did not constitute a criminal offence under Hungarian law at the time it was committed. Alternatively, to the extent that this is necessary to satisfy obligations under the EU law and in order to recognise each others’ decisions on the basis of reciprocity, without limiting the essential content of any fundamental right, under the law of the state cooperating in the establishment of a territory based upon individual freedom, security and rule of law.

Péter Paczolay attached a concurring opinion to the judgment, which was joined by András Holló, István Kukorelli and László Trócsányi. The concurring opinion noted that Article 57.4 of the Constitution possesses an autonomous meaning. In the Court’s jurisprudence “*Nullum crimen sine lege*” and “*nulla poena sine lege*” are fundamental constitutional principles whose legal content is determined by a number of criminal law provisions. The individual’s constitutional rights and freedoms however are affected not only by the elements of an offence and the sanctions of criminal law, but also by the inter-connected and closed system of regulation of criminal liability, punishability and determination of penalty. Modification of every regulation of criminal liability has a direct and fundamental impact on the freedom and constitutional position of an individual. For that reason, the above articles of the Act are unconstitutional.

András Bragyova attached a separate opinion to the judgment. In his view, according to the majority opinion, any treaties and legislation on surrender procedure, which does not contain a prohibition of double criminality, contravenes Article 57.4 of the Constitution. This casts doubt on the constitutionality of the European Search Warrant. The dissenting opinion emphasised that the surrender procedure has nothing to do with the *nullum crimen* and *nulla poena sine lege* principles. The surrender procedure is based upon the Contracting Parties’ mutual confidence in the functioning of their legal systems. The surrender procedure is not about pronouncing somebody guilty or punishing them for their actions. It is about making decisions on extradition. Therefore, the Court should not have to declare the challenged provisions of the Act unconstitutional on the basis of double incrimination.

Miklós Lévai also attached a dissenting opinion to the judgment. In his opinion, Article 3 of the Act is not unconstitutional, since even the Hungarian translation of Article 3.2 of the Treaty could be interpreted clearly. National judges can easily examine the requirement of double criminality, and it is within their competence to refuse the execution of an arrest warrant. This fact, coupled with the text of the Treaty itself, can guarantee the realisation of Article 57.4 of the Constitution.

Languages:

Hungarian.

*Identification:* HUN-2008-1-002

a) Hungary / b) Constitutional Court / c) / d) 24.04.2008 / e) 54/2008 / f) / g) *Magyar Közlöny* (Official Gazette), 2008/65 / h).

Keywords of the systematic thesaurus:

4.9.3.1 Institutions – Elections and instruments of direct democracy – Electoral system – **Method of voting.**

4.9.9 Institutions – Elections and instruments of direct democracy – **Voting procedures.**

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

Keywords of the alphabetical index:

Election, voting abroad.

Headnotes:

An unconstitutional situation had arisen, as Parliament had failed to secure the conditions of exercising the right to vote for those constituents who were staying in Hungary on polling day at foreign representations, and those who were abroad on the day of the Hungarian elections.

Summary:

I. Several petitions reached the Court concerning Article 96/A.1 of the Act of 1997 on Electoral Procedure. This provides that in the first round, votes may be cast at foreign representations on the 7th day before polling day in Hungary, between 6 a.m. and 7 p.m. local time. At foreign representations where the time difference is -1 hour or -2 hours compared to Central European time zone, between 6 a.m. local time and 7 p.m. CET. At foreign representations on the American continent, votes may be cast on the 8th day prior to voting in Hungary, between 6:00 a.m. and 7:00 p.m. local time.

One of the petitioners suggested that there had been a legislative omission resulting in unconstitutionality, as Parliament had failed to secure the conditions of exercising the right to vote for those constituents who were staying in Hungary on polling day at foreign representations, and those who were abroad on the day of the Hungarian elections. The petitioner contended that this omission resulted in a breach of the right to vote.

The petitioner also argued that Article 96/A.1 contravened Article 8.2 of the Constitution, since it restricts an essential part of a fundamental right by not guaranteeing the possibility of voting at foreign representations for all persons staying abroad at the time of parliamentary elections – as opposed to European parliamentary elections.

Another petitioner stated that Article 96/A.1 meant a technical barrier, violating the principle of the generality of the right to vote, thus restricting Article 70.1 of the Constitution. There are other methods of stating the results of elections, and securing the right to legal remedy. With respect to Article 8.2 of the Constitution, the restriction of the right to vote is unnecessary and disproportionate.

II.1. The Court began by examining the practice of other states in relation to voting from abroad. The majority of European states recognise the institution of voting abroad. The Italian legal system deals with the subject in a unique way. Under Article 48.4 of its Constitution, when there are elections for chambers, constituencies must be created abroad. Under the Act on Elections, eighteen representatives are elected in the foreign constituency. The right to vote can only be exercised by citizens residing permanently abroad. It does not extend to those abroad for a temporary period.

There are two methods of voting abroad, namely by post and by voting at foreign representations.

The legal electoral regimes of Germany, Switzerland and the United Kingdom allow for postal voting. The Irish legal system also allows for postal voting, but only for those who would find it disproportionately difficult to vote in their constituencies. Examples include members of the armed forces, the police, diplomatic corps, and their spouses.

Electronic voting is a special kind of postal voting. Here, votes can be cast by means of a network – characteristically, but not necessarily on the Internet. Trials of this system are taking place in the United Kingdom, Switzerland, Estonia and Austria.

Other states make it possible to vote abroad by voting at foreign representations. Hungary is one example; others include Denmark, Finland and Norway (with individual exceptions for referenda).

2. The provision of the Act in question draws a distinction between voting in Hungary and voting abroad only in the date of voting. The rationale behind Article 96/A is the swift and accurate determination of the results of the elections, thus establishing legal certainty, which in the Court's jurisprudence is an important element of the rule of law. This is particularly important in the first round of the elections, as a determination of validity and efficiency is necessary before the second round, which takes place two weeks later. If this procedural principle were not manifested, it would be impossible to exercise the right to legal remedy set out in Article 57.5 of the Constitution.

Thus, the fact that Article 96/A.1 sets the date for voting at foreign representations preceding the date of the elections in Hungary does not result *per se* in a breach of Article 70.1 of the Constitution.

3. The petitioner also pointed out that Article 96/A.1 restricts the principle of the generality of the right to vote, which is against Article 8.2 of the Constitution. In employing Article 71.1 of the Constitution, the generality of the right to vote is not a fundamental right in itself, but a basic principle, which is the guarantee of the democratic nature of the right to vote. For this reason, by employing the necessity/proportionality test, which judges the constitutionality of provisions restricting fundamental rights regulated in the Constitution, the procedural rules for elections could not be described as unconstitutional. The Constitutional Court rejected the petition to repeal Article 96/A.1.

4. The Court also assessed whether there was unconstitutionality manifested in omission in the fact that the legislator did not guarantee the exercise of the right to vote for those constituents who were staying in Hungary at the time of voting at foreign representations, but abroad at the time of the elections in Hungary. Those constituents could practice their right to vote neither abroad, nor in Hungary.

During parliamentary elections, the generality of the right to vote means that all citizens of age and with a permanent address within Hungary, and, with the exceptions given in Article 70 of the Constitution, have an active and passive right to vote. As a result barriers concerning the elections cannot be modified by means of law, the legislator has no right to set further objective barriers exceeding constitutional barriers. The legislator can only bind the exercise of the right to vote to procedural conditions. Any restriction of the equal and general nature of the right

to vote can only be acceptable and compatible with the Constitution for a very significant reason of principles. Convenience, surmountable technical difficulties or the aim of swift publicity cannot form the basis for restricting rights.

The general nature of the right to vote cannot be made absolute. However, the legislator is under a constitutional duty to make the exercise of the right to vote as widely accessible as possible. Under Article 96/A.1 in the first round of parliamentary elections, voting at foreign representations takes place one week (or, in the case of the American continent, eight days) before the elections in Hungary. As a result, those constituents who are staying in Hungary on the day of voting in foreign representations, but abroad on the day of the elections in Hungary, cannot practice their right to vote. The fact that there is no other legal institution available to these constituents, to enable them to exercise their right to vote, results in a breach of Articles 70.1 and 71.1 of the Constitution. For this reason, the Court stated that unconstitutionality manifested in omission, and called upon Parliament to fulfil its legislative duty.

Languages:

Hungarian.



Identification: HUN-2008-1-003

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 30.04.2008 / **e)** 63/2008 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 2008/69 / **h)**.

Keywords of the systematic thesaurus:

4.5.10.2 Institutions – Legislative bodies – Political parties – **Financing**.

4.5.10.3 Institutions – Legislative bodies – Political parties – **Role**.

5.2.2.9 Fundamental Rights – Equality – Criteria of distinction – **Political opinions or affiliation**.

Keywords of the alphabetical index:

Political party, equal treatment / Political party, foundation, state support, equality.

Headnotes:

It is not unconstitutional for the state to finance foundations close to political parties, provided such foundations are independent from parties both legally and effectively, fulfilling their duties independently and freely. When giving state financial support, however, the results of past political elections cannot be the constitutional basis for differentiating between political parties. In a democracy, no law can favour certain parties in forthcoming national elections based on the results of previous political elections.

Summary:

I. In this decision, the Constitutional Court examined the constitutionality of certain provisions of Act XXXIII of 1989 on the financial management and operation of political parties and Act XLVII of 2003 on foundations helping the operation of political parties.

II. The decision emphasised that under Article 3 of the Constitution, the state cannot hinder the formation and the activity of parties that are established within the constitutional framework, as this would hinder the principle of freedom of association. The parties can be of various types; they may have differing financial situations. They may start from different positions in the competition for constituents' votes, and they may be able to participate in the formation and expression of the will of the people to a different extent. If the legislature creates a rule relating to the state support of parties, it must take these differences into consideration.

Several decisions of the Constitutional Court have emphasised that, for the sake of Parliament's decision-making ability and the stability of government it is acceptable for parties with the least support not to have access to parliamentary mandates. In order to have state support, a party has to be able to fulfil its constitutional duty. The jurisprudence of the Constitutional Court demands rules related to the state support of parties to be adjusted to their duty of participating in the formation and expression of the will of the people, and to their social support.

Besides the operability of the parliamentary system, the Constitutional Court also emphasised that the fundamental value of democratic society is the ability of the multi-party system to renew itself, that is, the system's ability to adjust to changes in society, to answer the changing needs of constituents. The basis of parliamentary democracy is the competition between political parties for the support of constituents. The healthy operation of democracy is impossible without political pluralism and the equal

opportunity of parties to participate in the political contest. For this reason the state has to remain neutral in political contests and in creating legal rules regulating the conditions of this contest.

When creating rules relating to parties, the legislator has to treat parties equally, taking their interests into consideration with equal impartiality and circumspection. It cannot act arbitrarily when making a decision. The legislator has to legislate with the purpose of state support in view, that is, that parties should be able to fulfil their duties laid down in the Constitution. A regulation on state support cannot restrict the freedom of political parties to compete, as is demonstrated in case no. U-I-367/96. of the Slovenian Constitutional Court, and in decision no. US 53/2000 of the Czech Constitutional Court (*Bulletin* 1999/1 [SLO-1999-1-003]; *Bulletin* 2001/1 [CZE-2001-1-005]).

A statute validly in force must contain regulations that are not only "seemingly" neutral. It also has to ensure that the legal norm that applies to all parties equally should not result de facto in a constitutionally unsubstantiated discrimination in the case of a well-defined group of parties. Accordingly, if the statute allows discrimination between the parties, even though the legislator has taken account of equality in other respects, there must be a constitutionally acceptable reason for that discrimination.

In the light of the above, the Court stated that if the legislator decides to support the parties, then, based on the legal regulation financial support must be given to all parliamentary parties. This does not, in itself, secure the equal opportunities of different political powers in the elections. For this reason, state support must be extended to all political parties commanding the support of the bulk of the constituents, and which can nominate candidates in the parliamentary elections [Guidelines and Report on the Financing of Political Parties adopted by the Venice Commission, 9-10 March 2001, A. Regular Financing, a. Public Financing].

The Court stated that Article 70/A.1 of the Constitution is violated by the provision to the effect that full financial support can only be given to the foundation of a party that had had representatives in Parliament in at least two consecutive parliamentary cycles. The Court also found the provision unconstitutional, which gave full financial support exclusively to parties that formed factions in the forming session of Parliament.

The decision also annulled the provision, which secured basic, rather than full, financial support to the formation of parties that were excluded from Parliament after two cycles with a faction, and to the

formation of parties that formed factions in the forming session of Parliament but had not been present in Parliament previously.

The reason for repeal was that the legal provision drew a distinction between parties merely on the basis of previous presence in Parliament. This distinction, however, was not found constitutionally acceptable by the Court, because it was irrelevant from the perspective of the duty of parties laid down in the Constitution, their participation in the formation and expression of the will of the people. The basis of parliamentary democracy is competition for the support of constituents, and regular elections. However, we cannot draw conclusions from the results of a party in previous elections, neither as to future results, nor the extent to which it is able to fulfil its constitutional duties.

With effect from the date of the decision, the Court directed the repeal of provisions that made it impossible for the Tax Authorities and the Health Services to keep a financial-economic check on party formation. The Constitutional Court also found it unconstitutional that the prosecutor's competence differs between party formation and the formation of other entities.

Finally, the Constitutional Court found unconstitutionality manifested in omission, as there was no legal guarantee that parties founded under the auspices of the legislation on the operation of parties would use the financial support they were given to cover setting-up expenses. It could become covert party financing.

Mihály Bihari attached a dissenting opinion to the decision, which was joined by András Bragyova, Péter Kovács, Péter Paczolay, and László Trócsányi. According to the dissenting opinion as long as there is a reasonable justification for the legislator to differentiate between parties with a parliamentary faction and parties outside parliament in terms of their foundations being entitled to financial support, it is not possible to state the violation of Article 70/A.1 of the Constitution. This is true even if the legislator differentiates between parties with a parliamentary faction on the basis of whether they have a permanent presence in Parliament, when deciding on the extent of the financial support of their foundations.

Languages:

Hungarian.



Ireland Supreme Court

Important decisions

Identification: IRL-2008-1-001

a) Ireland / **b)** High Court / **c)** / **d)** 05.03.2008 / **e)** SC 60/07 / **f)** McFarlane v. D.P.P. / **g)** [2008] IESC 7 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

2.1.3.3 Sources – Categories – Case-law – **Foreign case-law.**

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

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

Keywords of the alphabetical index:

Abuse of process / Delay, systemic / Delay, prosecutorial.

Headnotes:

The right to a trial in due process of law is guaranteed under the Constitution. Delay constitutes both systemic and prosecutorial delay. Prosecutorial delay may breach an applicant's constitutional right to a trial with reasonable expedition. Actual prejudice caused by delay such as to preclude a fair trial will always entitle an applicant to prohibition. The Court must analyse the causes of the delay and balance the roles of the applicant and the prosecution.

Summary:

I. The applicant was charged with abduction in 1998. He had previously been imprisoned in Northern Ireland from 1975 in the Maze prison for other offences but had escaped in 1983 and was eventually deported from the Netherlands in 1986. In 1999, the applicant sought to prohibit his trial in judicial review proceedings arising from delay and prejudice on the grounds of missing evidence. There were numerous

discovery proceedings and a delay in hearing the case due to availability of a judge and as such, the proceedings were not completed until 2006. The High Court and Supreme Court held in favour of the applicant on the grounds of the missing evidence but not on the grounds of delay. He then initiated this second stage of judicial proceedings alleging delay in the hearing and determination of the proceedings relating to the prosecution for the abduction.

II. The Court (Kearns J. giving the main judgment) stated that the right to a trial in due process of law is a right guaranteed by Article 38.1 of the Irish Constitution (*Bunreacht na hÉireann*) and thus where it is established that there is a real risk of an unfair trial, a risk which cannot be overcome by rulings or direction from the trial court, the courts in this jurisdiction will prohibit such a trial from taking place. Delay, it was stated can arise from the tardiness of the police or on the part of the prosecuting authorities which is known as "prosecutorial delay". Delay may also arise when the State, by its failure to provide adequate resources or facilities for the disposal of the litigation, has itself contributed to the delay known as "systemic delay". It noted that there may also be judicial delay where the Court fails to deliver its judgment or decision within an appropriate time frame. Systematic and prosecutorial delay overlaps to an extent in the opinion of Kearns J. Geoghegan J. differed in this regard in stating he did not know of any case where as a consequence of an inadequate structure due to a lack of staff or lack of suitable staff, justiciable delay ensued.

The respondent argued that the applicant failed to argue systemic delay in the first set of judicial review proceedings and therefore could not in this set as it was an abuse of process according to the principle in *Henderson v. Henderson* (1843) 3 Hare 100. Kearns J. stated this rule should not be applied rigidly and stated that the applicant had gone far enough to demonstrate that a new point had arisen which required adjudication by the Court. Fennelly J. stated that this case was not appropriate for the application of the rule as one must look at the entire context of the case before concluding the proceedings amount to an abuse of process.

Under the current principles of Irish law and on assessing the relevant case law, the Court noted the following principles in relation to prosecutorial delay:

1. Inordinate, blameworthy or unexplained prosecutorial delay may breach an applicant's constitutional entitlement to a trial with reasonable expedition.

2. Prosecutorial delay of this nature may be of such a degree that a court will presume prejudice and uphold the right to an expeditious trial by directing prohibition.
3. Where there is a period of significant (as distinct from minor) blameworthy prosecutorial delay less than that in 2, is demonstrated, the Court will engage in a balancing exercise between the community's entitlement to see crimes prosecuted and the applicant's right to an expeditious trial, but will not direct prohibition unless one or more of the elements referred to in *P.M. v. Malone* [2002] 2 I.R. 560 and *P.M. v. D.P.P.* [2006] 3 I.R. 172 are demonstrated.
4. Actual prejudice caused by delay which is such as to preclude a fair trial will always entitle an applicant to prohibition.

Kearns J. noted that the U.S. Supreme Court decision of *Barker v. Wingo* 407 U.S. (1972) is to be seen as a model for Irish law. He was of the opinion that it is highly suitable for determining issues about prosecutorial delay and should be adopted directly rather than inferentially. Systemic delay should be governed by the same principles as prosecutorial delay.

Any court called upon to prohibit a trial must give due weight to the gravity and seriousness of the offence and must therefore analyse the causes of delay with great care, weighing up and balancing the role of both the prosecution and the applicant and their respective contributions to delay. Prohibition is a remedy which in the absence of actual prejudice, should only be granted where a serious breach of the applicant's rights under the Constitution or under the European Convention on Human Rights is established. Not every delay is significant or warrants the description of being blameworthy. It was Kearns J. opinion that the applicant should adduce and place before the Court some evidence of what the norm is in terms of the time taken for the particular process, which information can be gained from the Courts Service.

Delay may be seen as the enemy of justice, both from the point of view of the community whose interest in having serious crimes prosecuted is put in jeopardy by prosecutorial or systemic delay and, perhaps more particularly from the point of view of an accused person. Fennelly J. noted that the Court must have regard to the seriousness of the crime.

A substantial part of the delay must be attributed to the applicant in the opinion of Fennelly J. as he had carriage of the proceedings as well as an order restraining his continued prosecution.

The Court concluded that there was no blameworthy prosecutorial or systemic delay and no actual prejudice to the applicant was demonstrated nor was there any impairment of his rights guaranteed by the Constitution. Therefore he had not established that he had a right to have his trial prohibited.

Languages:

English.



Identification: IRL-2008-1-002

a) Ireland / b) High Court / c) / d) 05.04.2008 / e) SC 221/05 / f) D.P.P. v. Independent Newspapers Ltd / g) [2008] IESC 8 / h) CODICES (English).

Keywords of the systematic thesaurus:

1.3.4.8 Constitutional Justice – Jurisdiction – Types of litigation – **Litigation in respect of jurisdictional conflict.**

2.1.2.2 Sources – Categories – Unwritten rules – **General principles of law.**

2.3.6 Sources – Techniques of review – **Historical interpretation.**

Keywords of the alphabetical index:

Criminal contempt / Jurisdiction, summary / Contempt of court, nature.

Headnotes:

The jurisdiction to attach, commit or sequester for contempt of court is criminal in nature. Therefore the criminal standard of proof must apply. This jurisdiction is well established and inherent in the courts throughout the recorded history of the common law. This jurisdiction derives from the need for the courts to be in a position to act speedily to protect the respect and dignity of the courts in the independent exercise of their functions and to protect the judicial process from contamination. Judges in interpreting legislation do not interpret statutes in a vacuum but may take account of historical fact.

Summary:

I. The Director of Public Prosecutions (D.P.P.) sought an order for the attachment and committal and/or sequestration of the assets of the respondent newspapers for contempt of court for material published in one of their newspapers and a further order restraining them from further publishing material calculated to interfere with the course of justice and to prejudice the fair trial of one Patrick O'Dwyer who stood accused of murder.

The respondents had printed an article in the newspaper concerning the accused which he stated prejudiced his right to a fair trial. As a result, the D.P.P. commenced proceedings for contempt of court.

The application was heard in the High Court (Dunne J.) who noted this was a criminal contempt of court involving the application of the criminal standard of proof. She concluded that it had not been shown that the articles complained of had given rise to a real risk as distinct from a remote possibility of prejudice to the fairness of the trial. This was appealed to the Supreme Court where it was contended that the High Court had incorrectly failed to consider whether the appellant had made out a *prima facie* case that the respondents had committed a contempt of court. The respondents raised the question whether an appeal lies, as a matter of principle, from the decision of the High Court, which amounts to an acquittal in a criminal proceeding.

The issue centred upon whether Dunne J. was sitting as a judge of the Central Criminal Court. If so, the only appeal that could lie was to the Court of Criminal Appeal and not the Supreme Court according to the Criminal Procedure Act 1993 and considering the Courts (Supplemental Provisions) Act 1961.

II. Fennelly J. (with whom Murray C. J. and Finnegan J. concurred) was of the opinion that since the foundation of the Irish State and the enactment of the present Constitution in 1937, the courts have consistently held that they have an inherent jurisdiction to punish summarily contempt of court. He stated that the contempt jurisdiction derives from the needs for the courts to be in a position to act speedily to protect the respect and dignity of the courts themselves in the independent exercise of their functions and equally to protect the judicial process from contamination by prejudicing parties, witnesses or jurors, or risking the fairness of trials. He concluded that the Central Criminal Court has jurisdiction to conduct trials on indictment and is not vested with any other jurisdiction. Therefore, applications for attachment or committal which are tried summarily are not within the jurisdiction of the Central Criminal Court.

Geoghegan J. (with whom Murray C. J. and Finnegan J. concurred) noted that criminal contempt historically, was dealt with summarily in the High Court and was not prosecuted upon indictment. The historical reason was the urgency of obtaining such an order. In considering the relevant statutory provisions, he was of the opinion that courts do not interpret statutes in a vacuum. Judges are entitled to take judicial notice of relevant context and well-known relevant historical facts. He noted the difference between cases of contempt in the face of the Court and criminal contempt offences which are offences against the administration of justice itself and are therefore, offences not exclusively external to the Court itself even if the party applying for the attachment or committal is himself offended.

Hardiman J. stated that the jurisdiction to attach, commit or sequester for contempt of court is criminal in nature. Therefore the criminal standard of proof must apply. He noted that the jurisdiction is of immemorial origin and has been regarded as inherent in courts throughout the recorded history of the common law. He differed in opinion from other members of the Court in finding that the defendants were subjected to a criminal trial in the High Court in which, if they had been convicted, they might have been imprisoned for any length of time and deprived of their property without limitation on the amount. Therefore in his dissenting opinion, the decision made by Dunne J. should be regarded as a decision of the Central Criminal Court with no right of appeal to the Supreme Court.

The majority of the Court concluded that the Court in question was not the Central Criminal Court and therefore that a right of appeal does lie to the Supreme Court.

Languages:

English.



Identification: IRL-2008-1-003

a) Ireland / **b)** High Court / **c)** / **d)** 25.04.2008 / **e)** 2006/4427P / **f)** Fitzpatrick & Anor. v. K & Anor. / **g)** [2008] IEHC 104 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

5.3.44 Fundamental Rights – Civil and political rights – **Rights of the child.**

Keywords of the alphabetical index:

Blood, transfusion, refusal / Child, best interest / Competency of adult / Duty of care, clinician / Treatment, medical, refusal, religious grounds.

Headnotes:

There is a presumption that an adult patient has the mental capacity to make a decision to refuse medical treatment but that presumption may be rebutted. In determining whether a patient is deprived of the capacity to make a decision to refuse medical treatment, the test is whether the patient's cognitive ability has been impaired to such an extent that he or she does not sufficiently understand the nature, purpose and effect of the proffered treatment and the consequences of accepting or rejecting it in the context of the choice available, including alternative treatment, available at the time the decision is made.

Summary:

I. The plaintiff was the Master of a maternity hospital. The defendant (Ms K) is a patient of that hospital on 21 September 2006 who was from the Democratic Republic of Congo (DRC). The plaintiff gave birth on that date in question but afterwards suffered a massive haemorrhage resulting in the loss of nearly 80% of her blood. She required a blood transfusion but refused on religious grounds as a Jehovah's Witness. Difficulties arose as the defendant did not speak English and had stated on her admittance form that she was Roman Catholic. Medical personnel in the hospital concluded that a blood transfusion was necessary to save her life. The Master had doubts as to the quality of her refusal of the transfusion. He made an *ex parte* application to the Court to have the treatment administered and this was granted. The plaintiffs at the *ex parte* hearing asserted that they were concerned the defendant might not be in a position to make a fully formed decision to refuse consent to the medical procedures necessary to save her life.

It was argued by the plaintiff that the State was obliged by Articles 40.3.1, 40.3.2, 41 and 42.5 of the Irish Constitution (*Bunreacht na hÉireann*) to safeguard the constitutional rights of the defendant's baby who it was thought at that time would be alone in the State if his mother should die. The defendant argued that the order

should be set aside as it was obtained without notice to Ms K, a competent adult. It was also denied that Ms K was not in a position to make a fully informed decision to refuse consent to medical procedures necessary to save her life. It was argued that the right of her child to be nurtured did not override her autonomous refusal of medical treatment as a competent adult.

II. The core issue in the case in the opinion of the Court (Laffoy J.) was whether and, if so, in what circumstances a court may intervene in the case of a patient who is an adult and is not non *compos mentis*, who has refused medical treatment, and by order authorise the hospital and its personnel in which he or she is a patient to administer such treatment to the patient. The Court noted that an Irish Court had not yet considered previously how capacity to refuse consent to medical treatment on the part of an adult should be tested.

The Court considered the issue from case law from other jurisdictions and following the authority of *Re C (adult; refusal of medical treatment)* [1994] 1 All E.R. 819 established a test for assessing capacity:

1. There is a presumption that an adult patient has the capacity to make a decision to refuse medical treatment but that presumption can be rebutted.
2. In determining whether a patient is deprived of capacity to make a decision to refuse medical treatment, whether by reason of permanent cognitive impairment or temporary factors, the test is whether the patient's cognitive ability has been impaired to the extent that he or she does not sufficiently understand the nature, purpose and effect of the proffered treatment and the consequences of accepting or rejecting it in the context of the choices available at the time the decision is made.
3. The patient's cognitive ability will be impaired to the extent that he or she is incapable of making the decision to refuse the proffered treatment if the patient has not comprehended and retained the treatment information and has not assimilated the information as to the consequences likely to ensue from not accepting the treatment, has not believed the treatment information, and if it is this case that this will result in death, has not believed the outcome is likely and has not weighed the treatment information, in particular the alternative choices and likely outcomes in the balance in arriving at the decision.
4. The treatment information by reference to which the patient's capacity is assessed is the information which the clinician is under a duty to impart.

5. In assessing capacity it is necessary to distinguish between misunderstanding and misperception of the treatment information in the decision-making process on the one hand and an irrational decision or a decision made for irrational reasons, on the other hand. The former may be evidence of capacity; the latter is irrelevant to the assessment.
6. In assessing capacity, the assessment must have regard to the gravity of the decision, in terms of the consequences which are likely to ensue from the acceptance or rejection of the proffered treatment.

In concluding on the issue of capacity, the Court noted that the decisions made by the personnel were made in the context of an emergency and not in an elective situation. The Court pointed to the facts to conclude that Ms K did not understand the gravity of her situation in suggesting a remedy of coca-cola and tomatoes in substitution for the blood transfusion. The Court recognised that if the totality of the evidence suggested that she understood and believed that a blood transfusion was necessary to preserve her life but nonetheless made the decision which most people would regard as irrational, that decision would have to be respected.

The duty of a clinician caring for a patient in such circumstances is to advise the patient of, and afford him or her an opportunity to receive, appropriate medical treatment. If as a competent adult, the patient refuses and no issue arises as to the capacity of the patient to make that decision, the duty to provide treatment is discharged. But if an issue arises as to capacity, the duty of the clinician to advise on and provide the appropriate treatment remains. The Court concluded that the duty of care a clinician owes a patient in those circumstances is not different from what it would be if there was no refusal or if the patient was unconscious.

The Court concluded that the plaintiff gave the defendant the information necessary to enable her to make an informed decision as to whether to accept or refuse a blood transfusion. The Court concluded that Ms K's capacity was impaired to the extent that she did not have the ability to make a valid refusal to accept the appropriate medical treatment offered to her and that the plaintiffs acted lawfully in sedating and administering a blood transfusion and other blood products to her.

Languages:

English.



Israel

Supreme Court

Important decisions

Identification: ISR-2008-1-001

a) Israel / **b)** High Court of Justice (Supreme Court) / **c)** Panel / **d)** 27.01.2008 / **e)** H.C. 9132/07 / **f)** Al Bassiouni et al. v. The Prime Minister of Israel et al. / **g)** / **h)** CODICES (English).

Keywords of the systematic thesaurus:

2.1.1.4.3 Sources – Categories – Written rules – International instruments – **Geneva Conventions of 1949.**

3.13 General Principles – **Legality.**

5.1.1 Fundamental Rights – General questions – **Entitlement to rights.**

5.1.4 Fundamental Rights – General questions – **Limits and restrictions.**

5.3 Fundamental Rights – **Civil and political rights.**

Keywords of the alphabetical index:

Terrorism, fight / Geneva Convention of 1949 / International humanitarian law / Basic humanitarian relief, passage, obligation.

Headnotes:

The applicable rules of International Humanitarian Law oblige each party to a conflict to refrain from restricting the passage of basic humanitarian relief to the populations needing it in areas under its control. Moreover, according to the First Additional Protocol of the Geneva Conventions, a party to a conflict should not be able to refuse to allow passage of foodstuffs and the basic humanitarian equipment necessary for the survival of the civilian population.

Israel has not had effective control over events in the Gaza Strip since September 2005. The military government that had applied to that area was annulled by a government decision, and Israeli soldiers are not present in the area on a permanent basis, nor are they managing affairs there. In such circumstances, the State of Israel does not have a general duty to ensure the welfare of the residents of

the strip or to maintain public order within the Gaza Strip pursuant to the entirety of the Law of Belligerent Occupation in International Law.

The duty obligating Israel derives from the basic humanitarian needs of the residents of the Gaza Strip. The State of Israel has no obligation under international humanitarian law to allow passage of an unlimited amount of electricity and fuel into the Gaza strip in circumstances under which some of it is being used by the terrorist organisations in order to strike at the civilian population of Israel.

Based on the information that the state relayed to the High Court, the Court was convinced that the State is indeed monitoring the situation in the Gaza Strip, and allowing supply of the amount of fuel and electricity needed for the basic humanitarian needs in the area.

Summary:

The circumstances surrounding the petition were the combat activities that have been taking place in the Gaza Strip and the continuing terrorist attacks directed against the citizens of Israel, which have become more severe and intense since the Hamas Organisation secured control of the Gaza Strip.

As part of the actions taken by Israel against this ongoing terrorism, on 19 September 2007, the Ministerial Committee on National Security issued a decision which stated as follows:

“The Hamas is a terrorist organisation which has taken over the Gaza strip and turned it into hostile territory. This organisation carries out acts of hostility against the state of Israel and its citizens, and the responsibility for such acts lies with it. In light of that, it is resolved to adopt the recommendations presented by the security agencies, including continuation of the military and preventative activity against the terrorist organisations. Furthermore, additional restrictions will be placed upon the Hamas regime, in a way that will limit the passage of goods to the Gaza Strip and reduce the supply of fuel and electricity, and there will be restrictions placed upon the movement of persons to and from the strip. The restrictions will be implemented after legal examination, taking into account the humanitarian situation in the Gaza Strip, and with the intention of preventing a humanitarian crisis”.

Several human rights groups and residents of the Gaza Strip argued in their petitions that various limitations upon the supply of fuel and electricity to the Gaza Strip compromise the fulfilment of the basic humanitarian needs of the residents of the Gaza Strip.

The sources of applicable law are various rules of public international humanitarian law, including Articles 54 and 70 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and the Laws of Belligerent Occupation.

Regarding the legal framework in the Gaza Strip area, the High Court stated that since September 2005, Israel no longer has effective control over events there. The military government that had applied to that area was annulled by a government decision. Israeli soldiers are not present in the area on a permanent basis, nor are they managing affairs there. In such circumstances, the Court found that the State of Israel does not have a general duty to ensure the welfare of the residents of the strip or to maintain the public order within the Gaza Strip pursuant to the entirety of the Law of Belligerent Occupation in international law. Nor does Israel have effective capability, in its present status, to enforce order and manage civilian life in the Gaza Strip.

The High Court determined that in the circumstances that have been created, the main duties of the State of Israel towards the residents of the Gaza Strip derive from the situation of armed conflict that exists between it and the Hamas organisation controlling the Gaza strip. They also derive from the extent of the State of Israel's control over the border crossings between it and the Gaza Strip; and from the relations which have been created between Israel and the territory of the Gaza Strip after the years of Israeli military rule in the area. Because of the above, the Gaza Strip has become almost completely dependent upon the supply of electricity from Israel.

According to this legal framework, the High Court determined that the applicable rules of International Humanitarian Law oblige each party to the conflict to refrain from restricting the passage of basic humanitarian relief to the populations needing it in areas under its control. Moreover, according to the First Additional Protocol of the Geneva Conventions, a party to a conflict should not be able to refuse to allow passage of foodstuffs and the basic humanitarian equipment necessary for the survival of the civilian population.

The High Court determined that in this case, the duty obligating Israel derives from the basic humanitarian needs of the residents of the Gaza Strip. The State of Israel has no obligation under International Humanitarian Law to allow passage of an unlimited amount of electricity and fuel into the Gaza strip when terrorist organisations are using some of it to launch strikes at the civilian population of Israel.

The High Court emphasised that its decision was based, among other things, on the information that the state relayed to it, according to which the amount of fuel and electricity that is transferred to the Gaza strip is sufficient for the humanitarian needs of the residents of this area. Furthermore, the State reiterated its commitment to monitor the humanitarian situation in the Gaza Strip. In that context, the Court was informed, in various affidavits in the respondents' names, that the security agencies develop a situation report on the subject every week. This is based, *inter alia*, upon contacts with Palestinian officials in the areas of electricity and health, and contacts with international organizations. Therefore, the High Court was convinced that the State is indeed monitoring the situation in the Gaza Strip, and allowing supply of the amount of fuel and electricity needed for the basic humanitarian needs in the area.

Finally, the High Court emphasised that at a time of combat, like the one under discussion, the civilian population finds itself, unfortunately, in territory in which combat is taking place. They are the first and primary victims of the combat situation, even when efforts are being made to reduce the harm to them. In the territory of the State of Israel as well, in an era of terrorist attacks that have been continuing for years, the immediate and main victims of the combat situation are the civilian population. However, regarding the actions carried out against Israel, they are by no means random or collateral harm, but rather frequent terrorist attacks aimed directly at the civilian population, and intended to strike at innocent civilians. That is the difference between the State of Israel, a democratic state fighting for its life in the framework of the means that the law puts at its disposal, and the terrorist organisations that rise up against it. "The State fights in the name of the law and in order to preserve it. The terrorists fight against the law, and in violation of it. The war against terrorism is also the law's war against those who rise up against it" (HCJ 320/80 *Kawasme v. The Minister of Defense*, 35 PD (3) 113, 132).

In conclusion, the High Court reiterated that the Gaza Strip is controlled by a murderous terrorist organisation, which acts tirelessly to strike at the State of Israel and its inhabitants, violating every possible rule of international law in its violent acts, which are directed indiscriminately toward civilians – men, women and children. In light of the entirety of information presented before the Court regarding the provision of fuel and electricity to the Gaza Strip, the Court was of the opinion that the amount of fuel and electricity that the state announced it would supply fulfils the basic humanitarian needs of the Gaza Strip at the present time.

Cross-references:

- HCJ 3451/02 *Almadani v. The Minister of Security*, 56 PD (3) 30;
- HCJ 168/91 *Murkus v. The Minister of Defense*, 45 PD (1) 467, 470);
- HCJ 3114/02 *Barake v. The Minister of Defense*, 56 PD (3) 11);
- HCJ 320/80 *Kawasme v. The Minister of Defense*, 35 PD (3) 113, 132.

Languages:

Hebrew, English (translation by the Court).

*Identification:* ISR-2008-1-002

a) Israel / **b)** High Court of Justice (Supreme Court sitting as the Court of Criminal Appeals) / **c)** Panel / **d)** 11.06.2008 / **e)** CrimA 6659/06 / **f)** A v. State of Israel / **g)** / **h)** CODICES (English).

Keywords of the systematic thesaurus:

2.1.1.4.3 Sources – Categories – Written rules – International instruments – **Geneva Conventions of 1949.**

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

3.16 General Principles – **Proportionality.**

3.18 General Principles – **General interest.**

5.1.4 Fundamental Rights – General questions – **Limits and restrictions.**

5.3.5.1 Fundamental Rights – Civil and political rights – Individual liberty – **Deprivation of liberty.**

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:

Terrorism, fight / National security, protection / International humanitarian law / Geneva Convention of 1949 / Hague Convention (IV) Respecting the Laws and Customs of War on Land (1907) / Detention, judicial review / Detainee, rights.

Headnotes:

The security purpose of the Law on the Internment of Unlawful Combatants – removing “unlawful combatants” from the cycle of hostilities conducted by terror organisations against the State of Israel – constitutes a proper purpose that is based on a public need of the kind that may justify a significant infringement of the right to personal liberty.

In view of the extent of the infringement of personal liberty, and in view of the extreme nature of the measure of administrative detention provided in the law, an interpretive effort should be made in order to minimise, as far as possible, the infringement of the right to liberty so that it is commensurate with, and does not exceed, the need to achieve the security purpose. The provisions of the statute should also be interpreted, insofar as possible, in a manner consistent with the accepted norms of international law.

The interpretation of the definition of “unlawful combatant” in Section 2 of the law is subject to constitutional principles and international humanitarian law that require proof of an individual threat as a basis for administrative detention.

Administrative detention is an exceptional and extreme measure. Moreover, in view of the significant violation of the constitutional right to personal liberty, the state should prove, with clear and convincing evidence, that the conditions of the definition of “unlawful combatant” are satisfied and that the continuation of the detention is essential, both in the initial judicial review and in periodic judicial reviews.

Summary:

The appeals before the Court focused on the Internment of Unlawful Combatants Law, 5762-2002. The appeals challenged specific internment orders that were made under the law, but the case focused mainly on fundamental questions concerning the interpretation of the provisions of the Internment of Unlawful Combatants Law and the extent to which it is consistent with international humanitarian law, as well as the constitutionality of the arrangements prescribed in the law.

The Internment of Unlawful Combatants Law was enacted against a background of a harsh security reality of murderous terrorist threats that have plagued the State of Israel for years and attacked innocent persons indiscriminately. In view of this, the Court held that the law’s security purpose – removing “unlawful combatants” from the cycle of hostilities conducted by the terror organisations against the

State of Israel – constitutes a proper purpose that is based on a public need of the kind that may justify a significant infringement of the right to personal liberty.

The measure chosen by the legislature to realise the purpose of the Internment of Unlawful Combatants Law is administrative detention, in accordance with the arrangements provided in the law. There is no doubt that this is a measure that violates the right to personal liberty significantly and even severely. In view of the extent of the violation of personal liberty, and in view of the extreme nature of the measure of detention provided in the law, the Court held that an interpretative effort should be made in order to minimise, insofar as possible, the infringement of the right to liberty so that it is commensurate with the need to achieve the security purpose, and not in excess thereof. This interpretation should be consistent with the basic outlook that prevails in the Israeli legal system, according to which it is preferable to uphold a statute by interpretive means wherever possible, rather than to declare it void for constitutional reasons. The Court also held that the provisions of the statute should be interpreted, insofar as possible, in a manner consistent with the accepted norms of international law.

The international law that governs an international armed conflict is enshrined mainly in the Hague Convention (IV) Respecting the Laws and Customs of War on Land (1907) and the regulations appended to it, whose provisions have the status of customary international law; the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, 1949, whose customary provisions constitute a part of the law of the State of Israel, and some of which have been considered in the past by this Court; and the Protocol Additional to the Geneva Convention of 12 August 1949 Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977 (hereafter “the First Protocol”), to which Israel is not a party, but whose customary provisions also constitute a part of the law of the State of Israel. In addition, where there is a lacuna in the laws of armed conflict set out above, it is possible to fill it by resorting to international human rights law.

Examining the arrangements that were provided in the law in the light of their interpretation, which the Court discussed at length in the judgment, and was led to the conclusion that the arrangements provided in the law fall within the margin of proportionality: first, the measure chosen by the legislature, namely administrative detention that prevents the “unlawful combatant” from returning to the cycle of hostilities against the State of Israel, serves the legislative purpose and, therefore, satisfies the requirement of the rational connection between the legislative

measure and the purpose that the law was intended to realise. Second, the measures indicated by the appellants in their pleadings before the Court, namely recognising them as prisoners of war, bringing them to a criminal trial or detaining them under the Emergency Powers (Detentions) Law, do not realise the purpose of the Internment of Unlawful Combatants Law and, therefore, they cannot constitute a proper alternative measure to detention under the law under discussion. Third, the specific arrangements provided in the law do not, in themselves and irrespective of the manner in which they are applied, infringe the right to personal liberty excessively, and they fall within the scope of the margin of constitutional appreciation given to the legislature. Finally, a look at the overall combination of the aforesaid provisions, in light of the interpretation that the Court discussed in the judgment, leads to the conclusion that the violation of the constitutional right is reasonably commensurate with the social benefit arising from realising the legislative purpose. This conclusion is based on the combined effect of the following considerations:

First, according to the interpretation of the provisions of the law, the scope of the law’s application is relatively narrow: the law does not apply to citizens and residents of the State of Israel, but only to foreign parties who endanger the security of the state.

Second, the interpretation of the definition of “unlawful combatant” in Section 2 of the law is subject to constitutional principles and international humanitarian law that require proof of an individual threat as a basis for administrative detention. Accordingly, the Court held that for the purpose of detention under the law, the state is required to prove with administrative evidence that the detainee directly or indirectly played a real part – which is not negligible or marginal – in the hostilities against the State of Israel; or that the detainee belonged to an organisation that carries out hostilities against the State of Israel, in view of the detainee’s connection with, and the extent of his contribution to, the organisation’s cycle of hostilities in the broad sense of this concept. The Court held that proving the conditions of the definition of “unlawful combatant” in the aforesaid sense includes proving a personal threat that derives from the actual type of the detainee’s involvement in the terrorist organisation. The Court also said that the state declared before it that its policy until now has been to prove the personal threat of all the detainees who have been detained under the law on an individual basis, and it has refrained from relying on the probative presumptions provided in Sections 7 and 8 of the law. In view of this, the Court saw no reason to decide the question of the constitutionality of those presumptions.

Third, the Court held that because administrative detention is an exceptional and extreme measure, and in view of the significant infringement of the constitutional right to personal liberty, the state should prove, with clear and convincing evidence, that the conditions of the definition of "unlawful combatant" are satisfied, and that the continuation of the detention is essential, both in the initial judicial review and in the periodic judicial reviews. In this regard, the Court held that importance should be attached to the quantity and quality of the evidence against the detainee and also to whether the relevant intelligence information against him is up to date.

Fourth, the Court saw fit to attribute significant weight to the fact that detention orders under the Internment of Unlawful Combatants Law are subject to initial and periodic judicial reviews before a District Court judge, whose decisions may be appealed to the Supreme Court that will hear the case with one judge. In view of the reliance upon administrative evidence and privileged evidence that is heard *ex parte*, the Court held that the judge should act cautiously and carefully when examining the material brought before him. It was also held that the court that exercises judicial review of detention under the law may restrict and shorten the period of detention in view of the nature and strength of the evidence brought before it with regard to the security threat presented by the detainee as an "unlawful combatant," and in view of the time that has passed since the detention order was issued. This led the Court to say that judicial review may ensure that the absence of a specific date for the termination of the detention order under the law does not excessively violate the right to personal liberty, and that detainees under the law are not held in detention for a period longer than what is required by major security considerations.

Finally, the Court emphasised that the periods that were provided in the law with regard to the holding of an initial judicial review after the detention order is made, and with regard to preventing a meeting between the detainee and his lawyer, are maximum periods. The state still has a duty to make efforts to shorten these periods in each case on its merits, insofar as this is possible in view of security constraints and all the circumstances of the case. The Court also held that detention under the Internment of Unlawful Combatants Law cannot continue indefinitely, and that the question of the proportionality of the continuation of the detention should also be considered on a case by case basis in accordance with its specific circumstances.

In view of all of the above considerations: the relatively broad margin of appreciation given to the legislature when choosing the proper measure for

realising the essential purpose of the law; the fact that, according to the interpretation that was discussed above, the law does not allow the detention of innocent persons who have no real connection to the cycle of violence of terrorist organisations; and the provision of mechanisms whose purpose is to limit the infringement of the detainees' rights, the Court concluded that, notwithstanding the fact that the law significantly infringes upon the constitutional right to personal liberty, the Internment of Unlawful Combatants Law satisfies the conditions of the constitutional limitations clause, and there is no constitutional ground for any intervention in the law.

Regarding the specific internment orders made against the appellants under the law, here too the Court found that the appeals should be denied. From the evidence in the case, it could clearly be seen that the appellants are closely connected with the Hezbollah organisation and hold positions in the organisation's fighting force, including involvement in hostile terrorist activity against Israeli civilian targets. The Court was therefore persuaded that the individual threat presented by the appellants to state security was proved.

Cross-references:

- CrimFH 7048/97 *A v. Minister of Defence* [2000] IsrSC 44(1) 721;
- HCJ 769/02 *Public Committee against Torture in Israel v. Government of Israel* (unreported Judgment of 14.12.2006);
- HCJ 7015/02 *Ajuri v. IDF Commander in West Bank* [2002] IsrSC 56(6) 352; [2002-3] IsrLR 83;
- HCJ 3239/02 *Marab v. IDF Commander in Judaea and Samaria* [2003] IsrSC 57(2) 349; [2002-3] IsrLR 173;
- HCJ 7957/04 *Marabeh v. Prime Minister of Israel* [2005] (2) IsrLR 106;
- HCJ 7052/03 *Adalah Legal Centre for Arab Minority Rights in Israel v. Ministry of Interior* [2006] (1) IsrLR 442;
- *Hamdi v. Rumsfeld*, 542 U.S. 507, 518-19 (2004).

Languages:

Hebrew, English (translation by the Court).



Italy

Constitutional Court

Important decisions

Identification: ITA-2008-1-001

a) Italy / b) Constitutional Court / c) / d) 13.02.2008 / e) 103/2008 / f) / g) *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), 16.04.2008 / h) CODICES (Italian).

Keywords of the systematic thesaurus:

1.3.5.8 Constitutional Justice – Jurisdiction – The subject of review – **Rules issued by federal or regional entities.**

1.4.10.7 Constitutional Justice – Procedure – Interlocutory proceedings – **Request for a preliminary ruling by the Court of Justice of the European Communities.**

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

3.26.1 General Principles – Principles of Community law – **Fundamental principles of the Common Market.**

4.16.1 Institutions – International relations – **Transfer of powers to international institutions.**

Keywords of the alphabetical index:

Autonomy, regional / Service, provision, unrestricted / Competition, freedom / State aid.

Headnotes:

The Constitutional Court, though the supreme constitutional guarantor is in fact a national court within the meaning of Article 234.3 of the EC Treaty. In addition, the Constitutional Court is the sole court competent to determine applications made “on the main issue” by the State or the Regions (and the Provinces of Trento and Bolzano) and consequently if the Constitutional Court, in proceedings to determine constitutionality “as the main issue”, could not make a preliminary referral to the Court of Justice, then the uniform application of Community law would be in doubt.

Summary:

I. A law of the Region of Sardinia introduced with effect from the year 2006 a regional tax on light aircraft and yachts stopping for tourist purposes at Sardinia’s airports and ports between 1 June and 30 September. The tax is payable by natural and legal persons operating air or water craft (*unità da diporto*) and resident for taxation purposes outside the region’s boundaries. Exemptions from the tax apply (among other cases) to vessels participating in regattas, aircraft and vessels making “technical” stops, and vessels permanently docked in Sardinian ports. The tax is payable by enterprises operating to provide third parties with pleasure craft and enterprises engaging in unremunerated air transport operations for reasons bearing on their activity, in the context of general and business aviation as defined in Article 2.1 of Regulation (EEC) no. 95/93.

The Constitutional Court, on an application by the State, was to determine conformity with Article 117.1 of the Constitution (“Legislative power shall be exercised by the state and the regions in accordance with the Constitution and with European Union law and international obligations”) of the Region of Sardinia’s law.

The unconstitutionality allegedly arose from infringement of the provisions of the EC Treaty ensuring the protection of freedom to provide services (Article 49 of the EC Treaty) and free competition (Article 81 of the EC Treaty in conjunction with Articles 3.g and 10 of the EC Treaty) and those prohibiting State aid (Article 87 of the EC Treaty).

The State asked the Constitutional Court to refer the case for a preliminary ruling to the Court of Justice of the European Communities, on the basis of Article 234 of the EC Treaty, in order to obtain from the Court of Justice an interpretation of the aforementioned Community rules, since it considered that the Constitutional Court decision as to whether the Region of Sardinia upheld or infringed Article 117.1 of the Constitution would depend on the impugned law’s compliance (or non-compliance) with the above rules.

II. The Constitutional Court held that Community law should be taken into account as an element entering into Article 117.1 of the Constitution, the parameter of constitutionality in the judgment on constitutionality which it was to deliver. The Court recalled that in ratifying the Community treaties, Italy had incorporated Community law which, though self-sufficient, was to be integrated and co-ordinated with the domestic legal system. Italy had also accepted, under Article 11 of the Constitution, the transfer to the Community institutions of legislative powers (from the

State and from autonomous regions and provinces) in matters governed by the treaties. The domestic legislator was bound by the Community provisions, the sole limit being their compliance with the fundamental principles of constitutional law and with the inviolable rights of the individual as secured by the Italian Constitution.

In proceedings before Italian courts, the obligation to abide by Community law operates in different ways according to the various types of proceedings. Thus the ordinary court may apply a domestic statute to the case brought before it, on condition that it complies with the directly applicable Community provision. In order to verify compliance, the court may (or should where it has final decision) approach the Court of Justice through the preliminary referral procedure; if the reply is in the negative, the law that must be applied to the specific case is the directly enforceable Community law (but the domestic law still stands and may be applied in another case as appropriate). On the other hand the Constitutional Court, responding to the State's request to determine the compliance of a regional law with a rule of Community law, may avail itself of the latter to introduce the constitutional parameter represented by Article 117.1 of the Constitution. In the event of non-compliance, the regional law is declared unconstitutional with *erga omnes* effect and can no longer be applied.

So that it might verify the conformity of the regional law to Article 117.1 of the Constitution in the case before it, the Constitutional Court deemed it necessary to make a preliminary referral to the Court of Justice to learn its interpretation of the EC Treaty provisions ensuring the protection of freedom to provide services (Article 49 of the EC Treaty) and those prohibiting State aid (Article 87 of the EC Treaty), while reserving any decision in respect of the alleged violation of free competition (Article 81 of the EC Treaty).

The regional provision imposing a tax on enterprises not domiciled in Sardinia for taxation purposes did in fact seem to create discrimination between these enterprises and others which, while engaging in the same activity, were not subject to the tax simply because they were domiciled in Sardinia for taxation purposes. This might occasion an increase in the costs of services for the non-domiciled enterprises which under Community law would constitute a restriction on freedom to provide services (Article 49 of the EC Treaty), as well as aid granted by the State to enterprises domiciled in Sardinia for taxation purposes (Article 87 of the EC Treaty).

It was for the Court of Justice of the Communities, as guardian of the Community treaties, to demarcate the principle of "non-discrimination" apparently imperilled by the law of the region which was bound as an "infra-state" entity to uphold Community law to the same extent as the State (Case C-88/03, *Portuguese Republic v. Commission of the European Communities*).

The Court of Justice would therefore need to ascertain whether Article 49 of the EC Treaty was to be interpreted in the sense of prohibiting the regional measure that instituted a new tax applicable only to enterprises domiciled outside Sardinia for taxation purposes and whether the regional measure, in so far as it applied only to enterprises domiciled outside Sardinia for taxation purposes, represented aid granted by the State to enterprises domiciled in Sardinia for taxation purposes, within the meaning of Article 87 of the EC Treaty.

The conditions for preliminary referral to the Court of Justice were fulfilled.

Supplementary information:

This is the Constitutional Court's first referral to the Court of Justice for a preliminary ruling.

Languages:

Italian.



Japan

Supreme Court

Important decisions

Identification: JPN-2008-1-001

a) Japan / **b)** Supreme Court / **c)** Second Petty Bench / **d)** 02.02.2007 / **e)** (Ju), 1787/2004 / **f)** / **g)** *Minshu* (Official Collection of the decisions of the Supreme Court of Japan on civil cases), 61-1 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

5.4.11 Fundamental Rights – Economic, social and cultural rights – **Freedom of trade unions.**

Keywords of the alphabetical index:

Public policy / Trade union, membership, compulsory / Trade union, leaving.

Headnotes:

An agreement between an employee and an employer, which obliges the employee to continue to be a member of a particular labour union and prevents the employee from ever exercising his right to withdraw from the union is contrary to public policy, and therefore invalid.

Summary:

I. The appellant was an employee of Company Y2, where he worked in a factory. He belonged to Labour Union Y1, which consisted of employees working in the factory. He became dissatisfied with the way Union Y1 handled his complaints, so he joined another union, Union C, and submitted a letter of withdrawal to Union Y1. The appellant and Union C then made an offer for collective bargaining to Company Y2, which rejected the offer on the grounds that Union Y1 was still suspending the acceptance of the appellant's letter of withdrawal.

Alleging that Company Y2's rejection constituted unfair working practice, the appellant and Union C filed a petition for relief with a relevant institution. After approximately six months, they reached a settlement with Company Y2. When drafting the settlement, they reached another agreement (hereafter: "Ancillary Agreement"), part of which obliged the appellant to continue to be a member of Union Y1. However, even after the Settlement, the appellant became distrustful of Union Y1 and manifested his intention of withdrawal to it.

The appellant filed a lawsuit seeking a declaration that he no longer belonged to Union Y1, together with a refund of the amount paid as union dues. The court of second instance dismissed the applicant's claims because the appellant was obliged to continue to be a member of Union Y1 under the Ancillary Agreement. The appellant's manifestation of intention of the withdrawal is in conflict with this obligation and therefore ineffective.

II. The Supreme Court quashed the ruling on the following grounds.

It is construed that members of a labour union have freedom of withdrawal. The Ancillary Agreement can be construed to restrict the appellant's freedom of withdrawal and to promise Company Y2 that the appellant will never exercise his right to withdraw from Union Y1.

Since the Ancillary Agreement was concluded between the appellant and Company Y2, it is effective between them. Thus, even if the appellant exercises the right to withdraw from Union Y1 in breach of the Ancillary Agreement, it would only raise issues regarding his responsibility for default in the relationship with Company Y2. No special reason can be found to consider that the appellant's withdrawal would raise such issues in the relationship with Union Y1, which is not party to the agreement.

Furthermore, a labour union is vested with the power to exercise control over its members. Members under its control cannot, for instance, avoid the obligation to participate in the activities decided by the union and pay union dues. Such treatment is only permissible where the members have the freedom of withdrawal from the union. The part of the Ancillary Agreement that obliges the applicant never to exercise the right to withdraw from Union Y1, thereby preventing the appellant's withdrawal from becoming effective at all, deprives the appellant of freedom of withdrawal, which is an important right, and compels him to be under the union's control indefinitely. That part of the agreement was found to be contrary to public policy and therefore void.

Languages:

Japanese, English (translation by the Court).



Moldova Constitutional Court

Important decisions

Identification: MDA-2008-1-001

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 22.01.2008 / **e)** 21a/07 / **f)** Constitutional review of Article 2.1 and 2.4 of the Code of Criminal Procedure / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

1.3.5.4 Constitutional Justice – Jurisdiction – The subject of review – **Quasi-constitutional legislation**.

4.7.8.2 Institutions – Judicial bodies – Ordinary courts – **Criminal courts**.

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

Keywords of the alphabetical index:

Criminal procedure, uniformity / *Lex specialis*, between organic laws / Organic law, hierarchy.

Headnotes:

Under the Constitution, Parliament adopts constitutional laws, organic laws and ordinary laws and regulates the social relationships governed by these laws.

A code is a legislative act made up of complex sets of standard legal provisions relating to a particular subject.

The goal of criminal proceedings is to protect individuals, society and the state against offences and to protect individuals and society against unlawful acts committed by persons responsible for investigating suspected or actual offences.

Summary:

On 14 March 2003, Parliament adopted the Code of Criminal Procedure. Subsequently, the Constitutional

Court was asked to review the constitutionality of Article 2.1 and 2.4 of the Code.

Under Article 2.1, criminal proceedings are governed by the Constitution, the international treaties to which Moldova is a party and the Code itself.

Under Article 2.4, legal rules relating to criminal procedure contained in other national legislation may be applied provided that they are also included in the Code of Criminal Procedure.

The applicant submits that the adoption of the rules in question infringes Article 23.2 of the Constitution, under which everyone has the right to know his/her duties, and Article 72 of the Constitution, establishing the categories of laws and their corresponding fields.

In order to standardise procedural law and remove conflicting rules and to ensure that the fundamental rights and freedoms of anyone involved in criminal proceedings are respected, the Moldovan legislature considered that procedural rules contained in other national legislation could be applied provided that they were also included in the Code of Criminal Procedure. This legislative method precludes any divergence between the Code of Criminal Procedure and other laws, and ensures that they are all applied consistently with due regard for fundamental human rights and freedoms.

The Code of Criminal Procedure establishes the rules governing the conduct of proceedings and the activities of judicial authorities in Moldova. Under Article 72 of the Constitution, the Code of Criminal Procedure is an organic law and therefore it does not have precedence over any other organic law. However, as a special organic law, the Code may exclude the operation of general organic laws, in accordance with the legal principle *lex specialis derogat generali*.

The precedence of the Code of Criminal Procedure over other procedural rules, as provided for by Article 2.1 and 2.4, is entirely in keeping with the codification of criminal law and is currently the most suitable solution.

Languages:

Romanian, Russian.



Identification: MDA-2008-1-002

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 03.04.2008 / **e)** 1 / **f)** Opinion on the bill to amend Article 81.1 of the Constitution of the Republic of Moldova / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

1.2.1.2 Constitutional Justice – Types of claim – Claim by a public body – **Legislative bodies.**
 1.3.5.3 Constitutional Justice – Jurisdiction – The subject of review – **Constitution.**
 1.5.4.2 Constitutional Justice – Decisions – Types – **Opinion.**
 4.4.2.2 Institutions – Head of State – Appointment – **Incompatibilities.**

Keywords of the alphabetical index:

Constitution, revision, Constitutional Court, opinion / Political parties, agreement, force / Constitutional Court, opinion on constitutional revision, obligatory.

Headnotes:

Under Article 81.1 of the Constitution, the office of President of the Republic is incompatible with the holding of any other remunerated post.

Under the draft constitutional amendment, the office of President of the Republic would be incompatible with membership of any political party or political organisation throughout the President's term of office.

Under Article 141.1 of the Constitution, a process of revision of the Constitution may be initiated by at least a third of the members of parliament.

Under Article 141.2, constitutional bills may only be tabled in parliament if the Constitutional Court has issued the appropriate recommendation, supported by at least four judges.

Summary:

A group of thirty-six members of parliament applied to the Constitutional Court for a recommendation on the bill to amend Article 81.1 of the Constitution. The applicants submitted that the need to amend the article was the result of an agreement negotiated between the political parties during the 2005 election campaign under which the party membership of the person elected as head of state was to be suspended.

Membership, or leadership, of a political party was considered to interfere with the President's performance of his or her functions as a guarantor of the social and political stability and equilibrium of the state.

The Court found that this agreement between the political parties had no legal force from the constitutional viewpoint. In democratic states such as France, the United States, Italy, Austria or the Czech Republic, powerful political parties were not entitled to take decisions on the incompatibility of the office of head of state with membership of a political party.

Furthermore, the Constitution of the Republic of Moldova set out the fundamental principles of the economic, political, social and legal life of the state. An amendment to the Constitution was appropriate only where certain provisions of the Constitution stood in the way of implementation of these principles. Membership of a political party did not prevent the President from ensuring the social and political stability and equilibrium of the state.

The Court found that the motion to amend the Constitution and the recommendation of the Constitutional Court could be presented in parliament. It also held that the bill to amend Article 81.1 of the Constitution was incompatible with the constitutional provisions of Article 142.2, under which no revision of the Constitution which would result in the suppression of any of citizens' fundamental rights or freedoms was permissible.

During consideration of the case, Judge Victor Puscas submitted a dissenting opinion, stating that Article 141.2, under which draft constitutional laws may only be tabled in parliament if the Constitutional Court has issued the appropriate recommendation, supported by at least four judges, related only to positive recommendations of the Court, not to negative recommendations like this one.

The judge argued that the Court should give a favourable recommendation on the bill in question, taking the view that the adoption of the constitutional law on the suspension of the President of the Republic's membership of any political party throughout his or her term of office was a matter of expediency falling within the competence of parliament.

Languages:

Romanian, Russian.



Netherlands Supreme Court

Important decisions

Identification: NED-2008-1-001

a) Netherlands / b) Supreme Court / c) Second Chamber / d) 25.03.2008 / e) 02387/06 B / f) / g) www.rechtspraak.nl LJN BB2875 / h) CODICES (Dutch).

Keywords of the systematic thesaurus:

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950.**

3.16 General Principles – **Proportionality.**

4.11.3 Institutions – Armed forces, police forces and secret services – **Secret services.**

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

Keywords of the alphabetical index:

Seizure, document / Journalist, sources, disclosure.

Headnotes:

The protection of a journalist's source of information is an essential part of the right of the press to gather information freely and the protection of journalistic sources is one of the cornerstones of a free press. These rights protected in Article 10 ECHR can only be subject to restrictions which were prescribed by law, in the pursuit of the aims set out in Article 10.2 ECHR and these restrictions must be necessary in a democratic society.

A journalist's right to protect his or her sources can be restricted in the interest of national security and the necessity to stop the proliferation of confidential information as set out in Article 10.2 ECHR. This interference with the rights of the free press protected under Article 10 ECHR must also be proportionate and sufficiently justified by the governmental authorities imposing the restrictions. However, the seizure of documents containing confidential information pertaining to investigations by the secret service in the pursuit of preventing criminal activities

and the protection of the democratic legal order does not constitute an illegitimate interference of the rights of the applicant in Article 10 ECHR. The protection of the confidentiality of these documents is a matter of national security that merits an interference with the rights of the free press to the protection of its sources.

Summary:

The case concerned the seizure of leaked secret service documents in the possession of journalists, and whether this was justified under the European Convention on Human Rights, in terms of possible violation of freedom of expression and the gathering of news.

Two journalists working at a national newspaper (*“De Telegraaf”*) came into possession of documents originating from the Dutch secret service (*“AIVD”*) relating to investigations into the connection between organised crime and legitimate organisations. The two journalists published several articles based on these documents in *“De Telegraaf”*. The journalists released copies of the documents to the *“AIVD”* but refused to return the original documents. Having obtained a court warrant, criminal justice officials conducted a search at the offices of the journalists for the purpose of seizure of the original documents in the interest of the criminal investigation into the leak at the *“AIVD”*.

“De Telegraaf” lodged a complaint with regard to the seizure of the original documents and petitioned the district court for the return of the documents. The district court dismissed the complaint and refused to grant the injunction to return the documents to the journalists.

In the course of the appeal procedure at the Supreme Court, the applicant (*“De Telegraaf”*) argued that the seizure of the documents constituted an interference with its rights under Article 10 ECHR. The applicant argued that seizure of the original leaked documents and the testing of these documents for fingerprints would lead to the discovery of the journalists’ source of information, which would constitute a breach of the journalist’s right to protect their sources. The applicant argued that this interference with its rights under Article 10 ECHR was neither legitimate nor proportionate.

Languages:

Dutch.



Netherlands Council of State

Important decisions

Identification: NED-2008-1-002

a) Netherlands / b) Council of State / c) Third Chamber / d) 09.01.2008 / e) 200703524/1 / f) Bakhoven v. de Huisarts, Verpleeghuisarts en arts voor verstandelijk gehandicapten Registratie Commissie van de Koninklijke Nederlandsche Maatschappij tot bevordering der Geneeskunst / g) / h) CODICES (Dutch).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
5.3.27 Fundamental Rights – Civil and political rights – **Freedom of association**.

Keywords of the alphabetical index:

Medical practitioner, practise, right.

Headnotes:

Refusal to renew a licence to work as a general practitioner for more than one year for not being a member of a GP’s group practice amounts to a violation of Article 11 ECHR.

Summary:

I. The Royal Dutch Medical Association renewed Bakhoven’s licence to work as a general practitioner for a short period (less than one year). Bakhoven lodged a note of objection, but the Association dismissed her objections. She then launched proceedings in an administrative court. The District Court quashed the Association’s decision (taken in the internal review proceedings). The Association appealed to the Administrative Jurisdiction Division of the Council of State. On appeal, the Administrative Jurisdiction Division of the Council of State upheld the District Court’s decision (with correction of grounds).

The power to grant licences to act as a health professional was vested in the Association on the basis of Section 14 of the Individual Healthcare

(Health Professionals) Act. Section 15 stipulated that licences may be limited in time and only renewed if the professional concerned has exercised his profession on a regular basis or has been involved in an education and training programme in the period prior to the application for a renewal. Pursuant to its own regulations, laid down in the General Practitioners Medicine and Nursing Home Medicine Dec, licences could be renewed if the general practitioner concerned had worked on a regular basis and to a sufficient extent as a general practitioner (Section 1, opening and under a). They also needed to have participated to a sufficient extent in the advancement of expertise (Section 1, opening and under b). The Decree further stipulated that general practitioners are members of a general practitioners group (Section 2.a).

II. The Administrative Jurisdiction Division of the Council of State was prepared to examine the appeal notice in which Bakhoven stated that her rights under Article 11 ECHR (freedom of assembly and association) had been violated, although the argument had not been invoked at earlier stages (the application stage and the internal review proceedings) of the proceedings.

On the merits, the Administrative Jurisdiction Division of the Council of State first held that, under the case-law of the European Court of Human Rights, the right to freedom of association with others also included the right not to associate. It then held that general practitioners groups did qualify as associations in the sense of Article 11 ECHR. It concluded that Bakhoven's rights had been breached. It examined the questions of whether the restrictions on her rights were prescribed by law and necessary in a democratic society, especially in terms of protection of health. It concluded that the restrictions were prescribed by law and did serve a legitimate aim (guaranteeing a certain degree of professional competence). However, the Association did not supervise the activities of general practitioners groups. Membership of such groups turned out to be merely a formal condition, so that Bakhoven ought to have had a chance to prove that she actually did advance her professional standards through different channels. Therefore, the limitation of her right under Article 11 ECHR was disproportionate to the legitimate aim it served; the reasons the Association put forward were insufficient.

Languages:

Dutch.



Identification: NED-2008-1-003

a) Netherlands / **b)** Council of State / **c)** Third Chamber / **d)** 16.01.2008 / **e)** 200703283/1 / **f)** X v. de minister van Justitie / **g)** / **h)** CODICES (Dutch).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Criminal record, acquittal registration / Acquittal, registration, deletion, refusal.

Headnotes:

Registration of an acquittal in the criminal record register and the refusal to remove it are not to be considered as a 'criminal charge' in the sense of Article 6.2 ECHR and Article 14.2 of the International Covenant on Civil and Political Rights (ICCPR).

Summary:

I. In criminal proceedings, appellant had been acquitted in default of proof. His acquittal was subsequently registered in the Criminal Records Register. He applied to the Minister of Justice to remove the listing of his personal data and details of the trial from the Criminal Records Register. The Minister turned down his request. Appellant lodged objections, which were rejected by the Minister. Appellant launched proceedings in the administrative law section of the Utrecht District Court, but the court dismissed his claim.

II. The Administrative Jurisdiction Division of the Council of State upheld the District Court's judgment on appeal.

Registration of criminal data is based on the Justice System Data Act (*Wet justitiële en strafvorderlijke gegevens*). It concerns data in relation to the application of criminal law and the prosecution (Section 1), for the benefit of sound criminal procedure (Section 2). Appellant felt that the District Court had wrongly taken the position that registration of his acquittal was not in breach of the presumption

of innocence as laid down in Article 6.2 ECHR and Article 14 of the International Covenant on Civil and Political Rights (ICCPR). Under these provisions, anybody charged with a criminal offence shall be presumed innocent until proved guilty according to law. The Administrative Jurisdiction Division of the Council of State first had to decide whether registration of the acquittal and the refusal to remove it from the criminal records register as such were to be considered a 'criminal charge' in the sense of Article 6.2 ECHR and Article 14.2 ICCPR (not whether the acquittal itself qualified as a 'criminal charge'). Relevant factors to be taken into account are the aim and nature of the penalty risked by offending. Registration of criminal data is limited to the entry of the outcome of the prosecution (in case of the appellant: an acquittal). As stems from Section 2 of the Justice System Data Act, registration serves sound criminal procedure by providing information of the criminal past of the persons concerned. Moreover, registration of an acquittal may prevent somebody being prosecuted for the same offence twice. Neither the registration, nor the refusal to remove the data from the record, is objectively aimed at prolonging any suspicion or causing distress. The fact that the appellant has a different perception cannot be taken into account. Since there is no 'criminal charge' in the sense of Article 6.2 ECHR and Article 14 ICCPR, due to the purpose and nature of the registration, the Administrative Jurisdiction Division of the Council of State did not need to decide whether there had been a breach of the presumption of innocence.

Languages:

Dutch.



Poland

Constitutional Court

Statistical data

1 January 2008 – 30 April 2008

Number of decisions taken:

Judgments (decisions on the merits): 23

- Rulings:
 - in 11 judgments the Tribunal found some or all of the provisions under dispute to have contravened the Constitution (or other act of higher rank)
 - in 12 judgments the Tribunal found that not all of the challenged provisions were in conformity with the Constitution (or other act of higher rank)
- Proceedings:
 - 10 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
 - 4 judgments were issued at the request of the Commissioner for Citizens' Rights (i.e. the Ombudsman)
 - 1 judgment was issued at the request of the National Council of Judiciary
 - 1 judgment was issued at the request of local authorities
 - 1 judgment was issued at the request of professional organisations
- Other:
 - 2 judgments were issued by the Tribunal in plenary session
 - 1 judgment was issued with dissenting opinions

Important decisions

Identification: POL-2008-1-001

a) Poland / b) Constitutional Tribunal / c) / d) 13.03.2007 / e) K 8/07 / f) / g) *Dziennik Ustaw* (Official Gazette), 2007, no. 48, item 327; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2007, no. 3A, item 26 / h) CODICES (Polish).

Keywords of the systematic thesaurus:

1.3.1 Constitutional Justice – Jurisdiction – **Scope of review.**

1.6.5 Constitutional Justice – Effects – **Temporal effect.**

1.6.5.1 Constitutional Justice – Effects – Temporal effect – **Entry into force of decision.**

1.6.5.2 Constitutional Justice – Effects – Temporal effect – **Retrospective effect (*ex tunc*).**

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

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

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

3.10 General Principles – **Certainty of the law.**

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

3.16 General Principles – **Proportionality.**

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

5.3.41.2 Fundamental Rights – Civil and political rights – Electoral rights – **Right to stand for election.**

Keywords of the alphabetical index:

Municipality, municipal council, member, property statement, absence, consequence / Constitutionality, presumption.

Headnotes:

The right to vote is a constitutional right, under Article 62 of the Polish Constitution. It relates to all forms of elections, irrespective of the level or hierarchy of organs or representatives chosen in such elections. The right stems from the principle of the sovereignty of the Nation, under Article 4 of the Constitution.

The right to be elected is derived from the principle according to which nations are to exercise power directly or through their representatives (Article 4.2 of the Constitution). This right not only encompasses the right to stand as a candidate in elections, but also involves the right to exercise a mandate obtained by

way of elections conducted in a non-defective manner. As a result, the right is not exhausted in the act of voting, and the forfeiture of a mandate constitutes an infringement thereof. Regulations concerning the forfeiture of a mandate should, therefore, meet the constitutional criteria of proportionality (see Article 31.3 of the Constitution).

Allegations of lack of proportionality of a legal regulation may be based on Article 31.3 of the Constitution (prerequisites for the admissibility of limitations upon constitutional freedoms or rights) or Article 2 of the Constitution (the principle of a democratic state ruled by law). This will depend on whether this is the encroachment of the legislator into a constitutional right that is subject to review or the allegation concerns an inexplicable intensity of activity on the part of the legislator, the latter, however, bearing no connection to the limitations upon freedoms or rights.

The assessment of proportionality of a regulation requires that the following issues be addressed: first, the usefulness of the norm (i.e. whether the norm is capable of producing effects intended by the legislator); second, the legislator's necessity to act (i.e. whether the challenged norm is indispensable for the protection of the public interest, with which the norm is associated); third, the proportionality *stricto sensu* (i.e. whether the effects of the norm are proportionate to the burdens or limitations it places upon a citizen).

The existence of the possibility of various interpretations of a given provision does not, in itself, determine the unconstitutionality thereof. However, where the provision imposes obligations, especially ones that are connected with the sanction operating *ex lege*, shattering the outcome of an election, then the prerequisites behind the obligations should be defined in an unambiguous manner.

Summary:

Polish law envisages that each newly elected commune councillor or head of a commune (mayor, president of a city) shall submit, to appropriate organs, a set of statements – in particular, a statement of their personal property as well as a statement concerning economic activity conducted by their closest relatives, where the economic activity is being conducted in the same commune.

The initiator (a group of Deputies) challenged regulations that specify sanctions of instantaneous forfeiture of a mandate of a councillor or a head of a commune resulting from a failure to submit given statements and provisions that define the moment from which the 30-day period envisaged for submission of the aforementioned statements begins to run.

The right to vote manifests itself in both the very act of voting and in the effectiveness of the choice made. In consequence, the challenged regulation tilts the balance between the rights of voters and the necessity of attainment of the goal set by the legislator, as the sanction consisting in the automatic forfeiture of a mandate torpedoes the decision made by voters on the grounds of a trivial and temporary circumstance.

Failure to submit a property statement within a specified period, unlike other prerequisites for the expiration of a mandate (e.g. death, deprivation of the right to be elected, violation of the prohibition against accumulation of public functions), may result from temporary and removable obstacles. Hence, the imposition of sanctions appropriate for irreversible conditions, in situations where a removable obstacle exists, does not fulfil the prerequisite of necessity, and is, therefore, disproportionate.

The allegation concerning lack of horizontal conformity between provisions of the same rank is beyond the scope of control undertaken by the Tribunal. In such circumstances, those organs applying the law are obliged to rectify any such nonconformity by way of appropriate interpretation of law.

Amending provisions may be subject to review by the Tribunal only in case where there is a challenge regarding the procedure under which they were adopted or the way they came into force.

According to the principle *falsa demonstratio non nocet*, of decisive importance is the essence of the case, as opposed to a faulty designation thereof in a procedural letter. In proceedings before the Constitutional Tribunal the content expressed both in the *petitum* of an application and in the reasoning thereof, make up the essence of the application.

Where the Constitutional Tribunal declares the content of a legal act unconstitutional, in principle, the judgment waives the binding force of a norm as of the date of official publication of the decision in an appropriate promulgation organ (Article 190.3 of the Constitution). Finding of unconstitutionality of a regulation on the grounds of a faulty procedure for the adoption thereof or its entry into force would mean, however, that the temporal effects of the decision would have to be linked not with the date of promulgation of the judgment, but rather with the moment of the adoption of the regulation found unconstitutional.

The presumption of constitutionality of a provision is rebutted at the date of public delivery of a judgment by the Tribunal declaring the provision unconstitutional (i.e. prior to the promulgation of the Tribunal's decision

in the Official Gazette). Hence, organs applying provisions declared unconstitutional should take into account the fact that they deal with provisions that lost their presumption of constitutionality, even though other principles argue in favour of the application thereof or in cases where the Tribunal decided to postpone the entry into force of the judgment. In case of a decision regarding unconstitutionality, it is the intertemporal norm of a constitutional nature that should be applied. Such norm has precedence over general inter temporal norms that bring about changes to the legal environment in consequence of the legislator's activity.

Cross-references:

- Judgment K 28/97 of 09.06.1998, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1998, no. 4, item 50; *Bulletin* 1998/2 [POL-1998-2-013];
- Judgment K 39/97 of 10.11.1998, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1998, no. 6, item 99; *Bulletin* 1998/3 [POL-1998-3-018];
- Judgment P 2/98 of 12.01.1999, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1999, no. 1, item 2; *Bulletin* 1999/1 [POL-1999-1-002];
- Judgment P 10/98 of 24.05.1999, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1999, no. 4, item 77; *Bulletin* 1999/2 [POL-1999-2-016];
- Judgment SK 14/98 of 14.12.1999, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1999, no. 7, item 163;
- Judgment P 11/98 of 12.01.2000, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2000, no. 1, item 3; *Bulletin* 2000/1 [POL-2000-1-005];
- Judgment SK 18/01 of 08.04.2002, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2002, no. 2, item 16; *Bulletin* 2002/3 [POL-2002-3-024];
- Judgment K 26/00 of 10.04.2002, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2002, no. 2, item 18; *Bulletin* 2002/3 [POL-2002-3-025];
- Judgment SK 5/02 of 11.06.2002, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2002, no. 4, item 41; *Bulletin* 2002/2 [POL-2002-2-018];
- Judgment P 19/01 of 29.10.2002, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2002, no. 5, item 67;
- Judgment SK 12/03 of 09.06.2003, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2003, no. 6, item 51; *Bulletin* 2003/3 [POL-2003-3-024];

- Judgment SK 53/03 of 02.03.2004, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2004, no. 3, item 16;
- Procedural decision SK 32/01 of 14.04.2004, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2004, no. 4, item 35;
- Judgment K 20/03 of 13.07.2004, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2004, no. 7, item 63;
- Judgment SK 1/04 of 27.10.2004, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2004, no. 9, item 96;
- Procedural decision SK 8/04 of 06.04.2005, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2005, no. 4, item 44;
- Judgment K 41/04 of 28.06.2005, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2005, no. 6, item 68;
- Judgment Kp 1/05 of 22.09.2005, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2005, no. 8, item 93;
- Judgment SK 7/05 of 06.12.2005, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2005, no. 11, item 129;
- Judgment K 32/04 of 12.12.2005, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2005, no. 11, item 132; *Bulletin* 2006/1 [POL-2006-1-001];
- Judgment SK 20/04 of 12.12.2005, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2005, no. 11, item 133;
- Judgment K 21/05 of 18.01.2006, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2006, no. 1, item 4; *Bulletin* 2006/1 [POL-2006-1-003];
- Judgment U 5/06 of 16.01.2007, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2007, no. 1, item 3.

Judgments of the European Court of Human Rights:

- Judgment no. 9267/81 of 02.03.1987 (*Mathieu-Mohin and Clerfayt v. Belgium*); *Special Bulletin Leading Cases ECHR* [ECH-1987-S-001];
- Judgment no. 74025/01 of 06.10.2005 (*Hirst v. the United Kingdom* no. 2); *Bulletin* 2005/3 [ECH-2005-3-004];
- Judgment no. 63566/00 of 18.07.2006 (*Pronina v. Ukraine*);
- Judgment no. 10226/03 of 30.01.2007 (*Yumak and Sadak v. Turkey*).

Judgment of the Court of Justice of the European Communities:

- Judgment C-193/94 of 29.02.1996 (*Skanavi and Chryssanthakopoulos*).

Languages:

Polish.



Identification: POL-2008-1-002

a) Poland / b) Constitutional Tribunal / c) / d) 17.04.2007 / e) SK 20/05 / f) / g) *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2007, no. 71, item 481; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2007, no. 4A, item 38 / h) CODICES (Polish).

Keywords of the systematic thesaurus:

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

5.3.44 Fundamental Rights – Civil and political rights – **Rights of the child.**

Keywords of the alphabetical index:

Paternity, acknowledgement, rescission / Child, best interest / Child, paternity, biological truth.

Headnotes:

The obligation to protect a child's best interests is the fundamental and supreme principle of Polish family law. All provisions regulating relations between parents and children are subject to it. This also encompasses the manner of determination of a child's parentage (affiliation mechanisms).

The principle of the protection of a child's best interests finds its fullest realisation in the possibility of bringing up the child in a family, and, above all, a biological one. However, biological bonds do not always constitute the basis for the shaping of family relations, since the interests of children and the provision of an adequate environment for their upbringing and development are of utmost importance. Accordingly, closeness, stability of family relationships, child safety and decent conditions for the child's upbringing and development are among the protected values.

Summary:

The subject of constitutional review in the present case, initiated by a constitutional complaint, was a legislative omission consisting in the determination of a too limited a circle of subjects entitled to demand a rescission of the acknowledgement of paternity.

The complainant challenged the conformity with the Constitution of a regulation that deprived a biological father of the right to demand rescission of the acknowledgement of paternity of his child where this has been filed, with the mother's consent, by a man not related to the child. The complainant alleges that this regulation contradicts the principle of protection of the rights of the child (Article 72.1 of the Constitution), on the grounds of the impossibility of determination of the child's civil status in accordance with the so-called biological truth, which in turn limits the rights of the biological father.

Provisions are not unconstitutional, just because they allow for a situation where inconsistency exists between the official parentage of a child with their real parentage (material truth). The Constitution does not stipulate the forms and mechanisms as regards the determination of a child's parentage. This matter rests with the legislator. Moreover, there has been no rating of the mechanisms. International law, which is binding upon the Republic of Poland, as well as the interpretation thereof (including, particularly, The European Convention of Human Rights and the jurisprudence of the European Court of Human Rights) confirm that attempts to ensure consistency of civil status with the so-called biological truth is limited by the child's interests.

In its jurisprudence, the Tribunal has already confirmed the right of a biological father to determine his paternity before a court. One cannot, however, infer from this right a further right for the biological father to request the rescission of the acknowledgement of his natural child filed by another man. Following the acknowledgement of paternity of a minor by a man who is not their biological father, the civil status of the child has been shaped. Taking into account the child's interest the status should not be subject to change. Accordingly, vesting in the alleged biological father the right to demand the rescission of the acknowledgement of paternity filed by another man would undermine the child's civil status as well as the family bonds that have arisen. The admittance of such a request would not oblige anyone (not even the alleged father) to initiate proceedings to establish a new civil status of the child (i.e. acknowledgement of paternity of the child by the alleged biological father).

The Tribunal ruled that Article 81 of the Family and Guardianship Code, insofar as it excludes the right of a man who is convinced of his biological paternity to demand rescission of the acknowledgement of paternity filed by another man, conforms to Articles 45.1 and 77.2 of the Constitution, as well as to sentence 1 of Article 72.1 of the Constitution, read in conjunction with Article 31.3 of the Constitution.

The competence of the Constitutional Tribunal to review a normative act in force also includes the determination of whether the act lacks regulations, the absence of which might cast doubt upon its constitutionality. The assessment always encompasses the normative content of the provision, i.e. of what has been expressed, and what has not been included therein.

Cross-references:

Judgments of the Constitutional Tribunal:

- Judgment K 37/97 of 06.05.1998, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1998, no. 3, item 33; *Bulletin* 1998/2 [POL-1998-2-009];
- Judgment K 37/98 of 30.05.2000, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2000, no. 4, item 112;
- Judgment SK 7/00 of 24.10.2000, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2000, no. 7, item 256;
- Judgment SK 40/01 of 12.11.2002, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2002, no. 6, item 81; *Bulletin* 2003/1 [POL-2003-1-005];
- Judgment K 18/02 of 28.04.2003, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2003, no. 4, item 32; *Bulletin* 2003/2 [POL-2003-2-020];
- Judgment SK 4/05 of 14.03.2006, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2006, no. 3, item 29.

Decisions of the European Court of Human Rights:

- Decision no. 8257/78 of 10.07.1978 (*X v. Switzerland*);
- Judgment no. 6833/74 of 13.06.1979 (*Marckx v. Belgium*); *Special Bulletin Leading Cases ECHR* [ECH-1979-S-002];
- Decision no. 16944/90 of 08.02.1993 (*J.R.M. v. the Netherlands*);
- Judgment no. 19823/92 of 23.09.1994 (*Hokkanen v. Finland*); *Bulletin* 1994/3 [ECH-1994-3-015];

- Judgment no. 21830/93 of 22.04.1997 (*X., Y. and Z. v. the United Kingdom*); *Bulletin* 1997/2 [ECH-1997-2-010];
- Decision no. 29121/95 of 29.06.1999 (*Nylund v. Finland*).

Languages:

Polish.



Identification: POL-2008-1-003

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 23.10.2007 / **e)** P 10/07 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2007, no. 200, item 1445; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2007, no. 9A, item 107 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

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

5.2.1.3 Fundamental Rights – Equality – Scope of application – **Social security.**

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

5.4.14 Fundamental Rights – Economic, social and cultural rights – **Right to social security.**

Keywords of the alphabetical index:

Retirement, age, gender, discrimination / Retirement, reciprocity, principle.

Headnotes:

The right to social security is guaranteed by Article 67 of the Constitution. The legislator specifies the content and form of the right, yet, the regulatory freedom in shaping the regulation is limited by the constitutional principles of proportionality, social justice and equality.

The principle of equality requires that all entities characterised to an equal degree by a certain significant (relevant) feature be treated identically, that is, according to the same measures and without

differentiation which could amount to discrimination or favouritism.

According to the principle of reciprocity, the entitlement to early retirement is connected with the participation of the future pensioner in the creation of the insurance fund (by way of paying contributions). The principles of reciprocity and social justice require that the collection of money for future retirement pensions enable the use of these financial resources, and, additionally, that the period of time of receiving the benefit remain in appropriate proportion to the period when the contribution was being paid.

Summary:

The subject of review in the present case was a legislative omission. There was no provision in the norm in question for early retirement for men who have attained 60 years of age, have been in employment for at least thirty-five years, and retain full capacity for work.

The court referring the question if law thought that differentiation between the legal situation of men and women, as envisaged by the provision under review, might constitute discrimination on the grounds of gender. The court pointed out that such differentiation is not warranted by public interest, contradicts the principle of reciprocity and does not conform to the Community law.

Retirement pension is a benefit connected with work, having the nature of a claim and is based on the principle of reciprocity. The source of the benefit is the contributions of the insured persons who, in this manner, collect money for their future subsistence in the event of termination of their professional activity. The amount of the benefit depends on the amount paid in the form of contributions. Somebody who decides to take early retirement makes a conscious choice of a lower benefit, by comparison with a benefit received after the attainment of a common retirement age.

Compensatory measures serve to ensure actual equality of rights for subjects who would have otherwise been in a worse situation. The actual inequalities between men and women (biological and social differences) justify the introduction of a different retirement age. Moreover, the required insurance period is lower and shorter for women and higher and longer for men. The insurance period for men is 5 years longer than that of women.

The general principle of equality states that similar legal subjects shall be treated similarly. It applies both to men and to women. A common feature of both groups in case of early retirement is – taking into account the

compensatory measures – the long insurance period. The challenged provision excessively favoured women, discriminating against men, as the latter had to be in each case declared incapacitated for work in order to be eligible for early retirement.

Failure to grant entitlement to early retirement for men who have an appropriately longer insurance period than women, in the light of higher than average mortality among men and a considerably shorter average lifespan in men than in women, infringes the principles of reciprocity and social justice.

Article 29.1 of the Act on retirement and disability pensions from Social Insurance Fund does not grant entitlement to early retirement to men of at least sixty years of age who have been in work for at least thirty-five years. Likewise, women acquire the entitlement at the age of fifty-five years, provided they have also been in employment for at least thirty years. The Tribunal found the provisions to be out of line with Articles 32 and 33 of the Constitution.

There are three fundamental prerequisites for the issuing of a judgment by the Tribunal, comprising the answer to the referred question of law. They include: the subjective (a question of law may be referred by “any court”), the objective (a question of law concerns the conformity of a given provision to the Constitution, ratified international agreements or a statute), and the functional (a question of law relates to the provision whose elimination from the legal order by the Constitutional Tribunal will influence the decision in a case, in connection with which the court referred a question of law).

The competence of the Tribunal as regards the review of a legislative omission consists in the examination of whether the incomplete regulation conforms to higher ranking acts (to the Constitution, ratified international agreements or a statute). However, under no circumstances may the Tribunal review the omission of the law-maker, i.e. its failure to issue a normative act.

Cross-references:

Judgments of the Constitutional Tribunal:

- Procedural decision P 3/96 of 19.11.1996, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1996, no. 6, item 56;
- Judgment K 25/95 of 03.12.1996, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1996, no. 6, item 52; *Bulletin* 1996/3 [POL-1996-3-018];
- Judgment K 15/97 of 29.09.1997, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1997, no. 3-4, item 37; *Bulletin* 1997/3 [POL-1997-3-020];
- Judgment K 22/97 of 05.11.1997, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1997, no. 3-4, item 41; *Bulletin* 1997/3 [POL-1997-3-023];
- Judgment SK 22/99 of 08.05.2000, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2000, no. 4, item 107;
- Judgment P 3/00 of 14.06.2000, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2000, no. 5, item 138; *Bulletin* 2000/2 [POL-2000-2-015];
- Judgment K 1/00 of 12.09.2000, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2000, no. 6, item 185;
- Procedural decision P 10/00 of 10.10.2000, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2000, no. 6, item 195;
- Procedural decision P 9/00 of 13.12.2000, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2000, no. 8, item 302;
- Judgment K 45/01 of 25.06.2002, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2002, no. 4, item 46; *Bulletin* 2002/2 [POL-2002-2-020];
- Procedural decision P 16/03 of 27.04.2004, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2004, no. 4, item 36;
- Judgment SK 25/02 of 08.11.2005, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2005, no. 10, item 112;
- Judgment SK 38/03 of 18.05.2004, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2004, no. 5, item 45;
- Judgment SK 1/04 of 27.10.2004, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2004, no. 9, item 96;
- Judgment P 1/05 of 27.04.2005, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2005, no. 4, item 42; *Bulletin* 2005/1 [POL-2005-1-005].

Decisions of the European Court of Human Rights:

- Judgment no. 67847/01 of 14.02.2006 (*Lecarpentier v. France*);
- Judgment no. 60796/00 of 11.04.2006 (*Cabourdin v. France*);
- Judgment no. 66018/01 of 18.04.2006 (*Vezon v. France*);
- Judgment no. 72038/01 of 02.05.2006 (*Saint-Adam and Millot v. France*).

Judgment of the Court of Justice of the European Communities:

- Judgment C-450/93 of 17.10.1995 (*Kalanke v. Freie Hansestadt Bremen*).

Languages:

Polish.



Identification: POL-2008-1-004

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 24.10.2007 / **e)** SK 7/06 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2007, no. 204, item 1482; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2007, no. 9A, item 108 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

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

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

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

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

4.7.4 Institutions – Judicial bodies – **Organisation.**

4.7.4.1 Institutions – Judicial bodies – Organisation – **Members.**

4.7.4.1.1 Institutions – Judicial bodies – Organisation – Members – **Qualifications.**

4.7.4.1.2 Institutions – Judicial bodies – Organisation – Members – **Appointment.**

4.7.4.1.6 Institutions – Judicial bodies – Organisation – Members – **Status.**

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

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

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

Keywords of the alphabetical index:

Judge, impartiality, conditions / Right to court, scope / Court, independence, perception by public / Rule of law, essential elements.

Headnotes:

The three most frequently indicated elements of the right to court are the right to initiate court proceedings, the right to have court procedures framed in an appropriate manner, and the right to obtain a binding court decision. The right to court also includes the right to an appropriately shaped organisation and position of organs considering cases.

All cases (except for those that fall under the jurisdiction of tribunals) shall be considered before competent, impartial and independent courts specified in the Constitution. Independence of courts, above all, means the organisational and functional separateness of the judiciary from other organs of public authority in order to guarantee its full autonomy in terms of consideration of cases and adjudication. In turn, independence of judges means that the judge shall act solely on the basis on the law, in accordance with his or her conscience and personal convictions.

An independent court is composed of persons, in which the law vests the attribute of independence, not only in the form of a declaration, but also by shaping the system that determines the activity of judges, which amounts to a guarantee that is real and effective.

Impartiality is an inherent feature of the judicial power and, simultaneously, an attribute of the judge. Loss of it results in the judge being unable to carry out his or her job. Impartiality consists in the objective assessment of parties to proceedings, both in the course of a pending case and while adjudicating. Lack of impartiality of a judge while adjudicating constitutes a particularly gross violation of the principle of judicial independence.

Three types of competence characteristic of courts are listed below:

1. competencies connected with their fundamental task, that is, implementing the administration of justice;
2. other competencies conferred by the Constitution;
3. non-constitutional competencies conferred by statute.

The constitutional legislator vests certain competencies in courts, taking into account the necessity of fulfilment by the organs of certain requirements regarding their organisation and procedure, stemming from provisions of the Constitution. Accordingly, one has to acknowledge that the guarantees specified in Article 45 of the Constitution are applicable to all competencies reserved in the Constitution to courts, but not to the remaining “non-constitutional” competencies of the organs. With regard to the non-constitutional competencies, these are the general guarantees of procedural justice, constituting the essential element of the principle of a state ruled by law.

If courts are to be perceived by the public as truly independent institutions, it is vital for the administration of justice to be performed in such a way as to remove any potential reservations by parties to proceedings about the independence and impartiality of the Court.

An exception to the rule about the administration of justice by judges is the participation therein of the citizenry on the principles specified by statute. Further departure from the indicated rule is admissible if two requirements are met:

1. derogations from the rule must be justified by a constitutionally legitimate objective and be encompassed within the limits of the realisation of the objective;
2. all the essential “material” requirements as to the impartiality and independence of the court must be fulfilled.

Summary:

Two constitutional complaints were filed, challenging regulations on the basis of which assistant judges had adjudicated upon the complainants’ rights and freedoms. The complainants claimed that the regulations were out of line with the Constitution. They gave assistant judges and judges equal powers to adjudicate, but at the same time deprived assistant judges of the constitutional guarantee of independence.

The institution of an assistant judge is not to be associated with the principle envisaging participation of citizenry in the administration of justice (Article 182 of the Constitution). An assistant judge is not a representative of the society and discharges his or her function within the scope of employment, as opposed to a duty of a citizen.

A statutory regulation, pursuant to which the assistant judge, while adjudicating, shall be independent and subject only to the Constitution and statutes,

constitutes merely a declaration, which does not provide for an actual and effective independence required by the Constitution. Such a regulation needs to be accompanied by specific legal provisions with regard to the practical assurance of the observance of the individual elements making up the notion of independence.

A regulation envisaging the existence of the institution of the assistant judge or the possibility of adjudicating by persons other than judges (within the constitutional meaning) should guarantee the actual separation of the judicial power from other powers (see Article 10 of the Constitution). It should also weaken bonds between assistant judges and the Minister of Justice and ensure the influence of the National Council of the Judiciary on the professional career of the judge.

The Constitutional Tribunal declared the provision in question, Article 135.1 of the Law on the Organisation of Common Courts, to be out of line with Article 45.1 of the Constitution.

A prerequisite for the admissibility of a review of constitutionality within the procedure of a constitutional complaint is the existence of a relation between the norm under review and a legal basis of a final decision. It is possible to indicate four situations where the relation in question exists:

1. where the allegation of unconstitutionality concerns a normative act directly referred to in the sentencing part of a final decision;
2. where the allegation concerns a norm that is used for the reconstruction of content of a decision, which has not, however, been expressly indicated in the sentencing part of an individual act of applying the law;
3. where the challenged norm has found its application in a decision concerning a secondary or incidental issue, not referred to *expressis verbis* in the content of the final decision;
4. where the allegation concerns institutional provisions that constitute the basis for a final decision.

When adjudicating upon the constitutionality of a normative act the Constitutional Tribunal should recognise that the legal order emerging after the pronouncement of its judgment might not infringe the Constitution or, in consequence, lead to such infringement. In order to prevent such situations from occurring, the Tribunal may specify the effects of its decision in the prospective aspect by way of delaying the entry into force of the judgment (Article 190.3 of the Constitution). In each case, the Tribunal undertakes assessment of whether it is

necessary or at least appropriate to delay the entry into force of a judgment. Prerequisites for delay might include: actual effects triggered by an instantaneous elimination of an unconstitutional provision, the protection of constitutional norms, principles or values as well as the need to undertake extensive and broader legislative activity in order to make the legislation compatible with the Constitution.

Cross-references:

Judgments of the Constitutional Tribunal:

- Judgment K 11/93 of 09.11.1993, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1993, no. II, item 37; *Bulletin* 1993/3 [POL-1993-3-016]; *Special Bulletin Leading Cases 1* [POL-1993-S-001];
- Judgment K 3/98 of 24.06.1998, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1998, no. 4, item 52; *Bulletin* 1998/2 [POL-1998-2-014];
- Judgment K 1/98 of 27.01.1999, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1999, no. 1, item 3; [POL-1999-X-001];
- 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 21/99 of 10.05.2000, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2000, no. 4, item 109; *Bulletin* 2000/2 [POL-2000-2-013];
- Judgment P 1/99 of 16.05.2000, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2000, no. 4, item 111;
- Procedural decision SK 2/00 of 10.01.2001, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2001, no. 1, item 6;
- Judgment P 4/99 of 31.01.2001, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2001, no. 1, item 5; *Bulletin* 2001/1 [POL-2001-1-006];
- Judgment SK 10/00 of 02.04.2001, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2001, no. 3, item 52; *Bulletin* 2001/2 [POL-2001-2-013];
- Judgment SK 8/00 of 09.10.2001, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2001, no. 7, item 211;
- Judgment SK 35/01 of 17.09.2002, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2002, no. 5, item 60;
- Judgment SK 53/03 of 02.03.2004, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2004, no. 3, item 16;
- Judgment SK 43/03 of 14.06.2004, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2004, no. 6, item 58;
- Procedural decision SK 29/03 of 14.12.2004, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2004, no. 11, item 124;
- Judgment K 2/04 of 15.12.2004, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2004, no. 11, item 117; *Bulletin* 2004/3 [POL-2004-3-026];
- Judgment SK 20/04 of 12.12.2005, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2005, no. 11, item 133;
- Judgment SK 11/05 of 07.03.2006, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2006, no. 3, item 27;
- Judgment SK 58/03 of 24.07.2006, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2006, no. 7, item 85;
- Procedural decision S 3/06 of 30.10.2006, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2006, no. 9, item 146;
- Judgment U 5/06 of 16.01.2007, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2007, no. 1, item 3;
- Judgment K 8/07 of 13.03.2007, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2007, no. 3, item 26;
- Judgment SK 49/05 of 24.04.2007, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2007, no. 4, item 39.

Decisions of the European Court of Human Rights:

- Judgments nos. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72 of 08.06.1976 (*Engel and others v. the Netherlands*); *Special Bulletin Leading Cases ECHR* [ECH 1976-S-00];
- Judgments nos. 7819/77, 7878/77 of 28.06.1984 (*Campbell and Fell v. the United Kingdom*); *Special Bulletin Leading Cases ECHR* [ECH-1984-S-005];
- Judgment no. 8790/79 of 22.10.1984 (*Sramek v. Austria*);
- Judgment no. 8848/80 of 23.10.1985 (*Bentham v. the Netherlands*); *Special Bulletin Leading Cases ECHR* [ECH-1985-S-003];
- Judgment no. 9273/81 of 23.04.1987 (*Ettl and others v. Austria*).

Languages:

Polish.



Identification: POL-2008-1-005

a) Poland / b) Constitutional Tribunal / c) / d) 28.11.2007 / e) K 39/07 / f) / g) *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2007, no. 230, item 1698; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2007, no. 10A, item 129 / h) CODICES (Polish).

Keywords of the systematic thesaurus:

1.2.1 Constitutional Justice – Types of claim – **Claim by a public body.**

1.3.1 Constitutional Justice – Jurisdiction – **Scope of review.**

1.6 Constitutional Justice – **Effects.**

4.5.6 Institutions – Legislative bodies – **Law-making procedure.**

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.**

4.7.13 Institutions – Judicial bodies – **Other courts.**

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

5.3.13.8 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right of access to the file.**

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

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

Keywords of the alphabetical index:

Judge, immunity, purpose / Legislative proceedings, advisory competence.

Headnotes:

The formal immunity of judges serves to ensure the proper and stable functioning of the administration of justice, protecting courts and judges against influences. There is also a subjective aspect to immunity, in that it protects a given person. However, this effect is of secondary nature when set beside the primary aim of immunity, which is, ensuring the independence of courts and judges. The mechanism constitutes a guarantee of the separateness of the judiciary from other powers.

The significance of judicial immunity is particularly profound in countries where democracy and mechanisms for the separation of powers have not yet been consolidated. Independence of judges and

courts may exist without the need for the institution of immunity in countries of mature democracy, where the understanding of the separation of powers is already entrenched, and where there is a high degree of legal and political culture. These factors minimise the political risk of abusing the possibility of a judge's removal from office owing to the content of judgments delivered by them.

If derogations from immunity are excessively available, this leads to a "chilling effect", whereby the very fact of filing a motion requesting the derogation of immunity of a judge results in the lowering of the judge's reputation. Even where the groundlessness of such a motion has been proven in the course of follow-up proceedings and the judge has regained his or her power to adjudicate; there has been an effect upon their good reputation and readiness to exhibit independence and firmness.

Article 42 of the Constitution, whereby criminal responsibility is paralleled with the right to defence "at all stages of proceedings", is applicable to all repressive proceedings, whether these are penal or "quasi-penal", (examples would be disciplinary or preparatory proceedings). The right to defence before criminal proceedings, within the constitutional meaning, is enjoyed in "all proceedings", including incidental and preparatory ones, provided that they are connected with the encroachment into the sphere of constitutional freedoms and rights.

The realisation of the advisory competence in the course of legislative proceedings is not unlimited. The role of subjects in which the right to express an opinion has been vested is limited to taking a stance that will inform the legislator of their point of view. The expression of an opinion on a given matter by authorised organs does not mean that it will be possible to impose any solutions on Parliament; neither will it result in the right to veto any decisions of the Parliament.

Summary:

The First President of the Supreme Court presented allegations that were both substantive and procedural in nature. Within the substantive allegation, the applicant challenged, *inter alia*, the introduction of summary and simplified procedures for derogation of judicial immunity and limitation upon a judge's access to records of proceedings. In turn, allegations of procedural nature embraced reservations as regards the failure to seek the opinion of the Supreme Court on the amendments.

A regulation that makes it possible for a public prosecutor to restrict – in a manner binding upon the disciplinary court – the accessibility of records of

proceedings and their availability for the person subject to derogation of immunity, transforms court proceedings into inquisitorial proceedings, with the public prosecutor playing the leading role. In such an instance, the disciplinary court becomes merely the enforcer of the public prosecutor's decision. This is incompatible with the idea of the independence of the court, being one of the powers, and contradicts the guarantee and the legitimising function of courts.

The 24-hour period for the consideration of a case within an extraordinary procedure in immunity proceedings, stemming from the regulation under dispute, is too short for substantive reasons. In the course of such proceedings, the court is supposed to determine whether "there exists a sufficiently justified suspicion of a crime having been committed". In order to do so, it is necessary to assess materials and the stance of the public prosecutor presented in the motion and determine whether the motion should be considered within a summary procedure. The adopted solution may result either in a superficiality of the guarantee function of the court deciding upon the immunity or in a "wary" dismissal of motions, which – from the perspective of the reliability of utilising immunity proceedings in order to purge the judiciary – is highly inadvisable.

There is no necessity to again seek an opinion of appropriate subjects, where the amendments to a draft have been based on the same assumptions as the original version. In particular, there is no need to seek an opinion where the amendments concern the same object of a regulation, and where the advisory organ had the chance to present its stance in its first opinion. However, where amendments to a bill encompass issues that had not been included in the original draft, then such a normative novelty has to receive an opinion of authorised subjects.

Both the nature of the matter regulated by way of a statute and the nature of the advisory authority of authorised bodies (statutory or constitutional) are of significance in the determination of whether, in a given instance, the obligation to seek an opinion in the course of legislative work has been violated.

The fact that, under the Constitution, the National Council of the Judiciary, the Ombudsman and the National Council of Radio Broadcasting and Television safeguard particular values does not mean that the organs possess advisory competence within the legislative procedure. However, the National Council of the Judiciary, unlike the Ombudsman or the National Council of Radio Broadcasting and Television, has the capacity to initiate abstract reviews of constitutionality (Article 186.2 of the Constitution). Since the National Council of the

Judiciary has the right to initiate proceedings concerning the review of the constitutionality, it is all the more important that it should provide its opinion on appropriate statutes.

When undertaking a review of constitutionality, the Tribunal examines both the content of the challenged regulation (substantive criterion of review), competencies (competency criterion of review) as well as observance of an appropriate procedure, as envisaged by legal provisions, for the adoption or ratification thereof (procedural criterion of review). In case of a substantive review, the adjudication upon the constitutionality of a statute consists in a comparison of the challenged statutory norm with the content of a norm indicated as the basis of review. In turn, in case of a review regarding procedure, a review of constitutionality consists in the assessment of conformity of a procedure for the adoption of the challenged provisions against the requirements laid down in provisions regulating the legislative procedure.

Where there is a judgment finding unconstitutionality, irrespective of whether the review of constitutionality was undertaken based on a substantive or a procedural criterion, this will result in the elimination of the challenged regulation from the legal order. A finding of unconstitutionality on the grounds of a faulty procedure for the adoption of a statute will result in the failure of the statute to enter into force. A finding of unconstitutionality of a statute on the grounds of its content results in the repeal of the statute as of the day of promulgation of the Tribunal's judgment in the appropriate Official Gazette.

Six judges of the Tribunal presented dissenting opinions.

Cross-references:

Judgments of the Constitutional Tribunal:

- Judgment K 13/91 of 28.01.1991, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1991, item 3;
- Judgment K 19/95 of 22.11.1995, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1995, no. 3, item 16; *Bulletin* 1995/3 [POL-1995-3-017];
- Judgment K 7/95 of 19.11.1996, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1996, no. 6, item 49;
- Judgment K 25/97 of 22.09.1997, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1997, no. 3-4, item 35; *Bulletin* 1997/3 [POL-1997-3-017];

- Judgment K 3/98 of 24.06.1998, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1998, no. 4, item 52; *Bulletin* 1998/2 [POL-1998-2-014];
- Judgment K 25/98 of 23.02.1999, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1999, no. 2, item 23; *Bulletin* 1999/1 [POL-1999-1-004];
- Judgment K 11/02 of 19.06.2002, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2002, no. 4, item 43; *Bulletin* 2003/2 [POL-2003-2-014];
- Judgment SK 22/02 of 26.11.2003, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2003, no. 9, item 97; *Bulletin* 2004/1 [POL-2004-1-004];
- Judgment K 18/03 of 03.11.2004, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2004, no. 10, item 103;
- Procedural decision S 2/06 of 25.01.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2006, no. 1, item 13;
- Judgment K 25/07 of 18.07.2007, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2007, no. 7, item 80.

Decisions of the European Court of Human Rights:

- Judgment no. 6289/73 of 09.10.1979 (*Airey v. Ireland*);
- Judgment no. 11179/84 of 22.06.1989 (*Langborger v. Sweden*);
- Judgment no. 19178/91 of 22.11.1995 (*Bryan v. the United Kingdom*); *Bulletin* 1995/3 [ECH-1995-3-022];
- Judgment no. 46295/99 of 28.05.2002 (*Stafford v. the United Kingdom*);
- Judgment no. 65518/01 of 06.09.2005 (*Salov v. Ukraine*);
- Judgment no. 65411/01 of 09.11.2006 (*Sacilor-Lormines v. France*);
- Judgment no. 7333/06 of 24.04.2007 (*Lombardo and others v. Malta*);
- Judgment no. 1543/06 of 03.05.2007 (*Baczkowski v. Poland*);
- Judgment no. 25968/02 of 31.07.2007 (*Dyuldin and Kislov v. Russia*).

Languages:

Polish.



Portugal Constitutional Court

Statistical data

1 January 2008 – 30 April 2008

Total: 265 judgments, of which:

- Prior review: 1 judgment
- Abstract *ex post facto* review: 6 judgments
- Appeals: 177 judgments
- Complaints: 59 judgments
- Electoral disputes: 3 judgments
- Declarations of inheritance and income: 2 judgments
- Political parties' accounts: 14 judgments

Important decisions

Identification: POR-2008-1-001

a) Portugal / **b)** Constitutional Court / **c)** Second Chamber / **d)** 23.01.2008 / **e)** 45/08 / **f)** / **g)** *Diário da República* (Official Gazette), 44 (Series II), 03.03.2008, 8602 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

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

5.3.13.1.5 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Non-litigious administrative proceedings.**

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

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

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



Keywords of the alphabetical index:

Fine, administrative, spontaneous payment / Highway Code / Administrative decision, judicial review / Evidence, presumption, rebuttal.

Headnotes:

The interpretation of the Highway Code regulation to the effect that defendants who spontaneously pay a fine for a traffic offence cannot challenge the existence of the offence but solely defend themselves on the basis of the seriousness of the said offence and the applicable driving ban is unconstitutional.

Summary:

The question raised in this judgment is whether the prescriptive criterion to the effect that spontaneous payment of a fine for a traffic offence precludes the accused from challenging the existence of the offence in court fulfils the conditions set out in the Constitution for access to the courts with a view to ensuring the effective protection of legally recognised rights and interests by means of a fair trial.

This opinion is based either on the conviction that this situation involves an irrebuttable presumption or on the assignment of an absolute probative value to the defendants' admission of the offence, which is implicit in their spontaneous payment of the fine.

From the constitutional angle, there is no questioning the legislative possibility of establishing presumptions, even in the event of sanctions being imposed (including in criminal cases). What is intolerable is the irrefutability of these presumptions.

Although the rules of the Code of Criminal Procedure on the importance of the defendant admitting an offence have not been transposed to the administrative sanction procedure, spontaneous payment of fines, particularly at the time of recording of the offence, by a defendant who is thus unlikely to have secured legal assistance and cannot know the consequences of taking this option, cannot be deemed equivalent to admitting the offence, which would definitively deprive the accused of the possibility of retracting. The judgment at issue must accordingly be considered as intolerably diminishing the guarantees required by the principles of effective judicial protection and due process.

Languages:

Portuguese.

Identification: POR-2008-1-002

a) Portugal / **b)** Constitutional Court / **c)** Second Chamber / **d)** 23.01.2008 / **e)** 46/08 / **f)** / **g)** *Diário da República* (Official Gazette), 45 (Series II), 04.03.2008, 8940 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Legal aid, income, criteria for determining.

Headnotes:

In the Portuguese legal and constitutional system, access to the law and the courts is not a mere entitlement to a social service but rather a fundamental right which is necessary for the practical implementation of legal protection, which primarily depends on criteria delimiting and conditioning the appraisal of the insufficient level of resources (“means testing”) invoked by the applicant for legal assistance. By ignoring circumstances that make manifest a situation of insufficient resources capable of preventing access to the law and the courts, the mandatory stringent assessment of the “main household income” based exclusively on indicators and coefficients established in law, notably in order to determine the requisite amounts to meet the household’s “basic needs”, is an abusive and disproportionate restriction on this fundamental right.

Summary:

The provisions which are the subject of this appeal have given rise to previous decisions by the Court, although the prescriptive aspect challenged at the time does not exactly coincide with the dimension which is at issue here. According to the decisions in question, the said provisions are unconstitutional in that they violate the right of access to law and to the courts. This right is secured for citizens with insufficient resources by means of legal aid, which is

intended to prevent justice being denied for this reason to citizens wishing to defend their rights in court. In this judgment the review of constitutionality centres on whether the implementation of legal aid under the rule which the court in question failed to apply guarantees of access to the law and the courts for persons with insufficient means to pay for judicial proceedings, particularly the corresponding lawyer's and court fees. It is a case of verifying the "service provision" dimension of the fundamental guarantee on access to the law and the courts, which is reflected in the State's obligation to provide resources (such as legal aid) to prevent denial of justice for reasons of insufficient resources. According to applicable legislation, the provision of legal protection depends on economic factors and the financial capacity of persons who are objectively unable to afford the cost of a trial. The main income to be tested for the purposes of granting legal protection is the "household income", which includes the income of individuals who belong to the household of the person applying for legal aid. Practical assessment of the applicant's situation of insufficient resource is, in fact, now the exception, whereas under previous legislation, for instance, rebuttal of a legally established presumption of insufficient resources was subject to the proviso that the applicant had other sources of income, whether his or her own or those of third persons.

In view of this legislative change, according to the decision challenged, the norm (i.e. that deriving from the previous law, which had been adopted in the instant case) is now a rule which has been clarified by new legislation. A rule which had previously been open to appraisal of specific cases has become a closed rule that takes account solely of the economic and financial aspects, as the mathematical formula adopted clearly shows.

Therefore, the applicable legislation may fail to guarantee access to the law and the courts by allowing the possibility of refusing such access on the grounds of insufficient resources, to the extent that the main income for the purposes of granting legal aid is the total household income, whether or not the applicant has access to the income of any third person belonging to the same household. In fact, many legal aid applicants do not actually have access to the income of third persons belonging to their household. Furthermore, interests may diverge among the members of the same household, particularly in terms of the subject of the proceedings, and the legal aid applicant may wish to enjoy the right to secrecy of the defence of his/her legally protected rights and interests. The third person in question may also not be legally required to help the legal aid applicant to defray the costs.

The Constitutional Court therefore decides to declare unconstitutional, for breach of the right of access to the law and the courts, the rules subjected to review of constitutionality on the grounds that they necessitated rigidly considering the income of the legal aid applicant's whole household for the purposes of calculating its main income, without appraising the applicant's actual financial situation in accordance with his/her incomes and expenses.

Languages:

Portuguese.



Identification: POR-2008-1-003

a) Portugal / **b)** Constitutional Court / **c)** Third Chamber / **d)** 31.01.2008 / **e)** 69/08 / **f)** / **g)** *Diário da República* (Official Gazette), 128 (Series II), 04.07.2008, 29487 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

3.9 General Principles – **Rule of law.**
 3.10 General Principles – **Certainty of the law.**
 3.22 General Principles – **Prohibition of arbitrariness.**
 3.23 General Principles – **Equity.**
 5.2.2 Fundamental Rights – Equality – **Criteria of distinction.**

Keywords of the alphabetical index:

Experimentation, law / Law, experimental.

Headnotes:

The mere fact that a civil law procedural system operating on a trial basis was only applicable to specific judicial districts identified by prescriptive provisions did not mean that it violated of the equality principle prohibiting arbitrariness and discrimination. Nor can the experimental method in itself be held to infringe other constitutional rules and principles. The legislation of any law-based State must create a stable system of law, and therefore keep the use of experimentation to a minimum, in accordance with the principle of proportionality.

Summary:

In line with the principle that the economic and social reality is different from that at the time of the adoption of the Code of Civil Procedure, the Decree-Law no. 108/2006 brought about a system of civil procedure which has to be applied in certain actions. It is applicable only in specific judicial circumstances.

The constitutional point put to the Court is whether the application of the civil-law procedural system exclusively to these specific judicial districts is compatible with the Constitution, and whether “legislative experimentation” itself should be condemned as unconstitutional.

Constitutional case-law on the equality principle comprises three dimensions: prohibition of arbitrariness, prohibition of discrimination and the obligation of differentiation. The first of these three dimensions involves ensuring equal treatment of equal situations and prohibiting the equal treatment of manifestly unequal situations; the second presupposes the illegitimacy of any differentiated treatment based on subjective criteria (kinship, race, language, territory of origin, religion, political or ideological convictions, education, economic situation, social origin, etc); and the third dimension helps offset situations of unequal opportunities.

The prohibition of arbitrariness or differentiation imposed by legislation on inadequate grounds is one thing, but the prohibition of discrimination or differentiation based on specific “subjective criteria”, which, under the Constitution, cannot serve to justify separate legal systems because of their close links to human dignity, is another. Where differentiation based on “subjective criteria” is established prescriptively, “it is necessary to presume, at least initially, that this is a constitutionally unacceptable type of discrimination”, but “where subsequent examination reveals that this factor is the sole ground for the differentiation, there has indeed been a breach of the constitutional principle of equality”. If the differentiation is based on multiple grounds, the constitutionality of the standards in question must be reviewed differently. The authority responsible for the aforementioned “examination” must verify the rationality and objectivity of the underlying reasons for the differentiation, whereby the legislation will be open to criticism only if these “reasons” prove arbitrary or absurd, in the absence of “rational, objective grounds” potentially justifying them.

Under the decision challenged, the norms in question infringed the equality principle in that they not only expressed “legislative arbitrariness” but also violated the equality principle presupposing the prohibition of

discrimination. Article 13.2 of the Constitution enumerates the motives allowing for the prohibition of discrimination. However, this is merely an indicative “definition” rather than an exhaustive list. At all events, the grounds for the constitutional prohibition of discrimination must be “special”. According to legal opinion, such “specialness” must be identified on the basis of the constitutional value of equal human dignity, so that the grounds or factors considered discriminatory are such as are “exclusively based on [subjective] attributes which individuals can in no way control, or choices of lifestyle (...) which individuals are free to make”. Plainly, the rules in question give rise to differential treatment of different persons. The system introduced on a trial basis can only be applied to declaratory procedures unaccompanied by special proceedings, and special actions which are brought before specified courts and not others, with a view to ensuring compliance with financial obligations arising out of contracts. Anyone who is party to one of these procedures is “treated differently” from parties to other types of proceedings because of the location of the court action. However, the dubious aspect is this “different treatment”, because it involves discrimination, which is prohibited under the Constitution. The discrimination is interpreted exactly in the same way as the aforementioned “prohibition”.

No provision of the Constitution entitles individuals to a specific procedure for [civil] proceedings binding upon the ordinary legislator. The conformity of civil proceedings with legislation is bound up with the “due process of law” principle enshrined in the Constitution. The only consequence of this principle is the entitlement to legal settlement of disputes within a reasonable time, complying with the guarantees on impartiality and independence and ensuring proper application of the principle of adversarial proceedings.

Having established that the procedural system introduced on a trial basis is not discriminatory, we must ascertain whether or not it is arbitrary. Under the decision challenged, the “arguments” used to justify the restriction of the spatial application of the system introduced on a trial basis are far from providing an objective and rational justification.

Nevertheless, in connection with the principle of prohibiting arbitrary decisions, the Court has always stressed two fundamental ideas: there can be no “judgments” on the soundness of the legislative solutions; and since the Constitution only prohibits differential treatment without any adequate material basis, it is necessary to pinpoint the rationale behind the provisions at issue in order to assess, on the basis of this rationale, whether or not they are based on a “reasonable criterion”.

The fact is that the rationale behind the provisions in question is the “experimental” nature of this new procedural system, which is based on the principles of “simplicity”, “flexibility” and trust “in the capacity and interest of parties to the proceedings to settle judicial disputes expeditiously, efficiently and equitably”. It is precisely because the legislature wished to “test” and “improve” the system before expanding its scope that it began by restricting its application.

Since the challenged decision shows that it is accepted that unequal treatment can be reasonably based on the experimental nature of the system, we end up challenging the “experimentation” *per se*. This raises a pertinent question. The “grounds” or “adequate material bases” corresponding to criteria of constitutional significance are alone capable of shielding legislation from criticism in cases involving the prohibition of arbitrariness. The outstanding question is therefore whether the phenomenon of “legislative experimentation” should *per se* be included in this category.

This legislative “method”, which is in fact hotly debated in comparative law, is no novelty for us. “Experimental legislation” first of all tries out the application, and the effects of the application, of the rules in question in a limited area for a limited time, in order to obviate risks which, in situations entailing a high degree of uncertainty as to the effects of a given regulation, would probably lead to the adoption of “definitive” prescriptive systems. In view of their aim, such experimental methods are not discriminatory in themselves and cannot be considered arbitrary.

For the Portuguese system, an “experimental law” is a law like any other, being the expression of the constitutionally recognised legislative system, and it can therefore never infringe the (organic, procedural and material) constitutional principles governing all legislative activity.

Since all these conditions and limits have been respected in the instant case, there are no grounds for declaring the text in question unconstitutional.

Languages:

Portuguese.



Identification: POR-2008-1-004

a) Portugal / **b)** Constitutional Court / **c)** Second Chamber / **d)** 31.01.2008 / **e)** 70/08 / **f)** / **g)** *Diário da República* (Official Gazette), 44 (Series II), 03.03.2008, 29695 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

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

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

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

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

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

5.3.36.2 Fundamental Rights – Civil and political rights – Inviolability of communications – **Telephonic communications.**

Keywords of the alphabetical index:

Criminal procedure / Telephone, tapping, evidence.

Headnotes:

From the angle of safeguards on the defendants’ rights of the defence, particularly in terms of the principle of adversarial proceedings, and with the exception of the restrictions laid down in procedural rules, phone tapping is subject to the same regulations as any other legally admissible type of evidence and must also be dealt with in accordance with the general principles governing investigatory proceedings. Phone tapping differs solely in terms of the restrictiveness of either its admissibility or the formal procedure to which it is subject, which is justified by the fact that it objectively constitutes a form of violation of privacy.

Where the rule set out in the Code of Criminal Procedure on the destruction of information obtained by phone tapping is interpreted as allowing the investigating judge to destroy information which she/he deems insignificant without informing the defendants of such destruction, thus preventing the latter from judging the possible relevance of such information to their defence, it does not infringe the principle of adversarial proceedings and is not deemed unconstitutional.

Summary:

The contested judgment primarily concerns the legal and constitutional protection of the confidentiality of communications transmitted through telecommunications networks. The right to secrecy of correspondence transmitted by telecommunications entails prohibiting anyone accessing such correspondence from infringing their secrecy and revealing the content. The law can only restrict this constitutional guarantee in the field of criminal procedure. The requirements of the prosecution and of evidence-gathering can justify restricting the individual right to privacy of correspondence, but these requirements must be assessed by the courts in the light of the principles of necessity, expediency and proportionality. The procedural system presupposes ensuring that the admissibility of the interception and recording of telephone conversations and communications or of information transmitted through other technological channels comply with the principle of proportionality, so that secrecy of communications can be said to be relative.

Where the Court has ordered or authorised special operations to intercept and record communications on the assumption that they might be needed in evidence, it is not required to preserve the items stored in the file, even if they are not all useful and even where they objectively constitute a breach of the constitutional principle of non-infringement of privacy. The defendant's ability to analyse the transcript must be interpreted in line with this provision. The defendant and counsel for the defence, as well as the individuals whose conversations have been tapped, may analyse the transcript in order to ascertain the conformity of the recordings and obtain copies of these items. It is, however, obvious that only the transcribed items of information, i.e. those deemed necessary for the investigations, may be examined by those concerned (including the defendant), with an eye to ensuring the exercise of their procedural rights.

According to the judgment, the question therefore is whether the interpretation which complies most closely with the literal and teleological meaning of the provision, under the conditions specified, is unconstitutional for reasons of violating the procedural guarantees enshrined in the Constitution.

The principle of adversarial proceedings is one specific aspect of the rights of the defence, but it is also expressly acknowledged in the Constitution. In particular, this principle comprises the defendants' right to intervene in proceedings, to state their views and to contradict any witness statements, depositions and any other evidence or legal arguments produced, which presupposes their having the last word in the proceedings.

Nevertheless, the principle of adversarial proceedings must be interpreted in the light of the accusatorial structure of criminal proceedings, viewed by the Constitution as another guiding principle for criminal proceedings. The accusatorial principle basically posits that no one can be tried for a crime where the investigation and indictment procedures are matters for a body different from that responsible for the trial. This involves differentiating the various stages in proceedings (investigation, indictment and trial/judgment), and also the various bodies/officials involved (prosecutor, investigating judge and trial judge).

The accusatorial system does not preclude an investigatory phase preceding the indictment stage. However, the action taken under the investigatory proceedings must be justified by the quest for the truth (which means that the requisite action may be intended to confirm or disprove the suspected offence), and is subject to a fairness criterion that precludes the use of evidence which is not legally admissible or which infringes legally established formalities.

The aim of this stage in proceedings is the investigation, which is legally defined as the set of activities required to investigate a crime, to identify the perpetrators and determine their responsibility, and to uncover and gather items of evidence with an eye to an indictment.

Therefore, the importance of the accusatorial conception of proceedings as set out in the Constitution lies in its balancing of the legal position of the defence against that of the prosecution, ensuring compliance with the equality of arms principle via the entitlement of the defendant (and counsel for the defence) not only to help elucidate the facts during the investigatory phase but also to actively participate in the preparation and discussion of the case, whereby defendants are free to make their own inquiries alongside the formal investigations.

In this context, the principle of adversarial proceedings is reflected in the "trial hearing and legal investigatory acts", geared to ensuring an adversarial hearing between prosecution and defence, although there is a difference of degree between the trial and the indictment phases. The adversarial principle in the framework of the trial hearing presupposes inviting the parties to state their factual or legal claims, produce their evidence, verify the evidence produced against them and discuss the respective value and results of the said evidence. During the investigatory phase, the same principle represents the facility for the accused to produce any new items of evidence that have not yet been taken into account

and/or to organise a debate during the investigatory proceedings facilitating oral adversarial discussions before the judge, with a view to ascertaining whether the judicial investigations have produced sufficient material and legal evidence to justify bringing the accused before a court for trial. In connection with activities conducted during the investigations, the adversarial principle involves defendants participating in acts of directly relevance to them and being heard whenever a decision personally affecting them is to be taken, accompanied by the right not to answer questions put, the right to the assistance of a lawyer of their own choice or an officially assigned defence counsel and the right to be informed of their rights.

Investigatory measures which are taken under the adversarial principle in the conditions set out in the Constitution and implemented during the investigatory phase can consequently directly affect the legal status of the accused.

It is not for the defendant to pronounce on the importance of recordings made under phone tapping procedures or on the procedure for and time or place of interception. These aspects are covered by expediency criteria assessed exclusively by the Public Prosecutor's Office. Nor is it for the accused to pronounce on any other result obtained by means of other evidence. The principle of indictment and recognition of the right to adversarial proceedings therefore have a completely different meaning, i.e. they enable defendants to contradict, in subsequent phases of proceedings, the grounds and evidence gathered against them, to take specific action under the investigatory proceedings and to obtain items of evidence which they deem relevant.

The right to adversarial proceedings applies to the evidence on which the indictment was based. Such evidence will be assessed by the investigating judge for the purposes of the indictment and referred to the Court for trial. The accused can reply only to questions concerning this evidence, either by advancing arguments against the evidential results or by producing other evidence challenging or disproving these results.

Cross-references:

In its previous Judgments nos. 660/06, 450/07 and 451/07, the Constitutional Court had already reached decisions on the point at issue in this judgment, finding the interpretation of the provisions in question unconstitutional.

In these judgments the Court held that the destruction of evidence obtained by intercepting correspondence transmitted or received through telecommunications channels, based solely on a decision from the

investigating judge and unknown to the accused, was sufficient to unacceptably and unnecessarily reduce the safeguards of the defence. Such reduction is particularly serious in view of the comparative positions of the defendants and the prosecution, since the former, whose fundamental rights were already restricted when their phone calls were tapped, have no access to the content of these communications and consequently cannot assess their importance in view of the destruction of the relevant recordings, whereas the police and the prosecutor have had access to the full content of the communications and can therefore select any excerpts they consider important. Furthermore, in these judgments the Constitutional Court held that it could not be argued that this operation was intended to ensure protection of the fundamental rights of third persons or of the defendants themselves in order to justify the destruction of the recordings deemed unnecessary, since the data recorded had been obtained by intercepting communications and therefore infringed the defendants' private lives. The Court drew attention here to the fact that the destruction of recordings in pursuance of the Code of Criminal Procedure is based solely on the judge's appraisal of the importance of the conversations for evidential purposes, not on the illegality of the phone tapping procedures or the protection of third persons' or defendants' rights.

Nevertheless, in connection with constitutional case-law prior to the judgment in question, particularly that established by Judgment no. 660/06, the judges who voted against considered that, conversely, investigating judges are responsible for guaranteeing rights and freedoms and that consequently the interpretation to the effect that such judges cannot order the destruction of recordings of tapped phone calls which they consider manifestly unnecessary is a disproportionate interpretation of the constitutional requirements vis-à-vis criminal procedure.

Five judges voted against the judgment in question, repeating the line taken by the Constitutional Court. Basically they consider that, in accordance with the case-law of the European Court of Human Rights, there should be a requirement that the law empowering the authorities to tap phones should set out the requisite precautions for communicating the recordings made in their entirety for verification by the Court and the defence, thus giving persons whose phones have been tapped access to the recordings and the corresponding transcripts, as well as the circumstances under which the deletion or destruction of tapes may take place, notably after a case has been discontinued or a final decision taken; and that since our system permits the destruction of recordings of communications of which the prosecution, but not

the defence, has been apprised and whose importance has been assessed by the judge, it stands out in relation to other comparable legal systems.

It should also be stressed that the adversarial principle cannot apply to the investigatory phase, which means solely that the destruction of such special evidence (tapped communications) cannot be ordered during this phase. This is confirmed by the fact that the evidential value of conversations acquired for the proceedings during the investigatory stage is not confined to these proceedings. It is actually a case of incorporating all the items of evidence to be assessed by the Court, such assessment obviously taking place subsequently to the adversarial proceedings. If the adversarial proceedings are to be fully implemented in the procedural phases (viz the indictment and the trial), whose adversarial nature is guaranteed by the Constitution, the defendants must have guaranteed access to the full content of all the evidence gathered so that, having taken cognisance of it, they can not only discuss the evidential value of any conversations transcribed but also assess the importance of other conversation which have not yet been acquired for the proceedings, with a view to a final decision in the case, which obviously requires a retention order.

Languages:

Portuguese.



Romania Constitutional Court

Important decisions

Identification: ROM-2008-1-001

a) Romania / **b)** Constitutional Court / **c)** / **d)** 12.03.2008 / **e)** 305/2008 / **f)** Decision on the allegation of constitutionality of certain provisions of the Law on the elections for the Chamber of Deputies and the Senate and for the amendment and supplementing of Law no. 67/2004 for the election of local public administrative authorities, of Law no. 215/2001 on local public administration and of Law no. 393/2004 on the Statute of the local elected officials. Decision on constitutionality of the law, in its entirety / **g)** *Monitorul Oficial al României* (Official Gazette), 213/20.03.2008 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

4.9.1 Institutions – Elections and instruments of direct democracy – **Competent body for the organisation and control of voting.**

4.9.6 Institutions – Elections and instruments of direct democracy – **Representation of minorities.**

5.2.1.4 Fundamental Rights – Equality – Scope of application – **Elections.**

5.2.2.3 Fundamental Rights – Equality – Criteria of distinction – **Ethnic origin.**

5.2.2.9 Fundamental Rights – Equality – Criteria of distinction – **Political opinions or affiliation.**

5.3.41.2 Fundamental Rights – Civil and political rights – Electoral rights – **Right to stand for election.**

5.3.45 Fundamental Rights – Civil and political rights – **Protection of minorities and persons belonging to minorities.**

Keywords of the alphabetical index:

Election, electoral threshold, alternative for minority / Election, minority, representation.

Headnotes:

The Constitution establishes a special regime for organisations belonging to national minorities, which would allow them political representation within the legislative authority and which would allow their

participation in parliamentary elections. These organisations are to be assimilated within the political parties. Lack of such assimilation would jeopardise the equal opportunities of all those participating in the election.

The organisation and holding of electoral operations must be carried out by neutral bodies, elected or appointed through democratic and transparent procedures. The role of the Central Electoral Bureau is to watch over the proper organisation and holding of elections, to count the votes properly and to assure and guarantee equal opportunities for all candidates, regardless of their political affiliation.

The existence of an alternative electoral threshold does not interfere with equal votes within the meaning of Article 62.2 of the Constitution. There are two facets to this concept of equal rights. On the one hand, each voter is entitled to one vote... On the other hand, each Deputy or Senator must be appointed within certain electoral constituencies that are equal in terms of population, not to the number of voters. Under Article 2 of the Constitution, national sovereignty belongs to the entire Romanian people, rather than those who, being entitled to vote, may participate in the elections. The setting of an electoral threshold is the legislator's prerogative. The criteria provided by the legal text under dispute must be fulfilled alternatively, and not cumulatively. This represents a guarantee on the observance of a political party's representation at national level.

Summary:

The case concerned the compliance with the Constitution of various provisions of legislation on the election of the Chamber of Deputies and the Senate. These provisions covered issues such as the payment of a deposit into the account of the Permanent Electoral Authority of five minimum gross salaries per country for each candidate; and participation in the elections of the organisations of citizens belonging to national minorities and representation thereof in the Parliament. They covered the role of judges in the electoral bureaus, the existence of an alternative electoral threshold and the granting of a mandate conditional upon the fulfilment of such threshold. Another area covered was the delimitation of the uninominal colleges, according to certain rules, by Decision of the Government, as well as the election of the President of the County Council through uninominal vote. The provisions were found to be in accordance with the constitutional provisions and with international regulations concerning the possibility of imposing certain restrictions on the exercise of freedom, the principles of equality and non-discrimination on the grounds of ethnicity, political affiliation or wealth.

Twenty-six senators asked the Constitutional Court, under Article 146.a of the Constitution, to initiate a constitutional review of the Law on the elections for the Chamber of Deputies and the Senate and for the amendment and supplementing of other legislation. These laws were Law no. 67/2004 for the election of local public administrative authorities, Law no. 215/2001 on local public administration and Law no. 393/2004 on the Statute of local elected officials.

As grounds for the reference of unconstitutionality, it was alleged that Articles 29.5, 2.p, 9.1, 9.2, 9.3, 47.2.c, 48.11, 12.1, 77, and the legislation in its entirety, could have ramifications for certain democratic principles concerning the pluralism and the role of the political parties. They might also affect the formation of the fundamental institutions of the democracy.

The Constitutional Court dismissed these arguments for the reasons set out below.

The applicants had suggested that Article 29.5 of the Law represented a violation of the text of Article 4.2 of the Constitution, as the right to be elected depends on the candidate's wealth. In fact, this is a necessary condition for the exercise in good faith of the right to be elected. In any case, Article 29.7 made provision for the return of the deposit.

The Constitutional Court found that the provisions under the international regulations did not rule out the imposition of certain conditions, or even restrictions, on the exercise of freedoms. Under Article 19.3 of the International Covenant on Civil and Political Rights, the exercise of freedoms may be subject to certain limitations, which must be established by law and necessary, *inter alia*, for the protection of national security or public order. Likewise, according to Article 25 of the Covenant, the right to stand for elections must be exercised without unreasonable restrictions, and this includes the possibility to impose certain conditions on the exercise of these rights.

Articles 2.p, 9.1, 9.2 and 9.3 refer to the representation in Parliament of national minorities that did not obtain in the elections at least one mandate of Deputy or Senator. The applicants suggested that these provisions discriminated against Romanian citizens of Romanian origin who do not enjoy the same facilities and rights. The main beneficiaries of the provisions are Romanian citizens of Hungarian origin. The Court found these provisions to be in conformity with the application of the principle of equal opportunities for all citizens, removing, pursuant to Article 4.2 of the Constitution, all forms of discrimination on the grounds of nationality, ethnicity and political affiliation. They were also in accordance with Article 62.2 of the Constitution.

The applicants suggested that the law infringed the constitutional provisions under Chapter VI and Article 125.2, in that the appointment of judges within electoral proceedings grants them powers of public authority that are not in accordance with their statute.

Article 47.2.c establishes an electoral threshold related to the fulfilment of certain factual requirements. The applicants cited this as another example of discrimination.

There was a further argument to the effect that Article 48.11 contravenes the directly expressed will of the electorate, because the granting of a mandate to a candidate who obtained majority votes in an electoral constituency is conditional upon the fulfilment by the competitor proposing him or her of the alternative electoral threshold. The Court found that under this provision, voters vote personally for candidates proposed by an electoral competitor. At the same time, they express their preference for the political party to which the candidate belongs.

Article 12.1 of the Law establishes that the delimitation of the uninominal colleges shall be made by government decision; in essence, a technical operation carried out by parliamentary committee. The delimitation of electoral colleges should not, therefore, be confounded with the electoral system, the elements of which are established by law.

Article 77 of the Law (which allegedly infringed Articles 121, 122 and 123 of the Constitution) comprises regulations meant to implement the constitutional provisions on local autonomy. Under these rules, election through uninominal vote of the President of the Local Council is the result of the vote of the people, rather than certain political transactions by electoral competitors.

Cross-references:

The Constitutional Court has already adjudicated in its jurisprudence on these matters.

- See Decision no. 226/2001, published in the Official Gazette, Part I, no. 605/26.09.2001; *Bulletin* 2001/2 [ROM-2001-2-005];
- Decision no. 53/2004, published in the Official Gazette, Part I, no. 240/18.03.2004 and
- Decision no. 326/2004, published in the Official Gazette, Part I, no. 1001/30.10.2004.

Languages:

Romanian.



Slovenia

Constitutional Court

Statistical data

1 January 2008 – 30 April 2008

The Constitutional Court held 22 sessions over this period (11 were plenary and 11 were in chambers: 3 were in civil chambers, 5 in penal chambers and 5 in administrative chambers). There were 380 unresolved cases in the field of the protection of constitutionality and legality (denoted U- in the Constitutional Court Register) and 905 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 2008). The Constitutional Court accepted 127 new U- and 1 313 Up- new cases in the period covered by this report.

In the same period, the Constitutional Court decided:

- 170 cases (U-) in the field of the protection of constitutionality and legality, in which the Plenary Court made:
 - 23 decisions and
 - 147 rulings;
- 8 cases (U-) were joined to the above-mentioned cases for common treatment and adjudication.

Accordingly, the total number of U- cases resolved was 178.

In the same period, the Constitutional Court resolved 1 247 (Up-) cases in the field of the protection of human rights and fundamental freedoms (10 decisions issued by the Plenary Court, 1 237 decisions issued by a Chamber of three judges).

Decisions are published in the Official Gazette of the Republic of Slovenia. However, the rulings of the Constitutional Court are not generally published in an official bulletin, but are handed over to the participants in the proceedings.

The decisions and rulings are published and submitted to users:

- In an official annual collection (Slovenian full text versions, including dissenting/concurring opinions, and English abstracts);
- In the *Pravna Praksa* (Legal Practice Journal) (Slovenian abstracts, with the full-text version of the dissenting/concurring opinions);
- Since August 1995 on the Internet, full text in Slovenian as well as in English <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>;
- Since 1991 bilingual (Slovenian, English) version in the CODICES database of the Venice Commission.

Important decisions

Identification: SLO-2008-1-001

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 06.12.2007 / **e)** Up-752/07 / **f)** / **g)** *Uradni list RS* (Official Gazette), 118/07 / **h)** *Pravna praksa*, Ljubljana, Slovenia (abstract); CODICES (Slovenian, English).

Keywords of the systematic thesaurus:

3.21 General Principles – **Equality**.
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:

Capacity to bring legal proceedings / Party to an action.

Headnotes:

In case the existence of circumstances that raise doubts about a party's contractual capacity and thereby his or her capacity to sue or be sued, courts have to establish the complainant's actual capacity to sue or be sued. Not doing so will breach a party's right to the equal protection of rights in proceedings.

Summary:

In a probate matter, the Court of First Instance determined the extent of the deceased's intestate estate. It ruled that the complainant and his sister were heirs at law; each entitled to one half of the estate. The complainant (through his authorised representative) lodged an appeal against the decision of the Court of First Instance. The Court of First Instance rejected the complainant's appeal because his authorised representative did not submit an authorisation to represent him, even though the Court had summoned him to do so. He also failed to submit proof that he had passed the state legal examination. The Higher Court upheld the Court of First Instance's decision. With regard to the complainant's signature on the back of the appeal he lodged, the Higher Court adopted the position that because there was no text there, this could not be construed as an independent appeal.

The complainant's main contention was that there was a degree of doubt, throughout the first and second instance proceedings, regarding his capacity to sue or be sued, which was reflected in the fact that he was not capable of effectively protecting his rights and benefits in proceedings. The complainant pointed out that despite his medical condition and the fact that he had submitted documents issued by the doctor who treated him, the Court took no steps to determine his actual capacity to sue or be sued. It had failed to make the relevant inquiries, and to appoint an expert in the relevant medical field. Therefore, in the opinion of the complainant, the Court did not guarantee him equal protection of rights in proceedings (Article 22 of the Constitution), or the right to legal remedies (Article 25 of the Constitution).

The capacity to sue or be sued is the capacity of a party to perform procedural acts independently and with legal validity. This capacity of procedural law corresponds to the contractual capacity of substantive law. In addition, the Civil Procedure Act – hereinafter referred to as CPA) determines that the capacity to sue or be sued depends entirely on the contractual capacity in substantive law. The Inheritance Act – hereinafter referred to as IA) does not contain rules on the capacity to sue or be sued of parties to and participants in probate proceedings. This means that the provisions of CPA regarding the capacity to sue or be sued apply in such proceedings. As a result, in probate matters, parties have the capacity to sue or be sued within the limits of their contractual capacity. Under Article 80 of CPA, the Court must at all times during proceedings ensure that parties have the capacity to sue or be sued. The existence of the capacity to sue or be sued of parties to or participants in proceedings is also significant from the perspective of the right to the equal protection of rights (Article 22

of the Constitution). In judicial proceedings, it is a special manifestation of the general principle of equality before the law, as set out in the second paragraph of Article 14 of the Constitution.

In the Slovene legal system, the existence of contractual capacity and thereby the capacity to sue or be sued is presumed. It undoubtedly follows from such presumption that parties are not obliged to submit evidence regarding their contractual capacity. It also follows that in cases where there are no reasons to suspect that the capacity to sue or be sued does not exist, the Court is not obliged to establish this point. It only has to do so where it suspects that somebody lacks the capacity to sue or be sued. If so, an inquiry and the taking of evidence *ex officio* (by appointing a medical expert) may be appropriate. Case-law also establishes that if the circumstances of a particular case give rise to a suspicion that somebody lacks the capacity to sue or be sued, the Court must take relevant evidence in pending proceedings, and establish with certainty whether the prescribed procedural pre-condition exists. Where there is information on the court file that a party to proceedings has psychological problems, for which he or she has been receiving psychiatric treatment, and the party claims to be incapable of participating in proceedings, the Court must find out from the relevant authorities as to the party's capacity to perform procedural acts independently and with legal validity.

The purpose of the provisions on the legal representation of persons who are not capable of suing or being sued is to ensure better protection of their rights in proceedings. Correct legal representation of those who are incapable of suing or being sued as persons who are incapable of protecting their own rights and interests, is not only in the interest of the affected parties but also in the public interest. It is a manifestation of the principle of a social state. The protection the courts offer to somebody incapable of protecting their own rights and interests is particularly significant in probate matters. Under Article 166 of IA, the Court must take special care of the rights of persons who are underage, mentally ill, or for any other reason unable to take care of their own affairs. The Court must proceed with particular caution if it finds that such persons are to be parties to proceedings. It must provide for correct legal representation; in this regard, it must inform the relevant authorities of the need to appoint a guardian. This duty of special care exists even if such persons have correct legal representation and those who are representing them have appropriate legal knowledge. The Court must furthermore ensure that legal representatives, guardians, or authorised representatives of persons

who are under the special protection of the law have taken all necessary steps to implement the rights of persons they represent.

The Constitutional Court held that in the probate case, the courts had received sufficient information to cast doubt over the complainant's capacity to sue or be sued and to raise the possibility that the complainant might not be capable of effectively protecting his rights and benefits in proceedings. In view of the position both in legal doctrine and in case law, (see paragraph six of the reasoning of this decision), the courts had a duty to resolve the doubt over the complainant's capacity to sue or be sued. Although the complainant's contractual capacity had not been limited in any way, this fact did not relieve the Court of the duty to determine whether the complainant could sue or be sued. A party's capacity to sue or be sued is namely a general procedural precondition that the Court must ensure *ex officio* at all times during proceedings, and during appellate proceedings. The validity of an authorisation also depends on such. The capacity to grant authorisation forms part of the capacity to sue or be sued. Only someone with the full capacity to sue or be sued, or his or her legal representative, can grant valid authorisation. The circumstances of the present case cast doubt over the complainant's capacity to sue or be sued. As a result, the complainant could not grant legally valid authorisation to his alleged authorised representative who, in the opinion of the courts, had lodged an appeal against the probate decision issued at first instance in the name of the complainant.

The Constitutional Court held that in the probate proceedings, the courts had breached the complainant's right to equal protection of rights in proceedings (Article 22 of the Constitution) and the right to legal remedies (Article 25). They had made no effort to establish the complainant's capacity to sue or be sued, despite circumstances that cast doubt over his contractual capacity, and, therefore, his capacity to sue or be sued.

The Constitutional Court repealed the orders mentioned in paragraph 1 of the disposition and referred the case back to the Court of First Instance, for fresh adjudication. Before it once again decides on the appeal, in the new proceedings the Court will have to establish with certainty the existence of the complainant's capacity to sue or be sued. It will need to make relevant inquiries and, if necessary, should appoint an expert in the relevant field. Under Article 166 of IA, the Court will have to ensure appropriate protection of the complainant's rights and interests. It may need to appoint a guardian in certain special cases. See Article 211 of the Marriage and Family Relations Act.

Supplementary information:

Legal norms referred to:

- Articles 22, 24 and 25 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-2008-1-001

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 07.12.2007 / **e)** CCT 48/07; [2007] ZACC 27 / **f)** AD and Another v. DW and Others (The Department of Social Development Intervening; The Centre for Child Law as *Amicus Curiae*) / **g)** <http://www.constitutional.court.org.za/Archimages/11398.PDF> / **h)** CODICES (English).

Keywords of the systematic thesaurus:

4.7.1.1 Institutions – Judicial bodies – Jurisdiction – **Exclusive jurisdiction.**

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

4.7.8.1 Institutions – Judicial bodies – Ordinary courts – **Civil courts.**

5.1.1.4.1 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Minors.**

Keywords of the alphabetical index:

Adoption, non-citizen / Adoption, statutory requirements / Child, adoption / Child, best interest / Child, custody, order / International law, domestic law, relationship / International law, observance / Jurisdictional dispute / Parent, foster.

Headnotes:

The correct forum to determine the best interests of a child in inter-country adoption matters, is the Children's Court. Such matters cannot be effectively determined by the High Courts or Supreme Court of Appeal. The overall guiding principle used to determine the matter is the acknowledgment of powerful considerations favouring adopted children growing up in the country and community of their birth. However, the principle that the best interests of children are of paramount importance in every matter concerning the child, requires that each child must be considered as an individual, not an abstraction.

Summary:

I. The applicants, US nationals, applied to the Johannesburg High Court for an order of sole custody and guardianship of a South African child (Baby R). The High Court dismissed the application on the basis that sole custody and guardianship proceedings do not afford adequate protection to children's interests. The matter was taken on appeal. The Supreme Court of Appeal held that to grant the application would disregard the country's international obligations, and effectively by-pass the protections provided by the Children's Court. Applicants then appealed to the Constitutional Court seeking an order awarding them, *inter alia*, sole custody and guardianship of Baby R and authorising them to leave South Africa with her with a view to them adopting her in the United States of America. The Department of Social Development, an intervening party, argued that the only lawful procedure available to the applicants was application for an adoption order in the Children's Court. A *curatrix ad litem* appointed by the Court submitted that it was in the child's best interests to be placed permanently with the applicants, and recommended that the Children's Court deal with the adoption proceedings on an urgent basis.

II. Sachs J, writing for a unanimous Court, acknowledged that the forum most conducive to protecting the best interests of the child would be the Children's Court. Moreover, even though jurisdiction of the High Court to hear an application for sole custody and guardianship had not been ousted as a matter of law, this was not a matter in which the by-passing of the Children's Court could have been justified. Thus, the question of the best interests of Baby R was not one to be considered by the High Court or the Supreme Court of Appeal, but by the Children's Court.

Regarding the domestic legal framework concerning inter-country adoptions, the Court stated that there was no clear statutory regime with which to effectively deal with the many specific problems inherent in inter-country adoption. The only available statutory guidance, was contained in the Child Care Act which required that regard be had to achieving a religious and cultural match between the child and the adoptive parents. Accordingly, much of the regulation of this area of law fell within the realm of international law, in particular, the principle of subsidiarity.

South Africa's accession to the Hague Convention motivated the inclusion of Chapter 16 of the Children's Act, which requires the designation of a Central Authority to deal with inter-country adoptions. However, this Act has not yet been brought into force, and the emergent interim Central Authority did not have the structural capacity to regulate such matters effectively. The overall guiding principle must be

the acknowledgment that there are powerful considerations favouring adopted children growing up in the country and community of their birth. However, the subsidiarity principle is nevertheless subsidiary to the principle that the best interests of children are of paramount importance in every matter concerning the child. Thus, each child must be considered as an individual, not an abstraction. In light of this, the Supreme Court of Appeal, although correct in deciding that the matter should be dealt with at the Children's Court, should not have simply dismissed the appeal. Rather, it should have referred the matter to the Children's Court for speedy resolution, as this Court would endeavour to order.

The Court considered a draft agreement between the Department of Social Welfare and the *curatrix* reflecting their accord on how the interests of Baby R would best be served. The agreement sought the remittal of the matter, on an urgent basis to the Children's Court. The Court concluded that it was indeed in Baby R's best interest to grant the order, as it included safeguards, the Department of Social Welfare's co-operation in facilitating the administrative process, as well as an undertaking by the *curatrix* to continue to act on behalf of Baby R in the Children's Court proceedings. Accordingly, the Court ordered that the matter be heard by the Children's Court on an urgent basis.

Supplementary information:

Legal norms referred to:

- Sections 28.2, 39.1.b and 39.2 of the Constitution of the Republic of South Africa 1996;
- Section 40 of the Child Care Act 74 of 1983;
- Articles 3 and 21.b of the United Nations convention on the Rights of the Child;
- Articles 4, 5, 6, 14, 15, 17, 20 and 21.b of the Hague Convention;
- Articles 4 and 24.b of the African Charter.

Cross-references:

- *Du Toit and Another v. Minister of Welfare and Population Development and Others* (Lesbian and Gay Equality Projects as *Amicus Curiae*), *Bulletin* 2002/3 [RSA-2002-3-017];
- *Minister of Welfare and Population Development v. Fitzpatrick and Others*, *Bulletin* 2000/2 [RSA-2000-2-006];
- *M v. The State* (The Centre for Child Law as *Amicus Curiae*) 2007 (2) *South African Criminal Law Reports* 539 (CC); 2007 (12) *Butterworths Constitutional Law Reports* 1312 (CC);
- *Khosa and Others v. Minister of Social Development and Others*;

- *Mahlaule and Others v. Minister of Social Development and Others*, *Bulletin* 2004/1 [RSA-2004-1-002];
- *Fraser v. Naude and Others* 1999 (1) *South African Law Reports* 1 (CC); 1998 (11) *Butterworths Constitutional Law Reports* 1357 (CC).

Languages:

English.



Identification: RSA-2008-1-002

a) South Africa / b) Constitutional Court / c) / d) 19.02.2008 / e) CCT 24/07; [2008] ZACC 1 / f) Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v. City of Johannesburg and Others with the Centre on Housing Rights and Evictions and Another as *amici curiae* / g) <http://www.constitutionalcourt.org.za/Arcimages/11581.2.8.PDF> / h) as yet unreported; CODICES (English).

Keywords of the systematic thesaurus:

2.3.2 Sources – Techniques of review – **Concept of constitutionality dependent on a specified interpretation.**
 4.8.3 Institutions – Federalism, regionalism and local self-government – **Municipalities.**
 4.14 Institutions – **Activities and duties assigned to the State by the Constitution.**
 5.1.3 Fundamental Rights – General questions – **Positive obligation of the state.**
 5.4.13 Fundamental Rights – Economic, social and cultural rights – **Right to housing.**
 5.4.18 Fundamental Rights – Economic, social and cultural rights – **Right to a sufficient standard of living.**

Keywords of the alphabetical index:

Constitutional Court, order to engage / Decision, administrative, opportunity to be heard / Housing, decent / Housing, eviction / Housing, programme, need / Municipality, decision, procedure of adoption / Housing, occupation, unlawful, eviction / Social right, progressive realisation.

Headnotes:

The government, before it evicts residents from their homes, has the constitutional duty to engage meaningfully with them about possible steps that can be taken to alleviate homelessness. The constitutional obligations resting on a local government to eliminate health and safety risks in its jurisdiction need to be complied with but this duty does not exist in isolation. It must be considered along with the obligation to provide access to adequate housing on a progressive basis. It is unconstitutional to provide for a criminal sanction to be imposed on residents who remain in a building after the issue of an administrative eviction order. Such a sanction may only be imposed once there is a court order for the eviction.

Summary:

I. More than 400 occupiers of the inner city of Johannesburg were faced with eviction from their homes at the instance of the City of Johannesburg. The respondents attempted to use certain health and safety legislation in the form of the National Building Regulations and Building Standards Act to compel the occupiers to evict two dilapidated buildings. The buildings were to be cleared as part of the respondent's urban regeneration plan, the Inner City Rejuvenation Strategy. The respondents then approached the court for eviction orders.

The High Court rejected the respondent's eviction application on the basis that its housing programme did not cater for the evictees. On appeal to the Supreme Court of Appeal the eviction orders were granted on the condition that adequate alternative accommodation was provided to those occupiers who, by virtue of the eviction, were placed in desperate need of shelter.

II. Before the Constitutional Court gave judgment in this matter it issued an interim order directing the parties to engage meaningfully with each other. The engagement was intended to find short-term interim solutions to alleviate the deplorable living conditions of the occupiers as well as ways to find consensus on temporary accommodation once the evictions had taken place. The parties agreed on certain steps that could be taken in the interim and on temporary accommodation in specified buildings after eviction. In addition, they agreed to meet to discuss permanent housing solutions in the future. The affidavits presented were found to be a reasonable response to solving the issues and the agreement reached was made an order of court.

The issues had been narrowed down considerably as a result of the consensus, but there were still outstanding questions that required determination by the court. Justice Yacoob, writing for a unanimous court, first held that it was necessary for a municipality, when evicting residents, to engage meaningfully with them prior to approaching a court for an eviction order. A failure to comply with this would be a breach of Section 26.2 and 26.3 of the Constitution which provide for the progressive realisation of the right of access to adequate housing and the right to be protected from arbitrary evictions by considering all the circumstances.

Second, the judgment held that the positive obligation on the State to eliminate unsafe and unhealthy buildings did not exist in isolation. Before issuing an order for eviction on these grounds, a municipality must first consider potential homelessness that may result from the eviction so as to give effect to the constitutional duty to ensure the progressive realisation of access to adequate housing.

Finally, Section 12.6 of the National Building Regulations and Building Standards Act was declared to be unconstitutional. This Section provided for a criminal sanction to be imposed on residents remaining in occupation of a building once they had been issued with an eviction notice. The Section was said to serve a legitimate purpose but it was held that it could not be imposed on people where there had been no court order for their eviction. The Court ordered that a read-in proviso to this effect was necessary.

The Constitutional Court upheld the appeal and endorsed the agreement reached between the parties through consensus. It declared Section 12.6 to be unconstitutional and remedied this with a read-in proviso to the effect that criminal sanctions could only be imposed upon remaining residents once a court had ordered their eviction and they had failed to comply with that order.

Supplementary information:

Legal norms referred to:

- Sections 26.2, 26.3, 152 of the Constitution of the Republic of South Africa, 1996;
- Section 12.4, 12.5, 12.6 of the National Building Regulations and Building Standards Act 103 of 1977.

Cross-references:

- *Government of the Republic of South Africa and Others v. Grootboom and Others*, Bulletin 2000/3 [RSA-2000-3-015];
- *Port Elizabeth Municipality v. Various Occupiers* 2005 (1) *South African Law Reports* 217 (CC); 2004 (12) *Butterworths Constitutional Law Reports* 1268 (CC);
- *National Coalition for Gay and Lesbian Equality and Others v. Minister of Home Affairs and Others*, Bulletin 2000/1 [RSA-2000-1-001].

Languages:

English.

*Identification:* RSA-2008-1-003

a) South Africa / b) Constitutional Court / c) / d) 11.03.2008 / e) CCT 54/07; [2008] ZACC 3 / f) Jonathan Zealand v. Minister for Justice and Constitutional Development and Another / g) <http://www.constitutionalcourt.org.za/Archimages/11798.PDF> / h) CODICES (English).

Keywords of the systematic thesaurus:

4.7.16.1 Institutions – Judicial bodies – Liability – **Liability of the State.**
 5.1.1.4.3 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Prisoners.**
 5.3.5.1.3 Fundamental Rights – Civil and political rights – Individual liberty – Deprivation of liberty – **Detention pending trial.**
 5.3.17 Fundamental Rights – Civil and political rights – **Right to compensation for damage caused by the State.**

Keywords of the alphabetical index:

Accused, rights / Damages, compensation / Convicted person, imprisonment / Damages, constitutional, right / Detention, after conviction / Detention order, extension / Detention, after acquittal / Detention, judicial review / Detention, unjustified, compensation / Liability, state, civil / Remand in custody, duration / Miscarriage of justice, victim.

Headnotes:

The right not to be deprived of freedom arbitrarily or without just cause, in terms of Section 12.1 of the Constitution, requires detention to be both procedurally fair and substantively justified. Where one is detained as if one were a convicted prisoner, in circumstances where the ostensible basis for the detention is absent inasmuch as a court of law has upheld one's appeal against conviction and sentence, but one is awaiting trial on other charges in relation to a separate offence in respect of which one has not been convicted or sentenced, then that detention is not substantively justified. Such detention is therefore unlawful in the sense that Section 12.1 of the Constitution is unjustifiably infringed. That is sufficient to establish that the detention was also unlawful for the purpose of a claim for compensatory damages in delict.

Summary:

I. This case concerned the applicant's claim for damages against the state arising out of his alleged unlawful detention. While awaiting trial on earlier and independent criminal charges of rape, murder and assault (the first case), the applicant was convicted of murder and the unlawful possession of a firearm and ammunition (the second case). He was sentenced to eighteen years in prison and accordingly detained with other convicted prisoners in a maximum security facility. Later, his conviction and sentence in the second case were set aside on appeal. However, due to the admitted negligence of the appeal court officials, the prison authorities were not informed of the applicant's successful appeal. He continued to be detained in the maximum security prison with other convicted persons. Almost five years later, the charges against the applicant in the first case were dropped. Nevertheless, he was only released from prison roughly five months later.

II. In a unanimous judgment written by Chief Justice Langa, the Court held that the applicant's detention was unlawful for the period starting on the date of his successful appeal against conviction and sentence in the second case and ending on the day of his release – a total period of roughly five and a half years. It was held that to detain the applicant, who during this period was merely awaiting his trial in the first case, in a maximum security facility together with other convicted and sentenced prisoners was arbitrary and without just cause, in violation of Section 12.1 of the Constitution.

There was a deprivation of freedom because, had the appeal court informed the prison authorities of the applicant's successful appeal, he would immediately

have been transferred to the medium security awaiting-trial block of the prison. This failure meant that he was denied the additional amenities and liberties to which awaiting-trial prisoners are ordinarily entitled. That deprivation of freedom, moreover, was arbitrary and without just cause because: the applicant was treated as a sentenced prisoner when in fact he was not sentenced; he was remanded in maximum security when he no longer had any conviction of any serious wrongdoing; the fact that he was still awaiting trial in the first case was insufficient to justify treating him as if he were already convicted and sentenced; that additional encroachment on his liberty was unnecessary to secure his attendance at trial; and other awaiting-trial prisoners were not subjected to the same treatment.

In reaching this conclusion, the Chief Justice held that it was unnecessary to compare the relative factual conditions prevailing in the medium security awaiting-trial Section of the prison, where the applicant should have been detained, with those prevailing in the maximum security Section for convicted persons, where the applicant was in fact detained. What mattered was whether the applicant's detention affected him in his status and impacted upon his legal rights and the obligations of the state. In this case, the applicant's status as a person awaiting trial was ignored.

The violation of Section 12.1 of the Constitution was not justifiable under Section 36 of the Constitution as it had not been in terms of law of general application. Finally, in the context of detention in prison, this unjustifiable violation of the right not to be deprived of freedom arbitrarily or without just cause was sufficient to establish unlawfulness for the purpose of a claim for delictual damages. The case was remitted to the High Court so that the further questions of negligence and damages could be considered.

Supplementary information:

Legal norms referred to:

- Sections 1.a, 7.1, 12.1.a, 36 of the Constitution of the Republic of South Africa, 1996;
- Sections 82 and 83 of the Correctional Services Act 8 of 1959;
- Section 46 of the Correctional Services Act 111 of 1998;
- Sections 68, 72.4, 72A of the Criminal Procedure Act 51 of 1977;
- Articles 9.5, 10.2 of the International Covenant on Civil and Political Rights.

Cross-references:

- *De Lange v. Smuts NO and Others* 1998 (3) *South African Law Reports* 785 (CC); 1998 (7) *Butterworths Constitutional Law Reports* 779 (CC); *Bulletin* 2000/3 [RSA-2000-3-017];
- *Minister van Wet en Orde v. Matshoba* 1990 (1) *South African Law Reports* 280 (A); [1990] 1 *All South Africa Law Reports* 425 (A);
- *Rail Commuters Action Group and Others v. Transnet t/a Metrorail and Others* 2005 (2) *South African Law Reports* 359 (CC); 2005 (4) *Butterworths Constitutional Law Reports* 301 (CC); *Bulletin* 2004/3 [RSA-2004-3-013];
- *S v. Coetzee* 1997 (3) *South African Law Reports* 527 (CC); 1997 (4) *Butterworths Constitutional Law Reports* 437 (CC); 1997 (1) *South African Criminal Law Reports* 379 (CC).

Languages:

English.



Identification: RSA-2008-1-004

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 28.03.2008 / **e)** CCT 37/07; [2008] ZACC 4 / **f)** *Deliwe Muriel Njongi v. Member of the Executive Council, Department of Welfare, Eastern Cape* / **g)** <http://www.constitutionalcourt.org.za/Archimages/11953.PDF> / **h)** CODICES (English).

Keywords of the systematic thesaurus:

- 3.5 General Principles – **Social State**.
- 3.9 General Principles – **Rule of law**.
- 4.6.9.4 Institutions – Executive bodies – The civil service – **Personal liability**.
- 4.14 Institutions – **Activities and duties assigned to the State by the Constitution**.
- 5.1.3 Fundamental Rights – General questions – **Positive obligation of the state**.
- 5.2 Fundamental Rights – **Equality**.
- 5.3.1 Fundamental Rights – Civil and political rights – **Right to dignity**.
- 5.4.14 Fundamental Rights – Economic, social and cultural rights – **Right to social security**.

Keywords of the alphabetical index:

Administrative act, validity / Civil action, time-limit / Constraint, time-limits / Cost, award / Fundamental right, not open to restriction, limitation / Judicial review, time-limit / Social assistance, termination / Social justice / Welfare benefit, termination / Civil servant, negligence, damage caused, personal liability.

Headnotes:

An unlawful administrative action continues to have effect until set aside by a court on review or until its validity is disavowed by the state. Consequently, until an unlawful administrative decision cancelling a social grant was set aside or disavowed, the state's obligation to reinstate fully the grant does not amount to a due and payable debt, and the prescription time-limits ordinarily applicable to civil debt claims do not begin to run.

Summary:

I. The applicant, a disabled woman of little education, had since 1989 been receiving a social disability grant pursuant to her right to social assistance under Section 27.1 of the Constitution. In November 1997 payment of the grant ceased without explanation. This was part of a general cancellation conducted to identify fraudulent claimants in the system. She approached the Provincial Government and was told to re-apply. She did so, and payment of her grant was resumed in July 2000. She also received 'back pay' of R 1 100, although she claimed the arrear payments due to her totaled R 15 200. After proceedings were instituted she received a further payment of R 9 400, without explanation, leaving unpaid arrears of R 5 800.

In May 2004, the applicant approached the High Court seeking repayment of the outstanding amount. The Prescription Act provides for a three year time-limit for the claim of ordinary debts. This time period that, according to the Act, begins to run when the debt falls 'due'. (A debt is said to fall 'due' for the purposes of the Prescription Act at the point when a debtor becomes obligated to repay the debt immediately, as when there is no longer any legal basis on which to resist the claim.) Since the applicant's action was launched more than three years after the cancellation of the grant, the provincial government objected that the time period had expired and her claim had prescribed.

The High Court held that the debt was not 'due' while the administrative decision cancelling her grant remained in effect, and that the claim had not prescribed and should be paid by the Provincial Government. On appeal to a Full Bench, this decision was overruled and the claim held to have prescribed. The applicant appealed to the Constitutional Court.

II. In a unanimous judgment written by Yacoob J, the Court held that the claim had not prescribed. The Court expressed its doubt that prescription time-limits applicable to ordinary debts could apply to social grants which the State was constitutionally obliged to pay. However, it held that it was not necessary to decide the point.

Fundamental to the reasoning of the Full Bench decision was the notion that an unlawful administrative act is a legal nullity, as an axiomatic consequence of the rule of law. The Court held that this could not be the proper approach where the applicant had not received full reinstatement of her grant. Because she had not been put in the position in which she would have been if the unlawful administrative act had not occurred, it continued to have an effect. The Provincial Government had at no stage accepted that the administrative act was unlawful: it had argued that there was no need to decide on the question of the lawfulness of the administrative act. Since the decision cancelling the grant therefore remained effective, it remained an obstacle to the payment of the arrear grant. Until the decision was set aside, therefore, the payment was not 'due' and prescription time-limits did not begin to run.

The Court noted that thousands of administrative decisions are made and held that it was not necessary for a Court to set aside an unlawful decision on review for prescription time-limits to begin to run. A debt would also become due, and the time-limit begin to run, if the State disavowed reliance on the administrative action without qualification. Since a full reinstatement of the grant had not been made in this case, and there had no been no admission of unlawfulness, the Provincial Government could not be said to have disavowed reliance on the decision.

The Court also noted that previous decisions of other courts had condemned the general cancellation policy adopted by the provincial government in its efforts to identify fraudulent claimants. Before those courts, the Provincial Government had accepted the unlawfulness of similar administrative decision to cancel grants and had undertaken to fully reinstate the grants of those who had suffered unlawful cancellation. The Court held that the government's duty under Section 165.4 of the Constitution to ensure the dignity and effectiveness of the courts

required it to give effect to this undertaking. It further held that the cancellation of the grants was a cruel denial of assistance to the poorest and most vulnerable section of society utterly at odds with the constitutional commitment to uphold dignity and pursue equality. The Provincial Government's persistent failure to reinstate fully all unlawfully cancelled grants was a breach of these constitutional obligations.

Languages:

English.



Following the hearing, the Court issued directions calling on the Provincial Government officials responsible for the decision to oppose the applicant's claim to show why they should not be ordered to pay the applicant's costs in their personal capacities. Upon consideration of the evidence thus obtained, the Court strongly criticised the Provincial Government's decision to oppose the applicant's claim, and in particular the fact that the relatively small size of the disputed payment and the dire personal circumstances of the applicant were not adequately considered in arriving at that decision. It however held that it was not appropriate on the facts of this case to order the officials to pay the costs in their personal capacities.

Supplementary information:

Legal norms referred to:

- Sections 1.a, 27.1.c and 165.4 of the Constitution of the Republic of South Africa, 1996;
- Sections 10, 11, 12 of the Prescription Act 68 of 1969.

Cross-references:

- *Bushula and Others v. Permanent Secretary, Department of Welfare, Eastern Cape, and Another* 2000 (2) *South African Law Reports* 849 (E); 2000 (7) *Butterworths Constitutional Law Reports* 728 (E); *Bulletin* 2001/3 [RSA-2001-3-011];
- *Member of Executive Council, Department of Welfare v. Kate* 2006 (4) *South African Law Reports* 478 (SCA); [2006] 2 *All South African Law Reports* 455 (SCA);
- *Ntame v. Member of Executive Council for Social Development, Eastern Cape, and Two Similar Cases* 2005 (6) *South African Law Reports* 248 (E); [2005] 2 *All South African Law Reports* 535 (SE);
- *Permanent Secretary, Department of Welfare, Eastern Cape and Another v. Ngxuzza and Others* 2001 (4) *South African Law Reports* 1184 (SCA); 2001 (10) *Butterworths Constitutional Law Reports* 1039 (SCA).

Spain

Constitutional Court

Important decisions

Identification: ESP-2008-1-001

a) Spain / **b)** Constitutional Court / **c)** First Chamber / **d)** 27.03.2007 / **e)** 62/2007 / **f)** Ana María Hidalgo Laguna v. the “Servicio Andaluz de Salud” / **g)** no. 100, 26.04.2008 / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

1.3.5.15 Constitutional Justice – Jurisdiction – The subject of review – **Failure to act or to pass legislation**.
 1.6.1 Constitutional Justice – Effects – **Scope**.
 5.3.4 Fundamental Rights – Civil and political rights – **Right to physical and psychological integrity**.
 5.4.19 Fundamental Rights – Economic, social and cultural rights – **Right to health**.

Keywords of the alphabetical index:

Health, protection, workplace / Pregnancy, worker, protection / Work, conditions.

Headnotes:

A public authority, which assigns a pregnant staff member to a dangerous activity in breach of its duty to prevent legally established occupational risks, is infringing that person's right to physical integrity (Article 15 of the Constitution).

There is no need to wait for real exposure to the risk before the right to physical integrity is violated: it is sufficient to prove a serious risk or danger to the pregnant woman's health.

The lack of any response from the public authority to the existence of a significant risk violates the worker's rights.

The Constitutional Court decided to deliver a judgment on a possible violation of substantive law because, after exhaustion of judicial remedies prior to the administrative appeal, a finding of procedural defects would merely have delayed the protection offered by the right to physical integrity.

Summary:

I. A civil servant employed by the “Junta de Andalucía” as veterinary co-ordinator of a health district received instructions from the district management to the effect that, starting the next day, she would be responsible for veterinary monitoring and inspection of the Coria del Río slaughterhouse. After performing her new duties for one day, she went on sick leave and lodged a complaint on the grounds of her pregnancy which, given that she received no reply, gave rise to an administrative dispute.

The Court of First Instance allowed the application after establishing the risk to the pregnant woman, noting that, inside the slaughterhouse, there were animals carrying diseases dangerous to the health of a pregnant woman, such as tuberculosis or brucellosis, and that her new duties demanded a physical effort that was highly inadvisable for a pregnant woman. The Appeal Chamber, however, dismissed the application, arguing that the authorities were unaware of the pregnancy of the employee, who, in any case, was on sick leave.

II. The judgment of the Constitutional Court found a violation of the basic law, set aside the appeal decision and upheld the decision at first instance allowing the application.

The judgment argues that the 1995 Law on the prevention of occupational risks placed a duty on employers to protect their workers from occupational risks, with particular emphasis on maternity protection. This law therefore applies to public authorities in respect of staff employed by them. This legal duty of protection has a constitutional dimension as it expands on the specific protection of the fundamental right to physical integrity of pregnant women (Article 15 of the Constitution).

A violation of the law will occur if, disregarding the legal provisions relating to health protection of female workers and protection of pregnancy, an employer assigns a female worker to a dangerous activity that might entail a serious risk to her health or her pregnancy. This would contravene the obligations incumbent on him or her in the matter of protection and prevention.

The Constitutional Court considers that the public authority should have adopted the legally prescribed measures to adapt the employee's working conditions, as it was proved that it was aware of her pregnancy, at least at the time of the complaint. The public authority's failure to act cannot be justified by the fact that the employee was on sick leave, as she would have had to return to work after her sick leave, with all the risks which that entailed.

From a procedural standpoint, the judgment states that a finding that the appeal judgment violated Article 24 of the Constitution would have served merely to delay the protection afforded by the right to life and physical integrity; the Court therefore held the principal violation to be a violation of Article 15 of the Constitution attributable to the administrative authorities.

Supplementary information:

Law no. 31/1995, of 8 November 1995 on risk prevention at work.

Cross-references:

- Judgment no. 160/2007.

Languages:

Spanish.



Identification: ESP-2008-1-002

a) Spain / **b)** Constitutional Court / **c)** Plenary / **d)** 29.01.2008 / **e)** 12/2008 / **f)** Election candidate parity / **g)** no. 52, 29.02.2008 / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

2.1.1.3 Sources – Categories – Written rules – **Community law.**

2.1.1.4.12 Sources – Categories – Written rules – International instruments – **Convention on the Elimination of all Forms of Discrimination against Women of 1979.**

4.5.3.1 Institutions – Legislative bodies – Composition – **Election of members.**

4.5.10 Institutions – Legislative bodies – **Political parties.**

4.9.7.1 Institutions – Elections and instruments of direct democracy – Preliminary procedures – **Electoral rolls.**

5.2.1.4 Fundamental Rights – Equality – Scope of application – **Elections.**

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

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

5.3.41 Fundamental Rights – Civil and political rights – **Electoral rights.**

Keywords of the alphabetical index:

Equality, formal / Equality, material / Election, candidate, gender / Election, party, list of candidates, gender, balance.

Headnotes:

The statutory requirement of election candidate parity is designed to achieve genuine gender equality in political representation.

Contrary to other systems, Article 9.2 of the Spanish Constitution provides for equality in practice, in the broad sense, in several fields, including political participation. It is for this reason that constitutional reform to promote gender equality in political representation is not considered necessary.

Striving to achieve gender equality on paper and in practice is a principle common to international human rights law and EU law.

Spanish law provides for a gender balance formula that does not require total gender equality and does not favour either sex. The relative parity requirement is legitimate in that equality as proclaimed in Article 1.1 of the Constitution implies not only formal equality but also that the authorities must strive to ensure equality in practice.

Restricting the freedom of parties and groups of voters to select and present candidates for general elections, elections in the devolved regions (Autonomous Communities) and local elections in order to achieve genuine equality in political representation is in keeping with the Constitution.

Summary:

The judgment concerns an appeal and a question regarding the constitutionality of Implementing Act no. 3/2007 of 22 March 2007 concerning effective gender equality. The second additional provision of the Act introduces various amendments to Implementing Act no. 5/1985 of 19 June 1985 concerning the general election system. The new Section 44bis requires a balanced gender breakdown in election candidate lists: men and women may not constitute less than 40%, respectively, of the candidates on electoral lists. The judgment did not declare this law unconstitutional. One judge voted against it.

According to the Constitutional Court, the contested reform of the electoral system was designed to ensure the effective participation of men and women in the institutions representing a democratic society. It did not introduce any reverse discrimination or compensatory measure favouring one sex over the other, but provided for a formula ensuring a gender balance. This measure did not ensure strict parity, in that it did not impose total gender equality, but ensured that election candidates of either sex could not account for less than 40% of the candidates. It thus had a twofold effect, in that it benefited both sexes.

Furthermore, the gender balance electoral requirement concerned only parties putting forward candidates, namely political parties, federations and coalitions of parties and groups of voters (Section 44.1 of the Electoral Act). It was therefore not a condition of eligibility or a ground for ineligibility and did not directly affect the right of individuals to stand for election.

The requirement that political parties put forward a balanced set of candidates was constitutional, given that equality as proclaimed in Article 1.1 of the Constitution meant not only formal equality (Article 14) but also equality in practice, as provided for in Article 9.2, which obliged the authorities to remove obstacles to equality and do everything possible to ensure that the equality of individuals and of groups was genuine and effective (Constitutional Court Judgment no. 216/1991 of 14 November 1991).

Given that political parties were associations with constitutional functions, they also represented an effective means of achieving the equality referred to in Article 9.2 of the Constitution. The freedom of parties and groups of voters to choose and put forward candidates was not, strictly speaking, a fundamental right, but an implicit prerogative afforded by the Constitution (Article 6 of the Constitution). Restricting this freedom in order to achieve effective equality in political representation was in keeping with the Constitution, for the legislature enjoyed wide-ranging discretion. In addition, the system in question, which merely required a balanced composition, was reasonable, in that it established a minimum of 40%, did not impose any order of precedence, made exceptions for places with fewer than 3,000 inhabitants and provided that the Act would not apply to places with fewer than 5,000 inhabitants until 2011. The rule banned only those political formations that were not prepared to include citizens of both sexes among their candidates. This was a proportional limitation, in keeping with constitutional principles, and therefore a valid one.

The rule did not therefore in any way infringe either the ideological freedom of political parties or their freedom of expression (Articles 16.1 and 20.1.a of the Constitution), given that the requirement that political formations wishing to take part in elections must submit balanced lists in no way implied that those political parties shared the values on which parity democracy was based. The existence of political formations that actively defended the predominance of persons of a particular sex or "macho" or "feminist" theories was not prohibited in any way. They were simply required, if seeking to defend these ideas through the ballot box, to do so by means of candidates of both sexes.

The same applied to electoral groupings. Persons wishing to exercise their right to stand for election through an electoral grouping must not only fulfil the eligibility requirements but also meet all the conditions relating to their capacity to stand for election in the strict sense, such as the requirement that they form a list with other people. The inclusion of the requirement that the list be gender-balanced by no means unduly restricted opportunities to exercise fundamental rights in practice.

Nor was there any infringement of the right of access to elected office (Article 23.2 of the Constitution), given that the right to stand for election did not include the fundamental right to be proposed or presented as a candidate by a political formation (Judgment no. 78/1987 of 26 May 1987) or necessitate a particular electoral system or means of assigning representative duties (Constitutional Court Judgment no. 75/1985 of 21 June 1985).

As for the right to vote, citizens did not enjoy the right to vote for lists of a particular composition, and no such right could therefore be violated.

The Constitutional Court acknowledged the importance of arguments based on rules of international, EU and comparative law (particularly in respect of Italy and France). International treaties were not considered a basis for assessing legally binding rules, but the human rights instruments ratified by Spain had interpretative value. The reference to Article 10.2 of the Constitution reflected Spain's wish to be part of an international legal system guaranteeing the defence and protection of human rights as a fundamental basis for the organisation of the State, and constituted an acknowledgement that it shared the values and objectives of the instruments concerned (Constitutional Court Judgment no. 236/2007 of 7 November 2007).

Instruments of general international law, including the Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979,

and the Council of Europe instruments – in particular the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, made it clear that seeking to achieve gender equality formally and in practice was a principle of international human rights law. This premise was also part of EU law (Article 3.2 of the EC Treaty) and was spelt out in the Lisbon Treaty of 13 December 2007, which had not yet come into force. International and European rules made no mention of the specific instruments to be used by States to ensure implementation of the principle of genuine equality.

The comparative law analysis was not a determining factor. In some countries, such as France, promotion of gender equality in political representation had required a prior reform of the Constitution, but there was a fundamental difference between the systems concerned and the Spanish system, particularly in view of the specific features of Article 9.2 of the Constitution.

Supplementary information:

Second additional provision of Implementing Act no. 3/2007 of 22 March 2007, concerning gender equality in practice.

Section 44 bis of Implementing Act no. 5/1985 of 19 June 1985, concerning the general electoral system, provides as follows:

“1. Lists of candidates for parliamentary and local elections and elections of members of island councils and inter-island councils of the Canary Islands within the meaning of the said Act, the European Parliament and the legislative assemblies of the Autonomous Communities (devolved regions) shall comprise a balanced number of men and women, such that candidates of either sex account for at least 40% respectively of the candidates on the list.”

Cross-references:

- STC no. 216/1991, of 14.11, FJ 5.

Languages:

Spanish.



Identification: ESP-2008-1-003

a) Spain / **b)** Constitutional Court / **c)** First Chamber / **d)** 25.02.2008 / **e)** 34/2008 / **f)** Juan Manuel Falcón Ros / **g)** no. 76, 28.03.2008 / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

4.11.2 Institutions – Armed forces, police forces and secret services – **Police forces.**

5.3.3 Fundamental Rights – Civil and political rights – **Prohibition of torture and inhuman and degrading treatment.**

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

Keywords of the alphabetical index:

Interrogation, injury, investigation, requirement / Custody, injury, investigation, requirement.

Headnotes:

The judicial authorities did not carry out an effective investigation, despite the existence of a reasonable suspicion of an offence of torture. The right to effective court protection, a right related to the right not to be subjected to torture or inhuman or degrading treatment, (Articles 24.1 and 15 of the Constitution) was therefore violated.

Torture and inhuman or degrading treatment are intolerable violations of human dignity, but also a direct denial of the transparency of the exercise of power in a state governed by the rule of law and of the requirement that such exercise comply with the law. Their prohibition constitutes a fundamental value in democratic societies.

Summary:

Mr Falcón was arrested by two Guardia Civil officers on 1 January 2004 for alleged disobedience, resistance and infringement of the law, when he appeared to have hidden something in his mouth in order to swallow it. According to the police, after being taken into custody, he began banging his head, fists and feet against the wall and the police officers had to handcuff him to prevent his injuring himself further. He was then taken to hospital, and a medical examination confirmed that he suffered pain and bruising. The detainee stated that he had been beaten up by the police officers, and it was decided to carry out a preliminary investigation. The Court decided not to follow up the case, on the presumption that the police account was correct and in view of the confirmation

provided by the medical examination. The Court also refuse to admit evidence called for by the complainant, namely a forensic medical report and a statement by a witness present when he was in custody.

Judgment no. 34/2008 stated that, in the circumstances, there was reason to be suspicious about the truthfulness of the factual report, and that such suspicion was sufficiently substantial to warrant continuing the judicial investigation. The judgment acknowledged, accordingly, that the right of the detainee to effective court protection of his right not to be subjected to torture or inhuman or degrading treatment (Articles 24.1 and 15 of the Constitution) had been violated.

According to the Constitutional Court, the content of the fundamental right set out in Article 15 of the Constitution was in keeping with Article 3 ECHR. Its implementation required robust judicial protection, which could not be sufficient or effective unless there was a proper investigation. It was therefore necessary to rule on the existence of reasonable suspicion of torture and inhuman or degrading treatment. Conduct of this type, which was very serious, was difficult to detect and prosecute. Experience and analysis confirmed that it could be prevented and punished only through particularly thorough and persistent court investigations of complaints lodged by members of the public.

In ruling on the specific circumstances of the case, the judgment cited the following criteria:

- a. It was necessary to offset the virtual absence of direct evidence in such situations against the fact that complaints of torture appeared to be well-founded.
- b. The Court should be very prudent in reaching a conclusion as to whether the complaint could be shown to be founded or was reasonable, and must compensate for the inequality of arms between the complainant and the police officers, as any injuries suffered by the detainee after he had been taken into custody which were not present before that date could be presumed to have been inflicted by the persons in charge of him.
- c. An assessment of the statements made to the courts by the detainee – a particularly appropriate means of investigation – and of his earlier statements to doctors, the police and judicial bodies must take account of the fact that the coercive potential of the effects of the violence could persist after the event.

Cross-references:

- STC no. 224/2007, of 22.10.2007;
- European Court of Human Rights of 11.04.2000, *Sevtap Veznedaroglu v. Turkey*; of 02.11.2004, *Martínez Sala and others v. Spain*.

Languages:

Spanish.



Identification: ESP-2008-1-004

a) Spain / **b)** Constitutional Court / **c)** Plenary / **d)** 11.03.2008 / **e)** 48/2008 / **f)** Louis Vuitton / **g)** no. 91, 15.04.2008 / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

2.1.1.4.8 Sources – Categories – Written rules – International instruments – **International Covenant on Civil and Political Rights of 1966.**

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

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

5.3.15 Fundamental Rights – Civil and political rights – **Rights of victims of crime.**

Keywords of the alphabetical index:

Victim, *jus ut procedatur* / Victim, right to appeal against acquittal.

Headnotes:

In drafting criminal law, the legislature may restrict the bringing of evidence at the appeal stage. A refusal to admit evidence called for by the party claiming damages on the grounds that it was adduced at the oral court hearings is justified, and not arbitrary. Accordingly, it does not in any way violate the right to effective court protection or the right to have proceedings take place with all due procedural safeguards (Article 24 of the Constitution).

The constitutional rights of the victim of an offence consist of rights relating to the essential rules of procedure governing criminal proceedings, which cannot be reduced to the mere bringing of proceedings or the mere appearance of the victim in the proceedings, but which are different from the safeguards afforded to the accused.

Summary:

I. The company Louis Vuitton Malletier brought criminal proceedings in connection with an industrial property offence consisting of the import and marketing, without its consent, of goods reproducing a registered international trade mark belonging to it. The Court acquitted the accused, as no proof was adduced that they knew that the products were fake. The company appealed on the grounds that the evidence had been incorrectly assessed and asked that statements by the accused and two of the witnesses be reconsidered at the hearing. The Appeals Division refused to allow this evidence to be adduced on the grounds that it was not authorised by law to admit it, and consequently ratified the judgment acquitting the accused.

II. Judgment no. 48/2008 does not in any way acknowledge that this court decision violated the fundamental rights of the company owning the trademark. The company's status in the criminal proceedings was that of a party claiming damages in its capacity as a victim of offences: it could not therefore lay claim to the constitutional rights protecting accused persons. The Constitution merely afforded the victim of an offence *jus ut procedatur*. This right could not be reduced to the mere bringing of proceedings or the mere appearance of the victim in the proceedings, but implied a right relating to the essential rules governing proceedings (Constitutional Court Judgments nos. 218/1997 of 4 December 1997 and 215/1999 of 29 November 1999).

The company could not therefore claim the right of appeal in a criminal case provided for in Article 14.5 of the International Covenant on Civil and Political Rights, as this protected only the accused, who had the right to have a conviction reviewed. The other parties to the criminal proceedings enjoyed the right of access to the form of appeal provided for by law, in accordance with the conditions laid down by legal rules, as part of the right to effective court protection (Article 24.1 of the Constitution). In the instant case, this right was fully respected by the Criminal Appeals Division.

Nor was the right to adduce evidence (Article 24.2 of the Constitution) violated: the Criminal Court refused to admit the evidence the company wished to adduce,

in a decision which was not taken arbitrarily, on the grounds that the law did not under any circumstances allow evidence adduced before the Criminal Court to be reiterated at the appeal stage. The prime requirement of this fundamental right was that evidence be lawful.

The Constitution did not in any way require that, in an appeal in a criminal case in which the facts stated and proved by the lower court were called into question, new evidence had imperatively to be heard. This was a question which only the legislature could settle, when exercising its power to organise appeals in criminal cases.

The principles that proceedings should be reduced to a minimum number of procedural stages, that both parties should be heard and that hearings should be public, which were implicit in the right to due process, definitely prevented the criminal courts from weighing up personal statements that had not been adduced as evidence before them. However, Judgment no. 167/2002 handed down by the Court at a formal sitting did not call into question the system of appeal established by Spanish law on the grounds that it was restrictive: that judgment and numerous subsequent decisions establishing and confirming the court's position merely stated that, pursuant to the case-law of the European Court of Human Rights, a conviction could not be based on evidence weighed up without due regard for the principles that proceedings should be reduced to a minimum number of procedural stages, that both parties should be heard and that hearings should be public. The Spanish Constitution, as interpreted in accordance with the international human rights treaties and agreements ratified by Spain (Article 10.2 of the Constitution), in no way required that the review of a criminal court judgment comprise a re-examination of the evidence, or that the evidence be reiterated before the Court reviewing the judgment.

Judgment no. 48/2008 therefore restricted the scope of Constitutional Court Judgment no. 285/2005, arguing, in short, that the Code of Criminal Procedure could be given divergent interpretations, provided these were deemed constitutionally valid.

Supplementary information:

Code of Criminal Procedure, approved by the Royal Decree of 14 September 1882, as amended. Article 795.3 of the Code (currently Article 790.3, pursuant to Law no. 38/2002 of 24 October 2002), which states that, during an appeal, it is possible to request and take "steps to consider evidence that [appellants] were unable to submit at first instance, and proposals they made that were wrongly rejected,

provided they lodged an appropriate protest within the time limit, as well as evidence that was not adduced for reasons beyond their control”.

Cross-references:

- Constitutional Court Judgments nos. 167/2002 and 285/2005, concerning minimum procedural safeguards for appeals in criminal cases.

Languages:

Spanish.



Identification: ESP-2008-1-005

a) Spain / **b)** Constitutional Court / **c)** Plenary / **d)** 09.04.2008 / **e)** 49/2008 / **f)** Extension of the President's term of office / **g)** no. 117, 14.05.2008 / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

1.1.1.1.2 Constitutional Justice – Constitutional jurisdiction – Statute and organisation – Sources – **Institutional Acts**.

1.1.2.3 Constitutional Justice – Constitutional jurisdiction – Composition, recruitment and structure – **Appointing authority**.

1.1.3.2 Constitutional Justice – Constitutional jurisdiction – Status of the members of the court – **Term of office of the President**.

1.3.1.1 Constitutional Justice – Jurisdiction – Scope of review – **Extension**.

1.3.5.4 Constitutional Justice – Jurisdiction – The subject of review – **Quasi-constitutional legislation**.

3.19 General Principles – **Margin of appreciation**.

3.22 General Principles – **Prohibition of arbitrariness**.

4.4.1.3 Institutions – Head of State – Powers – **Relations with judicial bodies**.

4.5.2 Institutions – Legislative bodies – **Powers**.

4.5.6 Institutions – Legislative bodies – **Law-making procedure**.

4.8.6.3 Institutions – Federalism, regionalism and local self-government – Institutional aspects – **Courts**.

Keywords of the alphabetical index:

Constitutional Court, composition, region, participation / Constitutional Court, law regulating activity, review, restraint.

Headnotes:

The participation of the Parliaments of the Autonomous Communities in the election of four Constitutional Court judges for which the Senate is responsible in no way violates the principles of the Constitution.

The constitutional bodies which participate in the appointment of judges to the Constitutional Court elect them and do not confine themselves to merely making proposals. Responsibility for appointing the judges lies with the King.

The extension of the term of office of the President of the Constitutional Court, which should coincide with the partial replacement of the Court every three years, is fully in keeping with the Constitution.

The legislature is not required by the Constitution to justify its legislative choices in the preamble to laws.

The Organic Law provided for in Article 165 of the Constitution is the only law able to regulate the institution of the Constitutional Court.

The law regulating the Constitutional Court is subject to review of its constitutionality; however, this review must be carried out very carefully and must be subject to scrutiny by the democratic legislature.

Summary:

The judgment gives a ruling on the application made by over fifty MPs of the main opposition party for a finding of unconstitutionality against Organic Law no. 6/2007 of 24 May 2007 introducing a significant reform of the Organic Law regulating the Constitutional Court (LOTIC). Two points are discussed in the judgment: the election of judges by the Senate and the extension of the President's term of office.

The 2007 Law amended Article 16.1 LOTIC to allow the Autonomous Communities to participate in the election of four judges by the upper chamber of the Spanish Parliament. Specifically, the law requires the Senate to choose from among “the candidates put forward by the legislative assemblies of the Autonomous Communities under the terms established by the chamber's rules of procedure”.

The judgment notes that this provision does not violate the Constitution both from the standpoint of legal sources and from the standpoint of the Senate's constitutional position, its members' prerogatives and the principles governing the territorial structure of the state. It does not infringe the rule whereby the chambers of parliament establish their own regulations (Article 72.1 of the Constitution) because the participation of the Autonomous Communities goes beyond the internal sphere of the Senate and, in addition, the broad reference in the law to the rules of the chamber guarantees that the Senate is able to specify the legal rules governing that participation by virtue of its institutional autonomy. Furthermore, only the Organic Law regulating the Constitutional Court (Article 165 of the Constitution), and no other, can serve as the basis for decisions relating to the status of that Court.

The Senate does not lose its power to select judges under Article 159 of the Constitution, although the exercise of that power is subject to a procedure shared with the Autonomous Communities. The Senate is the chamber of territorial representation (Article 69 of the Constitution) and the senators by no means consider that their powers have been infringed by the mere fact of exercising that power at the end of the legislative procedure. Moreover, the power-sharing system between the state and the Autonomous Communities remains unchanged. The aim is to establish a kind of principle of co-operation between them and one cannot overlook the fact that the power to elect a certain number of judges has the added dimension of a constitutional and institutional duty, combined with loyalty to the Constitution.

The judgment states that the Spanish Constitution, unlike that of neighbouring countries, contains detailed rules on the election of the members of the Constitutional Court. However, Article 159.1 of the Constitution by no means excludes the possibility of other rules expanding on constitutional provisions which, among other things, say nothing about the procedure to be followed with regard to this election. The legislature enjoys great latitude in this regard. But the Court's mission entails formal and substantive limits which are provided for not only in the rules arising from Title IX of the Constitution, but also in the model of the Constitutional Court deriving from a joint interpretation of the Constitution.

Regarding the appointment of judges, the judgment stresses that the option chosen by the drafters of the Constitution is based on the participation of different constitutional bodies (two judges put forward by the government, two by the General Council of the Judiciary, four by the Chamber of Deputies and another four by the Senate). The outstanding feature

in this is the role played by the parliament, insofar as both chambers hold the same position, although this does not apply to the way their powers are exercised. Furthermore, the constitutional choice of a parliamentary monarchy as the political form of the state (Article 1.3 of the Constitution) involves the Senate and the other constitutional bodies mentioned in Article 159.1 of the Constitution, which are responsible for electing the judges – and not just putting forward proposals – and the King, who is responsible for appointing them by a formal ratified decision (Articles 159.1 and 64.1 of the Constitution).

The judgment is concerned secondly with the presidency of the Court. The 2007 reform states that if the President's three-year term of office does not coincide with the replacement of the Constitutional Court, it shall be extended up to the date on which the replacement is completed and the new judges take office.

The judgment considers that this provision does not violate the Constitution either. First of all, it dismisses the application relating to the extension of the Vice-President's term of office, given that this position is not provided for in the Constitution, which regulates only that of the President in Article 160 of the Constitution. Then the judgment notes that the rules governing this constitutional principle are not complete and do not preclude intervention by the Organic Law regulating the Constitutional Court with the aim of further developing them and adding to them. It is not considered to be of decisive importance that the subject is not expressly mentioned in Article 165 of the Constitution. The doctrine relating to the strict nature of reserved matters in organic laws should not be applied to this type of organic law as, in this case, the rules offer no other means (ordinary law) of regulating the reserved matters.

The aim of ensuring that the partial replacement of the Court coincides with the internal election of its President cannot be regarded as arbitrary and under no circumstances violates any other constitutional principle because what is sought here is harmonisation of different aspects of the organisational model of the Constitutional Court stemming from Articles 159.3 and 160 of the Constitution, namely that it should be partially replaced every three years, that its members should participate in the election of the President and that the President's term of office should also be three years. It is not a question of granting a new three-year term of office while disregarding the powers of the Court sitting in full bench, but simply of extending the term of office up to the date on which the four judges who leave office every three years are replaced. Furthermore, the fact that the President is always a member elected by all the judges making up the Court and that he retains that position up to the date on

which judges are replaced can facilitate the exercise of the President's representation and management functions.

In addition, although experience cannot be established as a guiding principle, it is nevertheless important to stress that, regarding the repercussions of delays in the renewal of the President's term of office, the Court has always taken the view that the term of office should be extended.

Lastly, Judgment no. 49/2008 asserts that there is a certain rational explanation for the disputed legal rules, which therefore cannot be said to be arbitrary within the meaning of Article 9.3 of the Constitution, which prohibits arbitrary action by public authorities. The prohibition of all arbitrary action, particularly as regards the democratic legislature, must under no circumstances be confused with a legitimate political dispute, the aim pursued by the law or the means employed by the law to do so. The democratic legislature is under no obligation to state the reasons why it took one decision or another in exercising its freedom of decision. It is the Council of Ministers which must accompany its draft laws with an explanatory memorandum and the necessary background material to enable the chambers to reach a decision (Article 88 of the Constitution).

The Court had previously stated that it had full scope to review the constitutionality of the organic law by which it is regulated. However, in so doing it must take due account of the institutional and functional considerations which always accompany any review by the democratic legislature, insofar as the Court is subject to the Constitution and its own organic law (Article 1 LOTC). The legislature must under no circumstances confine itself to executing the Constitution, but is empowered under the Constitution to take any measures which, in a context of political pluralism, do not overstep the limits deriving from the basic law. In addition, when it regulates the status of the Constitutional Court itself, its rules must not be declared unconstitutional unless there is an obvious and unavoidable conflict with the text of the Constitution.

Supplementary information:

The judgment was approved by the full Court consisting of eight judges. The President and Vice-President refrained from taking part in the process (ATC no. 387/207, 16 October 2007) and two judges were challenged by the government (ATC no. 81/2008, 12 March 2008). Three of the other judges had been challenged by the applicant MPs in an application which was declared inadmissible (ATC no. 443/2007, 27 November 2007).

The four judges appointed on a proposal from the Senate should have been replaced in December 2007.

Languages:

Spanish.



Identification: ESP-2008-1-006

a) Spain / **b)** Constitutional Court / **c)** Second Chamber / **d)** 14.04.2008 / **e)** 51/2008 / **f)** Annie Arraud Milbeau v. Santillana Publications / **g)** no. 117, 14.05.2008 / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

5.1.1.4 Fundamental Rights – General questions – Entitlement to rights – **Natural persons**.
5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression**.
5.3.31 Fundamental Rights – Civil and political rights – **Right to respect for one's honour and reputation**.
5.4.22 Fundamental Rights – Economic, social and cultural rights – **Artistic freedom**.

Keywords of the alphabetical index:

Literary creation, limits / Deceased, reputation, respect, right.

Headnotes:

The right to literary production and creation (Article 20.1.b of the Constitution) protects the freedom of the process of literary creation, guaranteeing its immunity from any form of prior censorship (Article 20.2 of the Constitution) and protecting it from any unlawful interference by the public authorities or private individuals.

Literary creation gives birth to a new reality which is transmitted through the written word and cannot be identified with empirical reality. It is therefore impossible to apply to this field the criterion of truthfulness, which defines freedom of information, or that of the public importance of the characters or events described, or that of the need for information to contribute to the formation of free public opinion.

The explicit constitutionalisation of the right to literary production and creation gives it an autonomous content which goes beyond, but does not exclude, freedom of expression (Article 20.1.a of the Constitution).

When people die, their reputation changes to a large extent, being associated above all with the memories that close family members have of them. For this reason, it can under no circumstances be claimed that their constitutional position and the degree of protection afforded to them are the same as in the case of living persons.

Summary:

In a novel entitled “Jardín Villa Valeria”, a reference can be seen to the character, profession, political activism, clothing and sexual behaviour of a real person who had died eleven years before the publication of the book. This person’s widow brought a civil action against the author and the publishing company, arguing that this passage in the book constituted an unlawful invasion of her husband’s privacy.

Although this issue had never been examined in any earlier decisions, the Constitutional Court analysed it in the context of the exercise of the fundamental right to literary production and creation recognised in Article 20.1.b of the Constitution.

The Constitutional Court considered that the literary nature of the work in which the impugned passage appeared was beyond doubt. Although the passage referred to real people, places and events, the novelistic nature of the work and the fact that it did not consist of memoirs precluded one from thinking that it was not a fictional creation: the portrayal of the generation to which the character in question belonged and his development during the political transition period did not claim to be true to life, but made use of literary devices such as exaggeration. Good taste or literary quality were not constitutional limits to the right to literary creation.

Given the specific circumstances of the case, the person’s reputation cannot be considered to have been damaged. It cannot be denied that the passage in question arises from the exercise of the right to literary production and creation and that this right protects the creation of a fictional universe which can use facts taken from the real world as points of reference. It is not possible to apply criteria of truthfulness or instrumentality to limit a creative and, hence, subjective process such as that of literary creation.

Accordingly, although the passage complained of clearly identifies the person alleged to have been wronged, it cannot be considered damaging to that person’s reputation as he had died eleven years before. Furthermore, no “procedural succession” was involved and the right to protection of reputation cannot be extended to the person’s family. For these reasons, the sentences alleged to have damaged his reputation cannot be regarded as insulting or pejorative.

Languages:

Spanish.



Switzerland

Federal Court

Important decisions

Identification: SUI-2008-1-001

a) Switzerland / **b)** Federal Court / **c)** Second Public Law Chamber / **d)** 25.10.2007 / **e)** 2C_335/2007 / **f)** SRG SSR idée Suisse v. Kessler and others and Independent Authority for the Examination of Broadcasting Complaints / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 134 I 2 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

3.17 General Principles – **Weighing of interests.**

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:

Election, media, public opinion formation / Elections, media, balanced presentation of candidates.

Headnotes:

Article 17.1 of the Federal Constitution (freedom of the media), Article 34 of the Federal Constitution (political rights) and Article 93 of the Federal Constitution (radio and television); compatibility with broadcasting legislation of a programme (“An eccentric in the Fribourg government”) portraying an incumbent member of the *Conseil d’État*, broadcast immediately before an election.

Scope of broadcasters’ mandate and independence in matters of programme design, and of the duty to ensure objectiveness and diversity of information in the case of programmes broadcast during a campaign preceding an election or a vote (recital 3).

Broadcasting a subjective, favourable portrait of a politician who had had an unconventional career immediately before an election is likely to prevent citizens from forming their own opinion and to

jeopardise equality of opportunity for all candidates; a programme of this kind accordingly breaches the duty of objectiveness and diversity laid down in broadcasting legislation (recitals 2 and 4).

Summary:

German-speaking Swiss television had broadcast, as part of its programme “*Schweiz Aktuell*” (Switzerland Today), a portrait of Pascal Corninboeuf, a member of the *Conseil d’État* of the canton of Fribourg, entitled “An eccentric in the Fribourg government”. The programme had been broadcast a few days before the elections to the Fribourg *Conseil d’État*.

A number of private individuals had complained to the Independent Authority for the Examination of Broadcasting Complaints, which had allowed their application and found that the programme had breached the principles governing television broadcasts.

Lodging a public-law appeal, the Swiss Radio and Television Company (SSR) asked the Federal Court to set aside the independent authority’s decision.

II. The Federal Court dismissed the appeal.

The Federal Law on Radio and Television gave practical effect to Article 93 of the Federal Constitution, providing that radio and television shall contribute to education and cultural development, to the free formation of opinion and to entertainment, that they shall take into consideration the country’s particularities and the cantons’ needs and that they shall present events in a truthful way and give a balanced reflection of the diversity of opinions. In addition, the independence of radio and television and their autonomy in matters of programme design are guaranteed.

When evaluating a specific programme, it was necessary to take into consideration the guarantee of autonomy in matters of programme design. A broadcaster was free to deal with any subject matter and to do so in a critical manner. An intervention by the supervisory authority was justified only in the light of the public right to information or other constitutional rights. It was a question of balancing opposing interests. The supervision must be confined to a review of lawfulness and could take place only where the minimum standards concerning programme content were at stake. These principles included the duties of objectiveness and diversity of information. In general, the principle of diversity required that programmes reflect a plurality of opinions. In periods preceding elections or popular votes, it was a question of avoiding any one-sided influence on public opinion. Article 34 of

the Federal Constitution guarantees political rights and safeguarded the freedom of formation of citizens' opinions and the unaltered expression of their will. The closer a programme's links with an election or vote, the greater weight must be attached to the duty of objectiveness and diversity of information. A Recommendation by the Committee of Ministers of the Council of Europe of 9 September 1999 also called for broadcasters' coverage of elections to be fair, balanced and impartial.

The programme in question had been broadcast only six days before the elections to the *Conseil d'État*, in which Pascal Corminboeuf was standing. It gave a very positive view of the candidate. The timing of the broadcast and its content were accordingly likely to influence citizens during this election. It did not matter that the programme had not been designed as a political contribution and was aimed at a broad audience. The supervisory authority's decision that press standards had been breached accordingly violated neither conventional nor constitutional law.

Languages:

German.



Identification: SUI-2008-1-002

a) Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 27.02.2008 / **e)** 1D_12/2007 / **f)** A. v. Commune de Buchs / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 134 I 49 / **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:

Headscarf, obstacle to naturalisation / Religion, headscarf, symbol / Naturalisation, integration / Religion, affiliation / Religious symbol / Religious dress.

Headnotes:

Discriminatory nature of refusal of naturalisation based on wearing of the headscarf. Article 8.2 of the Federal Constitution (prohibition of discrimination) and Article 15 of the Federal Constitution (freedom of conscience and belief).

Scope of the prohibition of discrimination and of freedom of conscience and belief (recitals 2 and 3.1).

Refusal of naturalisation founded on wearing of the headscarf as a religious symbol is likely to cause unacceptable prejudice to the applicant without having a sufficient legal basis: mere wearing of the headscarf does not in itself reflect a lack of respect for democratic and constitutional values (recital 3.2).

Summary:

In 1981, Mrs A., who came from Turkey, had settled in Switzerland and married B., also a Turkish national. The couple had had two children. Since 1995 the family had been living in Buchs in the canton of Aargau.

A. had filed a naturalisation request with the authorities of this municipality. Her husband had refrained from doing so. On the basis of an interview with the applicant, the municipal council (executive authority) had noted that A. had made a good impression and was well integrated and had accordingly applied to the municipal parliament for A. to be granted citizenship of the municipality.

The municipal parliament had discussed A's request. Some members had criticised the fact that A. wore the headscarf, which had been considered not as a religious symbol but as a sign of a fundamentalist religious attitude, favouring women's submission to male authority. This attitude had been regarded as incompatible with the constitutional guarantee of equality and with Switzerland's democratic and political values. The municipal parliament had therefore given a negative decision, which the municipal council had notified to Mrs A., informing her of the reasons.

Lodging a subsidiary constitutional appeal, Mrs A. asked the Federal Court to annul the decision of the Buchs municipal parliament. She alleged discrimination in the naturalisation procedure because she wore the headscarf as a religious symbol, which discrimination infringed the guarantees of Article 8.2 of the Federal Constitution. She also relied on freedom of conscience and belief in accordance with Article 15 of the Federal Constitution and Article 9 ECHR.

II. The Federal Court allowed the appeal and annulled the municipal decision.

The grounds for refusing naturalisation cited were such as to discriminate against the applicant, within the meaning of Article 8.2 of the Federal Constitution. Under this article, no one must be discriminated against because of his or her religious, philosophical or political beliefs. To determine the scope of religious beliefs, reference should be made, *inter alia*, to the freedom of conscience and belief guaranteed by Article 15 of the Federal Constitution.

Freedom of conscience and belief safeguards citizens from any interference by the State such as to hamper their religious beliefs. It includes the internal freedom to believe, not to believe and to change one's own religious beliefs at any time and in any way and the external freedom to manifest, practise and communicate one's religious beliefs or world view within certain limits. The guarantee of religious observance concerns not only religious worship and requirements but also expressions of religious life, in so far as they are kept within certain limits, such as, for example, the wearing of particular religious dress. The constitutional guarantee accordingly also protects the wearing of the headscarf as a manifestation of religious belief. It must be respected throughout the legal system by all state bodies.

There is discrimination under Article 8.2 of the Federal Constitution where a person is treated differently by reason of their affiliation to a specific group which, historically or in current social reality, is excluded or devalued. According to the case-law, discrimination exists where a person in a similar situation to another is clearly treated unequally with the aim or effect of placing them at a disadvantage, on the basis of a criterion of distinction concerning an essential element of their identity which could not be changed or only with difficulty. However, the constitutional provision does not rule out any form of distinction, while requiring an appropriate ground for it.

In this case, the wearing of the headscarf was the sole ground for refusing naturalisation. The Islamic headscarf is regarded as a religious symbol. The applicant was therefore treated unequally by comparison with applicants of another religion or those who did not wear the headscarf. There was no reason justifying such unequal treatment. The mere fact that the applicant wore the headscarf was not in itself a manifestation of any belief in women's submission to men. It had not been shown or even alleged that the applicant, on the basis of her religious beliefs, behaved in her day-to-day life in a manner contrary to the principles and values of a

democratic state governed by the rule of law. Her integration had not been called into question.

In these circumstances there was no tangible ground that might justify unequal treatment based on the manifestation of the applicant's religious beliefs. The municipal parliament's decision had therefore discriminated against her within the meaning of Article 8.2 of the Federal Constitution. It was accordingly annulled.

Languages:

German.



Identification: SUI-2008-1-003

a) Switzerland / **b)** Federal Court / **c)** Second Social Law Chamber / **d)** 06.03.2008 / **e)** I 725/06 / **f)** C. v. Office AI of the canton of St Gallen / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 134 I 105 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

5.2.2.8 Fundamental Rights – Equality – Criteria of distinction – **Physical or mental disability**.
5.3.33 Fundamental Rights – Civil and political rights – **Right to family life**.

Keywords of the alphabetical index:

Insurance, invalidity / Invalidity, benefit.

Headnotes:

Article 8 ECHR; Article 8.2 and Article 8.4 of the Federal Constitution (equality) and Article 14 of the Federal Constitution (right to family life). Coverage of the costs of disability adaptations to a second place of abode.

A child born in 1991 who had been paraplegic since 2003 lived with his mother in M. and spent every second weekend and part of the school holidays with his father and sister in S.

The invalidity insurance scheme must also bear the cost of disability adaptations to the home in S. where, failing such transformation, enjoyment of the fundamental right to stay with the father is entirely impossible. As this is the second place of abode used by the insured person, the claims are confined to the most rudimentary adaptations making a stay there possible, provided the father's assistance is available.

Summary:

The applicant C., born in 1991, had been paraplegic since 2003 as a result of an accident. He lived with his mother, who was separated from his father, in M. The invalidity insurance scheme had acknowledged the need to adapt the mother's home and the municipal school in M. to the child's needs and had borne the corresponding costs. Regarding the father's home in S., where the applicant spent every second weekend and part of his holidays, the insurance invalidity scheme had refused to fund any adaptation work. An objection by C. had been dismissed, as had his appeal to the Administrative Court of the canton of St Gallen.

Lodging an administrative-law appeal, C. asked the Federal Court to set aside the Administrative Court's judgment. He relied *inter alia* on the guarantees resulting from Article 8 ECHR and Articles 8 and 14 of the Federal Constitution.

II. The Federal Court allowed the appeal, set aside the impugned decision and referred the case back to the Invalidity Insurance Office for a new decision in accordance with the terms of its judgment.

Under Article 8.2 of the Federal Constitution, no one shall be discriminated against because of physical, mental or psychic impairment. This article accordingly prohibits any clearly unequal treatment having the aim or the effect of placing certain persons or groups of persons at a disadvantage. However, it does not apply to the present case. It is not the State that is disadvantaging C. because of his disability. C. is applying for social insurance benefits in order to attain living conditions comparable with those of others. The question of possible discrimination would arise only if there was a differential in State benefits according to prohibited criteria. The provision of Article 8.4 of the Federal Constitution requiring that the law institute measures to eliminate the inequalities suffered by people with disabilities entails a legislative task but guarantees no constitutional rights to individuals.

In addition, C. relied on the guarantees enshrined in Article 8 ECHR and Article 14 of the Federal Constitution, whereby everyone is entitled to respect

for their family life. This freedom is primarily negative in scope and is targeted against the State; in principle, it does not confer an entitlement to certain benefits. It is not violated by the invalidity insurance scheme's failure to cover all the costs arising from a disability. However, the guarantees relied on can be taken into consideration when it is a matter of interpreting legislation providing for the service of benefits in so far as that legislation allows the authorities a degree of discretion.

From this standpoint, the social insurance scheme cannot withhold all support from C. on the sole ground that he does not live in S. The applicant is entitled to regular contact with his parents, not least where the father and the mother are separated. Such contact is impossible in that C's disability prevents him from staying with his father. Measures to adapt the father's home are accordingly necessary to permit a family life, within the meaning of the conventional and constitutional guarantees.

It is not the purpose of social insurance to eliminate all disadvantages associated with a disability. To assess the extent of the support, account must be taken of the fact that the father's home in S. is not C's permanent place of abode. It is also allowable to ask the father to provide more assistance to allow C. to spend certain weekends and holidays in his home. For these reasons, the Social Insurance Office must review C's application, taking into account the above considerations.

Languages:

German.



“The former Yugoslav Republic of Macedonia” Constitutional Court

Important decisions

Identification: MKD-2008-1-001

a) “The former Yugoslav Republic of Macedonia” / b) Constitutional Court / c) / d) 30.01.2008 / e) U.br.202/2007 / f) / g) / h) CODICES (Macedonian, English).

Keywords of the systematic thesaurus:

5.2.2.8 Fundamental Rights – Equality – Criteria of distinction – **Physical or mental disability.**

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

Keywords of the alphabetical index:

Disabled person / Property, possession.

Headnotes:

The right and the duty of the State Sanitary and Health Inspectorate, when supervising the implementation of the Law on Mental Health, to direct that somebody with mental illness may be able to exercise a right that has previously been restricted, without any medical grounds, does not violate the right of mentally ill persons to own property. The provision in point allows possession and use of objects for personal use and hygiene, i.e. enjoyment of special rights with the aim of protection of health. It is in line with the Constitution.

Summary:

I. An association of citizens with disabilities asked the Court to assess the constitutionality of certain provisions of the Law on Mental Health (“Official Gazette of the Republic of Macedonia”, no. 71/2006). They alleged that the discretionary power of the State Sanitary and Health Inspectorate to decide on the right of somebody with mental illness to own items for personal use violated the constitutionally guaranteed right of property and discriminated against this category of persons on the grounds of their disability.

II. Under the provisions of the Law on Mental Health, the State Sanitary and Health Inspectorate has the right and duty to direct that somebody with mental illness may own items for personal use and clothing, ensuring personal hygiene, as well as for other personal and indispensable needs in line with the condition of his mental health.

The Court took account of the provisions of Articles 8.1.3.6, 9 and 30 of the Constitution and the provisions of the Law on Mental Health. In particular, it noted the provision enshrining the right of somebody with mental illness to own objects for personal use, for clothing, ensuring personal hygiene, as well as for other personal and indispensable needs in line with the condition of his or her mental health. See Article 14.7 of the Law.

The Law goes on to stipulate that a specialist doctor, taking into account the condition of the patient's mental health, shall determine whether the above right should be restricted, in order to protect the health of the patient or that of others around them.

The Court found that the contested Article 38.8 of the Law was a provision enabling the exercise of the above right, in that it authorised the State Sanitary and Health Inspectorate to supervise the implementation of the Law. Because the article under dispute allows for the exercise of a right that had previously been restricted, it could not be described as a provision violating the right of mentally ill persons to own property and objects for personal use and hygiene.

Both provisions of the Law take as a starting point the condition of the patient's health. This will determine whether the mentally ill person can exercise the given rights and enjoy the restricted rights. The rationale behind the provisions is the protection of the patient's health and that of those around them, from possible physical injuries that could arise from the nature of the illness.

The Court found that the Law was in conformity with the principle of equality, in terms of the enjoyment of the rights, and that Article 39.8 of the Law on Mental Health was in accordance with Articles 9 and 30 of the Constitution.

Languages:

Macedonian.



Identification: MKD-2008-1-002

a) “The former Yugoslav Republic of Macedonia” / b) Constitutional Court / c) / d) 13.02.2008 / e) U.br.216/2007 / f) / g) / h) CODICES (Macedonian, English).

Keywords of the systematic thesaurus:

3.5 General Principles – **Social State.**

3.11 General Principles – **Vested and/or acquired rights.**

5.4.14 Fundamental Rights – Economic, social and cultural rights – **Right to social security.**

5.4.16 Fundamental Rights – Economic, social and cultural rights – **Right to a pension.**

Keywords of the alphabetical index:

Pension, employment, reduction / Pension, reduction.

Headnotes:

Legislation providing for a reduction of the amount of pension during the period in which the pensioner earns for his or her living in another manner (employment or other paid activity) does not violate the principle of social justice and the principle of vested/acquired rights. The right to a pension under these circumstances is neither transferred nor taken away, but simply temporarily restricted in cases stipulated by law.

Summary:

I. The petitioner requested an assessment of the constitutionality of Article 154 of the Law on Pension and Disability Insurance. He claimed that the old-age pension was a vested right and no one, under any conditions whatsoever, could restrict the payment of the pension to a pensioner whilst he or she was employed or carrying out an activity.

Paragraph 1 of the disputed article provides that if a pensioner is employed or occupied fulltime in an activity in the Republic of Macedonia or abroad, he or she will be paid 30% of the pension. Paragraph 2 allows a pensioner working half of the full working hours to be paid 50% of the pension. If they work for less than half of the full working hours, they will receive 70% of the pension. Under paragraph 3, if the beneficiary of a disability pension or survivors' pension does not attend a compulsory check-up, payment of his or her pension shall cease. If there are justified reasons for their failure to attend, such as hospital treatment in the country or abroad, payment of the pension shall not be stopped until the

completion of the treatment, or the appearance at the compulsory check-up.

II. The Constitutional Court took as its starting point the definition of the Republic of Macedonia in its Constitution as a social state, and constitutional principles of humanity, social justice and solidarity set down as fundamental values of the constitutional order. It held that the right to an old-age pension and the right to a disability pension are personal rights that are acquired on grounds of work, and based on the principle of social justice and generation solidarity.

A condition for the exercise of these rights is termination of employment because the person insured has reached a certain age, conditioned by the realisation of minimum length of service, as well as on grounds of general or reduced disability for employment of the insured person. Thus, the pension insurance in the cases noted is actually providing social security for citizens after the termination of their employment or after the termination of the performance of an activity or of another legally defined manner of providing means for living.

The Court found that the disputed article did not violate the principle of social justice defined in Article 8.1.8 of the Constitution. Neither did it violate the principle of acquired rights. This was because there was no constitutional obstacle preventing the pensioners from ensuring their social security in another manner, that is, by finding other paid work, as set out in legislation. The Court therefore found no substance in the allegations in the petition to the effect that the legal provisions violated the right to work, freedom of choice of work and availability of work for all under equal conditions.

However, the Court noted that although the constitutional rights to social security and social insurance are defined by law and collective agreement, this does not rule out the possibility of alterations to these rights, under certain conditions and circumstances. These would also need to be set down by law and collective agreement.

Interim restriction of the use of the full amount of the pension where the beneficiary of the pension becomes employed (i.e. performs an activity from which he or she earns a living) does not infringe upon the already vested right to pension. It does not transfer or remove it, but merely restricts its use in cases and under conditions set down by law. The citizen's social security does not come into question, and there is no breach of the principle of social justice. In the provisions under dispute, the legislator does guarantee that the pensioner will receive part of

the pension, during his or her new working engagement. This is a personal and material right, gained in the system of pension and disability insurance, which ensures social security. The legislator also allows for the possibility of new work for pensioners, which will enable them to earn extra income, thus enhancing their material situation and social security, not only while they are actually working, but also with the increase in the amount of the pension after the period of work. The Constitutional Court accordingly ruled that the provision of the Law that restricts payment of the full amount of the pension in certain cases does not exceed the constitutional frameworks under which the legislator governs the sphere of pension and disability insurance. In so doing, the legislator is taking care of social security and social justice for insured persons, and aiming to provide a sustainable and stable pension system based on the principle of social justice and generation solidarity.

Languages:

Macedonian.



Identification: MKD-2008-1-003

a) "The former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 13.03.2008 / **e)** U.br.220/2007 / **f)** / **g)** / **h)** CODICES (Macedonian, English).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Passport, issuing / Passport, photograph / Passport, biometric data.

Headnotes:

The Ministry of Internal Affairs is competent to issue citizens' travel documents. It is therefore responsible for ensuring and guaranteeing biometric characteristics in travel documents in accordance with the security

standards laid down in international instruments. Taking a photograph of the citizen for the purpose of issuing a passport is an integral part of the administrative procedure. It does not constitute photography as an economic activity, governed solely by market laws.

Summary:

I. The Chamber of Craftsmen (Section of Photographers) requested an assessment of the constitutionality of Article 26.2 and 26.3 of the Law on Travel Documents of Citizens of the Republic of Macedonia. They also asked for an assessment of Article 2-b.2 of the Rulebook for Changing and Supplementing the Rulebook for the Forms of Travel Documents and Visas of Citizens of the Republic of Macedonia. The Chamber raised concerns about methods of photography for passports and record keeping.

The petitioner suggested that the contested provisions violated the constitutional guarantee of the freedom of the market and entrepreneurship, because they provided a profitable economic activity for the ministry. With such legal competence, it gained the status of an economic subject, with a monopoly on the market for carrying out photographic activity. Under the provisions of the Law and Rulebook, only the Ministry of the Interior could photograph citizens of the Republic of Macedonia for the entry of the biometrical characteristics in passports being issued to citizens.

II. The Court found that by photographing applicants for passports, the Ministry of the Interior provides biometrical characteristics of the applicant with a view to issuing him or her with a passport. Such activities fall within the competence of this body of state administration, with quality standards and security formats set out by Parliament. The Ministry only takes photographs of applicants for travel documents. It does so in order to provide biometrical data for the passport, and for no other purpose.

The photograph is a biometrical characteristic of the countenance of the holder of the travel document. The Ministry of the Interior, as the competent body with the act of issuing the document within the frameworks of the administrative procedure, verifies the data in the document based on the biometrical characteristics.

Hence, photography provided by the Ministry is a biometrical characteristic. The actions that it undertakes are within the framework of the administrative procedure it conducts in the issuing of the document the data of which is verified by the Ministry. They derive from the administrative actions of the body in accordance with law.

The Court noted that the travel documents should include security characteristics in line with the standards in international law. See EU Council Regulation no. 2252/2004 on the standards for security characteristics and biometry in passports and travel documents issued in member states.

The Constitutional Court accordingly found no substance to the petitioner's contention that the contested provisions enabled the state, as an economic subject, to carry out an economic activity – photography – and, because of its monopolistic conduct on the market obtained profit to the detriment of other economic subjects carrying out the photographic activity. The special standards needed for photographs for travel documentation form a biometrical characteristic and an integral part of administrative procedure. It does not constitute an economic activity, governed solely by market laws.

Languages:

Macedonian.



Tunisia

Constitutional Council

Important decisions

Identification: TUN-2008-1-001

a) Tunisia / **b)** Constitutional Council / **c)** / **d)** 23.06.2005 / **e)** 34-2005 / **f)** General Principles Act on the advancement and protection of persons with disabilities / **g)** *Journal officiel de la République tunisienne - Lois et Décrets* (Official Gazette), 19.08.2005, 66, 2128 / **h)** CODICES (Arabic, French).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.

5.1.1.4.2 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Incapacitated**.

5.2.2.8 Fundamental Rights – Equality – Criteria of distinction – **Physical or mental disability**.

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

Keywords of the alphabetical index:

Equality effective / Human rights, general guarantee / Disabled person, advancement, protection / Solidarity, mutual assistance.

Headnotes:

Even though Article 6 of the Constitution stipulates equality in respect of rights and obligations and before the law, it is possible to institute positive discrimination on behalf of certain categories of persons with a view to effective equality by referring to the global connotation of human rights in Article 5 of the Constitution. Such positive discrimination must not affect the fundamental rights guaranteed by the Constitution; it must be aimed strictly at equal opportunities, and be characterised by proportionality between the advantages granted to the persons concerned and the goal pursued.

Special stipulations of State responsibility towards public institutions and individuals may be made to assist certain persons, in keeping with Article 5 of the Constitution which provides that the State and society

and mutual assistance between individuals, groups and generations.

Summary:

I. Under the mandatory referral procedure set out in Article 72 of the Constitution, the President of the Republic asked the Constitutional Council to assess a bill for a General Principles Act on the advancement and protection of persons with disabilities, in terms of its conformity and compatibility with the Constitution. The bill provided for privileges, advantages, facilities and exemptions for persons with disabilities. For instance, a system of quotas in training and employment was instituted, as were preferential integration measures in respect of education. Furthermore, privileges were granted to the persons concerned in public transport. They also enjoyed coverage by the social security structures of their expenses for care, hospitalisation and appliances. Finally, a tax reduction was prescribed for families having children with disabilities.

II. The Council considered the provisions of the bill in the light of the principle of equality laid down by Article 6 of the Constitution. It finally held that the Constitution did not prohibit positive discrimination as long as it was intended to ensure effective equality between citizens. Its reasoning invoked Article 5 of the Constitution, which on the one hand gives fundamental freedoms and human rights a global connotation and on the other hand lays down the duties of solidarity and mutual assistance in society.

The Council did not find any unconstitutionality in the bill before it and thus delivered an opinion certifying its conformity and compatibility with the Constitution.

Supplementary information:

The bill subsequently went before Parliament (Chamber of Deputies). After its approval, it was again submitted by the President of the Republic to the Constitutional Council for examination of the substantive amendments made to it in Parliament. The Council delivered Opinion no. 59-2005 of 10 August 2005 on the bill, in which it found no unconstitutionality. It was then possible for the bill to be promulgated by the President of the Republic as General Principles Act no. 2005-83 of 15 August 2005 on the advancement and protection of persons with disabilities.

Languages:

Arabic, French (translation by the Council).



Turkey Constitutional Court

Important decisions

Identification: TUR-2008-1-001

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 03.01.2008 / **e)** E.2005/151, K.2008/37 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 29.03.2008, 26831 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

1.2.3 Constitutional Justice – Types of claim – **Referral by a court.**
 3.17 General Principles – **Weighing of interests.**
 3.21 General Principles – **Equality.**
 4.5 Institutions – **Legislative bodies.**
 5.2.2.12 Fundamental Rights – Equality – Criteria of distinction – **Civil status.**

Keywords of the alphabetical index:

Criminal proceedings, sentencing / Victim, crime, family member / Domestic, violence, prevention / Penalty, increased for attack against family member.

Headnotes:

The legislator may enact different criminal sanctions, depending on whether somebody has committed the crime of laceration against a close relative or against somebody else. The state is obliged to prevent domestic violence. The application of the principle of equality before the law in criminal law does not require that all criminals be punished in the same way. Different rules against individuals having different status may be introduced in order to prevent domestic violence in society.

Summary:

I. Several courts asked the Constitutional Court to assess the compliance with the Constitution of Article 86.3 (as amended by Law no. 5328) of the Turkish Penal Code, 5237.

Article 86.2 of the Turkish Penal Code introduced some provisions on deliberate laceration. If the result of deliberate laceration is slight and it can be removed with simple medical intervention, the perpetrator shall be sentenced to imprisonment for between four months and one year, and shall be fined at the instigation of the injured party.

Article 86.3.a provides that where deliberate laceration has been committed against ancestors, descendants, spouses or siblings, the sanction to be applied shall be increased by half, regardless of whether the injured party has lodged a complaint.

II. The applicant courts asserted that the offence of laceration against relatives results in direct prosecution, irrespective of whether the injured party has complained. Offences of laceration against others will be prosecuted upon complaint by the injured party.

In its judgment the Constitutional Court referred to Articles 2, 5, 10, 12, 17, 38 and 41 of the Constitution.

National and international statistics demonstrate that offences stemming from domestic violence and their results are common problems within all societies. It is notable that countries take criminal, legal and administrative measures in order to prevent these kinds of offences, in line with their social values, traditions and individual tendencies. In some countries, domestic violence is prosecuted directly, without the need for the injured party to lodge a complaint. In others, the criminal investigation is commenced upon complaint from the injured party.

In recent years, extensive legal and administrative measures have been taken in order to prevent domestic violence and to penalise criminals effectively in Turkey. Within this context, a provision has been introduced, whereby domestic violence will be prosecuted without seeking any complaint if the deliberate laceration could be treated with simple medical intervention.

The legislator may draw a distinction between offences that are directly prosecutable by the public prosecutor and those where a complaint by the injured party is required. This will depend upon the gravity of the offence and its significance from the perspective of public order, privacy of private life and other factors. Thus, the legislator may introduce a prosecution principle, whereby suspects are to be prosecuted directly, in order to reduce domestic violence and to prevent "cover-ups" of offences committed within the family, whose members are responsible to treat each other with kindness.

The application of the equality principle before the law in criminal law does not mean that all criminals who have committed the same offence will be subject to the same punishment, without taking account of their differing characteristics. Equality before the law is the principle under which each individual is subject to the same laws, with no individual or group having special legal privileges. The equality principle envisaged by the Constitution is legal, as opposed to absolute, equality. Provided that those of the same legal status are subject to the same rules and those of differing legal status to different rules, the equality principle enshrined in the Constitution is not violated. Different regulations for those who have the same status contravene the equality principle.

Differences in the conditions of the injured party or perpetrator may require the application of different rules. The fact that there are different rules to follow for the individuals mentioned in the provision under dispute (i.e. ancestors, descendants, spouses or siblings), detaching them from another individuals, does not constitute a contradiction of the equality principle.

On the other hand, it is clear that improvement of the moral and material assets of family members is only possible within a peaceful and confident environment. In order to ensure this environment, domestic violence should be prevented.

Analysis shows that the legislator, by using its discretionary powers, expressed a preference for the protection of close family members by comparison with other individuals. The provision in dispute covers families consisting of physically and psychologically healthy individuals. It was not found to be contrary to Article 41 of the Constitution.

The state must protect individuals who are the cornerstones of the family and society from all threats, violence and danger. The provision in point is a reflection of the state's obligations in this regard, as indicated in Article 17 of the Constitution.

For those reasons, the article was found to be compatible with the Constitution. Justices Kılıç, Akyalçın, Özgüldür and Kaleli expressed dissenting opinions, however.

The provision stipulates an increase by half of the term of imprisonment and the level of fine. The Constitutional Court noted that an examination of past and present Turkish criminal legislation demonstrates two parts to the legislative approach towards family members and close relatives as suspect and injured party. The fact that one is a family member or close relative can be a mitigating factor in terms of the

applicable sanction, while in other cases, it makes matters worse. It is up to the legislator to determine which actions shall be deemed crimes and which sanctions shall be applied to them, provided that this is in conformity with the general principles of the Constitution and those of the criminal law. The legislator has discretionary power to prevent domestic violence, by increasing terms of imprisonment and levels of fines by half, if the offence has been committed against family members and close relatives, as stipulated in the provision. For those reasons, it is not contrary to the Constitution, and the petition was rejected.

Languages:

Turkish.



Identification: TUR-2008-1-002

a) Turkey / b) Constitutional Court / c) / d) 17.01.2008 / e) E.2004/25, K.2008/42 / f) / g) *Resmi Gazete* (Official Gazette), 21.02.2008, 26794 / h) CODICES (Turkish).

Keywords of the systematic thesaurus:

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

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

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

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

Keywords of the alphabetical index:

Expropriation, compensation, right to appeal to court.

Headnotes:

Hindrance of actions before the court by individuals whose real estate has been expropriated constitutes a clear interference with the right to litigate and the principle of the rule of law. Judicial review of administrative actions is one of the requirements of the rule of law.

Summary:

I. Two Peace Courts asked the Constitutional Court to assess the compliance with the Constitution of Articles 1, 2, 3, 4 of Law no. 221.

The Court rejected the requests under Articles 1, 2 and 4 of Law no. 221.

Under Article 3.2 of the Law no.221, no hearings were to be held in lawsuits dealing with the expropriation of real property and compensation. The applicant courts argued that property owners are entitled to enjoy their property, provided that they do not infringe the rights of others and adhere to legal provisions. If real property is expropriated, this administrative action leads to losses on the part of property owners. In such cases, there should be no limits to the right to litigate.

II. The principle of the rule of law is enshrined in Article 2 of the Constitution. A State governed by this principle is one that respects and upholds human rights and freedoms. Its activities must be open to judicial review. Parliament must be aware that there are fundamental principles governing the laws, which have to be respected. The rationale behind Article 2 of the Constitution is that all acts and actions by the state are to be open to judicial review. It is the *sine qua non* condition of the rule of law.

However, Article 36 of the Constitution reads as follows, “Everyone has the right of litigation either as plaintiff or defendant and the right to a fair trial before the courts through lawful means and procedures. No court shall refuse to hear a case within its jurisdiction.” The right of litigation as guaranteed in this article, besides its nature as a fundamental right, is one of the most effective guarantees in enjoying other fundamental rights and freedoms, as it is a requirement for the protection of those rights. The most effective and guaranteed way of defending against any injustice or damage is the right to litigation. The right to litigate before the judicial authorities constitutes a prerequisite for fair trial.

The objected provision does not recognise the right to litigate of the individual whose property may have been expropriated. The obstruction of compensation actions is a clear interference with the right to litigate as guaranteed by Article 36 of the Constitution. It cannot be reconciled with the principle of the rule of law and the right to litigate.

The objected provision was held to be in breach of Articles 2 and 36 of the Constitution. It was accordingly repealed.

Languages:

Turkish.

*Identification:* TUR-2008-1-003

a) Turkey / b) Constitutional Court / c) / d) 07.02.2008 / e) E.2004/30, K.2008/55 / f) / g) *Resmi Gazete* (Official Gazette), 19.03.2008, 26821 / h) CODICES (Turkish).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Passport, right to obtain / Passport, issuing, discrimination.

Headnotes:

The sons and daughters of special passport holders have the same legal status; they must be given the same rights in the issue of passports. Provisions that contravene these conclusions constitute sexual discrimination against sons.

Summary:

I. The First Konya Administrative Court complained to the Constitutional Court that the phrase "... immature sons living with them ..." in Article 14.A of Law no. 5682 on Passports was contrary to the Constitution. Under Article 14.A "Daughters not having a job and living with the public officials who have a status to obtain special passport and under-age sons who also live with them shall be given a special passport or they shall be registered either in their fathers' or mothers' passports. Children registered in their parents' passports cannot use them unless they are travelling with their parents.

The appellant court claimed that this provision discriminated between daughters and sons from the perspective of sex. The state has negative and positive obligations to preserve familial integrity. It

must take the necessary measures in order to continue family life and remove any provision that impedes it in this task.

II. Article 14.A of Law no. 682 determines the conditions under which sons and daughters will have this type of passport. In order for daughters of special passport holders to obtain one, they must live with the special passport holder; they must not be working and must be unmarried. However, the sons of special passport holders will only receive a special passport if they live with their parents and are under age. Mature daughters who do not have a job and who live with their parents can have a special passport, but this would not apply to grown-up sons.

A State governed by the principle of the rule of law, under Article 2 of the Constitution, is a State that respects human rights and strengthens those rights and freedoms. Its acts and actions must be open to judicial review and the legislator must be aware that there are fundamental principles governing the laws, and those principles have to be respected.

The principle of equality before the law is enshrined in Article 10 of the Constitution. All individuals are equal before the law with no discrimination on the grounds of language, race, colour, sex, political persuasion, philosophical belief, religion or sect. This principle prevents the creation of privileged groups or individuals. If different legal rules for those with the same status were enacted, this would be at odds with the principle of equality. The daughters and sons of special passport holders have the same legal status. Under the principle of equality, individuals with the same status must benefit from rights provided by law under the same conditions.

The provision in dispute states that unmarried daughters who live with their parents and do not work will have a special passport. The same does not apply to sons under the same conditions. This contravenes the principle of equality before the law.

The provision was unanimously found contrary to Articles 2 and 10 of the Constitution. It was repealed.

Languages:

Turkish.



Ukraine

Constitutional Court

Important decisions

Identification: UKR-2008-1-001

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 10.01.2008 / **e)** 1-rp/2008 / **f)** On compliance with the Constitution of provisions of Articles 2.7, 2.11, 3, 4.9 and Chapter VIII “Arbitration Self-Government” of the Law on Courts of Arbitration (case on the tasks of an arbitration court) / **g)** *Ophitsiynyi Visnyk Ukrainy* (Official Gazette), 28/2008 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

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

4.7.14 Institutions – Judicial bodies – **Arbitration.**

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:

Arbitration, quality of court.

Headnotes:

Arbitration courts do not contravene the constitutional provision that justice is to be dispensed exclusively by courts, as they do not fall within the jurisdiction of the general courts. Their regulatory system also differs from that of courts of general jurisdiction.

Summary:

This case dealt with the compliance with the Constitution of certain provisions of the Ukrainian Law on Courts of Arbitration, dealing *inter alia* with the regulation of arbitrators and courts of arbitration.

Fifty-one People’s Deputies asked the Constitutional Court to assess the constitutionality of certain provisions of the Law on Courts of Arbitration, over which they had some concerns.

Pursuant to the Constitution, Ukraine is a democratic, social and law-based state; human rights and freedoms and guarantees thereof determine the

content and direction of the state’s activities; activities aimed to strengthen and ensure human rights and freedoms are the primary responsibility of the state.

By guaranteeing protection in court by the state, the Constitution simultaneously recognises a universal right to resort to any means not prohibited by law to protect one’s rights from violation and illegal encroachment. This constitutional right may not be eliminated or restricted.

One method of guaranteeing the right to protect one’s rights from violation or illegal encroachment in civil and economic legal relationships is an appeal to court of arbitration (see paragraph 1, section 5, motivation part of a decision by the Constitutional Court on the implementation of arbitration courts’ decisions 24 February 2004 no. 3-rp/2004). The current legislation allows a dispute falling under a court of general jurisdiction that concerns legal relationships in civil or economic sphere to be forwarded to a court of arbitration upon consent of both parties to the litigation, except in certain cases envisaged by law (see Article 17 of the Code of Civil Procedure; Article 12 of the Code of Economic Procedure, and Article 6 of the Law. To ensure implementation of the provisions of the above Codes, and in line with Article 85.1.3 of the Constitution, the *Verkhovna Rada* adopted legislation setting out procedures governing the formation and the activities of arbitration courts.

Other states recognise in their procedural rules the possibility of the state forwarding disputes related to civil and economic relationships for consideration by arbitration courts. General principles of the arbitration examination of such disputes are stipulated in the European Convention on International Commercial Arbitration of 21 April 1961 and recommended to the state parties by the Arbitration Rules of United Nations Commission on International Trade Law (UNCITRAL) on 15 June 1976.

Under case-law from the European Court of Human Rights, petitions by individuals and other legal entities to courts of arbitration are deemed legitimate if refusal of the services of a national court was rejected by free consent of the litigants (Judgment in *Deweer v. Belgium*, 27 February 1980).

According to Article 124.1 of the Constitution, justice is administered exclusively by courts. In so doing, courts ensure the protection of constitutional human rights and freedoms, rights and legal interests of legal entities, and the interests of society and the state. See subsection 4.1.4 of the motivation part of the Constitutional Court’s Decision in a case concerning the imposition of a more lenient sanction (2 November 2004, no. 15-rp/2004). Therefore, in the context of

Article 55 of the Constitution, judicial bodies may protect property and non-property rights and legal interests of individuals and/or legal entities in civil and economic legal relationships.

The arbitration of disputes between litigants in civil and economic legal relationships is a type of non-state jurisdiction administered by arbitration courts based on Ukrainian laws through utilising *inter alia* means of arbitration. The protection provided by the arbitration court, as defined in Article 2.7 and 2.3 of the Law, does not mean the administration of justice, but rather the arbitration examination of disputes between litigants in civil and economic legal relationships within the limits provided for in Article 55.5 of the Constitution.

According to Article 124.5 of the Constitution, court decisions are rendered by the courts in the name of the state, and are mandatory for execution on the whole territory. Pursuant to the Law, courts of arbitration make decisions only on their own behalf (Article 46) and such decisions rendered within the framework of effective legislation are binding only upon the litigants. Ensuring the implementation of arbitration courts' decisions exceeds the limits of arbitration examination. This is the responsibility of competent courts and state executive service (see Article 57 of the Law and Article 3.2.1 of the Law on Executive Proceedings).

Consequently, the provisions of the arbitration legislation under dispute do not contradict the norms of Article 124 of the Constitution, to the effect that justice is to be administered exclusively by courts. Arbitration examination is not the same as justice. Decisions by courts of arbitration are purely non-state jurisdictional activities with the aim of resolving disputes between litigants over civil and economic matters.

An analysis of other provisions of the Law shows that courts of arbitration are non-state independent bodies, with the aim of protecting the property and non-property rights and legal interests of individuals and/or legal entities in civil and economic matters. According to Article 7 of the Law, arbitration is carried out by standing courts of arbitration in order to resolve specific disputes.

Hence, courts of arbitration do not administer justice; their decisions are not instruments of justice and they do not belong to the system of courts of general jurisdiction.

One form of public self-government is the system of regulation of arbitration. This was set up to represent and protect the interests of arbitrators of standing arbitration courts, and to guarantee their rights and

freedoms. Accordingly, pursuant to Article 92.1.1 of the Constitution, the *Verkhovna Rada* has a right to the legislative regulation thereof.

Arbitration self-government is not identical to judicial self-government, since arbitration courts are not included to the system of general jurisdiction, and arbitrators do not have the status of professional judges. Its purpose is to facilitate the organisation of arbitration courts. Judicial self-government, by contrast, falls within the system of the constitutional order within the state, under Article 130.2 of the Constitution. It is a form of self-organisation of professional judges.

The Constitutional Court drew a distinction between the arbitration regulatory system, which is a form of public self-government, and public organisations that fall into the sphere of voluntary public associations. There are specific, and different, legal provisions on the creation, systems and governance of arbitration courts on the one hand, and public organisations on the other.

The Arbitration Chamber was set up by the All-Ukrainian Congress of Arbitrators. Standing arbitrators are elected from a body of fellow arbitrators. It should not, therefore, be considered as a public organisation and thus subject to the provisions of Article 36 of the Constitution or to legislative restrictions over its name, status and governance. The referral by the petitioners to the provision of Articles 85.2, 92.1.11 of the Constitution and the legal position of the Constitutional Court as stated in its Opinion of 13 December 2001, no. 18-rp/2001 was unfounded.

Languages:

Ukrainian.



Identification: UKR-2008-1-002

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 15.01.2008 / **e)** 1-v/2008 / **f)** On the compliance of draft legislation on the introduction of amendments to the Constitution to improve the local self-government system with provisions of Articles 157 and 158 of the Constitution (case on introducing amendments to Articles 85, 118, 119, 133, 136, 140, 141, 142 and 143 of the Constitution) / **g)** *Ophitsiynyi Visnyk Ukrainy* (Official Gazette), 80/2008 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

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

1.5.4.2 Constitutional Justice – Decisions – Types – **Opinion.**

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

Keywords of the alphabetical index:

Constitution, amendment / Local self-government.

Headnotes:

Granting the right to represent the joint interests of communities to executive bodies of raion and oblast councils might disrupt the principle of delimitation of functions between local self-government bodies and entrust them with powers and authorities that they do not normally possess.

The recognition of the Sevastopol local administration in the Treaty between Ukraine and Russian Federation on the status and conditions for deployment of the Black Sea Fleet of the Russian Federation does not mean that its status could not be changed.

Summary:

The case dealt with the compliance of various provisions of the draft legislation on introducing amendments to the Constitution, with a view to improving the system of local self-government.

The Ukrainian Parliament passed a Resolution on the Preliminary Approval and Forwarding to the Constitutional Court of draft legislation on the introduction of amendments to the Constitution, no. 3288-IV on 23 December 2005. It asked the Constitutional Court to assess the compliance with the Constitution of draft legislation introducing amendments to the Constitution to improve the local self-government system (Registration no. 3207-1). The relevant provisions of the Constitution were Articles 157 and 158 of the Constitution. The draft law envisaged amendments to Articles 85.1.29, 118, 119, 133, 136.1, 140, 141.2, 141.4, 142.1, 142.3, 143.1-143.3, Chapter XV.3.8 “Transitional Provisions” of the Constitution.

Under the draft legislation, Article 85.1.29 of the Constitution states that it is within the authority of the Parliament to create and eliminate the boundaries of cities and raions (or administrative sub-districts), to bestow the status of cities on settlements, to name and re-name settlements, neighbourhoods and

raions, and to create and eliminate settlements and neighbourhoods.

The rationale behind the provisions amending Article 118 of the Constitution is the reorganisation of the existing system of local authorities. At the level of administrative territorial units such as raions, local state administration is eliminated.

The suggested wording of Article 118 of the Constitution would result in the removal of the mechanism of the expression of no confidence in the head of an oblast state administration by local deputies. This, in turn, might result in a restriction of citizens’ rights, in violation of Article 157 of the Constitution.

The draft legislation envisages that Article 119 of the Constitution will provide for various functions by local state administration in relevant territories. These will include the supervision of the observance of laws by local executive bodies subordinate to central executive bodies; cooperation between local executive bodies and local self-government bodies and other authorities provided for by law. It should be noted, however, that the provision according to which local state administrations perform cooperation between local executive bodies and local self-government bodies is worded in a way that allows for administration by local state administrations of such cooperation.

Under Article 133 of the Constitution, as set out in the draft law, the system of administrative territorial organisation includes the Autonomous Republic of Crimea, oblasts, raions, cities, city districts, villages and settlements as well as neighbourhoods. Neighbourhood is an administrative territorial unit based on a voluntary union of citizens that consists of several settlements. The Ukraine consists of the Autonomous Republic of Crimea, Vinnytsia, Volyn, Dnipropetrovsk, Donetsk, Zhytomyr, Zakarpattia, Zaporizhia, Ivano-Frankivsk, Kyiv, Kirovohrad, Luhansk, Lviv, Mykolaiv, Odesa, Poltava, Rivne, Sumy, Ternopil, Kharkiv, Kherson, Khmelnytskyi, Cherkasy, Chernivtsi and Chernihiv oblasts, cities of Kyiv and Sevastopol, the boundaries of which are determined by law. The cities of Kyiv and Sevastopol have a special status that is determined by laws.

Amendments to Article 136.1 of the Constitution envisage legislative regulation of the procedure for elections of deputies of the Supreme Council of the Autonomous Republic of Crimea and a five-year period of authority for deputies of the Supreme Council of the Autonomous Republic of Crimea, i.e. the same as for the deputies of all representative bodies.

Amendments to Article 140 of the Constitution clarify the notion of local self-government, and its fundamental aspects.

The draft legislation also allows raion and oblast councils to set up their own executive bodies, to enhance the efficiency of councils' activities and to adequately represent the common interests of communities at a raion and oblast levels.

Granting the right to represent the joint interests of communities to executive bodies of raion and oblast councils, under Article 140.6 of the draft law, might disrupt the principle of delimitation of functions between local self-government bodies and entrust them with powers and authorities that they do not normally possess.

The amendments to Article 141.2 and 141.4 of the Constitution mentioned above state that the period of tenure of village, settlement and city mayors is to coincide with the period of authorities of local deputies, which is five years. The draft legislation also clarifies the procedure for the election of chairs of raion and oblast councils and provides that they are to act as heads of executive bodies attached to the councils.

Amendments to Article 142.1 and 142.3 of the Constitution as stated in the Draft-law taking into consideration introduction of a neighbourhood provide the material and technical basis for local self-government.

At the constitutional level, the draft legislation provides a legal definition of the minimum share of taxes and other payments to be allocated to form the revenue part of local budgets. In order to avoid any misinterpretation of provisions of Article 142.3 of the draft law, this should stipulate the proportion of taxes and other payments (national etc.) to be used for determining the minimum share to be allocated to form the revenue part of local budgets. It should also state whether this share is to be calculated from the overall tax sum or from selected taxes and payments.

Amendments to Article 143.1 to 143.3 of the Constitution provide for a constitutional definition of provisions concerning the right of oblast and raion councils to make decisions within the framework established by law on issues of administrative territorial organisation.

Corrections are introduced to the procedure for bestowing certain powers and authorities of executive bodies on local self-government bodies. Under the current wording of Article 143 of the Constitution, the granting of these powers and authorities is to be regulated by a separate law. Under the draft legislation,

such granting may be done within the framework and under the procedures established by law.

Transitional provisions of the Constitution are aimed to organise its implementation. A considerable part of the transitional provisions expires after a certain time, and has a purely historical meaning.

The Constitutional Court took the view that Chapter XV.3.8 "Transitional Provisions" had expired. It was not, therefore, a subject the Constitutional Court would consider.

The Court examined the issue of the execution of powers and authorities by Sevastopol local state administration as provided for in sub section 5 "Final and Transitional Provisions" of the Draft Law in accordance with the Law on Local State Administration in the wording of 1 January 2006. It was for the period of effect of a Treaty between Ukraine and Russian Federation on the status and conditions for deployment of the Black Sea Fleet of the Russian Federation on the territory. This was not adequately justified. The recognition of the Sevastopol local administration as one of the competent Ukrainian bodies in international treaties entered into pursuant to the above Treaty did not mean that its status could not be changed. Such an exception regarding the powers and authorities of Sevastopol local state administration may impede legislative regulation of the special status of the city of Sevastopol and specific characteristics of local self-government therein as provided for in Articles 133 and 140 of the draft legislation.

Languages:

Ukrainian.



Identification: UKR-2008-1-003

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 29.01.2008 / **e)** 2-rp/2008 / **f)** On the compliance of the Law on Specific Procedure for Dismissal of Persons Combining Deputy's Mandate with Other Forms of Activities" with the Constitution (constitutionality) and a constitutional petition by 89 People's Deputies concerning the official interpretation of Article 90.2.2 of the Constitution,

Article 5 of the Law on Specific Procedure for Dismissal of Persons Combining Deputy's Mandate with Other Forms of Activities" (case on dismissal of People's Deputies from other offices in the event of their combining offices) / **g) Ophitsiynyi Visnyk Ukrainy** (Official Gazette), 80/2008 / **h) CODICES** (Ukrainian).

Keywords of the systematic thesaurus:

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

5.3.41.2 Fundamental Rights – Civil and political rights – Electoral rights – **Right to stand for election.**

5.4.3 Fundamental Rights – Economic, social and cultural rights – **Right to work.**

Keywords of the alphabetical index:

Parliament, member, incompatibility, other activity / Parliament, member, mandate, termination.

Headnotes:

Legislation providing for the automatic termination of the mandate of a member of Parliament without providing for the deputy to take adequate measures violates the right to work.

Summary:

I. The case concerned the compliance with the Constitution of certain provisions of 2005 legislation on procedures for the dismissal of persons who combined the role of deputy with other professional activities.

Groups consisting of fifty-two People's Deputies and eighty-nine People's Deputies asked the Constitutional Court to assess the constitutional compliance of certain provisions on the Ukrainian legislation on the procedure for the dismissal of persons combining the role of deputy with other activities. They had some concerns about this legislation, and requested an official interpretation of its Article 5, in the light of Article 90.2.2 of the Constitution.

People's Deputies execute their powers and authorities on a permanent basis. However, there is provision for the early termination of authority, over the issue of the incompatibility of a deputy's mandate with other forms of activities. The requirement concerning incompatibility is a component of the status of national deputies and one of the characteristics of their mandates. There is a direct prohibition on the combination of the role of a

deputy with other professional activities, and in fact, transgression amounts to a violation of the Constitution.

The early termination of the mandate, which is a consequence of such actions, may only occur as provided for within Article 81.4 of the Constitution, and in line with the procedure set out in legislation. The essence of conflict resolution in this regard is the termination of powers and authorities of a People's Deputy. The introduction of any other mechanism would amount to a breach of the Constitution.

From the perspective of the constitutional petition, the priority of natural human rights is to be considered as one of the fundamental principles of the Constitution.

II. The right to earn one's living cannot be separated from the right to life as such. The latter is guaranteed only insofar as adequate material support is available. The right to work follows from human nature itself. It applies to every individual and is inalienable.

The right to participate in public administration is established by the state. It exists and may be enjoyed in different forms, namely as a right to elect and be elected to government bodies. This right applies only to citizens. It presents citizens with the opportunity to participate in public administration and to form government bodies.

When a citizen takes up as position of People's Deputy, he or she is fulfilling the right to participate in public administration. This right differs from the right to labour, as it has political characteristics and follows from the fact of having Ukrainian citizenship. Execution of a right to be elected to government bodies also differs from the fulfilment of the right to labour because it is not directly dependent on a person's will. Engagement in political activities, including election as a national deputy, is not aimed (and is not immediately justified by the need) to receive remuneration (salary) for such activities.

Under the legislation in question, the positive right of a citizen to be elected to the representative body takes precedence over the natural human right to labour. It also allows for restriction of the right to labour that contradicts provisions of Article 3 of the Constitution, according to which a human being has the highest social value.

Where questions have arisen over the incompatibility of a deputy mandate with other forms of activities, the provisions of Article 81.2.5 and 81.4 of the Constitution are applied. In order to ensure implementation of this constitutional norm, specific laws were adopted to resolve this conflict – namely the elimination of the right to participate in representative bodies by court.

This results in the forced termination of the authorities of a national deputy.

The contents of the Law fail to meet the constitutional requirements protecting the constitutional human right to labour. Thus, pursuant to provisions of Article 152 of the Constitution, there are grounds to recognise the whole text as unconstitutional.

The law also violates the norm of Article 78.3 of the Constitution – “requirements concerning incompatibility of a deputy’s mandate with other forms of activities are provided for by law”. There is no provision in this norm for the establishment of a procedure for the elimination of acts concerning other professional activities. It is covered to a certain extent in Article 3 of the Law on the Status of a People’s Deputy, and, with regard to the mechanism and procedures for the resolution of conflicts – in provisions of Article 5.2 of the same law. See also Articles 17.1.4 and 180 of the Code of Administrative Court Proceedings.

Besides the above conceptual inconsistency, the text of Articles 3, 4 and 5, at the basis of the Law, contradicts the provisions of Articles 78.4 and 81.2.5 of the Constitution. The provisions state that a People’s Deputy has to perform certain responsibilities in order to ensure compliance with the requirements prohibiting combination of offices. Timelines for ensuring such compliance are also established.

If a People’s Deputy is appointed to a position not compatible with a deputy’s mandate, he/she has to submit a personal application, which will be examined in accordance with the procedure set out in Article 81.4 of the Constitution.

If a People’s Deputy complied with this requirement having preferred a right to labour, the provisions of Article 5 of the Law (on cancelling a relevant appointment document *a priori*) present an obstacle for exercising such a right by the person in breach of Article 81.4 of the Constitution. Furthermore, Parliament has already provided another mechanism to exclude the possibility of combining incompatible positions. Article 3.3 of the Law on the Status of a People’s Deputy covers the point. If somebody is appointed to a position that is not compatible with the position of deputy, and their authority has not been terminated according to the procedure established by law, they can only carry out their responsibilities in such a position after submission of an application requesting the termination of authority as a People’s Deputy.

A People’s Deputy in this position must take the above steps within twenty days. However, this

obligation corresponds to the right of a People’s Deputy to take the steps within twenty days. The provisions of Articles 3 and 4 of the Law that envisage fifteen days for the resolution of issues of incompatibility violate this constitutional norm.

A person may actively prefer the right to labour to the positive right to be elected a member of a representative body. If they then fail to terminate their authorities in accordance with the legislation, a legislator is not entitled to establish a norm under which a document on appointing a People’s Deputy is to be recognised null and void immediately after 20 days from the day it was issued. This deprives a person of a right to a free choice.

Article 88.2 of the Constitution enumerates the powers and authorities of the Chairman of the Parliament. It does not envisage a right by this official to restrict the process of execution of constitutional authorities by a People’s Deputy pursuant to the procedure provided for in Article 7.3 of the Law. Such measures include the issuing of instructions on the blocking of a personal electronic voting card, suspension of salary and other remuneration connected with the performance of his or her function as deputy. That particular provision of the legislation is therefore in breach of the Constitution.

Because Articles 3, 4, 5, 7.2, 7.3 of the Law are recognised as unconstitutional, the Law is to be recognised null and void as a whole. It may not be applied as a complete legal instrument. This constitutes grounds for recognising the whole Law as unconstitutional.

As the Constitutional Court pronounced the Law unconstitutional, there was no need for an official interpretation of norms constituting the subject matter of the constitutional petition.

Languages:

Ukrainian.



Identification: UKR-2008-1-004

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 01.04.2008 / **e)** 3-rp/2008 / **f)** On conformity of the provisions of Articles 6.1, 6.5 and 6.12 of the “Law on state regulation of securities market”, items 1, 9 of the Regulations on the State Commission on Securities and Stock Market approved by the Decree of the President, 14 February 1997 with the Constitution (case on the State Commission on Securities and Stock Market) / **g)** *Ophitsiynyi Visnyk Ukrainy* (Official Gazette), 29/2008 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

3.4 General Principles – **Separation of powers.**
4.4.1.2 Institutions – Head of State – Powers – **Relations with the executive powers.**

Keywords of the alphabetical index:

Head of State / Separation of powers.

Headnotes:

The President’s authorities are exhaustively determined by the Constitution. This makes it impossible to adopt legislation that would set forth other authorities (rights and duties).

Without an explicit constitutional basis, a law providing for the participation of the President in the formation of central state bodies and to regulate their activity is unconstitutional.

Summary:

I. The Constitutional Court was asked to assess the compliance with the Constitution of various provisions of the Ukrainian law on the state regulation of the securities market.

The authorities of the President are determined by the Fundamental Law. The Constitutional Court has made repeated reference to this point in its decisions. Decision no. 7-rp/2003, of 10 April 2003 was a case on guarantees of the activity of a People’s Deputy. In the decision, it was stated that the President’s authorities are exhaustively determined by the Constitution, and that this made it impossible to adopt legislation that would set forth other authorities (rights and duties). The Court adhered to this position in Decisions no. 9-rp/2004 of 7 April 2004, which was a case on the Coordination Committee to Counter Corruption and Organised Crime, and no. 1-rp/2007, which dealt with the dismissal of a judge from an administrative position.

In adopting the 1996 Law on the State regulation of the Securities Market, referred to here as “the Law”, and vesting the President with the authorities mentioned in the provisions of Article 6.1, 6.5 and 6.12 of the Law, the Parliament (*Verkhovna Rada*) acted in compliance with the scope of the constitutional competence of the Head of State, determined in Article 106 of the Constitution. Of particular note here was the possibility to participate in the formation of central state bodies and to regulate their activity.

The Law on Introducing Amendments to the Constitution of 8 December 2004, no. 2222-IV, came into force on 1 January 2006. It changed the wording of Article 106 of the Constitution. The new provisions of this Article establish an exhaustive list of positions, which envisage the participation of the President in order to hold them. They determine the authorities of the Head of State as to the regulation of the activity of state bodies by his or her acts. The President may only regulate the activity of those bodies for which he has constitutional authority to establish and administrate.

Immediately the above amendments to the Constitution took effect, they resulted in inconsistencies with the compliance with the Fundamental Law of various provisions of Article 6 of the Law concerning the Subordination of the Commission to the President. Examples included the first sentence of Article 6.1, the appointment and dismissal of the Chairman of the Commission, and its members upon the consent of the Parliament (*Verkhovna Rada*) by the President (Article 6.5). There were also problems with the approval of the Regulations on the Commission by the President (see first sentence of Article 6.12). Doubt was also cast over Article 1 of the Decree of the President “On the State Commission on Securities and Stock Market”, 14 February 1997 no. 142 (hereinafter referred to as “the Decree”) as to the approval of the Regulations on the Commission.

II. In deciding upon the issues raised in the constitutional petition, the Constitutional Court discovered problems over the compliance of further provisions of the Law, in particular the third sentence of Article 5.3 of the Law concerning the approval of the composition of the Coordination Council and Regulations on the Coordination Council by the President. Under such circumstances and under Article 61.2 and 61.3 of the Law on the Constitutional Court, the Constitutional Court considered it necessary to decide on the constitutionality of the above provisions of Article 5.

The Constitution has the highest legal force and the laws and other legal acts are to comply with it (Article 8.2 and 8.3 of the Constitution). Under Article 19.2 of the Constitution, bodies of state power, in particular, the Parliament and the President, are to act only on the grounds, within the limits and in a manner envisaged by the Constitution and laws. Guided by the provisions of Article 85.1.3 of the Constitution (“adopting laws”) and item 1 Chapter XV “Transitional Provisions” of the Constitution (“laws and other legal acts, adopted prior to this Constitution entering into force, are in force in the part that does not contradict the Constitution”), the Parliament should bring the Laws in conformity with those norms of the Constitution which took effect from 1 January 2006. Since the above provisions of Articles 5.3, 6.1, 6.5 and 6.12 of the Law, Article 1 of the Decree do not correspond to Articles 8, 19, 85 and 106 of the Constitution, then, under Article 61.2 and 61.3 of the Law on the Constitutional Court, there are grounds to recognise them unconstitutional.

Languages:

Ukrainian.



Identification: UKR-2008-1-005

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 01.04.2008 / **e)** 4-rp/2008 / **f)** On the conformity of the provisions of Article 219.2, 219.3 and 219.4 of the Rules of Procedure of the Parliament (*Verkhovna Rada*) with the Constitution (case on the Rules of Procedure of the Parliament / **g)** *Ophitsiynyi Visnyk Ukrainy* (Official Gazette), 28/2008 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Parliament, rules of procedure / Parliament, member, activity.

Headnotes:

The separation of state power is a structural differentiation of the three equal fundamental functions of the state: legislative, executive, judicial. It reflects the functional determination of each state body, envisages not only separation of their authorities but also their interaction, the system of checks and balance aimed at ensuring their cooperation as a single state power.

The rules of procedure of Parliament have to be adopted in the form of a law.

Summary:

The case dealt with the resolution of the Parliament on its rules of procedure.

Under the Constitution the authorities of People's Deputies shall be determined by the Constitution and laws; the status of People's Deputy is to be determined exclusively by Law.

One authority set out at constitutional level is the right of a People's Deputy of inquiry. The procedure stipulated by Article 85.1.43 of the Constitution allows a People's Deputy, a group of People's Deputies or a committee of the Parliament to initiate the adoption of a decision on forwarding an inquiry to the President by the Parliament.

The above provision of the Constitution is elaborated in the Law on the status of People's Deputy. A deputy can present a demand for an official response to issues related to the competence of a wide number of bodies and individuals. These include the President, the bodies of the Parliament, the Cabinet of Ministers, chief officers of other bodies of state power and bodies of local self-government, and the chief executives of enterprises, institutions and organisations located on the territory (irrespective of their subordination and forms of ownership presented at the session of the Parliament.

The right of a People's Deputy to inquiry guaranteed by the Constitution and the right to application set forth by the law are authorities exercised independently from each other. The Constitution contains no reservations as to the admissibility of a submission by a People's Deputy of an inquiry only after forwarding a respective application or the inadmissibility of submission of an inquiry without a deputy's application.

The Constitutional Court took the view that Article 219.2 – 219.4 of the Rules of Procedure (which do not constitute a Law) should be pronounced as incompatible with the Constitution, and thus unconstitutional. During consideration of the case, it found a lack of compliance of the Resolution of the Parliament with the Constitution.

The principle of separation of powers only makes sense if all bodies of state power act within the limits of their single legal field. It means that bodies of state power must exercise their authorities within the limits set forth by the Constitution and according to the laws. The state bodies and bodies of local self-government and their officials must only act within the limits of their authority, and in a manner envisaged by the Constitution and laws.

Strict observance of the Constitution and laws by bodies of legislative, executive and judicial power ensures the realisation of the principles of separation of power and is a guarantee of their unity and an important prerequisite of stability, ensuring civil peace and welfare in the state.

In securing the principle of the rule of law the Constitution, as a legal act with the highest legal force, systematically ensures the principle of the rule of statute in the system of legal acts.

The determination of the term “rule of law” is laid down in paragraph two sub-item 4.1 of the motivation part of the Constitutional Court’s Decision, 2 November 2004, no. 15-rp/2004.

Article 92.1 of the Constitution secures the principle of the priority (rule) of statute in the system of other legal acts, with the help of which legal regulation of the most important public relations is realised. This norm enumerates the list of issues to be regulated exclusively by law. Because it is imperative in nature, all decisions in this regard are to be adopted in the form of a law. To them one relates, in particular, the organisation and operational procedure of the Parliament, the status of People’s Deputies; organisation and activity of executive bodies, the fundamentals of civil service, the judicial system and the status of judges.

Thus, under the Constitution, only the Parliament has the right to determine the organisation and the operational procedure of bodies of legislative, executive and judicial power and the status of their officials in a respective law.

It is logical that other norms of the Constitution envisage equal legal approaches to the legal mechanism of regulation of the procedure of the

organisation and activity of state bodies and their officials. Under Article 76.4 of the Constitution, the authorities of People’s Deputies are determined by the Constitution and laws, as are the organisation and operational procedure of the committees of the Parliament, its temporary special and temporary investigation commissions are determined by law; exercising parliamentary control within the limits established by the Constitution and the law. The organisation, authority and operational procedure of the Cabinet of Ministers, other central and local executive bodies are determined by the Constitution and laws; the procedure of organisation and activity of the Constitutional Court and the procedure of examination of cases are determined by law.

According to Article 83.5 of the Constitution the operational procedure of the Parliament is set forth by the Constitution and the Rules of Procedure. To the authorities of the Parliament there are related the adoption of the Rules of Procedure (Article 85.1.14 of the Constitution). The Parliament adopted the Rules of Procedure as a supplement to the Resolution on the Rules of the Procedure of the Parliament of 16 March 2006.

Article 1 of the Rules of Procedure sets out the procedure governing the activities of the Parliament, its bodies and officials, and the principles of formation, organisation and termination of the activity of deputies’ factions. It also deals with the coalition of deputies’ factions at the Parliament, the procedure of preparation and conduct of its sessions and the formation of state bodies. It determines a legislative procedure, the procedure of consideration of other issues related to its competence, and the procedure of exercising control functions of the Parliament. The Rules of Procedure regulate a number of other important issues which are related to the status of People’s Deputies, relations between the Parliament and other bodies of state power, granting consent to appointment or dismissal of officials, decision on resignation of the Prime-Minister, and members of the Cabinet of Ministers.

According to the Constitution, all the above-mentioned issues are to be determined exclusively by law. See Articles 6.2, 19.2, 76.4, 89.5, 85.1.33, 92.1.12, 92.1.14, 92.1.21, 120.2 and 153 of the Constitution. However, these are regulated by the Rules of Procedure, adopted as a supplement to the Resolution on the Rules of Procedure of the Parliament.

According to Article 8.2 of the Constitution, laws and other legal acts shall be adopted on the basis of the Constitution and are to comply with it.

Having scrutinised the provisions of Articles 83.5 and 85.1.15 of the Constitution in their systematic link with the provisions of Articles 6.2, 19.2, 92.1.21 of the Constitution, the Constitutional Court concluded that the Rules of Procedure of the Parliament are to be adopted exclusively as a Law. The adoption and coming into force of the Rules also had to follow Articles 84, 93 and 94 of the Constitution.

Cross-references:

Legal views as to the adoption of the Rules of Procedure as a law were also expressed by the Constitutional Court in its decision, 3 December 1998, no. 17-rp/98, and Rulings 27 June 2000, no. 2-up/2000, 11 May 2007, no. 22-u/2007.

Languages:

Ukrainian.



Identification: UKR-2008-1-006

a) Ukraine / b) Constitutional Court / c) / d) 02.04.2008 / e) 5-rp/2008 / f) On official interpretation of provisions of Article 122.2 of the Constitution and Article 2.3 of the Law “On Public Prosecution” / g) *Ophitsiynyi Visnyk Ukrainy* (Official Gazette), 28/2008 / h) CODICES (Ukrainian).

Keywords of the systematic thesaurus:

4.7.4.3.4 Institutions – Judicial bodies – Organisation – Prosecutors / State counsel – **Term of office.**

Keywords of the alphabetical index:

Prosecutor, dismissal.

Headnotes:

The term of office of the Prosecutor-General and subordinate prosecutors is to be interpreted as an uninterrupted period, commencing directly after the document appointing the Prosecutor General and subordinate prosecutors to their offices is enacted. It ends after five calendar years.

Summary:

The Ukrainian Prosecution Office is an integrated system, headed by the Prosecutor General. The President appoints and dismisses the Prosecutor-General from office, but can only do so with parliament’s consent. See Articles 85.1.25, 106.1.11, 121 and 122.1 of the Constitution.

The organisation and procedure for the activities of prosecution bodies are determined exclusively by law. See Articles 92.1.14 and 123 of the Constitution.

Under Article 122.2 of the Constitution, and Article 2.3 of the Law on Public Prosecution, the term of authority of the Prosecutor General and subordinate prosecutors is five years.

A decision by the Parliament, consenting to the appointment or dismissal from office of the Prosecutor-General must be made pursuant to the procedure provided for in Articles 84.2 and 91 of the Constitution.

The term of authority of the Prosecutor General starts directly after the presidential decree appointing somebody to this position is enacted, and it lasts for five years. Once the five years have expired, the person appointed no longer has the authority to hold office as Prosecutor General. The end of the Prosecutor-General’s term of office constitutes unconditional grounds for the termination of his authority, as mentioned in Article 122.1 of the Constitution.

The Prosecutor General may only be dismissed from office before the expiry of the five-year term on the grounds set out in Article 122.1 of the Constitution, and Article 2.1 and 2.2 of the Law on Public Prosecution.

Analysis of those norms of Ukrainian legislation with a bearing on the subject of the constitutional petition shows that it contains no provisions that allow for termination, suspension or extension of the term of authorities of the Prosecutor General, including cases of unlawful dismissal, or election to an elected office.

The issue of temporary execution of the Prosecutor-General’s duties in the event of his or her dismissal is regulated by the Law on Temporary Execution of Duties by Officials Appointed by the President upon consent of the Parliament or by the Parliament on nomination of the President.

The general provisions of this decision as to the term of office are applicable to prosecutors of the Autonomous Republic of Crimea, prosecutors of oblasts, the cities of Kyiv and Sevastopol, city, raion, inter-raion and other prosecutors of equivalent status appointed by the Prosecutor General, taking into consideration specific provisions concerning the Prosecutor General only. See Articles 15.1.4, 15.1.5 and 16.1 of the Law on Public Prosecution.

Languages:

Ukrainian.



Identification: UKR-2008-1-007

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 16.04.2008 / **e)** 6-rp/2008 / **f)** On official interpretation of provisions of Articles 5.2, 5.3, 69, 72.2, 74, 94.2 and 156.1 of the Constitution (case on adoption of the Constitution and laws at a referendum) / **g)** *Ophitsiynyi Visnyk Ukrainy* (Official Gazette), 32/2008 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

4.1.2 Institutions – Constituent assembly or equivalent body – **Limitations on powers.**

4.9.2 Institutions – Elections and instruments of direct democracy – **Referenda and other instruments of direct democracy.**

Keywords of the alphabetical index:

Referendum, constitutional / Constitution, amendment by referendum.

Headnotes:

1. The people are the bearers of sovereignty and the only source of power in Ukraine. They may exercise their exclusive right to determine and change the constitutional order in Ukraine at an all-Ukrainian referendum upon popular initiative by means of adopting the Constitution pursuant to a procedure to be determined in the Constitution and laws (see Article 72.2 of the Constitution).

2. The people when exercising their right at an all-Ukrainian referendum upon popular initiative may adopt (amend) laws pursuant to procedure provided for in the Constitution and laws except for laws that cannot be adopted at a referendum under the Constitution (see Article 72.2 of the Constitution).

3. The procedure for signing and promulgation of laws provided for therein should not apply to laws adopted at a referendum (Article 94.2).

4. Decisions on adopting laws adopted at an All-Ukrainian referendum are final and do not require any approval, including that by the Parliament (Articles 5.2, 5.3 and 69 of the Constitution).

Summary:

Under the Constitution, Ukraine is a sovereign, democratic, and law-based state; the bearer of sovereignty and the only source of power in Ukraine is the people. The procedure for the exercise of constituent power by the state is defined by the Constitution and legislation.

In order for the constitutional provisions on people's power to be implemented, certain mechanisms are necessary. Article 5.2 of the Constitution provides that people exercise their power both directly and through state bodies and bodies of local self-government. This basic provision is further explained in Article 69 of the Constitution (the expression of the people's will is exercised through elections, referenda and other forms of direct democracy).

Organisation and procedure for holding referenda pursuant to Article 92.1.20 of the Constitution are provided for exclusively by laws. Currently, these issues are regulated by that part of the Law on All-Ukrainian Referendum and Local Referenda of 3 July 1991 that does not conflict with the Constitution and the Law on the Central Election Commission of 30 June 2004.

The motivation part of a decision by the Constitutional Court, no. 3-zp, 11 July 1997, sub-paragraph 4.1, states as follows:

“Adoption of the Constitution by the *Verkhovna Rada* was an immediate act of realising people's sovereignty that only once authorised the *Verkhovna Rada* to adopt it. Further confirmation thereof is found in Article 85.1 of the Constitution that does not provide for a right of the *Verkhovna Rada* to adopt the Constitution and Article 156 of the Constitution, according to which a draft-law on amending chapters establishing fundamental principles of the constitutional order after

adoption by the *Verkhovna Rada* are to be approved at an all-Ukrainian referendum”.

In its Decision no. 6-rp/2005, 5 October 2005, the Constitutional Court stated that people’s power is exercised within the state’s territory pursuant to the procedure and in the form provided for in the Constitution and laws. This means that a new Constitution, with new wording, can be adopted through constituent power under the procedure and in forms provided for in the Constitution and laws.

The process of adoption of a new Constitution (new wording) can only be initiated once the people have expressed their will as to the need for this step. The Constitutional Court in its Decision no. 6-rp/2005, 5 October 2005 interpreted the provisions of Article 5.3 of the Constitution as meaning that the right to determine and change the constitutional order belongs exclusively to the people. It is not to be usurped by the State, its bodies or officials. It should be understood as reading that the people alone have the right to determine a constitutional order directly at an all-Ukrainian referendum, and to change the constitutional order by amending the Fundamental Law pursuant to the procedure provided for in its Chapter XIII. See subparagraph 2 of the resolution part.

Under the Constitution, one example of the exercise of constituent power by the people is an all-Ukrainian referendum, called on popular initiative upon request of no less than three million citizens who have the right to vote. The signatures designating the referendum must be collected in no less than two-thirds of the oblasts, with a minimum of 100 000 signatures in each oblast. See Article 72.2 of the Constitution. Such a referendum may be held on issues mentioned in the constitutional petitions, under the procedure contained in the Constitution and laws.

Under Article 75 of the Constitution, the only body of legislative power is the Parliament – *Verkhovna Rada*. This does not preclude the people from adopting legislation directly at a referendum since the people are the only source of power (Article 5.2 of the Constitution).

Article 74 of the Constitution provides for the possibility of holding a legislative referendum. Under this article, a referendum may not be held on issues concerning taxes, budget and amnesty. Under Articles 5, 72 and 74 of the Constitution, the people, as bearers of sovereignty and the only source of power, when expressing their will at a referendum may adopt laws and amend or repeal effective laws on other topics, under the procedure provided for in the Constitution and laws.

Articles 91, 92, 93 and 94 of the Constitution govern the procedure for exercising the right to adopt laws by the Parliament, as set out in Article 85.1.3 of the Constitution. They establish the number of votes of People’s Deputies necessary to adopt draft laws, and identify the scope of issues to be regulated exclusively by laws. They also list subjects of legislative initiative, procedures for signature, promulgation or return of laws to Parliament for repeat consideration, and conditions for their enactment.

Article 94 of the Constitution governs the procedure for signing and promulgation of laws as well as their enactment. Under Article 94.2, the President has to sign legislation signed by the Chair of the Parliament, within fifteen days of receipt. He or she must undertake to implement it, and will either promulgate it or refer it to Parliament for repeat consideration, accompanied by well-founded suggestions.

This constitutional provision corresponds to the provisions of Article 106.1 of the Constitution. This legislation establishes the President’s authority, particularly with regard to the procedure for signing and promulgation of legislation. The powers and authorities of the President provided for in other constitutional articles do not cover the procedure for signing and promulgating laws adopted at a referendum. This is to be determined exclusively by the legislature. It is beyond the competence of the Constitutional Court.

The Constitution provides for cases of approval by the Parliament of legal acts adopted by other bodies. However, none of the Fundamental Law’s articles envisages approval of decisions adopted at an all-Ukrainian referendum by the Parliament.

Decisions adopted at an all-Ukrainian referendum on adopting (amending or cancelling) laws are final and require no approval or endorsement by the Parliament or any other state bodies.

Languages:

Ukrainian.



Identification: UKR-2008-1-008

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 17.04.2008 / **e)** 7-rp/2008 / **f)** On official interpretation of provisions of Article 18 of the Law “On High Council of Justice” (case on termination of authorities of a member of the High Council of Justice”) / **g)** *Ophitsiynyi Visnyk Ukrainy* (Official Gazette), 32/2008 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

4.7.5 Institutions – Judicial bodies – **Supreme Judicial Council or equivalent body.**

Keywords of the alphabetical index:

Judicial Council, member, dismissal.

Headnotes:

The list of grounds for terminating the authority of a member of the High Council of Justice by the body that appointed him or her is exhaustive. There are no other grounds for termination of authorities than those provided for by law.

The provisions of this legislation should be interpreted as reading that a decision to terminate the authority of a member of the High Council of Justice in the event of his or her violation of the oath is taken by the body that appointed him or her. Under the law, the High Council of Justice is not obliged to provide the body concerned with an assessment of such facts and a decision concerning the presence of grounds for termination of authority.

Constitutional proceedings concerning an official interpretation of the term “immoral act” within the above legislation should be terminated, based upon provisions of the Law on the Constitutional Court. The constitutional petition did not comply with the requirements under this law and the Constitution.

Summary:

Under Article 131 of the Constitution, the High Council of Justice consists of twenty members. Parliament, President, the Congress of Judges, the Congress of the Bar and the Congress of Representatives of legal higher education institutions and research institutions each appoint three members of the High Council of Justice, and the All-Ukrainian Conference of Prosecutors appoints two members of the High Council *ex officio*. Members of the Council

are the President of the Supreme Court, the Minister of Justice and the Prosecutor General.

The procedure for appointing members of the High Council of Justice is set out in Articles 8, 9, 10, 11, 12 and 13 of the Law on the High Council, whilst the procedure for the termination of their authorities is contained in Article 18.1. The list of grounds for termination of the authority of a member of the High Council of Justice as provided for in Article 18.1 is exhaustive. It does not allow termination of authorities on other grounds by the body that appointed him or her.

Analysis of the contents of Article 18.2 of the Law, in systemic connection with the provisions of Article 18.1.8.2, shows that a decision to terminate the authority of a member of the High Council of Justice in the event of his or her violation of the oath is taken by the body that appointed him or her. Under the law, the High Council of Justice is not obliged to provide the body concerned with an assessment of such facts and a decision concerning the presence of grounds for termination of authority. Decisions are only made to recommend the termination of authorities of the person who is a member thereof *ex officio* if such a person violated the oath and forwards this decision to the body that elected or appointed him or her.

The correct interpretation of Article 18.2 of the Law, in the context of provisions of Article 18.1.8 is that the body who appointed a member of the High Council of Justice should take the decision to terminate his or her authority, in the event that he or she violates the oath or commits an immoral act. The law does not envisage provision for an assessment and a decision of the High Council of Justice on the presence of grounds for termination of authority.

At the same time, the Constitutional Court believes that in the event of a violation of the oath by a member of the High Council of Justice appointed by a respective body, the High Council of Justice may provide this body with its assessment of such fact.

Languages:

Ukrainian.



Identification: UKR-2008-1-009

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 22.04.2008 / **e)** 8-rp/2008 / **f)** On compliance with the Constitution of Article 15 of the Code of Administrative Court Proceedings and Article 7 of the Civil Procedural Code (case on the language of court proceedings) / **g)** *Ophitsiynyi Visnyk Ukrainy* (Official Gazette), 33/2008 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

4.7.4.4 Institutions – Judicial bodies – Organisation – **Languages.**

5.2.2.10 Fundamental Rights – Equality – Criteria of distinction – **Language.**

5.3.45 Fundamental Rights – Civil and political rights – **Protection of minorities and persons belonging to minorities.**

Keywords of the alphabetical index:

Language, official, use / Language, regional, use in public services / Language, Court proceedings.

Headnotes:

The Constitution rules out any preferences for citizens based on their language characteristics. Guarantees of use of Russian and other languages of national minorities in the court proceedings is completely in line with the European Charter for Regional or Minority Languages.

Summary:

Fifty-two members of the national Parliament filed a petition with the Constitutional Court, requesting an assessment of the compliance with the Constitution of Article 15 of the Code of Administrative Court Proceedings (CACP) and Article 7 of the Civil Procedural Code (CPC). They had certain concerns over these provisions.

The Supreme Council of the Autonomous Republic of Crimea also asked the Constitutional Court to assess the constitutionality of Article 7 of the CPC.

Under Article 10.1 of the Constitution, the state language is Ukrainian. The status of Ukrainian as the state language is a component of the constitutional order of a state along with its territory, capital and national symbols.

In clause 3 of the motivational part of the Decision no. 10-rp/99, 14 December 1999, a case relating to

the use of the Ukrainian language, the Constitutional Court expounded its position as follows. State language means a language that has been accorded the status of the mandatory means of communication in the public spheres of social life. This sphere includes activities of judicial bodies.

Pursuant to Article 124 of the Constitution, the Constitutional Court and courts of general jurisdiction exercise justice in the spheres of constitutional, administrative, economic, criminal and civil court proceedings. These forms of court proceedings are procedural forms of justice and include procedures for appealing to court, consideration of the case by the Court, and adoption of a court decision.

Courts use the state language in the process of court proceedings and guarantee citizens a right to use their native language during court proceedings, or a language that they speak as provided for in the Constitution and laws.

Hence, the Fundamental Law lays down the constitutional foundation for using the Ukrainian language as the language of court proceedings. At the same time, it guarantees equality of citizens' rights in court proceedings from a linguistic perspective.

Articles 10.5 and 92.1.4 of the Constitution stipulate that the procedure for using languages is to be determined only by laws.

Official use of the state language in administrative and civil court proceedings is provided for in the Law on the Judiciary (Article 10.1) and in the analysed articles of the Code of Administrative Court Proceedings and the Civil Procedural Code (referred to here as "the Codes"). The state language is used to conduct court proceedings, to prepare court documents, and to carry out other acts of communication between the court and other parties at all stages of consideration and resolution of administrative and civil cases.

The Codes guarantee citizens who have insufficient or no command of the state language a right to use their native language or another language they speak during court proceedings (Article 15.2 of the CACP, Article 7.2 of the CPC).

Therefore, legislative regulation of the court language and the above citizens' rights is a mandatory precondition for the use of language in administrative and civil court proceedings.

It follows from the contents of the constitutional petitions that their authors raise an issue of compliance of the provisions of Article 15 CACP and

Article 7 of the CPC with Articles 3.2, 10.3, 10.5, 21, 22.3, 24.2 and 64.1 of the Constitution. Based on systemic analysis, the Constitutional Court concluded that the above provisions were in line with the Constitution. The Constitutional Court arrived at this conclusion for the reasons set out below.

According to the petitioners, the “controversial” articles of the Codes violate Article 10.3 and 10.5 of the Constitution. These articles guarantee the free development, use and protection of the Russian language and other languages of national minorities. Use of languages is guaranteed by the Constitution and determined by law. They maintain that by violating citizens’ rights provided for in Article 10 of the Constitution, Article 15 of the CACP and Article 7 of the CPC change the language regime of courts’ activities.

Pursuant to the Codes, administrative and civil court proceedings are carried out in the state language. The same language is used to prepare court documents (Article 15.1 and 15.2 of the CACP; Article 7.1 and 7.3 of the CPC). This fact by no means limits the rights of citizens with insufficient or no command of the state language, since Article 10.3 of the Constitution guarantees their right to use Russian and other languages of national minorities during court proceedings. Furthermore, the Constitution rules out any preferences for citizens based on their language characteristics. Guarantees of use of Russian and other languages of national minorities in the court proceedings is completely in line with the European Charter for Regional or Minority Languages ratified by Law no. 802-IV, 15 May 2003.

Administrative and civil court proceedings in the Autonomous Republic of Crimea are carried out by courts that belong to the unified system of courts (Article 136.5 of the Constitution).

The petitioners referred to Article 22.3 of the Constitution, contending that the enactment of the Codes resulted in restrictions on the context and scope of citizens’ rights. The 1963 Civil Procedural Code allowed civil procedural court proceedings to be held “in the Ukrainian language or the language of a majority of population in the given locality”.

In its Decision no. 8-rp/2005, of 11 October 2005, on the level of pension and monthly allowance for life, the Constitutional Court ruled that narrowing of the scope of existing rights and freedoms means diminishing the features and essential characteristics of a citizen’s opportunities. It entails narrowing the group of subjects, the size of a territory, time, size or a number of benefits or any other quantitative indicators used to measure citizens’ rights and freedoms.

The contents of Article 7.2 of the CPC, under which those with insufficient or no command of the state language may use their native language or a language they speak in court proceedings did not change by comparison with the contents of Article 9.2 of the 1963 Civil Procedural Code. The disputed provisions of the CPC repeat the characteristics of rights of individuals with insufficient or no command of the state language that existed before it came into force. Hence, these provisions did not limit the constitutional human and citizens’ rights and freedoms and do not restrict the right of parties to court proceedings to use their native language or a language they speak.

Languages:

Ukrainian.



Identification: UKR-2008-1-010

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 22.04.2008 / **e)** 9-rp/2008 / **f)** On compliance with the Constitution of several presidential decrees on activities of the National Security and Defence Council and various appointments and dismissals from office / **g)** *Ophitsiynyi Visnyk Ukrainy* (Official Gazette), 33/2008 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

1.3.5.6 Constitutional Justice – Jurisdiction – The subject of review – **Decrees of the Head of State**.
4.4.1.2 Institutions – Head of State – Powers – **Relations with the executive powers**.

Keywords of the alphabetical index:

President, individual act, control / President, decree, legal effects.

Headnotes:

The President’s individual acts may be taken without counter-signature by the Prime Minister and a minister responsible for a respective act and implementation thereof.

Decrees having lost their force are beyond the competence of the Constitutional Court. The jurisdiction of the Constitutional Court extends only to effective normative legal acts.

Summary:

On 13 December 2006, fifty-two members of the national Parliament filed a petition with the Constitutional Court, questioning the constitutional compliance of the various presidential decrees:

Fifty members of the national Parliament filed a petition with the Constitutional Court, regarding the Decree of the President "On Membership of the National Security and Defence" no. 749, 11 September 2006. The petitioners had concerns that this decree was out of line with the Constitution.

Under Article 106.1.31 of the Constitution, the President exercises other constitutional powers and authorities in addition to those listed in subparagraphs 1-30 of this article. These powers are *inter alia* provided for in Article 107 of the Constitution, pursuant to which the President forms the membership of the Council and enacts its decisions by his decrees (Article 107.4 and 107.7). By issuing Decrees nos. 1447, 822 and 895 the President exercised the powers that were assigned to him in the above constitutional norms.

The petitioners argued that Decrees of the President on forming the membership of the Council and enacting its decisions pursuant to Article 106.4 are to be counter-signed by the Prime Minister and a minister responsible for a respective act and implementation thereof.

The aforementioned statement by the members of the Parliament was not based on provisions of Article 106.1.18 and 106.4 of the Constitution in their connection to provisions of Article 107 of the Constitution.

The Constitutional Court adopted the stance here that the President's individual acts may be taken without applying the requirements of Article 106.4 of the Constitution.

Decrees of the President nos. 864, 865 and 1013 are non-normative legal instruments (individual acts), which dismiss V. Horbulin from his temporary office as Council Secretary and appoint V. Haiduk and I. Dryzhchanyi as Council Secretary and Deputy Secretary respectively. These decrees were aimed at the particular individuals dismissed and appointed. They lost their force after implementation. This was

confirmed by the dismissal of V. Haiduk and I. Dryzhchanyi from their offices by Decrees of the President on dismissing V. Haiduk from Office of the Secretary of the National Security and Defence Council no. 395, 12 May 2007 and on dismissing I. Dryzhchanyi from Office of the Deputy Secretary of the National Security and Defence Council no. 1022, 29 October 2007.

This conclusion follows from a legal position of the Constitutional Court concerning a non-normative character of legal instruments set forth in paragraph 4 clause 1 of the motivational part of the Decision no. 2-rp, 23 June 1997. This case related to acts of bodies of the Parliament. The Court stated then that "by their nature, non-normative legal instruments, unlike normative, do not establish general rules of behaviour but contain specific prescriptions concerning a specific individual or a legal entity and are applied once and lose their force after implementation".

As the decrees had lost their force, they could not form the subject of constitutional review. Thus, the issue of their constitutionality is beyond the competence of the Constitutional Court.

Decree no. 749 in accordance with the Decree of the President "On Membership of the National Security and Defence Council" no. 43, 21 January 2008, was pronounced null and void. The legal position of the Constitutional Court as stated in Decision no. 15-rp/2001, 14 November 2001 (a case on registration) was that its jurisdiction extends only to effective normative legal acts (clause 5 of the motivational part). The issue of the constitutionality of an ineffective legal act is beyond jurisdiction of the Constitutional Court.

Lack of jurisdiction of the Constitutional Court over issues raised by the constitutional petition as provided for in Article 45.3 of the Law on the Constitutional Court and § 51 of the Rules of Procedure of the Constitutional Court constitutes grounds for termination of the constitutional examination of a case.

Languages:

Ukrainian.



United Kingdom

House of Lords

Important decisions

Identification: GBR-2008-1-001

a) United Kingdom / **b)** House of Lords / **c)** / **d)** 12.03.2008 / **e)** / **f)** Regina (Animal Defenders International) v. Secretary of State for Culture, Media & Sport / **g)** [2008] UKHL 15 / **h)** [2008] 2 *Weekly Law Reports* 781; CODICES (English).

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**.

3.19 General Principles – **Margin of appreciation**.

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**.

Keywords of the alphabetical index:

Media, advertising, political, prohibition / Animal rights / Pressing social need, advertising, prohibition.

Headnotes:

The imposition of a ban on television advertising on a non-profit-making company whose aims were: to lawfully suppress animal cruelty; alleviate animal suffering; and conserve and protect their environment under Sections 319 and 321 of the Communications Act 2003 (the 2003 Act) did not amount to an infringement of Article 10 ECHR. The ban was justified as it was necessary within a democratic society.

Summary:

I. The claimant was a campaigning organisation which wished to influence public and parliamentary opinion through a wide-ranging advertising campaign, including television advertising, in 2005. The campaign's focus

was the use of primates by humans and the threat this posed to their survival in the wild. On 5 April 2005 the Broadcast Advertising Clearing Centre, an informal monitoring body refused to specify that the advert was suitable for transmission. It made its decision on the ground that the advert breached the bar on political advertising set out in Section 321 of the 2003 Act. It confirmed its decision on 6 May 2005. The claimant issued judicial review proceedings against the defendant, who it was accepted was the proper defendant given his overarching responsibility for broadcasting media. Within the judicial review proceedings the claimant sought a declaration that Section 321 of the 2003 Act was incompatible with Article 10 ECHR. The judicial review action failed. Permission was given to appeal directly to the House of Lords under Section 12 of the Administration of Justice Act 1969.

II. Their Lordships noted that there was considerable common ground between the parties. It was accepted that: Sections 319 and 321 of the 2003 Act interfered with the claimant's Article 10 ECHR right; the restriction was one prescribed by law and served a legitimate aim i.e., to protect the democratic rights of other members of society; and that in respect of whether or not the restriction on the Article 10 ECHR right was necessary it was for the defendant to demonstrate that there was a pressing social need for it and that the threshold test was a high one with the margin of appreciation correspondingly small.

The claimant in its submissions relied on the Strasbourg court's decision in *VgT Verein gegen Tierfabriken v. Switzerland* [2001] 34 European Human Rights Reports 159. The facts underlying that decision were noted as being remarkably similar to the immediate case. The Strasbourg Court could have held that a ban imposed on political television advertising did amount to an infringement of Article 10 ECHR in that the ban was not necessary in a democratic society.

The defendant based his submissions on the Strasbourg court's decision in *Murphy v. Ireland* [2003] *European Human Rights Reports* 212. In that decision, the Strasbourg Court accepted that insofar as restrictions on advertising concerning morality and religion was concerned, States enjoyed a wider margin of appreciation than they did in respect of political matters. Furthermore, the defendant relied on Ouseley J's reasoning at first instance in the present case, which was to the effect that there was no sensible distinction to be drawn between a political party and a single issue pressure group, which had discernible political ends and that the distinction drawn by the Strasbourg Court in *VgT* and *Murphy* was unworkable.

The Lords dismissed the appeal. Lord Bingham, who gave the lead judgment, with whom Baroness Hale, Lord Carswell and Lord Neuberger agreed and with whom Lord Scott agreed in part, set out the following fundamental principles. First, freedom of expression and thought are essential features of a healthy democratic society. The fundamental rationale of the democratic process is that opposed, competing views, beliefs and policies should be subject to open scrutiny, with genuine choice between the alternative views coming after that open scrutiny and debate. It was the duty of broadcasters to ensure that such views were presented impartially, without favour or bias to any particular position. The playing field in an open society should be, as far as possible, a level one. That is not achieved, nor is proper debate achieved, if well-endowed interests which are not political parties are able to use their resources to give an enhanced prominence to their views. He put it this way (at paragraph 28): 'The risk is that objects which are essentially political may come to be accepted by the public not because they are shown in public debate to be right but because, by dint of repetition, the public has been conditioned to accept them.'

Lord Bingham went on to state that it was not apparent that the full strength of the argument had been put to the Strasbourg Court in *VgT*. It was a matter for Parliament to decide whether there was a real danger from such adverts, because it was reasonable to expect democratically elected representatives to be peculiarly sensitive to what was needed to safeguard democracy; that it had chosen a blanket prohibition despite advice that it might infringe Article 10 ECHR; legislation could not be framed so as to deal with particular cases; fourthly, as a general rule had to be drawn, it was for Parliament to draw it. He went on to hold that, insofar as television and radio advertising was concerned, there was a pressing social need for a blanket ban on such advertising due to the immediate impact that such advertising had.

Languages:

English.



Identification: GBR-2008-1-002

a) United Kingdom / b) House of Lords / c) / d) 09.04.2008 / e) / f) Regina (Gentle & Another) v. Prime Minister & Others / g) [2008] UKHL 20 / h) [2008] 2 *Weekly Law Reports* 879; CODICES (English).

Keywords of the systematic thesaurus:

2.1.1.4.1 Sources – Categories – Written rules – International instruments – **United Nations Charter of 1945.**

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950.**

2.1.3.1 Sources – Categories – Case-law – **Domestic case-law.**

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights.**

2.3.6 Sources – Techniques of review – **Historical interpretation.**

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

5.1.1.4.4 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Military personnel.**

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

Keywords of the alphabetical index:

War, legality, enquiry, obligation.

Headnotes:

The European Court of Human Rights did not provide a proper mechanism for assessing the legality of war. The Court held specifically that Article 2 ECHR, while it placed obligations on a State to protect military personnel within its jurisdiction, this did not give rise to the basis of an assessment of the lawfulness of an invasion of a sovereign state. The proper instrument for assessing the legality of war was the 1945 UN Charter.

Summary:

I. Two soldiers serving in the British army were killed whilst in Iraq. The first was killed in a 'friendly fire' incident in March 2003, whereas the latter of the two was killed by a roadside bomb in June 2004. Properly constituted inquests into the deaths were conducted in the UK, which left no outstanding questions as to the circumstances of their deaths. The mothers of both soldiers commenced actions against the

government on the basis that, in virtue of Section 1 and 2 of the Human Rights Act 1998 and Article 2 ECHR, they had an enforceable legal right to require the government to hold an independent public inquiry into the circumstances surrounding the invasion of Iraq; an inquiry which would include an assessment of the steps the government took to obtain legal advice as to the legality of the invasion.

II. Lord Bingham, giving the lead judgment, noted at the outset that the claimants underlying complaint was that the Iraq war was unlawful: this was not a matter that fell for the Court to decide.

The claimants' central contention was that there had been a breach of their sons' Article 2 ECHR right, which ought to be investigated. The alleged breach was said to be the government's failure to take proper steps to ascertain whether the Iraq invasion complied with international law. Article 2 ECHR was said to give rise to a duty to take reasonable steps to investigate whether an invasion would, in international law, be lawful. It was submitted that if a proper investigation as to legality had taken place, there was a good chance that the UK would not have taken part in the invasion and subsequent occupation of Iraq and the two soldiers would not have lost their lives. The failure to carry out this exercise was said to be a substantial and operative cause of their deaths. It was not suggested that Article 2 ECHR imposed a duty on the government not to take part in invasions that were unlawful in international law.

The fundamental question in the case was whether or not Article 2 ECHR imposed a substantive obligation on the government to take reasonable steps to ascertain the lawfulness of the invasion. This question had to be answered in the negative. In the first instance, Article 2 ECHR did not impose a duty on the government not to take part in unlawful invasions. As a necessary consequence a duty to take reasonable steps to ensure that an invasion was lawful would, in the words of Lord Rodger, be futile. Secondly, the proposed obligation, which is implied into Article 2 ECHR, to hold an effective investigation into any death occurring in circumstances where the substantive obligation under this article came into play could not itself be transformed into a substantive obligation. Thirdly, taking steps to ascertain the legality of an invasion did not have a causal relation with the risk to soldiers' lives. As Baroness Hale put it, the legality of war is an issue between states and not between individuals and states. It is an issue which has no direct link to the risk to life: 'Soldiers are just as likely to die in a just war as an unjust one' (see paragraph 57).

She went on to hold, echoing Lord Scott, that if there is no duty owed to individual soldiers which requires a state to only send soldiers to lawful wars, it makes no difference whether or not reasonable steps have been taken to ascertain whether or not it was lawful.

Lord Bingham in his reasoning held that the draftsman of the European Convention on Human Rights could not have envisaged that it could provide a suitable framework for resolving questions as to the legality of war. They would have been well aware of the then recently drafted and adopted UN Charter, and the framework it provided for resolving such questions. Moreover even if the claimants were to establish a relevant substantive right under Article 2 ECHR there was nothing in the Strasbourg case-law to establish that it contemplated a right to as wide a ranging inquiry as the claimants contended e.g., *Jordon v. the UK* [2001] *European Human Rights Reports* 52; *Bubbins v. the UK* [2005] *European Human Rights Reports* 458.

Languages:

English.



United States of America

Supreme Court

Important decisions

Identification: USA-2008-1-001

a) United States of America / b) Supreme Court / c) / d) 25.03.2008 / e) 06-984 / f) *Medellin v. Texas* / g) 128 *Supreme Court Reporter* 1346 (2008) / h) CODICES (English).

Keywords of the systematic thesaurus:

2.1.1.4 Sources – Categories – Written rules – **International instruments.**

2.1.1.4.1 Sources – Categories – Written rules – International instruments – **United Nations Charter of 1945.**

2.1.3.2.3 Sources – Categories – Case-law – International case-law – **Other international bodies.**

4.5.2.1 Institutions – Legislative bodies – Powers – **Competences with respect to international agreements.**

4.6.2 Institutions – Executive bodies – **Powers.**

4.6.6 Institutions – Executive bodies – **Relations with judicial bodies.**

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

4.16.1 Institutions – International relations – **Transfer of powers to international institutions.**

Keywords of the alphabetical index:

Consular Relations, Vienna Convention, Optional Protocol / International Court of Justice / Judgment, international court / Treaty, interpretation / Treaty, self-executing.

Headnotes:

An international treaty constitutes an international legal commitment, but is not binding domestic law unless the federal legislature has enacted implementing legislation or the treaty itself conveys the intent that it is self-executing.

Interpretation of a treaty, like interpretation of a domestic legislative act, begins with its text.

In addition to the text of a treaty, aids to its interpretation include the treaty's negotiation and drafting history, as well as the post-ratification understanding of the states-parties.

In interpreting a treaty, a court shall give great weight to the interpretation of the federal executive branch.

United Nations Charter requirement that each member-state undertake to comply with an International Court of Justice decision in any case in which the state is a party does not entail immediate legal effect in the state's domestic courts, but instead represents the state's commitment that its political branches will take future compliance actions.

International Court of Justice decisions are not automatically enforceable in domestic courts; instead, the sole remedy under the United Nations Charter for non-compliance is an aggrieved state's referral to the United Nations Security Council.

The authority of the executive branch to act must stem either from an act of the legislative branch or from the Constitution itself.

The executive branch lacks authority to convert unilaterally a non-self-executing treaty into a self-executing treaty; instead, the constitutional authority to transform an international duty arising from a non-self-executing treaty into domestic law resides in the legislative branch.

Summary:

A jury in the state of Texas found Jose Ernesto Medellin, a citizen of Mexico, guilty of murder. He was sentenced to death. His conviction and sentence were affirmed on appeal.

After the appellate court decision, Medellin raised for the first time a claim based on the Vienna Convention on Consular Relations ("VCCR"): that the authorities had never informed him of his right under the VCCR to notify the Mexican Consulate about his detention. The United States is a party to the VCCR. In a series of state and federal court decisions, this claim was denied in part because it had not been raised at trial or on appeal and therefore was barred under Texas's procedural default law.

Meanwhile, in its 2004 decision in the Case Concerning Avena and Other Mexican Nationals (*Mexico v. U.S.*) ["*Avena*"], the International Court of Justice ("ICJ") ruled that, based on violations of the VCCR, the United States was obliged to provide, "review and reconsideration" of the convictions and

sentences of Medellín and a number of other Mexican nationals. The ICJ had jurisdiction in this case because the United States at the time was a party to the VCCR's Optional Protocol, which grants the ICJ compulsory jurisdiction to adjudicate disputes.

In 2005, President George W. Bush issued a 2005 Presidential Memorandum to the U.S. Attorney General. The Memorandum provided that the United States would discharge its international obligations under the Avena decision, and would do so by having State courts give effect to that decision.

In 2006, the Texas Court of Criminal Appeals dismissed Medellín's application for review of his conviction and sentence. The Court ruled that neither the Avena decision nor the President's Memorandum was binding federal law that would supersede Texas's legislation. The U.S. Supreme Court agreed to review the Texas Court's decision.

The Supreme Court affirmed the Texas Court's decision. It rejected Medellín's argument that the ICJ's Avena decision was a binding obligation on U.S. state and federal courts because of the Supremacy Clause in Article VI.2 of the U.S. Constitution, which states in part that all treaties to which the U.S. is a party "shall be the supreme Law of the Land" and "the Judges in every State shall be bound thereby." The treaties upon which this argument was based were the United Nations Charter (including its accompanying ICJ Statute) and the VCCR Optional Protocol. In rejecting this argument, the Court ruled that the relevant treaties are non-self-executing: in other words, although they imposed international law commitments on the U.S., they do not function as binding federal law in the absence of implementing legislation. The U.S. Congress never has enacted legislation implementing the U.N. Charter or the VCCR Optional Protocol (or the VCCR itself). While U.S. law does recognise that a treaty may be self-executing, the Court concluded that the treaties in question were not, on the basis of their texts and interpretive aids such as drafting history and "post-ratification understanding" of the states-parties. In regard to the U.N. Charter, the Court concluded that the text of Article 94.1, providing that each member-state "undertakes to comply" with the decision of the ICJ in any case to which the member is a party, is not a directive to domestic courts, but instead is the members' commitment that they will take future action through their political branches to comply with an ICJ decision.

The Court also rejected a second line of argument, asserted by both Medellín and the U.S. government, that the President's 2005 Memorandum required the Texas courts to give effect to the ICJ's order. This

argument was based on an assertion that the treaties in question authorised the President to implement obligations arising from them and therefore were a form of legislative delegation because the U.S. Senate had approved ratification of the treaties. In the alternative, the proponents argued that the Memorandum was a valid exercise of the President's independent constitutional foreign affairs authority. Applying a three-part analysis of executive branch action first adopted in its 1952 *Youngstown Sheet & Tube Co. v. Sawyer* decision, the Court rejected the first assertion because the constitutional responsibility for transforming an international obligation arising from a non-self-executing treaty lies with the legislative branch, not the executive. As to the second assertion, the Court concluded that nothing in past practice would support the issuance of an executive branch directive to state courts.

Supplementary information:

Justice Stevens filed an opinion concurring in the judgment. Three of the Court's nine Justices dissented from the Court's decision. Their views were set forth in a lengthy dissenting opinion authored by Justice Breyer.

Cross-references:

- *Youngstown Sheet & Tube Co. v. Sawyer*, 343 *United States Reports* 579, 72 *Supreme Court Reporter* 863, 96 *Lawyer's Edition* 1153 (1952).

Languages:

English.



Identification: USA-2008-1-002

a) United States of America / **b)** Supreme Court / **c)** / **d)** 16.06.2008 / **e)** 07-5439 / **f)** *Baze v. Rees* / **g)** 128 *Supreme Court Reporter* 1521 (2008) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

5.3.3 Fundamental Rights – Civil and political rights – **Prohibition of torture and inhuman and degrading treatment.**

Keywords of the alphabetical index:

Death penalty, injection, lethal.

Headnotes:

The death penalty in itself does not violate the constitutional prohibition of cruel and unusual punishments.

The constitutional prohibition of cruel and unusual punishments does not require avoidance of all risk of pain in the carrying out of an execution.

A method of execution will not constitute cruel and unusual punishment unless it presents a substantial risk of serious harm when compared to known and available alternatives.

Summary:

I. The petitioners, Ralph Baze and Thomas Bowling, were found guilty of murder in the State of Kentucky courts and sentenced to death. While in prison on death row, they filed a lawsuit challenging the constitutionality of Kentucky's method of administering capital punishment. They alleged that the State's administration of a three-drug lethal injection method was a prohibited form of punishment under the Eighth Amendment to the U.S. Constitution. The Eighth Amendment, which is applicable to the States through the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution, states in full that: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The petitioners did not challenge the constitutionality of the death penalty itself, or of the method of lethal injection as a general matter. Instead, their argument focused on the details of the punishment's administration, including the chemicals used, the training of the personnel involved, and the adequacy of medical supervision. Kentucky, like most of the 35 States that impose capital punishment by means of lethal injection, uses a combination of three drugs administered in sequence. The first, sodium thiopental, induces unconsciousness when administered in an adequate amount and is intended to ensure that the prisoner does not experience any pain resulting from the second and third drugs, which paralyze the muscles and stop the heart. The petitioners' lawsuit alleged that Kentucky's administration of this punishment posed an unnecessary risk that the condemned person would endure an unacceptable level of pain and suffering, and that this risk could be eliminated by the adoption of certain alternative procedures. For example, the challengers cited the recognition in certain other States

that an inadequate amount of sodium thiopental might be administered, with the result that the condemned person would not be properly anaesthetised before injection of the second and third drugs, which can cause severe pain. Those other States have adopted additional safeguards, which Kentucky has not adopted, against this risk.

The first instance court, a State of Kentucky trial court, upheld the method's constitutionality, ruling that there was a minimal risk of improper administration. The Kentucky Supreme Court affirmed this decision, holding that the method was constitutional because it did not create a substantial risk of wanton and unnecessary infliction of pain, torture, or lingering death.

II. The U.S. Supreme Court accepted review and affirmed the ruling of the Kentucky Supreme Court. It began with the observation that some risk of pain is inherent in any method execution, particularly from the possibility that there will be an error in following the required procedure. For this reason, since capital punishment is constitutional, the Eighth Amendment does not require that all risk of pain be avoided in the carrying out of an execution. The central question before the Court, then, was identification of the proper standard to apply in evaluating the risk of an unacceptable level of pain and suffering. In identifying this standard, the Court rejected the petitioners' proposed "unnecessary risk" of error. Instead, the Court stated, a successful challenge to an execution method must demonstrate that its administration presents a "substantial" risk of serious harm when compared to known and available alternatives. Applying this standard, the Court ruled that Kentucky's method of administering the three-drug injection did not pose a substantial risk of serious harm, and that Kentucky's decision not to adopt the petitioners' proposed alternatives did not make the State's method a cruel and unusual punishment.

Supplementary information:

The Court voted 7-2 to affirm the ruling of the Kentucky Supreme Court. The range of views on the case resulted in the filing of seven opinions by the Justices. Two other Justices joined Chief Justice Roberts's opinion for the Court. In addition, five other Justices filed concurring opinions, and Justice Ginsburg filed a dissenting opinion that Justice Souter joined. In his concurring opinion, Justice Stevens stated that he was bound by the Court's precedents to find Kentucky's method consistent with the Eighth Amendment, but at the same time he called for full-scale examination of the constitutionality of the death penalty. Justice Scalia's concurring opinion was sharply critical of this proposal, stating that it was an expression of the "principle of rule by judicial fiat."

Federal law and the laws of 36 States provide for capital punishment. After the Supreme Court accepted review in *Baze v. Rees* in September 2007, the federal government and the States voluntarily adopted moratoria on scheduled executions, in order to await the Court's decision. Therefore, no executions took place during this period. Shortly after the Court's decision, States began the re-scheduling of executions, and the first took place on 6 May in the State of Georgia.

Languages:

English.



Inter-American Court of Human Rights

Important decisions

Identification: IAC-2008-1-001

a) Organisation of American States / **b)** Inter-American Court of Human Rights / **c)** / **d)** 11.05.2007 / **e)** Series C 164 / **f)** Bueno-Alves v. Argentina / **g)** / **h)** CODICES (English, Spanish).

Keywords of the systematic thesaurus:

1.6.2 Constitutional Justice – Effects – **Determination of effects by the court.**
 4.18 Institutions – **State of emergency and emergency powers.**
 5.1.3 Fundamental Rights – General questions – **Positive obligation of the state.**
 5.3.4 Fundamental Rights – Civil and political rights – **Right to physical and psychological integrity.**

Keywords of the alphabetical index:

Damages, non-pecuniary, next of kin / Human rights, violation, state, tolerance / State, responsibility, international / Torture, prohibition / Treatment or punishment, cruel and unusual, prohibition.

Headnotes:

International Human Rights Law strictly prohibits torture and cruel, inhuman, or degrading punishment or treatment. Said prohibition remains valid even under the most difficult circumstances, such as war, the fight against terrorism and other public emergencies or catastrophes.

States are bound to take effective measures to prevent and punish torture within their jurisdiction and prevent and punish other cruel, inhuman, or degrading treatment or punishment.

In cases of serious breaches to fundamental rights the imperious need to avoid the repetition of said facts depends on avoiding their impunity and satisfying the right of both victims and society as a whole to have access to the knowledge of the truth of what happened. The obligation to investigate

constitutes a means to guarantee said rights, and failure to comply with it brings about the State's international responsibility.

The elements of torture are considered to be following:

- a. an intentional act;
- b. which causes severe physical or mental suffering; and
- c. is committed with a given purpose or aim.

Summary:

I. Early in 1988 Mr Bueno-Alves, a Uruguayan national residing in Argentina engaged in a real estate sales transaction with Norma Lage, which at the end was not carried out. Both parties alleged fraud in relation to the frustrated transaction and on 20 March 1988 agreed that it be cancelled. On 5 April 1988, at a meeting held for that purpose, Mr Bueno-Alves and his attorney were detained and the offices of the latter were searched by officials of the Fraud and Embezzlement Division of the Argentine Federal Police, under order of the court in charge of criminal proceedings. While he was arrested and kept under police custody, Mr Bueno-Alves was subjected to torture consisting of being beaten on the ears and the stomach, insulted because of his nationality, and deprived of his medication for an ulcer. As a consequence, Mr Bueno-Alves suffered a hearing impairment of his right ear and the loss of his balancing capability.

On 31 March 2006, the Inter-American Commission on Human Rights (hereinafter "the Commission") submitted an application to the Court against the Republic of Argentina to determine if the State was responsible for the violation of the rights recognised in Article 5 ACHR (Right to Humane Treatment), Article 8 ACHR (Right to a Fair Trial) and Article 25 ACHR (Right to Judicial Protection), in relation to Article 1.1 ACHR (Obligation to Respect Rights), to the detriment of Mr Bueno-Alves. The Commission requested the Court that the State be required to take certain measures of reparation.

On 20 July 2006, the alleged victim's representative requested the Court to declare that, in addition to the violations alleged by the Commission, the State was internationally responsible for the violation of the rights recognised in Article 7 ACHR (Right to Personal Liberty), Article 11 ACHR (Right to Privacy) and Article 24 ACHR (Right to Equal Protection) and Articles I, V, VI, XVII, XVIII, XXV, XXVI and XXVIII of the American Declaration of the Rights and Duties of Man.

On 26 September 2006, the State filed a brief, whereby it reiterated its acceptance of the Commission's conclusions and its legal consequences. The State, however, contested the arguments of the additional arguments submitted by the victim's representative.

II. The Court proceeded to consider the representative's allegations. On an assessment of the facts, the Court considered that the petitioner was arrested due to causes and in conditions established by the laws of Argentina and therefore the arrest itself did not constitute an Article 7 ACHR violation of the petitioner's right to personal liberty.

Pertaining to the State's alleged indifference and lack of interest regarding the honour, dignity, and life of the victim and his next of kin, the Court considered that a legal process does not constitute, in itself, an illegal violation of the honour and dignity of a person. The process is intended to solve a controversy, even though this may indirectly bring about nuisance for those who are subject to trial. Thus, the Court considered that in the instant case the violation of Article 11 ACHR had not been proven. Further, the Court found no evidence that Mr Bueno-Alves was subjected to alleged insults or discriminatory treatment in violation of Article 24 ACHR.

The Court defined the elements that constitute the crime of torture and subsequently held, in view of the acknowledgment made by the State, that Mr Bueno-Alves was in fact tortured, which constitutes a violation of the right recognised in Article 5.1 and 5.2 ACHR, in relation to Article 1.1 ACHR. The Court also held that a nine year delay in the domestic court proceedings constituted a violation of Mr Bueno-Alves' due process right to be heard within a reasonable time, as established under Article 8.1 ACHR and further declared that the State violated Mr Bueno-Alves' right to judicial protection under Article 25.1 ACHR.

Consequently, the State was ordered to pay Mr Bueno-Alves for non-pecuniary damages as well as for his subsequent work disability, lost future earnings and medical, pharmaceutical, treatment and rehabilitation expenses. Additionally, the State was ordered to conduct the necessary investigations so that those responsible for the acts denounced in the instant case be identified and punished as provided by law.

Languages:

Spanish.



Identification: IAC-2008-1-002

a) Organisation of American States / **b)** Inter-American Court of Human Rights / **c)** / **d)** 20.11.2007 / **e)** Series C 169 / **f)** Boyce et al. v. Barbados / **g)** / **h)** CODICES (English, Spanish).

Keywords of the systematic thesaurus:

5.1.4.1 Fundamental Rights – General questions – Limits and restrictions – **Non-derogable rights.**

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

5.3.3 Fundamental Rights – Civil and political rights – **Prohibition of torture and inhuman and degrading treatment.**

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

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

Keywords of the alphabetical index:

Damages, non-pecuniary / Detention, conditions, isolation / State, responsibility, international / Treatment or punishment, cruel and unusual / Punishment, individualisation / Sentence, minimum / Death penalty, limitation.

Headnotes:

Capital punishment is not *per se* incompatible with or prohibited by the American Convention, however, the Convention sets out strict limitations to the imposition of capital punishment. First, the imposition of the death penalty must be limited to the most serious common crimes not related to political offences. Second, the sentence must be individualised in conformity with the characteristics of the crime, as well as the participation and degree of culpability of the accused. Finally, the imposition of this sanction is subject to certain procedural guarantees, and compliance with them must be strictly observed and reviewed.

A lawfully sanctioned mandatory sentence of death may be deemed arbitrary where the law fails to distinguish the possibility of different degrees of culpability of the offender and fails to individually consider the particular circumstances of the crime.

All detained persons have the right to live in conditions compatible with the inherent dignity of every human being. States have the duty to ensure that the manner and method of any deprivation of liberty do not exceed the unavoidable level of suffering inherent in detention, and that the detainees' health and welfare are adequately safeguarded. A failure to do so may result in a violation of the absolute prohibition of cruel, inhuman or degrading punishment or treatment.

States may not invoke economic hardships to justify imprisonment conditions that do not conform to the very minimum international standards in this area and that fail to respect the inherent dignity of human beings.

A law that impedes the exercise of the right not to be arbitrarily deprived of life may be, *per se*, contrary to the American Convention on Human Rights and the State has a duty to eliminate or modify it pursuant to Article 2 ACHR.

Regardless of whether a petitioner has a "constitutional right" or a "legitimate expectation", it is fundamental that litigants be able to complete their appeals at the national level as well as petitions and applications before the Commission and Court, respectively, before any execution may be carried out.

National courts must address whether domestic law restricts or violates the rights recognised in the Convention.

Constitutional clauses that effectively deny the right to seek judicial protection against violations of fundamental rights are incompatible with the American Convention.

Summary:

I. On 23 June 2006, the Inter-American Commission on Human Rights (hereinafter, the Commission) filed an application against the State of Barbados to determine the international responsibility of the State for the violation of Article 4.1 and 4.2 ACHR (Right to Life), Article 5.1 and 5.2 ACHR (Right to Humane Treatment) and Article 8.1 ACHR (Right to a Fair Trial), as well as Article 1.1 ACHR (Obligation to Respect Rights) and Article 2 ACHR (Domestic Legal Effects), to the detriment of Lennox Ricardo Boyce, Jeffrey Joseph, Frederick Benjamin Atkins and Michael McDonald Huggins.

All four alleged victims were sentenced to death pursuant to Section 2 of Barbados' Offences Against the Person Act (OAPA) of 1994, which imposes a mandatory sentence of death for persons convicted for the crime of murder. The Commission alleged that the State is responsible for the violations resulting from the mandatory nature of the death penalty imposed upon the alleged victims for their murder convictions, the conditions of their detention, the reading of warrants of execution while their complaints were allegedly pending before domestic courts and the Inter-American Human Rights System, and the alleged failure to bring the domestic legislation of Barbados into compliance with its obligations under the American Convention.

Prior to analysing the preliminary objection submitted by the State and the possible merits of this case, the Tribunal addressed the effect of Barbados' reservation to the American Convention on Human Rights. In interpreting Barbados' reservation, the Court held that it must rely on a strictly textual analysis and ensure the protection of the basic rights of individual human beings. The reservation must be interpreted in accordance with Article 29 ACHR, which implies that a reservation may not be interpreted so as to limit the enjoyment and exercise of the rights and liberties recognised in the Convention to a greater extent than is provided for in the reservation itself. Accordingly, the Court held that Barbados' reservation to the American Convention on Human Rights did not specifically address the issue of mandatory death sentences, and therefore the Court was not barred from addressing that issue.

The Court held that Barbadian domestic law mandated the application of the death penalty for all murders without differentiating between intentional killings punishable by death, that is, those involving the most serious crimes, and intentional killings that would not be punishable by death. Thus, because the law under examination did not allow judges to take into consideration the particular characteristics of the crime, as well as the participation and degree of culpability of the accused when deciding the appropriate form of punishment, the Court held that the State violated Article 4 ACHR.

Additionally, the Court analysed Section 26 of the Constitution of Barbados, which prevents judicial scrutiny over the law that authorises mandatory death sentences for all murderers, which in turn violates the right not to be arbitrarily deprived of life. The Court held that the State had failed to abide by its obligations under Article 2 ACHR, in relation to Articles 1.1, 4.1, 4.2 and 25.1 ACHR.

The Court further held that the prison conditions in which the victims' were held amounted to inhuman and degrading treatment as they failed to respect the human dignity of the person, in contravention to Article 5.1 and 5.2 ACHR. The inmates were forced to use slop buckets in plain view of others, had little to no privacy, as they were being held in cage-like conditions for 23 hours each day, had inadequate lighting and ventilation, their contact with the outside world was extremely limited, and they had few opportunities to exercise.

Finally, the Court held that the reading of death warrants while their domestic appeals and petition before the Inter-American System were pending, constituted a cruel treatment in violation of Article 5 ACHR, in conjunction with Article 1.1 ACHR.

Consequently, the Court considered that the recognition of the violations declared in its judgment were, *per se*, a form of reparation. Furthermore, to guarantee the non-repetition of the violations of the rights addressed in the judgment, the Court ordered the State to formally commute the death sentence of one of the victims; adopt such legislative or other measures as may be necessary to ensure that the imposition of the death penalty does not contravene the rights and freedoms guaranteed under the Convention; adopt legislative or other measures necessary to ensure that the Constitution and laws of Barbados are brought into compliance with the American Convention on Human Rights; and adopt and implement such measures necessary to ensure that the conditions of detention in which the victims in this case are held to comply with requirements of the American Convention.

Languages:

Spanish.



Identification: IAC-2008-1-003

a) Organisation of American States / **b)** Inter-American Court of Human Rights / **c)** / **d)** 21.11.2007 / **e)** Series C 170 / **f)** Chaparro Álvarez and Lapo Íñiguez v. Ecuador / **g)** / **h)** CODICES (English, Spanish).

Keywords of the systematic thesaurus:

- 1.6.2 Constitutional Justice – Effects – **Determination of effects by the court.**
 3.16 General Principles – **Proportionality.**
 3.18 General Principles – **General interest.**
 5.3.13.13 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Trial/decision within reasonable time.**
 5.3.13.22 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Presumption of innocence.**
 5.3.39 Fundamental Rights – Civil and political rights – **Right to property.**
 5.4.5 Fundamental Rights – Economic, social and cultural rights – **Freedom to work for remuneration.**

Keywords of the alphabetical index:

Human right, violation, state, tolerance / Detainee, statement before prosecutor, right to a judge.

Headnotes:

Any arrest carried out without a written judicial order, except *in flagrante delicto*, may be unlawful.

A detained person must understand that he or she is being detained, and the agent who carries out the arrest must inform him or her in simple language the legal grounds and facts of the arrest.

A detained person's statement before a prosecutor cannot be considered to comply with the right to be brought before "a judge or other officer authorised by law to exercise judicial power" embodied in Article 7.5 ACHR.

To prevent the arbitrary deprivation or restriction of the right to liberty, the measures used must be:

- a. for a purpose compatible with the Convention;
- b. appropriate to achieve the purpose sought;
- c. absolutely essential to achieve the purpose and that, among all possible measures, there is no less burdensome one in relation to the right involved, that would be as suitable to achieve the proposed objective; and
- d. strictly proportionate.

In order to restrict the right to personal liberty using measures such as preventive custody, there must be sufficient evidence to allow a reasonable supposition that the detained person has taken part in the criminal offence under investigation.

Judges should assess periodically that the reasons and purposes that justified the deprivation of liberty subsist, whether a precautionary measure is still absolutely necessary in order to achieve these purposes, and whether it is proportionate. At any time that the precautionary measure does not meet any of these conditions, the release of those detained must be ordered. Likewise, when a request is received for the release of those detained, the judge must explain the grounds, even if very briefly, on which he considers that preventive detention should be maintained.

Control of deprivation of liberty must be of a judicial nature. Although a mayor may be granted competence by law, he or she is not a judicial authority.

The principle of presumption of innocence constitutes a cornerstone of the right to a fair trial. The State has an obligation not to restrict the liberty of a detained person beyond the limits strictly necessary to ensure that he will not prevent the proceedings from being conducted or evade the justice system.

It is only admissible to seize and deposit property when there is clear evidence of its connection to the offence, and provided that it is necessary to guarantee the investigation and the payment of the applicable pecuniary responsibilities, or to avoid the loss or deterioration of the evidence. Also, these measures must be adopted and supervised by judicial officials, taking into account that, if the reasons that justified the precautionary measure cease to exist, the judge must assess the pertinence of maintaining the restriction.

While the right to property is not an absolute right, the deprivation of the property must be for reasons of public utility or social interest, subject to payment of just compensation, and only in the cases and in the ways established by law.

Summary:

I. Mr Chaparro, a Chilean national, owned a factory that manufactured ice chests for transporting and exporting different products and Mr Lapo, an Ecuadorian national, was the manager of the factory. On 14 November 1997, Ecuadorian anti-narcotics police officials seized a shipment of fish belonging to another company and discovered packets of heroine and cocaine hydrochloride in the thermal insulated boxes, which Ecuador believed had been fabricated at Mr Chaparro's factory. As a result, Mr Chaparro was deemed to belong to an international drug trafficking organisation, his factory was searched and seized, and he and Mr Lapo were detained. At the

time of Mr Chaparro's detention, the State authorities did not advise him of the respective reasons or justification for his arrest, or of his right to request consular assistance from the country of which he was a national. The detention of Mr Lapo was not made *in flagrante delicto* and it was not preceded by a written order by a judge; moreover, he, also, was not advised of the reasons and justification for his detention. Mr Chaparro did not have a lawyer present when he made his pre-trial statement and Mr Lapo's public defender was unsatisfactory. Furthermore, the detention of the alleged victims exceeded the legal maximum allowed by domestic law and they were not taken before a judge promptly. They remained in preventive custody for over a year, despite the lack of any substantial evidence linking them to illicit acts. Finally, the State did not return the seized property in a timely fashion or in adequate conditions.

On 23 June 2006 the Inter-American Commission on Human Rights (hereinafter "the Commission") lodged before the Court an application against the Republic of Ecuador to establish the international responsibility of the State for the violation, to the detriment of Mr Chaparro and Mr Lapo, of the rights recognised in Article 2 ACHR (Domestic Legal Effects), Article 5 ACHR (Right to Humane Treatment), Article 7 ACHR (Right to Personal Liberty), Article 8 ACHR (Right to a Fair Trial), Article 21 ACHR (Right to Property) and Article 25 ACHR (Right to Judicial Protection), in relation to Article 1.1 ACHR (Obligation to Respect Rights). During the public hearing, the State acquiesced to the violations of Articles 2, 5, 8 and 25 ACHR. The Court's judgment primarily focused on the violations of Articles 7 and 21 ACHR.

II. In the case of Mr Lapo, the Court found that his arrest was illegal, as it did not comply with the requirements established in Ecuador's domestic laws, in contravention of Article 7.2 ACHR. In the case of Mr Chaparro, the Court established that the State did not inform him of the "motives" or "reasons" for his arrest, rendering the arrest unlawful and contrary to Article 7.2 and 7.4 ACHR. The Court also held that their preventive custody was arbitrary and contrary to Article 7.3 ACHR.

The Court declared that the failure to return property belonging to the company had an impact on its value and productivity, which, in turn, prejudiced Mr Chaparro's patrimony. The Court considered this prejudice as an arbitrary interference in the "enjoyment" of the property under the provisions of Article 21.1 ACHR. Further, the Court found that the State is responsible for compensating Mr Chaparro for the damage of his property while in its custody.

The Court ordered the State to compensate Mr Chaparro for the financial losses that the depreciation in the value of the company caused him, for loss of earning from the time elapsed from the time of the victims' arrest until the time they recovered their liberty, as well as for non-pecuniary damages. Additionally, the State was ordered to inform public and private institutions, and the population in general that the victims were found innocent of all the charges of which they were accused.

Languages:

Spanish.



Identification: IAC-2008-1-004

a) Organisation of American States / **b)** Inter-American Court of Human Rights / **c) / d)** 28.11.2007 / **e)** Series C 172 / **f)** The Saramaka People v. Suriname / **g) / h)** CODICES (English, Spanish).

Keywords of the systematic thesaurus:

1.6.2 Constitutional Justice – Effects – **Determination of effects by the court.**
 5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts.**
 5.3.39 Fundamental Rights – Civil and political rights – **Right to property.**
 5.5.5 Fundamental Rights – Collective rights – **Rights of aboriginal peoples, ancestral rights.**

Keywords of the alphabetical index:

Judicial personality, right / Property right, communal / Tribal people, ancestral territory.

Headnotes:

The Court's jurisprudence regarding indigenous peoples' right to property is applicable to tribal peoples because both share distinct social, cultural, and economic characteristics, including a special relationship with their ancestral territories.

Members of tribal and indigenous communities have the right to own the natural resources they have traditionally used within their territory for the same reasons that they have a right to own the land they have traditionally used and occupied for centuries. Without them, the very physical and cultural survival of such peoples is at stake.

Pursuant to Article 21 ACHR, a State may restrict the use and enjoyment of property so long as the restrictions are:

- a. previously established by law;
- b. necessary;
- c. proportional; and
- d. have the aim of achieving a legitimate objective in a democratic society. Additionally, a State may restrict the property rights of tribal and indigenous communities involving any development, investment, exploration or extraction plan in their traditional territory only if said plan does not result in a total denial of the communities survival and means of subsistence.

Accordingly, a State Party must

- e. ensure the effective participation of the indigenous or tribal people in such plans, in conformity with their customs and traditions;
- f. guarantee that the tribal or indigenous people will receive a reasonable benefit from any such plan within their territory, and
- g. ensure that independent and technically capable entities, with the State's supervision, perform a prior environmental and social impact assessment.

The right to have their juridical personality recognised by the State is one of the special measures owed to indigenous and tribal groups in order to ensure that they are able to use and enjoy their territory in accordance with their own traditions. This is a natural consequence of the recognition of the right of members of indigenous and tribal groups to enjoy certain rights in a communal manner.

In order to guarantee members of indigenous and tribal peoples their right to communal property, States must establish effective means with due process guarantees for them to claim traditional lands.

Summary:

I. The State of Suriname had issued a number of timber logging and gold mining concessions inside territory that presumably belonged to the Saramaka people, a tribe whose descendants were African

slaves brought to Suriname during the European colonisation in the 17th century. The tribe claimed to have communal property rights over its ancestral territory and alleged that the current domestic legal system did not allow them effective access to the judicial system in order to remedy possible violations of said rights.

On 23 June 2006, the Inter-American Commission on Human Rights (hereinafter "the Commission") submitted an application against the State of Suriname to determine whether the State had violated Article 21 ACHR (Right to Property) and Article 25 ACHR (Right to Judicial Protection), in conjunction with Articles 1.1 and 2 ACHR, to the detriment of the Saramaka people.

II. In its judgment of 28 November 2007, the Court declared that the members of the Saramaka people are to be considered a tribal community, and that Article 21 ACHR protects the right of the members of tribal peoples to the use and enjoyment of communal property in their ancestral territory, including those natural resources traditionally used and necessary for the very survival, development and continuation of such people's way of life. Thus, the Court declared that the State had an obligation to adopt special measures to recognise, respect, protect and guarantee this right in order to guarantee the survival of the Saramaka people. The Court held that the timber logging and gold mining concessions issued inside traditional Saramaka territory violated their right, recognised in Article 21 ACHR, to use and enjoy their communal property, and that, pursuant to Article 2 ACHR, Suriname's legal framework was deficient insofar it merely granted the members of the Saramaka people a privilege to use land, which does not guarantee the Saramaka people's right to effectively control their territory without outside interference. Thus, the Court held that the State violated its duty to recognise the right to property of members of the Saramaka people, within the framework of a communal property system, and to establish the mechanisms necessary to give domestic legal effect to such right recognised in the Convention.

Finally, the Court concluded that the State violated the right to judicial protection recognised in Article 25 ACHR, in conjunction with Articles 21 and 1.1 ACHR, to the detriment of the members of the Saramaka people because Suriname's domestic provisions did not provide adequate and effective legal recourses to protect the Saramaka people against acts that violate their right to property. In this regard, the Court also declared that the State must recognise the juridical personality of the members of the Saramaka people, in accordance with Article 3 ACHR, so that they may

access the judicial system in order to address possible violations of their right to communal property.

To guarantee the non-repetition of the violation of the Saramaka peoples' rights to property, judicial protection, and the recognition of their juridical personality, the Court ordered the State:

- a. to delimit, demarcate, and grant collective title over the territory of the members of the Saramaka people, in accordance with their customary laws, and through previous, effective and fully informed consultations with the Saramaka people, without prejudice to other tribal and indigenous communities;
- b. to grant the members of the Saramaka people legal recognition of their collective juridical capacity;
- c. to remove or amend the legal provisions that impede protection of the right to property of the members of the Saramaka people and adopt legislative, administrative, and other measures as may be required to recognise, protect, guarantee and give legal effect to the right of the members of the Saramaka people to hold collective title of the territory they have traditionally used and occupied;
- d. to adopt legislative, administrative and other measures necessary to recognise and ensure the right of the Saramaka people to be effectively consulted;
- e. to ensure that environmental and social impact assessments are conducted by independent and technically competent entities, prior to awarding a concession for any development or investment project within traditional Saramaka territory; and
- f. to adopt legislative, administrative and other measures necessary to provide the members of the Saramaka people with adequate and effective recourses against acts that violate their right to the use and enjoyment of property in accordance with their communal land tenure system.

Languages:

Spanish.



Court of Justice of the European Communities and Court of First Instance

Important decisions

Identification: ECJ-2008-1-001

a) European Union / **b)** Court of Justice of the European Communities / **c)** Fourth Chamber / **d)** 27.01.2005 / **e)** C-125/04 / **f)** Denuit and Cordenier / **g)** *European Court Reports* I-923 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

1.2 Constitutional Justice – **Types of claim.**
1.2.3 Constitutional Justice – Types of claim – **Referral by a court.**

Keywords of the alphabetical index:

Preliminary ruling / National court or tribunal within the meaning of Article 234 EC / Arbitration panel, meaning, excluded.

Headnotes:

An arbitration tribunal, such as the *Collège d'arbitrage de la Commission de Litiges Voyages* (Belgium), which resolves disputes between individuals and travel agencies, is not a court or tribunal within the meaning of Article 234 EC where the parties are under no obligation, in law or in fact, to refer their disputes to arbitration and the Belgian public authorities are not involved in the decision to opt for arbitration (see paragraphs 13, 15-16, operative part).

Summary:

This case concerned a dispute between Mr Denuit and Ms Cordenier, hereafter the claimants, and *Transorient – Mosaïque Voyage et Culture SA*, a travel agency, concerning the price of a package trip to Egypt.

The claimants had reserved with the agency an all-inclusive package to Egypt. In the agency's special conditions it was stated that "the price of these services has been calculated on the basis of the dollar rate in force on publication of this brochure. Any alteration in either direction of more than 10% prior to departure will enable us to adjust our prices".

After the holiday, the claimants had asked the agency to reimburse to them a part of the total price already paid by them, claiming that it ought to have been revised downwards in proportion to the dollar amount calculated in respect of the services offered following a change in the exchange rate of that currency.

The agency had refused any refund, relying on the Belgian law transposing Directive no. 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours.

The claimants therefore brought the matter before the *Collège d'arbitrage de la Commission de Litiges Voyages* (Arbitration Panel of the Travel Dispute Committee), a non-profit-making association governed by Belgian law. The panel deemed it appropriate to put a number of questions to the Court for preliminary ruling on the interpretation of Directive no. 90/314 EEC.

As a preliminary issue, the Court considered whether the *Collège d'arbitrage de la Commission de Litiges Voyages* should be regarded as a court or tribunal for the purposes of Article 234 EC.

It took the view that it should not, given, on the one hand, that the contracting parties were under no statutory or *de facto* obligation to refer their disputes to arbitration, and on the other, the fact that the Belgian public authorities were not involved in the decision to opt for arbitration.

Languages:

Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovakian, Slovenian, Spanish, Swedish.



Identification: ECJ-2008-1-002

a) European Union / **b)** Court of First Instance / **c)** Fifth Chamber / **d)** 03.02.2005 / **e)** T-139/01 / **f)** Comafrika and Dole Fresh Fruit Europe v. Commission / **g)** *European Court Reports* II-409 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

3.26 General Principles – **Principles of Community law.**

4.6 Institutions – **Executive bodies.**

4.6.10.1 Institutions – Executive bodies – Liability – **Legal liability.**

4.6.10.1.2 Institutions – Executive bodies – Liability – Legal liability – **Civil liability.**

Keywords of the alphabetical index:

European Community, non-contractual liability, conditions / Community law, protecting individuals, breach, sufficiently serious / Institution without a discretion / Community law, breach, sufficiently serious.

Headnotes:

In order for the Community to incur non-contractual liability within the meaning of Article 288.2 EC, a number of conditions must be satisfied: the alleged conduct of the institutions must be unlawful, there must be actual damage and there must be a causal link between the alleged conduct and the damage pleaded.

Concerning the first of those conditions, it is necessary that there be a sufficiently serious breach of a rule of law intended to confer rights on individuals. As regards the requirement that the breach be sufficiently serious, the decisive test for finding that it is fulfilled is whether the Community institution concerned manifestly and seriously disregarded the limits on its discretion. Where that institution has only a considerably reduced discretion, or even none, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach.

Summary:

This case concerned the Community's non-contractual liability and the conditions which must be fulfilled for that liability to be incurred.

The applicants, the Comafrika and Dole companies, engaged in producing, processing, distributing and marketing fresh fruit and vegetables, submitted an action for compensation to the Court of First Instance, to obtain reparation of the damage allegedly suffered following the adoption by the Commission of two regulations governing the regime applicable to the importation of bananas.

On 13 February 1993, the Council had adopted regulation no. 404/93 setting up a common organisation of the market in bananas. On 29 January 2001, following proceedings brought by the Republic of Ecuador and the United States of America against the Community pursuant to the dispute settlement system of the World Trade Organisation, the Council had adopted a new regulation (no. 216/2001), modifying the 1993 regulation, itself modified by regulation no. 1637/98 of 20 July 1998. That regulation had been supplemented by Commission Regulation no. 896/2001 of 7 May 2001 laying down detailed rules for applying Council Regulation no. 404/93 and replacing regulation no. 1442/93. The Committee had also adopted, on the basis of its regulation no. 896/2001, regulation no. 1121/2001 on ensuring the proper implementation of the rules for the management of the tariff quota regime set up by Regulation no. 896/2001.

The applicants claimed that the Commission had acted unlawfully with harmful consequences, by adopting regulations nos. 896/2001 and 1121/2001, and that, accordingly, the Community's non-contractual liability could be incurred. They put forward three arguments. First, the disputed regulations were not legislative measures involving economic policy choices and that, by adopting them, the Commission had been guilty of an "administrative failure". Second, the applicants claimed to have suffered damage by reason of the adoption of the contested regulations, namely the loss of the right to import certain quantities of bananas and worsening of their position in the market. Third, they felt that there was a causal link between the unlawful measures taken by the Commission and the harm they had suffered.

The Commission challenged these claims, holding that it had a wide margin of discretion in relation to the common agricultural policy and that it could be held liable only as a result of a sufficiently serious breach of a rule of law intended to confer rights on individuals, which in its view was not the case.

The Court of First Instance rejected the applicants' submissions. Referring, first of all to the case-law whereby for the Community's non-contractual liability to be incurred a number of cumulative conditions

must be satisfied, the Court found that in the present case these conditions had not been satisfied and declared the action for damages to be unfounded.

Cross-references:

- Judgment Atlanta AG of 14.10.1999, *Reports* I-6983, C-104/97; *Bulletin* 2003/1 [ECJ-2003-1-005];
- Judgment Dorsch Consult of 15.06.2000, *Reports* I-4549, C-237/98; *Bulletin* 2003/2 [ECJ-2003-2-014];
- Judgment Bergaderm of 04.07.2000, *Reports* I-5291, C-352/98; *Bulletin* 2003/3 [ECJ-2003-3-018];
- Judgment *Afrikanische Frucht-Compagnie v. Council and Commission* of 10.02.2004, *Reports* II-521, T-64/01 and 65/01; *Bulletin* 2006/1 [ECJ-2006-1-003];
- Judgment *Chiquita Brands e.a. v. Commission* of 03.02.2005, *Reports* II-315, T-19/01).

Languages:

Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovakian, Slovenian, Spanish, Swedish.



Identification: ECJ-2008-1-003

a) European Union / **b)** Court of Justice of the European Communities / **c)** Second Chamber / **d)** 15.02.2005 / **e)** T-229/02 / **f)** PKK and KNK v. Council / **g)** *European Court Reports* II-539 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

1.2 Constitutional Justice – **Types of claim.**

1.2.2.1 Constitutional Justice – Types of claim – Claim by a private body or individual – **Natural person.**

1.2.2.2 Constitutional Justice – Types of claim – Claim by a private body or individual – **Non-profit-making corporate body.**

Keywords of the alphabetical index:

Person, measures of direct and individual concern / Terrorism, restrictive measure / Admissibility, assessment on a case-by-case basis.

Headnotes:

As regards groups or entities to which specific restrictive measures for combating terrorism apply, the rules governing the admissibility of an action for annulment must be construed according to the circumstances of the case. It may be that those groups or entities do not exist legally, or that they were not in a position to comply with the legal rules which usually apply to legal persons. Therefore, excessive formalism would amount to the denial, in certain cases, of any possibility of applying for annulment, even though those groups and entities were the object of restrictive Community measures.

Summary:

The Kurdistan Workers' Party, the PKK had emerged in 1978 and engaged in an armed struggle against the Turkish Government to obtain recognition of the Kurds' right to self-determination. In April 2002, the Congress of the PKK decided that "all activities under the name of 'PKK' would cease and that any activities taken under the name of the PKK would be deemed illegitimate". A new group, the Kurdistan Freedom and Democracy Congress – KADEK, was founded in order to attain political objectives democratically on behalf of the Kurdish minority. The Kurdistan National Congress, the KNK, was an umbrella organisation comprising approximately 30 individual entities, whose purpose was "to strengthen the unity and co-operation of the Kurds in all parts of Kurdistan and [to] support their struggle based on the best interests of the Kurdish nation". Witnesses have stated that the leader of the PKK was among those who spearheaded the creation of the KNK, that the PKK was a member of the KNK and that the individual members of the PKK partly financed the KNK.

On 27 December 2001, taking the view that action by the Community was needed in order to implement Resolution no. 1373 (2001) of the United Nations Security Council, the Council had adopted Common Position 2001/930/CFSP on combating terrorism and Common Position 2001/931/CFSP on the application of specific measures to combat terrorism. The same day, the Council had adopted Regulation (EC) no. 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism. On 2 May 2002, it had adopted Decision no. 2002/334/EC implementing

Article 2.3 of Regulation no. 2580/2001 and repealing Decision no. 2001/927/EC. That decision had included the PKK in the list provided for under Article 2.3 of Regulation no. 2580/2001. On 17 June 2002, the Council had adopted Decision no. 2002/460/EC implementing Article 2.3 of Regulation no. 2580/2001 and repealing Decision no. 2002/334. The PKK's name had been kept on the disputed list. The list had then been regularly updated by various Council decisions.

The PKK and the KNK brought the present action for annulment of Council Decisions nos. 2002/334 and 2002/460.

The Council held that the PKK lacked the capacity to be a party to judicial proceedings because the applicant itself had declared that it no longer existed.

The Court of First Instance, following a detailed examination of the case and underlining the need for flexibility in assessing the conditions for admissibility, dismissed the PKK's action as inadmissible, holding that it could not be accepted that a legal person which had ceased to exist could in all validity appoint a representative to lodge an appeal. It also highlighted the paradoxical situation with which it was confronted, namely a situation in which the natural person deemed to represent a legal person was not only unable to demonstrate that he was its valid representative, but, further, proffered explanations as to why he was unable to represent it.

Languages:

Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovakian, Slovenian, Spanish, Swedish.

*Identification:* ECJ-2008-1-004

a) European Union / **b)** Court of Justice of the European Communities / **c)** First Chamber / **d)** 15.02.2005 / **e)** T-256/01 / **f)** *Pyres v. Commission* / **g)** Not yet published in *Reports* / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

2.1.1.3 Sources – Categories – Written rules – **Community law.**
5 Fundamental Rights. – **Fundamental Rights.**

Keywords of the alphabetical index:

Community law, fundamental rights / European Union, Charter of Fundamental Rights, scope.

Headnotes:

While it is true that the Charter of Fundamental Rights of the European Union has been relied on by the Community Courts on several occasions as a source of inspiration for recognising and protection the rights of citizens and as reference criterion for the rights protected by the Community legal order, the fact remains that, at the present time (that is to say in February 2005), it is merely a declaration that has no legally binding force (see paragraph 66).

Summary:

Mr Pyres, a former temporary staff member of the Commission, had applied for three selection procedures organised by the 'Research' Directorate General in response to a selection notice published by the Commission, seeking to draw up several reserve lists for the recruitment of temporary staff members of Category A.

However, he had been informed by letter from the secretary of the selection committee that his application for each of the selection procedures had not been accepted as, on the date of the submission of applications, he did not fulfil the age-limit requirement specified in the selection notice (Judgment, paragraph 4).

Mr Pyres had then filed a complaint against these three decisions. Nonetheless, as his complaint had been dismissed by decision of the authority responsible for employment contracts, he had lodged an appeal, the subject of the present case. Judgment, paragraphs 5 and 6. However, both his grounds of appeal had been dismissed.

In his second ground, he had argued that when an institution decided, availing itself of the possibility provided for in Article 1.1g) of Annex III of the Staff Regulations to introduce an age limit in a notice of competition, it was required to justify this move in an objective and reasonable manner with reference to a legitimate objective and to ensure that the steps taken to achieve that objective were appropriate and

necessary. He had concluded that in the instant cases, the objectives set out by the Commission had not been legitimate and that the measures taken to achieve them were disproportionate (Judgment, paragraphs 51 and 52).

In support of this ground, Mr Pyres had underlined the fundamental nature of the principle of non-discrimination as a founding principle of Community law, which should be applied in all matters and in all circumstances. In particular, he had pointed out that Article 21 of the European Union's Charter of Fundamental Rights, proclaimed in Nice on 7 December 2000, stated that any discrimination on the ground of age was prohibited and had included this prohibition among the general principles deriving from the constitutional tradition of member states and coming under the Community legal order. He also observed that the European Union's Charter of Fundamental Rights, insofar as it had been adopted by solemn declaration, itself adopted and signed by the European Commission, was binding on that institution which was therefore required to comply with it, not only when adopting legislative acts, but also in all its administrative acts, such as its decisions in respect of its staff (Judgment, paragraph 58).

It was in connection with the argument based on the European Union's Charter of Fundamental Rights that the Court of First Instance held that while the Charter of Fundamental Rights had been referred to by the Community Court on several occasions as a source of inspiration for the recognition and protection of citizens' rights, and as a reference criterion for the rights guaranteed by the Community legal order, nevertheless at the time of the judgment (i.e. February 2005) the Charter was merely a declaration which had no binding legal force (Judgment, paragraph 66).

Languages:

Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovakian, Slovenian, Spanish, Swedish.



Identification: ECJ-2008-1-005

a) European Union / b) Court of First Instance / c) Grand Chamber / d) 01.03.2005 / e) C-377/02 / f) Van Parys / g) *European Court Reports* I-1465 / h) CODICES (English, French).

*Keywords of the systematic thesaurus:*1.3 Constitutional Justice – **Jurisdiction.**

1.3.4.10 Constitutional Justice – Jurisdiction – Types of litigation – **Litigation in respect of the constitutionality of enactments.**

2.1.1 Sources – Categories – **Written rules.**

2.1.1.4 Sources – Categories – Written rules – **International instruments.**

Keywords of the alphabetical index:

Court of Justice of the European Communities, preliminary ruling / WTO, agreement, basis for challenge of the legality of a Community measure / WTO, Dispute Settlement Body, decision.

Headnotes:

Given their nature and structure, the WTO agreements are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions. It is only where the Community has intended to implement a particular obligation assumed in the context of the WTO, or where the Community measure refers expressly to the precise provisions of the WTO agreements, that it is for the Court to review the legality of the Community measure in question in the light of the WTO rules.

By undertaking, after the adoption of the decision of the WTO Dispute Settlement Body (DSB), to comply with the rules of that organisation and, in particular, with Articles I.1 and XIII of GATT 1994, the Community did not intend to assume a particular obligation in the context of the WTO, capable of justifying an exception to the impossibility of relying on WTO rules before the Community Courts and enabling the latter to exercise judicial review of the relevant Community provisions in the light of those rules.

First, even where there is a decision of the DSB holding that the measures adopted by a member are incompatible with the WTO rules, the WTO dispute settlement system nevertheless accords considerable importance to negotiation between the parties. In those circumstances, to require courts to refrain from applying rules of domestic law which are inconsistent with the WTO agreements would have the

consequence of depriving the legislative or executive organs of the contracting parties of the possibility afforded in particular by Article 22 of the Understanding on rules and procedures governing the settlement of disputes of reaching a negotiated settlement, even on a temporary basis.

Secondly, to accept that the Community Courts have the direct responsibility for ensuring that Community law complies with the WTO rules would deprive the Community's legislative or executive bodies of the discretion which the equivalent bodies of the Community's commercial partners enjoy.

Therefore, an economic operator cannot plead before a court of a Member State that Community legislation is incompatible with certain WTO rules, even if the DSB has stated that that legislation is incompatible with those rules.

Summary:

This case concerned Van Parys NV, a company established in Belgium, which had been importing bananas into the European Community from Ecuador for more than 20 years. In 1998 and 1999 the relevant Belgian authority (*Belgisch Interventie- en Restitutiebureau*) had refused to issue it with import licences for the full quantity applied for. Those refusals were based on the Community regulations governing imports of bananas into the European Community.

Van Parys had challenged these decisions before the *Raad van State* (Belgian Council of State) arguing that the Community regulations in question were unlawful in the light of certain rules of the World Trade Organisation (WTO). The WTO's Dispute Settlement Body had declared that the legislation adopted by the Community was incompatible with the WTO rules on the matter. Press release no. 16/05.

Holding that, in accordance with the case-law of the Court of Justice, it was not for the domestic courts to rule on the validity of Community acts, the *Raad van State* had then decided to stay the proceedings and to refer a number of questions to the Court for a preliminary ruling (Judgment, paragraph 36).

The Court of Justice, first of all examined whether the WTO agreements gave Community nationals a right to rely on those agreements in legal proceedings challenging the validity of Community legislation.

The Court pointed out that the WTO agreements were not in principle among the rules which the Court must take into account when reviewing the legality of

measures adopted by the Community institutions. In its view, it was only where the Community intended to implement a particular obligation assumed in the context of the WTO, or where the Community measure referred expressly to particular provisions of the WTO agreements, that it was for the Court to review the legality of a Community measure in the light of the WTO rules.

However, the Court found in the present case that the Community had not intended to assume a particular obligation in the context of the WTO, enabling the Community Court to exercise judicial review of the Community provisions in the light of the WTO rules in question. Nor did the regulations in question expressly refer to particular provisions of the WTO agreements.

First, the Court pointed out that even where there was a decision of the Dispute Settlement Body holding that the measures adopted by a member were incompatible with the WTO rules, the WTO dispute settlement system nevertheless accorded considerable importance to negotiation between the parties, and that, in those circumstances, to require the Community Courts directly to ensure the conformity of Community law with the WTO rules would deprive the Community's legislative or executive bodies of the possibility afforded by the WTO rules concerning the settlement of disputes of reaching a negotiated settlement, even on a temporary basis. The Court noted that in the instant case a solution had indeed been negotiated between the Community, on the one hand, and the United States and Ecuador, on the other.

Second, the Court emphasised the need not to deprive the Community's legislative or executive bodies of the discretion which the equivalent bodies of the Community's commercial partners enjoyed. It noted that some of the contracting parties, which were amongst the Community's most important commercial partners, had concluded that the WTO agreements were not among the rules applicable by their courts when reviewing the lawfulness of their domestic rules. Such lack of reciprocity would therefore risk introducing an anomaly into the application of the WTO rules.

Accordingly, a legal person may not, in principle, rely in proceedings before a court of a member state on the fact that Community legislation was incompatible with certain rules of the WTO even where the Dispute Settlement Body had declared that legislation to be incompatible with such rules (Press release no. 16/05).

Cross-references:

- Judgment of the Court of First Instance (Grand Chamber) of 14.12.2005, *Beamglow Ltd v. European Parliament, Council and Commission* (T-383/00, *European Court Reports*, II-05459, items 127, 130-132, 142).

Languages:

Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovakian, Slovenian, Spanish, Swedish.



European Court of Human Rights

Important decisions

Identification: ECH-2008-1-001

a) Council of Europe / b) European Court of Human Rights / c) Grand Chamber / d) 04.12.2007 / e) 44362/04 / f) Dickson v. the United Kingdom / g) *Reports of Judgments and Decisions of the Court* / h) CODICES (English, French).

Keywords of the systematic thesaurus:

2.1.1.4.3 Sources – Categories – Written rules – International instruments – **Geneva Conventions of 1949.**

3.16 General Principles – **Proportionality.**

3.17 General Principles – **Weighing of interests.**

3.19 General Principles – **Margin of appreciation.**

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

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

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

Keywords of the alphabetical index:

Insemination, artificial, prisoner / Prison, purpose, evolution / Penal policy, evolution.

Headnotes:

The rights guaranteed by the European Convention on Human Rights are retained on imprisonment, so that any restriction has to be justified, either on the grounds that it is a necessary and inevitable consequence of imprisonment or that there is an adequate link between the restriction and the prisoner's circumstances. A restriction cannot be based solely on what would offend public opinion.

The notion of private and family life incorporates the right to respect for a couple's decision to become genetic parents.

A policy which does not allow for artificial insemination by prisoners except in exceptional circumstances, without permitting any balancing of the competing interests or an assessment of the

proportionality of the restriction, fails to strike a fair balance between those interests.

Summary:

I. The applicants are a married couple who met through a prison correspondence network while serving prison sentences. The husband was convicted of murder and is not scheduled for release before 2009. He has no children. His wife has completed her sentence and has three children from other relationships. The applicants requested artificial insemination facilities to enable them to have a child together, arguing that it would not otherwise be possible, given the husband's earliest release date and his wife's age (she was born in 1958). The Secretary of State refused their application, explaining that under his general policy requests for artificial insemination by prisoners could only be granted in "exceptional circumstances". The grounds given for refusal were that the applicants' relationship had never been tested in the normal environment of daily life; that insufficient provision had been made for the welfare of any child that might be conceived; that mother and child would have only a limited support network and that the child's father would not be present for an important part of her or his childhood. It was also considered that there would be legitimate public concern that the punitive and deterrent elements of the first applicant's sentence were being circumvented if he were allowed to father a child by artificial insemination while in prison. The applicants appealed unsuccessfully.

In their application to the Court, the applicants complained that the refusal to grant them facilities for artificial insemination constituted, in particular, a breach of their right to respect for private and family life. They relied in that respect on Article 8 ECHR.

II. The Court accepted that Article 8 ECHR was applicable in that the refusal of artificial insemination facilities concerned the applicants' private and family lives, which notion incorporated the right to respect for their decision to become genetic parents. Convention rights were retained on imprisonment, so that any restriction had to be justified, either on the grounds that it was a necessary and inevitable consequence of imprisonment or that there was an adequate link between the restriction and the prisoner's circumstances. A restriction could not be based solely on what would offend public opinion. The core issue was whether a fair balance had been struck between the competing public and private interests.

The conflicting interests – As to the applicants' interests, it was accepted domestically that artificial insemination remained the applicants' only realistic hope of having a child together, given the wife's age and the husband's release date. It was evident that this was a matter of vital importance to them. Three justifications for the policy were cited by the Government, namely, that losing the opportunity to beget children was an inevitable and necessary consequence of imprisonment, that public confidence in the prison system would be undermined if prisoners guilty of serious offences were allowed to conceive children, and that the lengthy absence of a parent would have a negative impact on both the child and society as a whole. On the first point, the Court noted that while the inability to beget a child was a consequence of imprisonment, it was not an inevitable one as it had not been suggested that the grant of artificial insemination facilities would have involved any security issues or imposed any significant administrative or financial demands on the State. As to the question of public confidence in the prison system, while accepting that punishment remained one of the aims of imprisonment, the Court underlined the evolution in European penal policy towards the increasing relative importance of the rehabilitative aim of imprisonment, particularly towards the end of a long prison sentence. Lastly, although the State had obligations to ensure the effective protection of children, that could not go so far as to prevent parents from attempting to conceive in circumstances such as those in the applicants' case, especially as the wife was at liberty and could have taken care of any child conceived until her husband was released.

Balancing the conflicting interests and the margin of appreciation – This was an area in which the Contracting States could enjoy a wide margin of appreciation as, while the Court had expressed its approval for the evolution in several European countries towards conjugal visits, which could obviate the need for artificial insemination facilities, it had not yet interpreted the Convention as requiring Contracting States to make provision for such visits. Nevertheless, the policy as structured effectively excluded any real weighing of the competing individual and public interests and prevented the required assessment of the proportionality of a restriction in any individual case. In particular, it placed an inordinately high "exceptionality" burden on applicants for artificial insemination as they had to demonstrate both that the deprivation of artificial insemination facilities might prevent conception altogether and that the circumstances of their case were "exceptional" within the meaning of certain criteria. The policy thus set the threshold so high that it did not allow a balancing of the competing interests

or an assessment of the proportionality of the restriction by the Secretary of State or the domestic courts. Nor did it appear that such a balancing exercise or assessment of proportionality had been carried out when the policy was originally fixed. The fact that only a few persons might be affected by it made no difference here. The absence of such an assessment had to be seen as falling outside any acceptable margin of appreciation so that a fair balance had not been struck between the competing public and private interests involved. There had therefore been a violation of Article 8 ECHR.

Cross-references:

- *L.C.B. v. the United Kingdom*, Judgment of 09.06.1998, *Reports of Judgments and Decisions* 1998-III;
- *Osman v. the United Kingdom*, Judgment of 28.10.1998, *Reports of Judgments and Decisions* 1998-VIII;
- *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, *Reports of Judgments and Decisions* 1999-VI
- *Z. and Others v. the United Kingdom* [GC], no. 29392/95, *Reports of Judgments and Decisions* 2001-V;
- *E.L.H. and P.B.H. v. the United Kingdom*, nos. 32094/96 and 32568/96, dec. 22.10.1997, *Decisions and Reports* 91-A;
- *Kalashnikov v. Russia* (dec.), no. 47095/99, *Reports of Judgments and Decisions* 2001-XI;
- *Boso v. Italy* (dec.), no. 50490/99, *Reports of Judgments and Decisions* 2002-VII;
- *Odièvre v. France* [GC], no. 42326/98, *Reports of Judgments and Decisions* 2003-III;
- *Aliev v. Ukraine*, no. 41220/98, 29.04.2003;
- *Hirst v. the United Kingdom* (no. 2) [GC], no. 74025/01, *Reports of Judgments and Decisions* 2005-IX, *Bulletin* 2004/1 [ECH-2004-1-003];
- *Evans v. the United Kingdom* [GC], no. 6339/05, 10.04.2007, *Bulletin* 2007/1 [ECH-2007-1-002].

Languages:

English, French.



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a) Council of Europe / b) European Court of Human Rights / c) Grand Chamber / d) 29.04.2008 / e) 13378/05 / f) *Burden v. the United Kingdom* / g) *Reports of Judgments and Decisions of the Court* / h) CODICES (English, French).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Tax privilege, siblings, discrimination / Marriage, tax privilege / Civil partnership, tax privilege.

Headnotes:

The relationship between siblings is qualitatively of a different nature from that between married couples and homosexual civil partners. Consequently, the limitation of a tax exemption to married and homosexual couples does not constitute unjustified discrimination.

Summary:

I. Under the Inheritance Tax Act 1984, inheritance tax is charged at 40% on the value of the deceased's estate above a threshold fixed in the annual budget. Property passing from the deceased to his or her spouse or "civil partner" (a category introduced under the Civil Partnership Act 2004 for same-sex couples, which does not cover family members living together) is, however, exempt from charge. The applicants are elderly, unmarried sisters who have lived together all their lives, for the last 31 years in a house they owned jointly built on land inherited from their parents. Each has made a will leaving all her estate to the other. They are concerned that, when one of them dies, the survivor will face a heavy inheritance tax bill – unlike the survivor of a marriage or a civil partnership – and might be forced to sell the house to pay the liability.

In their application to the Court, the applicants complained that when the first of them died, the survivor would be required to pay inheritance tax on the dead sister's share of the family home, whereas the survivor of a married couple or a registered homosexual relationship would be exempt from paying inheritance tax in these circumstances. They relied on Article 14 ECHR in conjunction with Article 1 Protocol 1 ECHR.

II. The Court held that the relationship between siblings was qualitatively of a different nature to that between married couples and homosexual civil partners under the Civil Partnership Act. The very essence of the connection between siblings was consanguinity, whereas one of the defining characteristics of a marriage or Civil Partnership Act union was that it was forbidden to close family members. The fact that the applicants had chosen to live together all their adult lives did not alter that essential difference between the two types of relationship. Marriage conferred a special status on those who entered into it and civil partnerships gave rise to a legal relationship designed by Parliament to correspond as far as possible to marriage. The legal consequences which couples in both marriages and civil partnerships expressly and deliberately decided to incur set those types of relationship apart from other forms of cohabitation. Rather than the length or the supportive nature of the relationship, what was determinative was the existence of a public undertaking, carrying with it a body of rights and obligations of a contractual nature. The absence of such a legally-binding agreement between the applicants rendered their relationship of cohabitation, despite its long duration, fundamentally different to that of a married or civil partnership couple. There had therefore been no discrimination and no violation of Article 14 ECHR in conjunction with Article 1 Protocol 1 ECHR.

Cross-references:

- *Shackell v. the United Kingdom* (dec.), no. 45851/99, 27.04.2000;
- *Orion-Břeclav, SRO v. the Czech Republic* (dec), no. 43783/98, 13.01.2004;
- *B. and L. v. the United Kingdom* (dec.), no. 36536/02, 29.06.2004;
- *Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, *Reports of Judgments and Decisions* 2005-X;
- *Stec and Others v. the United Kingdom* [GC], nos. 65731/01 and 65900/01, *Reports of Judgments and Decisions* 2006-VI;
- *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, *Reports of Judgments and Decisions* 2007.

Languages:

English, French.



Systematic thesaurus (V19) *

* Page numbers of the systematic thesaurus refer to the page showing the identification of the decision rather than the keyword itself.

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¹ This chapter – as the Systematic Thesaurus in general – should be used sparingly, as the keywords therein should only be used if a relevant procedural question is discussed by the Court. This chapter is therefore not used to establish statistical data; rather, the *Bulletin* reader or user of the CODICES database should only look for decisions in this chapter, the subject of which is also the keyword.

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.

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¹² Including questions on the interim exercise of the functions of the Head of State.

¹³ Referrals of preliminary questions in particular.

¹⁴ Enactment required by law to be reviewed by the Court.

¹⁵ Review *ultra petita*.

¹⁶ Horizontal distribution of powers.

¹⁷ Vertical distribution of powers, particularly in respect of states of a federal or regionalised nature.

¹⁸ Decentralised authorities (municipalities, provinces, etc.).

¹⁹ For questions other than jurisdiction, see 4.9.

²⁰ Including other consultations. For questions other than jurisdiction, see 4.9.

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²¹ Examination of procedural and formal aspects of laws and regulations, particularly in respect of the composition of parliaments, the validity of votes, the competence of law-making authorities, etc. (questions relating to the distribution of powers as between the State and federal or regional entities are the subject of another keyword 1.3.4.3).

²² As understood in private international law.

²³ Including constitutional laws.

²⁴ For example, organic laws.

²⁵ Local authorities, municipalities, provinces, departments, etc.

²⁶ Or: functional decentralisation (public bodies exercising delegated powers).

²⁷ Political questions.

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.

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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.

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³⁵ For questions of constitutionality dependent on a specified interpretation, use 2.3.2.

³⁶ Only for issues concerning applicability and not simple application.

³⁷ This keyword allows for the inclusion of enactments and principles arising from a separate constitutional chapter elaborated with reference to the original Constitution (declarations of rights, basic charters, etc.).

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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.

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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.

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.

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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.

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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.

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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.

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⁸² See also keywords 5.3.41 and 5.2.1.4.

⁸³ Organs of control and supervision.

⁸⁴ Including other consultations.

⁸⁵ For questions of jurisdiction, see keyword 1.3.4.6.

⁸⁶ Proportional, majority, preferential, single-member constituencies, etc.

⁸⁷ For example, *Panachage*, voting for whole list or part of list, blank votes.

⁸⁸ For aspects related to fundamental rights, see 5.3.41.2.

⁸⁹ For the creation of political parties, see 4.5.10.1.

⁹⁰ For example, names of parties, order of presentation, logo, emblem or question in a referendum.

⁹¹ Tracts, letters, press, radio and television, posters, nominations, etc.

⁹² Impartiality of electoral authorities, incidents, disturbances.

⁹³ For example, signatures on electoral rolls, stamps, crossing out of names on list.

⁹⁴ For example, in person, proxy vote, postal vote, electronic vote.

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⁹⁵ For example, Auditor-General.

⁹⁶ Parliamentary Commissioner, Public Defender, Human Rights Commission, etc.

⁹⁷ For example, Court of Auditors.

⁹⁸ The vesting of administrative competence in public law bodies situated outside the traditional administrative hierarchy. See also 4.6.8.

⁹⁹ *Staatszielbestimmungen*.

¹⁰⁰ Institutional aspects only: questions of procedure, jurisdiction, composition, etc. are dealt with under the keywords of Chapter 1.

¹⁰¹ Including state of war, martial law, declared natural disasters, etc.; for human rights aspects, see also keyword 5.1.4.1.

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¹⁰² Positive and negative aspects.

¹⁰³ For rights of the child, see 5.3.44.

¹⁰⁴ The criteria of the limitation of human rights (legality, legitimate purpose/general interest, proportionality) are indexed in Chapter 3.

¹⁰⁵ Includes questions of the suspension of rights. See also 4.18.

¹⁰⁶ Taxes and other duties towards the state.

¹⁰⁷ Universal and equal suffrage.

¹⁰⁸ 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).

¹⁰⁹ For example, discrimination between married and single persons.

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¹¹⁰ This keyword also covers "Personal liberty". It includes for example identity checking, personal search and administrative arrest.

¹¹¹ Detention by police.

¹¹² Including questions related to the granting of passports or other travel documents.

¹¹³ May include questions of expulsion and extradition.

¹¹⁴ 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.

¹¹⁵ This keyword covers the right of appeal to a court.

¹¹⁶ Including the right to be present at hearing.

¹¹⁷ Including challenging of a judge.

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¹¹⁸ Covers freedom of religion as an individual right. Its collective aspects are included under the keyword "Freedom of worship" below.

¹¹⁹ This keyword also includes the right to freely communicate information.

¹²⁰ Militia, conscientious objection. etc.

¹²¹ Aspects of the use of names are included either here or under "Right to private life".

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This keyword also covers "Freedom of work".

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Includes rights of the individual with respect to trade unions, rights of trade unions and the right to conclude collective labour agreements.

Keywords of the alphabetical index *

* The précis presented in this *Bulletin* are indexed primarily according to the Systematic Thesaurus of constitutional law, which has been compiled by the Venice Commission and the liaison officers. Indexing according to the keywords in the alphabetical index is supplementary only and generally covers factual issues rather than the constitutional questions at stake.

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