

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.

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The decisions are presented in the following way:

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

G. Buquicchio

Secretary of the European Commission for Democracy through Law

THE VENICE COMMISSION

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

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

Editors:

Sc. R. Dürr, T. Gerwien, D. Jones

A. Gorey, M.-L. Wigishoff

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There was no relevant constitutional case-law during the reference period 1 September 2008 – 31 December 2008 for the following countries:

Bulgaria, Denmark, Finland, Ireland, Romania, Russia, United States of America.

Précis of important decisions of the reference period 1 September 2008 – 31 December 2008 will be published in the next edition, *Bulletin* 2009/1, for the following countries:

Georgia, Norway, European Court of Human Rights.

Armenia

Constitutional Court

Statistical data

1 September 2008 – 31 December 2008

- 106 applications were filed, including:
 - 19 applications, filed by the President
 - 85 applications, filed by individuals
 - 1 application, filed by an ordinary court
 - 1 application, filed by a Human Rights' Defender.
- 26 cases were admitted for review, including:
 - 18 applications, concerning the compliance of obligations stipulated in international treaties with the Constitution
 - 6 individual complaints, concerning the issue of constitutionality of certain legal provisions
 - 1 application, filed by an ordinary court
 - 1 application, filed by a Human Rights' Defender
- 29 cases heard and 29 decisions delivered (including decisions on applications filed before the relevant period), including:
 - 6 decisions on individual complaints (where the applications were filed before the relevant period)
 - 1 decision on an application, filed by a Human Rights' Defender
 - 22 decisions concerning the compliance of obligations stipulated in international treaties with the Constitution (in applications filed before the relevant period)

Important decisions

Identification: ARM-2008-3-008

a) Armenia / **b)** Constitutional Court / **c)** / **d)** 09.09.2008 / **e)** DCC-758 / **f)** On the conformity with the Constitution of Article 80.1, 80.4 and 80.5 of the Law on Amendments to the Civil Procedural Code / **g)** *Tegekagir* (Official Gazette) / **h)**.

Keywords of the systematic thesaurus:

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950.**

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights.**

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

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

Keywords of the alphabetical index:

Judgment, revision / Obligation, international, state / *Restitutio in integrum.*

Headnotes:

The system for the review of judicial acts can only proceed effectively if the opportunity is provided to review judicial acts from courts of all instances where new circumstances have arisen; provisions whereby only the court of first instance that initiated the judicial act can review it would constitute a considerable hindrance to such progress.

Summary:

The Constitutional Court examined a case arising from an individual application, relating to the constitutional compliance of various norms of the Civil Procedural Code regulating the review of judicial acts where new circumstances have arisen. These norms stipulated that only judicial acts by first instance courts could be subject to review on the basis of new circumstances. Thus, where the Constitutional Court or international courts have pronounced an applied legal norm unconstitutional, only the court of first instance that initiated the judicial act in question is entitled to review it. Judicial acts by the Court of Appeal and the Cassation Court are not subject to review.

The Constitutional Court noted for the record the practical possibility that the restoration of a violated right should exclusively require the review of judicial acts made by the Appeal or Cassation Courts, on the basis that norms found to be contrary to the Constitution could be implemented by those courts. v In this context, the Constitutional Court examined Article 101.6 of the Constitution (governing an individual's right to appeal to the Constitutional Court). The above paragraph allowed for the possibility of a

challenge, in the course of an individual application, of the legal provision applied by the final judicial act. There were certain cases where judicial acts made by courts of different instances (such as first instance courts, the Appeal Court or the Cassation Court) could constitute final judicial acts. More commonly, the Cassation Court's decision is the final judicial act.

The Constitutional Court stressed that under Article 101.6, the criterion for the admissibility of the individual application is that the disputed provision should be applied by the final judicial act. However, the provision applied by the final judicial act does not necessarily have to be applied by the court of first instance or the Court of Appeal: the application of the legal provision by the final judicial act will suffice for a challenge to the provision in the Constitutional Court. Accordingly, under Article 101.6, it is possible to challenge legal provisions in the Constitutional Court that have been applied by a final judicial act by the Appeal Court or the Court of Cassation, but which have not been applied by the first instance court. Where this is the case, and legal provisions are to be pronounced in contravention of the Constitution and null and void by the Constitutional Court, the review of the judicial act made by the court of first instance based on the Constitutional Court's corresponding decision becomes pointless and does nothing to assist the making good of the individual's violated right. Restoring the individual's violated right on the basis of the Constitutional Court's decision only requires that the final judicial act be reviewed.

In its decision, the Constitutional Court touched on the problems the disputed provisions could cause in terms of executing judgments of the European Court at a domestic level. Regarding the obligation to execute European Court's judgments under Article 46 ECHR, the Constitutional Court noted that, in order to execute these judgments, High Contracting States, including the Republic of Armenia, should, *inter alia*, take individual measures in favour of the applicant. The aim is to put an end to continuing violations and, as far as possible, erase their consequences (*restitutio in integrum*). Individual measures, as a rule, entail the revision of domestic judicial acts on the basis of European Court's judgments. The review of domestic judicial acts is of fundamental importance for the execution of the European Court's judgments, when the infringement of procedural norms during trial entails violations of rights. Violations of procedural norms can occur at any instance in the domestic court system, and in terms of executing judgments of the European Court, it is necessary to review the judicial act of the court that has violated the procedural norms.

The Constitutional Court found that the current legal regulations governing the review of domestic judicial acts on the basis of European Court judgments offer no opportunity for the restoration of the individual's violated right. They also hamper the Republic of Armenia in its execution of European Court's judgments, and pose problems in the meeting of its obligations under the European Convention on Human Rights.

The Constitutional Court referred in its decision to the consistent development within the practice of the European Court of what are known as "pilot judgments". In view of these current developments in European Court practice, and the need to provide opportunities for the restoration of the rights of individuals on the basis of European Court judgments at a domestic level, a clear definition of the review of judicial acts is needed in domestic legislation.

The Constitutional Court observed that the problem with the disputed norms is that they deprive individuals of the possibility of a complete restoration of their rights through the review of judicial acts on the basis of new circumstances. This threatens the legal security of the state and the stability of the civil order, increases the risk of corruption and prevents the Republic of Armenia from executing its duties in its capacity as Contracting Party to international treaties.

The Constitutional Court held the disputed norms to be in contravention of the Constitution.

Languages:

Armenian.



Identification: ARM-2008-3-009

a) Armenia / **b)** Constitutional Court / **c)** / **d)** 08.10.2008 / **e)** DCC-765 / **f)** On the conformity with the Constitution of several provisions of the Civil Procedural and Criminal Procedural Codes, together with Article 29.1 of the Law on Advocacy / **g)** *Tegekagir* (Official Gazette) / **h)**

Keywords of the systematic thesaurus:

3 General Principles. – **General Principles.**

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

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

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

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

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

Keywords of the alphabetical index:

Cassation, appeal / Court, access / Lawyer, choice, restriction / Judicial protection, effective.

Headnotes:

Access to the Cassation Court is of particular importance in the context of a democratic state under the rule of law and the right of access to justice. Its decisions, as stipulated by its constitutional functions, are significant not only for parties to the proceedings, but also for society as a whole.

The right to legal aid presents the opportunity to receive advice from qualified lawyers. Moreover, the state must ensure everyone has access to such advice, especially when certain individuals are not in a position to gain access to it themselves.

A demand for a case to be brought before the Cassation Court through advocacy or by an advocate is only legitimate if the interests of natural and legal persons are represented by experienced and proficient lawyers. One could extend this premise, so that the institution of bringing a case before the Cassation Court through an advocate could only be considered legitimate if the legislation guarantees universal access to the services of an advocate, irrespective of financial resources.

Summary:

Numerous citizens had applied to the Constitutional Court for a review of the provisions of the Civil Procedural and Criminal Procedural Codes, and the Law on Advocacy, under which the parties to a trial are only entitled to bring an appeal before the Cassation Court against a judicial act by a lower court that is already in force and has determined the case

on the merits, through an advocate accredited at the Cassation Court.

The applicants suggested that these provisions were in conflict with the Constitution, as they constituted interference with the exercise of an individual's right to judicial protection, effectively leaving the execution of justice to be governed by the financial resources of the individual concerned and the personal wishes of the advocate.

During the review the Constitutional Court considered it necessary to ascertain:

- Whether the advocates' professional body stems from international legal principles on advocacy and those set out in the Law on Advocacy, especially principles of self-government and equality.
- Is the independence of accredited advocates at the Cassation Court guaranteed?
- Do the current conditions of legal regulation of the institution under scrutiny guarantee the rights of access to court and to effective judicial remedies?

In view of the fact that:

- The Chairman of the Cassation Court is vested with licensing power but the Chamber of Advocates has no such power,
- an advocate is accredited based on criteria such as the consent of ten advocates, without taking into account performance criteria such as levels of proficiency and quality of professional knowledge,
- licensing legislation only allows a limited number of advocates to be accredited. This results in a smaller pool of advocates from which parties can select, in order to bring cases before the Cassation Court. This in turn could be an additional factor that restricts access to the Cassation Court,
- the Cassation Court's chairman's licensing power has been interpreted and exercised as discretionary power,
- the Constitutional Court has found that the principles of advocates' independence, self-government and legal equality underlying the activity of the advocates' licensing body have been violated by the regulation under dispute.

Mindful of the importance of access to the Cassation Court in the context of the principles of a democratic state under the rule of law and the right of access to justice, the Constitutional Court assessed in this case the impact of the norms in dispute on access to the Cassation Court and effectiveness of judicial protection.

The Court also assessed the constitutionality of the institute of advocates accredited at the Cassation Court and the right of access to the Cassation Court in the context of developments in criminal procedure and civil procedure legislation. It found that the existence of accredited advocates disproportionately restricted the right of access to the Cassation Court, as the legislation does not provide any mechanism for free legal assistance by accredited advocates. As a result, an individual's right to access to court will be limited by their financial resources.

The Constitutional Court also held that the advocate licensing order is a factor that in practice restricts the right of access to the Cassation Court.

The restriction on the right of access to the Cassation Court by the requirement that cases are only brought before it by advocates accredited at the Cassation Court is disproportionate to its goal, because it impedes the free and effective exercise of right to trial by parties to proceedings.

The Constitutional Court also assessed the system of accredited advocates in the light of the principles of equality before law and the prohibition on discrimination set out in Article 14.1 of the Constitution, taking into account the interests of both advocates and parties.

The only criterion for accreditation of advocates at the Cassation Court is written consent by ten advocates. There is no objective and legitimate distinction as to professional skills and experience between "ordinary" advocates and those accredited at the Cassation Court. The Constitutional Court accordingly found that depriving ordinary advocates of the opportunity to bring a case before the Cassation Court is discriminatory treatment. The legislation also fell foul of the principle of equality of parties before law, because it does not allow for free legal assistance in order to bring cases before the Cassation Court. The Constitutional Court also took note of statistical data showing that there had been a two-fold increase in the number of cassation applicants, following the introduction of the rules stipulating that only accredited advocates could bring cases before the Cassation Court.

The Constitutional Court found that the lack of objective and legitimate distinction as to professional skills and experience between ordinary advocates and those accredited at the Cassation Court, the order of licensing of court advocates, limitations on the activities of accredited advocates and the essence of co-operation between the Cassation Court and accredited advocates make the existence of the institution of accredited advocates pointless. The Constitutional Court also took note of the

entrepreneurial and monopolistic nature of this state of affairs, the comparatively high costs occasioned by the fact that only accredited advocates can bring cases before the Cassation Court and the vital requirement that all remedies are exhausted before cases are brought before the Constitutional Court and the European Court. It concluded that the rule that only accredited advocates can bring cases before the Cassation Court does not simply restrict access to that court. It also restricts access to the Constitutional Court and the European Court of Human Rights, and impedes the right to effective judicial remedy.

Languages:

Armenian.



Identification: ARM-2008-3-010

a) Armenia / **b)** Constitutional Court / **c)** / **d)** 25.11.2008 / **e)** DCC-780 / **f)** On the conformity with the Constitution of several provisions of the Civil Code, Law on Taxes, and Articles 15 and 118 of the Administrative Procedural Code / **g)** *Tegekagir* (Official Gazette) / **h)**.

Keywords of the systematic thesaurus:

3.9 General Principles – **Rule of law.**
 3.10 General Principles – **Certainty of the law.**
 3.12 General Principles – **Clarity and precision of legal provisions.**
 4.7.9 Institutions – Judicial bodies – **Administrative courts.**
 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.**
 5.4.6 Fundamental Rights – Economic, social and cultural rights – **Commercial and industrial freedom.**

Keywords of the alphabetical index:

Freedom of enterprise / Administrative justice / Effective remedy.

Headnotes:

Under the Armenian Constitution, the universal right to freedom of enterprise (provided this is not prohibited by law), comprises all legal remedies creating preconditions for an individual to make his or her own decisions on economic activity. It includes fair competition, the opportunity to set up economic enterprises without restriction, to change the format and direction of one's activity, to wind up existing businesses and to sign contracts. A vital component of the right to freedom of enterprise is the opportunity for somebody wishing to engage in business to enter or leave the market without any artificial obstacles.

The Constitution allows the legislator the discretion to create a court of appeal within the framework of administrative justice. Nonetheless, in exercising this discretion, the legislator should be guided by the necessity to protect fundamental human and civil rights provided by the Constitution and by international treaties. The rights to judicial protection and to appeal require special safeguarding.

The review of judgments which have been handed down, based on judicial error is prohibited as this would render the concept of the final and binding force of judgments pointless.

Judgments by the specialised administrative court could not be reviewed by the court, where there is no appropriate specialised judicial chamber. Guarantees under the Constitution of the existence of the chambers within the Cassation Court will make sense once the Cassation Court has its own specialised chamber with the power to examine the facts of a given case and make a decision on it.

Summary:

The applicant argued that the uncertainty of the notion of "entrepreneurial activity" and the wording determined in various normative acts were open to different interpretations, as they allowed an individual's activity to be considered both entrepreneurial and non-entrepreneurial.

In its analysis of the legislation, the Constitutional Court noted that the legislator had outlined the basic features of the notion of "entrepreneurial activity" and had placed no restrictions on the inclusion of additional features. The Cassation Court, within the scope of its function of ensuring uniformity in the implementation of the law and within the scope of its authority to contribute to the development of law, had interpreted the legislative meaning of the notion and the ambit of the features.

The Constitutional Court found no uncertainty in the disputed norms.

The applicant also challenged the norms of the Administrative Procedural Code, according to which judgments of the Administrative Court are final and binding from the moment they are handed down, and the procedure of bringing an administrative case before the Cassation Court and proceedings of that case in front of the Cassation Court were regulated by the relevant norms of the Civil Procedural Code.

Systematic analysis of the Judicial Code led the Constitutional Court to pinpoint the following elements of the legal regulation on the lodging of an appeal against judgments of the Administrative Court:

- judgments of the Administrative Court become binding from the moment they are handed down and cannot be brought before the Appeal Court;
- judgments of the Administrative Court can only be brought before the Cassation Court;
- as it is not possible to bring judgments of the Administrative Court before the Appeal Court, they can be brought before the Cassation Court on the same basis as judgments of the Civil Court of Appeal;
- the criteria of admissibility of appeals against judgments of the Administrative Court are the same as those governing appeals against judgments of the Civil Court of Appeal;
- the Cassation Court examines appeals against the judgments of the Administrative Court within the same ambit as appeals against judgments of the Civil Court of Appeal and exercises the same authority.

The Constitutional Court made reference to the fundamental legal opinion expressed consistently in the case-law of the European Court of Human Rights, under which the European Convention on Human Rights does not compel contracting states to create appeal courts or cassation courts. However, if they are created, those involved must exercise all the guarantees enshrined in Article 6 ECHR. In the case under review, the Constitutional Court began by examining whether the legal provision for appeal against administrative law judgments could safeguard the effective exercise of the right to a fair trial within the administrative justice system.

The Constitutional Court found that the effectiveness of exercising the right to a fair trial within administrative justice primarily hinged upon the two-tier system of administrative justice of the Republic of Armenia and the effectiveness of that system. The efficiency of and access to the Cassation Court were

particularly important, given that this was the only court to which an appeal could be lodged.

The Constitutional Court observed that the disputed norms of Article 118 of the Administrative Procedural Code, without taking into account the features of administrative justice and the features of determination of disputes in public law, had extended the regulations on the Cassation Court within the three-instance system of civil procedure to appeals against administrative court judgments, including the criteria for appealing to the Cassation Court and the criteria of admissibility of an appeal. This effectively restricted access to the Cassation Court. Because there was no recourse to the Appeal Court in administrative cases, the Constitutional Court deemed it unlawful to use the same basis for appealing against administrative court decisions and criteria for the admissibility of an appeal, within the three-instance system of civil procedure. The Constitutional Court called for a clear definition within the Administrative Procedural Code of the procedure for lodging appeals against decisions by administrative courts, the basis for bringing an appeal before the Cassation Court, and rules of appellate procedure. Reference should be made to other laws only if such references fell within the general constitutional principles of the judicial system.

The Constitutional Court emphasised that the provision in Article 115.1 of the Administrative Procedural Code underlined the inefficiency of the current two-instance system of administrative justice. Under this provision, the judgments of the Administrative Court deciding the case in point become binding from the moment they are handed down. The Constitutional Court found that taking administrative court judgments to the Cassation Court under such circumstances not only makes the protection of rights inefficient in the Cassation Court, but also violates the principles of legal certainty and security. These are elements of a democratic state governed by the rule of law, and are enshrined in Article 1 of the Constitution.

The Constitutional Court noted that it is not possible to file an appeal against a decision by the Cassation Court which declared the case inadmissible. This differs from the situation governing decisions by the Appeal Court to declare a case inadmissible. This has an impact on access to and efficiency of the two-instance system of administrative justice. Thus, in instances of an appeal being declared inadmissible by the Cassation Court, an individual is not only deprived of the opportunity to file an appeal against that decision, (and therefore any effective remedy against that decision), but the right to a fair trial is effectively only available within the Court of First Instance.

The Constitutional Court also commented that the requirement that appeals before the Cassation Court can only be lodged through accredited advocates is a factor that restricts access to the Cassation Court. Yet this is the only judicial instance available for appeals against administrative court acts.

The Constitutional Court observed that in the sphere of administrative specialised justice the right to a fair trial is only effective where there is access to an efficient Cassation Court. A specialised chamber is also needed, for effective judicial protection, in the form of a separate specialised chamber vested with the power to examine facts, and to organise the examination of cases according to the features of administrative justice.

The Constitutional Court pronounced the disputed norms of the Administrative Procedural Code contrary to the Constitution and accordingly null and void.

Languages:

Armenian.



Azerbaijan

Constitutional Court

Important decisions

Identification: AZE-2008-3-001

a) Azerbaijan / b) Constitutional Court / c) / d) 20.11.2008 / e) / f) / g) *Azerbaijan, Respublika, Khalq gazetesi, Bakinski rabochiy* (Official Newspapers); *Azərbaycan Respublikası Konstitusiyası Məhkəməsinin Məlumatı* (Official Digest) / h) CODICES (English).

Keywords of the systematic thesaurus:

2.1.1.4.2 Sources – Categories – Written rules – International instruments – **Universal Declaration of Human Rights of 1948.**

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950.**

2.1.1.4.8 Sources – Categories – Written rules – International instruments – **International Covenant on Civil and Political Rights of 1966.**

3.21 General Principles – **Equality.**

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.**

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

Keywords of the alphabetical index:

Civil law / Civil procedure / Right to a fair trial / Judge, impartiality.

Headnotes:

A question arose as to the conformity of a decision by the Civil Board of the Supreme Court to the Constitution and national legislation. The decision related to eviction, demolition of a building and the payment of compensation. In cross-claim proceedings, authorisation was also sought for repealing the authorisation for constructing of a commercial facility on a 374 square metre plot

which was a part of the territory of the “Guba-Istehsalat” Joint-Stock Company of Open Type (described here as JSCOT).

Summary:

The case stemmed from the fact that Mr Zulfugarov occupied land which belonged to K. Mammadov and began construction work on this plot. He refused to leave, despite numerous warnings.

Guba District Court refused to hear the case. The Civil Board of the Court of Appeal overturned the decision of the Guba District Court, deciding instead to pronounce the Protocol no. 4 of “Guba-Istehsalat” JSCOT null and void, concerning the allocation of a 374 square meter ground area and authorisation no. 192, concerning the building of a commercial facility, the eviction of Mr Zulfugarov from the plot of land he occupied, the destruction of facilities and payment of compensation. The Civil Board of the Supreme Court upheld the judgment of the Court of Appeal.

Mr Zulfugarov lodged a complaint with the Constitutional Court on the ground that he had been given no information as to the place and date of the appeal. As a result, the examination of the case was held in his absence, and he did not appoint anyone to represent his interests during the court sessions. Despite the violations of law at the appeal stage, the Civil Board of the Supreme Court upheld the ill-grounded and unlawful ruling, not having paid sufficient heed to the evidence before it.

The applicant argued that during the court sessions his right to legal protection (which is guaranteed by Article 60 of the Constitution) was violated. The Plenum of the Constitutional Court emphasised the following with reference to Mr Zulfugarov’s complaint:

Article 60.1 of the Constitution provides a legal safeguard for the rights and liberties of every citizen. The guarantee of legal protection on the basis of the right to a fair trial by an independent court is prescribed by international law (Article 8 of the Universal Declaration of Human Rights, Article 14.1 of the International Covenant on Civil and Political Rights, Article 6.1 ECHR). In conformity with the Constitution and provisions of international law, justice in the true sense of the word should respond to the notion of fairness and effectively ensure the restoration of rights. The judicial decision handed down after the court session where legal provisions were breached could not be considered as fair justice.

The Plenum of the Constitutional Court took the view that the Court of Appeal breached the requirements of Civil Procedure Code (hereinafter, "CPC"). As was evident from the materials of the case, the Court of Appeal fixed the date of examination and sent the writ to Mr Zulfugarov. However, the address indicated on the writ for Mr Zulfugarov was not an exact one, but only a district. The materials of the case contained no information as to the service of the writ upon Mr Zulfugarov. The Court of Appeal acted in breach of the main principles of civil procedure legislation, namely the principles of adversarial proceedings and equality of parties by not ensuring Mr Zulfugarov's participation at court sessions. Under Article 127.2 of the Constitution, when considering legal cases, judges must act fairly and impartially. They must treat parties equally from a juridical perspective, and act based on facts and according to the law. Based on this norm, Article 9.1 CPC stipulates that justice should be exercised based on facts, and the principles of adversarial proceedings and equality of parties. Judges should always secure compliance with the adversarial principle and should base their decisions solely upon reasons discussed in compliance with the adversarial principle, and explanations and documentation submitted by parties. Courts are not entitled to make their own decisions based upon reasoning put forward by the Court in virtue of its professional status (Article 9.3 CPC).

In its judgment on the case of *Krchmar and others v. the Czech Republic* of 3 March 2000, the European Court of Human Rights noted that the principle of equality of arms, which is one of the elements of the broader elements of a fair hearing, requires that each party be given a reasonable opportunity to present its case under conditions that do not place it at a substantial disadvantage *vis-à-vis* its opponent. During its examination of the case in point, the Court of Appeal violated Article 127.2 of the Constitution, Articles 9.1, 9.3, 73.1, 140.1, 140.3, 140.6, 142.1, 373 CPC and thereby violated the right to legal protection ensured by Article 60 of the Constitution.

Violation or incorrect application of material and procedural norms of law are grounds for repeal of resolutions or court rulings at appeal instance (Article 418.1 CPC). Resolutions or rulings on appeal should, irrespective of the arguments evinced in the complaint, be overturned where the court has heard the case in the absence of the requisite notification to parties to the proceedings of the time and place of the court hearing (Article 418.4.5 CPC).

The Court of Cassation attached no importance to facts that were indicated in the complaint of Mr Zulfugarov and upheld the decision, even though the Court of Appeal had examined the case with violation of legal norms.

The Plenum of the Constitutional Court decided that since the decision of the Civil Board of the Supreme Court of 2 August 2007 contravened Article 60.1 of the Constitution and Articles 416 and 418.4.5 CPC, the decision in the civil case whereby Mr Zulfugarov was evicted from the land he occupied, the building was to be demolished and compensation paid, should be deemed null and void. In accordance with this decision, the case would now have to be reheard, in the time and manner prescribed by the civil procedure legislation.

Languages:

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



Belgium

Constitutional Court

Important decisions

Identification: BEL-2008-3-011

a) Belgium / b) Constitutional Court / c) / d) 03.12.2008 / e) 171/2008 / f) / g) *Moniteur belge* (Official Gazette) / h) CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950.**

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights.**

2.2.1.4 Sources – Hierarchy – Hierarchy as between national and non-national sources – **European Convention on Human Rights and constitutions.**

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

3.17 General Principles – **Weighing of interests.**

3.21 General Principles – **Equality.**

5.2 Fundamental Rights – **Equality.**

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

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

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.**

5.3.13.20 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.**

5.3.35 Fundamental Rights – Civil and political rights – **Inviolability of the home.**

5.4.17 Fundamental Rights – Economic, social and cultural rights – **Right to just and decent working conditions.**

Keywords of the alphabetical index:

Preliminary question, judge of the court below / Confidentiality / Interpretation, principle / Labour inspection, access, premises, inhabited / House searches, judicial guarantees.

Headnotes:

The right to respect for one's home has a civil-law nature within the meaning of Article 6.1 ECHR. Given that the exercise of the right to enter inhabited premises constitutes interference with this right, disputes regarding the latter must be dealt with in accordance with the guarantees laid down in this provision.

The guarantees set out in Article 6.1 ECHR include respect for the principle of adversarial proceedings. This principle generally involves the right of litigants to take cognisance of and discuss all items of evidence or observations produced in court.

However, the rights of the defence must be weighed against the interests covered by Article 8 ECHR. For instance, exceptional situations may arise in which specific items in the case-file should be exempt from the adversarial principle.

Summary:

The Constitutional Court was called on to consider a number of preliminary questions from Ghent Court of First Instance on a provision of the Law of 16 November 1972 relating to labour inspection. This provision authorises welfare inspectors, carrying documentary evidence and acting in an official capacity, to freely enter, at any time of day or night without prior notice, any workplace or other premises subject to their supervision in which they have reasonable grounds to believe that persons subject to the legislation whose application they are responsible for monitoring may be working. The provision specifies that inspectors can only enter inhabited premises with the prior authorisation of the judge of the district court.

Ghent Court of First Instance interprets this provision as authorising access to inhabited premises on the basis of documents and verbal explanations which are not included in the criminal case-file. It asks the Constitutional Court about the compatibility of this provision with the constitutional right to inviolability of the home (Article 15 of the Constitution) in conjunction with Article 8 ECHR (first question). It also asks the Court about its compatibility with the constitutional rules on equality and non-discrimination

(Articles 10 and 11 of the Constitution), in conjunction with Article 6.1 ECHR, given that the lawfulness of the authorisation given by the judge of the district court cannot be verified by any other judge, whereas search warrants issued by an investigating judge can be challenged before the trial court (second question).

Where the second preliminary question is concerned, the Court first of all points out that where it is called upon to verify compliance with the principle of equality and non-discrimination, in conjunction with a contractual provision guaranteeing a fundamental right, it is sufficient to note that this provision has been violated in order to conclude that the category of persons in respect of whom this fundamental right has been violated has been discriminated against as compared with the category of persons for whom this fundamental right is guaranteed.

The Court then notes that the interpretation of the provision in question by the judge of the Court below was based on a Court of Cassation judgment of 9 March 2004. Furthermore, it points out that since the exercise of the right to enter inhabited premises gave rise, in the case considered by the judge of the Court below, to criminal proceedings, it confined its analysis to this specific matter.

In connection with the second preliminary question, the Court firstly notes that the prior intervention of an independent and impartial judge is a major safeguard against the risk of abuse or arbitrariness, but that the mere fact of the authorisation to enter inhabited premises being issued by a judge cannot be deemed a sufficient guarantee, given that the person concerned cannot secure a hearing. In fact, the efficacy of the measure would be seriously undermined if this person were informed of it in advance. The Court refers in this context to several judgments of the European Court of Human Rights.

The fact is that the guarantees set out in Article 6.1 ECHR require the persons concerned to enjoy effective *de facto* and *de jure* judicial supervision of the lawfulness of the decision authorising access to the inhabited premises, as well as any measures based on this decision. The Court therefore concludes that, in the interpretation of the judge of the lower court to the effect that the provision in question precludes any judicial review of the lawfulness of the authorisation granted by the district court, this provision does not comply with the requirements of Article 6.1 ECHR and therefore constitutes a violation of the constitutional rules on equality and non-discrimination (Articles 10 and 11 of the Constitution). The Court considers, however, that the provision is amenable to an alternative interpretation, viz to the effect that it does

not preclude challenging before the Criminal Court the authorisation given by the district court, and is therefore in conformity with the Constitution.

In connection with the first preliminary question, the Court recalls the substance of the principle of adversarial proceedings secured by Article 6.1 ECHR and the weighing up of the rights of the defence and the interests covered by Article 8 ECHR. Exceptional situations might conceivably arise exempting specific items of evidence from the adversarial principle.

However, only measures restricting the rights of the defence which are absolutely necessary are legitimate under Article 6.1 ECHR. Moreover, any difficulties encountered by either of the parties in exercising his/her defence owing to a restriction of his/her rights must be offset by the guarantee provided by the judicial proceedings.

Conversely, infringements of private life deriving from judicial proceedings must as far as possible be confined to those which are strictly necessary because of the specific nature of the proceedings, as well as the particular configuration of the dispute. In this context the Court refers to several relevant judgments of the European Court of Human Rights.

The Court goes on to specify that in the interpretation of the judge of the Court below, the authorisation given by the district court to enter the inhabited premises may be based on documents and declarations which have not been included in the criminal case-file. It adds that Article 15.c of ILO Convention no. 81 on labour inspection in industry and commerce, approved by a Belgian law, requires labour inspectors to treat as absolutely confidential the source of any complaint of a defect in installations or a breach of legal provisions, and to refrain from disclosing to employers or their representatives that they conducted their inspection as a result of a complaint.

According to the Court, the rights of the defence would be disproportionately restricted if the documents and declarations substantiating the district court's authorisation to enter the inhabited premises were completely exempted from the principle of adversarial proceedings. On the other hand, the protection granted by Article 8 ECHR is sufficiently respected if none of the items enabling the identity of the person who submitted the complaint or denunciation to be deduced are included in the case-file. It is not necessary to exempt the complaint or denunciation itself from the adversarial principle in order to protect these interests.

The Court concludes that under the interpretation of the provision in question to the effect that the documents and declarations substantiating the district court's authorisation to enter the inhabited premises are completely exempt from the principle of adversarial proceedings, this provision does not meet the requirements of Article 6.1 ECHR and leads to arbitrary interference with the right to the inviolability of the home as secured under Article 15 of the Constitution and Article 8 ECHR.

The Court considers, however, that the provision in question can be interpreted in a manner compatible with the Constitution, in that it is not the complaint or denunciation itself but solely the data enabling the identity of the person who submitted the complaint or denunciation to be deduced that is exempt from the adversarial principle.

The Court incorporates all four interpretations into its judgment, i.e. the two which it deems unconstitutional and the two considered compatible with the Constitution.

Languages:

French, Dutch, German.



Identification: BEL-2008-3-012

a) Belgium / **b)** Constitutional Court / **c)** / **d)** 18.12.2008 / **e)** 182/2008 / **f)** / **g)** *Moniteur belge* (Official Gazette), 22.01.2009 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

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

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

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

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

Keywords of the alphabetical index:

Lawyer, fees, scales / Lawyer, fees payable by the losing party / Judicial fees, reimbursement / Proceedings, fees, reimbursement / Criminal proceedings, fees / Law, application, immediate / Law, entry into force / Acquittal, effect / Party, winning party, losing party.

Headnotes:

The constitutional and international legal rules (European Convention on Human Rights and International Covenant on Civil and Political Rights) guaranteeing access to equitable justice without discrimination are not violated by the Belgian legislation introducing, for the first time in Belgium, the principle of the recoverability of lawyer's fees permitting the winning party to obtain a lump-sum contribution to expenses from the losing party.

It is not discriminatory to extend such a system to criminal cases, confining it to relations between the accused and the party claiming damages.

Summary:

A large number of appellants lodged applications for the repeal of the Law of 21 April 2007 on the recoverability of lawyer's fees. This Law established a system enabling the party winning the case to recover part of the expenses for its defence from the losing party.

It had previously been incumbent on each party to defray its own defence costs, including its legal fees. Such expenditure was not part of the procedural costs chargeable to the losing party. The only correction had been the "procedural indemnity" provided for under Article 1022 of the Judicial Code, permitting the judge to order the losing party to pay an indemnity for material acts performed during proceedings by a lawyer.

By judgment of 2 September 2004, the Court of Cassation accepted that lawyers' fees could be subsumed under the compensation to be paid in the context of contractual liability. This judgment prompted numerous comments, and case-law split on a series of questions bound up with recoverability of costs.

Under Judgment no. 57/2006 of 19 April 2006 [BEL-2006-1-005], the Constitutional Court ruled that the lack of legislative provisions making lawyers' fees payable to the plaintiff in an action for damages or the party claiming damages in criminal proceedings, where it loses, violates Articles 10 and 11 of the Constitution, in conjunction with Article 6 ECHR, adding that in order

to put an end to this discrimination, the legislator must evaluate how and to what extent the recoverability of lawyers' fees must be organised.

Article 1022 of the Judicial Code now provides for a lump-sum contribution to the lawyers' fees incurred by the winning party, the amounts of which are determined by Royal Decree in accordance with the type of case and the scope of the proceedings, on an opinion from the Bar Associations. The judge may reduce or increase the indemnity within specific limits in the light of: the losing party's financial capacity (in order to decrease the amount of the indemnity); the complexity of the case; the contractual indemnities agreed for the winning party; and cases where the situation would be manifestly unreasonable.

Lastly, the new Law partly extends the recoverability principle to cases tried by criminal courts.

The appellants rely on the right to a judge (Article 13 of the Constitution), the right to legal aid (Article 23.3 of the Constitution), the principle of equality and non-discrimination (Articles 10 and 11 of the Constitution) and the international rules securing a fair hearing (Article 6 ECHR and Article 14 of the International Covenant on Civil and Political Rights) without discrimination of any kind (Article 14 ECHR and Article 26 CCPR).

The Constitutional Court considers that the Law challenged does not violate the right of access to a judge, which is a vital aspect of the right to a fair hearing and is essential in any State governed by the rule of law. By limiting any increase in the amount of procedural indemnities and granting discretionary powers to the judge to adjust this amount, the system can restrict the effects of recoverability in respect of any losing party with limited financial resources. The Court also considers that the legislator could leave it to the Crown to set the amounts of the procedural indemnity in consultation with the Bar Associations, after having itself established the principle and scope of recoverability of lawyers' fees and having assigned the judge a series of discretionary powers subject to specific criteria.

The Court accepts several limits on the recoverability system as adapted by the legislator, e.g. the lump-sum principle, the exclusion of fees for technical consultancy and the exclusion of trade union delegates from the ambit of the law.

The Court holds that it is not discriminatory for the legislator to extend the recoverability principle to criminal cases, while restricting such extension to relations between the accused and parties claiming damages in such cases.

The legislator's decision to preclude recoverability in cases of relations between the accused and the public prosecutor's office means that in the event of a discharge or acquittal, litigants who have been forced to call on a lawyer to defend them where they have been wrongfully accused must defray all fees and costs incurred for their own defence.

The mandate conferred on the public prosecutor's office most likely prompted the legislator to consider that there was no need to extend to it a system requiring payment of procedural indemnity whenever its action proved ineffective. The Court concludes that the legislator could no doubt organise a system of State indemnification of persons who are acquitted or discharged that takes account of the specificities of criminal proceedings. However, it does not follow from the fact that the legislator did not extend the lump-sum indemnity system provided for in the disputed provisions to the State in cases of acquittal or discharge that he or she violated Articles 10 and 11 of the Constitution, in conjunction with Article 6 ECHR.

Lastly, the Court considers that in the context of the uncertainty of the law consequent upon the new case-law of the Court of Cassation, the immediate application of the contested law would be an appropriate measure to put an end, in respect of all litigants, to the development of case-law lines which diverge and are therefore inegalitarian *vis-à-vis* the principle of recoverability and the amounts deemed recoverable.

Supplementary information:

- See Judgment no. 57/2006 of 19.04.2006, *Bulletin* 2006/1 [BEL-2006-1-005];
- To be compared (in criminal-law matters) with the decisions of the Polish Constitutional Court, nos. SK 60/03 of 11.01.2005 and SK 21/04 of 26.07.2006 (reversal of precedent).

Languages:

French, Dutch, German.



Brazil

Federal Supreme Court

Important decisions

Identification: BRA-2008-3-001

a) Brazil / b) Federal Supreme Court / c) / d) 06.02.1992 / e) ADIn 2-1 / f) / g) *Diário da Justiça* (Official Gazette), 21.11.1997 / h) CODICES (Portuguese).

Keywords of the systematic thesaurus:

1.3.5.5.1 Constitutional Justice – Jurisdiction – The subject of review – Laws and other rules having the force of law – **Laws and other rules in force.**

2.2.2.1 Sources – Hierarchy – Hierarchy as between national sources – **Hierarchy emerging from the Constitution.**

2.2.2.2 Sources – Hierarchy – Hierarchy as between national sources – **The Constitution and other sources of domestic law.**

Keywords of the alphabetical index:

Constitution, new, law, prior, relation / Law, prior, simple repeal / Law, prior, subsequent unconstitutionality.

Headnotes:

With the adoption of a new Constitution, prior law is either consistent with it and will remain in force, or inconsistent with it and will be repealed by it. When drafting legislation, lawmakers observe the limits imposed by the Constitution in force, as it is obviously impossible to obey the terms and precepts of a future, still non-existent Constitution.

Summary:

I. The National Federation of Teaching Establishments (*Federação Nacional de Estabelecimentos de Ensino – FENEN*) filed a Direct Unconstitutionality Action before the Federal Supreme Court against legislation regulating the prices charged by such establishments (Articles 1 and 3 of Decree-Law no. 532/1969 and Articles 2 and 5 of Decree no. 95921/1988). The plaintiff claimed that those provisions were inconsistent with the (then recent) 1988 Constitution and therefore demanded that they be declared unconstitutional. The

Plenary of the Court examined whether the advent of a new Constitution repeals or renders unconstitutional prior law that is inconsistent with the Constitution. The Court reviewed the thesis of simple repeal and of subsequent unconstitutionality.

II. The theory of the unconstitutionality of law presupposes that a Constitution be in force, which limits the powers of the State and establishes its responsibilities and competences. The law is deemed unconstitutional when written by a Power which oversteps the limits established in the Constitution in force at that moment, proceeding in a manner that is alien to its constitutional competences.

The advent of a new Constitution does not have the capacity of rendering unconstitutional a law that was consistent with the previous one. Unconstitutionality is always congenital, never subsequent. Thus, the decision does not nullify a previously valid law, but only declares the pre-existing flaw.

The new Constitution repeals prior laws that are inconsistent with it for the simple fact that new law repeals prior law, i.e. it is a matter of inter-temporal law.

The decision defeated the thesis that the repealing of prior law by the Constitution does not exclude its possible unconstitutionality, as this would be a qualified repealing, stemming from the subsequent unconstitutionality of the law. According to the proponents of this thesis, the advent of a new Constitution produces a renewal of all prior Law, because the Constitution in force is always the basis for the validity of the norms of a legal system. This way, one should not exclude the possibility of the Court judging the norm in abstract control, thus ensuring the possibility of putting an end to the many disputes over the impugned law without forcing every interested party to seek judicial remedy through the tortuous road of appeals.

Consequently, by a majority of the vote the Plenary of the Court dismissed the Action because of the juridical impossibility of the claim, as a direct unconstitutionality action does not have as its purpose the examination of the repeal – or not – of laws by a subsequent constitution.

Supplementary information:

Legal norms referred to:

- Articles 5.XXI, 8.III, 101.I.a and 103.IX of the Constitution;
- Articles 1 and 3 of Decree-Law no. 532/1969;
- Articles 2 and 5 of Decree no. 95921/1988.

Languages:

Portuguese.

*Identification:* BRA-2008-3-002

a) Brazil / b) Federal Supreme Court / c) / d) 28.03.1996 / e) ADIn 815 / f) / g) *Diário da Justiça* (Official Gazette), 10.05.1996 / h) CODICES (Portuguese).

Keywords of the systematic thesaurus:

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

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

2.2.2.1 Sources – Hierarchy – Hierarchy as between national sources – **Hierarchy emerging from the Constitution.**

Keywords of the alphabetical index:

Power, constitutional, original / Constitution, clause, immutable / Norm, constitutional, constitutionality / Supreme Court, Constitution, guardian.

Headnotes:

Establishing a hierarchy among original constitutional norms is not compatible with a rigid constitutional system. The foundation of the validity of all original constitutional norms lies in the original constitutional power – not in other constitutional norms.

Summary:

I. The Governor of the State of Rio Grande do Sul filed a Direct Unconstitutionality Action before the Federal Supreme Court against the constitutional provision establishing criteria for the number of Federal Deputies that each state may have. Article 45.1 and 45.2 of the Constitution establish a minimum of 8 and a maximum of 70 Deputies per state and the Federal District, and a fixed number of 4 Deputies per Territory.

The petitioner alleged, the existence of a hierarchy among original constitutional norms in order to justify his claim for a declaration of unconstitutionality of the impugned provisions. The latter, he argued, would be in violation of some of the immutable clauses (“*cláusulas pétreas*”) included in Article 60.4 of the Constitution, which would be “superior” constitutional norms. Article 60.4 limits the scope of constitutional amendments, barring proposals aimed at abolishing the federative State; direct, secret universal and periodic voting; the separation of powers; and individual rights and guarantees. These allegedly “superior” norms would be those that constitute the principles of super-positive Law, to which even the original constitutional power would be subjected. The Court examined the argument about the existence of unconstitutional constitutional norms.

II. The Plenary of the Court affirmed that the thesis of a hierarchy among ordinary constitutional norms is not compatible with the rigid constitutional system in force in Brazil, because the foundation of the validity of all original constitutional norms lies in the original constitutional power and not in other constitutional norms.

Thus, the Court argued that, in order to preserve the identity and the continuity of the constitutional text as a whole, the framers of the Constitution created immutable clauses, which impose limits to derivative constitutional power. They did not create norms that would subordinate original constitutional power itself and then be capable of rendering other original norms unconstitutional.

Therefore, the contradiction among original constitutional norms is not a question of unconstitutionality, but rather of illegitimacy of the Constitution regarding one of its points. For this reason, one should not seek the jurisdiction of the Court over the matter, as it is not up to the Court to oversee original constitutional power itself, but only to act “primarily as a guardian of the Constitution” (Article 102 of the Constitution), so as to prevent it from being disrespected.

Consequently, the Plenary of the Court unanimously dismissed the Action for the juridical impossibility of the claim.

Supplementary information:

Legal norms referred to:

- Articles 45.1, 45.2, 60.4 and 102 of the Constitution.

Languages:

Portuguese.

*Identification:* BRA-2008-3-003

a) Brazil / **b)** Federal Supreme Court / **c)** / **d)** 17.09.2003 / **e)** HC 82.424 / **f)** / **g)** *Diário da Justiça* (Official Gazette), 19.03.2004 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

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

2.3.9 Sources – Techniques of review – **Teleological interpretation.**

5.1.4 Fundamental Rights – General questions – **Limits and restrictions.**

5.2.2.2 Fundamental Rights – Equality – Criteria of distinction – **Race.**

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

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

5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression.**

Keywords of the alphabetical index:

Habeas corpus, writ / Racism, definition / Anti-Semitism, definition / Book, publication.

Headnotes:

To achieve a juridico-constitutional definition of the term “racism”, it is necessary to combine the historical, political and social factors and circumstances that governed its formation and application.

The crime of racism constitutes an assault against the principles upon which human society is built and organised, such as the respectability and dignity of the human being and his peaceful coexistence.

Summary:

I. A petition for a writ of *habeas corpus* was filed before the Federal Supreme Court (FSC), on behalf of Sigfried Ellwanger, a writer and publisher who was convicted, at the appellate level, of the crime of anti-Semitism for publishing, selling and distributing anti-Semitic material. Article 5.42 of the Constitution determines that “the practice of racism constitutes a crime neither subject to bail nor to the statute of limitations.” Arguing that Jews are not a race, the petitioner alleged that the crime of anti-Semitic discrimination, for which he was condemned, does not have the racial connotation necessary for barring the statute of limitations, as disposed by Article 5.42 of the Constitution, which should be confined to the crime of racism.

II. The Plenary of the Court, based upon the premise that there are no biological subdivisions of the human species, found that the division of human beings in races results from a process whose content is merely politico-social. This process gives birth to racism, which in turn generates discrimination and segregationist prejudice.

In order to achieve a juridico-constitutional definition of the term “racism”, the Court concluded that it is necessary to combine the historical, political and social factors and circumstances that governed its formation and application, through a systemic and teleological interpretation of the Constitution. Only this way it is possible to attain the real meaning and scope of the norm, which must make the etymological, ethnological, sociological, anthropological and biological concepts consistent with each other.

It was argued that the discrimination against the Jews, which results from the core of the National-Socialist thought that Jews and Arians form distinct races, is irreconcilable with the ethical and moral standards defined in the Constitution and in the contemporary world, on which the Democratic Rule of Law arises and harmonises itself.

Hence, the crime of racism is verified by the simple use of these stigmas, which constitutes an assault against the principles upon which human society is built and organised, such as the respectability and dignity of the human being and his peaceful coexistence in the social environment.

It was therefore recognised that the editing and publishing of written works conveying anti-Semitic ideas – which seek to revive and lend credibility to the racial conception defined by the Nazi regime, denying and subverting incontrovertible historical facts as the Holocaust, predicated on the supposed inferiority and

disqualification of the Jewish people – amount to inciting discrimination with a heightened racist content, made even more serious in light of the historical consequences of the acts upon which they are based.

The Justices understood that, in this case, the conduct of the petitioner in publishing books with anti-Semitic content was explicit, revealing a manifest intention to deceive, as he based himself on the wrong premise that the Jews are not only a race, but more than that, a fundamentally and genetically lesser and pernicious racial segment. In this way, the discrimination he committed, deliberately and aimed specifically against Jews, constitutes the illicit act of practicing racism, with the grievous consequences that accompany it.

The Plenary determined that the Constitution imposes to the agents of such crimes, for the nature, gravity and repulsiveness of the offense, a clause barring the statute of limitations so that the rejection and abjection of Brazilian society to its practice may remain established *ad perpetuam rei memoriam*. Barring the application of the statute of limitations for the crimes of racism is justified as a serious warning to present and future generations, in order to forestall the revival of old and outdated concepts that the juridical conscience no longer admits.

It was decided, at last, that as any individual right, the constitutional guarantee to freedom of expression is not absolute, as it may be retracted when it oversteps its moral and juridical limits, as in the case of immoral manifestations that amount to penal violations. For this reason, in the concrete case, the guarantee of freedom of expression was retracted in the name of the principles of the dignity of the human person and of judicial equality.

The theory that would grant the writ of *habeas corpus*, assuming the application of the statute of limitations and the theory that would grant the writ *ex officio* to acquit the petitioner for atypical conduct were both defeated. Consequently, the Plenary of the Court, for a majority of the votes, denied the writ.

Supplementary information:

Legal norms referred to:

- Article 5.42 of the Constitution.

Languages:

Portuguese.



Identification: BRA-2008-3-004

a) Brazil / b) Federal Supreme Court / c) / d) 24.03.2004 / e) RE 197,917 / f) / g) *Diário da Justiça* (Official Gazette), 07.05.2004 / h) CODICES (Portuguese).

Keywords of the systematic thesaurus:

1.3.2.2 Constitutional Justice – Jurisdiction – Type of review – **Abstract / concrete review**.

1.6.1 Constitutional Justice – Effects – **Scope**.

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

1.6.5.3 Constitutional Justice – Effects – Temporal effect – **Limitation on retrospective effect**.

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

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

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

Keywords of the alphabetical index:

Election, representation, proportionality / Unconstitutionality, *incidenter tantum* / *Pro futuro* effects.

Headnotes:

In declaring the unconstitutionality of a law, the concrete situation may have to be respected, for the sake of judicial security. The declaration of annulment of the law, with its *ex tunc* effects, would result in a serious threat to the entire legislative system. Taking into account the public interest, *pro futuro* effects were exceptionally granted to the incidental declaration of unconstitutionality.

Summary:

I. The Public Attorney of the State of Sao Paulo filed an extraordinary appeal before the Federal Supreme Court against a decision by the Court of Justice ("*Tribunal de Justiça*") of the State of Sao Paulo. That decision overturned the verdict of a lower court which, recognising the unconstitutionality of a provision of the Organic Law of the municipality of Mira Estrela (Article 6, sole paragraph), determined that the number of city counselors be reduced from 11 to 9

and decreed the annulment of the political mandates that exceed that number.

Article 29.4 of the Constitution says that the number of city counselors must be proportional to the population of the municipality. The appellant alleged that the municipal legislation had violated the proportionality demanded by the Constitution by establishing an excessive number of counselors, considering that the city had only 2 651 inhabitants.

II. The Plenary of the Court decided that Article 29.4 of the Constitution requires the aforementioned proportionality, observing the limits defined in letters "a" to "c" of that Article. Thus, to leave the establishment of the composition of city councils to municipal lawmakers, observing only the maximum and minimum limits, is to render meaningless the express constitutional requirement of proportionality.

Hence, the Organic Law that establishes the composition of the City Council without regard to the cogent proportional relationship with the respective population configures an excess of legislative power and is therefore contrary to the constitutional system in force. The non-observance of the proportionality requirement violates the constitutional principles of isonomy and reasonableness.

Justices convened, therefore, on the need to interpret the cited constitutional provisions in such a way as to observe a general arithmetic parameter, so that the claimed proportionality would not imply any violation of other constitutional principles and would not produce results which are foreign to the reality of Brazilian municipalities.

The rationale followed by the Court in this case is confirmed by the constitutional model for the composition of the Chamber of Deputies and of State Legislative Assemblies (Articles 25 and 45.1 of the Constitution).

The decision defeated the theory that, in order not to violate municipal political autonomy, municipalities have the discretionary power to decide on the composition of the City Council, as long as they respect the maximum and minimum constitutional limits.

Justices, upon realising the unconstitutionality of the impugned law, were confronted with the fact that the consolidated situation should be respected on behalf of the principle of judicial security. They recognised this was an exceptional situation, in which a declaration of annulment, with its usual *ex tunc* effects, would result in a serious threat to the entire legislative system in force. So in order to preserve

public interest, *pro futuro* effects were exceptionally granted to the incidental declaration of unconstitutionality.

Consequently, the Plenary of the Court, by a majority of votes, partially granted the extraordinary appeal, partly re-establishing the verdict of the lower courts, in order to declare unconstitutional, *incidenter tantum*, the sole paragraph of Article 6 of the Organic Law no. 226/1990 of the municipality of Mira Estrela and to order the City Council to adopt the necessary measures to make its composition adequate to the parameters established by the decision, respecting the mandates of current counsellors.

Supplementary information:

Legal norms referred to:

- Articles 25, 29.4 and 45.1 of the Constitution;
- Sole paragraph of Article 6 of the Organic Law no. 226/1990 of the municipality of Mira Estrela, Sao Paulo.

Languages:

Portuguese.



Identification: BRA-2008-3-005

a) Brazil / b) Federal Supreme Court / c) / d) 22.06.2005 / e) MS 24.831 / f) / g) *Diário da Justiça* (Official Gazette), 04.08.2006 / h) CODICES (Portuguese).

Keywords of the systematic thesaurus:

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

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

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

4.5.4.4 Institutions – Legislative bodies – Organisation – **Committees.**

Keywords of the alphabetical index:

Constitutional review, legislative act, possibility / Guarantee, constitutional inobservance / Parliament, investigating committee.

Headnotes:

The Judicial Branch, when intervening to guarantee constitutional franchises and to assure the integrity and supremacy of the Constitution, legitimately fulfills the duties granted to it by the Constitution, even if its institutional action projects itself in the organic domain of the Legislative Branch.

Summary:

I. Senators filed a petition for a “*mandado de segurança*” (a peculiar institute of the Brazilian judicial system, which shares some elements with the Common Law petition for a writ of *mandamus*; it seeks relief from a violation of a “liquid and certain” right which is threatened by action or inaction of a public entity and can be filed as a stand alone proceeding) against the Senate’s Directing Board for its omission in adopting the necessary procedures for the installation of a parliamentary investigating committee (Article 58.3 of the Constitution) charged with:

- a. probing the use of “bingo houses” in money-laundering crimes; and
- b. clarifying their possible connection, along with lottery concessionary companies, to crime organisations.

The Constitution establishes that parliamentary investigating committees can be created by the Chamber of Deputies and by the Federal Senate, jointly or separately, through a motion from one third of its members (Article 58.3 of the Constitution). The petitioners alleged that the specified omission would be in violation of the subjective public right of parliamentary minorities to the installation of a parliamentary committee.

II. In order to avoid that the legislative majority would deny the exercise of the right of parliamentary investigation by legislative minorities, the Plenary of the Court granted the writ. Article 58.3 of the Constitution establishes that a request for the installment of a parliamentary investigating committee must:

- a. be subscribed by at least 1/3 of the members of the legislative chamber (in this case, the Senate);
- b. indicate a determined fact as the object of the investigation; and

- c. define a specific timeframe for the duration of the committee.

It was decided that if these constitutional requirements are met, a parliamentary investigating committee must be installed, without requiring approval by a majority, so that the chairman of the Legislative Chamber must adopt the subsequent necessary procedures for the effective installation of the committee.

The judgment asserted the possibility of judicial review of parliamentary acts as long as there is an allegation of inobservance of rights and/or guarantees of a constitutional nature. The occurrence of juridico-constitutional deviations in the works of a parliamentary investigating committee is exactly what justifies the exercise, by the Judiciary, of the activity of jurisdictional review over possible legislative abuses, without implying a situation of illegitimate interference in the organic sphere of another power of the Republic.

The decision defeated the theory/argument that, even if the majority would not appoint members to the parliamentary investigating committee, the committee could still function only with those members appointed by the minority, so that there would not be any obstacle to the exercise of the right to oversight.

Consequently, the Plenary of the Court granted the petitioned writ of *mandamus*, by a majority of the vote, in order to ensure to the petitioners the right to the effective installation of the parliamentary investigating committee object of Request no. 245/2004, determining – by analogically applying Article 28.1 of the Internal Rules of the Chamber of Deputies, combined with Article 85, *caput*, of the Internal Rules of the Federal Senate – that the President of the Senate himself proceed to appoint the missing members to the parliamentary investigating committee, observing also Article 58.1 of the Constitution.

Supplementary information:

Legal norms referred to:

- Article 58.1, 58.3 of the Constitution; Article 28.1 of the Internal Rules of the Chamber of Deputies;
- Article 85, *caput*, of the Internal Rules of the Federal Senate.

Languages:

Portuguese.



Identification: BRA-2008-3-006

a) Brazil / **b)** Federal Supreme Court / **c)** Second Chamber / **d)** 11.10.2005 / **e)** RE 201.819 / **f)** / **g)** *Diário da Justiça* (Official Gazette), 27.10.2006 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

5.1.1.5.1 Fundamental Rights – General questions – Entitlement to rights – Legal persons – **Private law**.
5.1.2 Fundamental Rights – General questions – **Horizontal effects**.

Keywords of the alphabetical index:

Fundamental right, application / Association, internal decision, due-process / Association, right of defence.

Headnotes:

Fundamental rights guaranteed by the Constitution bind not only public powers, but are also directed to the protection of private citizens against private powers. Violations of fundamental rights do not occur only within the realm of relations between a citizen and the State, but also in the relations between natural persons and legal private persons.

The sphere for private autonomy granted to private associations is limited by the observance of the principles and fundamental rights enshrined in the Constitution.

Summary:

I. The Brazilian Composers' Union ("*União Brasileira de Compositores, UBC*") filed an extraordinary appeal before the Federal Supreme Court against a decision of the Justice Tribunal of the State of Rio de Janeiro reinstating a member of that Union who had been expelled. The Tribunal ruled that the member had been denied the right to an ample defence in the proceeding that resulted in his expulsion.

The appellant alleged that the constitutional principle of ample defence is not applicable to the case because the Composer's Union is an entity of private law and not an organ of the public administration.

II. The Second Chamber of the Court considered that the fundamental rights guaranteed by the Constitution do not only bind public powers, but are also directed to the protection of private citizens against private powers. Thus, it was decided that the violations of fundamental rights do not occur only within the realm of relations between a citizen and the State, but also in the relations between natural persons and legal private persons.

In this way, the sphere for private autonomy granted to associations is limited by the observance of the principles and fundamental rights enshrined in the Constitution. Moreover, the entity in question, though private, is part of the public sphere, even if not a state entity. The Composer's Union takes on a privileged position to determine the extension to which its members can enjoy and profit from their copyrights. The expulsion of a member in disregard of the constitutional principles of due process and ample defence ends up restricting his very freedom of professional practice, as it becomes impossible for him to receive copyrights for the performance of his works.

The decision defeated the theory that private associations enjoy the freedom to organise themselves and establish operating rules and rules for relations among members as long as they respect current legislation. According to this understanding, the solution to the controversy on the expulsion of a member would be based on bylaws and civil law, without regard to the constitutional principle of ample defence.

Consequently, the second Chamber of the Court, by a majority of votes, overruled the extraordinary appeal.

Supplementary information:

Legal norms referred to:

- Article 5.LV of the Constitution.

Languages:

Portuguese.



Identification: BRA-2008-3-007

a) Brazil / **b)** Federal Supreme Court / **c)** / **d)** 07.12.2005 / **e)** ADPF 33 / **f)** / **g)** *Diário da Justiça* (Official Gazette), 27.10.2006 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

1.3.5.5.1 Constitutional Justice – Jurisdiction – The subject of review – Laws and other rules having the force of law – **Laws and other rules in force before the entry into force of the Constitution.**

1.3.5.8 Constitutional Justice – Jurisdiction – The subject of review – **Rules issued by federal or regional entities.**

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

Keywords of the alphabetical index:

Law, Constitution, conformity / Minimum wage, indexation / Federative principle, violation / Subsidiarity, clause.

Headnotes:

An already existing state level law deemed to be in violation of a subsequent Constitution can form the basis of a Claim of Non-compliance with a Fundamental (constitutional) Precept. Taking into account the subsidiarity clause, the Claim must be interpreted in the context of the overall constitutional order.

Summary:

I. The governor of the State of Para filed, in the Federal Supreme Court, a “Claim of Non-Compliance with a Fundamental Precept” (*Ação de Descumprimento de Preceito Fundamental*, ADPF, hereinafter: Claim of Non-Compliance) against Article 34 of the Personnel Statute of the Social and Economic Development Institute of Pará (*Instituto de Desenvolvimento Econômico-Social do Pará – IDESP*, hereinafter: “the Institute”), alleging that it violated the federative principle (Article 60.4 of the Constitution) and the constitutional ban on indexation to the minimum wage (Article 7.IV of the Constitution).

The Claim of Non-Compliance was introduced by Article 102.1 of the 1988 Constitution and later regulated by Law no. 9.882 of 3 December 1999. It encompasses controversies against the constitutionality of federal, state or municipal laws in force before the entry into force of the Constitution. This was the first Claim of Non-Compliance ever to

be judged on its merit by the Court, thus providing it with an opportunity to define the main features of this constitutional action.

II. The Plenary of the Court decided that the subsidiarity clause that defines the object of the Claim of Non-Compliance applies to the proceedings of the abstract review of norms. The principle of subsidiarity of the Claim of Non-Compliance, which consists in the inexistence of other efficient means to repair the damage, must be interpreted in the context of the overall constitutional order, i.e. as a principle capable to solve a relevant constitutional controversy in an ample, general and immediate way. Thus, when a norm cannot be submitted to the review of the Court through a Direct Unconstitutionality Action or through a Constitutionality-Declaring Action (as defined in Article 102.I.a. of the Constitution), a Claim of Non-Compliance may be filed. The reception or not of pre-constitutional law by the Constitution in force may be submitted to the review of the Court through a Claim of Non-Compliance, and the decision of the Court will produce *erga omnes* results and will be binding due to the objective feature of the proceeding.

Consequently, the Plenary of the Court, by unanimous vote, judged acceptable the proceeding to declare the illegitimacy (non-reception) of the personnel statute of the Institute in light of the federative principle and the ban on indexation to the minimum wage (Articles 60.4.I and 7.IV. of the Constitution).

Supplementary information:

Legal norms referred to:

- Articles 7.IV, 60.4.I. and 102.I.a. of the Constitution;
- Law 9.882 of 03.12.1999.

Languages:

Portuguese.

**Identification:** BRA-2008-3-008

a) Brazil / **b)** Federal Supreme Court / **c)** / **d)** 07.12.2006 / **e)** ADI 1351 / **f)** / **g)** *Diário da Justiça* (Official Gazette), 30.03.2007 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

1.6.5 Constitutional Justice – Effects – **Temporal effect.**

3.3.1 General Principles – Democracy – **Representative democracy.**

3.3.3 General Principles – Democracy – **Pluralist democracy.**

3.16 General Principles – **Proportionality.**

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

4.9.8.1 Institutions – Elections and instruments of direct democracy – Electoral campaign and campaign material – **Financing.**

4.9.10 Institutions – Elections and instruments of direct democracy – **Minimum participation rate required.**

5.2.1.4 Fundamental Rights – Equality – Scope of application – **Elections.**

Keywords of the alphabetical index:

Political party, law / Political party, performance clause / Political party, parliamentary representation / Political party, access to public funding for campaign / Equality of arms, principle / Unconstitutional law, temporary correction.

Headnotes:

Performance clauses that require political parties to obtain a certain percent of the vote as a precondition for them to operate in Congress, enjoy access to publicly funded political propaganda on TV and radio, or use public resources from the Parties' Fund and violate the constitutional principles of proportionality and of equality of arms ("*Chancengleichheit*") for political parties.

Summary:

I. The "Communist Party of Brazil (PC do B)" and the "Democratic-*Trabalhista* Party (PDT)" filed a Direct Unconstitutionality Action before the Federal Supreme Court against certain provisions of Law no. 9.96 of 19 September 1995 (Law of Political Parties), which established a "performance clause" or a "barrier clause" for the functioning of political parties. According to that clause, a political party could only operate in Congress and enjoy access to publicly funded TV and radio air time as well as to resources from the Parties' Fund if it had obtained at least 5% of tallied votes – excluding void and invalid ones – and at least 2% of the total vote in at least one third of the States.

The petitioners alleged that the impugned provisions violated the principle of equality of arms for all political parties, as well as the democratic regime, the plurality of parties and the principle of proportionality.

II. The Plenary of the Court ruled that a law which, taking into account the amount of votes obtained by a political party, bars its congressional representation, substantially reduces its air time for publicly funded political propaganda and its participation in the quotas of the Parties' Fund, violates the Constitution. The unconstitutionality of the law is a consequence of the violation of the constitutional principles of proportionality and of equality of arms, which are preconditions for the competition among political parties inherent to the very model of representative democracy.

By declaring the unconstitutionality of the impugned provisions, the Court also had to confront the resulting normative vacuum. In order to solve it, the Court chose to temporarily preserve the unconstitutional provision – Article 57 of Law no. 9.96/1995 – without its temporal limitations, until lawmakers enact legislation consistent with constitutional principles.

Thus, the expression "as disposed of in Article 13" of the afore-mentioned Article 57 was declared unconstitutional and, in order to avoid the normative vacuum, the unconstitutional expression was struck out and replaced by the words "as disposed in the previous clause", only until lawmakers address the issue anew, within constitutional principles and the limits spelled out by the Court.

The Plenary of the Court, by unanimous vote, accepted the Direct Unconstitutionality Action and declared the unconstitutionality of the following provisions of Law no. 9.96/1995:

- a. Article 13;
- b. The expression "in obedience to the following criteria", in the *caput* of Article 41;
- c. Clauses I and II of Article 41;
- d. Article 48;
- e. The expression "in compliance with Article 13", included in the *caput* of Article 49;
- f. The *caput* of Articles 56 and 57, with an interpretation that eliminated its temporal limitations until legislative action addresses it; and
- g. The expression "in Article 13" in Article 57.II. Also by unanimous vote, the Court overruled the part of the Action related to Article 56.II.

Supplementary information:

Legal norms referred to:

- Articles 5.XXXVI, 17 and 14.3.V of the Constitution;
- Law no. 9.96/1995.

Languages:

Portuguese.

*Identification:* BRA-2008-3-009

a) Brazil / b) Federal Supreme Court / c) / d) 09.05.2007 / e) ADI 2.240 / f) / g) *Diário da Justiça* (Official Gazette), 03.08.2007 / h) CODICES (Portuguese).

Keywords of the systematic thesaurus:

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

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

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

3.17 General Principles – **Weighing of interests.**

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

4.8.5 Institutions – Federalism, regionalism and local self-government – **Definition of geographical boundaries.**

Keywords of the alphabetical index:

Legislative body, omission / Fact, normative force / Municipality, creation, conditions / Law, unconstitutionality, nullity, postponement.

Headnotes:

The unconstitutionality of a State law in violation of a constitutional provision and well-established case law must also be considered in light of the exceptionality arising from a *de facto* situation and from the omission of federal lawmakers in regulating the constitutional provision through a required complementary law.

The decision of the Federal Supreme Court must take into account the normative force of facts and strike a balance between the nullity of the unconstitutional law and the safeguard of the principle of legal security. Thus, the Law can be declared unconstitutional without being annulled for a certain period of time, until state lawmakers adjust the legislation to constitutional requirements, as regulated in the complementary law to be enacted at the federal level.

Summary:

I. The Worker's Party (*Partido dos Trabalhadores, PT*) filed a Direct Unconstitutionality Action before the Federal Supreme Court against Law no. 7.619/2000 of the State of Bahia, which created the municipality of Luis Eduardo Magalhaes by dismembering the district of Luis Eduardo Magalhaes and part of the district of Sede from the municipality of Barreiras.

The petitioner alleged that the impugned Law violated Article 18.4 of the Constitution for creating a municipality in a year when municipal elections were being held, while the complementary Law mentioned in the Constitution had not yet been approved, determining the period during which States could create, incorporate, merge and dismember municipalities. Complementary laws are situated below constitutional norms and above ordinary legislation in the hierarchy of Brazilian laws. As they usually deal with quasi-constitutional matters, they do not follow the same degree of requirements of a constitutional amendment, but cannot be simply revoked by subsequent ordinary laws.

II. The Plenary of the Court, taking into account well-established case law on the unconstitutionality of laws that create municipalities disregarding Article 18.4 of the Constitution, recognised the unconstitutionality of the impugned Law, which created the municipality of Luis Eduardo Magalhaes.

Upon pronouncing the unconstitutionality of the Law, the Court had to face the fact that the municipality in question had been effectively established and already existed as a *de facto* federative entity for over 6 years. At this point, the Court envisaged the judicial chaos that a declaration of unconstitutionality, voiding the whole Law, could bring to the municipality. Thus, the Court recognised the need for striking a balance between the principle of nullity of the unconstitutional Law and the principal of legal security. Consequently, the Plenary of the Court, by unanimous vote, accepted the Action and, by a majority vote, applying Article 27 of Law no. 9.868/1999, declared the unconstitutionality without pronouncing the nullity of the impugned law, keeping it in force for a period of 24 months. This timeframe was considered reasonable for state

lawmakers to reassess the issue taking into account the guidelines to be established by the federal complementary Law, according to the Court's ruling in the Direct Unconstitutionality Action 3.682.

Supplementary information:

Legal norms referred to:

- Article 18.4 of the Constitution;
- Law no. 9.868/1999;
- Law no. 7.619/2000 of the State of Bahia.

Cross-references:

- ADI 3682. To previous precis...

Languages:

Portuguese.



Identification: BRA-2008-3-010

a) Brazil / **b)** Federal Supreme Court / **c)** / **d)** 09.05.2007 / **e)** ADI 3.682 / **f)** / **g)** *Diário da Justiça* (Official Gazette), 06.09.2007 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

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

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

1.6.5 Constitutional Justice – Effects – **Temporal effect.**

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

Keywords of the alphabetical index:

Provision, constitutional, regulation / Legislative omission, Constitution, violation / *Inertia deliberandi*, of the Legislative.

Headnotes:

The omission of federal lawmakers in regulating the constitutional provision through a required complementary law may constitute a violation of constitutional order.

Establishment of a reasonable temporal parameter for the enactment of constitutionally-mandated legislation by the Legislative Branch.

Summary:

I. The Legislative Assembly of the State of Mato Grosso filed a Direct Unconstitutionality Action before the Federal Supreme Court against the omission of the President of the Republic and the National Congress in not having enacted the complementary law referred to in Article 18.4 of the Constitution, which should regulate the exercise of the state competence to create, incorporate, merge and dismember municipalities.

II. The Plenary of the Court recognised the omission of the Legislative Branch in enacting the complementary law on the creation, incorporation, merging and dismemberment of municipalities. In reason of this omission, which lasted since the adoption of constitutional Amendment 15/96, it was impossible for states to exercise their competence to create, incorporate, merge or dismember municipalities.

Even though several bills had been introduced in Congress with a view to regulating Article 18.4 of the Constitution, the Court considered it possible to recognise the unconstitutional omission as to the effective deliberation and approval of the aforementioned complementary law. The peculiarities of parliamentary activities which inexorably bear upon the legislative process do not justify a manifestly negligent or remiss conduct of the Legislative Houses, which may put at risk the constitutional order itself.

In this way, it was decided that the *inertia deliberandi* of the Legislative Houses can be the object of a direct unconstitutionality action and that the non-enactment of the complementary law within a reasonable delay constituted an authentic violation of constitutional order.

The Court had to face the fact that, lacking the mentioned complementary law, since the adoption of Constitutional Amendment 15/96 several municipalities had been effectively created and already existed as *de facto* federative entities. Consequently, the Plenary of the Court, by unanimous vote, accepted the

Direct Action and declared the National Congress to be in a state of delay, so that in the reasonable period of 18 months it should adopt all legislative measures necessary to fulfilling the constitutional duty imposed by Article 18.4 of the Constitution, contemplating the imperfect situations caused by the state of unconstitutionality generated by the omission.

Lastly, the Court stressed that the decision did not impose a deadline for the legislative action by the National Congress, but only established a reasonable temporal parameter in light of the timeframe of 24 months set by the Court, in Actions 2.240, 3.316, 3.489 and 3.689, for the state laws that created municipalities or altered their territorial boundaries to remain in force, until the enactment of the federal complementary law that would take into account the situation of those municipalities.

Supplementary information:

Legal norms referred to:

- Article 18.4 of the Constitution, Constitutional Amendment 15/96.

Cross-references:

- ADIs 2.240, 3.316, 3.489 and 3.689.

Languages:

Portuguese.



Croatia Constitutional Court

Important decisions

Identification: CRO-2008-3-011

a) Croatia / b) Constitutional Court / c) / d) 18.06.2008 / e) U-III-2646/2007 / f) / g) *Narodne novine* (Official Gazette), 104/08 / h) CODICES (Croatian, English).

Keywords of the systematic thesaurus:

3.9 General Principles – **Rule of law**.
 3.10 General Principles – **Certainty of the law**.
 3.16 General Principles – **Proportionality**.
 5.3.13.1.2 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Civil proceedings**.
 5.3.13.1.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Trial/decision within reasonable time**.

Keywords of the alphabetical index:

Legal remedy, effective / Currency, denomination / Law, interpretation, implications / Interpretation, erroneous, sufficiently serious.

Headnotes:

When civil proceedings last for twenty years and the amount in dispute is determined according to the nominal sum and not the actual value, this lengthy period will invariably suit one of the parties better; the protracted proceedings alone will lead to a favourable outcome. It will, however, prejudice the other party's equal position before the law. The devaluation of the currency during that time makes no difference to the civil-law concept of the relevant legal norms: their regulatory purpose remains the same, as do the legal relations in character and extent. To claim in this situation that the value of the amount in controversy has decreased because of the change in the nominal amount of money used to express it constitutes a *formalistic* approach where the ostensible is accepted as true. This is an incorrect legal interpretation – when words or figures are taken literally without

consideration for their meaning – because it is not even a valid grammatical interpretation, let alone a proper teleological interpretation which requires discovering the purpose of a law and ascertaining the values that the law was written to protect.

The principle of monetary nominalism, to guarantee the fair exchange of economic goods, cannot be applied to guarantee fair court proceedings under conditions of inflation and money devaluation. Judicial proceedings must comply with the constitutional principle of the rule of law, as the highest value of the constitutional order. They must not only satisfy the demand for government bodies to act legally, but must also meet the demand for the legal effects to be appropriate to the legitimate expectations of the parties in each specific case. These expectations undoubtedly also include the expectation that the suit will be resolved by applying the legal standards valid at the time when it was brought, which also fulfils the principle of a fair trial.

Summary:

The applicant (the defendant in the civil proceedings) lodged a constitutional complaint against the ruling of the Supreme Court of 24 January 2007. Because the sum in dispute was small, the Supreme Court dismissed the applicant's motion for revision on points of law of the second instance judgment of 21 March 2006. This ruling rejected her appeal as ill-founded, upholding the first-instance judgment of 16 May 2002 which accepted the plaintiff's claim to be co-owner of half of a street-facing single-story family house, and ordered the applicant of the constitutional complaint to recognise this state of affairs and to issue the plaintiff with a title deed allowing a land registry transfer into the plaintiff's name, otherwise this document would be replaced by the judgment.

The Supreme Court dismissed the applicant's motion for revision on points of law on the grounds of Article 382.2 and 382.3 of the Civil Procedure Act, or CPA. (See *Narodne novine* nos. 53/91, 91/92 and 112/99). These provisions preclude revision on points of law in property rights proceedings claiming money, the handing over of other items, or the execution of some other term if the disputed amount cited by the plaintiff in the action does not exceed the sum of 100,000.0 kunas. In the course of the proceedings, it was established that the amount in dispute at the time when the motion for revision on points of law was submitted, and after the entry into force of Articles 4 and 10.3 of the Civil Procedure (Amendments) Act (*Narodne novine* no. 112/99), was only 0.12 kunas. The Supreme Court accordingly concluded that revision on points of law against the final judgment was not permissible here.

The applicant argued that the Supreme Court ruling violated her constitutional rights as set out in Article 14.2 (equality of all before the law) and Article 29.1 (right to a fair trial) of the Constitution because in the specific case the suit could not only be examined from the aspect of the value criteria in Article 382.2 and 382.3 CPA.

The Constitutional Court accepted the applicant's constitutional complaint, overturned the disputed ruling and referred the case to the Supreme Court for retrial for the following reasons.

The Constitutional Court noted that in her appeal of 9 April 1987, the applicant stated the value of the property in dispute, one co-owner's part of the "street-facing one-storey house, as "120,000 dinars" in the currency at that time. The Supreme Court found the applicant's motion for revision on points of law inadmissible saying that "what was then 120,000 dinars is now 0.12 kunas", which is a long way below the point at which revision is possible. This statement is substantiated by the currency changes that took place in the Republic of Croatia, especially the denomination of Croatian currency, which resulted in the nominal value of the co-owner's share of the building altering from 120,000 dinars to 0.12 kunas in the period between 1987 and 2007.

The Constitutional Court noted that the Supreme Court had raised the issues of the safeguarding and implementation of the constitutional guarantee of the equal application of the law, the equality of citizens, and the equality of everyone before the law, which the Supreme Court is bound by in accordance with Article 118.1 of the Constitution and Article 24.1 of the Judicial Act (*Narodne novine* no. 150/05). When civil proceedings last for twenty years and the amount in controversy is determined according to the nominal sum rather than the actual value, this lengthy period will invariably suit one of the parties better; the protracted proceedings alone will lead to a favourable outcome. It will, however, prejudice the other party's equal position before the law. The devaluation of the currency during that time did not affect the civil-law concept of the relevant legal norms: their regulatory purpose remains the same, as do the legal relations in character and extent. To claim in this situation that the value of the amount in controversy has decreased because of the change in the nominal amount of money used to express it constitutes a *formalistic* approach where the ostensible is accepted as true. This is an incorrect legal interpretation – when words or figures are taken literally without consideration for their meaning – because it is not even a valid grammatical interpretation, let alone a proper teleological interpretation which requires discovering the purpose of a law and ascertaining the values that the law was written to protect.

The Constitutional Court pointed out that by failing to honour the constitutional principle of a fair trial when deciding upon the applicant's rights and obligations under Article 29.1 of the Constitution, the court had denied her equality before the law under Article 14.2 of the Constitution. When it reviewed her motion for revision on points of law, the Supreme Court then applied the wrong formalistic interpretation of procedural law to the relevant value criterion for the admissibility of the revision, assessing the value of one co-owner's share of the family house in Z. to be 0.12 kunas. It thus violated her right of access to the legal expedient, contained with other rights, in the provision of Article 29.1 of the Constitution which bestows a universal right to an independent and fair trial provided by law and a decision on the merits within a reasonable time.

The Constitutional Court found that the principle of monetary nominalism, the purpose of which is to guarantee the fair exchange of economic goods, cannot be applied in order to guarantee fair court proceedings under conditions of inflation and devaluation of the dinar. Judicial proceedings must comply with the constitutional principle of the rule of law, as the highest value of the constitutional order. They must not only be implemented to meet the demand for government bodies to act legally but must also meet the demand for the legal effects to be appropriate to the legitimate expectations of the parties in each specific case. These expectations undoubtedly also include the expectation that the suit will be resolved by applying the legal standards valid at the time when it was brought, which also fulfils the principle of a fair trial in Article 29 of the Constitution. In this case the applicant could legitimately have expected that her lawsuit against the plaintiff would end before the court of revision on points of law (the plaintiff had brought an action against the applicant's predecessor on 9 April 1987, before the procedural law then in force had increased the value of the revision census from 50,000 to 800,000 dinars; Civil Procedure (Amendments) Act – *Službeni list SFRJ* no. 74/87 of 14 November 1987). This violation of the principle of the rule of law also violated the constitutional principle of a fair trial under Article 29 of the Constitution. The application of these constitutional principles clearly takes precedence over the formalistic interpretation of legal provisions as to the admissibility of revision on points of law.

Languages:

Croatian, English.



Identification: CRO-2008-3-012

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 19.11.2008 / **e)** U-I-2720/2007 / **f)** / **g)** *Narodne novine* (Official Gazette), 138/08 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

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

1.3.2.2 Constitutional Justice – Jurisdiction – Type of review – **Abstract / concrete review.**

1.3.5.5 Constitutional Justice – Jurisdiction – The subject of review – **Laws and other rules having the force of law.**

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

Keywords of the alphabetical index:

University, autonomy / Students, pupils / Ombudsman, powers.

Headnotes:

The office of students' ombudsman was established to protect students' interests exclusively within the academic community. He or she will themselves be a student, with the task of mediating between students and other members of the academic community, to help them realise their rights and obligations, in the manner laid down in the Act regulating this institution.

The students' ombudsman differs from the People's Ombudsman and the Attorneys' ombudsman in that the students' ombudsman is an internal *sui generis* institution of the academic community. The relationship between members of this community (students and others) and the students' ombudsman is a specific one, on the grounds of which and in accordance with which issues arising in academic life are resolved within the academic community. Therefore the students' ombudsman, attorney and People's Ombudsman are in different legal positions, based on their respective statutory powers.

Summary:

The Constitutional Court rejected a proposal from a natural person to review the constitutionality of that part of Article 1.1 reading “the election and activities of the students’ ombudsman”, that part of Article 2.4 reading “protection enjoyed before the students’ ombudsman”, that part of Article 3.1 reading “and the students’ ombudsman”, and Articles 5.4, 7.2.4 and 17 of the Students’ Union and Other Students’ Organisations Act (*Narodne novine* no. 71/07, referred to here as “the Act”).

The disputed provisions of the Act regulate the election and activities of the students’ ombudsman. They prescribe that the students’ union appoints the students’ ombudsman for a period of one year, and that this term of office may be repeated once. They also allow a student who satisfies the conditions for being a member of the student’ union to be appointed students’ ombudsman, and stipulate that a students’ ombudsman receives students’ complaints about their rights and discusses them with the competent bodies of the institution of the higher education. He or she also advises students as to how to realise their rights, can participate in disciplinary proceedings against students in order to safeguard their rights, and performs other matters established in the general act of the institution of higher education.

The applicant argued that the institute of students’ ombudsman did not comply with Article 27 of the Constitution, as it hinders the independence and autonomy of the Bar, which also provides students with assistance. Moreover, it infringed Articles 92.1 and 5.2 of the Constitution, because the authority to protect constitutional and legal rights of students in the proceedings before the bodies vested with public powers was already vested in the Peoples’ Ombudsman.

The Constitutional Court reviewed the disputed provisions and the disputed parts of provisions of the Act against the background of the provisions of Article 3 of the Constitution (the rule of law as one of the highest values of the constitutional order and the grounds for interpretation of the Constitution) and Article 27 of the Constitution (autonomy of universities and their independence in deciding on their organisation and activities).

Starting from its previous views on the autonomy of universities and its contents, the Constitutional Court noted that the concept of academic rights and freedoms in university autonomy also implies the manner of their realisation and protection within the academic community. One method of safeguarding academic rights and freedoms is the institution of the

students’ ombudsman, which was established to protect students’ interests exclusively within the academic community. He or she will themselves be a student, with the task of mediating between students and other members of the academic community, to help them realise their rights and obligations, in the manner laid down in the Act regulating this institution. The students’ ombudsman differs from the People’s Ombudsman and the Attorneys’ ombudsman in that the students’ ombudsman is an internal *sui generis* institution of the academic community. The relationship between members of this community (students and others) and the students’ ombudsman is a specific relationship on the grounds of which and in accordance with which issues arising in academic life are resolved within the academic community. Therefore the students’ ombudsman, attorney and People’s Ombudsman are in different legal positions, based on their respective statutory powers. Members of the academic community (in this case students) may only seek the protection of their rights outside the system if they are unable to resolve issues of relations within the academic community through the institutions that the legislator provided to help and mediate in the realisation of academic rights and freedoms. The students’ ombudsman cannot participate in the realisation of students’ academic rights and freedoms beyond this point.

In accordance with the above, bearing in mind the jurisdiction of attorneys and People’s Ombudsman stipulated in the Legal Profession Act and People’s Ombudsman Act (*Narodne novine*, no. 60/92), the Constitutional Court found that the mediation of the students’ ombudsman is not identical nor similar to, and thus cannot be compared with, the mediation and services provided by the attorney and People’s Ombudsman. The Students’ Ombudsman does not represent students before other government bodies, and he or she is not empowered to represent students outside the institution of higher education. Therefore the students’ ombudsman, attorney and People’s Ombudsman are in different legal positions based on their respective statutory powers. It is not possible to compare them from the perspective of university autonomy, which is the relevant aspect in this matter of constitutional law.

Languages:

Croatian, English.



Identification: CRO-2008-3-013

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 26.11.2008 / **e)** U-III-543/1999 / **f)** / **g)** *Narodne novine* (Official Gazette), 145/08 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Res judicata / Criminal charge, connection / Crime, qualification / War crime.

Headnotes:

When a judgment became final the matter in the indictment becomes *res judicata*. A subsequent trial in this case will violate the *ne bis in idem* principle although the original judgment does not represent the *meritum*, which is sometimes simply understood as a solution to the question of whether the defendant committed (if he is convicted) or did not commit (if he is acquitted) the criminal offence. The formal difference between an acquittal and a dismissal cannot be taken as the only criterion on which the possibility of a new and independent criminal trial for the same criminal offence is based: amnesty, even where it is contained in a dismissal, creates the same legal consequences as an acquittal.

Summary:

The applicant lodged a constitutional complaint against the judgment of the Supreme Court of 1 April 1999, which upheld the first instance judgment of the Sisak County Court of 19 December 1997. Here, the applicant, as a member of the diversionist platoon of the 18th Corps of the so-called Republic of Srpska Krajina, was found guilty, along with three other defendants, of crimes against humanity and international justice – a war crime against the civilian population – under Article 120.2 in conjunction with Article 120.1 of the Basic Penal Act of the Republic of Croatia (*Osnovni krivični zakon Republike Hrvatske, Narodne novine* nos. 31/93, 39/93, 108/95, 16/96 and 28/96, hereinafter, “BPA RC”). Each of them was sentenced, under the above legal provision, to a term of imprisonment of 5 years.

The applicant invoked the violation of the procedural rule *ne bis in idem*.

The Constitutional Court accepted the constitutional complaint and found violation of constitutional rights guaranteed by Article 14.2 of the Constitution (equality of all before the law) and Article 29.1 of the Constitution (right to a fair trial).

The Constitutional Court firstly found that the Military State Prosecution in Bjelovar, in its indictment of 26 May 1995, charged the applicant and others with a serious type of crime against the Republic of Croatia, i.e. for the criminal offence of sabotage in Article 244.1 in conjunction with Article 237 of the Penal Act of the Republic of Croatia (*Krivični zakon Republike Hrvatske, Narodne novine* nos. 32/93, 38/93, 16/96 and 28/96, hereinafter, “PARC”).

The applicant and others were accused of having mined the water system at the beginning of November 1993. On 13 September 1995 the Bjelovar Military Court rejected the charges as it had not been proved that all the essential characteristics of the criminal offence of sabotage exist. Nonetheless, it decided that the accused had mined (and damaged) the water system as members of the rebel paramilitary Serb units and held that this has all characteristics of the criminal offence of armed revolt in Article 235.1 PARC. However, the Bjelovar Military Court had acquitted the accused pursuant to Article 2 of the General Amnesty Act (*Zakon o općem oprost, Narodne novine* no. 80/96), which provides that only the perpetrators of criminal offences that the Republic of Croatia is bound to prosecute under the provisions of international law shall be exempted from amnesty. The Supreme Court on 7 and 21 October 1996 delivered a judgment rejecting all charges against all the accused because both criminal offences were covered by the General Amnesty Act.

On 2 May 1997, the County Attorney’s Office in Sisak then indicted the same persons, including the applicant, for the same act but with a different description of facts and with a different legal qualification i.e. for a crime against humanity and international law – a war crime against the civilian population (Article 120.2 in conjunction with Article 120.1 BPA RC). On the grounds of this indictment, the Sisak County Court handed down the disputed judgment of 19 December 1997, which was upheld by the judgment of the Supreme Court of 1 April 1999. In the legal opinion of the Supreme Court a final judgment or ruling for the criminal offence of armed rebellion does not preclude instituting and conducting new criminal proceedings for the same incident and convicting the perpetrators for a war crime against the civilian population. This is so because,

unlike the criminal offence of armed rebellion, a war crime against the civilian population is directed against humanity and international law, not only against the social values of the Republic of Croatia, and is not covered by the General Amnesty Act.

The Constitutional Court began by observing that the descriptions of the facts contained in the earlier judgments undoubtedly showed that they referred to the same incident that was given different legal qualifications and that all decisive facts of the real incident were established before the Bjelovar Military Court (before which the first criminal proceeding took place).

The Constitutional Court was of the opinion that the Supreme Court had erred in its conclusion in the disputed judgment that the perpetrator, after a final judgment had been passed for one of several concurrent crimes, could be tried in a new trial for another of several concurrent crimes. Under Article 336.2 of the Criminal Procedure Act the court is not bound by the prosecutor's proposal of the legal qualification of the offence. Accordingly, the Bjelovar Military Court should – if it deemed that the facts of the case in the indictment justified charges for a war crime against the civilian population in Article 120.1 BPA RC – have declared itself to be without subject-matter jurisdiction (because it did not have the jurisdiction to adjudicate for war crimes). It should then have referred the matter to the competent regular court, which had the power to pass judgment for a war crime against the civilian population, because this criminal offence was not covered by the general amnesty. As the Bjelovar Military Court did not follow this procedure, it follows that when its judgment became final the matter in the indictment was finally disposed of, *res judicata*. A subsequent trial in this case runs counter to the *ne bis in idem* principle, although the original judgment does not represent the *meritum*, which is sometimes simply understood as a solution to the question of whether the defendant committed (if he is convicted) or did not commit (if he is acquitted) the criminal offence. The formal difference between an acquittal and a dismissal cannot be taken as the only criterion on which the possibility of a new and independent criminal trial for the same criminal offence is based: amnesty, although it is contained in a dismissal, creates the same legal consequences as an acquittal, and in both decisions the particular set of facts are considered equally unproven.

Languages:

Croatian, English.



Identification: CRO-2008-3-014

a) Croatia / b) Constitutional Court / c) / d) 10.12.2008 / e) U-II-355/2007 and U-II-3924/2007 / f) / g) *Narodne novine* (Official Gazette), 148/08 / h) CODICES (Croatian, English).

Keywords of the systematic thesaurus:

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

1.2.4 Constitutional Justice – Types of claim – **Initiation ex officio by the body of constitutional jurisdiction.**

1.3.2.2 Constitutional Justice – Jurisdiction – Type of review – **Abstract / concrete review.**

1.3.5.8 Constitutional Justice – Jurisdiction – The subject of review – **Rules issued by federal or regional entities.**

3.9 General Principles – **Rule of 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.**

Keywords of the alphabetical index:

Local self-government, legislative power / Contractual relation / Contract, parties, autonomy / Parking, fee, essence and purpose.

Headnotes:

The public-law nature of parking organisations and payment for the use of a parking space does not absolve the local authority from complying with the general principles of the law of obligations (such as contract law) in regulating the general rules of the parking contract.

A contract to use a car park is a standard-form adhesion contract. The relevant public authority will set out its general conditions in its general act (in this case, the disputed Ordinance). Publication of the general act (Ordinance) in the official gazette of the local authority is deemed to be publication of the general conditions of the contract on the use of car parks.

Where a violation of the general conditions of the parking contract has been established, the general authority may only charge the parking user for the outstanding fee limited by the time for which he used the parking space, and for related expenses. Under the relevant provisions of the law on obligations, an outstanding fee for the use of a time-limited parking space, resulting from a violation of the general conditions of the parking contract, will always preclude charging any kind of contractual penalty. A different legal regulation (for example where the Ordinance provides for a contractual penalty) leads to an obvious inequality in the rights and obligations of the contracting parties (the provider of the public service of parking and the parking user), and thus to illegality resulting in consequences which threaten the very purpose of the contract.

Summary:

The Constitutional Court accepted in part proposals from two natural persons to review the conformity of the Parking Organisation and Payment Ordinance (Official Gazette of the Town of Sisak / *Službeni glasnik Grada Osijeka* / nos. 4/97, 1/99, 3/02 and 6/05) with the Constitution and the law. It repealed that part of Article 14.2 of the Ordinance providing: "and writing parking-tickets for payment of the contractual penalty", that part of Article 16 in providing: "which results in a contractual penalty", and "intentionally misleads the parking warden in any way", and Articles 17, 18, 19 and 20. It stipulated that the repealed provisions would lose their force on 31 December 2009.

The applicants suggested that Articles 14 to 20 of the Ordinance ran counter to the relevant provisions of the Civil Obligations Act, or COA, which provide that a contractual penalty may not be negotiated for monetary obligations.

The disputed provisions of the Ordinance identify the body that controls the regulation of the proper use of car parks and the technical equipment for it (Article 14); the manner and effects of the conclusion of contracts on using car parks (Article 15); breaches of contracts on use of car parks which result in contractual penalty, such as: not displaying the parking card in a visible place under the vehicle's windscreen or not reporting the use of the car park via an SMS message (Article 16.a), using a card bought for a lower parking zone in a higher parking zone (Article 16.b), exceeding the time allotted for parking (Article 16.c), occupying two parking places with the vehicle (Article 16.d), intentionally misleading the parking warden in any way (Article 16.e), parking of a vehicle without a parking card for longer than one day (Article 16.f); the amount of contractual penalty

(Article 17); the body that issues bills and payment orders for contractual penalties, and the time limit of 8 days within which the parking user must act as instructed in the order (Article 18); the obligation to pay the debt and the costs of the warning within the further period of 8 days if the user fails to follow the terms set in the order and who is considered liable for contractual penalty.

The Constitutional Court found the disputed provisions of the Ordinance to be in breach of the relevant provisions of the COA and provisions of Article 3 of the Constitution (rule of law) and Article 5.1 of the Constitution (constitutionality and legality) of the Constitution. It began by examining the general legal nature of parking activity and regulating payment for the use of a parking space. It observed that this is a public service which, under Articles 134.1 and 136 of the Constitution, and in accordance with the Local and Regional Self-Government Act, must be organised by the local authority. The local authority lays down the conditions (in the form of general rules) for regulating car parks and for payment for their use; these conditions are valid and binding for everyone equally. They are not and cannot be a subject of negotiation between the provider and the user of the parking service.

The Constitutional Court found that the public-law nature of the parking organisation and payment for the use of a parking space does not absolve local authorities from complying with the general rules of the law on obligations in regulating general rules of parking contracts. Furthermore, when establishing the legal nature of the contractual relationship between the provider of the public service of parking and the user of the parking space, the Constitutional Court found that this contract has the legal characteristics of a standard-form adhesion contract in Article 295 COA, in which the contracting parties are the public authority (provider of the parking service) and the user of the parking space. As this is a standard-form adhesion contract, whose general conditions the public authority prescribes in its general act (in this case, the disputed Ordinance), the publication of the general act (Ordinance) in the official gazette of the local authority is considered to be the publication of the general conditions of the contract on using car parks.

This satisfies the legal requirement that the general conditions of the contract must be published in the usual manner accessible to all parking users, and that they bind the contracting parties because they were or should have been familiar with them at the time the contract was formed.

In this context the Constitutional Court pointed out that the parking user may only be charged for violating the parking contract by conduct (“performance” and “non-performance”) in breach of the general conditions of the parking contract – which, under Article 16 sub-paragraphs. a, b, c, d and f of the Ordinance, is correctly defined as a violation of that contract. Having confirmed the liability for violating the general conditions of the parking contract, the public authority (or concessionary) may only charge the parking user for the outstanding fee which is limited by the time during which he or she used the parking space, and for related expenses.

Moreover, the Constitutional Court found that the breach of the parking contract provided for in Article 16.e of the Ordinance is not acceptable in constitutional law from the perspective of the rule of law, because it is not sufficiently certain, precise and predictable and therefore places parking users in an obviously unfavourable legal position by comparison with that of the other contracting party. Therefore, in accordance with the Article 38.2 of the Constitutional Act on the Constitutional Court, the Constitutional Court itself initiated proceedings to review the constitutionality of Article 16.e of the Ordinance, and then repealed it.

In accordance with its earlier opinion the Constitutional Court reiterated that under Article 350.3 COA, an outstanding fee for the use of a time-limited parking space, resulting from a violation of the general conditions of the parking contract, will always preclude charging any kind of contractual penalty. A different legal arrangement (as is the case where the first sentence of Article 16 and Articles 17 to 20 of the Ordinance provide for a contractual penalty) leads to an obvious inequality in the rights and obligations of the contracting parties (the provider of the public service of parking and the parking user), i.e. to illegality resulting in damaging consequences which threaten the very purpose of the contract (in this case use of the parking space).

Languages:

Croatian, English.



Identification: CRO-2008-3-015

a) Croatia / b) Constitutional Court / c) / d) 10.12.2008 / e) U-I-523/2002 and U-I-746/2006 / f) / g) *Narodne novine* (Official Gazette), 2/09 / h) CODICES (Croatian, English).

Keywords of the systematic thesaurus:

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

1.3.2.2 Constitutional Justice – Jurisdiction – Type of review – **Abstract / concrete review.**

1.3.5.5 Constitutional Justice – Jurisdiction – The subject of review – **Laws and other rules having the force of law.**

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950.**

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.**

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

Keywords of the alphabetical index:

Legislation, formal, majority / Decision, administrative, judicial review / Challenging, procedure / Organic law.

Headnotes:

The transfer of judicial control from one type of court to another in cases of expropriation of immovable property is not a constitutionally justified reason to proclaim an act an organic law.

The legal nature of expropriation (which appears in two basic forms under public law, as annulling or restricting property rights in the general or public interest upon the payment of compensation) makes it necessary to ensure a fair and effective procedure for the protection of rights to property before an independent and impartial court of full jurisdiction.

Expropriation is carried out through judicial administrative proceedings *sui generis*, with certain characteristics that ensure the quality of the County Court’s jurisdiction when this court adjudicates in proceedings stemming from a complaint over a second-instance administrative decision. The County Court will usually hand down its decision following a contested and public hearing at which the parties can

participate in the proceedings and represent their interests. It is not restricted to reviewing the legality of the disputed administrative act; it is also empowered to decide directly on the rights of the plaintiff to whom the administrative act refers. Thus, it can expand the examination to issues of fact, including the assessment of evidence.

Summary:

The Constitutional Court rejected requests from two natural persons to review the constitutionality of the Act amending the Expropriation Act (*Narodne novine* no. 114/01, hereinafter, "AA EA/01").

The Expropriation Act, or EA, (and therefore also AA EA/01) expands on the protection of constitutionally guaranteed property rights by determining the purpose, objects and beneficiaries of the expropriation. The AA EA/01 stipulates who decides on the expropriation in first and second instance administrative proceedings and court protection in the expropriation proceedings, i.e. judicial review of a second-instance administrative decision on expropriation, (Article 1); territorial jurisdiction of the first instance administrative body and the obligation to hear the property owner before passing the act on the expropriation (Article 2) and the proceedings of court protection before the County Court i.e. judicial review proceedings (Article 3, which add Articles 42a and 42h to the EA).

One of the applicants argued that AA EA/01 was organic law and that under Article 82.2 of the Constitution, in order to pass through Parliament it required majority votes of the total number of representatives of the Croatian Parliament.

The Constitutional Court noted that the AA EA/01 was passed by the statutory majority. Having regard to the rationale behind the EA, and the fact that under the Constitution, the institute of expropriation is within the framework of the interests of the Republic of Croatia, the Constitutional Court took the view that the transfer of judicial control from one type of court to another in cases of the expropriation of immovable property was not a constitutionally justified reason to proclaim an act an organic law. Having determined that AA EA/01 did not regulate the organisation, jurisdiction and manner of the work of government bodies within the meaning of Article 82.2 of the Constitution, the Constitutional Court took the view that AA EA/01 had to be passed in the manner and under the procedure provided for in Article 81.1 of the Constitution, i.e. by majority vote provided that a majority of representatives were present at the session.

The second applicant challenged the provisions of Articles 21.a, 22, 42.a, 42.b, 42.c., 42.d, 42.e, 42.f and 42.g EA, and the content of the proposal showed that he was in fact challenging Articles 1, 2 and 3 AA EA/01. He also contended that the County Court was not a court of full jurisdiction.

The Constitutional Court noted that the disputed legal provisions advanced the protection of the interests of the owner in expropriation proceedings because they sufficiently increased, by comparison with the law previously in force, the protection of the right to a fair trial and right to an effective legal remedy before a domestic authority.

The Constitutional Court pointed out that the legal nature of expropriation requires fair and effective proceedings for the protection of ownership rights before an independent and impartial court established by law. It held that proceedings before the County Court in response to an appeal against a decision to expropriate, under Article 3 AA EA/01, may be considered judicial proceedings before a court of full jurisdiction in all cases of expropriation where this may be necessary. The reasons for this finding can be summarised as follows.

Proceedings before the County Court are administratively judicial proceeding *sui generis*, with certain characteristics to ensure the sufficient quality of the county court's jurisdiction when this court adjudicates in proceedings stemming from a complaint about a second-instance expropriation decision. The County Court will usually hand down its decision after a contested and public hearing at which the parties can participate in the proceedings and represent their interests. The only exception to the principle of a contradictory trial is that the judicial panel may, if especially grave procedural defects have arisen in the administrative proceedings or the substantive law has clearly been misapplied, annul the administrative act in closed session. Because of the manifest defects, the County Court is not making a decision on the merits, and so in such cases, proceedings before it will comply with the requirements provided in Article 29.1 of the Constitution and Article 6.1 ECHR (right to a fair trial).

Moreover, the County Court is not restricted to examining the legality of an impugned administrative act. It is also empowered to decide directly on the rights of the plaintiff to whom the administrative act refers. When it examines the grounds for the complaint the County Court may expand the examination to issues of fact, including the assessment of evidence. The only restriction is the introduction of new facts that were not presented in the previous administrative proceedings, but this does not contravene the relevant

provisions of the Constitution and the European Convention on Human Rights because the principle of legal certainty and the efficient conduct of proceedings require that the possibility of presenting new facts be denied after a certain stage in the proceedings.

Moreover, despite the above restriction, if the County Court finds, having established all the facts and assessed all the evidence, (including that which has just been presented), that the administrative bodies did not properly and completely establish the facts of the case, or that they misapplied substantive law, it is empowered to overturn their decisions and refer the case to the administrative body for new proceedings.

Languages:

Croatian, English.



Identification: CRO-2008-3-016

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 19.11.2008 / **e)** U-I-2921/2003 and others / **f)** / **g)** *Narodne novine* (Official Gazette), 137/08 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

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

1.3.2.2 Constitutional Justice – Jurisdiction – Type of review – **Abstract / concrete review.**

1.3.5.5 Constitutional Justice – Jurisdiction – The subject of review – **Laws and other rules having the force of law.**

5.3.17 Fundamental Rights – Civil and political rights – **Right to compensation for damage caused by the State.**

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

Keywords of the alphabetical index:

Compensation for damage / Compensation, determination, grounds / Compensation, amount, calculation / Proceedings, discontinuation / Law, amendment, retroactive, application / *Res judicata* / Retroactivity, law, exceptional circumstances.

Headnotes:

Where an action is brought on one set of legal grounds under specific conditions, this does not exclude the legal possibility of a subsequent change of legal grounds and of a claim – on which the competent court has not yet passed final judgment – being judged on new legal grounds. In a state governed by the rule of law, it would only be possible for previous legal arrangements to be eradicated and new arrangements enacted, with the proviso that all outstanding claims unresolved on the basis of previous legal grounds would be adjudicated on the basis of new legal grounds, if there was a justified legitimate aim for this state of affairs, directed towards the realisation of some general or public interest of the community.

Where court proceedings refer to damages sustained in the period of armed aggression, there are three possible types of wrongful act performed by violence, namely a civil delict, an act of war or a terrorist act. If parties to proceedings believe that their particular cases were the result of terrorist acts under the old legal regulation (inherited from the legal system of the former State without it having been harmonised with the Constitution of the new State), even though the competent courts did not decide on such claims until this legal regulation had been deleted from the legal order, this will not suffice to constitute a legally protected “legitimate expectation”.

In the circumstances mentioned above, the retroactive effect of a few provisions of the new legal regulation of the state’s liability for damage caused by terrorist acts and other acts of violence is not disputable in constitutional law.

The legislator’s decision to avail itself in part of the possibility, recognised in the European Convention on the Compensation of Victims of Violent Crimes, to limit the amount of compensation and the scope of the right to the compensation of immaterial damage is constitutionally acceptable. With respect to compensation for material damage, it is essential that the legislator does not cancel out the very essence of the potential victim’s right by placing on him a disproportionate and excessive burden, because this would impair the fair balance that must exist between the protection of individual rights and the realisation of general or public interests.

Summary:

The Constitutional Court did not accept requests from several natural persons and two associations to review the constitutionality of the Liability for Damage Caused by Terrorist Acts and Public Demonstrations

Act (*Zakon o odgovornosti za štetu nastalu uslijed terorističkih akata i javnih demonstracija*, Narodne novine no. 117/03, or the LDCTA).

The LDCTA governs liability for damage caused by terrorist acts and other acts of violence committed with the aim of severely violating public order by intimidating citizens and provoking a feeling of insecurity among them, in the course of protests and other forms of mass public demonstration. Under the provisions of the LDCTA the state is responsible for damage in accordance with the principles of public solidarity, proportional bearing of public burden and fair and swift compensation. Article 7 LDCTA provides that damaged parties are only entitled to compensation for damage resulting from death, bodily injury or damage to health. Such compensation amounts to 60% of the estimated damage, and the total compensation cannot exceed 350,000.0 HRK. Article 8 LDCTA provides that material damage shall be compensated throughout the state's territory in the form of the reconstruction of damaged or destroyed material goods, under the provisions of the Reconstruction Act.

Several applicants challenged the LDCTA in its entirety; others only challenged certain of its provisions. They were of the opinion that they had a "legitimate expectation" that their claims would be decided pursuant to the law previously in force; that the LDCTA has a retroactive effect, that it creates differences in the legal position of persons who were awarded damages under the old law, and that the preconditions for realising the right to reconstruction are not suitable for compensation for damage from terrorism.

The Constitutional Court found the following:

- Before the Act amending the Civil Obligations Act (*Zakon o izmjeni Zakona o obveznim odnosima*, Narodne novine, no. 7/96, hereinafter, "AA COA") came into force on 3 February 1996, the "socio-political community" was responsible for loss caused by death or bodily injury or for damage or destruction of the property of others where this resulted from violent acts or terror or from public demonstrations, if "its officers" were under a duty, according to the laws in force, to prevent such loss (Article 180 COA). This shows that Article 180 COA had been taken over from the legal system of the former Socialist Federal Republic of Yugoslavia since "socio-political communities" never existed in the legal system of the Republic of Croatia;
- The AA COA of 1996 repealed Article 180 and *ex lege* stayed proceedings brought under this Article; with the proviso that the stayed proceedings would be resumed after special legislation was enacted governing liability for

damage caused by terrorist acts. In the application of the AA COA of 1996 the competent courts passed declaratory rulings staying these cases. The "special legislation", i.e. the disputed LDCTA, was enacted in 2003;

- After the disputed LDCTA entered into force on 31 July 2003 a legal possibility for the resumption of all the proceedings stayed by the AA COA of 1996 was opened, so the competent courts began to pass rulings on the resumption of these proceedings and in deciding on whether the claims were well founded they applied the provisions of the LDCTA from 2003;
- The LDCTA has broadened the state's liability for immaterial damage although it only provides for limited compensation of this damage up to a specified maximum sum, while for the compensation of material damage it refers to the application of the Reconstruction Act.

The Constitutional Court found that the fact of bringing an action on one set of legal grounds (in this case, Article 180 COA) under specific conditions does not exclude the legal possibility of a subsequent change of legal grounds (i.e. legal provisions) and of the claim – on which the competent court has not yet passed final judgment – being judged on the new legal grounds. In a state governed by the rule of law, deleting a previous legal arrangement and enacting a new one with the provision that all the outstanding claims unresolved on the basis of previous legal grounds would be adjudicated on the basis of new legal grounds must be justified, i.e. it must have a legitimate aim directed towards realising some general or public interest of the community. It found that the intervention of the legislator in this case had a legitimate aim (namely, to change the legal preconditions for the state's liability for damage due to terrorist acts resulting from the irregular conditions in the country caused by the armed aggression; the contents of Article 180 COA had to be harmonised with the Constitution to remove existing imprecision in the previous legal order and to adapt the legal preconditions for the liability to the new circumstances in the state in order to prevent imposition of an excessive financial burden on the state during a defence war and in the post-war period of reconstruction).

The Constitutional Court pointed out that when court proceedings refer to damage occurred in the period of armed aggression, three types of wrongful act performed by violence are possible – a civil delict, an act of war or a terrorist act. If parties to proceedings believe that their particular cases were the result of terrorist acts under the old legal regulation (inherited from the legal system of the former State without it having been harmonised with the Constitution of the

new State), even though the competent courts did not decide on such claims until this legal regulation had been deleted from the legal order, this will not suffice to constitute a legally protected “legitimate expectation”; all the more so as deleting Article 180 COA from the legal order did not also entail deleting the parties’ claims. They were simply subsumed under the new legislation.

In relation to the retroactive effect of particular provisions of the LDCTA, the Constitutional Court noted that Article 10 LDCTA, as a transitional legal provision, provides for all stayed proceedings to be resumed and lays down the application, in the continuation of these proceedings, of the substantive provisions of the LDCTA. In view of the circumstances outlined above, the retroactive effect of several provisions of the LDCTA (especially Articles 7 and 8) cannot be disputed, in the view of the Constitutional Court view, from any perspective.

One of the most important issues the Constitutional Court dealt with was whether the LDCTA established the necessary balance between the protection of individual rights and the realisation of public or general interests of the community.

The legislator’s decision to partially avail itself of the possibility, recognised in Article 5 of the European Convention on the Compensation of Victims of Violent Crimes (ETS no. 116) of 24 November 1983, to limit the amount of compensation and the scope of the right to the compensation of immaterial damage is, according to the Constitutional Court, constitutionally acceptable.

With regard to compensation for material damage the Constitutional Court found no constitutional reasons to dispute compensation by the state in the form of reconstructing the property instead of paying a defined amount of money. In deciding how to regulate the issue of compensation, the legislator must take care not to annul the very essence of the potential victim’s right by placing on him or her a disproportionate and excessive burden, because this would impair the fair balance that must exist between the protection of individual rights and the realisation of general or public interests.

Languages:

Croatian, English.



Cyprus Supreme Court

Important decisions

Identification: CYP-2008-3-001

a) Cyprus / **b)** Supreme Court / **c)** / **d)** 19.02.2009 / **e)** 127/07 / **f)** Tryfonos v. Republic / **g)** to be published in *Cyprus Law Reports* (Official Digest) / **h)** CODICES (Greek).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Appeal / Criminal proceedings / Fair trial / Right to legal representation.

Headnotes:

Under the Cypriot Constitution, anybody who is charged with an offence has the right to defend himself in person or through a lawyer of his own choosing.

Summary:

The appellant was convicted by the Assize Court on charges of theft. He appealed to the Supreme Court, complaining that he had been deprived of his right to legal representation.

The appellant first appeared before the Assize Court and pleaded not guilty. On the day that the case was set for hearing the appellant informed the court that his lawyer had withdrawn from the case and the case was adjourned. On the date of the hearing the appellant stated that he had approached three lawyers to take up his case but all three refused. The

court adjourned the case again setting it for hearing 10 days later. On that date the appellant applied again for adjournment of the case since he could not find a lawyer to represent him. The Assize Court dismissed his application and the case proceeded to a hearing. The appellant represented himself, but pointed out on several occasions to the Assize Court that he did not have any legal knowledge.

The Supreme Court upheld the appeal and stated that the appellant was deprived of his right to a fair trial. It noted that although the Assize Court tried to ensure that the trial of the case commenced as it was planned, it should, at the same time, have safeguarded the appellant's right to legal representation.

The Supreme Court ordered a retrial of the case.

Languages:

Greek.



Czech Republic Constitutional Court

Statistical data

1 September 2008 – 31 December 2008

- Judgment of the Plenary Court: 8
- Judgment of panels: 67
- Other decisions of the Plenary Court: 3
- Other decisions of panels: 1 074
- Other procedural decisions: 30
- Total: 1 182

Important decisions

Identification: CZE-2008-3-010

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 20.05.2008 / **e)** Pl. US 40/06 / **f)** / **g)** *Sbírka zákonů* (Official Gazette), no. 6/2009 Coll; *Sbírka nálezů a usnesení* (Collection of Decisions and Judgments of the Constitutional Court); www.nalus.usoud.cz / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

- 1.2.1.2 Constitutional Justice – Types of claim – Claim by a public body – **Legislative bodies.**
- 1.3.2.2 Constitutional Justice – Jurisdiction – Type of review – **Abstract / concrete review.**
- 1.3.5.5 Constitutional Justice – Jurisdiction – The subject of review – **Laws and other rules having the force of law.**
- 2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights.**
- 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.**

Keywords of the alphabetical index:

Association, professional, membership, obligatory / Medical practitioner / Professional self-governance / Freedom of association / Medical Association (*Ordre des médecins*).

Headnotes:

The requirement that physicians who practice medicine and preventive medical care in the Czech Republic must be members of the Czech Medical Association do not pose a problem in terms of the right to freedom of association under Article 20.1 of the Charter of Fundamental Rights and Freedoms (hereinafter the “Charter”) and Article 11 ECHR. These articles cannot be applied to the Czech Medical Association or to regulation of its membership.

Summary:

In its judgment, the plenum of the Constitutional Court rejected a petition submitted by a group of senators seeking to repeal § 3.1 of Act no. 220/1991 Coll., on the Czech Medical Association, the Czech Dental Association, and the Czech Pharmacy Association, which stipulates that any physician who practices medicine and preventive medical care in the Czech Republic must be a member of the Czech Medical Association. The petitioners based their petition primarily on the need to choose between the right to free exercise of the medical profession and the obligation to associate in a professional self-governing body, which limits physicians’ right of association under Article 20 of the Charter.

The Constitutional Court stated its opinion, on a general level, of the constitutional basis of professional self-governance, which it perceives to fall within the right of citizens to participate in the management of public affairs. Otherwise, however, there is no explicit provision within the constitutional order for the creation of this kind of self-governance, and there is no obligation incumbent on the legislator to establish professional associations. Thus, in the absence of a special constitutional guarantee of the right to professional self-governance, the definitive starting point for organising a review of the practice of medicine is the protection of public health. The constitutional order provides relatively wide discretion for specific measures to ensure it. Ensuring (the organisation of) proper provision of medical care is undoubtedly one of the requirements for achieving this aim, which is constitutionally enshrined in Article 6.1 (the right to life) and Article 31 of the Charter (right to protection of health).

The Constitutional Court also considered the question of whether the right to associate under Article 11 of the Convention and Article 20.1 of the Charter is *ratione materiae* applicable to the Czech Medical Association. In that regard, it noted several decisions of the European Court of Human Rights (e.g. the judgment of 23 June 1981 in the case of *Le Compte, Van Leuven and De Meyere v. Belgium*), which

indicate that Article 11 of the Convention is not applicable to professional associations where membership is mandatory. It duly proceeded to consider whether these conclusions are also applicable to the Czech Medical Association. For that purpose it reviewed a number of statutory elements of that institution, such as the fact that it was established by law, the requirement that doctors must become members of it, and the fulfilment of public law tasks for purposes of protection of the public. This entails ensuring proper practice of medicine based on review, autonomous norm-creating authority in relation to issuing the rules of procedure of the chambers, personnel and disciplinary authority, as well as participation in tender offers and negotiation proceedings. These statutory elements, as a “public law” provenance, distinguish the Czech Medical Association from those “private law” associations that obviously enjoy protection under Article 11 of the Convention or Article 20.1 of the Charter. Having examined the elements outlined above, and having compared them with the conclusions of the European Court of Human Rights, the Constitutional Court concluded that these statutory elements permit the identification of the Czech Medical Association with those institutions (professional associations), that were reviewed by bodies under the Convention. Insofar as the bodies of the Convention concluded that the reviewed institutions were not associations under Article 11 of the Convention, due to which interference in that provision was not even possible, this conclusion can justifiably be applied to a comparable institution, such as the Czech Medical Association. While the freedom of association cannot be at all affected by mandatory membership of the Czech Medical Association, there is also no scope for a continued review of the petition according to the proportionality test in order to verify whether the limitations were unconstitutional or whether there were less draconian methods available to achieve the stated goal.

The judge rapporteur in the matter was Vladimír Kurka. Judge Eliška Wagnerová filed a dissenting opinion against the verdict and the reasoning of the judgment.

Languages:

Czech.



Identification: CZE-2008-3-011

a) Czech Republic / **b)** Constitutional Court / **c)** First Chamber / **d)** 18.11.2008 / **e)** I. US 1835/07 / **f)** / **g)** *Sbírka nálezů a usnesení* (Collection of Decisions and Judgments of the Constitutional Court); www.nalus.usoud.cz / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

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

1.3.2.2 Constitutional Justice – Jurisdiction – Type of review – **Abstract / concrete review.**

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

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:

Income tax / Tax, powers of the tax authorities / Tax control.

Headnotes:

If a tax administrator does not have a specific suspicion that the tax reported by a taxpayer is lower than it should be, and does not inform the taxpayer of that suspicion, a tax audit cannot be considered an act directed toward tax assessment under the provisions of the Act on Administration of Taxes and Fees, capable of interrupting the running of the preclusive deadline. If the tax administrator assesses tax on the basis of a tax audit thus opened, after the deadline set for doing so, it violates the right to protection of property guaranteed by Article 11.1 of the Charter of Fundamental Rights and Freedoms (the “Charter”).

Summary:

The Financial Office issued tax assessments additionally assessing the complainant (a natural person) individual income tax for the tax periods 1998 and 1999. The complainant’s appeals against these assessments were denied by a decision of the Financial Directorate, and its administrative complaint was rejected by the Regional Court. The Supreme Administrative Court then denied the complainant’s cassation complaint. The complainant’s basic objection was that the tax was assessed after the preclusive deadline set by law for assessing it had

expired, because he believed that the tax audit was opened only formally, and as such could not be considered an action directed toward tax assessment, which would affect the running of the preclusive deadline. In his constitutional complaint, the complainant sought the repeal of the decisions and tax assessments mentioned above.

The Constitutional Court stated that in order for the tax audit to be considered an action directed toward tax assessment under the provisions of the Act on Administration of Taxes and Fees, capable of interrupting the running of the preclusive deadline for assessing tax, it is necessary for the tax administrator to have a specific suspicion that the tax reported by the taxpayer is lower than it should be. The tax administrator should inform the taxpayer of the specific grounds for that suspicion when the audit commences. If the tax administrator does not do so, it will have exercised its authority inconsistently with Article 2.2 of the Charter. The Constitutional Court also noted that if the tax administrator could open a tax audit at any time and without providing specific grounds for starting it for taxpayers it chose at will, it would be proceeding arbitrarily, and arbitrariness is not permitted in a law-based state. In the Constitutional Court’s opinion, in this case the opening of a tax audit on 20 December 2002 cannot be considered an action directed toward tax assessment under provisions of the Act on Administration of Taxes and Fees in view of the fact that the tax administrator did not have sufficient a priori grounds to open an audit, did not inform the complainant of any grounds, and did not state them in the protocol on opening a tax audit. The contested additional tax assessment, issued on 26 March 2004 was accordingly issued after the deadline provided by law.

The Constitutional Court concluded that, in view of the fact that a tax obligation was imposed on the complainant that burdened his property in an unconstitutional manner, inconsistently with Article 2.2 of the Charter, his property rights guaranteed in Article 11.1 of the Charter were violated. In the contested decisions, the administrative courts, by confirming the actions taken by the tax administrator did not meet their obligation to provide the individual with protection of his rights under Article 90 of the Constitution, or his fundamental rights under Article 4.1 of the Charter.

The Constitutional Court denied as impermissible the complainant’s petition to annul the administrative decisions and the decision of the Regional Court, in view of the principle of minimising interference by the Constitutional Court in the powers of other bodies.

The judge rapporteur in the case was Eliška Wagnerová. Judge Ivana Janů filed a dissenting opinion to the verdict and the reasoning of the judgment.

Languages:

Czech.



Identification: CZE-2008-3-012

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 26.11.2008 / **e)** Pl. US 19/08 / **f)** Treaty of Lisbon / **g)** *Sbírka zákonů* (Official Gazette), no. 446/2008 Coll.; *Sbírka nálezů a usnesení* (Collection of Decisions and Judgments of the Constitutional Court); www.nalus.usoud.cz / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

1.2.1.2 Constitutional Justice – Types of claim – Claim by a public body – **Legislative bodies**.
 1.3.2.1 Constitutional Justice – Jurisdiction – Type of review – **Preliminary / ex post facto review**.
 1.3.4.14 Constitutional Justice – Jurisdiction – Types of litigation – **Distribution of powers between Community and member states**.
 1.3.5.1 Constitutional Justice – Jurisdiction – The subject of review – **International treaties**.
 3.1 General Principles – **Sovereignty**.
 3.3 General Principles – **Democracy**.

Keywords of the alphabetical index:

Rule of law / Preliminary review / Sovereignty, transfer, limit.

Headnotes:

The transfer of powers of bodies of the Czech Republic to an international organisation under Article 10a of the Constitution cannot go so far as to violate the very essence of the republic as a democratic state governed by the rule of law, founded on respect for the rights and freedoms of human beings and of citizens, and to establish a change to the essential requirements of a democratic state governed by the rule of law (Article 9.2 in connection

with Article 1.1 of the Constitution). Otherwise, the transfer of powers is a sovereign political question.

If, on the basis of a transfer of powers, an international organisation could continue to change its powers at will, and independently of its members, i.e. if the constitutional “competence-competence” were transferred to it, this would be a transfer inconsistent with Articles 1.1 and 10a of the Constitution.

In preventive review of international treaties, the criterion of reference for the Constitutional Court is the constitutional order as a whole, not just its material core; the Constitution does not distinguish between “ordinary” international treaties under Article 49 and international treaties under Article 10a, and sets forth the same procedure for review of both by the Constitutional Court. The Treaty amending the Treaty on European Union and the Treaty establishing the European Community (the “Treaty of Lisbon”) does not have such consequences in relation to the European Union, and the reviewed provisions thereof are consistent with the constitutional order of the Czech Republic.

Summary:

The Senate petitioned the Constitutional Court under § 71a.1.a of the Act on the Constitutional Court after the government of the Czech Republic submitted the Treaty of Lisbon to the Senate, requesting the Senate’s consent to its ratification. In its petition, the Senate stated that the Treaty of Lisbon brings about fundamental changes that affect substantive elements of the statehood and constitutional characteristics of the Czech Republic as a sovereign, unitary and democratic state governed by the rule of law (Article 1.1 of the Constitution), or even the essential requirements of a democratic state governed by the rule of law, which, under Article 9.2 of the Constitution, may not be changed.

President Václav Klaus, as a party to the proceedings, agreed with the Senate’s petition, and added to its arguments, *inter alia*, by emphasising the argument that the Treaty of Lisbon is inconsistent primarily with the material core of the Constitution, and that this inconsistency cannot be removed even by a possible amendment to the Constitution. In contrast, the government of Mirek Topolánek stated its belief that the Treaty of Lisbon is not inconsistent with the constitutional order of the Czech Republic.

The plenum of the Constitutional Court heard the arguments of the parties and their attorneys at a hearing on 25 November 2008, which, after presentation of closing arguments, it adjourned until 26 November 2008. It then decided in a judgment that the Treaty of Lisbon,

or Article 2.1 (before renumbering, Article 2a.1), Article 4.2 (before renumbering, Article 2c), Article 352.1 (before renumbering, Article 308.1), Article 83 (before renumbering, Article 69b.1) and Article 216 (before renumbering, Article 188) of the Treaty on the Functioning of the European Union (the “TFEU”) and Article 2 (before renumbering, Article 1a), Article 7 and Article 48.6 and 48.7 of the Treaty on European Union (the “TEU”), as amended by the Treaty of Lisbon, and the Charter of Fundamental Rights of the European Union (the “CFREU”) are not inconsistent with the constitutional Order of the Czech Republic.

From the Reasoning of the Constitutional Court’s Judgment:

The Constitutional Court was faced with a petition for review of an international treaty for the first time. It began by addressing the procedural issues inherent in proceedings of this nature. It rejected the arguments of the parties that the nature of the proceeding was non-adversarial (implying an obligation to review all provisions of an international treaty for consistency with the entire constitutional order, stating that this is a concept from civil trials, not transferable to this quite unique proceeding). Analogously to proceedings on review of norms, the Constitutional Court felt bound by the scope of the petition to open proceedings, which means that it concentrated its review only on those provisions of the international treaty whose consistency with the constitutional order the petitioner expressly contested, and where, in an effort to meet the burden of allegation, it supported its claims with constitutional law arguments (i.e., in the scope of a proper petition). The Constitutional Court peripherally indicated that it would take a restrictive approach to addressing the issue of the impediment of *res judicata*, established for the future by this judgment of the Constitutional Court in relation to other potential petitions from other possible petitioners to open proceedings on review of whether the Treaty of Lisbon is consistent with the constitutional order. The Constitutional Court also stated more precisely that in this review it did not intend, for a number of reasons, to distinguish between the provisions of the Treaty of Lisbon described as “normatively” old or new, i.e. it reviewed all those provisions of the Treaty of Lisbon that the petitioner properly contested.

In this regard, the Constitutional Court expressed the opinion that, even after ratification of the Accession Treaty, the normatively supreme position of the constitutional order was not rendered meaningless, and that, in exceptional cases, one can conclude that a treaty is inconsistent with the constitutional order even *ex post*, subsequently, after it has been ratified, via an individual constitutional complaint proceeding.

It again subscribed to the principle of a Euro-conforming interpretation of Czech constitutional law, but noted that in the event of a clear conflict between the domestic Constitution, especially its material core (Article 9.2 and 9.3 of the Constitution) and European law that cannot be overcome by a reasonable interpretation, the constitutional order of the Czech Republic, especially its material core, must take precedence. However, as regards the referential viewpoint of a preventive review of whether an international treaty is consistent with the constitutional order, then the constitutional order as a whole can apply as a criterion of reference, although in that case the material core of the Constitution naturally plays a primary and key role.

Given this procedural definition, the Constitutional Court then considered the individual objections from the Senate and other parties to the proceedings.

To begin with, the Constitutional Court stated that the limit for transfer of powers to an international organisation under Article 10a of the Constitution consists of the essential requirements of a sovereign, democratic state governed by the rule of law under Articles 9.2 and 1.1 of the Constitution. However, today sovereignty can no longer be understood absolutely; sovereignty is more a practical matter. In this sense, the transfer of certain competences of the state, which arises from the free will of the sovereign and will continue to be exercised with the sovereign’s participation, in a manner that is agreed on in advance and is reviewable, is not a conceptual weakening of the sovereignty of a state, but, on the contrary, can lead to strengthening it within the joint actions of an integrated whole.

Therefore, in this regard the Constitutional Court generally recognised the functionality of the EU institutional framework for ensuring review of the scope of the exercise of the transferred powers, although it acknowledged that its position could change in the future, if it appeared that this framework was demonstrably non-functional. In addition, the Constitutional Court can review whether an act by bodies of the Union exceed the powers that the Czech Republic transferred to the European Union under Article 10a of the Constitution, although only in wholly exceptional cases.

Specifically, as regards the first group of objections from the Senate (Articles 2.1 and 4.2 of the TFEU), the Constitutional Court stated that the category of the EU’s exclusive powers is not new in any way. The Treaty of Lisbon does not establish an unlimited competence clause even in the area of shared competences, but only declares the main areas in which shared competences occur. In the context of

other provisions of the Treaty of Lisbon (Article 2.6 of the TFEU, Article 5.2 of the TEU, protocols on the application of the principles of subsidiarity and proportionality and on the exercise of shared competence) it is evident that the Treaty of Lisbon provides a sufficiently certain normative framework for determining the scope in which the Czech Republic will transfer its powers to the EU. And, because the Union does not have “competence-competence” even under the Treaty of Lisbon (in any case, the petitioner did not claim otherwise), it cannot be considered either a kind of federal state or a special entity, standing in every regard, and always, above the individual states.

As regards Article 352.1 of the TFEU (the Senate’s second objection), the Constitutional Court stated that the transfer of “constitutional” competence to an international organisation would be impermissible. However, in the case of the Treaty of Lisbon this will not occur: amendment of the primary treaties will continue to be possible only with the consent of all EU states, which thus remain masters of the treaties; moreover, the possibility of withdrawing from the EU is expressly established (Article 50 of the TEU). This is in no way changed by the so-called flexibility clause under Article 352.1 of the TFEU; the possibility of adopting such a measure is limited to the objectives defined in Article 3 of the TEU and is also narrowed in view of Declarations nos. 41 and 42 contained in the Final Act of the Intergovernmental Conference on the Treaty of Lisbon. Thus, the flexibility clause is not a blanket norm that would enable circumventing Article 10a of the Constitution; in this regard the Constitutional Court also found adequate the institutional framework of review of transferred powers, as it follows from the practice of bodies of the EU and from the case law of the European Court of Justice. The Constitutional Court observed that the Treaty of Lisbon leaves it fully to the constitutional structures of member states to determine how to ensure that the principle of subsidiarity is respected in decision-making under the flexibility clause. Thus, the Czech legislature has scope to pass an appropriate legal regulation that will be consistent with the constitutional order.

As regards the Senate’s doubts about Article 48.6 and 48.7 of the TEU (the third group of objections) the Constitutional Court pointed to Article 48.6.3 of the TEU, which expressly eliminates any doubts relating to Article 10a of the Constitution consisting of the claim that it would thus be possible to continue to increase the competences conferred on the EU by the primary treaties. One cannot even conceptually think of amendments expanding Union powers, because a possible amendment clearly applies only to voting. The primary treaties will maintain superior

legal force over any acts adopted in this manner; moreover, the Article establishes the possibility for national parliaments to block such acts. However, the Constitutional Court, *obiter*, criticised the lack of legal regulation that would permit implementing decision-making procedures under Article 48 of the TEU on a domestic level, and *de lege ferenda* named certain criteria that such procedures should meet.

As regards Article 83.1 of the TFEU, especially regarding the third subparagraph, the Constitutional Court stated that the Senate overlooked Article 83.3 of the TFEU, which indicates that Article 83.1 of the TFEU cannot be applied to our legal order without the consent of the Czech Republic.

The Constitutional Court also noted, regarding these objections, that the Treaty of Lisbon transfers powers to bodies whose regularly inspected legitimacy comes from general elections in the individual member states. Moreover, the Treaty of Lisbon allows for various methods of involving domestic parliaments. The Constitutional Court concluded from this that the Treaty of Lisbon reserves an important role for domestic parliaments, whose consequences are to strengthen the role of individual member states; moreover, the regulation is one that makes the structure of the whole system more comprehensible and clearer, by comparison with the present state of affairs. Therefore, voting by a qualified majority under Article 48.7 of the TEU is not inconsistent with Articles 1.1 and 15.1 of the Constitution.

As regards the fourth group of the Senate’s objections (regarding Article 216 of the TFEU) the Constitutional Court stated that there is no question of conflict with Articles 10, 49 and 63.1.b of the Constitution, because these provisions do not apply to the negotiation of such treaties concluded by the Union. Article 216 of the TFEU is not a norm of competence that expands the powers of the Union; it only expands the catalogue of instruments that the Union can use within the framework of its competences. Thus, the EU can exercise the transferred powers both internally and externally, and the text of Articles 49 and 63 of the Constitution does not form an insurmountable obstacle to the transfer of powers in the area of concluding international treaties. Nonetheless, the Constitutional Court noted that Article 216 of the TFEU, due to its vagueness, is on the borderline of compatibility with requirements that the text of a legal norm be certain, or with requirements that the transfer of powers to the EU be determinable; however, this vagueness does not reach the intensity necessary to declare Article 216 of the TFEU inconsistent with the constitutional order.

As regards the fifth group of the Senate's objections, concerning the CFREU and Article 6 of the TEU, the Constitutional Court emphasised that the CFREU would primarily bind Union bodies and only bind Czech bodies in the event of application of European law. The CFREU does not expand the area of application of Union law beyond the framework of the Union's powers. In addition, as a result of the EU's accession to the European Convention on Human Rights, the bodies of the Union, including the Court of Justice, will become subject to review by the European Court of Human Rights. This will strengthen the mutual conformity of both systems for the protection of fundamental rights and freedoms. The Constitutional Court also noted that the CFREU recognises the fundamental rights arising from the constitutional traditions common to the member states, and must therefore be interpreted in accordance with these traditions (Article 52.4 of the CFREU). It also emphasised that protection of fundamental rights and freedoms is part of the material core of the Constitution, where it is beyond the reach of the legislature, and if the standard of protection ensured in the EU were unacceptable, the bodies of the Czech Republic would once again have to take over the transferred powers, in order to ensure protection of the standard. However, it has not observed anything like that at the present time.

The Constitutional Court stated that it is difficult at an abstract level to review the mutual harmony of individual rights and freedoms under the CFREU and the CFRF. *Prima vista* there is no conflicting provision in the CFREU; in contrast, the catalogue of rights in the CFREU is fully comparable to the set of fundamental rights and freedoms protection in the Czech Republic on the basis of the CFRF; even the petitioner did not raise any questions in this regard. The Constitutional Court found that in the present situation, the European institutional provision of the standard of protection for human rights and fundamental freedoms is compatible with the standard provided by the constitutional order of the Czech Republic. In the event of a conflict of sources governing the rights and freedoms of individuals under the CFREU and the CFRF the applying bodies will naturally proceed according to the one that provides individuals the higher standard of protection.

As regards the sixth group of the Senate's objections, the Constitutional Court stated that the values mentioned in Articles 2 and 7 of the TEU are fundamentally consistent with the values on which the material core of the Constitution rests (cf. Articles 1.1, 5, 6 of the Constitution, Articles 1, 2.1, 3, Chapter 4 of the CFRF). Therefore, in this regard as well the Treaty of Lisbon is consistent with the untouchable principles protected by the Czech constitutional order. Insofar as the Senate relies on state sovereignty in

this regard, the Constitutional Court stated that in a modern, democratic state, governed by the rule of law, state sovereignty is not an aim in and of itself, in isolation, but is a means for fulfilling the fundamental values on which the construction of a constitutional state governed by the rule of law, stands.

Therefore, the Constitutional Court summarised that the Treaty of Lisbon changes nothing on the fundamental concept of current European integration, and that, even after the entry into force of the Treaty of Lisbon, the Union would remain a unique organisation of an international law character.

Finally, the Constitutional Court addressed the arguments, on the initiative of the President of the Republic concerning the manner in which the Treaty of Lisbon is to be approved (whether in a referendum or by parliament), and stated that resolution of this issue lies outside the bounds of the possible review of an international treaty under Article 87.2 of the Constitution.

The judge rapporteur was Vojen Güttler. No judge filed a dissenting opinion either with regard to the verdict or the justification of the judgment.

Languages:

Czech.



Identification: CZE-2008-3-013

a) Czech Republic / b) Constitutional Court / c) Plenary / d) 09.12.2008 / e) Pl. US 26/07 / f) / g) *Sbírka zákonů* (Official Gazette), no. 47/2009 Coll.; *Sbírka nálezů a usnesení* (Collection of Decisions and Judgments of the Constitutional Court); www.nalus.usoud.cz / h) CODICES (Czech).

Keywords of the systematic thesaurus:

1.2.3 Constitutional Justice – Types of claim – **Referral by a court.**
 1.3.2.2 Constitutional Justice – Jurisdiction – Type of review – **Abstract / concrete review.**
 1.3.5.5 Constitutional Justice – Jurisdiction – The subject of review – **Laws and other rules having the force of law.**

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

5.3.3 Fundamental Rights – Civil and political rights – **Prohibition of torture and inhuman and degrading treatment.**

Keywords of the alphabetical index:

Foreigner, forcible removal / Judicial review, decision, administrative.

Headnotes:

Under Article 36.2 of the Charter of Fundamental Rights and Freedoms (hereinafter the “Charter”) a decision concerning fundamental rights and freedoms may not be removed from the jurisdiction of courts. Thus removing a decision on the administrative expulsion of a foreigner who was present in the territory of the Czech Republic illegally, under § 171.1.c of Act. no. 326/1999 Coll., on the Stay of Foreigners in the Territory of the Czech Republic, and Amending Certain Acts, is inconsistent with the above Article of the Charter, because it is an administrative decision that is capable of interfering in the fundamental rights and freedoms, e.g. the right to life under Article 6 of the Charter, the prohibition of torture and cruel, inhuman, or degrading treatment under Article 7 of the Charter, or the right to protection from unjustified interference in private and family life under Article 10.2 of the Charter.

Summary:

Upon a petition from the Supreme Administrative Court, the plenum of the Constitutional Court, by a judgment, annulled the abovementioned provision of the Act on the Stay of Foreigners in the Territory of the Czech Republic, under which decisions on administrative expulsion were removed from judicial review, if, before proceedings on such expulsion started, a foreigner was present in the country or in the transit area of an international airport illegally. The Supreme Administrative Court filed the petition in connection with a proceeding on a cassation complaint, in which the petitioners sought the annulment of a general court denying a complaint against a decision on administrative expulsion with reference to the contested provision.

The Constitutional Court stated that Article 36.2 of the Charter permits the legislature to set exceptions from judicial review of administrative decisions, but that authorisation is limited by the fact that decisions concerning the fundamental rights and freedoms may not be removed from the jurisdiction of courts. The right arising from that provision is not limited only to

citizens of the Czech Republic, but also applies to foreigners. The Constitutional Court did not cast doubt on its previous conclusions, under which there is no subjective, constitutionally guaranteed right for citizens to stay in the territory of the Czech Republic. However, the Charter safeguards foreigners’ rights that may be affected by expulsion, e.g. the right to life under Article 6 of the Charter or the ban on torture and cruel, inhuman, or degrading treatment under Article 7 of the Charter, which protect a foreigner from expulsion to a country where these rights would be jeopardised. Similarly, interference in the right to protection from unjustified interference in private and family life under Article 10.2 of the Charter comes into consideration. From the viewpoint of the Charter, it is not decisive whether a foreigner is present in the territory of the Czech Republic legally or not. The case law of the European Court of Human Rights likewise gives rise to limitations on the autonomy of member states when deciding on expulsion, based on the fundamental rights of the foreigners, e.g. the abovementioned rights, to which there are equivalents in the European Convention on Human Rights. The mere fact that the European Court of Human Rights does not apply the right to access to courts under Article 6.1 of the Convention to decision making on expulsion of a foreigner is not a reason to lower the level of procedural protection for fundamental rights that the Charter clearly guarantees. Thus, the Constitutional Court concluded that the contested provision is inconsistent with Article 36.2 of the Charter.

The judge rapporteur in the matter was Pavel Rychetský. None of the judges filed a dissenting opinion.

Languages:

Czech.



Estonia

Supreme Court

Important decisions

Identification: EST-2008-3-013

a) Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 30.09.2008 / **e)** 3-4-1-8-08 / **f)** Petition by the Tallinn Administrative Court to review the constitutionality of Section 28.2.3 of the State Pension Insurance Act / **g)** *Riigi Teataja III* (Official Gazette), 2008, 38, 251, www.riigikohus.ee / **h)** CODICES (Estonian, English).

Keywords of the systematic thesaurus:

3.5 General Principles – **Social State.**

3.16 General Principles – **Proportionality.**

5.1.4.3 Fundamental Rights – General questions – Limits and restrictions – **Subsequent review of limitation.**

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

5.3.26 Fundamental Rights – Civil and political rights – **National service.**

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

Keywords of the alphabetical index:

Military service abroad, consent / Pension, pensionable service, period / Pension, determination.

Headnotes:

A provision of the State Pension Insurance Act is unconstitutional and invalid to the extent that it excludes from the years of pensionable service the time during which an individual was called up for compulsory military service from outside Estonia, if before and after the referral that person resided in Estonia and had built up at least fifteen years of pensionable service in Estonia.

Summary:

I. H.K. contested the decision of the Pension Board which failed to include in his years of pensionable service the time of compulsory military service in the Armed Forces of the former USSR during 1969-1972.

Tallinn Administrative Court upheld H.K.'s action and declared unconstitutional Article 28.2.3 of the State Pension Insurance Act (hereinafter, "SPIA"). The Court also initiated constitutional review proceedings in the Supreme Court.

II. Having established the relevance of the norm under dispute to the constitutional review proceedings, and its formal constitutionality, the Supreme Court went on to assess its material constitutionality.

The Supreme Court held that Article 28.2.3 SPIA infringed the fundamental right to equality established in the first sentence of Article 12.1 of the Constitution, because it treated unequally persons referred to military service from outside Estonia and those referred from Estonia, although both categories of person resided in Estonia before and after their military service and had accrued fifteen years pensionable service in Estonia.

An infringement of the right to equality will only take place when those treated unequally are in an analogous situation. In this case the comparable groups of persons were those who were referred to compulsory military service from Estonia and those referred to service from outside the country. Otherwise both groups met the general conditions for the acquisition of pension arising from the SPIA and were both called up to serve in the former USSR army before 1 January 1991.

To ascertain whether unequal treatment was proportionate, the Court weighed the objective of unequal treatment and the gravity of the unequal situation created.

The Court found that fifteen years of pensionable service, earned in Estonia, was sufficient in itself to prove a person's connection with Estonia. The fact that a person worked briefly in another republic of the USSR after compulsory military service and before returning to Estonia could not be of decisive importance in proving a sufficient connection with Estonia.

The Court held that the legislator lacked reasonable and appropriate cause for different treatment of the groups of persons referred to above. Although the general purpose of the State Pension Insurance Act is to grant and pay state pensions for time worked in Estonia, Article 28.2.3 SPIA aims to compensate for the time during which a person was deprived of the possibility to work in Estonia due to compulsory referral to military service. Excluding the group of persons referred to military service from outside Estonia hindered the achievement of this aim.

The Supreme Court affirmed that when a person's course of life before and after compulsory military service indicated that service only constituted an obstacle to accruing qualifying pensionable service in Estonia, the time spent in military service should be included in that person's pensionable service, even where they were called up for military service from outside Estonia, assuming that the person accrued fifteen years pensionable service in Estonia.

Cross-references:

- Decision 3-4-1-10-00 of 22.12.2000, *Bulletin* 2000/3 [EST-2000-3-009];
- Decision 3-4-1-2-02 of 03.04.2002 of the Constitutional Review Chamber, *Bulletin* 2002/1 [EST-2002-1-002];
- Decision 3-4-1-5-02 of 28.10.2002, *Bulletin* 2002/3 [EST-2002-3-007];
- Decision 3-1-1-77-02 of 14.11.2002 of the General Assembly;
- Decision 3-4-1-2-05 of 27.06.2005 of the General Assembly;
- Decision 3-4-1-8-06 of 02.11.2006;
- Decision 3-3-1-101-06 of 03.01.2008 of the General Assembly, *Bulletin* 2008/1 [EST-2008-1-002].

Languages:

Estonian, English.



Identification: EST-2008-3-014

a) Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 15.12.2008 / **e)** 3-4-1-14-08 / **f)** Petition of the Tallinn City Council to declare Article 32.1 of the Accounting Act and Article 11.5 of the Minister of Finance Regulation no. 105 of 11 December 2003 null and void, and to pronounce the Guidelines of the Accounting Standards Board unconstitutional / **g)** *Riigi Teataja III* (Official Gazette), 2008, 52, 360, www.riigikohus.ee / **h)** CODICES (Estonian, English).

Keywords of the systematic thesaurus:

- 3.10 General Principles – **Certainty of the law.**
- 3.13 General Principles – **Legality.**

4.6.8 Institutions – Executive bodies – **Sectoral decentralisation.**

4.8.4.1 Institutions – Federalism, regionalism and local self-government – Basic principles – **Autonomy.**

4.8.7 Institutions – Federalism, regionalism and local self-government – **Budgetary and financial aspects.**

Keywords of the alphabetical index:

Local authority, freedom of administration / Local self-government, budget.

Headnotes:

The provision of the Ministry of Finance regulations requiring local authorities to prepare annual reports on the basis of the Guidelines of the Accounting Standards Board is unconstitutional in the formal sense and violates the principle of legality.

Summary:

I. On 11 December 2003, under Article 36.1 of the Accounting Act, the Minister of Finance issued Regulation no. 105 “General rules of state accounting” (referred to here as “the Rules”). Under Article 11.5 of the Rules, local governments must prepare annual reports in conformity with the accounting policies set out in the Rules, on the basis of requirements established in the Accounting Act and the Guidelines of the Accounting Standards Board.

On 11 February 2008, the Accounting Standards Board approved Guidelines “Concession contracts of services”. These came into force on 1 January 2009, and apply retroactively to all concession contracts of services in force at that time. Under Articles 15 and 25 of the Guidelines, public sector entities (not private sector entities as before) must enter objects of public infrastructure in their balance sheets as a tangible asset if they have control over the use of the object of infrastructure.

On 8 September 2008 the Tallinn City Council petitioned the Supreme Court to declare Article 11.5 of the Rules null and void, and the Guidelines unconstitutional. The petitioner contended that the Rules and the Guidelines, as quasi-legislative acts of a lower ranking than Acts of Parliament, violate the institutional guarantee of local authorities by forcing them to re-classify partnership contracts which have already been concluded. As well as imposing restrictions on taking debt obligations, the Guidelines restrict local authorities' rights to implement their development plans through public and private partnership projects, and to choose the best ways to

fulfil local government functions. The Guidelines contravene the principle of legality; and their retroactive application violates the principle of legitimate expectation.

The Tallinn City Council also challenged Article 32.1 of the Accounting Act which entitles the Accounting Standards Board to issue accounting guidelines explaining and specifying the Act, on the grounds of violation of the competence of the legislative power and conflict with the constitutional principle of legal clarity.

The request of the Tallinn City Council was supported by the Association of Municipalities and the Association of Cities. The Minister of Justice agreed with the request in part. The Constitutional Committee of the Parliament, the Minister of Finance and the Chancellor of Justice, however, opposed the request of the Tallinn City Council.

II. The Supreme Court did not accept the City Council's petition concerning the unconstitutionality of the Guidelines. The Guidelines cannot be regarded as legislation of general application, because they are not issued by a body competent to legislate but by the Accounting Standards Board which acts as an independent committee.

The Supreme Court also rejected the City Council's challenge of the regulation simply on the grounds of an alleged violation of the principle of legal clarity or exceeding the competence of the legislative powers. The Court found that the City Council failed to explain how these alleged violations infringed the constitutional guarantees of local governments.

The Supreme Court upheld the City Council's petition only to the extent that it requested Article 11.5 of the Rules to be declared null and void because it was in conflict with Articles 154 and 157.1 of the Constitution. These provisions establish guarantees to local governments' revenue bases and budgeting.

The Court found that the obligation established in Article 11.5 of the Rules to prepare annual reports in conformity with the accounting principles set out in the Rules, on the basis of the Guidelines of the Accounting Standards Board, infringes the right of local authorities to independently resolve and manage local issues, and the financial autonomy of local governments. The data (including the amount of obligations) that local governments must present in annual reports has an impact on their ability to assume debt obligations.

The Supreme Court found that in the formal sense Article 11.5 of the Rules is in conflict with the first sentence of Article 3.1 of the Constitution (principle of

legality). The obligation to prepare annual reports on the basis of the requirements set out in the Guidelines of the Accounting Standards Board is unconstitutional. There is no authority within the Constitution for the Accounting Standards Board to establish generally binding norms. Therefore the local governments may not be required, by a ministerial regulation, to adhere to these guidelines.

Nevertheless, the Chamber pointed out that although the legislator must decide on all important issues restricting local authorities' rights of self-organisation and financial autonomy, the legislator may delegate to the executive the right to specify such restrictions established by law.

Languages:

Estonian, English.



Identification: EST-2008-3-015

a) Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 30.12.2008 / **e)** 3-4-1-12-08 / **f)** Request by R.P. for a declaration that the length of his trial was unreasonable, thus breaching his right to a trial within a reasonable time / **g)** *Riigi Teataja III* (Official Gazette), 2009, 2, 7; www.riigikohus.ee / **h)** CODICES (Estonian, English).

Keywords of the systematic thesaurus:

- 1.2.2.1 Constitutional Justice – Types of claim – Claim by a private body or individual – **Natural person.**
- 1.3.5.15 Constitutional Justice – Jurisdiction – The subject of review – **Failure to act or to pass legislation.**
- 1.4.9.1 Constitutional Justice – Procedure – Parties – **Locus standi.**
- 5.3.13.2 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Effective remedy.**
- 5.3.13.13 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Trial/decision within reasonable time.**
- 5.3.17 Fundamental Rights – Civil and political rights – **Right to compensation for damage caused by the State.**

Keywords of the alphabetical index:

Individual complaint, grounds / Judicial protection, effectiveness / Trial, reasonable time, remedy.

Headnotes:

The Supreme Court cannot review an individual complaint in constitutional review proceedings about the unreasonable length of time the complainant's trial has taken, as the complainant has other ways of exercising the constitutional right to judicial protection.

Summary:

I. On 2 September 2008 R.P., whose criminal case had taken more than nine years, asked the Supreme Court to:

1. hold that the criminal proceedings had taken an unreasonable length of time, which ran counter to Article 14 of the Constitution and Article 6.1 ECHR;
2. hold that the fact that the legislation made no provision for the hearing of appeals against unreasonable time of proceedings and for awarding just compensation was in conflict with Article 14 of the Constitution and Article 13 ECHR;
3. award just compensation for the moral damage caused by the violation of fundamental rights.

II. The Supreme Court emphasised that it is only possible to review an individual complaint in constitutional review proceedings if the person has no other way to exercise the right to judicial protection guaranteed by Article 15 of the Constitution. The right to judicial protection, established in Articles 13, 14 and 15 of the Constitution, includes a person's right to file a complaint with a court if his or her rights and freedoms are violated, as well as the duty of the state to establish an appropriate procedure for the protection of fundamental rights which is fair and which would safeguard the effective protection of individual rights.

The Supreme Court found that R.P.'s right to a hearing within a reasonable time had been violated. However, R.P could have submitted a relevant complaint within the proceedings pending before the Tartu County Court. That Court would then have been under a duty to adjudicate the complaint at any stage of the proceedings, rather than at the point of handing down judgment. The county court would have had to determine whether the length of the trial was reasonable, in the light of the particular circumstances of the case, taking into account the criteria laid down in the case-law of the European Court of Human Rights, in particular the complexity of the case, the applicant's

conduct and that of the competent authorities. If the Court had found that R.P.'s right to a trial within a reasonable time was violated, the Court could – in the light of all circumstances and on the basis of Article 6.1 ECHR – have terminated the criminal proceedings for reasons of expediency, decided to acquit or taken the excessive length of trial into account when imposing sentence.

As regards R.P.'s request to declare the failure to issue legislation unconstitutional, the Supreme Court observed that if he felt that this failure had violated his subjective rights, he could have filed an appropriate application with the Tartu County Court during the hearing of his criminal case.

Compensation for damage caused by the alleged violation of fundamental rights could have been demanded in an administrative court under the procedure set out in the State Liability Act.

Because criminal proceedings involving R.P. was still pending before the Tartu County Court, the Constitutional Review Chamber of the Supreme Court concluded that his requests were not admissible. The Supreme Court lacked grounds to hear these requests on the merits. They were accordingly dismissed.

Cross-references:

Case-law of the Supreme Court:

- 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];
- Decision 3-4-1-6-05 of 23.03.2005 of the Constitutional Review Chamber;
- Decision 3-4-1-8-07 of 04.04.2007 of the Constitutional Review Chamber;
- Decision 3-1-1-13-03 of 06.01.2004 of the General Assembly;
- Decision 3-3-2-1-04 of 06.01.2004 of the General Assembly.

Case-law of the European Court of Human Rights:

- *Pélissier and Sassi v. France* [GC], Judgment no. 25444/94 of 25.03.1999, § 67.

Languages:

Estonian, English.



Germany

Federal Constitutional Court

Important decisions

Identification: GER-2008-3-015

a) Germany / **b)** Federal Constitutional Court / **c)** First Chamber of the First Panel / **d)** 18.08.2000 / **e)** 1 BvQ 23/00 / **f)** / **g)** / **h)** *Neue Juristische Wochenschrift* 2000, 3053-3056; *Deutsches Verwaltungsblatt* 2000, 1605-1608; *Bayerische Verwaltungsblätter* 2001, 79-81; *Verwaltungsrundschau* 2002, 66-67; CODICES (German).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
 3.17 General Principles – **Weighing of interests**.
 4.11.2 Institutions – Armed forces, police forces and secret services – **Police forces**.
 5.3.28 Fundamental Rights – Civil and political rights – **Freedom of assembly**.

Keywords of the alphabetical index:

Demonstration, ban / Demonstration, danger, prediction / Counter-demonstration, danger of violence / Extremist, right-wing, right to demonstrate / Demonstration, ulterior reasons, covered / Demonstration, change of purpose / Police, inability to secure public safety / Public safety, danger / Public order, danger / Police, capacity to ensure safety.

Headnotes:

The application for a temporary injunction against a directly enforceable ban on an assembly is neither inadmissible nor patently unfounded.

In the present case, the result of weighing the consequences of either allowing or disallowing an assembly (which is required in temporary injunction proceedings) was that the reasons in favour of a temporary injunction prevailed. For the disadvantages which could arise if the ban on the assembly is of immediate effect prevail over these disadvantages which could arise if the assembly takes place, and if the ban on the assembly has been imposed correctly.

Summary:

I. In an application to the responsible authority dated 3 August 2000, a group of right-wing extremists gave notice of their intention to organise an outdoor assembly in Hamburg from 2 p.m. to approximately 6 p.m. on 19 August 2000. The assembly was to take place under the motto “*Gegen Lügen und Hetze der BILD-Zeitung – Enteignet Springer!*” (“Against the lies and smear campaign of the [daily tabloid] BILD-Zeitung – Expropriate [its publishing house] Springer!”). The assembly was to include a march of a length of about 2.6 km through the city centre taking place between an opening and closing rally. When giving notice of the assembly, the applicant estimated the number of participants to be at between 100 and 200.

On 12 August 2000, the organising group additionally gave notice of an identical assembly which was to take place on 20 August 2000, in the event that the originally planned demonstration was banned and the time-period for obtaining legal protection from such ban had expired.

In its order dated 16 August 2000, the Free and Hanseatic City of Hamburg banned both marches and any kind of substitute events on the city territory on 19 and 20 August, and ordered the immediate enforcement of the bans.

The order banning the two events was based on § 15.1 of the German Assembly Act (*Versammlungsgesetz*) and was, on the one hand, based on a danger to public safety and public order. In particular, the administrative authority feared that the march, contrary to the information provided in the notification, was to be organised as a commemoration of the 13th anniversary of the death of Rudolf Hess on 17 August 2000, and that criminal offences would possibly be committed in its wake.

On the other hand, the administrative authority alleged that the planned march had to be banned because it would create a situation in which the police was unable to secure public safety (*polizeilicher Notstand*). According to information available to the police at that point in time, it was expected that up to 1,500 counter-demonstrators would be present and among them up to 200 persons with a propensity to violence and an unpredictable number of members of foreign left-wing extremist groups. Due to the emotionally charged public discussion about right-wing extremism it could be expected, according to the administrative authority, that violent criminal offences committed by left-wing extremists would be tolerated by protesters from the political centre. The administrative authority also identified, based on the assessment of the police, particular risks along the

route that the demonstration was to take. According to the police, it was not possible to achieve sufficient protection of the demonstrators and of innocent bystanders, *inter alia*, due to the fact that a large part of the police force would be assigned to other big events taking place at the same time.

The administrative authority claimed that, even if the route of the march were shortened or its location were shifted, the situation would still be extremely dangerous and likely to generate conflict.

As all appeals against the order imposing the ban were unsuccessful, the person who had given notice of the demonstration filed an application for a temporary injunction pursuant to § 32 of the Federal Constitutional Court Act, putting forward that the ban constituted a violation of his rights under Article 8 of the Basic Law (freedom of assembly).

II. Pursuant to the temporary injunction proceedings, the First Chamber of the First Panel of the Federal Constitutional Court permitted the announced demonstration, with certain conditions, to take place in Hamburg on 20 August.

The grounds for the decision included:

A constitutional complaint lodged by the person who had given notice of the planned demonstration is neither inadmissible nor patently unfounded. In the present case, after weighing the possible consequences of allowing or disallowing the march, the conclusion was reached in favour of the applicant.

In general, the Federal Constitutional Court itself is not in a position to clarify and assess the facts in temporary injunction proceedings. In cases such as this it would be impossible, for reasons of time alone, to consult files from authorities and from the courts presiding over the case and to obtain *amicus curiae* opinions. In such cases, the Federal Constitutional Court must normally base its consideration of interests on the finding and assessment of facts in the challenged decisions.

This rule is not observed only if the finding of facts was obviously erroneous or if the assessment of the facts is clearly not convincing in the light of the respective fundamental right involved. This is the case in particular if the prediction of dangers which a demonstration could cause is based on circumstances whose consideration obviously contradicts the extent of the protection provided by Article 8 of the Basic Law.

In this case, the authority responsible for granting or denying permission to hold the demonstration feared a change of purpose of the assembly, i.e. that a commemoration of Rudolf Hess would take place instead of the assembly as it had originally been announced, and that in this context, crimes would be committed which, as experience had shown, are likely to occur in connection with such events.

The aspects which justify the order imposing the ban (change of purpose of the event, danger to the public order, *polizeilicher Notstand*) do not fully justify the immediate enforcement of the ban.

In particular, the weighing of consequences cannot be based on the assumption that the assembly described in the notice merely serves as a cover for the applicant's ulterior plan to commemorate Rudolf Hess. Certainly the authority responsible for granting or denying the permission for the demonstration has quoted plausible evidence to indicate the possibility of such a change of purpose. However, it does not consider the indications to the contrary which also exist.

A ban on an assembly on the grounds that the assembly's real purpose is to commemorate Rudolf Hess can ultimately be imposed only if the authority has concrete indications of the intention to cover such ulterior motives. If there are possible indications to the contrary, the authority must take them into consideration and must justify why they are not of decisive importance.

The examination of the prerequisites for a ban on an assembly must be based on the information given in the notification, unless there is (even when interpretation takes place in conformity with the fundamental rights) a strong suspicion that in reality another intention is planned and that the organiser will, in spite of the threat of punishment, hold an assembly with a different intention, and therefore with a different potential for danger, than the one for which he gave notice.

The responsible authority and the courts which originally presided over the case did not comply with these requirements. The Administrative Court (*Verwaltungsgericht*) stated that it was unable to believe the applicant's verbal detachment from a Rudolf Hess event as his personal development and the activities of the right-wing extremist scene constituted indications to the contrary.

In reaching this conclusion, the Administrative Court misjudged the relation between the guarantee provided by the fundamental right in question and the possibility of restricting this right. If it is suspected that

the real intention of an event, which would justify a ban if it were known, is covered, i.e. that the notification is deceptive, the burden of proof lies with the authority. Even in temporary injunction proceedings, the finding that there is a lack of credibility requires concrete indications, e.g. the information that the applicant has lied before. This is not the case here.

The dangers to the public order which the responsible authority expects in connection with a commemoration of Rudolf Hess must therefore not be considered.

In the temporary injunction proceedings, the First Chamber of the First Panel of the Federal Constitutional Court cannot verify the information about the number of counter-demonstrators and their propensity to violence provided by the responsible authority. Neither can it verify the information concerning the required counter-measures by the police and about the means available for these measures. The assessment concerning the dangers to life and limb of police officials, passers-by, travellers and demonstrators, and about the damage to property justify the conclusion that there is a direct danger to the public safety. The information provided by the police on the staff and material available to them can be taken as the basis for weighing the consequences. This, however, does not apply to potential dangers which can be ruled out when taking the principle of proportionality into consideration. In this respect, the potential danger on 19 August, a Saturday, differs considerably from the potential danger on 20 August, a Sunday. If the event is organised as a stationary assembly on 20 August and if further obligations are imposed on the organisers, the dangers can be minimised in such a way that the ban on the assembly on the grounds of a *polizeilicher Notstand* is also ruled out.

It is true that Article 8 of the Basic Law permits restrictions on the right to assemble in the event of a *polizeilicher Notstand*. In the case of a *polizeilicher Notstand*, a holder of the fundamental right of freedom of assembly has to forgo this right in the interest of the protection of others. If the *polizeilicher Notstand* is justified by the potential for violent counter-action, the assembly can be postponed if necessary. If it is to be expected, however, that the organisation of the assembly at different points in time will lead to the same counter-action and thus repeatedly lead to situations giving rise to *polizeilicher Notstand*, there is the danger that the holder of the fundamental right who is affected by the repeatedly imposed ban will be permanently prevented from realising his or her right.

In the case of imminent violence as a reaction to assemblies, it is the task of the police to work in an impartial way towards the realisation of the right of assembly. The police must therefore also verify if a *polizeilicher Notstand* can be avoided by modifying aspects of the assembly without frustrating the specific intention of the assembly.

The Federal Constitutional Court must also take these possibilities into consideration when weighing the consequences during temporary injunction proceedings. It may not take consequences into consideration whose occurrence can be avoided if a corresponding framework of conditions has been established by the responsible authority.

In cases in which the immediate enforcement of a ban on an assembly violates Article 8 of the Basic Law, the courts originally presiding over the case may not restrict themselves to the alternatives:

1. an order voiding the injunctive impact of the ban; or
2. an order confirming the ban.

Instead, they must either enjoin the responsible authority to impose necessary obligations on the organisers to rule out dangers, and if necessary, they must make the order voiding the injunctive impact of the ban itself subject to obligations. In the present case, the courts which presided over the case have not performed this duty. As a general rule, it is not the task of the Federal Constitutional Court to impose obligations itself. If it regards it as necessary for the responsible authorities or courts to impose obligations, it informs these institutions of this in the grounds of its decision. In view of the obvious defectiveness of the previous decisions in the present case, the Federal Constitutional Court exceptionally combined the order voiding the injunctive impact of the ban with provisions concerning the course and subject-matter of the assembly.

Languages:

German.



Identification: GER-2008-3-016

a) Germany / b) Federal Constitutional Court / c) Third Chamber of the Second Panel / d) 15.03.2001 / e) 2 BvR 1841/00, 2 BvR 1876/00, 2 BvR 2132/00, 2 BvR 2307/00 / f) Genetic fingerprint II / g) / h) *Europäische Grundrechte-Zeitschrift* 2001, 249-254; *Der Strafverteidiger* 2001, 378-382; *Neue Juristische Wochenschrift* 2001, 2320-2323; CODICES (German).

Keywords of the systematic thesaurus:

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:

Fingerprint, genetic / DNA analysis / Criminal proceedings, prediction of future dangerousness / Informational self-determination, right / DNA, identification pattern, storage / DNA, person, identity, establishment.

Headnotes:

The ascertaining, storage and (future) use of the identification pattern of a person's DNA encroaches upon his or her right to informational self-determination guaranteed by Article 2.1 in conjunction with Article 1.1 of the Basic Law if these measures are taken without examining, in each individual case, the severity of the criminal offence the resolution of which the measures are intended to serve.

Summary:

I. The decision of the Federal Constitutional Court is based on four constitutional complaints against judicial orders. These judicial orders compelled the taking of samples of body cells and their examination by methods of molecular genetics for use in establishing a person's identity in future criminal proceedings pursuant to § 2 of the Act governing the establishment of a person's identity by means of his or her DNA (*DNA-Identitätsfeststellungsgesetz* – hereinafter “the Act”) in conjunction with § 81g.1 of the Criminal Procedure Code (*Strafprozessordnung*).

All the complainants affected by these judicial orders had been repeatedly convicted of theft, bodily injury or offences in violation of the Narcotics Act (*Betäubungsmittelgesetz*) and had been sentenced to fines and imprisonment of between 6 months and 2 years. All of these sentences had been suspended in favour of probation. In all cases, the competent

local courts had, on the basis of § 2 of the Act in conjunction with § 81g.1 of the Criminal Procedure Code, ordered the complainants' “genetic fingerprint” to be stored. The complainants' appeals against these orders were unsuccessful.

By way of their constitutional complaints, the complainants challenge the violation of their fundamental rights under Article 2.1 of the Basic Law in conjunction with Article 1.1, Article 2.2.1, Article 19.4 and Article 2.1 of the Basic Law. In particular, they claimed that the reasons given by the courts presiding over the cases violated the principle of proportionality because they did not rely on the specifics of each case.

II. The Third Chamber of the Second Panel, in all cases, reversed and remanded the challenged judicial decisions because they violate the complainants' right to informational self-determination (Article 2.1 of the Basic Law).

The justifications offered by the courts presiding over the cases do not demonstrate that the required examination of the individual circumstances of each case has taken place. In this context, the Chamber points out that the storage of a person's “genetic fingerprint” may only be ordered if strict prerequisites are met. Thus, the fact that a person who is affected by the storage of his or her “genetic fingerprint” has committed a criminal offence listed under § 81g of the Criminal Procedure Code does not always excuse the competent court from examining whether the criminal offence in question was a serious one. If e.g. lenient sentences or the fact that the sentence was suspended in favour of probation indicate that the case in question constitutes an exception to the rule, the decision to order the offender's genetic fingerprint must deal with these specific circumstances in detail. Nor is it sufficient to merely mention previous convictions in order to predict the person's future dangerousness. Such a prediction (which must be geared to the individual case) must assess the personality of the person affected, taking his or her living conditions into account. When assessing a person's future dangerousness, the period of time that has lapsed since the last criminal offence carries as much weight as any special circumstances that have led to the present offence. If the sentence was suspended in favour of probation, this fact must also be considered in the court's assessment. In principle, a positive prediction of socialisation, which led to the suspension of a sentence in favour of probation, does not automatically preclude a negative prediction of future dangerousness under § 2 of the Act in conjunction with § 81g.1 of the Criminal Procedure Code. If the courts originally presiding over the cases had wanted to deviate from the current prediction of future dangerousness, they would have also had to justify this in detail.

Languages:

German.

*Identification:* GER-2008-3-017

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 20.03.2001 / **e)** 1 BvR 491/96 / **f)** Age limit for licensed physicians / **g)** *Entscheidungen des Bundesverfassungsgerichts* (Official Digest), 103, 172-195 / **h)** *Sozialrecht* 3-5520 § 25 no. 4; *Neue Juristische Wochenschrift* 2001, 1779-1783; *Gesundheit und Gesellschaft* 2001, no. 6, 42; *Deutsches Verwaltungsblatt* 2001, 979-983; *Arztrecht* 2001, 263-267; *Urteilssammlung für die gesetzliche Krankenversicherung* 2001-117; CODICES (German).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
 3.19 General Principles – **Margin of appreciation**.
 5.2.2.7 Fundamental Rights – Equality – Criteria of distinction – **Age**.
 5.4.4 Fundamental Rights – Economic, social and cultural rights – **Freedom to choose one's profession**.

Keywords of the alphabetical index:

Physician, age limit / Occupation, admission, restrictions / Health-insurance scheme, statutory, financial stability.

Headnotes:

It is consistent with the fundamental right of occupational freedom (Article 12.1 of the Basic Law) and with the general principle of equality before the law (Article 3.1 of the Basic Law) that licensed physicians aged 55 or over are, in principle, not newly admitted to the lists of physicians eligible to provide services under the statutory health-insurance scheme.

Summary:

I. In the framework of the 1998 Healthcare Reform Act (*Gesundheitsreformgesetz*) a substantial number of measures were taken to stabilise the statutory health-insurance scheme *inter alia*, the income limit for the assessment of premiums was raised, additional payments were required from the persons insured in the statutory health-insurance scheme, fixed maximum amounts for pharmaceuticals were set, and specific services were completely eliminated from the catalogue of benefits available through the statutory health-insurance scheme. Moreover, Parliament made a physician's admission to the lists of physicians eligible to provide services under the statutory health-insurance scheme contingent on training as a medical specialist. Parliament also established the age of 68 as the absolute age limit for physicians eligible to provide services under the statutory health-insurance scheme. Measures such as the budgeting of the physicians' remuneration, the lowering of their remuneration for specific services, etc. were aimed at preserving the quality of the statutory health-insurance system while at the same time keeping the premiums paid by the insured persons and the employers justifiable. Finally, § 98 of the Fifth Book of the Code of Social Law (*Sozialgesetzbuch Fünftes Buch*) and the rules of admission to the lists of eligible physicians were amended to preclude the first-time admission of a doctor aged 55 or over. This regulation was meant to contribute to cost-cutting in the health sector.

The complainant, a specialist in internal medicine born in 1934, had worked at a University hospital as an assistant medical director and as a supernumerary professor since 1969. Shortly before his 60th birthday he unsuccessfully applied for admission to the lists of physicians eligible to provide services under the statutory health-insurance scheme. The admission board and the courts justified their rejection of the complainant's application by invoking the legislation that has been in force since 1998, and held that the complainant's circumstances did not qualify as a hardship case justifying an exceptional admission.

By means of his constitutional complaint, the complainant challenged the denial of his application, alleging that it constitutes a violation of his fundamental rights under Articles 3.1 and 12.1 of the Basic Law.

II. In its decision of 20 March 2001, the First Panel, rejected the constitutional complaint as being unfounded for the following reasons:

The safeguarding of the financial stability of the statutory health-insurance scheme is a public interest

of overriding importance. It therefore justifies regulations concerning the practice, but also the choice of an occupation or profession. To achieve the objective of safeguarding the statutory health-insurance scheme, Parliament has broad discretion to issue specific regulations. Parliament did not overstep its discretion by establishing the challenged age limit. If Parliament pursues a complex aim such as the financial stability of the statutory health-insurance scheme by various means, the fact that the persons affected by a specific measure see greater potential for cost-cutting elsewhere does not make the challenged measure unsuitable. Neither is a single measure disproportionate merely because it does not place an equal burden on all persons affected by its terms. When issuing regulations in this field, Parliament must reconcile different, sometimes opposing, legal positions and public interests. The size of personal premiums paid to the statutory health-insurance scheme cannot be increased at will. The majority of persons insured in the statutory health-insurance scheme belong to the lower or medium income range. The system does not regulate itself under the influence of market forces; the price of a physician's services is not negotiated between physician and patient, but is determined by regulations based on the concept of the social welfare state. These regulations make it possible to participate in the comprehensive system of social services provided by the statutory health-insurance scheme. The system is financed by the premiums paid by those covered by the scheme. The providers of services within the system also profit from it; the state is responsible for the functioning of the system. At the same time, there must be assurances that those covered by the scheme are provided with adequate services; a capable medical profession is the precondition for this.

The effort to achieve a just distribution of burdens also belongs to the aims of a balanced structure of the statutory health-insurance scheme, which have been legitimately defined by Parliament.

In principle, the measures that have been taken are a suitable contribution to the financial stability of the statutory health-insurance scheme, although none of the individual measures has had a sustainable effect. The establishment of the individual measures is a political decision which is not prescribed by the Constitution. In particular, the question whether the overall aim could have been achieved in a different, and better, way is not a question of constitutional law.

The age limit challenged by the complainant is a suitable measure in this context. Parliament could expect major savings from it, because of the threat, which is based on plausible assumptions, that

physicians who are eligible to provide services under the statutory health-insurance scheme for only a short period of time (i.e. between age 55 and 68) will strive for increased returns. Particularly in the first years, after opening his or her practice, the percent-age of a physician's returns that can be retained as income is relatively low, as the physician normally has to repay loans. It takes, on average, 12 years for a physician to repay all the loans he or she has taken out in order to buy an existing practice or to open a new one. If physicians have only a few years in which they can make profits from their professional activities, they must strive for higher returns, a phenomenon that can result in an increase in the number of services provided. This potentiality is undesirable from the perspective of the statutory health-insurance scheme. Parliament was therefore right to think it expedient to preclude, by means of restriction of admission to the eligibility lists, exactly such physicians who, in view of the economic pressure by which they themselves are affected, seem less inclined to conduct their activities in the overall system in a cost-conscious manner.

Nor can the complainant claim that there are less burdensome means for stabilising the statutory health-insurance scheme. The fact that an alternative measure does not affect the complainant but is aimed at a different group does not make the measure less burdensome. A further decrease of a physician's remuneration, would, e.g., not constitute a less burdensome measure as it, essentially, affects physicians who have already been admitted to the eligibility lists.

Neither does the 55-year age limit for a first-time admission to the eligibility lists affect the complainant in a disproportionate manner. This is an age in which employed persons may already qualify for pre-retirement part-time work or for early retirement. The persons affected by the age limit have, as a general rule, already fully established themselves in their profession, which they can continue to practise. It must also be taken into account that the decision whether to establish themselves as physicians who are eligible to provide services under the statutory health-insurance scheme before reaching the age of 55, to a great extent, rests with the physicians themselves. Finally, it is possible to allege hardship circumstances, to which the regulation may extend some flexibility in extraordinary cases.

Languages:

German, English (translation by the Court).



Identification: GER-2008-3-018

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 09.12.2008 / **e)** 2 BvL 01/07, 2 BvL 2/07, 2 BvL 1/08, 2 BvL 2/08 / **f)** Commuter tax allowance / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

4.10.7 Institutions – Public finances – **Taxation.**

5.2.1.1 Fundamental Rights – Equality – Scope of application – **Public burdens.**

5.3.42 Fundamental Rights – Civil and political rights – **Rights in respect of taxation.**

Keywords of the alphabetical index:

Commuter, fiscal treatment / Income tax, commuter tax allowance / Income tax, decision on burden, consistent implementation.

Headnotes:

Decision regarding the requirements placed on a consistent delimitation of occupational expenses in income tax law. [Official Headnotes]

The amended statutory regulation of the mileage allowance for journeys between the home and the workplace, which has been applicable as from 1 January 2007, is unconstitutional because it is not compatible with the requirements placed by the general principle of equality on a consistent implementation of decisions that concern burdens under income tax law. There is no sufficient factual substantiation for:

1. the regulation's departing from the principle that the reason for the accrual of expenses is the decisive factor for assigning them to the work-related or the private sphere, and for
2. the introduction of what is known as the "factory gate principle". Until a new statutory regulation is adopted, the flat rate under § 9.2.2 of the Income Tax Act is to be applied – provisionally – without restricting its application to the 21st kilometre and above of distances travelled.

Summary:

I. Until 2006, the costs for travelling between the home and the workplace could be deducted from income liable to income tax as income-related expenses pursuant to § 9 of the Income Tax Act (hereinafter: the Act) or as business expenses pursuant to § 4 of the Act. As a general rule, the deduction took the shape of a flat rate per working day and kilometre travelled to the amount of EUR 0.30 immediately before its abolition (mileage allowance, commuter tax allowance); the allowance was independent of the cost actually incurred. With effect from 2007, the legislature provided in § 9.2.1 and § 9.2.2 of the Act (and correspondingly in § 4.5a of the Act) that the expenses incurred for travelling to one's regular workplace were not income-related expenses (sentence 1), but that "to cover increased expenditure", a flat rate of EUR 0.30 was to be allowed "like income-related expenses" for journeys from the 21st kilometre travelled (sentence 2). In the legislative procedure, the fact that the amendment of sentence 1 was tantamount to the introduction of what is known as the "factory gate principle" was justified by putting forward the objective of a necessary consolidation of the excessively indebted state budget (through expected increases in revenue of approximately EUR 2.53 billion); the remaining deductibility of longer distances travelled was justified by referring to it as a complementary hardship arrangement.

In proceedings involving the concrete review of a statute, the Finance Courts (*Finanzgerichte*) of Lower Saxony and of the Saarland as well as the Federal Finance Court (*Bundesfinanzhof*) submitted this regulation to the Federal Constitutional Court for a review of its constitutionality.

As regards the submissions made, the Second Panel of the Federal Constitutional Court ruled that for lack of viable reasoning under constitutional law, the amended statutory regulations are incompatible with the requirements placed by the general principle of equality under Article 3.1 of the Basic Law on a consistent structure of decisions which concern income tax burdens, and that they are hence unconstitutional. Accordingly, the legislature is obliged to retroactively eliminate the unconstitutionality from 1 January 2007 by reorganising the legal situation. Until a new statutory regulation is adopted, the flat rate under § 9.2.2 of the Act is to be applied – provisionally – without restricting its application to the 21st kilometre and above of distances travelled.

II. The decision is essentially based on the following considerations:

1. When determining income tax, the legislature is required by the Basic Law's general principle of equality to lend its decisions concerning income tax burdens a sufficiently consistent structure which is orientated towards the taxable person's ability to pay. According to the valid income tax law, the taxable person's ability to pay is determined, in principle, according to his or her annual net income, i.e. according to the amount of income less expenses accruing as work-related expenses or business expenses (this is known as the objective net principle), and less further expenses accruing for private reasons, in particular less the expenses for the taxable person's minimum income, and that of his or her family members entitled to maintenance (this is known as the subjective net principle). What is decisive for the tax-reducing deductibility of expenses is therefore, in principle, the respective context in which they accrue.

The introduction of the "factory gate principle", which stipulates that what is decisive for the deductibility or non-deductibility of expenses are not the work-related or private reasons for which they accrue, but exclusively the spatial distance of a journey to the workplace that incurs costs, constitutes a singular exception within the valid income tax law. It is to be examined against the standard of whether the structure of a measure of taxation is consistent, and whether it is orientated towards the principle of the ability to pay. The requirement of a consistent structure of decisions which concern income tax burdens demands that exceptions from the principles which govern the valid non-constitutional law be sufficiently substantiated. According to the Federal Constitutional Court's established case-law, non-fiscal objectives of promotion and control and requirements in connection with the need for defining typical facts and with the purpose of simplification are recognised as sufficient reasons; what is not recognised as a sufficient reason is, however, the purely fiscal objective of increasing state revenue. This line of argument is upheld by the Second Panel in the case at hand.

Accordingly, the new statutory regulation lacks a sufficient factual basis for departing from the principle that the reason for the accrual of expenses is the decisive factor when the basis of assessment is delimited under income tax law (2.). The legislature is also not released from the requirements placed on consistency under income tax law in view of the possibilities of introducing a "change of system" that is in conformity with the Constitution or in view of the possibilities of a new "assignment decision" (3.).

2. In spite of its urgency also under constitutional law, the objective of budget consolidation (which was almost the only argument advanced in the legislative procedure) cannot by itself justify the new statutory regulation because the delimitation of the tax assessment basis is about the equitable distribution of tax burdens. The increase of state revenue cannot, however, provide a standard for this, because any increase of the tax burden, even an arbitrary one, will serve this objective.

Pursuant to the Federal Constitutional Court's case-law, the objectives of promotion and control can be used as a reason for justifying a tax burden only if they are motivated by legislative decisions to this effect. Renowned economists and specialists in public-sector economics are demanding the abolition of the "commuter tax allowance" in the interest of providing the taxable person with tax incentives to encourage behaviour which is efficient for the economy as a whole. According to the reference materials submitted in the legislative procedure, the legislature has, however, never adopted this objective so that such a justification is ruled out.

Also the need for defining typical facts and the purpose of simplification do not provide a viable justification. Admittedly, it is constitutionally unobjectionable that the legislature proceeded on the assumption that the travel expenses in question accrue for "mixed" reasons, i.e. for reasons that are private as well as work-related, and that there is considerable latitude for defining typical facts and for simplification in the interest of the adequate assessment and classification of such expenses under income tax law. The new statutory regulation, however, is not an assessment and classification (for which typical facts are defined) of the different weight of the private and the work-related components which give rise to the expenses. It is instead a delimitation of constituent elements which is orientated exclusively, and in a purely quantitative manner, towards the desired result, i.e. towards an increased tax revenue. As the amount of the general wage or salary earner's standard allowance has not been harmonised correspondingly, the additional burden caused by travel expenses for distances of up to 20 kilometres cannot be "defined away" by making reference to this general standard allowance.

3. Finally, a fundamental system change, which would "release" the legislature, or a decision concerning a new assignment, is also lacking. It is true that constitutionally, the latitude which is attributed to the legislature when drafting tax law includes the authorisation to introduce new rules without being bound by principles of consistency to previous fundamental decisions. A permissible

system change, however, cannot be implemented without a minimum orientation towards a new system.

If this were otherwise, every statutory exemption could be declared (the beginning of) a new concept. The new provisions concerning the spatial delimitation of deductible travel expenses are not showing any signs of moving towards a new fundamental concept, which could, for instance, be achieved step by step. The general exclusion of travel expenses from the element of income-related expenses while providing that the costs for distances from 21 kilometres onwards be treated "like" income-related expenses, and assessing a mileage allowance for it which is unrelated to expenditure actually incurred, is characterised by a contradictory connection of different regulatory contents and objectives and is not based on a comprehensive concept. In particular, upholding the previous legal situation for distances of 21 kilometres and above cannot be justified as a hardship arrangement as it lacks plausible hardship criteria, and, as was the case for the previous unrestricted mileage allowance, the flat rate, which is independent of expenditure actually incurred, has the effect of a subsidy of transport policy and environmental policy objectives in cases in which low expenditure, or none at all, is incurred because cost-free or low-cost transport possibilities are available. Using the flat rate as a hardship arrangement is, however, contrary to these objectives because it rewards, in particular, the choice and the upholding of using longer travelling distances, and thus a decision in favour of behaviour which is less desirable under transport policy and environmental policy aspects, whereas the decision in favour of living near one's "factory gate" results in disadvantages which are contrary to these objectives.

Languages:

German.



Hungary Constitutional Court

Statistical data

1 September 2008 – 31 December 2008

Number of decisions:

- Decisions by the Plenary Court published in the Official Gazette: 40
- Decisions in Chambers published in the Official Gazette: 11
- Other decisions by the Plenary Court: 49
- Other decisions in Chambers: 27
- Number of other procedural orders: 44

Total number of decisions: 171

Important decisions

Identification: HUN-2008-3-008

a) Hungary / b) Constitutional Court / c) / d) 06.11.2008 / e) 132/2008 / f) / g) *Magyar Közlöny* (Official Gazette), 2008/157 / h).

Keywords of the systematic thesaurus:

2.2.2 Sources – Hierarchy – **Hierarchy as between national sources.**

2.2.2.1.1 Sources – Hierarchy – Hierarchy as between national sources – Hierarchy emerging from the Constitution – **Hierarchy attributed to rights and freedoms.**

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

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

5.3.3 Fundamental Rights – Civil and political rights – **Prohibition of torture and inhuman and degrading treatment.**

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

Keywords of the alphabetical index:

Police, powers / Detainee, rights / Search, body / Privacy, personal, right / Fundamental right, regulation exclusively by law.

Headnotes:

Under the Constitution, fundamental rights are to be regulated exclusively by Act of Parliament. A ministerial decree cannot contain rules pertaining to fundamental rights and duties. The Court accordingly struck out the section of the decree that pertained to body searches on formal grounds.

Summary:

I. A petitioner sought to challenge the constitutionality of a non-statutory provision regulating searches. Decree no. 19/1995 (XII.13.) of the Ministry of the Interior deals with the regulation of police jails. Under Section 16.1, upon arrival, the clothing of a detainee and, if necessary, his or her person, may be searched by somebody of the same sex. In justified cases body searches may include body cavity searches. A physician is to perform the body cavity search. During searches of clothing, no other detained person may be present. During body searches, other detainees and persons of the opposite sex are not allowed to be present. Under the Decree, the notion 'detained' includes those placed under short-term arrest, held in custody, or placed in pre-trial detention.

The basis of the petition was that the ministerial decree on body searches contravened Article 8.2 of the Constitution, as it constituted non-statutory regulation of issues involving fundamental rights and duties which could only be regulated by statute.

The petitioner also argued that the challenged Section of the Decree ran counter to Article 54.1 of the Constitution, in that it made insufficient provision for the possible timing, place and manner of the body search.

II.1. In the Court's jurisprudence statutory regulation is required for any direct and significant restriction of fundamental rights and, in certain instances, the determination of the content of such rights and the manner of their protection. The need for statutory regulation depends on the particular measure and the intensity of its relationship to fundamental rights (Decision no. 64/1991 (XII.17.)), [HUN-1991-S-003]. In this particular case, the regulation of body searches (including body cavity searches) concerned the fundamental right of the detained to human dignity. A body cavity search is an invasive search procedure which can be a serious assault on a person's privacy and dignity.

Section 31 of Act XXXIV of 1994 on the Police ("the Police Act") allows a policeman to perform a search of clothing, but not a body search. Law-Decree no. 11

of 1979 on the enforcement of punishment and measures makes no provision for body searches. Consequently, a body search that includes all body orifices may only take place according to the ministerial decree.

Based on the Court's reasoning, the challenged provision of the Decree was held to be unconstitutional, given that by regulating body searches it also decided on the question of privacy and human dignity, pertaining to Article 54.1 of the Constitution. Under Article 8.2 of the Constitution, such a decision could only be made by statute. The Court declared Section 16.1 of the Decree null and void as of 30 June 2009 and called upon Parliament to enact legislation on body searches before then.

2. In the second part of its decision the Court assessed whether the content of the challenged provision of the Decree, viewed in tandem with the relevant provisions of the Police Act, is necessary and proportionate to the aim (security reason) to be achieved.

Treatment of detainees should be based upon the requirement of proportionality (Section 15 of the Police Act). If means of coercion are applied during police procedures, injuries should be avoided as far as possible (Section 17 of the Police Act). Moreover, the rights of a detainee should only be restricted to the extent that this is necessary to prevent him or her from absconding or hiding, altering or destroying evidence, or for reasons of safety and the maintenance of order in jail (Section 18.3 of the Police Act).

When applying Section 16.1 of the Decree, the Police should take into account the above provisions of the Police Act. These will assist them in decision-making as to the necessity for a body search is necessary or the justification for a body cavity search is justified.

When Section 16.1 is interpreted in this manner, the content of the challenged provision does not run counter to Article 54.1 of the Constitution, since it guarantees respect for individual privacy and dignity.

Cross-references:

- Decision no. 64/1991 (XII.17.), *Special Bulletin Leading Cases 2* [HUN-1991-S-003].

Languages:

Hungarian.



Identification: HUN-2008-3-009

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 17.12.2008 / **e)** 154/2008 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 2008/180 / **h)**.

Keywords of the systematic thesaurus:

1.3.2.1 Constitutional Justice – Jurisdiction – Type of review – **Preliminary / ex post facto review.**

2.1.1.4.2 Sources – Categories – Written rules – International instruments – **Universal Declaration of Human Rights of 1948.**

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950.**

2.1.1.4.8 Sources – Categories – Written rules – International instruments – **International Covenant on Civil and Political Rights of 1966.**

5.2.2.11 Fundamental Rights – Equality – Criteria of distinction – **Sexual orientation.**

5.3.34 Fundamental Rights – Civil and political rights – **Right to marriage.**

Keywords of the alphabetical index:

Protection of marriage, state duty / Same sex and different sex couples / Registered partnership law.

Headnotes:

The Registered Partnership Act, which accords recognition to unmarried and same-sex partnerships, is unconstitutional, as it downgrades marriage. However, a partnership scheme for homosexual couples only would be constitutional.

Summary:

I. In December 2007, the Hungarian Parliament adopted the Act on Registered Partnership, which would have enabled same-sex and different-sex couples to enter into registered partnerships. The Act was scheduled to enter into force in January 2009. However, in the spring of 2008 several petitioners sought its repeal before the Constitutional Court.

The petitioners argued that the Act contravened Article 15 of the Constitution which aims to protect marriage, because by legalising registered partnerships, it creates a “marriage-like institution” which would

diminish the importance of marriage. They contended that the process of establishment of registered partnership is the same as in cases of marriage; partners have to declare their intention to enter into partnership before a registrar, and the ceremony is exactly as solemn as a marriage ceremony. The petitioners pointed out that the same legal consequences apply to marriage and to registered partnerships. The Act stipulates that in those matters which it does not regulate, the rules of the Family Act concerning marriage are to be applied analogously (Section 2.2). Last, but not least the petitioners drew the attention to the fact that registered partnerships can be terminated in a similar manner to a marriage. There is, however, an extra method of termination not available to spouses, in the form of termination by public notary. In the petitioners’ view, swifter and more flexible provision for termination of registration may endanger the interest of the child.

The petitioners emphasised that the notion of marriage means a union exclusively of a man and a woman. This is what Article 15 of the Constitution protects. Therefore the Act, which introduces a marriage-like institution for same-sex couples, is unconstitutional.

II.1. In the first part of the reasoning the Court referred to its Decision no. 14/1995 (III.13.), where it pointed out that marriage “typically is aimed at giving birth to common children and bringing them up in the family in addition to being the framework for the mutual taking care and assistance of the partners”. This Decision also emphasised that “movements have been started to protest against discrimination with respect to homosexuals. In addition, changes can be observed in the traditional family model, especially in terms of the durability of marriages. All these are not reasons for the law to diverge from the legal concept of marriage which has been preserved in traditions to this day, which is also common in today’s laws and which, in addition, is in harmony with the notion of marriage according to public opinion and in everyday language. Today’s constitutions – among them the Hungarian concerning its provisions on marriage and the family – consider marriage between a man and a woman as a value and protect it (Articles 15, 67, 70/J).”

In the case under review, the Court reaffirmed that marriage must be restricted to different-sex couples. In the Court’s view, the wording of the most significant human rights documents it would also indicate that the family is perceived as the union of a man and woman: the right to get married is defined as the right of men and the right of women, while in relation to other rights the subject of rights are “persons” without any such differentiation (Article 16 of the Universal Declaration

of Human Rights, Article 23 of the International Covenant on Civil and Political Rights; and Article 12 ECHR). The Court pointed out that the European Court of Human Rights has so far refused to apply the protections of this Article to same sex marriage and argued that Article 12 ECHR was intended to apply only to different-sex marriage, and that a wide margin of appreciation must be granted to member states in this area.

2. Secondly, the Court assessed the content of the special, express constitutional protection of marriage under Article 15 of the Constitution. In the Court's view, the protection of marriage under this provision means that the State should not discriminate between spouses and those not living in marriage. Moreover, the State should promote marriage and the family. This constitutional protection does not exclude the statutory protection of other kinds of personal relationships, but the legislator should take into account that the content of a registered partnership could not be identical to marriage. According to the Act, however, registered couples are entitled to almost all of the rights and duties granted to spouses. The process of establishment is the same as that of marriage. The new Act modifies the Act on Maintaining the Register so that registered partnerships have to be registered as well as births, marriages and deaths. This procedure follows the model of marriage. The registrar has competence in both ceremonies according to the same principles. The same also applies to other formal criteria, namely that the establishment of registered partnership should happen in public and solemnly. On the whole, therefore, registered partnerships result in the same consequences of marriage, with only a few differences:

1. Only a man and a woman can enter into a marriage.
2. A minor over 16 can marry with the permission of the guardianship authority, but cannot enter into a registered partnership.
3. Registered partners are not permitted to adopt a child as adoptive partners together.
4. A registered partner cannot adopt the child of his or her registered partner and it is irrelevant whether the child is related by blood or was adopted.
5. Registered partners cannot use their partner's surname.
6. An extra method of termination (termination by public notary) is available for registered partners.

The Court found these differences to be insufficient in relation to different sex partners who can enter into a marriage. Although joint adoption is prohibited regardless of the gender of the registered partners, the

rules of paternal legal status and of the common child's surname are the same in a marriage and in a different sex registered partnership. Moreover, the presumption of paternity is statutorily established both in marriage and in registered partnerships between men and women. Secondly, although under the challenged Act registered partners by their status cannot use their partner's surname, it is always possible to change one's surname by an administrative procedure. The Court accordingly found that by offering all the same rights to different sex registered partners, the Act downgraded the importance of marriage, and thus violated Article 15 of the Constitution. The Court added however, that it would accept registered partnerships for gay couples, as they do not have the possibility of entering into marriage.

Under Article 42.2 of the Act on the Constitutional Court, an Act which has been promulgated but has not yet entered into force will not enter into force if it is held to be unconstitutional.

Justice András Bragyova attached a dissenting opinion concerning the notion of marriage and emphasised the equality of those wishing to enter into marriage with those who wish to choose other partnership forms. Justice Elemér Balogh and Justice László Kiss attached a concurring opinion to the judgment.

Cross-references:

- Decision no. 14/1995 (III.13.), *Bulletin* 1995/1 [HUN-1995-1-002].

Languages:

Hungarian.



Israel

Supreme Court

Important decisions

Identification: ISR-2008-3-003

a) Israel / b) High Court of Justice (Supreme Court) / c) Panel / d) 12.12.2006 / e) HCJ 2557/05 / f) Al Bassiouni et al. v. The Prime Minister of Israel et al. / g) / h) CODICES (English).

Keywords of the systematic thesaurus:

3.17 General Principles – **Weighing of interests.**
 4.11.2 Institutions – Armed forces, police forces and secret services – **Police forces.**
 5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression.**
 5.3.28 Fundamental Rights – Civil and political rights – **Freedom of assembly.**

Keywords of the alphabetical index:

Freedom of expression / Freedom of Assembly / Constitutionality, review / Police force, duty.

Headnotes:

The freedom of speech is the 'essence' of democracy – a basic right that is also a supreme principle in every democratic system of government. The right to demonstrate and hold processions is an inseparable component of the right to freedom of speech.

The duty of the state to protect the constitutional right of freedom of speech and demonstration has two aspects – a negative aspect and a positive one. The significance of the positive duty is reflected in the duty of the state, within the limits of reason and taking into account the means available to it and the order of priorities determined by it, to allocate the resources that are required in order to allow the realisation of the right of freedom of speech and demonstration.

Providing security at events that involve the realisation of basic freedoms is one of the most basic and obvious duties of the police. They are not entitled to impose this responsibility, in whole or in part, on the persons who wish to realise their right. It does not

follow from this position that the Israeli police are liable to provide security at every demonstration that is requested. The right to freedom of expression and demonstration, like all rights, is not an absolute right. It is possible to impose restrictions on its realisation.

Summary:

The petitioners wished to hold a march from Rabin Square to Dizengoff Square and to hold a demonstration there. The demonstration was intended to express support for the government's plan of disengagement from the Gaza Strip. The police commissioner made the granting of the licence for the demonstration conditional upon the presence of cordons, security personnel and organisers on behalf of the organisers of the demonstration and at their expense. He also made the granting of the licence conditional upon the presence of fire engines and ambulances. The fire extinguishing authority and Magen David Adom made the provision of services conditional upon payment by the organisers of the demonstration. The petitioners estimated the cost of these demands at more than one hundred thousand sheqels.

The petition before the court challenged the legality of the demands made by the police commissioner, the fire extinguishing authority and Magen David Adom. The petitioners claimed that the respondents are not entitled to impose on them demands that fall within the scope of the natural duties of the police and which entail considerable cost. The petitioners further argued that the demands of the police, the fire extinguishing services and Magen David Adom constitute a serious violation of the constitutional right of the petitioners and their supporters to demonstrate and their right to freedom of speech.

The petition was granted.

The High Court held that the freedom of speech is the 'essence' of democracy – a basic right that is also a supreme principle in every democratic system of government. The right to demonstrate and hold processions is an inseparable component of the right to freedom of speech. It constitutes one of the main ways of expression of opinions and raising social issues on the public agenda.

The duty of the state to protect the constitutional right of freedom of speech and demonstration has two aspects. First, the state has a duty not to violate a person's right of freedom of speech and demonstration, for instance by imposing a prohibition on his ability to realise his right. This is the negative aspect (the *status negativus*) of the right. It is enshrined in Section 2 of the Basic Law: Human

Dignity and Liberty ('one may not harm the life, body or dignity of a person'). Second, the state has a duty to protect the right of freedom of speech and demonstration. This is the positive aspect (the *status positivus*) of the right. It is enshrined in Section 4 of the Basic Law: Human Dignity and Liberty ('every person is entitled to protection of his life, body and dignity'). In the case before the court, the significance of the positive duty is reflected in the duty of the state, within the limits of reason and taking into account the means available to it and the order of priorities determined by it, to allocate the resources that are required in order to allow the realisation of the right of freedom of speech and demonstration.

The duty of the state according to the 'positive' aspect of the right of freedom of speech and demonstration means, *inter alia*, its duty to allow the realisation of the right to demonstrate by providing security and maintaining public order during the demonstration. The Israeli Police is the body that is responsible for this aspect. The task of maintaining public order during a demonstration and protecting the possibility of realising the constitutional right of freedom of expression, procession and demonstration is one of the main, patent and vital functions of the Israel Police. This conclusion is required both from the viewpoint of the functions of the police under the law and also in view of the importance of the protection of basic constitutional rights in a democracy.

Providing security at events that involve the realisation of basic freedoms is one of the most basic and obvious duties of the police. Indeed, just as it is inconceivable that the police should impose a financial burden on someone requesting its protection against a burglar, so too it is inconceivable that the police should impose a financial burden on someone wishing to realise his right to freedom of speech and demonstration. Property rights and the right to physical safety are important rights. Protecting them is a part of police functions. But the freedom of speech and the right to demonstrate are also basic rights. The police are also charged of protecting them. They are not entitled to pass the responsibility for security and maintaining public order at demonstrations, in whole or in part, to the persons who wish to realise their right to demonstrate. Thereby the police fail in their public duty. Thereby a financial burden is also imposed on the persons wishing to realise their right, and their right to freedom of speech and demonstration is violated. Indeed, fixing a 'price tag' for the realisation of a right means a violation of the right of those persons who cannot pay the price. Moreover, imposing a financial burden on persons who wish to realise their right to freedom of speech may harm in particular those persons who wish to express ideas that give rise to considerable

opposition. This is because it may be assumed that the expense of maintaining security in such circumstances will be higher than the norm. The protection of the freedom of speech is important precisely in circumstances of this kind. We are speaking therefore of a serious violation of the freedom of speech and the right of demonstration and procession, on the basis of financial ability or on the basis of the content of the speech and the degree of opposition that it arouses. The result of this violation, beyond the direct violation of the constitutional rights of the persons who wish to demonstrate, is that public debate is harmed. The marketplace of opinions and ideas is weakened. The democratic nature of the system of government is prejudiced.

It does not follow from this position that the Israeli Police is liable to provide security at every demonstration that is requested. The right to freedom of expression and demonstration, like all rights, is not an absolute right. It is possible to impose restrictions on its realisation.

When he makes a decision with regard to an application to hold a demonstration, the police commissioner is entitled to take into account, *inter alia*, the question of the forces and resources that are available to the police for the purpose of providing security at the event, the other operations that the police are liable to carry out at that time, and the police's order of priorities in carrying out its duties. Therefore, if the police commissioner is of the opinion that in view of the police's additional operations, or in view of the range of the forces that are required for providing security at a given event, it is unable to allocate the forces required to maintain public order, he may make the demonstration conditional upon restrictions of time, place and manner. In extreme circumstances, in the absence of a less harmful possibility, he may even refuse to give a licence for the demonstration. Nonetheless, the saving of resources is not a consideration that will in itself justify a refusal to provide security at a demonstration.

Cross-references:

- HCJ 153/83 *Levy v. Southern District Commissioner of Police* [1984] IsrSC 38(2) 393; IsrSJ 7 109;
- HCJ 4804/94 *Station Film Ltd v. Film and Play Review Board* [1996] IsrSC 50(5) 661; [1997] IsrLR 23;
- HCJ 2481/93 *Dayan v. Wilk* [1994] IsrSC 48(2) 456; [1992-4] IsrLR 324;
- HCJ 5009/97 *Multimedia Co. Ltd v. Israel Police* [1998] IsrSC 52(3) 679;
- HCJ 399/85 *Kahane v. Broadcasting Authority Management Board* [1987] IsrSC 41(3) 255;

- HCJ 6658/93 *Am Kelavi v. Jerusalem Police Commissioner* [1994] IsrSC 48(4) 793;
- HCJ 6897/95 *Kahane v. Brigadier-General Kroizer* [1995] IsrSC 49(4) 853;
- *Forsyth County, Georgia v. Nationalist Movement*, 505 U.S. 123 (1992);
- *Jones v. City of Opelika*, 319 U.S. 103 (1943).

Languages:

Hebrew, English (translation by the Court).



Identification: ISR-2008-3-004

a) Israel / b) High Court of Justice (Supreme Court) / c) Panel / d) 06.02.2007 / e) HCJ 258/07 / f) K Zahava Gal-on. v. The Government Commission of Investigation for Examining the Events of the 2006 war in Lebanon / g) / h).

Keywords of the systematic thesaurus:

3.17 General Principles – **Weighing of interests.**
 4.7 Institutions – **Judicial bodies.**
 5.3.24 Fundamental Rights – Civil and political rights – **Right to information.**

Keywords of the alphabetical index:

Fundamental right, essence / Proceedings, publication / Proceedings, public / Information, right.

Headnotes:

The Winograd Commission is a body that has been given quasi-judicial powers, and should therefore give considerable weight to the principle of holding proceedings in public when it decides whether to hold the sessions at which it hears evidence *in camera*. As a public authority it should also give considerable weight to the general norm of the duty of disclosing information in its possession, when there is no legal reason to prevent its disclosure.

The principle that proceedings should be held in public, like the basic rights that underlie it, is not absolute. There are cases where it needs to yield to conflicting rights and interests. The two values under discussion – state security on the one hand and public

proceedings and the public's right to know on the other – are basic values in our legal system. A proper balance, therefore, needs to be struck between the aforesaid two values when they clash 'head on.' The balancing formula should realise the value of state security, but at the same time minimise, as much as possible, the violation of the principle of holding proceedings in public and the freedom of information, which are important values in our legal system.

Whatever the balancing formula may be, there is no doubt that the outcome of the balance between public proceedings and state security cannot be decided in advance since it depends upon an assessment of the extent of the harm to security and of the probability that such harm will occur. Therefore, the result of the proper balancing point is determined by the circumstances and merits of each case. It should be emphasised that in view of the importance of the principle that proceedings should be held in public, a general and sweeping assessment of the danger to the security of the state based on the general nature of the issues under discussion will not suffice. In this context, a concrete and specific examination of the circumstances of the case should be made in order to decide whether there is a justification for departing from the rule that proceedings should be held in public.

Summary:

On 12 July 2006, following terrorist operations carried out by the Hezbollah organisation, in which eight IDF soldiers were killed and two others were kidnapped to Lebanon, fighting began in the north and this continued until 14 August 2006 when a ceasefire came into effect in accordance with decision no. 1701 of the Security Council of the United Nations (described here as 'the Second Lebanon War' or 'the war'). On 17 September 2006 the Government of Israel decided to authorise the Prime Minister and the Minister of Defence to appoint a government commission of investigation under Section 8A of the Government Law no. 5761-2001 (referred to here as 'the Government Law'), to examine the conduct of the political and defence establishments during the war. It was decided that the president emeritus of the Tel-Aviv-Jaffa District Court, Justice E. Winograd, would chair the Commission (described here as 'the Winograd Commission' or 'the Commission'). The Commission decided to hold all of its proceedings *in camera* and not to publish any transcripts of the proceedings, on the ground that they were privileged for the reason of state security. The Commission's position was that only after the final report is presented to the government will it decide whether to publish those parts of the transcript that may be disclosed without harming the security of the state or other protected interests. The petition before the court was directed at the Commission's position.

In the petition and also in her pleadings before the court, the petitioner discussed the centrality of the public's right to know and of the importance of this principle in the democratic process and in safeguarding basic rights. According to the petitioner, the proceedings before the Winograd Commission concerning the conduct of the political and defence establishments during the Second Lebanon War are of great public importance since the matter concerns human lives and public security. She argued that the public is entitled to as much information as possible as to the acts, omissions, achievements, and failures that accompanied fighting in which the public suffered injuries and losses, both on the battlefield and on the home front. The petitioner further argued that the public's right to know will yield only when there is an almost certain probability that disclosure of the information will cause severe, grave, and serious damage to the security of the state.

The petition was denied.

The Court held that the issue of the publicity of the proceedings before the Winograd Commission was expressly addressed in the letter of appointment that the Winograd Commission received from the Prime Minister and the Minister of Defence in accordance with the government's decision of 17 September 2006. According to paragraph G of the letter of appointment, the government left the question of the publicity of the Winograd Commission's proceedings to the discretion of the Commission, although it saw fit to emphasise that no public proceedings should take place when doing so might endanger the security of the state or another protected interest.

The Commission's character as an administrative body and its quasi-judicial powers are characteristics that affect the norms that apply to it. There is no doubt that the discretion given to the Commission on the subject of the publicity of its proceedings is not absolute. The Commission, as a public authority, is liable to exercise its discretion reasonably, after considering all of the relevant factors and giving proper weight to each of them in accordance with the basic principles of our legal system. Since the Commission is a body that has been given quasi-judicial powers, the Commission should give considerable weight to the principle of public proceedings when it decides whether to hold the sessions at which it hears evidence *in camera*. As a public authority it should also give considerable weight to the general norm of the duty of disclosing information in its possession, when there is no legal reason to prevent its disclosure.

The premise is that the publicity of the proceedings contributes to improving the quality of the decision that is made at the end of the process. In addition, the publicity of proceedings in judicial proceedings or a quasi-judicial proceeding contributes to strengthening public confidence in public authorities, in general, and in the body that is hearing the matter, in particular. The principle of public proceedings is also based on the public's right to know and the duty of disclosure that governs a public authority. The public's right to receive information concerning the manner in which public authorities operate allows public scrutiny of them – a scrutiny that is one of the cornerstones of democracy. The realisation of the public's right to know by disclosing to the public the manner in which the public authority operates allows the public to determine its agenda and helps individuals in society decide their positions by means of an open discussion of the problems and by a free exchange of opinions on the basis of the information that is published.

The criteria concerning the publicity of the proceedings of the Winograd Commission are essentially similar to those of a state commission of inquiry, in view of the special character and the scope of powers of the Commission under discussion. Indeed, the Winograd Commission is considering issues of paramount public importance and interest. All of these factors affect the weight of the principle that proceedings should be held in public and that the public has a right to know about the Commission's proceedings. Therefore, it is proper that the general principle concerning the publicity of proceedings, which is also enshrined in Section 18 of the Commissions of Inquiry Law, should govern the Winograd Commission. It would appear that the Commission has indeed taken the aforesaid principle into account. In so far as possible and in the absence of any impediment for reasons of the security of the state, the proceedings of the Winograd Commission should be held in public.

The principle that proceedings should be held in public, like the basic rights that underlie it, is not absolute. There are cases where it needs to yield to conflicting rights and interests. The two values under discussion – state security on the one hand and public proceedings and the public's right to know on the other – are basic values in our legal system. A proper balance, therefore, needs to be struck between the aforesaid two values when they clash 'head on.' The balancing formula should realise the value of state security, but at the same time minimise, as far as possible, the violation of the principle of holding proceedings in public and the freedom of information, which are important values in our legal system.

Whatever the balancing formula may be, there is no doubt that the outcome of the balance between holding public proceedings and state security cannot be decided in advance since it depends upon an assessment of the extent of the harm to security and of the probability that such harm will occur. Therefore, the result of the proper balancing point is determined by the circumstances and merits of each case. In view of the importance of the principle that proceedings should be held in public, a general and sweeping assessment of the danger to the security of the state based on the general nature of the issues under discussion will not suffice. In this context, a concrete and specific examination of the circumstances of the case should be made in order to decide whether there is justification for departing from the rule that proceedings should be held in public.

The petitioner sought two types of relief in the petition: first, to order the proceedings of the Winograd Commission and its hearing of the testimonies to be held in public; and second, to order the publication of the transcripts of the commission's proceedings at the end of each session.

With regard to the first relief, since the petition was filed after the vast majority of the testimonies were heard by the Commission, the question of hearing them in public is no longer relevant.

The second relief that is sought in the petition concerns the publication of the transcripts of the Commission's hearings. The Court held that, prima facie the state's position, according to which most of the testimonies may not be published, appears reasonable. The nature of the subjects being considered by the Winograd Commission, the identity of the persons appearing before it, and the sensitivity of the information being considered by it may lead in most cases to the existence of an almost certain danger of harm to the security of the state if the information that is revealed in the Commission's hearings is published. Nonetheless, this does not exempt the Commission from the need to examine the transcripts in detail in order to publish those parts that may be disclosed under the law. In this regard, a general assessment made at the outset is insufficient; a detailed examination is needed. An examination should be made for each testimony to see whether there is a justification for prohibiting publication of what was said in it.

The Commission was given discretion with regard to the question of the publication of the transcripts of hearings that took place before it and also with regard to their date of publication. The Commission should exercise its discretion reasonably and give proper weight to all the relevant factors. If the transcripts of

the Winograd Commission hearings contain parts with regard to which there is no legal impediment preventing their disclosure to the public, it is not reasonable to delay the publication of the material until the final report is presented.

Cross-references:

- HCJ 11793/05 *Israel News Company Ltd v. State of Israel* (not yet reported);
- AAA 9135/03 *Council for Higher Education v. HaAretz Newspaper Publishing* [2006] (1) IsrLR 1;
- AAA 6013/04 *Ministry of Transport v. Israel News Co. Ltd* (not yet reported);
- HCJ 680/88 *Schnitzer v. Chief Military Censor* [1988] IsrSC 42(4) 617; IsrSJ 9 77;
- CA 2800/97 *Lipson v. Gahal* [1999] IsrSC 53(3) 714;
- HCJ 6005/93 *Eliash v. Israel Bar Association* [1995] IsrSC 49(1) 159;
- LCA 3614/97 *Avi-Isaac v. Israel News Co. Ltd* [1999] IsrSC 53(1) 26.

Languages:

Hebrew, English (translation by the Court).



Italy

Constitutional Court

Important decisions

Identification: ITA-2008-3-003

a) Italy / b) Constitutional Court / c) / d) 08.10.2008 / e) 334/2008 / f) / g) *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), 15.10.2008 / h) CODICES (Italian).

Keywords of the systematic thesaurus:

1.3.4.2 Constitutional Justice – Jurisdiction – Types of litigation – **Distribution of powers between State authorities.**

1.3.5.12 Constitutional Justice – Jurisdiction – The subject of review – **Court decisions.**

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

4.5.2 Institutions – Legislative bodies – **Powers.**

4.7.1 Institutions – Judicial bodies – **Jurisdiction.**

Keywords of the alphabetical index:

Vegetative coma / Euthanasia / Human life, intrinsic value.

Headnotes:

The Chamber of Deputies and the Senate lodged a complaint of “conflict of the attribution of functions between state powers”, within the meaning of Article 134.2 of the Constitution, against the Court of Cassation and the Court of Appeal of Milan, claiming that these authorities of the judiciary had “exercised functions vested in the legislature” and, at the very least, interfered with Parliament’s prerogatives by their action.

In their judgments, the courts in question determined the conditions rendering it permissible to interrupt the artificial feeding and hydration treatment to which a patient in a vegetative coma is subjected.

Considering that judicial power had been exercised with the aim of modifying the legislative system in force and had thus encroached on the purview of the legislature, the Chamber of Deputies and the Senate appealed to the Constitutional Court.

Summary:

Before all else, the Court needed to ascertain the presence of the “subjective and objective conditions” for a “conflict of the attribution of functions between state powers” to exist. This examination would determine the admissibility of the appeals by the two houses of parliament. In the case before it, the “subjective and objective conditions” determining a “conflict of the attribution of powers” were present: it was clear that both the Chamber of Deputies and the Senate possessed legitimacy to defend the powers conferred on them by the Constitution; likewise, the Court of Cassation and the Court of Appeal of Milan possess legitimacy to oppose appeals as competent bodies so as to express in definitive terms, in the context of the proceedings held before them, the will of the judiciary.

In the judgment challenged by the two appeals alleging conflict of the attribution of functions between state powers which was adopted under a “*volontaria giurisdizione*” (non-contentious) procedure, the Court of Cassation stated a principle of law which binds the court of referral (here, the Court of Appeal of Milan) and which that court had applied in the case on which it was to rule. It had thus authorised, on predetermined conditions and terms, the interruption of the artificial feeding and hydration of Eluana Englaro, a woman aged 37 years in a coma since 1992.

The Constitutional Court recalled the requirement of its case-law that, for an appeal against an act of the judiciary to be declared admissible, there must be contestation of the judicial nature of the act in question or complaint that it oversteps the limits imposed on the judicial function in order to safeguard the functions of the other state powers.

As the Court had repeatedly pointed out in this regard, contestation of the legal arguments employed in a court’s decision and suggestion of a different solution to the legal question submitted to it does not suffice to substantiate a “conflict of the attribution of functions between state powers”, for such conflict cannot be transformed into a further means of challenging a judicial decision.

The case disclosed no indications that, through the decisions which it had adopted (which displayed all the characteristics of judicial acts and were thus effective only in respect of the case to be determined), the ordinary court had performed a legislative function and consequently impinged on the preserve of parliament, the latter at all events remaining the holder of legislative power.

The Court noted that the two houses of parliament, while stating that they did not desire a formal investigation of the *errores in iudicando* allegedly committed by the two courts (Court of Appeal of Milan and Court of Cassation), nevertheless raised numerous criticisms of the way in which the Court of Cassation selected and used, or interpreted, the relevant statutory material.

In conclusion, the Court recalled that at any time parliament could adopt provisions governing “end-of-life” situations while trying to strike a balance between the various constitutional principles involved.

Finally, the Court declared inadmissible the appeals of the Chamber of Deputies and Senate on the ground that the “objective conditions” of a “conflict of powers” were absent.

Supplementary information:

The case of Eluana Englaro unleashed a veritable political battle in Italy. Following the judgment of the Court of Appeal of Milan, Beppino Englaro, father and guardian of Eluana Englaro, moved his daughter to a private clinic in Udine (Region of Friuli) in order to have all artificial feeding and hydration suspended. On 6 February 2009 Mr Berlusconi’s Government, seeking to prevent what it considered an outright act of euthanasia, took the decision to adopt an emergency decree law prohibiting the termination of the patient’s feeding. The President of the Republic informed the government, convened as the Council of Ministers, of his refusal to sign such a decree which he viewed as contrary to the principle of separation of powers and to the principle that a final judgment has binding effect. The government therefore converted the decree law into a bill which it forthwith transmitted to the Senate upon authorisation by the Head of State. On 9 February the Senate began debating the bill, which would have compelled the physicians in attendance to resume Eluana Englaro’s feeding had she not died the same evening after cardiac arrest due to dehydration, as the autopsy established. The bill on “end-of-life situations” is currently before the Senate.

Languages:

Italian.



Japan Supreme Court

Important decisions

Identification: JPN-2008-3-002

a) Japan / **b)** Supreme Court / **c)** Grand Bench / **d)** 04.06.2008 / **e)** (Gyo-Tsu), 135/2006 / **f)** / **g)** *Minshu* (Official Collection of the decisions of the Supreme Court of Japan on civil cases), 62-6 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.4 General Principles – **Separation of powers**.
3.21 General Principles – **Equality**.
5.2.2.12 Fundamental Rights – Equality – Criteria of distinction – **Civil status**.
5.3.8 Fundamental Rights – Civil and political rights – **Right to citizenship or nationality**.
5.3.44 Fundamental Rights – Civil and political rights – **Rights of the child**.

Keywords of the alphabetical index:

Nationality, acquisition by descent / Nationality, refusal.

Headnotes:

Article 3.1 of the Nationality Act provides that a child born out of wedlock to a Japanese father and a non-Japanese mother and acknowledged by the father after birth may acquire Japanese nationality only if the parents later enter into matrimony; in 2003 at the latest, this provision was in violation of the Constitution’s guarantee of equality before the law under Article 14.1.

The unconstitutionality of the above provision does not result in nullity of the provision of Article 3.1 as a whole. Article 3.1 should be read without the part that imposes an excessive requirement, and therefore a child will acquire Japanese nationality if he or she satisfies the requirements for acquisition of Japanese nationality except for the requirement of the marriage of the parents.

Summary:

I. Article 2.1 of the Nationality Act provides that a child shall be a Japanese citizen if the father or mother is a Japanese citizen at the time of birth, applying the principle of *jus sanguinis*.

Article 3.1 of the Nationality Act in effect provides that a child born out of wedlock to a Japanese father and a non-Japanese mother and acknowledged by the father after birth may acquire Japanese nationality, if the child has acquired the status of a child born in wedlock as a result of the marriage of the parents.

The applicant, who was born to a father who is a Japanese citizen and a mother who has nationality of the Republic of the Philippines, a couple having no legal marital relationship, submitted a notification for acquisition of Japanese nationality to the Ministry of Justice on the grounds that he/she was acknowledged by the father after birth. However, the minister determined that the applicant had not acquired Japanese nationality due to failure to meet the requirement of the marriage of the parents. The applicant sued the State, seeking a declaration that the applicant has Japanese nationality. It was alleged *inter alia* that Article 3.1 of the Nationality Act was in violation of Article 14.1 of the Constitution which provided for equality before the law.

The Court of First Instance decided in favour of the applicant.

The judgment of second instance dismissed the applicant's claim without considering the constitutionality of Article 3.1 of the Nationality Act. It ruled that even supposing that the provision of said Article should be in violation of Article 14.1 of the Constitution and therefore void, this does not lead to creating a new system for granting Japanese nationality to a child born out of wedlock who only satisfied the requirement of acknowledgment by a Japanese father after birth (but does not satisfy the requirement of the marriage of the parents).

The Supreme Court quashed the judgment of the second instance for the following reason. (There are both concurring and dissenting opinions.)

II. The legislative purpose of the provision of Article 3.1 of the Nationality Act, granting Japanese nationality only to persons who have a close tie with Japan, has a reasonable basis, and at the time when this provision was established, a certain reasonable relevance could be found between this provision and the legislative purpose. However, due to changes in social and other circumstances both in Japan and abroad, it is now difficult to find any reasonable

relevance between the policy of maintaining legitimisation as a requirement to be satisfied when acquiring Japanese nationality, and the above mentioned legislative purpose.

Under these provisions, a child born in wedlock to a Japanese father or mother can acquire Japanese nationality by birth, as can a child born out of wedlock but acknowledged by a Japanese father before birth, and a child born out of wedlock to a Japanese mother. However, a child born out of wedlock who is acknowledged by a Japanese father after birth but has not been legitimised is unable to acquire Japanese nationality. Considering that acquisition of Japanese nationality is highly significant in terms of enjoying the guarantee of fundamental human rights and other benefits in Japan, the disadvantages that children would suffer from such discriminatory treatment cannot be overlooked, and there is no reasonable relevance between such discriminatory treatment and the above-mentioned legislative purpose.

In view of these circumstances, although the legislative purpose itself has a reasonable basis, reasonable relevance between the provision of Article 3.1 of the Nationality Act and the legislative purpose no longer exists. Consequently, by 2003 at the latest, this provision was in violation of Article 14.1 of the Constitution.

However, if the whole part of said provision is made void and the chance to acquire Japanese nationality is denied even for a child who is legitimised, this would ignore the purpose of said Act, and can hardly be perceived as the lawmakers' reasonable intention. Therefore such a legal construction is unacceptable.

In light of the demand for equal treatment under Article 14.1 of the Constitution and the principle of *jus sanguinis*, it should be construed that a child born out of wedlock to a Japanese father and a non-Japanese mother is allowed to acquire Japanese nationality by making a notification if he/she satisfies the requirements prescribed in Article 3.1 of the Nationality Act save for the requirement of the marriage of the parents. Such construction is also appropriate from the perspective of opening a path to direct relief for people subject to unreasonable discriminatory treatment.

The Court took the view that this interpretation was permissible, because it equated to cases where the Court creates a new requirement for acquisition of Japanese nationality not stipulated within the law, and carries out a legislative act that should originally be performed by the Diet.

In conclusion, a child born out of wedlock to a Japanese father and a non-Japanese mother and acknowledged by the father after birth shall be allowed to acquire Japanese nationality under Article 3.1 of the Nationality Act if the child satisfies the requirements prescribed in this paragraph, save for the requirement of the marriage of the parents.

Languages:

Japanese, English (translation by the Court).



Latvia Constitutional Court

Important decisions

Identification: LAT-2008-3-004

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 21.10.2008 / **e)** 2008-02-01 / **f)** On Compliance of the first and third sentence of the first part and the first sentence of the sixth part of Section 52 of the Latvian Penalty Execution Code with Article 107 of the Constitution of the Republic of Latvia / **g)** *Latvijas Vestnesis* (Official Gazette), no. 166(3950), 24.10.2008 / **h)** CODICES (Latvian, English).

Keywords of the systematic thesaurus:

2.1.1.4.6 Sources – Categories – Written rules – International instruments – **European Social Charter of 1961.**

2.1.1.4.9 Sources – Categories – Written rules – International instruments – **International Covenant on Economic, Social and Cultural Rights of 1966.**

3.16 General Principles – **Proportionality.**

5.4.5 Fundamental Rights – Economic, social and cultural rights – **Freedom to work for remuneration.**

5.4.17 Fundamental Rights – Economic, social and cultural rights – **Right to just and decent working conditions.**

Keywords of the alphabetical index:

Prisoner, pay / Prisoner, employment / Prisoner, minimum wage / Working time / Work, legal length / Minimum wage.

Headnotes:

All basic rights established in the Constitution are applicable to prisoners insofar as they are not restricted and are compatible with the objective of punishment and the custody regime. These rights are not absolute; restrictions are possible, and in fact restrictions for prisoners may be even stricter by comparison to those applicable to those who are free. Prisoners' issues are dealt with in separate legislation, and these regulations differ from the legal regulations on labour. However, it is not permissible

to include these norms in special regulations that would deny the rights established by the Constitution.

Any restriction on the rights of persons in custody must be justified on a case by case basis. This justification can be based on the necessary and inevitable consequences of imprisonment or the existence of a sufficient link between the restriction and the circumstances of the prisoner in question. Restrictions shall be no greater than is necessary for the type of penalty imposed and the way it is to be carried out. Measures connected with the restriction of fundamental rights are only permissible to the extent that this is necessary for achieving the legitimate aim.

Holidays for prisoners have the same function as holidays of those in employment and free, namely rest. In certain cases, prisoners' rights to paid holiday may be restricted, for example by providing fewer vacation days by comparison to what has been provided for in the labour Law. These rights cannot, however, be denied in their terms.

Summary:

I. The law establishing prisoners' labour regulations was adopted in 1970. Questions had arisen over their holiday entitlement and length of working week. Anybody sentenced to deprivation of liberty shall be provided with an eight-hour working day six days per week. Prisoners had the right to paid leave from their employment from 1 April 1999 to 9 December 2004, when the word "paid" was excluded. The applicant contested these provisions in the constitutional complaint.

Article 107 of the Constitution provides as follows: "Every employed person has the right to receive, for work done, commensurate remuneration which shall not be less than the minimum wage established by the State, and has the right to weekly holidays and a paid annual vacation."

The applicant argued that these particular provisions were out of line with Article 107 of the Constitution as they constituted a disproportionate restriction on the rights of employed prisoners to weekly holidays and paid annual holiday. The applicant was working a forty-eight hour week, but was only receiving the minimum wage of the State to cover a forty hour working week.

II. The Constitutional Court, considering requirements resulting from international documentation, held that it follows from Article 107 of the Constitution that there must be an established minimum length of working week with provision for the minimum amount of free

time and paid annual leave. Under the Labour Law, normal working time is forty hours per week. The number of rest days correlates to a certain number of working hours per day, and it should not be less than one rest day per week. The Labour Law regulates the rights of an employee to paid annual leave.

The Constitutional Court began by assessing whether Article 107 of the Constitution was applicable to prisoners and whether somebody being employed at prison fell within the category of "employee" as deployed in this Article.

There are other provisions in force to govern the involvement of prisoners in legal labour relations, and these differ from general legal labour regulations. Nonetheless, prisoners should be regarded as employees and therefore they enjoy all the fundamental rights set out in Article 107 of the Constitution.

The Constitutional Court concluded that although the labour relations of prisoners might not be regarded as labour relations outside custody, the principles of labour law stemming from the provisions of human rights must be observed in relation to prisoners. Therefore, persons employed in prisons should not be provided with non-commensurate working time or dangerous and hard working conditions.

In regulating prisoner employment, the State must observe the basic rights of those concerned, insofar as this is permissible by the objective of the punishment and the regime of the place of custody. The State must follow the recommendations made by the United Nations and the Council of Europe concerning the employment of prisoners. Consequently, living conditions in places of custody shall be made to resemble as far as possible conditions outside prison, the maximum daily and weekly working hours of the prisoners shall be fixed in conformity with local rules or customs regulating the employment of those who are free, prisoners shall have at least one rest day a week and sufficient time for education and other activities.

Having assessed the restrictions, the Court found that the provisions under dispute did not comply with the Constitution.

The regulatory framework regarding a forty eight hour working week for prisoners has been in force since 1971. At that time, free workers were also expected to work six days a week, for eight hours per day. The Constitutional Court noted that the legislator had not revised the regulations regarding the length of a working week for employed prisoners for over ten years, although there had been amendments to the length of the working week for free employed persons.

Having examined the case, the Constitutional Court could find no legitimate objective for the restriction. It concluded that in the absence of justification by a legitimate goal, a restriction of fundamental rights is to be regarded as unlawful.

The issue regarding paid leave is related to the fact that conditions of custody must as far as possible be approximated to living conditions in freedom by preparing prisoners for a normal rhythm of working life, with provision for the right to paid vacation, during which his or her living standard would not fall.

On the evidence before it, the Constitutional Court held that the reason behind the restriction on the rights of employed prisoners to paid leave was to preserve additional resources so that they could be deployed elsewhere. It could certainly not be regarded as a legitimate objective for the restriction of the basic rights of prisoners.

Cross-references:

Previous decisions of the Constitutional Court in the following cases:

- Judgment no. 2001-05-03 of 19.12.2001; *Bulletin* 2001/3 [LAT-2001-3-005];
- Judgment no. 2002-04-03 of 22.10.2002; *Bulletin* 2002/3 [LAT-2002-3-008];
- Judgment no. 2005-03-0306 of 21.11.2005; *Bulletin* 2005/3 [LAT-2005-3-007];
- Judgment no. 2005-17-01 of 06.02.2006; *Bulletin* 2006/1 [LAT-2006-1-001];
- Judgment no. 2006-31-01 of 14.06.2007.

European Court of Human Rights:

- *Gülmez v. Turkey*, Judgment of 20.05.2008, paragraph 46;
- *Dickson v. The United Kingdom*, Judgment of 04.12.2007, paragraph 68.

Languages:

Latvian, English (translation by the Court).



Identification: LAT-2008-3-005

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 05.11.2008 / **e)** 2008-04-01 / **f)** On Compliance of the second part of Section 441 of the Civil Procedure Law (insofar as it Concerns Decisions Regarding Imposition of a Fine as Procedural Sanction) with Article 92 of the Constitution of the Republic of Latvia / **g)** *Latvijas Vestnesis* (Official Gazette), no. 175(3959), 11.11.2008 / **h)** CODICES (Latvian, English).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
 5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts**.
 5.3.13.6 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to a hearing**.

Keywords of the alphabetical index:

Fine / Sanction, nature / Economy, principle.

Headnotes:

A fair trial as a judicial procedure in a State governed by the rule of law comprises several mutually related rights.

Examination of a case pursuant to both appellate and cassation procedures is guided towards issues that are substantial for the adjudication of the relevant civil case. The provisions regarding the imposition of a fine as a procedural sanction, however, shall not be applied to the dispute under consideration; neither can it affect the dispute. The decision as to the imposition of the above-mentioned fine or refusing to release somebody from the fine or to reduce the amount cannot serve as the subject of proceedings pursuant to appellate or cassation procedures.

Summary:

I. Under Article 92 of the Constitution, everyone has the right to defend his or her rights and lawful interests in a fair trial.

The provisions under dispute do not allow for appeal against a decision imposing a fine as procedural sanction. In the case in point, a person had failed to attend a court session. The applicant submitted a constitutional complaint holding that the contested provisions were a disproportionate restriction on the right to a fair trial.

II. The Constitutional Court concluded that Article 92 of the Constitution does not require provision to be made in every case for the possibility of an appeal to a higher instance court, if there have been proper court proceedings at the instance where the fine was imposed. The right to a fair trial means that the person has the right to be heard. The procedural law provides for the possibility to be heard and to submit evidence. According to the law somebody who has been given a fine may apply to the Court which imposed the fine to release him or her from the fine or reduce the amount. The Court is under an obligation to release a person from a fine imposed as a procedural sanction if he or she succeeds in submitting evidence that demonstrates that there were justified reasons for their non-attendance at a court session and lack of notice to that effect.

The Constitutional Court held that that the right to fair trial had been restricted, as the rights of the individual to be heard were only guaranteed once a fine had been imposed and executive procedure initiated. However, this restriction was permissible and proportionate.

The legitimate objective of the restriction included in the contested provision is to ensure an effective adjudication of a case in its terms, and to observe the principle of procedural economy by ensuring protection of the rights of other persons.

The fact that a fine as procedural sanction is imposed immediately and the person who avoids attending court immediately feels the negative consequences of the fine makes that fine an effective means for reaching a legitimate objective. Moreover, the benefit derived by society as a whole from the possibility of effective sanctions for parties to proceedings who have no valid excuse not to turn up to court and who do not give notice of non-attendance will be demonstrated by a smaller workload for the judicial system and an increase in prestige. Moreover, those involved in the proceedings will be spared the necessity of attending several fruitless court hearings.

Cross-references:

Previous decisions of the Constitutional Court in the following cases:

- Judgment no. 2001-10-01 of 05.03.2002;
- Judgment no. 2001-17-0106 of 20.06.2002; *Bulletin* 2002/2 [LAT-2002-2-006];
- Judgment no. 2003-04-01 of 27.06.2003; *Bulletin* 2003/2 [LAT-2003-2-009];
- Judgment no. 2004-04-01 of 05.11.2004; *Bulletin* 2004/3 [LAT-2004-3-008];

- Judgment no. 2004-10-01 of 17.01.2005; *Bulletin* 2005/1 [LAT-2005-1-001];
- Judgment no. 2004-16-01 of 04.01.2005;
- Judgment no. 2004-18-0106 of 13.05.2005; *Bulletin* 2005/2 [LAT-2005-2-005];
- Judgment no. 2005-18-01 of 14.03.2006;
- Judgment no. 2005-19-01 of 22.12.2005;
- Judgment no. 2006-12-01 of 20.12.2006; *Bulletin* 2006/3 [LAT-2006-3-006];
- Judgment no. 2007-03-01 of 18.10.2007;
- Judgment no. 2007-22-01 of 02.06.2007.

European Court of Human Rights:

- *Engel and Others v. the Netherlands*, Judgment of 08.06.1976, paragraph 2;
- *Weber v. Switzerland*, Judgment of 22.05.1990, paragraphs 31-34;
- *Ravnsborg v. Sweden*, Judgment of 23.03.1994, paragraphs 30, 34, 35;
- *Putz v. Austria*, Judgment of 22.02.1996, *Reports of Judgments and Decisions* 1996 I, paragraphs 31, 33, 34-37.

Courts of other countries:

- Judgment StGH 1996/6; *Bulletin* 1996/3 [LIE-1996-3-002];
- Judgment of 19.05.1992, Federal Constitutional Court, Germany, BVerfGE 86, 133 <144>;
- Judgment of 11.09.1963, Federal Court, Switzerland, Zbl. 1964, S.216.

Languages:

Latvian, English (translation by the Court).



Liechtenstein State Council

Important decisions

Identification: LIE-2008-3-004

a) Liechtenstein / **b)** State Council / **c)** / **d)** 30.06.2008 / **e)** StGH 2007/70 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Surety deposit / Security for costs / Right to be heard, exception, decision, influence.

Headnotes:

Pursuant to the latest Strasbourg case-law demanding particularly close compliance with the stringency of the right to be heard in court, it is no longer possible to maintain the restriction prevailing hitherto whereby the right to a court hearing lapses in exceptional cases where, for technical reasons, the granting of this right can have no influence on the decision.

Thus, where the respondent in an action requests the court to find that the complaint is withdrawn, the request must be brought to the notice of the instigator of the action before the delivery of the decision.

Summary:

As the period of four weeks allowed for payment had elapsed without the compulsory surety deposit (*cautio judicatum solvi*) being paid, the court, at the request of the respondents in the action, declared the complaint lodged to have been withdrawn failing payment of the surety deposit in due time, without having notified the applicant of the request.

Diverging from what had been its current practice until that time, the State Council allowed the appeal against the Supreme Court's decision to uphold the ruling of the court below. Among other complaints, it

was argued in the appeal that the right to be heard by the court had been infringed by a failure to give notice of the respondents' substantive petition.

Languages:

German.



Identification: LIE-2008-3-005

a) Liechtenstein / **b)** State Council / **c)** / **d)** 30.06.2008 / **e)** StGH 2006/94 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

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

2.2.1.6.2 Sources – Hierarchy – Hierarchy as between national and non-national sources – Community law and domestic law – **Primary Community legislation and domestic non-constitutional legal instruments.**

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

3.16 General Principles – **Proportionality.**

3.26 General Principles – **Principles of Community law.**

5.1.1.2 Fundamental Rights – General questions – Entitlement to rights – **Citizens of the European Union and non-citizens with similar status.**

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

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

Keywords of the alphabetical index:

Security for costs / Discrimination, indirect / Discrimination, foreigners / Procedural costs, discrimination / Foreigner, discrimination / European Economic Area, discrimination, foreigners / Court costs, security, discrimination / Procedure, costs, advance.

Headnotes:

Liechtenstein's regulations on levying of deposits, despite their differentiated adjustment, actually affect foreigners much more markedly than nationals. As a whole, the regulations in the Code of Civil Procedure (ZPO) on the *judicatum solvi* deposit therefore display indirect

discrimination within the meaning of the case-law of the European Court and the EFTA Court. Such indirect discrimination is not in itself unlawful, but requires justification. While in principle sound administration of civil justice can be regarded as an interest justifying indirect discrimination, the rule adopted must nevertheless be proportionate. The right to equal treatment embedded in Community law should not be made subservient to agreements on mutual arrangements concluded between Member States. Consequently, indirect discrimination in connection with the *judicatum solvi* deposit under the Code of Civil Procedure (ZPO) can have no justification in the lack of international agreements on the recognition and execution of judgments abroad. The rules on the *judicatum solvi* deposit in the Code of Civil Procedure (ZPO) are thus contrary to the prohibition of discrimination under Article 4 of the Agreement on the EEA.

It is accepted, if only for reasons of legal certainty, that in a given framework of preliminary examination the State Council likewise nullifies laws or regulations in domestic law which are contrary to the law of the EEA and unconstitutional.

Summary:

Since in principle the law of the EEA amends or supplements the Constitution, the unlawfulness of a law or regulation in the eyes of the law of the EEA may be pleaded before the State Council.

In an appeal brought in civil proceedings before the State Council against a decision of the Supreme Court, it was pleaded *inter alia* as a ground of the appeal that Article 57 ZPO – governing the deposit of procedural costs for persons with no fixed abode in Liechtenstein – was contrary to the law of the EEA having regard to the case-law of the Court of Justice of the European Communities and of the EFTA Court.

Departing from its earlier precedent regarding the conformity of the *judicatum solvi* deposit arrangement with the law of the EFTA, the State Council allowed the appeal and declared Articles 56 to 62 ZPO null and void on the ground of unconstitutionality.

Languages:

German.



Identification: LIE-2008-3-006

a) Liechtenstein / **b)** State Council / **c)** / **d)** 29.09.2008 / **e)** StGH 2008/43 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

5.1.3 Fundamental Rights – General questions – **Positive obligation of the state.**

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

Keywords of the alphabetical index:

Media, freedom / Media, press, role / State, impartiality, press / Subsidy, State / Good faith, protection / Trust, legitimate, protection.

Headnotes:

No claim to State benefits such as subsidies may be inferred from the principle of freedom of the press. Thus no right to State support for the press derives from Article 40 of the Constitution.

Equality before the law and prohibition of arbitrary treatment, juxtaposed with freedom of the press, have a special significance that follows from the State's duty of impartiality. They generate a right to equal treatment in respect of media competition.

It is within the legislator's independent discretion to decide whether and in what way there should be support for the press. Consideration of frequency of publication is an objectively justifiable criterion.

In principle, only someone unable to foresee an amendment to the law can lay claim, as against the legislator, to protection owed to persons of good faith. Once an amendment to the law has been announced, confidence in the permanency of legal rules is broken.

Summary:

Under the 2006 reform of the Law on support to the media, it was newly established as a requirement for support to a newspaper that it should be published at least 10 times in a calendar year, which requirement the appellant incontestably did not fulfil. The State Council did not allow the appeal founded on freedom of the press, brought against the Administrative Court judgment upholding the refusal of the application for subsidy.

Languages:

German.



Lithuania

Constitutional Court

Important decisions

Identification: LTU-2008-3-004

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 01.10.2008 / **e)** 26/08 / **f)** On elections to the parliament (*Seimas*) / **g)** *Valstybės Žinios* (Official Gazette), 114-4367, 04.10.2008 / **h)** CODICES (English, Lithuanian).

Keywords of the systematic thesaurus:

1.3.4.5 Constitutional Justice – Jurisdiction – Types of litigation – **Electoral disputes**.

3.3.1 General Principles – Democracy – **Representative democracy**.

4.5.3.1 Institutions – Legislative bodies – Composition – **Election of members**.

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

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

4.9.5 Institutions – Elections and instruments of direct democracy – **Eligibility**.

5.3.41.2 Fundamental Rights – Civil and political rights – Electoral rights – **Right to stand for election**.

Keywords of the alphabetical index:

Election, parliamentary / Election, candidate, condition / Election, candidate, requirements / Electoral rights / Electoral system.

Headnotes:

Legislation must not be enacted that would result in somebody wishing to avail himself or herself of his or her passive electoral rights in the election of members of parliament being compelled to become a member of or to become linked to any political party other than by way of formal membership. The system for electing members of parliament whereby candidates recorded in the lists of political parties and individual candidates nominated by political parties compete for mandates for election to parliament is possible provided that citizens who are not recorded in the lists of political parties or who are not

nominated by them are guaranteed the chance to participate in parliamentary elections.

Summary:

The petitioner, the Supreme Administrative Court, requested an assessment of the constitutional compliance of Article 37.1 of the Law on Elections to the parliament (*Seimas*). The petitioner had concerns over its provision that candidates for election to the parliament may only be nominated in the multi-member constituency by a party which has been registered in accordance with the Law on Political Parties and which meets the requirements regarding the number of party members, laid down in the Law on Political Parties, in that it might run counter to Articles 34.1, 35.2 and 55.1 of the Constitution.

The Supreme Administrative Court of Lithuania, the petitioner, suggested that this particular legal regulation, under which only political parties have the right to nominate candidates for members of the parliament in the multi-member constituency violates the democratic principles of universal, equal and direct suffrage, since those citizens who do not belong to a political party may nominate candidates for election to parliament only in single-member constituencies.

The Constitutional Court noted that the Constitution does not establish a concrete system of parliamentary election. Article 55.3 of the Constitution leaves the legislator with a wide discretion in this regard. Neither proportional, majority nor a mixed electoral system combining proportional and majority electoral systems may be regarded as themselves creating the preconditions to violate the requirements of free and democratic elections, universal and equal suffrage, secret ballot and other standards for elections in a democratic state under the rule of law.

The Constitutional Court stressed that the establishment of political parties and their activities are inseparable from seeking public power, and therefore also from participation in elections to the representative institutions of public power, including the parliament. The Constitution does not allow for the establishment of any legal regulation which would prevent political parties and their nominated candidates from participating in parliamentary elections. It also prevents any legislation being enacted which would compel somebody wishing to avail him or herself of passive electoral rights in parliamentary elections to join or to become involved with any political party other than through formal membership. A system of election of members of parliament whereby candidates recorded in the lists of political parties and individual candidates nominated by political parties compete for mandates for election as members of parliament is possible provided

that citizens who are not recorded in the lists of political parties and who are not nominated by them are guaranteed the chance to participate in parliamentary elections.

It was noted in the ruling that the legislator established a mixed electoral system for parliamentary elections, whereby seventy members of the parliament are elected in the multi-member constituency according to the proportional system, drawn only from those candidates included in the lists of political parties. Seventy-one members of the parliament are elected according to the majority system in single-member constituencies, where citizens may nominate themselves as candidates provided they meet the requirements of the passive electoral right established in the Law on Elections to the parliament; they do not have to be put forward by a political party. Therefore, in terms of the legal regulation enshrined in Article 37.1 of the Law on Elections to the parliament, a citizen seeking election to the parliament who is not directly or indirectly bound to any party, and who meets the requirements of the law, is not deprived of the opportunity to nominate himself or herself as a candidate.

The Constitutional Court held that the disputed provision of the Law on Elections to the parliament did not contravene the Constitution.

Languages:

Lithuanian, English (translation by the Court).



Identification: LTU-2008-3-005

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 30.10.2008 / **e)** 16/06-69/06-10/07 / **f)** On demanding and obtaining an item from the acquirer in good faith / **g)** *Valstybės Žinios* (Official Gazette), 126-4816, 04.11.2008 / **h)** CODICES (English, Lithuanian).

Keywords of the systematic thesaurus:

3.15 General Principles – **Publication of laws.**
5.2.2 Fundamental Rights – Equality – **Criteria of distinction.**
5.3.39 Fundamental Rights – Civil and political rights – **Right to property.**

Keywords of the alphabetical index:

Property, right, inviolability / Private property, equal protection.

Headnotes:

Where an owner of property loses his or her property due to a crime committed by another person, he or she does not necessarily lose their rights of ownership, neither does somebody acquiring property in this way become its owner. Under the Constitution, the owner is entitled to retrieve property that has been lost under these circumstances.

Summary:

This case was initiated by a group of members of the parliament (*Seimas*) and two courts, seeking an assessment of the compliance of Article 4.96.2 of the Civil Code with Articles 23 and 29.1 of the Constitution and the constitutional principle of a state under the rule of law. Under this provision, immovable property cannot be demanded and obtained from somebody who has acquired it in good faith unless the owner lost the item due to a crime committed by other persons.

The petitioners expressed concern that under the above provision, more protection is afforded to the rights of a person who has lost an item as a result of a crime committed by another by comparison with the rights of somebody who has acquired the item in good faith. They argued that such an “acquirer” becomes an “equal” owner of this item. The situation of two “equal” owners is therefore different, and so the provision results in a violation of the constitutional principle of equal rights for all. Under Article 23 of the Constitution, property is inviolable and can be expropriated only for the needs of society. Legal procedure must be followed, and just compensation awarded. The provision in Article 4.96.2 of the Civil Code under which the item can be demanded and obtained from someone who has acquired it in good faith does not meet the needs of society as a whole, and the acquirer does not receive just compensation. The disputed legal regulation therefore breaches the rights of ownership of a person.

In its ruling the Constitutional Court noted that Article 23 of the Constitution enshrines the principle of inviolability of property. This principle would be denied if the rights of ownership of an owner were not protected where they lost their property as a result of a crime committed by another. Where this has occurred, the owner does not lose his or her rights of ownership, and somebody who has acquired the

property does not become its owner. Under the Constitution, a property owner is entitled to retrieve property that has been lost due to a crime committed by another; this is an important constitutional guarantee of protection of the rights of ownership. It implies a duty on the part of the legislator to establish such legal regulation which would ensure the protection of the rights of persons who have lost their property in such circumstances.

The Constitutional Court also stressed that if somebody acquires property and does not or cannot know that its owner lost it due to a crime committed by another, the acquisition cannot be treated as creating ownership rights for the acquirer. The Court also noted that although the rights of those who have lost their property as a result of crime require protection, this does not rule out the need for protection of the rights of those who have acquired property lawfully and in good faith but who did not realise that the owner had lost it due to a crime committed by another. The requirement to defend the rights of such persons stems from the Constitution, *inter alia* the constitutional principle of a state under the rule of law, the constitutional principle of compensation for damage which is enshrined in Article 30 of the Constitution, Article 46 of the Constitution, *inter alia* Paragraph 1 thereof, which also enshrines freedom of individual economic activity and initiative which in turn imply freedom of concluding agreements.

The Constitutional Court noted that the constitutional principle of equality of persons does not rule out the possibility of treating persons differently by taking account of their status and situation. The legal status of the owner and the acquirer in good faith is not the same, they are in different positions.

The Constitutional Court recognised that the disputed legal regulation was not in conflict with the Constitution.

Languages:

Lithuanian, English (translation by the Court).



Identification: LTU-2008-3-006

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 04.12.2008 / **e)** 47/04 / **f)** On connecting to electricity network / **g)** *Valstybės Žinios* (Official Gazette), 140-5569, 06.12.2008 / **h)** CODICES (English, Lithuanian).

Keywords of the systematic thesaurus:

2.1.1.3 Sources – Categories – Written rules – **Community law**.
 3.12 General Principles – **Clarity and precision of legal provisions**.
 3.17 General Principles – **Weighing of interests**.
 3.19 General Principles – **Margin of appreciation**.
 5.4.6 Fundamental Rights – Economic, social and cultural rights – **Commercial and industrial freedom**.
 5.4.7 Fundamental Rights – Economic, social and cultural rights – **Consumer protection**.

Keywords of the alphabetical index:

Consumer, protection / Energy law / Electricity, transmission.

Headnotes:

The case concerned a legal provision to the effect that a customer's equipment may be connected to transmission network only in cases where the operator of the distribution network refuses, due to established technical or maintenance requirements, to connect the equipment of the customer to the distribution network which is on the territory indicated in the licence of the distribution network operator. It was held that this provision did not result in an absolute limitation on customers' opportunities to choose their electricity provider (either the operator of the distribution network or the operator of the transmission network). Neither did it create any preconditions for discrimination against the customer. This provision is aimed at protection of the interests of electricity customers; it also seeks to ensure the protection of the general welfare of the Nation.

Summary:

The petitioner, a group of members of parliament, requested an assessment of the compliance with Articles 5.2 and 46 of the Constitution and the constitutional principle of a state under the rule of law of Article 15.2 of the Law on Electricity. This provision states that the equipment of a customer may be connected to transmission network only in cases where the operator of the distribution network

refuses, due to established technical or maintenance requirements, to connect the equipment of the customer to the distribution network which is on the territory indicated in the licence of the distribution network operator.

The petitioner stated that the freedom of economic activity of an individual does not *per se* guarantee competition. The state must accordingly protect fair competition; the possibility for competition is diminished or competition is removed from the corresponding market when a monopoly becomes dominant in it; the state must limit monopolistic tendencies by legal means. Legal acts of European Union (Directive no. 2003/54/EC) do not impose a direct obligation on customers to connect their equipment to the electricity transmission network, neither does it oblige them only to connect to the electricity distribution network. It does not establish the right and freedom of consumers to connect to any electricity network at their discretion.

While preparing the case for hearing and taking account of the fact that the Law on Electricity implements Directive no. 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive no. 96/92/EC the Constitutional Court decided to apply to the Court of Justice of the European Communities for a preliminary ruling on clarification of Article 20 of Directive no. 2003/54/EC. The preliminary ruling was adopted on 9 October 2008.

In its ruling, the Constitutional Court noted that:

- the formula "the State shall regulate economic activity" of Article 46.3 of the Constitution does not mean the right of the state to administer all or certain economic activity at its discretion, but its right to establish legal regulation of economic activity, i.e. establishment of limitations (prohibitions) and conditions of economic activity, regulation of procedures in legal acts;
- legal regulation of economic activity is not an end in itself, it is a means of social engineering and a method of seeking the welfare of the Nation through law; the content of the notion "general welfare of the Nation" is revealed in each concrete case by taking account of economic, social and other important factors;
- the introduction of monopolies is prohibited; thus it is not permissible to grant exceptional rights to an economic entity to operate in a certain sector of economy which would result in a monopoly within that sector. However, it is permissible, under certain circumstances, to state in the law the existence of monopoly in a certain sector of

economy or to reflect factual monopolistic relations otherwise and to regulate them accordingly;

- the prohibitions provided for in the law must be reasonable, adequate to the objective sought, non-discriminatory and clearly formulated;
- the Constitution allows a degree of limitation on individual rights and freedoms, as well as freedom of economic activity, provided that this is achieved by means of legislation; the limitations are necessary in a democratic society in order to protect the rights and freedoms of other persons and values entrenched in the Constitution, as well as constitutionally important objectives; the limitations do not deny the nature and essence of the rights and freedoms; the constitutional principle of proportionality is followed;
- individual economic activity may be restricted when it is necessary to protect the interests of consumers, fair competition and the other values entrenched in the Constitution; the special measures of protection of the interests of consumers are: restriction of establishment of discriminatory prices, state regulation of the size of prices and tariffs for the goods of the monopolistic market, establishment of the requirements for the quality of goods as well as other requirements for monopolistic entity of economy, etc.
- due to complexity of economic activity and the dynamics of particular relations, regulation in this area may be subject to change.

The Constitutional Court noted that under the legal provision in dispute, the equipment of the customer is connected to the distribution network, while this equipment can only be connected to the transmission network in cases where, due to established technical or maintenance requirements, the operator of the distribution network refuses to connect the equipment (which is in the territory of the activity of the distribution network operator specified in the licence) of the customer to the distribution network. Such legal regulation does not deny the right of the consumer to have access to the electricity energy system and this regulation applies to all customers; thus it equally ensures this right of all customers.

The limitation of the opportunity for customers to choose their electricity provider (either the operator of the distribution network or the operator of the transmission network) under the disputed provision of Article 15.2 of the Law on Electricity is not absolute, and it does not create any preconditions for the discrimination of the customer. It does not in itself result in discrimination for a certain group of persons, neither are privileges bestowed on a certain group of persons. On the contrary, this legal regulation is

aimed at the equal protection of electricity customers. Thus, such legal regulation seeks to ensure the general welfare of the Nation as well.

The Constitutional Court also took into account a preliminary ruling adopted by the Court of Justice of European Communities.

The Constitutional Court held that the disputed provision of the Law on Electricity is not in conflict with the Constitution.

Languages:

Lithuanian, English (translation by the Court).



Luxembourg Constitutional Court

Important decisions

Identification: LUX-2008-3-001

a) Luxembourg / **b)** Constitutional Court / **c)** / **d)** 12.12.2008 / **e)** 00047/08 / **f)** Case of X v. Y / **g)** *Mémorial, Recueil de législation* (Official Gazette), A no. 197 of 22.12.2008 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

5.2.1.2.1 Fundamental Rights – Equality – Scope of application – Employment – **In private law**.
5.3.33 Fundamental Rights – Civil and political rights – **Right to family life**.

Keywords of the alphabetical index:

Parental right / Parental authority / Parental authority, joint / Child, natural / Child, born out of wedlock, parental authority / Child, born out of wedlock, equal treatment with legitimate child / Divorce / Parental authority, exercise.

Headnotes:

Articles 302.1 and 378.1 of the Civil Code, insofar as they do not permit the joint exercise of parental authority by divorced parents in respect of children of both spouses, do not comply with Article 10bis.1 of the Constitution, which states that Luxembourgers are equal before the law.

Summary:

Having received an application by X seeking to establish joint parental authority in respect of the child of both spouses following the parents' divorce, the Court of appeal referred the following preliminary points of law to the Constitutional Court:

“Do Articles 302.1 and 378.1 of the Civil Code comply with Article 10bis of the Constitution in assigning on principle the sole exercise of parental authority in the event of divorce to one of the parents, thereby excluding the other parent

from the exercise of parental authority, subject to their right of supervision and right of access?

Do Articles 302.1 and 378.1 of the Civil Code comply with Article 10bis of the Constitution in assigning on principle the sole exercise of parental authority in the event of divorce to one of the parents without the law providing for the possibility of maintaining or establishing joint parental authority in cases where the joint exercise of parental authority would be justified by the interest of the child whereas Article 380 of the Civil Code provides for the possibility of establishing joint parental authority for unmarried parents in the case of a natural child recognised by both parents, regardless of whether the parents cohabit or live separately?"

I. The Constitutional Court, after acknowledging that, as a rule, it was in the interest of children for parental authority to be exercised jointly by their parents and not solely by one of them, held that the principle of parental authority being exercised solely by the mother or father after divorce had no rational justification.

II. The Constitutional Court, after observing that married parents who were not judicially separated jointly exercised parental authority in respect of their child even if they actually lived separately and that the Civil Code allowed unmarried parents of a "natural child" to jointly exercise parental authority in respect of the recognised child, whether they lived together or were judicially separated, further considered that the difference in the exercise of parental authority between the situation of divorced or judicially separated parents and that of married parents, just as between the situation of divorced or judicially separated parents and that of parents having recognised the natural child, had no rational justification.

III. Finally, the Court held that, by permitting the joint exercise of parental authority by the parents of a "natural child" they had recognised, whereas a child born out of wedlock could not benefit from the joint exercise of parental authority by his divorced or judicially separated parents, the articles of the Civil Code in dispute created a differentiation with no rational justification between the situation of children born in wedlock and that of children born out of wedlock.

In the light of these considerations, the Constitutional Court replied that the legal provisions contested did not comply with Article 10bis.1 of the Constitution.

Languages:

French.



Moldova

Constitutional Court

Important decisions

Identification: MDA-2008-3-003

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 20.05.2008 / **e)** 9 / **f)** Concerning the exception of unconstitutionality of the provision of Article 401.3.1 of the Criminal Procedure Code of the Republic of Moldova / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

1.1.1.1.2 Constitutional Justice – Constitutional jurisdiction – Statute and organisation – Sources – **Institutional Acts.**

1.2.3 Constitutional Justice – Types of claim – **Referral by a court.**

2.1.1.4.2 Sources – Categories – Written rules – International instruments – **Universal Declaration of Human Rights of 1948.**

3.3 General Principles – **Democracy.**

3.7 General Principles – **Relations between the State and bodies of a religious or ideological nature.**

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

5.3.13.5 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Suspensive effect of appeal.**

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

Keywords of the alphabetical index:

Appeal, jurisdiction / Court, decision / Constitutional Court, legislative role / Criminal procedure, Code.

Headnotes:

Under the Constitution, Moldova is a democratic state governed by the rule of law, in which human dignity and rights and freedoms, as well as the free development of human personality represent supreme values that are to be safeguarded (Article 1.3).

Constitutional provisions for human rights and freedoms shall be understood and implemented in accordance with the Universal Declaration of Human Rights and with other conventions and treaties endorsed by the Republic of Moldova (Article 4.1 of the Constitution).

Laws with the potential to suppress or diminish fundamental human and citizens' rights and freedoms may not be adopted in the Republic of Moldova (Article 54.1).

Under Article 20 of the Constitution, everybody has the right to obtain effective protection from competent courts of jurisdiction against actions infringing on his or her legitimate rights, freedoms and interests. Legislation cannot restrict the access of persons to justice, whether they are physical persons or legal entities; indicted persons or injured parties.

Article 26 of the Constitution safeguards the right of defence is guaranteed, so that everybody has the right to respond independently by appropriate legitimate means to an infringement of his or her rights and freedoms. As a core element of the right to a fair trial, the right of defence is a fundamental one which cannot be restricted.

Summary:

The Supreme Court of Justice submitted a petition to the Constitutional Court referring to the exception of unconstitutionality of the provision of Article 401.3.1 of the Criminal Procedure Code (CPC) of the Republic of Moldova.

Article 401 of the CPC designates the persons who may declare an appeal. According to the contested provision of Article 401.3.1 of the CPC, an injured party may declare an appeal in regards to the criminal aspect of the proceedings where a criminal case is to be initiated based only on the preliminary complaint of the damaged party.

The Court noted that the Republic of Moldova has proclaimed the protection and promotion of human rights as fundamental democratic principles. In accordance with Article 1.3 of the Constitution, the Republic of Moldova is a democratic state governed by the rule of law, in which human dignity and rights and freedoms, free development of human personality, justice and political pluralism represent supreme values that require protection.

In conformity with the CPC, the injured party is also party to a criminal trial. The goal of criminal procedure is the protection of individuals, society and state against

crimes, and the protection of individuals and society against abusive acts committed by officials investigating or trying alleged or committed crimes, so that individuals who have committed crimes will be punished according to his or her guilt and innocent persons will not be prosecuted and convicted (Article 1.2).

The Court pointed out that the contested provision of the CPC effectively prevents the injured party from applying to the judicial institutions for protection and taking advantage of all procedural guarantees which govern a fair trial in a democratic society.

The Constitutional Court took the view that Article 401.3.1 of the CPC was at odds with the constitutional stipulations on free access to justice (Article 20), right to defence (Article 26), restrictions on the exercise of certain rights and freedoms (Article 54), ways to appeal against sentences pronounced in courts of law (Article 119). It declared the following provision of Article 401.3.1 unconstitutional:

“...with regard to the criminal aspect, criminal cases are only to be initiated based upon the preliminary complaint of the injured party”.

Dissenting opinion:

One Judge expressed a dissenting opinion, to the effect that the Constitutional Court's decision was ill-founded, since the issue regarding the right of the injured party to lodge an appeal against the criminal aspect of his sentence was not an issue of constitutionality but rather one of opportunity; furthermore, it is related to the competences of the legislative power.

The legal text under dispute concerns the injured party, and is covered by a limiting norm which stipulates the situations where an appeal can be lodged against penal judgments, and the persons who can do so. The problem with the lodging of an appeal by an injured party lies with the criminal aspect of a sentence, where the trial is launched solely on the basis of the preliminary complaint of the injured party. Within the framework of the trial the criminal aspect consists of the designation of the offence, the charges and the punishment of the defendant. In enacting the provisions of Article 401 the lawmaker respected the principle of penal procedure law upon joint accusation which is applicable in the Republic of Moldova. With respect to categories of case where the trial does not concern the preliminary complaint of the injured party, it applied the principle of public charging according to which the criminal side represents an issue of public interest as opposed to a private one.

The judge took the view that as the contested norms did not contravene the Constitution and international treaties to which the Republic of Moldova is party and the issue under consideration was one of opportunity, related exclusively to the competences of the Parliament, the Court had exceeded its powers by adopting the decision.

Address:

The unconstitutionality of the provision of Article 401.3.1 of the CPC determines the need for the stipulation in Article 60 of the CPC of the right of the injured party to lodge an appeal or some other recourse, depending on the case, with regard to the criminal perspective of the case.

Upon consideration of the case the Court determined several loopholes in Title III, Chapter I “Party of prosecution” of the CPC.

On the grounds of Article 28 of the Law on Constitutional Court and Article 79 of the Constitutional Jurisdiction Code, the Constitutional Court requested the Parliament to examine the address and to notify the Court about the decision taken on that matter.

Languages:

Romanian, Russian.



Identification: MDA-2008-3-004

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 03.07.2008 / **e)** 10 / **f)** Constitutionality control of the Law no. 90-XVI dated 5 April 2007 on amending and supplementing Annex no. 3 to the Law no. 764-XV dated 27 December 2001 “Regarding the administrative and territorial organisation of the Republic of Moldova” / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

2.1.1.4.14 Sources – Categories – Written rules – International instruments – **European Charter of Local Self-Government of 1985.**

3.7 General Principles – **Relations between the State and bodies of a religious or ideological nature.**

4.8.4.1 Institutions – Federalism, regionalism and local self-government – Basic principles – **Autonomy.**

4.8.5 Institutions – Federalism, regionalism and local self-government – **Definition of geographical boundaries.**

Keywords of the alphabetical index:

Territorial law / Territorial unit, autonomous, status / Territory, self-governing / Local authority, law-making power / Property, public, transfer, conditions, procedure.

Headnotes:

Articles 109 and 110 of the Constitution set out the basic principles of local public administration and administrative and territorial organisation. These constitutional principles are clarified in the Law on Local Public Administration, which stipulates that authorities of local public administration must exercise in line with the law and their powers within the limits of the territory in question (Article 3.2).

The organisation of local administration, of the national territory and the general functioning of local autonomy is regulated through the organic law by Parliament (Article 72.3.f of the Constitution).

In accordance with Articles 17 and 18 of the Law on the Administrative and Territorial Organisation of the Republic of Moldova – formation, abolition, modification of the status of administrative and territorial units and changes to their borders (arising from the necessity of transferring localities from one administrative and territorial unit to another) are carried out by Parliament after consultation with citizens.

Summary:

The ground for consideration of this case was the complaint lodged by a group of parliamentarians for constitutional control of the Law on modifying and supplementing of Annex no. 3 which is an integral part of the Law on administrative and territorial organisation of the Republic of Moldova.

Under the disputed provisions, the regional Sugar Factory was included as part of Făleşti City being managed by the mayoralty. The argument was put forward in the complaint that the legislation breached the principles of local autonomy, consultation of

citizens' opinions on local matters of special interest, legality and collaboration over the settlement of common issues and protection of public property by the state. The authors of the complaint were of the view that the law was adopted without consultation of the opinion of the citizens of Sărata Veche Commune and in the absence of a decision by the Council of Sărata Veche Commune on whose territory the locality Sugar Factory is located. They argued that the transfer of the property of this commune to another administrative and territorial unit without preliminary consultation was a serious infringement of local interests and the principle of local autonomy.

The Court ascertained that requests from Făleşti District Council and Făleşti City Council and procedures at the general meeting of the local Sugar Factory had served as grounds for amending the Law regarding the Administrative and Territorial Organisation of the Republic of Moldova” and for the inclusion of the locality Sugar Factory as part of Făleşti City.

Formation of a locality, which in this case does not constitute a separate administrative and territorial unit, does not infringe the principle of local autonomy. The legal provision referring to the local Sugar Factory was adopted on the basis of a decision by the local populace in its favour. It does not interfere with the right of administrative and territorial units to resolve and to manage a significant area of public affairs.

Having at its disposal the requests of Făleşti District Council, Făleşti City Council and the procedures at the general meeting of the local Sugar Factory, Parliament was entitled to include the factory within Făleşti City. The issue under discussion concerns the population of both localities and their interests. When this particular law was adopted, the principle of collaboration in settling joint matters of the localities concerned – Sugar Factory and Făleşti City – was respected.

The Court held to be ill-founded the arguments set out in the complaint regarding Article 127.3 of the Constitution which stipulates the protection of public property belonging to the state and to administrative and territorial units. The contested law refers exclusively to administrative and territorial organisation and does not establish rules with regard to property.

Languages:

Romanian, Russian.



Identification: MDA-2008-3-005

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 21.10.2008 / **e)** 18 / **f)** Constitutionality review of some provisions of clause 13 of the Regulation on the method of determining and paying life indemnities for sports performers approved by the Government Decision no. 1322 of 29 November 2007 / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

1.2.1.8 Constitutional Justice – Types of claim – Claim by a public body – **Ombudsman**.
 1.3.2.1 Constitutional Justice – Jurisdiction – Type of review – **Preliminary / ex post facto review**.
 1.3.5.10 Constitutional Justice – Jurisdiction – The subject of review – **Rules issued by the executive**.
 2.1.1.1.1 Sources – Categories – Written rules – National rules – **Constitution**.
 2.1.1.4.6 Sources – Categories – Written rules – International instruments – **European Social Charter of 1961**.
 3.4 General Principles – **Separation of powers**.
 4.6.3.2 Institutions – Executive bodies – Application of laws – **Delegated rule-making powers**.
 5.4.18 Fundamental Rights – Economic, social and cultural rights – **Right to a sufficient standard of living**.

Keywords of the alphabetical index:

Compensation / Appeal, jurisdiction / Constitutional Court, decision, execution / Social protection, state / State, duty to protect.

Headnotes:

The Supreme Law of the Republic of Moldova clearly sanctions the principle of separation and co-operation of state powers in Article 6, stipulating that the Legislative, the Executive and the Judicial Powers are separate and co-operate in the exercise of their prerogatives, in accordance with the provisions of the Constitution.

In conformity with Article 96.1 of the Constitution and Article 1.1 of Law no. 64-XII of 31 May 1990 on Government, the Government ensures the realisation of the domestic and external policy of the state and

carries out general management of public administration. In its activity it is guided by the Constitution, by other laws of the Republic of Moldova, by decrees of the President of the Republic of Moldova and by international treaties to which the Republic of Moldova is party (Article 2).

The Executive is authorised to adopt decisions, ordinances and regulations. Article 102.2 of the Constitution, Article 30.1 of the Law regarding Government, and Article 11.1 of Law no. 317 of 18 July 2003 regarding the normative acts of government and other authorities of central and local public administration expressly provide that the Government adopts decisions as to the coming into force of legislation. As they are adopted and executed on the basis of law, government decisions have less legal force than legislation, and cannot contradict or exceed it.

Summary:

Ombudsman Iurie Perevoznic lodged a petition with the Constitutional Court, seeking the constitutional review of certain provisions of clause 13 of the Regulation on the method of determination and payment of life indemnities for sports performers approved by Government Decision no. 1322 of 29 November 2007.

The petitioner raised certain concerns as to the conformity with the Constitution of clause 13 of the Regulation excepting the phrase “Those sportsmen, who submitted requests for the allocation of life indemnities before 31 December 2006 and did not receive them, will receive the indemnity in accordance with the 1999 version of Article 34 of the Law no. 330-XIV on physical education and sport”. He cited several points connected with constitutional norms, and argued that clause 13 of the Regulation was out of line with the provisions of Articles 6 and 102 of the Constitution as it went beyond the framework of Law no. 66-XVI. Thereby, the Government admitted interference in the activity of the legislative and exceeded its duties. It also infringed the principle of non-retroactivity enshrined in Article 22 of the Constitution because it extends its action to matters that arose before the adoption of Law no. 66-XVI. It infringed Article 47 of the Constitution, which sets out the liability of the state to create a decent standard of living for everybody, in that it diminishes the value of life indemnities by comparison with those established before. Finally, it restricted rights obtained legally. However, restrictions are only permissible under conditions stipulated in law in accordance with Article 54.2 of the Constitution.

The Court pointed out that the provisions of clause 13 of Government Decision no. 1322 by which it was decided to make payment and recalculate life indemnities in accordance with Law no. 66-XVI to sportsmen who until 1 January 2007 were entitled to receive or were already receiving that indemnity in conformity with the 1999 version of Article 34 of the Law no. 330-XIV exceeded the framework of Law no. 66-XVI conveying in their contents a primary normative character. Law no. 66-XVI modified the amount of life indemnity, specifying only that its disbursement would commence with effect from 1 January 2007. As a consequence, the new provisions are only applicable to those sportsmen who were entitled to receive a life indemnity as of the date stipulated in the law.

By providing conditions for disbursement and fresh calculation of life indemnities beginning with 1 January 2007 for sportsmen who were entitled to receive the indemnity on the basis of the 1999 version of Article 34 of Law no. 330-XIV the Government exceeded its powers, thus breaching Articles 6 and 102.2 of the Constitution.

The Court dismissed as ill-founded the petitioner's argument on the violation of the principle of non-retroactivity of the law enshrined in Article 22 of the Constitution. As mentioned before, government decisions are acts subordinated to law. They have less legal force by comparison with legislation, and a lower normative act cannot confer a retroactive character on the law.

The extension of provisions of clause 13 of the Regulation to legal relationships that came into being before 1 January 2007 does not demonstrate a breach of the principle of non-retroactivity as the petitioner suggested. Rather, it demonstrates that the Government has exceeded its duties. The allegation of violation of Articles 47 and 54 of the Constitution was equally ill-founded.

It is true that Article 47 of the Supreme Law lays down a fundamental right – right to assistance and social protection that in accordance with paragraph 1 presumes the obligation of the State to take action aimed at ensuring that every person has a decent standard of living, whereby good health and welfare based on available food, clothing shelter, medical care and social services are secured for that person and his /her family.

The Court took the opportunity of pronouncing on the nature of life indemnity granted to sports performers in proportion to labour conscription guaranteed by Article 47 of the Constitution. In accordance with Article 34 of the Law no. 330-XIV, social indemnity is

granted to sports performers in case of withdrawal from active sports activity for winning a golden, silver or a bronze medal at the Olympic Games, World and European Senior Championships, or other Olympic events.

The norm in question extends to a group of persons who meet objective criteria, clearly stated in Article 34 of Law no. 330-XIV, and not society as a whole. It grants the right to indemnity in other cases than those specified in Article 47.2 of the Constitution and itself represents social assistance from the state destined for some subjects of lawful relations specified by law. It does not form part of the public system of social insurance.

Accordingly, the right of sports performers to life indemnities does not represent a category of fundamental rights which cannot be restricted; this was why the Court rejected as ill-founded the petitioner's argument as to the violation of Article 47 and, by implication, of Article 54 of the Constitution.

The Constitutional Court recognised as unconstitutional the provisions of clause 13 of the Regulation on the method of determination and payment of life indemnities for sports performers approved by Government Decision no. 1322 of 29 November 2007:

“... but starting with 1 January 2007 the amount of life indemnity is calculated and paid in conformity with the provisions of Law no. 66-XVI of 22 March 2007 referring to the amendment of Article 34 of the Law no. 330-XIV of 25 March 1999 on physical education and sport.

As regards those sportsmen who received life indemnity in conformity with the 1999 version of Article 34 of the Law no. 330-XIV on physical education and sport the amount of life indemnities is to be calculated and paid starting with 1 January 2007 in accordance with the provisions of the Law no. 66-XVI of 22 March 2007 referring to the amendment of Article 34 of the Law no. 330-XIV of 25 March 1999 on physical education and sport.”

Languages:

Romanian, Russian.



Identification: MDA-2008-3-006

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 16.12.2008 / **e)** 21 / **f)** Constitutionality of some stipulations in the Law on Free Entrepreneurship Zone “Expo-Business-Chișinău” no. 625-XIII of 03.11.1995, Law on Free Economic Zones no. 440-XV of 27.07.2001 and Law on Customs Tariff no. 1380-XIII of 20.11.1997 / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

1.2.1 Constitutional Justice – Types of claim – **Claim by a public body.**

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

1.4.3.1 Constitutional Justice – Procedure – Time-limits for instituting proceedings – **Ordinary time-limit.**

1.5.6.3.1 Constitutional Justice – Decisions – Delivery and publication – Publication – **Publication in the official journal/gazette.**

3.25 General Principles – **Market economy.**

Keywords of the alphabetical index:

Commercialisation / Competition, economic, protection / Economy / Entrepreneur, equal status / Tax control / Tax exemption / Taxation of partners, rules.

Headnotes:

In accordance with the fundamental principles enshrined in the Constitution, the major factors of the economy of the Republic of Moldova are free market, free economic initiative and fair competition. In applying these principles the state shall ensure regulation of economic activity, freedom of trade and of entrepreneurial activity, safeguard fair competition and set up an appropriate framework for the development of all factors capable of stimulating production, the protection of the national interests involving economic, financial and currency exchange activity, increasing the numbers in gainful employment, establishing adequate conditions for improving the quality of life, and guaranteeing the inviolability of investments made by physical and juridical entities including those from abroad.

The author of the constitutional complaint under consideration in these proceedings contended that those businesses situated within the Free Entrepreneurship Zone “Expo-Business-Chișinău” benefit from a preferential customs and fiscal regime

by comparison with other economic entities. Although formally residents of the free economic zone, they in fact transact their business across the entire territory of the Republic of Moldova. Thus, raw material imported by the residents of the free zone may be processed at businesses located outside the free zone. As a result, the state had created fiscal and customs incentives which created conditions for the emergence of unfair competition, a state of affairs that contravened the Constitution and other national legislation on fiscal affairs, competition and entrepreneurship and enterprises.

Summary:

On 16 February 2004 the Court pronounced constitutional certain stipulations of the Law on Free Entrepreneurship Zone “Expo-Business-Chișinău” no. 625-XIII dated 3 November 1995, Article 15.4 of the Law on Free Economic Zones no. 440-XV dated 27 July 2001 and Article 28.1 of the Law on Customs Tariff no. 1380-XIII dated 20 November 1997.

The argument put forward in the complaint was that by providing fiscal and customs incentives the state creates conditions for the emergence of unfair competition. Such a state of affairs contravenes the stipulations of Articles 9.3, 126.1, 126.2.b and 126.2.c of the Constitution, various provisions of the Fiscal Code, Law on Competition Protection and the Law on Entrepreneurship and Enterprises.

The norm under dispute is to be found in Article 28.1 of the Law on Customs Tariff, and concerns the exemption from customs tax for goods originating from the free economic zone which applies to the rest of the customs territory. The Court held that this norm did not infringe the constitutional principles of free market, free economic initiative and fair competition because, under Article 58.2 of the Constitution, the legal system of taxation will safeguard the fair arrangement of fiscal duties. The fairness of fiscal duties is guaranteed by the law which stipulates them to be in conformity with Article 130.2.b of the Constitution, which covers the formation, administration, utilisation and control of state financial resources. The Court noted that the state, in accordance with Article 126.2.b of the Constitution, had set up an appropriate framework for the development of all factors capable of stimulating production, thus abiding by the basic guidelines of domestic and foreign policy approved by Parliament.

The Court held that the provisions of Article 5 of the Law no. 625-XIII dated 3 November 1995 and Article 15.4 of the Law on Free Economic Zones no. 440-XV dated 27 July 2001 were consistent with the fundamental principles concerning free market,

free economic initiative and fair competition. They also conformed to the constitutional stipulations as to the obligation of the state to guarantee freedom of trade and entrepreneurship activity, to safeguard fair competition, to set up an appropriate framework to cover all factors capable of stimulating production, and to protect the national interests relating to economic, financial and currency exchange activities stipulated in Articles 9.3, 126.1, 126.2.b and 126.2.c of the Constitution.

Languages:

Romanian, Russian.



Identification: MDA-2008-3-007

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 18.12.2008 / **e)** 22 / **f)** Exception of unconstitutionality of a provision of clause 9.1 of the Regulation on secondment of employees of enterprises, institutions and organisations from the Republic of Moldova approved by the Government Decision no. 836 of 24 June 2002 / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

1.2.3 Constitutional Justice – Types of claim – **Referral by a court.**
 1.3.5.10 Constitutional Justice – Jurisdiction – The subject of review – **Rules issued by the executive.**
 1.5.4.1 Constitutional Justice – Decisions – Types – **Procedural decisions.**
 1.5.4.3 Constitutional Justice – Decisions – Types – **Finding of constitutionality or unconstitutionality.**
 1.5.6.3.1 Constitutional Justice – Decisions – Delivery and publication – Publication – **Publication in the official journal/gazette.**
 3.7 General Principles – **Relations between the State and bodies of a religious or ideological nature.**
 4.8.4.1 Institutions – Federalism, regionalism and local self-government – Basic principles – **Autonomy.**

Keywords of the alphabetical index:

Autonomy, regional / Local government, freedom / Delegation of powers / Legislation, delegated / *Ultra vires.*

Headnotes:

The Constitution of the Republic of Moldova refers in Chapter VIII entitled “Public Administration” to the legal nature and basic principles of local public administration and outlines the general scheme of local public administration authorities.

Under the Constitution, public administration as manifested in administrative territorial units is based on the principles of local autonomy, of decentralisation of public services, of the eligibility of local public administration authorities and of consulting citizens on local problems of special interest.

The principle of local autonomy and that of decentralisation of public services represent the expression of administrative decentralisation regime enforced at the level of public administration of state’s territory.

In accordance with Article 112.1 of the Constitution, the authorities of public administration exercising local autonomy in villages and cities are elected local councils and elected mayors. Relationships between local public authorities both at the first and second levels (and centrally) do not have a subordination character.

The main rules to guide local public administration authorities are set out in Article 113.3 of the Constitution. This stipulates that relationships between public authorities are based on the principles of autonomy, legality and co-operation in solving common problems.

Summary:

The Supreme Court of Justice lodged a complaint with the Constitutional Court which served as grounds for the examination of the case referring to the exception of unconstitutionality in conformity with Article 12 of the Civil Procedure Code. The argument was evinced that clause 9.1 of the Regulation on secondment of employees of enterprises, institutions and organisations approved by Government (Decision no. 836 of 24 June 2002) runs counter to Articles 102.2, 109.1, 109.2, 112.1, 112.2 and 113.3 of the Constitution.

The Constitutional Court noted that this provision encroached on the basic principles of local public administration including the principle of local autonomy stated in the Constitution, namely, Articles 109.1, 109.2, 112.1, 112.2 and 113.3. These provisions require local public administration authorities to be autonomous in their organisation of their activities and to exert autonomy through elected local council and mayors under conditions of law and in accordance with Articles 3.1, 8.1 and 8.2 of the European Charter of Local Autonomy. The latter provisions stipulate that the term local autonomy means the right and effective capacity of local communities to solve and supervise, in accordance with the law, an important area of public affairs in the interest of the people and under their own responsibility. Any administrative control of local communities can only be exercised in circumstances and cases foreseen by the Constitution or law. Any administrative control of the local community's activity can usually only extend to the provision of respect for legality and constitutional principles. However, administrative control may include regular checks by higher level authorities with regard to tasks which are carried out by local communities.

The Court emphasised that the secondment abroad of chief executives of local public authorities of the second level is not a matter that needs or should be subject to co-ordination at the level of Prime Minister or administrative control at the superior level. The latter would only apply in cases of infringement of legislation or on submission of a request from the local community. However, it is a matter of public concern, in that secondment presupposes the spending of public funds and notification of the central authority in cases of emergency; the public interest prevailing over all other interests of public servants.

The Court noted that the provision in dispute is of primary character, intervening in the field of law, although the Government in accordance with the stipulations of Article 102.2 of the Constitution adopts decisions on ensuring the execution of laws. The Court decided that in enacting the provision contained in clause 9.1 of the Government Regulation, the Government had exceeded its duties as laid down in Article 102 of the Constitution and in the Law concerning Government.

Languages:

Romanian, Russian.



Netherlands Council of State

Important decisions

Identification: NED-2008-3-009

a) Netherlands / **b)** Council of State / **c)** Third Chamber / **d)** 03.09.2008 / **e)** 200706325/1 / **f)** Stichting Overlegorgaan Caribische Nederlanders v. College Bescherming Persoonsgegevens / **g)** *Administratiefrechtelijke Beslissingen* 2008, 335; *Jurisprudentie Bestuursrecht* (JB) 2008, 222 / **h)** CODICES (Dutch).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
5.2.2.3 Fundamental Rights – Equality – Criteria of distinction – **Ethnic origin**.

Keywords of the alphabetical index:

Data, personal, collecting, processing / Discrimination, foreigners.

Headnotes:

Establishing a separate database for 'problem' youths of Antillean origin does not constitute a breach of anti-discrimination clauses in the Constitution or international treaties.

Summary:

I. The Dutch Data Protection Authority granted permission to the Minister of Housing, Communities and Integration and to the mayors of twenty one cities to incorporate personal data relating to ethnicity into an Antilleans Reference Index. This national database would contain identified data and reference data on persons under the age of twenty five, who were either themselves born in the Dutch Antilles or Aruba, or whose parent or parents were born there. In order for their data to be contained in the Antilleans Reference Index, youths had to fulfil one or more of the so-called problem criteria, such as the perpetration of violent or drug related offences, accumulation of rent arrears, evading the obligation to attend school or not registering with the municipal

personal records database. The Antilleans Reference Index would not contain substantive information, but merely data to establish whether a youth was known to local authorities and who would be the contact person.

II. The foundation Consultative Body Caribbean Dutch Citizens, referred to here as “the foundation”, contested the decision. However, the Dutch Data Protection Authority dismissed its objections. The foundation then launched proceedings in an administrative law court. The District Court quashed the Data Protection Authority’s decision. On appeal to the Administrative Jurisdiction Division of the Council of State, the minister and the mayors argued that the Antilleans Reference Index was a necessity and that its establishment implied no discrimination against Antilleans.

III. The Administrative Jurisdiction Division of the Council of State held that the incorporation of personal data regarding the ethnicity of Antilleans was necessary for reasons of important general interest, a requirement set by the Personal Data Protection Act. The problems relating to Antillean youths were very serious, of greater severity than those belonging to other high-risk groups. An urgent solution to the problem was needed. Furthermore, the Administrative Jurisdiction Division of the Council of State held that there was no breach of Article 1 of the Dutch Constitution or of provisions of treaties that are binding on the Netherlands. The Antilleans Reference Index was a proportionate way of achieving a legitimate aim, as the database would not contain substantive information and facilitated an integrated approach to the problems of Antillean youths.

Supplementary information:

In November 2008 the Minister for Housing, Communities and Integration decided not to proceed with plans to set up a separate register listing the names of Antillean youths who are considered to be trouble-makers. Shortly afterwards, the minister resigned, having lost the support of her own (Labour) party. The future of the Antilleans Reference Index is uncertain.

Languages:

Dutch.



Poland

Constitutional Tribunal

Statistical data

1 September 2008 – 31 December 2008

Number of decisions taken:

Judgments (decisions on the merits): 35

- Rulings:
 - in 15 judgments the Tribunal found some or all challenged provisions to be contrary to the Constitution (or other act of higher rank)
 - in 20 judgments the Tribunal did not find the challenged provisions to be contrary to the Constitution (or other act of higher rank)
- Initiators of proceedings:
 - 11 judgments were issued at the request of courts – question of legal procedure
 - 8 judgments were issued at the request of private individuals (physical or natural persons) – the constitutional complaint procedure
 - 7 judgments were issued at the request of the Commissioner for Citizens’ Rights (i.e. Ombudsman)
 - 3 judgments were issued at the request of local authorities
 - 2 judgments were issued at the request of the First President of the Supreme Court
 - 2 judgments were issued at the request of trade unions
 - 1 judgment was issued at the request of the President of the Republic – preliminary review procedure
 - 1 judgment was issued at the request of a group of Deputies (members of the first chamber of Parliament)
- Other:
 - 4 judgments were issued by the Tribunal in plenary session
 - 7 judgments were issued with dissenting opinions attached.

Important decisions

Identification: POL-2008-3-006

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 23.04.2008 / **e)** SK 16/07 / **f)** / **g)** *Monitor Polski* (Official Gazette), 2008, no. 38, item 342; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2008, no. 3A, item 45 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

1.3.5 Constitutional Justice – Jurisdiction – **The subject of review.**

3.16 General Principles – **Proportionality.**

5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression.**

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

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

Keywords of the alphabetical index:

Health, right / Norm, legal, interpretation, application / Expression, freedom.

Headnotes:

Freedom of expression, under Article 54.1 of the Constitution, is not necessarily limited to information and opinions that are regarded as favourable or perceived to be harmless or neutral; it encompasses the expression of opinions in all forms and in all circumstances. An “opinion” is understood not only as the expression of personal assessment as regards facts and occurrences of various spheres of life, but also as a presentation of opinions, conjectures, predictions and judgments regarding controversial matters, and the communication of information concerning both ascertained and conjectured facts. The broadest scope of freedom of expression and the right to voice criticism exists in the sphere of politics. Yet, freedom of expression also encompasses other areas of public and private life. Freedom of expression has particular significance in the shaping of attitudes and opinions on matters that attract public interest or cause concern.

Petitions, proposals and complaints, as referred to in Article 63 of the Constitution (right to petition), concern the broadly understood activity of public authority, which is characterised by its political nature.

Summary:

The subject of review in the present case were provisions of the Act on Chambers of Physicians, under which physicians must abide by the principles of professional ethics and are subject to sanctions for failure to do so. The provisions also authorise medical courts to adjudicate on penalties such as warning, reprimand, suspension or deprivation of the right to practice a profession. The challenged provision of Article 52 of the Code of Medical Ethics expresses the so-called principle of loyalty, prescribing an obligation to express opinions on the activity of another physician with particular caution, as well as a prohibition on discrediting the person in public.

Medical courts interpret the prohibition on public discredit as a prohibition on any public criticism, irrespective of the motives underlying its expression or the veracity of allegations. The complainant alleged an infringement of freedom of expression by the adopted interpretation of the Code of Medical Ethics, and pointed out that the imposed limitation of the right is not justified in view of the principle of proportionality.

The Constitutional Tribunal examined Article 52.2 of the Code of Medical Ethics, in conjunction with Articles 15.1, 41 and 42.1 of the Act of 17 May 1989 on Chambers of Physicians. It held that to the extent that it prohibits the expression of public statements on professional activities of another physician, where the statements are veracious and justified by the protection of the public interest, the provision runs counter to Article 54.1, read in conjunction with Articles 31.3 and 17.1 of the Constitution, and is inconsistent with Article 63 of the Constitution.

It is necessary to compare two values: the freedom to make public statements that are truthful and justified by the protection of the public interest with the appropriateness of the protection of the public interest connected with the public image of health service and its employees. Any limitations upon the freedom of expression on the grounds of the protection of the public interest have to be weighed against patients' rights to proper health care and to information. Furthermore, the limitations must satisfy the formal criteria for the admissibility of limitations upon constitutional freedoms and rights, and pass a test of proportionality, which is composed of three elements:

1. the prerequisite of usefulness of a norm;
2. the prerequisite of the legislator's necessity to act;
3. the prerequisite of proportionality in the strict sense.

The Tribunal acknowledges the need for certain limitations upon the freedom of expression and the right to voice criticism in relations existing between physicians, on account of the necessity to protect patients' confidence in the health care system, which is indispensable for the proper functioning of the medical profession as a whole, the specific nature of relations between a physician and a patient, based on the trust the patient places in his or her physician, and, finally, the specific character of diagnostic and therapeutic decisions, which are very often taken in circumstances of incomplete understanding of the conditions related to a given case. However, it may be necessary to voice public criticism of another physician, within the limits of the veracity of the statements expressed, and the need to protect the patient's health and life. The Code of Medical Ethics should not be interpreted in such a way as to impose an outright ban on voicing public criticism by another physician.

A complex statutory norm is a norm of universally binding law (e.g. of a statute) specified in detail by the content of a particular decision, e.g. an act adopted by an organ of a professional self-regulating body, belonging to a separate deontological normative order. Provisions of the Code of Medical Ethics acquire legal value solely in conjunction with another act of universally binding law, as can be seen from the relevant provisions of the Act on Chambers of Physicians.

The subject of review within the procedure of a constitutional complaint is a normative act in its substantive meaning. Of decisive significance in the assessment of a particular act is whether its content is general (i.e. the provision is addressed to a particular category of persons non-identifiable by name) and abstract in its nature (i.e. the content of the provision does not exhaust itself in a one-off obligation to behave in a particular manner). The assessment is undertaken for each and every act separately, applying the presumption of normative nature of legal acts.

Cross-references:

Decisions of the Constitutional Tribunal:

- Judgment U 15/88 of 07.06.1989, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1989, item 10;
- Judgment U 6/92 of 19.06.1992, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1992, no. I, item 13;
- Procedural decision U 1/92 of 07.10.1992, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1992, no. II, item 38;
- Procedural decision U 5/94 of 06.12.1994, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1994, no. II, item 41; *Bulletin* 1994/3 [POL-1994-3-021];
- Procedural decision U 7/99 of 14.12.1999, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1999, no. 7, item 170;
- Judgment P 6/99 of 15.12.1999, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1999, no. 7, item 164; *Bulletin* 2000/1 [POL-2000-1-002];
- Procedural decision P 13/99 of 29.03.2000, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2000, no. 2, item 68;
- Judgment K 21/00 of 13.03.2001, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2001, no. 3, item 49;
- Judgment SK 1/01 of 12.07.2001, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2001, no. 5, item 127;
- Judgment SK 10/03 of 13.01.2004, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2004, no. 1A, item 2; *Bulletin* 2004/1 [POL-2004-1-009];
- Judgment P 21/02 of 18.02.2004, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2004, no. 2A, item 9; *Bulletin* 2004/2 [POL-2004-2-012];
- Judgment P 2/03 of 05.05.2004, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2004, no. 5A, item 39; *Bulletin* 2004/2 [POL-2004-2-015];
- Judgment K 4/06 of 23.03.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2006, no. 3A, item 32; *Bulletin* 2006/1 [POL-2006-1-006];
- Judgment U 4/06 of 22.09.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2006, no. 8A, item 109;
- Judgment P 3/06 of 11.10.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2006, no. 9A, item 121;
- Judgment P 10/06 of 30.10.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2006, no. 9A, item 128; *Bulletin* 2007/2 [POL-2007-2-003];
- Judgment P 1/06 of 20.02.2007, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2007, no. 2A, item 11;
- Judgment K 8/07 of 13.03.2007, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2007, no. 3A, item 26;
- Procedural decision SK 13/07 of 16.10.2007, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2007, no. 9A, item 115.

Decisions of the European Court of Human Rights:

- Judgment no. 9815/82 of 08.07.1986 (*Lingens v. Austria*); *Special Bulletin Leading Cases – ECHR* [ECH-1986-S-003];
- Judgment no. 11798/85 of 23.04.1992 (*Castells v. Spain*); *Special Bulletin Leading Cases – ECHR* [ECH-1992-S-003];
- Judgment no. 22678/93 of 09.06.1998 (*Incal v. Turkey*), *Reports* 1998-IV;
- Judgment no. 25181/94 of 25.08.1998 (*Hertel v. Switzerland*), *Reports* 1998-VI;
- Judgment no. 26132/95 of 02.05.2000 (*Bergens Tidende v. Norway*), *Reports of Judgments and Decisions* 2000-IV;
- Judgment no. 37928/97 of 17.10.2002 (*Stambuk v. Germany*);
- Judgment no. 56767/00 of 16.11.2004 (*Selistö v. Finland*).

Languages:

Polish.



Identification: POL-2008-3-007

a) Poland / b) Constitutional Tribunal / c) / d) 03.06.2008 / e) K 42/07 / f) / g) *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2008, no. 100, item 648; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2008, no. 5A, item 77 / h) CODICES (Polish).

Keywords of the systematic thesaurus:

- 1.6.6 Constitutional Justice – Effects – **Execution**.
- 3.9 General Principles – **Rule of law**.
- 3.12 General Principles – **Clarity and precision of legal provisions**.
- 3.16 General Principles – **Proportionality**.
- 5.3.5.1.1 Fundamental Rights – Civil and political rights – Individual liberty – Deprivation of liberty – **Arrest**.
- 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**.

Keywords of the alphabetical index:

Criminal proceedings / Criminal procedure, file, access.

Headnotes:

The constitutional right to defence constitutes a fundamental standard of a democratic state under the rule of law, and thus it applies to all proceedings carrying a penal sentence. Therefore, it should be understood broadly, i.e. as a right vested in an individual at the point where proceedings are instituted against him or her (in practice from the time the charges are presented to the accused), until a valid court judgment is handed down and enforced.

The right to defence is not absolute in nature, but any limitations on it are subject to an assessment undertaken against the background of the principle of proportionality. Prerequisites for the admissibility of limitations upon the exercise of constitutional rights and freedoms are: imposition of the limitations by way of statute, a functional relationship between the limitation and the realisation of values under the Constitution, prohibition on the violation of the essence of a given right or freedom, and the existence of a necessity to impose such limitations in a democratic state under the rule of law. The third prerequisite implies the need to consider whether the introduced regulation is capable of producing the intended effects, whether the regulation in question is indispensable to the protection of the public interest and whether its effects are proportionate to the burdens imposed by it on the citizen.

Summary:

The subject of review in the present case was Article 156.5 of the Code of Criminal Procedure. This sets out the principles of making case records accessible and making copies available in the course of preliminary proceedings to parties to proceedings, defence counsel or attorneys and statutory representatives. In his application, the Ombudsman only challenged that part of the provision which established the formal procedural requirement for making case records accessible, i.e. the obligation to obtain the consent of the body conducting preliminary proceedings. The Ombudsman had some concerns over the applicability of the provision in situations where a decision concerning a temporary arrest is taken in the course of preliminary proceedings.

The Constitutional Tribunal ruled that Article 156.5 of the Code of Criminal Procedure, insofar as it allows for an arbitrary exclusion of free access to those

materials of preliminary proceedings that substantiate the motion of a public prosecutor concerning a temporary arrest, does not conform to Articles 2 and 42.2, read in conjunction with Article 31.3 of the Constitution.

Jurisprudential practice shows that Article 156.5 of the CCP is understood in different ways. The point of divergence as regards the interpretation of the challenged provision lies in the very general manner of its formulation. Of particular significance here is the fact that the prerequisites the body conducting the proceedings should take in to account are not specified. Moreover, the legislator failed to define the phrase "court case records", as contained in the challenged provision.

The challenged provision remains in contradiction with the standards of diligent legislation and clarity and precision of law. In practice, allows an arbitrary interpretation by bodies conducting proceedings of circumstances that are decisive as regards the consent to make records or other materials accessible to the suspect and their defence counsel.

Any interference with the Preliminary proceedings are not based on the principle of free access to case records. As a matter of principle, such an assumption is legitimate, since the possibility of attaining the aims of preliminary proceedings is dependent upon factors such as maintaining confidentiality of certain information. Therefore, the principle of making case records accessible in court proceedings is replaced by a discretionary application of the principle in preliminary proceedings. The answer to the question as to whether the suspect or their defence counsel may acquaint themselves with case records depends each time on legal circumstances and, above all, factual background.

sphere of the right to defence, such as refusal to grant access to case records, becomes an issue of particular significance in cases of the imposition or extension of the period of a temporary arrest. Where a preventative measure in the form of a temporary arrest has been applied, persons who have been arrested (and their defence counsel) must be able to personally acquaint themselves with the materials of preliminary proceedings justifying the motion of a public prosecutor, in order to exercise their right to defence.

The effectiveness of the right to defence should be the decisive factor in the choice of the part of case records to be made accessible to those temporarily under arrest and their defence counsel. All materials of preliminary proceedings justifying the motion of a public prosecutor in this respect have to be freely accessible.

The provision under review is often perceived as a provision that allows for the denial of access to the records of arrest proceedings. Such a limitation of the right to defence does not fulfil the criteria mentioned above, stemming from Article 31.3 of the Constitution. The challenged provision disregards the principle of proportionality, since it allows for an excessive limitation of the right of an individual, to the extent that the limitation may encroach on the essence of the constitutional right to defence. Similarly, the provision in question does not fulfil the principle of subsidiarity, as it would be possible to safeguard the effectiveness of preliminary proceedings by using other methods which would be less restrictive for the citizen. In particular, this may encompass a greater selectivity of information included in the justification of the motion concerning an arrest.

The decision in the present case can be described as a "scope judgment". Thus, where only part of a provision has been pronounced unconstitutional, as is the case here, it will not lose its binding force. The interpretation of the challenged regulation should be altered so as to eliminate any possibility of an unconstitutional interpretation.

Cross-references:

Decisions of the Constitutional Tribunal:

- Judgment K 11/94 of 26.04.1995, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1995, no. 1, item 12;
- Judgment U 11/97 of 27.11.1997, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1997, nos. 5-6, item 67, *Bulletin* 1997/3 [POL-1997-3-025];
- Judgment K 36/98 of 13.04.1999, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1999, no. 3, item 40;
- Judgment K 7/99 of 11.01.2000, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2000, no. 1, item 2, *Bulletin* 2000/1 [POL-2000-1-004];
- Judgment K 34/99 of 28.06.2000, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2000, no. 5, item 142;
- Judgment K 24/00 of 21.03.2001, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2001, no. 3, item 51;
- Judgment SK 8/00 of 09.10.2001, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2001, no. 7, item 211;
- Judgment P 12/01 of 04.07.2002, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2002, no. 4A, item 50;

- Judgment P 14/01 of 24.03.2003, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2003, no. 3A, item 22;
- Procedural decision SK 50/03 of 27.01.2004, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2004, no. 1A, item 6;
- Judgment SK 39/02 of 17.02.2004, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2004, no. 2A, item 7;
- Judgment K 18/03 of 03.11.2004, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2004, no. 10A, item 103;
- Judgment SK 29/04 of 06.12.2004, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2004, no. 11A, item 114;
- Judgment SK 54/06 of 06.03.2007, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2007, no. 3A, item 23;
- Judgment K 47/05 of 19.03.2007, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2007, no. 3A, item 27;
- Judgment K 39/07 of 28.11.2007, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2007, no. 10A, item 129; *Bulletin* 2008/1 [POL-2008-1-005].

Decisions of the European Court of Human Rights:

- Judgment no. 10444/83 of 30.03.1989 (*Lamy v. Belgium*), *Series A*, no. 151;
- Judgment no. 24479/94 of 13.02.2001 (*Lietzow v. Germany*), *Reports of Judgments and Decisions* 2001-I;
- Judgment no. 23541/94 of 13.02.2001 (*Garcia Alva v. Germany*);
- Judgment no. 25116/94 of 13.02.2001 (*Schöps v. Germany*), *Reports of Judgments and Decisions* 2001-I;
- Judgment no. 24244/94 of 25.06.2002 (*Migoń v. Poland*);
- Judgment no. 38822/97 of 09.01.2003 (*Shishkov v. Bulgaria*);
- Judgment no. 41035/98 of 18.01.2005 (*Kehayov v. Bulgaria*); *Bulletin* 2008/3 [POL-2008-3-002].

Languages:

Polish.



Identification: POL-2008-3-008

a) Poland / b) Constitutional Tribunal / c) / d) 17.06.2008 / e) K 8/04 / f) / g) *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2008, no. 110, item 707; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2008, no. 5A, item 81 / h) CODICES (Polish).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
 5.3.32 Fundamental Rights – Civil and political rights – **Right to private life**.
 5.3.32.1 Fundamental Rights – Civil and political rights – Right to private life – **Protection of personal data**.

Keywords of the alphabetical index:

Data, personal, collecting, processing / Rights and freedoms, statutory limitation, requirement.

Headnotes:

The constitutional principle of informational autonomy should be understood as both the right of an individual to decide autonomously whether they should disclose personal information to others, and the right to exercise control over such information where other subjects are in possession of it. The right is not and should not be absolute in nature. This is highly significant in relations between the citizen and public authorities.

The scope of the notion of informational autonomy encompasses both personal data and data concerning the property and the economic situation of an individual. In the latter case, Constitutional Tribunal's case-law allows for the possibility of setting less rigorous criteria as regards limitations on autonomy.

The legislator's observance of the principle of proportionality within the scope of limitations upon individual informational autonomy should be assessed against the background of the relevant constitutional provisions indicated above. Accordingly, there has to be an interest encompassed within the definition contained in Article 31.3 of the Constitution. Furthermore, it is necessary to demonstrate the fulfilment of the prerequisite of lawfulness of encroachment into the sphere of informational autonomy. It stems from the prerequisites that the regulation that has been introduced must enable the attainment of the assumed purposes (the principle of usefulness), must be necessary for the protection of the public interest with which it is connected (the

principle of necessity), and its effects must be proportionate to the burdens it imposes upon the citizen (the principle of proportionality in the strict sense).

Summary:

The Ombudsman initiated proceedings challenging Article 7b of the Fiscal Control Act, which allowed organs of fiscal control to gather, make use of and process personal data, without the consent of the person whom the data concerns. The Ombudsman argued that there was too broad a definition of the authority of the organs of fiscal control within the above provision; and pointed to the lack of a requirement that the information gathered be necessary for a case under investigation or that the request to access the information should contain justification.

The Constitutional Tribunal pronounced Article 7b of Fiscal Control Act to be inconsistent with the constitutional principle of informational autonomy.

The clause within the provision, under which the gathering and processing of personal data is admissible solely for the purpose of realisation of statutory tasks of fiscal control, does not meet the requirements stemming from the principle of informational autonomy (Article 51.2 of the Constitution). A general reference of this nature cannot be reconciled with the requirement of precision which, under Article 2 of the Constitution, is required in circumstances where state authorities encroach into the sphere of constitutionally guaranteed rights and freedoms. Furthermore, the relationship between the type of data gathered (i.e. concerning a particular person) and the purpose of the activity (the reason for which the organs of fiscal control were gathering the data) was not specified. The prerequisite of purposefulness, stemming from the challenged provision, does not correspond to the constitutional requirement of necessity within the meaning contained in Articles 31.3 and 51.2 of the Constitution.

Cross-references:

Decisions of the Constitutional Tribunal:

- Judgment K 21/96 of 24.06.1997, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1997, no. 2, item 23; *Bulletin* 1997/2 [POL-1997-2-016];
- Judgment K 15/98 of 11.04.2000, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2000, no. 3, item 86; *Bulletin* 2000/2 [POL-2000-2-011];

- Judgment K 21/99 of 10.05.2000, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2000, no. 4, item 109; *Bulletin* 2000/2 [POL-2000-2-013];
- Judgment K 33/99 of 03.10.2000, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2000, no. 6, item 188; *Bulletin* 2000/3 [POL-2000-3-020];
- Judgment K 19/99 of 13.02.2001, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2001, no. 2, item 30; *Bulletin* 2001/1 [POL-2001-1-008];
- Judgment U 3/01 of 19.02.2002, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2002, no. 1A, item 3; *Bulletin* 2002/2 [POL-2002-2-014];
- Judgment SK 40/01 of 12.11.2002, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2002, no. 6A, item 81; *Bulletin* 2003/1 [POL-2003-1-005];
- Judgment K 41/02 of 20.11.2002, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2002, no. 6A, item 83; *Bulletin* 2003/1 [POL-2003-1-006];
- Judgment K 45/02 of 20.04.2004, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2004, no. 4A, item 30;
- Judgment K 4/04 of 20.06.2005, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2005, no. 6A, item 64.

Languages:

Polish.



Portugal

Constitutional Court

Statistical data

1 September 2008 – 31 December 2008

Total: 183 judgments, of which:

- Prior review: 1 judgment
- Abstract *ex post facto* review: 2 judgments
- Appeals: 154 judgments
- Complaints: 41 judgments
- Declarations of inheritance and income: 1 judgment
- Political parties' accounts: 8 judgments

Important decisions

Identification: POR-2008-3-009

a) Portugal / b) Constitutional Court / c) Second Chamber / d) 23.09.2008 / e) 444/08 / f) / g) *Diário da República* (Official Gazette), 209 (Series II), 28.10.2008, 43791 / h) CODICES (Portuguese).

Keywords of the systematic thesaurus:

- 1.3.5.1 Constitutional Justice – Jurisdiction – The subject of review – **International treaties**.
 4.5.2 Institutions – Legislative bodies – **Powers**.
 5.3.39 Fundamental Rights – Civil and political rights – **Right to property**.

Keywords of the alphabetical index:

Compensation / Ships, owners, duty.

Headnotes:

The ordinary legislature enjoys a margin of discretion in applying the right to compensation for unwarranted damage sustained by anyone as a result of another's conduct. Although full reparation of damage need not be guaranteed in all cases, the limitations that may be applied in such matters must be justified and must not result in paltry compensation.

While it is not for the Constitutional Court to determine the actual threshold beyond which compensation resulting from application of the statutory limits is so paltry that it can no longer be regarded as real reparation for the damage sustained, it must ensure that the constitutional objective of protecting citizens against injustice is respected, in accordance with the principle of evidential scrutiny.

Summary:

In accordance with the Brussels Convention of 10 October 1957 on limitation of the liability of the owners of sea-going ships, a liability limitation fund was constituted at the Lisbon Maritime Court with a view to compensating victims entitled to claim compensation for damage sustained following a collision between two fishing vessels. The fund amounted to € 8.267.41.

Following an accident at sea, a total of 47,086,770 Portuguese escudos (€ 234,867.82) was claimed at the meeting of the creditors as compensation for damage to property with default interest.

The Lisbon Maritime Court considered that damage to property, in a total amount of € 65,785.04, had been substantiated and, following the distribution of the full amount in the liability limitation fund among all the claimant creditors, the sum due to two of them was set at € 2,465.34. These claimants' appeals to the Lisbon Court of Appeal and the Supreme Court of Justice were dismissed, and they accordingly appealed to the Constitutional Court arguing a breach of the rule of law in that applying the above-mentioned international convention, and, consequently, the fund provided for therein, to coastal vessels was contrary to the letter of the law, from which it was clear that Portugal had wished to apply the Brussels Convention of 10 October 1957 not to coastal vessels but solely to sea-going ships.

They maintained that application of this Convention in the case under consideration was also unconstitutional since it constituted a violation of the right to private property and to fair compensation.

With regard to the first question – application of the Convention to coastal fishing vessels – the Constitutional Court held that, under its governing law, it could not deal with the dispute concerning the scope of an international convention, since the decision appealed against had not applied or refused to apply a rule laid down in legislation violating a higher-ranking law. On reviewing the constitutionality of setting the amount in the liability limitation fund in

accordance with the Brussels Convention, the Constitutional Court held that compensation representing only 3.75% of the corresponding claim must be deemed manifestly paltry, taking into account the fact that the total damage sustained by the victims amounted to € 65,785.04. The disproportion between this sum and the amount awarded as compensation was so shocking that the latter must be deemed insignificant.

Allowing that a ship, whatever its tonnage, could wrongfully collide with another ship, thereby causing it to sink, and that the maximum amount payable for the pecuniary damage caused was only € 8,267.41 clearly undermined the essence of the constitutional right to reparation of damage, as a principle inherent in the rule of law.

The Constitutional Court accordingly declared the rule setting up the liability limitation fund provided for in the Brussels Convention of 10 October 1957 on limitation of the liability of the owners of sea-going ships, as amended by the Brussels Protocol of 21 December 1979, unconstitutional in so far as the amount of compensation awarded following distribution of the fund among the claimants was equivalent to 3.75% of certain victims' claims amounting to a total of € 65,785.04.

Languages:

Portuguese.



Identification: POR-2008-3-010

a) Portugal / **b)** Constitutional Court / **c)** Second Chamber / **d)** 07.10.2008 / **e)** 488/08 / **f)** / **g)** *Diário da República* (Official Gazette), 250 (Series II), 29.12.2008, 51150 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

4.5.2 Institutions – Legislative bodies – **Powers**.
5.3.5.1 Fundamental Rights – Civil and political rights – Individual liberty – **Deprivation of liberty**.
5.3.15 Fundamental Rights – Civil and political rights – **Rights of victims of crime**.

Keywords of the alphabetical index:

Amnesty / Compensation / Imprisonment.

Headnotes:

It is for the ordinary legislature to decide, under its discretionary powers, to grant a pardon from punishment and determine the categories of offences concerned and whether the pardon shall be subject to conditions, provided that it does so in a general, abstract way and with regard to all eligible persons and situations concerned.

Summary:

The appellant complained that she had not benefited from the pardon of a one-year prison sentence because she had failed to repair the damage sustained by an injured party through the payment of compensation within 90 days of her conviction and sentencing. She maintained that this condition was to her detriment on account of her financial situation, that it failed to comply with the principle of equality before the law and that it restricted her rights and freedoms without this restriction being of a general, abstract nature.

The Constitutional Court held that, although it was for the ordinary legislature to grant a general pardon under its crime policy, its discretionary legislative power was not without bounds. On the contrary, it must comply with constitutional standards and principles. One such principle which the ordinary legislature must uphold in this context was equality before the law.

The Constitutional Court considered that the legislature had not breached the principle of equality before the law. The pardon had been granted to all persons convicted of the same offence as the appellant and who therefore found themselves in the same situation. Furthermore, the time-limit for payment of the compensation, constituting a condition for granting the pardon, had also been imposed in a general, abstract manner, in so far as all those sentenced to prison and to pay compensation had been treated in the same way as regarded their entitlement to benefit from the clemency measure.

With regard to the question whether the impugned legislation breached the principle of equality enshrined in the law or resulted in unlawful discrimination on account of the appellant's financial situation, the Constitutional Court considered that the impugned condition making the pardon void in certain circumstances had not been imposed without sufficient

rational or tangible grounds and, consequently, could under no circumstances be deemed to constitute an unreasonable or arbitrary measure.

The compensation was not only justified by reason of the commission of the offence, it was also a legal consequence thereof, in the same way as the criminal sentence imposed.

The body holding the power to grant clemency and, simultaneously, the right to punish (*"jus puniendi"*) – the state – could consider that, where the punishment was pardoned, legal stability would be fully achieved only if a defendant ordered to pay compensation in respect of the offence committed had effectively repaired the damage caused to the injured party.

Since a pardon is a measure of clemency which cancels in full or in part the penalty applied to the offence of which the defendant has been convicted, but does not nullify the criminal and civil unlawfulness of the acts committed, the legislature's decision not to grant a pardon in cases of non-payment of civil compensation, of even more relevance to the need for legal peace with the injured party, is indeed justified. There is accordingly a sufficient tangible ground for failing to take into consideration the beneficiary's financial situation when granting a general pardon.

The Constitutional Court therefore held that the legislation in question was not unconstitutional.

Supplementary information:

One judge voted against since he was of the opinion that the rules in question could be incompatible with the Constitution from a certain standpoint, since they allowed the convicted person 90 days to pay the compensation due to the injured party, failing which the pardon would be revoked. He considered that imposing this condition, whereby the pardon became void in certain circumstances, was itself constitutionally valid, but that the lack of a "safeguard clause" making it possible to exclude cases of manifest absolute incapacity to pay was not.

By entirely ignoring financial situations in which it is effectively impossible to make the payment within the time-limit, the legislation in question treats dissimilar situations in the same way, without sufficient grounds, and thereby breaches the principle of equality.

In addition to voting, one judge submitted a written opinion, as he considered that, although he had voted for the decision, it had not settled all the doubts raised with regard to the principle of equality.

Languages:

Portuguese.



Identification: POR-2008-3-011

a) Portugal / **b)** Constitutional Court / **c)** Second Chamber / **d)** 07.10.2008 / **e)** 491/08 / **f)** / **g)** *Diário da República* (Official Gazette), 219 (Series II), 11.11.2008, 46368 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

4.6.8.1 Institutions – Executive bodies – Sectoral decentralisation – **Universities**.

5.2.1.1 Fundamental Rights – Equality – Scope of application – **Public burdens**.

5.4.1 Fundamental Rights – Economic, social and cultural rights – **Freedom to teach**.

5.4.21 Fundamental Rights – Economic, social and cultural rights – **Scientific freedom**.

Keywords of the alphabetical index:

Administrative act, effects / Education, higher, public.

Headnotes:

University autonomy is a fundamental constitutional guarantee, the subjective scope of which goes beyond the purely institutional level since it also extends to the status of university staff, notably with regard to freedom of research, teaching, thought and pedagogy, in accordance with the Constitution, constituting what is usually designated "academic freedom".

However, university autonomy and scientific freedom require that evaluation of teaching proficiency, for career advancement purposes, should continue to be performed by the traditional method, that is to say according to the rule of appraisal of absolute and relative merit.

Summary:

The question raised in this judgment is the constitutionality of the interpretation of two rules

contained in the legislation on the Status of Civil Service Managerial Staff, whereby members of teaching staff of public universities can be promoted without sitting a competitive examination aimed at assessing their absolute and relative merit.

The appeal was based on two separate grounds.

Firstly, it argued that the unconstitutionality in substance of the challenged legislation resulted from the fact that this situation should have been governed by a law, since it came within parliament's reserved legislative jurisdiction and went beyond the law delegating legislative powers, which merely stated that its aim was to clarify the right to a career and to remuneration without making any reference to the scope of these rights or the possibility of extending the legal rules to the special professions. This accordingly breached the constitutional provision whereby "Laws delegating powers of legislation shall determine the subject, the purpose, the extent and the period of the delegation ..." With regard to this ground, the judgment, based firstly on elements of comparative law and Portuguese doctrine regarding the nature of delegations and secondly on the concept of university autonomy, ruled that the legislature had not acted outside the scope of the delegating law.

The second argument of *de facto* unconstitutionality "for having breached the constitutional principles of justice, equality and universities' autonomy" required an analysis of university autonomy within the meaning of the Constitution and in particular of its limits, as a parameter to be observed by the ordinary legislature – whether the author of the delegating law or of the delegated legislation. With regard to this ground, the judgment points out that university autonomy is aimed at affording institutional guarantees of freedom of research and teaching. Universities are therefore institutions which simultaneously exercise scientific freedom and the freedom to teach the knowledge obtained through it.

This teaching puts into practice the right to education and to instruction. To this extent it corresponds to the service provision role of universities, as public services. It is nonetheless a service of a different kind from those proposed by other public bodies and must therefore be supplied under different conditions, although universities are part and parcel of the education system.

Equality of access to the teaching profession and to career advancement must be achieved through selection methods based solely on the criteria of merit and scientific proficiency, assessed through examinations open to all.

Since autonomy is an attribute of all universities – which is why it is simultaneously an individual right and a collective institutional right (of all universities) – the ordinary legislature must be acknowledged to have the competence and the discretionary power to identify a method which "while being general in nature also guarantees everyone concerned equality of opportunity and public comparison of their respective merits and capabilities".

The judgment then raises the question whether the rules under consideration respect these constitutional criteria. It bases its reasoning, *inter alia*, on the concept that the equality requirement is not synonymous with egalitarianism, and consequently "the principle of equality does not prohibit distinctions, except where they have no tangible foundation" and finds that, in the case under consideration, there is no tangible ground for failing to apply to "university teaching staff, who are also civil servants, albeit members of a special profession" the "special entitlement conferred solely on civil service managers", which the legislature established in recognition of the performance of managerial functions for a certain time.

The Constitutional Court nonetheless considers that university autonomy and scientific and academic freedom require that the evaluation continue to be performed by the general method of public comparison of capabilities and merit, that is to say according to the principle of appraisal of absolute and relative merit.

This being the case, scientific or teaching proficiency that may have been acquired outside the university by a member of faculty who has held a civil service managerial post can be of only limited importance when applying the general method for appraising merit and scientific capabilities. The reasoning behind the regulatory provision that periods of service in managerial posts must be taken into account for career advancement purposes is completely divorced from that underlying the criterion of appraisal according to merit and scientific proficiency, imposed in connection with university autonomy. Consequently, the two are in no way related.

There is therefore no sufficient tangible ground for exempting a member of university teaching staff from a competitive examination, the aim being to assess his or her merit and scientific proficiency in absolute and relative terms.

The Constitutional Court accordingly held that the interpretation of the challenged legislation, whereby members of the teaching staff of public universities could be promoted without having to sit a competitive examination aimed at assessing their absolute and

relative merit was unconstitutional since it breached the principle of equal access to the civil service, as a corollary to the constitutional principle of equality, and the principle of university autonomy.

Supplementary information:

The judgment's interest lies, *inter alia*, in its references to comparative law.

Languages:

Portuguese.



Identification: POR-2008-3-012

a) Portugal / **b)** Constitutional Court / **c)** Third Chamber / **d)** 09.10.2008 / **e)** 496/08 / **f)** / **g)** *Diário da República* (Official Gazette), 219 (Series II), 11.11.2008, 46376 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

3.10 General Principles – **Certainty of the law.**
 3.16 General Principles – **Proportionality.**
 3.17 General Principles – **Weighing of interests.**
 5.3 Fundamental Rights – **Civil and political rights.**
 5.3.39.3 Fundamental Rights – Civil and political rights – Right to property – **Other limitations.**

Keywords of the alphabetical index:

Development, planning / Immovable property / Land ownership, limitation.

Headnotes:

The legislature holds full powers to devise spatial planning rules restricting building rights. This jurisdiction covers regulations on types of access to and use and possession of “private property”, and is “in conformity with the Constitution”. Building rights cannot be considered part of the constitutional protection of property, and therefore the ordinary legislature is not required to respect it on the same basis as other constitutional rights, freedoms or safeguards.

Summary:

The appellant challenges the constitutionality of the provisions of a Regulation contained in the *Plano de Ordenamento da Orla Costeira* (Coastal Zone Development Plan), to the extent that they permit the demolition of her house and also affect her ownership rights as being analogous to the other rights, freedoms and safeguards coming under the legislative jurisdiction of Parliament. In addition to this aspect relating to unconstitutionality in substance, the appellant invokes the unconstitutionality of the same provisions in their “practical scope”, on the grounds that they infringe the constitutional safeguard on ownership, the right of private economic initiative and the underlying principles of proportionality and protection of confidence, as deriving from the constitutional principle of the rule of law.

Notwithstanding the fact that Constitutional Court case-law firmly holds that the right of private ownership, while belonging to the chapter of the Constitution on Economic, Social and Cultural Rights, is highly complex in structure, embracing certain “rights and powers that are analogous to rights, freedoms and safeguards”, the Court considers it essential to demonstrate that the Constitution protects building rights as a component part of the right of ownership if the appellant's contentions are to be admissible. As the appellant notes, it would be incomprehensible for the right of ownership to be challenged by the regulation in question, as this is a field which should be considered normally to come under the exclusive jurisdiction of Parliament, to the extent that it induces a “destructive” effect *vis-à-vis* the powers comprised in a right which is analogous to “rights, freedoms and safeguards”.

Consequently, the Court holds that the question of constitutionality in substance raised by the appellant can only be decided after the first of the constitutionality questions has been settled, to the extent that the main core of this appeal concerns the configuration of the *jus aedificandi*.

The Court contends that the constitutional safeguard on ownership must be understood in the light of certain basic postulates, including the principle of differentiation between the social concept of ownership and its constitutional acceptance. The legal interest protected by the Constitution is different from that protected by civil law, where it typically appears in the form of rights *in rem*. To the extent that the Constitution “ensures” the ownership of the property, it above all protects the individual's option to accede to property liable to appropriation (*res intra commercium*), and to use and dispose of it under conditions established by any legal, constitutional or

infra-constitutional system. In addition to this specific constitutional parameter, the Article of the Constitution also enshrines a major institutional guarantee – everyone's right to accede to property liable to appropriation and to use and dispose of it – under conditions established by any legal system. The ordinary legislature is prohibited from “affecting” or “annihilating” the core of the “ownership” principle according to which the constitutionally recognised rights are to be exercised; however, the legislature is also required to comply with the definitive content which this principle can have in its regulatory action.

The definition by the ordinary legislature of a special regional development plan primarily means implementing the provisions of the Constitution which confer on the State the fundamental task, in addition to protecting nature and the environment, of “guaranteeing proper development of the territory”. The Constitution also establishes the right to housing and urban planning, compliance with which requires the State, the autonomous regions and the local authorities to devise “rules on the use, exploitation and transformation of urban land, particularly by means of planning tools, in accordance with the laws on spatial planning and urban development”. This right also requires the State to ensure the enforcement of the right to environment and quality of life by promoting spatial planning. Jurisdiction for formulating regulations governing spatial planning and restricting building rights is an integral part of the legislature's core prerogatives when regulating the type of access, use and possession of “private property”, “in accordance with the Constitution”. Building rights therefore cannot be said to appertain to the constitutional protection of property, and the legislature accordingly does not have to take account of them as a right analogous to a “right, freedom or safeguard”. For the same reason, we cannot conclude that all regulations entailing a “destructive” effect come under the exclusive jurisdiction of Parliament.

In connection with the appellant's second contention to the effect that the regulations in question also violate the right of private economic initiative, even though it is possible to argue that in enshrining such a right – also known as “the right of enterprise” – the Constitution set the aim of guaranteeing that the production and distribution of goods and services must be open to individuals, in the context of a market economy and an open society.

However, the limits of this guarantee are the same as those imposed by all constitutional systems, one of these limits being the basic State task of ensuring proper spatial planning of its territory. Therefore, the exercise of freedom of enterprise is limited by the imperative of town planning regulations.

According to the appellant, the regulations in question “implementing the administrative decision to demolish the building in question” infringe the principle of the rule of law. This principle was primarily violated because in the instant case the protection of legitimate confidence, without which no constitutional system is conceivable for a law-based State, was infringed. The appellant also adduced violation of the principles of proportionality and the prohibition of *ultra vires* action, both of which govern all State action.

In accordance with its case-law on the protection of confidence, the Court considers that two conditions must always be met for a finding that the State has infringed this principle of the rule of law. Firstly, the State must have acted or deliberated in such a way as to prompt individuals to expect a given situation to persist; and secondly, this expectation must be legitimate or based on sound reasons.

According to the Constitutional Court, since it has been established that the issue at stake is not the restriction of a “right, freedom or safeguard”, it cannot validly be argued that the legislature had any duty to offer the individuals in question any less onerous solutions to protect the public interest.

The Court therefore concludes that the regulations in question comply with the Constitution.

Languages:

Portuguese.



Identification: POR-2008-3-013

a) Portugal / **b)** Constitutional Court / **c)** Third Chamber / **d)** 23.12.2008 / **e)** 632/08 / **f)** / **g)** *Diário da República* (Official Gazette), 6 (Series II), 09.01.2009, 161 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

1.2.1.1 Constitutional Justice – Types of claim – Claim by a public body – **Head of State**.
 5.1.2 Fundamental Rights – General questions – **Horizontal effects**.
 5.4.3 Fundamental Rights – Economic, social and cultural rights – **Right to work**.

5.4.17 Fundamental Rights – Economic, social and cultural rights – **Right to just and decent working conditions.**

Keywords of the alphabetical index:

Employment, trial period / Employment, conditions / Employee, protection.

Headnotes:

The right to work, enshrined in the Constitution as a social right, a right to State benefit or a right to the development and adoption of public policies geared to promoting employment, includes in its scope the right to seek employment, the negative interpretation of which generates a right not to be arbitrarily deprived of employment which has been sought and obtained. In the infra-constitutional system, recourse to insecure work based on “fixed-term contracts” must be exceptional, as required by the duty incumbent on the ordinary legislature to prevent unjustified situations of insecure employment.

The principle of necessity or enforceability which governs all infra-constitutional rules restricting fundamental rights does not justify increasing from 90 to 180 days the trial period applicable to workers holding contracts of employment.

Summary:

The President of the Republic requested the Constitutional Court to conduct prior verification of the constitutionality of the rule governing the duration of the trial period set out in fixed-term contracts of employment and increasing the said trial period applicable to workers from 90 to 180 days. According to the President of the Republic, this rule restricts constitutional rights, freedoms and safeguards, because the longer the trial period the greater the insecurity of the legal relationship and the weaker the guarantee of retaining employment.

It must therefore be ascertained whether the restriction noted complies with the principle of proportionality, in the framework of its underlying principles of appropriateness, necessity and reasonability, in accordance with Article 18 of the Constitution.

The judgment points out that under constitutional case-law, to the extent that the Constitution imposes the status of the person, citizen and worker as a criterion governing the possession of constitutional rights, freedoms and safeguards, the Constitution clearly stipulates that the rights which it enshrines cannot be seen exclusively as rights to forbearance

on the part of the State or rights which concern the State only, since they also include rights which, although they concern relations among citizens, can “be binding on private bodies”.

This fact is bound up with the principle of the rule of law and that of the realisation of economic, social and cultural democracy, which derives from the constitutional aim of providing special protection for the status of workers as holders of constitutional rights, freedoms and safeguards. The fact of the matter is that the word “worker” as used in the Constitution embraces all those who work for someone else.

The Constitutional Court stresses that the safeguard on retaining employment, understood as a “right, freedom and/or safeguard”, has a content that cannot be treated in isolation from the right to work, which is also enshrined in the Constitution. As a social right, a right to State benefit or a right to the formulation and adoption of public policies geared to promoting employment, the right to work includes several subjective, complex and multifaceted structures within its scope. These include the right to seek employment as a means of achieving personal projects in a context of human dignity. To that extent, the interest which is legally protected by this specific aspect of the right to work is closely linked to the right freely to choose one's occupation.

In the Portuguese Constitution, however, the right to seek employment has a dimension that results from the prohibition of arbitrary deprivation of employment and from the right to stability of employment, both these aspects deriving from the right to retain employment. That being the case, the State in general and the legislature in particular are required to prevent unjustified situations of insecure employment.

The strict definition of an “unjustified situation of insecure employment” or of the right to stability of employment must also take account of the right to free private economic initiative as enshrined in the Constitution. “The requisite counterbalance to rights in the employment field is the freedom of enterprise and private initiative, without which neither employment nor workers can exist”. In the context of a market economy and an open society, respect for the legal interest which freedom of enterprise is intended to protect requires individuals not to be barred from producing and distributing goods and services. This means that the freedom to organise the requisite institutional resources for executing the activity initiated must also be included in the mechanism for protecting this legal rule. Thus in the Portuguese legal system, “possession of the enterprise comprises neither its ownership nor

its lease, with their absolute and exclusive natures; on the contrary, such possession is restricted, and the enterprise therefore embraces different legal positions, rights and expectations on the part of the workers which the entrepreneur is legally obliged to respect". The prohibition of arbitrary dismissal and the need to prevent unjustified situations of insecure employment are two of these legal constraints. This is why the Court notes that "the indefinite contract of employment is the type of contract which best serves the worker's interests and the social aims pursued by working activities".

The relations between workers and employers as embodied in indefinite contracts must be the rule and fixed-term contracts the exception. This is why the law currently provides that the possibility of concluding fixed-term contracts must be restricted by criteria which are absent from the regulations governing indefinite contracts.

In the infra-constitutional system, any recourse to insecure work on the basis of fixed-term contracts must be exceptional.

The Court stresses that the legal stipulation of a "trial" or "probation" period coinciding with the initial phase of execution of the contract corresponds to a well-established tradition, accompanied by a justification of the need for such a probation period (coinciding with the initial phase of execution of the contract), particularly in indefinite contracts of employment.

The "probation" period is intended to enable the parties to verify – in the context of an established legal relationship of employment – whether the projected usefulness of the contract corresponds to the actual conditions under which the work is carried out.

Clearly, however, since the two parties do not have the same options as regards terminating the trial period – the worker can do so at any time by providing prior notice, whether or not there is any real justification, whereas the employer can only do so in accordance with the Code – the trial period is particularly advantageous for the employer. To that extent it is understandable that any prolongation of this period will be profitable for the employer and simultaneously "deleterious" to the worker's interests.

Consequently, it would seem obvious that this period must be limited by law. For reasons of protecting the workers' interests, as well as for reasons linked to the constitutional principle of avoiding unjustified situations of insecure employment, the legislature must establish a maximum duration for such "trial periods". The legislature is at liberty to determine the length of probation, but not to refrain from so determining.

The length of the trial period "cannot correspond to such a long time as to rob the principle of retaining employment of all meaning."

Legal measures to prolong the trial period are therefore potentially restrictive of the "right, freedom and safeguard" on retaining one's employment.

In the instant case the aim of amending the relevant legislation is to prolong the trial period solely in respect of unskilled workers. The period would be prolonged to twice the current length, which means that the probation period for such workers would be identical in length to that for skilled workers.

In reply to the question whether it is necessary, or enforceable, in view of the aim pursued by the legislative measures (ensuring that both parties to the contract of employment have a suitable "probation" or "trial" period), for indefinite contracts for unskilled workers to stipulate a trial period which not only corresponds to twice the duration of the current trial period but is equal to the "probation" period applied to skilled workers, the Constitutional Court concludes that the possible marginal increase in efficiency which prolonging the trial period would bring about does not *per se* justify increasing the trial period for unskilled workers from 90 to 180 days, the period demanded for skilled workers. For this reason it concludes that the legislature has not duly protected unskilled workers from unjustified situations of insecure employment, and declares unconstitutional the regulation the constitutionality of which it has examined.

Languages:

Portuguese.



Slovakia

Constitutional Court

Statistical data

1 September 2008 – 31 December 2008

Total number of motions: 10 742

Number of decisions taken:

- Decisions on the merits by the plenum of the Court: 12
- Decisions on the merits by the Court panels: 162
- Number of other decisions by the plenum: 3
- Number of other decisions by the panels: 526



Slovenia

Constitutional Court

Statistical data

1 September 2008 – 31 December 2008

The Constitutional Court held 30 sessions during the above period. 14 were plenary and 16 were in Chambers. Of these, 5 were in civil chambers, 6 in penal chambers and 5 in administrative chambers. There were 358 unresolved cases in the field of the protection of constitutionality and legality (denoted U- in the Constitutional Court Register) and 1 018 unresolved cases in the field of human rights protection (denoted Up- in the Constitutional Court Register) from the previous year at the start of the period 1 September 2008. The Constitutional Court accepted 100 new U- and 788 Up- new cases in the period covered by this report.

In the same period, the Constitutional Court resolved 187 (Up-) cases in the field of the protection of constitutionality and legality (36 decisions and 151 rulings issued by the Plenary Court). 34 cases (U-) cases joined to the above-mentioned cases for common treatment and adjudication.

Accordingly the total number of U- cases resolved was 221.

In the same period, the Constitutional Court resolved 1 119 (Up-) cases in the field of the protection of human rights and fundamental freedoms (22 decisions issued by the Plenary Court, 1 097 decisions issued by a Chamber of three judges).

Decisions are published in the Official Gazette of the Republic of Slovenia, whereas the rulings of the Constitutional Court are not generally published in an official bulletin, but are handed over to the participants in the proceedings.

However, 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-2008-3-003

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 02.10.2008 / **e)** Up-106/05-27 / **f)** / **g)** *Uradni list RS* (Official Gazette), 100/08 / **h)** *Pravna praksa*, Ljubljana, Slovenia (abstract); CODICES (Slovenian, English).

Keywords of the systematic thesaurus:

1.5.4.4 Constitutional Justice – Decisions – Types – **Annulment.**

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights.**

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

Keywords of the alphabetical index:

Police, powers / Privacy, personal, right / Telephone conversation, confidentiality.

Headnotes:

During police proceedings, the police managed to obtain data which is protected by the rules governing privacy of communications (which are constitutionally guaranteed). This was found not to satisfy the conditions under the Constitution which would allow for interference with privacy in communications to be admissible, i.e. that the interference is based on a court order. Because the judgments in question were based on a standpoint which was inconsistent with a constitutionally guaranteed right, the Constitutional

Court overturned those parts of the judgments that referred to the complainant and referred the matter to Nova Gorica District Court for fresh adjudication.

Summary:

The Higher and Supreme Courts had taken the stance in these proceedings that in police proceedings, the police could obtain data saved in the seized telecommunication equipment (i.e. the telephone memory record) without a court order. The question for the Constitutional Court was whether the challenged judgments were founded on a standpoint which was inconsistent with the right determined in Article 37.1 of the Constitution.

Article 37.1 guarantees the privacy of correspondence and other means of communication; it protects the freedom of communication. This right protects the interest of the individual insofar as the content of messages he conveys by any means that allow the exchange or conveying of information will not be divulged without his consent. It also protects his interest in that he is free to decide to whom, to what extent, in what manner, and under what conditions he will convey a certain message. This is the protection of free and unsupervised communication and thereby the protection of the confidentiality of the relations into which an individual enters when communicating. See Klemencic, G.L. Sturm (Editor), *Komentar Ustave Republike Slovenije, Fakulteta za podiplomske državne in evropske studije, Ljubljana, 2002*, p. 391.

The sphere of protection of the privacy of communications includes correspondence and other means of communication (e.g. telephone, fax, computer), and the conveying of written, sound, or image messages or other messages with a subjective informative value. See Klemencic, p. 396, above. Privacy of communication primarily covers data which refers to the content of the message. The Constitutional Court has already taken the stance that the interception and recording of telephone conversations is only admissible if the conditions determined in Article 37.2 of the Constitution are met (Decision no. U-I-25/95, dated 27 November 1997, Official Gazette RS, no. 5/98 and OdlUS VI, 158).

Legal theory supports the position that not only the content of the communication but also the circumstances and facts connected to the communication are protected. See Klemencic again, page 396. When using a telephone, it is not simply the content of the conversation that merits protection, but other data connected with the telephone conversation. See Klemencic, page 396. It follows from the case law of the European Court of Human Rights (ECHR) that information on telephone numbers dialled are

considered an integral element of telephone communications. In this regard, see the judgment in *Malone v. The United Kingdom*, dated 2 August 1984, A 82 page 84, and the judgment in *P.G. and J.H. v. United Kingdom*, dated 25 September 2001, paragraph 45.

In the opinion of the Court, the release of that information to the police without the consent of the subscriber amounts to an interference with the right guaranteed by Article 8 ECHR (Official Gazette RS, no. 33/94, IT, no. 7/94). See paragraph 84 of the judgment in *Malone v. The United Kingdom*, cited above. The scope of the protection of communication privacy must be interpreted more broadly, so that it includes information on telephone calls which are an integral element of the communication. Data in the telephone memory record must, by their nature, be considered an integral element of communication privacy. Thus, the obtaining of data on last dialled and last unanswered calls and the examination of the content of short text messages entail an examination of the content and circumstances of the communication and consequently an interference with the right determined in the first paragraph of Article 37 of the Constitution.

Article 37.2 of the Constitution sets out the conditions that need to be fulfilled in order for limitations on the right to the privacy of correspondence and other means of communication to be admissible. These are as follows:

1. interference is prescribed by law
2. interference is allowed under a court order
3. the duration of the interference is precisely determined
4. interference is necessary for the institution or progression of criminal proceedings or for reasons of national security.

Under Article 37.2 of the Constitution, interference with the freedom of communication is not permitted in the absence of a prior court order. If police are allowed to obtain data that falls within the scope of privacy of communication, as protected by the Constitution, this does not satisfy the conditions set out in Article 37.2. The Higher and Supreme Court judgments under consideration are accordingly based on a standpoint which is inconsistent with the right determined in Article 37.1 of the Constitution. The judgment at first instance is also indirectly based on that standpoint. The Constitutional Court accordingly overturned those parts of the challenged judgments that made reference to the complainant and referred the matter to Nova Gorica District Court for fresh adjudication.

Supplementary information:

Legal norms referred to:

- Article 37.1 and 37.2 of the Constitution [URS];
- Article 59.1 of the Constitutional Court Act [ZUstS].

Cross-references:

- Decision no. U-I-25/95, dated 27.11.1997, Official Gazette RS, no. 5/98 and the Court's Official Annual Collection, OdlUS VI, 158.

Languages:

Slovenian, English (translation by the Court).



South Africa Constitutional Court

Important decisions

Identification: RSA-2008-3-011

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 22.10.2008 / **e)** CCT 41/08; [2008] ZACC 19 / **f)** Hugh Glenister v. The President of the Republic of South Africa and Others / **g)** www.constitutionalcourt.org.za/Archimages/13058.PDF / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

1.3.4.10 Constitutional Justice – Jurisdiction – Types of litigation – **Litigation in respect of the constitutionality of enactments.**

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

4.11.2 Institutions – Armed forces, police forces and secret services – **Police forces.**

Keywords of the alphabetical index:

Act, unconstitutional / Act, community, declaration of invalidity / Amendment, legislative / Judicial review / Appeal, civil proceedings / Assembly resolution / Autonomy, constitutional, relative / Bill, constitutionality / Cabinet / Cabinet of Ministers / Constitution, direct effect / Law, national / Law, promulgation / Legislative discretion / Parliament, autonomy / Parliament, powers, nature / Parliamentary Assembly / Parliamentary legislative sphere / Separation of powers.

Headnotes:

The question for decision in this case was whether it was appropriate for the Constitutional Court to intervene at the bill stage of the legislation process prior to the official enactment of legislation, namely, the promulgation of the National Prosecuting Authority Amendment Bill, 2008 and the South African Police Service Amendment Bill, 2008 which seek to dissolve the specialised crime fighting unit, the Scorpions. The Court held that this would be an infringement of the separation of powers and as such, the Court could not interfere in the affairs of Parliament in this case.

Summary:

The respondent approved draft legislation which, among other things, proposed to dissolve the Directorate of Special Operations Unit (DSO), “the Scorpions”, and relocate them so that they would amalgamate with the South African Police Service. The applicant challenged this decision in the High Court (which was dismissed for lack of jurisdiction) and secondly in the Constitutional Court (hereinafter referred to as the Court) on two bases. Firstly, by an application for direct access on an urgent basis against the judgment of the High Court; and secondly, by an application for direct access to declare that the decision taken by Cabinet was unconstitutional and invalid and that the relevant ministers had to withdraw the two bills. He submitted that it was appropriate for the Court to intervene prior to the legislation being enacted as the DSO would have been destroyed long before the enactment of the legislation. A political party that supported the applicant’s application further argued that because the decision emanated directly from a resolution made by the governing party structure, it amounted to Cabinet having abdicated its constitutional responsibility.

The respondents argued against judicial intervention at this stage, because in order to do so, exceptional circumstances must be established that prove immediate and irreversible harm. The judiciary should not interfere in the processes of Parliament unless it is mandated by the Constitution.

The Court held that if the legislation had been enacted, the applicant’s remedy would have been to challenge its constitutionality. However, the applicant had not waited for this to happen. As the bills were before Parliament, the judiciary was being asked to consider a matter that was presently within the sphere of responsibility of Parliament, and as such to intervene before Parliament had concluded its work. The Court held, however, that the Constitution requires courts to ordinarily refrain from interfering with the autonomy of the legislature and the executive in the legislative process. The ordinary rule is that courts will not interfere until the process is complete, unless exceptional circumstances are apparent. The question whether exceptional circumstances exist depends on the facts of each case and thus would be decided on a case by case basis.

The Court found that the reasons advanced by the parties who argued for judicial intervention required close examination. The Court held that their argument had to fail as the applicant’s case regarding material and substantive harm was premised on the assumption that the legislation would be enacted without material change. However, Parliament could have made significant and substantial amendments to the draft

legislation or, alternatively, have chosen not to enact the legislation at all. Furthermore, if the legislation was enacted and it was found that it was in breach of the Constitution, relief would be available and the legislation would then be declared invalid. In the Court's view, this argument did not establish that material and irreversible harm would result if the Court did not intervene at this stage, and as such the application could not succeed.

Supplementary information:

Legal norms referred to:

- Sections 1, 38, 179.2, 179.4, 85.2 of the Constitution, 1996;
- Section 7.1 of the National Prosecuting Authority Act 32 of 1998, The National Prosecuting Authority Amendment Bill of 2008 (NPAA Bill) (B23-2008), The South African Police Service Amendment Bill (SAPSA Bill) (B30-2008).

Cross-references:

- *The Affordable Medicines Trust and Others v. Minister of Health and Others*, Bulletin 2005/1 [RSA-2005-1-002];
- *Doctors for Life v. Speaker of the National Assembly and Others*, Bulletin 2006/2 [RSA-2006-2-008];
- *Pharmaceutical Manufacturers Association and Another: In re ex parte President of the Republic of South Africa and Other*, Bulletin 2005/3 [RSA-2005-3-009];
- *President of the Republic of South Africa and Others v. South African Rugby Football Union and Others*, Bulletin 1999/3 [RSA-1999-3-008].

Languages:

English.



Identification: RSA-2008-3-012

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 26.11.2008 / **e)** CCT 26/08; [2008] ZACC 21 / **f)** Izak Andreas Geldenhuys v. National Director of Public Prosecutions and Others / **g)** <http://41.208.61.234/uhb/cgisirsi/20090305135139/SIRSI/0/520/J-CCT26-08A> / **h)** CODICES (English).

Keywords of the systematic thesaurus:

5.2.2.11 Fundamental Rights – Equality – Criteria of distinction – **Sexual orientation**.

Keywords of the alphabetical index:

Act, unconstitutional / Discrimination / Discrimination, justification / Sexual orientation / Discriminatory treatment.

Headnotes:

Differentiation in the criminal law on the basis of sexual orientation is presumptively unfair under Section 9.3 and 9.5 of the Constitution and, if not justifiable under Section 36 of the Constitution, is unconstitutional. Different ages of consent for heterosexual and homosexual acts respectively were found unconstitutional.

Summary:

In 2005 the applicant was convicted of violating Sections 14.1.b of the Sexual Offences Act 23 of 1957 (the Act). This section of the Act prohibited the commission or attempted commission of an immoral or indecent act with a girl or boy under the age of 19 years by any male person.

The applicant applied to the Constitutional Court for confirmation of an order made by the Supreme Court of Appeal declaring unconstitutional Section 14.1.b and 14.3.b of the Act. Section 14.3.b is the mirror provision of Section 14.1.b, relating however to acts committed by an adult woman.

The crux of the issue before the Court was the effect of reading Section 14.1.b of the Act with Section 14.1.a of the Act. Read together, the two sections provided that in respect of what were termed indecent acts by an adult man, the age of consent for a girl was 16 years, whereas the age of consent for a boy was 19 years. An equivalent differentiation in respect of indecent acts by adult women arose on reading Section 14.3.b with Section 14.3.a; that is to say, the age of consent for a boy in such situations was 16 years whereas it was 19 years for a girl.

The unanimous judgment of the Court set out the Court's approach to the equality guarantee in Section 9 of the Constitution. First, under Section 9.1 of the Constitution, any differentiation between categories of people must bear a rational connection to a legitimate government purpose, otherwise it is unconstitutional. Second, under Section 9.3 of the Constitution, any differentiation of a specified ground

is presumed unfair. Absent a rebuttal of such a presumption of unfairness, the unfair discrimination is established. Unfair discrimination is unconstitutional unless justified under the general limitation provision in Section 36 of the Constitution.

The Court's analysis focused on Section 9.3. The differentiation was found to be discrimination on the basis of sexual orientation, a listed ground, and was thus found to be presumptively unfair under Section 9.5 of the Constitution. The Court could find no evidence to rebut the presumption. The impugned provisions, therefore, were found to limit Section 9 of the Constitution.

The Court held that the unfair discrimination could not be justified in terms of the limitation clause of the Constitution. Moreover, it was held that the inevitable inference from the unfair differentiation was that "there is something odd, deviant and even perverse about homosexual acts and/or homosexual people". The provisions were found to be unconstitutional and therefore invalid.

In respect of the remedy, the Court followed the approach of the Supreme Court of Appeal in setting an age limit of 16 years for all Section 14.1.b and 14.3.b offences. Regarding the retrospectivity of the order, the Court held that its order shall not invalidate any conviction under Section 14.1.b and 14.3.b unless an appeal from such order is pending, the time of noting such an appeal has not yet expired, or condonation for any late filing of an appeal is granted by a court of competent jurisdiction.

Supplementary information:

Legal norms referred to:

- Sections 91, 9.3, 9.5 and 36 of the Constitution, 1996;
- Section 14.1.a, 14.1.b, 14.3.a, 14.3.b of the Sexual Offences Act 23 of 1957 (now repealed);
- Sections 19 and 20 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

Cross-references:

- *Harksen v. Lane NO and Others*, *Bulletin* 1997/3 [RSA-1997-3-011];
- *National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others*, *Bulletin* 1998/3 [RSA-1998-3-009];
- *President of the Republic of South Africa and Another v. Hugo*, *Bulletin* 1997/1 [RSA-1997-1-004];

- *Pretoria City Council v. Walker*, *Bulletin* 1998/1 [RSA-1998-1-001];
- *Prinsloo v. Van der Linde*, *Bulletin* 1997/1 [RSA-1997-1-003].

Languages:

English.



Identification: RSA-2008-3-013

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 08.12.2008 / **e)** CCT 50/08; [2008] ZACC 23 / **f)** Gumedde v. President of the Republic of South Africa / **g)** <http://www.constitutionalcourt.org.za/Archimages/23.PDF> / **h)** CODICES (English).

Keywords of the systematic thesaurus:

- 1.2.2.1 Constitutional Justice – Types of claim – Claim by a private body or individual – **Natural person**.
- 5.1.1 Fundamental Rights – General questions – **Entitlement to rights**.
- 5.2.2.1 Fundamental Rights – Equality – Criteria of distinction – **Gender**.
- 5.2.2.2 Fundamental Rights – Equality – Criteria of distinction – **Race**.
- 5.2.2.3 Fundamental Rights – Equality – Criteria of distinction – **Ethnic origin**.
- 5.2.2.5 Fundamental Rights – Equality – Criteria of distinction – **Social origin**.
- 5.2.2.13 Fundamental Rights – Equality – Criteria of distinction – **Differentiation *ratione temporis***.

Keywords of the alphabetical index:

Act, unconstitutional / Constitutional invalidity confirmation / Cultural property, ownership / Custom / Customary Law / Declaration of unconstitutionality / Treatment, discriminatory / Divorce / Equal treatment, unequal situations / Justification, grounds.

Headnotes:

The Constitution provides that any differentiation based upon a listed ground is presumed to be unfairly discriminatory. Provisions of the Recognition of Customary Marriage Act (Recognition Act), along with

provisions of certain codified customary law legislation, saw the exclusion of women married before the commencement of the Recognition Act from the benefits of the Recognition Act's property regime. This was held to be unfairly discriminatory. As insufficient justification was provided for this limitation on the right to equality, such provisions were held to be unconstitutional.

Summary:

The applicant entered into a customary marriage with her husband Mr Gumede before 15 November 2000. During the course of the marriage Mrs Gumede had not worked, but had maintained the family household as well as their four children. In 2003 the marriage broke down irretrievably and Mr Gumede instituted divorce proceedings. Although the Recognition Act provided that a customary marriage concluded after its commencement is a marriage in community of property, it provided that a customary marriage concluded before its coming to operation was governed under customary law.

In KwaZulu Natal where Mrs Gumede lived, the KwaZulu Act and the Natal Code both provided that the husband was the head of the family and the owner of all family property. The result therefore, was that a wife in a customary marriage concluded before the commencement of the Act, as was the applicant, would, in effect, not be entitled to any property upon dissolution of the marriage. Provision, however, was made in the Recognition Act for a court, upon the dissolution of a customary marriage, to exercise the powers contemplated in the Divorce Act. In terms of the Divorce Act, a court has discretion, upon the dissolution of a marriage, to transfer property from one spouse to another.

The applicant approached the High Court for an order declaring the relevant provisions of the Recognition Act inconsistent with the equality guarantee afforded by the Constitution. The High Court declared such sections of the Recognition Act as well as certain sections of the KwaZulu Act and the Natal Code inconsistent with the Bill of Rights. The applicant sought confirmation of this order in the Constitutional Court.

The Court examined the Recognition Act and the codified customary law of marriage in KwaZulu-Natal and found these impugned provisions to be self-evidently discriminatory on at least one listed ground, gender. Only women in a customary marriage are subject to these unequal proprietary consequences. Because this discrimination is on a listed ground it was presumed to be unfair, and the burden fell on the respondents to justify the limitation on the equality

rights of women party to marriages concluded under customary law before the commencement of the Recognition Act.

The Court found that the respondents had failed to provide adequate justification for this unfair discrimination. It also held that Section 8.4.a of the Recognition Act, which gives a court granting a decree of divorce of a customary marriage the power to order how the assets of the customary marriage should be divided between the parties, does not cure the discrimination which a spouse in a customary marriage has to endure during the course of the marriage. The matrimonial proprietary system of customary law during the subsistence of a marriage, as codified in the Natal Code and the KwaZulu Act, patently limited the equality dictates of the Constitution and of the Recognition Act itself. For these reasons, the Court confirmed the order of invalidity made by the High Court.

Supplementary information:

Legal norms referred to:

- Sections 9.3, 9.5, 36, 39.2, 167.5 of the Constitution;
- Sections 7.1, 7.2 and 8.4 of the Recognition Marriages Act 120 1998;
- Section 20 of the Kwa-Zulu Act 16 of 1985;
- Sections 20 and 22 of the Natal Code of Zulu Law Proclamation R115 of 1957.

Cross-references:

- *Bhe and Others v. Magistrate, Khayelitsha and Others*, *Bulletin* 2004/3 [RSA-2004-3-011];
- *Moise v. Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Women's Legal Centre as Amicus curiae)*, *Bulletin* 2001/2 [RSA-2001-2-009].

Languages:

English.



Identification: RSA-2008-3-014

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 21.01.2009 / **e)** CCT 24/08 and 52/08 / **f)** President of the Republic of South Africa and Others v. Quagliani; President of the Republic of South Africa and Others v. Van Rooyen and Another; Goodwin v. Director-General, Department of Justice and Constitutional Development (Speaker of the National Assembly and the Chairperson of the National Council of Provinces intervening) / **g)** <http://www.constitutionalcourt.org.za/Archimages/41208.PDF> / **h)** CODICES (English).

Keywords of the systematic thesaurus:

1.1.2.6 Constitutional Justice – Constitutional jurisdiction – Composition, recruitment and Ostructure – **Functions of the President / Vice-President.**

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

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

2.1.1.4.10 Sources – Categories – Written rules – International instruments – **Vienna Convention on the Law of Treaties of 1969.**

4.4.1.2 Institutions – Head of State – Powers – **Relations with the executive powers.**

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

Keywords of the alphabetical index:

Arrest / Cabinet of Ministers / Constitution, constitutional validity / Country, foreign / Criminal charge / Criminal law, compliance / Criminal matters, mutual assistance between states / Criminal procedure, extradition / Detention, actual / Detention, for purposes of extradition, legality / International agreement / International agreement, parliamentary approval / International agreement, validity, assessment / Legislative procedure / Parliament, action, internal.

Headnotes:

The President, as head of the national executive, takes the final decision on whether to enter into an Extradition Agreement. This does not prevent Cabinet Ministers from negotiating and signing such agreements. The Extradition Act 67 of 1962 anticipates and provides for the enforcement of provisions of Extradition Agreements. Authorities are therefore empowered in terms of the Extradition Act to act in terms of Extradition Agreements made in accordance with it.

Summary:

In the Quagliani matter (which included Van Rooyen and Another as respondents), an extradition request was made by US authorities in terms of an Extradition Agreement concluded between the United States and South Africa, for the extradition of the respondents, who were, at that time, in South Africa. In the Goodwin matter, the applicant's extradition from the United States, where he was being detained, was sought by South African authorities in terms of the same agreement.

The applicants in both matters contended in the Constitutional Court that the Extradition Agreement between the United States and South Africa was unconstitutional for three reasons:

1. the President of South Africa had not "enter[ed] into" the Agreement as required by the Extradition Act;
2. the Agreement was not validly approved, as required by the Constitution, by the National Council of Provinces; and
3. the Agreement had not been incorporated into South African domestic law, and moreover, because it was not "self-executing" in terms of the Constitution, it had therefore not been brought into force.

Regarding the first issue, the Court held that the President, as head of the national executive, takes the final decision to enter into an agreement. The fact that Cabinet Ministers played a role in the negotiation and signing of the Agreement was consistent with the exercise of the President's powers as head of the national executive. On the second issue, the Court held that the parties were, in effect, not at liberty to raise such an issue for they had failed join the Provinces in the proceedings. On the last issue, the Court held that the provisions of the Agreement were enforceable to the extent that they had been anticipated and provided for by the Extradition Act, and that reading the provisions of the Extradition Act with those of the Agreement, empowered the authorities to undertake extradition proceedings.

Supplementary information:

Legal norms referred to:

- Sections 83.a, 84.2, 85.2 and 231 of the Constitution of the Republic of South Africa;
- Sections 3.1, 5, 9, 10, 19 and 20 of the Extradition Act 67 of 1962.

Cross-references:

- *Mohamed and Another v. The President of the Republic of South Africa and Others*, Bulletin 2001/2 [RSA-2001-2-007];
- *President of the Republic of South Africa and Others v. South African Rugby Football Union and Others*, Bulletin 1999/3 [RSA-1999-3-008];
- *Doctors for Life International v. Speaker of the National Assembly and Others*, Bulletin 2006/3 [RSA-2006-3-010];
- *Rail Commuters Action Group v. Transnet Ltd t/a Metrorail*, Bulletin 2004/3 [RSA-2004-3-012].

Languages:

English.



Switzerland

Federal Court

Important decisions

Identification: SUI-2008-3-006

a) Switzerland / **b)** Federal Court / **c)** Court of Criminal Law / **d)** 12.06.2008 / **e)** 6B_241/2008 / **f)** X. v. Office for the Enforcement of Sentences of Vaud Canton / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 134 I 221 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

- 3.13 General Principles – **Legality**.
- 3.16 General Principles – **Proportionality**.
- 5.3.3 Fundamental Rights – Civil and political rights – **Prohibition of torture and inhuman and degrading treatment**.
- 5.3.5.1 Fundamental Rights – Civil and political rights – Individual liberty – **Deprivation of liberty**.

Keywords of the alphabetical index:

Solitary confinement, duration / Medication, compulsory / Social isolation, relative.

Headnotes:

Article 3 ECHR; Article 10.2 of the Federal Constitution (right to personal liberty) and Article 36 of the Federal Constitution (limitations of fundamental rights); Article 90.1b of the Swiss Criminal Code. Solitary confinement and treatment with medication during the execution of a measure.

Article 90.1b of the Criminal Code constitutes a sufficient legal basis for ordering the isolation of a dangerous individual executing a measure provided for in Articles 59-61 of the Criminal Code (recital 3.1).

Relative social isolation, namely deprivation of contact with other detainees for reasons of protection, does not constitute degrading or inhuman treatment under Article 3 ECHR (recital 3.2).

Examination of the proportionality of prolonged isolation compared with forced medication (recital 3.3).

Summary:

I. In December 2007 the Vaud Canton's Office for the Enforcement of Sentences ordered X's continuing placement in the solitary confinement sector of the *Établissements de la plaine de l'Orbe* for three months as a security measure. The measure was extended by three months in February 2008. By a judgment of 20 March 2008 the judge for the enforcement of sentences of Vaud Canton dismissed appeals lodged by X. against these two decisions.

The grounds for these decisions were briefly the following: the trial court of Vaud Canton had in 2002 held that X. was not liable for his acts and ordered his placement in an institution for drug addicts, along with simultaneous out-patient treatment of his schizophrenia including the prescription of neuroleptic medication. In 2005 it noted the failure of the above-mentioned placement and ordered X.'s compulsory confinement along with simultaneous treatment of his schizophrenia including the prescription of neuroleptic medication. In 2007 it in the end ordered that X. be made subject to institutional treatment. A number of examinations had shown that X. was making no progress. The experts had diagnosed episodic paranoid schizophrenia with progressive deficit and a syndrome of dependence on multiple psychoactive substances, while drawing attention to the need for therapeutic measures and psychiatric care.

Lodging a criminal-law appeal with the Federal Court, X. submitted that the judgment of 20 March 2008 must be set aside so that a psychiatric examination would be ordered to determine whether he must be compelled to take neuroleptics, he would no longer be obliged to take such medication and he would be released from solitary confinement. He challenged his solitary confinement for a lengthy period, maintaining that the conditions of Article 90 of the Criminal Code were not met, that the measure imposed breached Article 3 ECHR and Article 10 of the Federal Constitution and that its ultimate aim was to compel him to take neuroleptic medication.

II. The Federal Court dismissed the appeal.

Under Article 90.1 of the Criminal Code a person executing a measure provided for in Articles 59 to 61 can be made subject to uninterrupted segregation from others only as a provisional therapeutic measure (indent a), for his or her personal protection or for that of third parties (indent b) or as a disciplinary sanction (indent c). This article accordingly constitutes a sufficient legal basis for ordering solitary confinement particularly where a detainee is dangerous. The appellant suffers from a serious psychological disorder. He presents a hetero-aggressive risk, which

is increased in the event of a relapse of his drug addiction. In view of the experts' findings and, in particular, the appellant's state at the time and the danger he posed to himself and others if he went untreated, the cantonal authority could, without breaching federal law, consider that the conditions of Article 90.1b of the Criminal Code were met.

To come within the scope of Article 3 ECHR treatment must reach a minimum degree of severity. Assessment of this minimum depends on all the facts of the case, in particular the nature and the context of the treatment, its duration and its psychological or mental effects. Full sensory deprivation combined with total social isolation can destroy a personality and constitute a form of inhuman treatment that cannot be justified on security or other grounds. Conversely, prohibiting contact with other detainees for reasons of security, discipline and protection is not in itself a form of inhuman punishment or treatment. In the case under consideration the appellant was not undergoing sensory deprivation or absolute social isolation. On the other hand, he had been subject to relative social isolation since 25 September 2006, in so far as he was no longer permitted to mix with other detainees. This concern for protection was justified and reasonable. The appellant was not deprived of all forms of contact, in particular with the staff of the custodial establishment, doctors or his lawyer. He would have had access to a telephone and have been able, under certain conditions, to undertake professional, occupational or socio-educational activities. He had not complained of the material conditions of his detention nor did he allege having suffered adverse physical or psychological effects as a result of his isolation. Under these conditions, the treatment complained of by the applicant did not reach the necessary minimum degree of severity to come within the scope of Article 3 ECHR.

Solitary confinement also constitutes a breach of personal liberty guaranteed by Article 10.2 of the Federal Constitution. Article 36 of the Federal Constitution requires that limitations of fundamental rights should have a legal basis, be ordered in the public interest and respect the proportionality principle. The latter principle entails that coercive measures taken by the authorities should be appropriate to attaining the goal pursued, justified by a primary public interest and necessary and reasonable for the person concerned.

According to constant case-law the impugned measure has a sufficient statutory legal basis. It remained to be examined whether X.'s prolonged solitary confinement constituted an unacceptable sanction and a means of obliging him to accept a neuroleptic treatment inconsistent with the proportionality principle. In the

case under consideration the segregation did not amount to a sanction, such as a disciplinary measure that was far more severe and strict. Its aim was not to force the appellant to take his medication, but to protect others. The authorities executing the measure moreover examined Mr X.'s progress on a regular basis, and the measure had to be renewed, and hence justified, every three months. The fact remained that at present, in view of his sickness, the appellant had no choice other than to follow his treatment, which should lead to a more flexible placement in an institutional environment, or to refuse treatment, thereby preventing any improvement in his condition and a more open detention regime. The appellant indeed refused to acknowledge his health problem and to take his medication diligently. In these circumstances the challenged measure was not disproportionate and the complaint of a violation of personal liberty was therefore ill-founded.

The appellant had been subject to the solitary confinement regime, practically without interruption, since 25 September 2006. This measure could not be indefinite. X. refused to undergo neuroleptic treatment, which was deemed absolutely essential to reduce his dangerousness. It followed that the solitary confinement measure might never be lifted. The execution authorities must accordingly examine whether forced medication could be envisaged and might constitute a more propitious measure than lasting solitary confinement. In the case under consideration even forced medication would have a sufficient legal basis, as could be seen from the case-law.

Languages:

French.



Identification: SUI-2008-3-007

a) Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 05.09.2008 / **e)** 1C_155/2008 / **f)** Amaudruz and Others v. Geneva cantonal government (*Conseil d'État*) / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 134 I 322 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

2.2.2.2 Sources – Hierarchy – Hierarchy as between national sources – **The Constitution and other sources of domestic law.**

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

3.13 General Principles – **Legality.**

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

Keywords of the alphabetical index:

Legislative delegation / Smoking, ban, legal basis / Public place, ban on smoking / Public health, protection.

Headnotes:

Separation of powers; Article 5.1 of the Federal Constitution (rule of law), Article 36.1 of the Federal Constitution (limitations of fundamental rights require a legal basis) and Article 164.1 of the Federal Constitution (requirement of a legal basis in statute law).

Regulations issued by the Geneva cantonal government prohibiting smoking in public places.

The cantonal constitution's provisions on the ban on smoking in public places are not directly applicable (recital 2.5). The challenged regulations cannot have their basis in these provisions, which are insufficiently precise and contain no delegation in favour of the executive (recital 2.6), or in the clause on states of emergency (recital 2.7).

Summary:

I. A popular initiative entitled "Passive smoking and health" called for the introduction, in the Constitution of the Canton of Geneva, of a new Article 178B under the title "Protection of public hygiene and health; passive smoking". The Geneva Grand Council (cantonal parliament) validated the initiative with a minor amendment. The Federal Court confirmed this validation on appeal. The initiative was approved by a popular vote held on 24 February 2008.

On 3 March 2008 the Geneva *Conseil d'État* (cantonal government) adopted implementing regulations on the ban on smoking in public places. Lodging public-law appeals, two citizens asked the Federal Court to annul the entire regulations. Arguing that the cantonal government was not authorised to issue regulations that had no legal basis in statute law, the appellants claimed there had been a breach of the principle of separation of powers and of the rule of law.

II. The Federal Court allowed the appeals and annulled the challenged regulations.

The rule of law is not an individual constitutional right but a constitutional principle whose violation cannot be alleged separately, but solely in relation with a violation, *inter alia*, of the principle of separation of powers. All the cantonal constitutions, including that of the Canton of Geneva, uphold the latter principle, at least by implication. This principle guarantees compliance with the powers conferred by the cantonal constitution. The executive is accordingly not authorised to issue legal rules, save under a delegation validly conferred on it by the constitution and parliament.

In the case under consideration the challenged regulations were of the nature of a substitute decree, since parliament had not yet passed the law implementing the new constitutional provisions prohibiting smoking in public places. It was clear from the drafting work and the terms of the constitution that the constitutional provisions were not directly applicable but must be the subject of implementing legislation.

The challenged regulations could not be regarded as an autonomous decree based directly on the constitutional provisions. The latter contained none of the essential points delimiting a framework for the regulatory activity. In particular the constitutional provisions did not specify, even in broad terms, the points to be covered by implementing regulations (the definition of public places, powers of supervision, the sanctions incurred by consumers and business operators). The provisional nature of the regulations made no difference. There was no state of emergency justifying reliance, even for a limited duration, on the general policing clause.

Since they were devoid of any basis in law or the constitution, the challenged regulations had to be annulled on the ground of a breach of the separation of powers.

Languages:

French.



"The former Yugoslav Republic of Macedonia" Constitutional Court

Important decisions

Identification: MKD-2008-3-006

a) "The former Yugoslav Republic of Macedonia" / b) Constitutional Court / c) / d) 10.09.2008 / e) U.br.74/2008 / f) / g) *Sluzben vesnik na Republika Makedonija* (Official Gazette), 118/2008, 19.09.2008 / h) CODICES (Macedonian, English).

Keywords of the systematic thesaurus:

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

4.7.4.2 Institutions – Judicial bodies – Organisation – **Officers of the court.**

5.4.10 Fundamental Rights – Economic, social and cultural rights – **Right to strike.**

Keywords of the alphabetical index:

Court, administration / Strike, public services, restriction.

Headnotes:

The provision of the Law on the Courts which provides that during strikes, courts must deal with matters that are urgent and those that cannot be delayed, does not amount to a restriction of the right of court officials to strike. However, the statement that matters that are, by definition, necessary shall be attended to during a strike (with no clear legal definition) could allow for a degree of arbitrariness by the court in their determination of such matters. This situation is not permissible under the Constitution, as the conditions under which the right to strike is realised are to be governed by law and by collective agreement, rather than by-laws.

Summary:

The petitioner asked the Court to assess the constitutionality of that part of Article 98.2 which reads "and according to the nature of matters" of the Law on the Courts ("Official Gazette of the Republic of Macedonia", nos. 58/2006 and 35/2008), suggesting that it might infringe the right of court officials to strike.

The Court took account of the provisions of Articles 8.1.1 and 3, 32.5 and 38 of the Constitution, and the relevant provisions of the Law on the Courts. It noted that the right to strike is one of the fundamental freedoms and rights of the individual and citizen defined by the Constitution. This right, as one of the basic economic and social rights, is constitutionally guaranteed. However, the Constitution leaves the regulation of the exercise of this right to be done through law and a collective agreement, so as not to interfere with the exercise of other constitutionally guaranteed freedoms and rights.

The Law on the Courts defines the work of the court in strike situations, and in the contested provision of Article 98.1 provides that when court officials are on strike, matters relating to scheduled hearings and public sessions for the taking and delivery of all decisions within legal time limits will be dealt with. Article 98.2 states that, even during a strike, courts are required to deal with proceedings defined by law as urgent, that is, matters which by law and by their nature are necessary.

The Court observed that establishing the type and scope of matters to be dealt with during strikes fell within the category of ensuring the necessary level of the process of work of the court with a view to protecting both the community as a whole and certain persons, against large scale detrimental consequences. This state of affairs does not impinge upon the right of court officials to strike; it simply regulates the manner in which that right is exercised.

A stipulation that during a strike, urgent matters and those that cannot be delayed and are defined by law must be dealt with by the courts, does not amount to a restriction on the right of officials to strike. The right to strike cannot be perceived as an absolute one; its exercise may affect the exercise of the constitutionally guaranteed freedoms and rights of others, the exercise of which is also within the competence of the state.

Nonetheless, the Court ruled that the stipulation that during a strike matters that are necessary are to be dealt with, with no further legal definition, could leave scope for arbitrariness by the court in the

determination of these matters. This is not allowed by the Constitution, since the conditions under which the right to strike is realised may be governed by law and by collective agreement, not through by-law. As a consequence, the Court found that Article 98.2 in the part: "and according to the nature of the matters" of the Law on the Courts was not in conformity with the Constitution.

Languages:

Macedonian.

*Identification: MKD-2008-3-007*

a) "The former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 12.11.2008 / **e)** U.br.52/2008 / **f)** / **g)** *Sluzben vesnik na Republika Makedonija* (Official Gazette), 152/2008, 05.12.2008 / **h)** CODICES (Macedonian, English).

Keywords of the systematic thesaurus:

5.2.2.6 Fundamental Rights – Equality – Criteria of distinction – **Religion**.
5.3.18 Fundamental Rights – Civil and political rights – **Freedom of conscience**.
5.3.32 Fundamental Rights – Civil and political rights – **Right to private life**.

Keywords of the alphabetical index:

Freedom of religion / Judge / Oath, swear, refusal / Oath, traditional / Oath, religious significance / Holiday, public / Holiday, religious.

Headnotes:

1. A solemn oath containing the words: "I swear" is a personal guarantee by the judge and jury judge to respect the Constitution and laws and values set out therein. There is no inherent religious aspect. The words thus pronounced serve only to reinforce the solemn, dignified act of taking a solemn oath prior to taking up public office. The taking of such a type of solemn oath cannot be refused under the pretext of freedom of confession. Such an oath is in accordance with Articles 19, 25, 32 and 51 of the Constitution and Amendment VII of the Constitution.

2. The stipulation in the Macedonian legislation on holidays that certain days are designated "non-working" and are celebrated by different religious communities is in essence a provision that guarantees the equality of citizens on religious grounds, allowing them to celebrate their own festivals whilst respecting the values of others at the same time. This is in accordance with Article 9 of the Constitution.

Summary:

1. A judge of the Basic Court in Kocani asked the Court to assess the constitutionality of Article 50.1 in the part: "I swear" of the Law on the Courts ("Official Gazette of the Republic of Macedonia", no. 58/2006), that provides for the swearing of a solemn oath by judges prior to taking office.

She alleged that taking the solemn oath containing the words "I swear" was in conflict with her faith as a born-again Christian. Such an oath, due to her religious belief puts her in an unequal position and discriminates against her by comparison with other citizens, contrary to Articles 19, 25, 32, 51 and Amendment VII.1 of the Constitution.

The Court noted the provisions of Articles 19, 25, 32 and Amendment VII of the Constitution, as well as relevant provisions of international law, in particular Articles 9 and 14 ECHR, Article 18 of the Universal Declaration of Human Rights, and Article 18 of the International Covenant on Civil and Political Rights.

The Court noted that both the Constitution of the Republic of Macedonia and the corresponding provisions in international documents treat freedom of belief, conscience and thought as a right which is naturally and inseparably linked with the human being. It belongs within the sphere of personal, intellectual and philosophical understanding of the world surrounding the individual and is based on an individual's own beliefs and convictions. As such, it may not be the subject of any type of coercion or pressure which might lead to its disturbance or restriction.

The Court took into consideration that the Republic of Macedonia is constitutionally set up as a state where religion is separate from the state; it is a multi-confessional space in which citizens of different religious affiliations and atheists live and work. In a state organised in such a way pluralism of religions implies freedom to have religious beliefs or not to have them, and to practice religion or not to practice it. However, the right of confession and conscience is not absolute and it may only be exercised in a way that does not lead to violation of the Constitution and laws, and of the freedoms and rights of others.

Starting from the premise that judges and jury judges hold public office, it is self-evident that in the performance of their duties, they should be independent and unbiased and as removed as possible from any religious choices or feelings. In order to avoid any conflict of religions or religious beliefs, judges and jury judges, when exercising their judicial power, should not let themselves be swayed by their own interpretation of religion and their personal choices. This ensures observance of the constitutional and legal obligation to respect the Constitution of the Republic of Macedonia, the laws, and the international agreements ratified in accordance with the Constitution of the Republic of Macedonia, as well as the observance of the obligation for lawful, honest, conscientious, independent and responsible adjudication and protection of the freedoms and rights of the individual and citizen. Amongst these freedoms and rights is the freedom of confession which may well be diametrically opposed to that of the judge or jury judge.

The Court noted that if the solemn oath is viewed as a personal guarantee by the judge and jury judge to respect the principles set out above, with a view to observing the Constitution and the laws and values set forth therein, the words "I swear" within Article 50.1 of the Law serve only to reinforce the solemn, publicly given, guarantee in the sense previously noted. If one considers that the words under dispute are not pronounced in a religious facility, and not accompanied by the placing of hands on one of the holy books, there are no other accompanying gestures or rites, peculiar to each religion, which would definitively confirm the inclusion of a religious element within a section of public life (taking a solemn oath). In this connection, it was noted that the use of the words "I swear" is a legacy from customs law, which originated etymologically and semantically from the old Slavic lexical tradition. They cannot be said to be connected with the practice of religion, and the Court accordingly held that the oath was traditional, rather than religious. As such, it did not jeopardise the freedom of belief, and the question of its conformity with the corresponding Articles of the Constitution did not arise.

2. The petitioner challenged provisions on the Law introducing amendments to legislation governing holidays in the Republic of Macedonia, on the basis that it placed her in an unequal position, not simply in relation to herself but also in relation to atheists. As a Christian, it impinged on her beliefs when she had to celebrate the religious holidays of other denominations.

The Court again took as its starting point Articles 9, 19 and Amendment VII of the Constitution, and the relevant provisions of the Law on Holidays. Article 2.1 of the Law deals with the state holidays of the Republic of Macedonia; Article 2.2 deals with other holidays. Article 4.1 deals with non-working days for worshippers from different denominations, and Article 4.2 deals with non-working days in general. Thus, state holidays are a category of holiday with particular significance for the statehood of the Republic of Macedonia. Certain holidays and non-working days are of significance for certain categories of citizen, when, according to the teachings of their faith, they celebrate and do not work, while others do not work out of respect and to enable these celebrations to take place.

The stipulation in the Law that differing days are designated as non-working and are observed by different religious communities is in complete conformity with the principle of equality for citizens on religious grounds under Article 9 of the Constitution, allowing them to observe their own religious days and to respect those of other denominations. It is often the case that members of different religious communities believe in different values, or believe in the same values but attribute a different meaning to them. This difference in content results in a different manifestation of belief, and so citizens have different days for the celebration of religious values, as defined in the legal provisions under dispute. The Court therefore found the Law to be in accordance with Article 9 of the Constitution.

Supplementary information:

In his dissenting opinion, Constitutional Judge Igor Spirovski emphasised that the case concerned an essential aspect of “conscientious objection” and that the question here was whether the legislator respected it with regard to those persons who, for serious reasons related to their belief, are prohibited from taking an oath. In his view, the provision was unconstitutional because there was no possibility of taking the oath in a manner that would not injure the most profound beliefs of the individual, which is one of the essential aspects of the protection of the freedom of belief, conscience and thought.

Languages:

Macedonian.



Identification: MKD-2008-3-008

a) “The former Yugoslav Republic of Macedonia” / b) Constitutional Court / c) / d) 17.12.2008 / e) U.br.134/2008 / f) / g) *Sluzben vesnik na Republika Makedonija* (Official Gazette), 162/2008, 25.12.2008 / h) CODICES (Macedonian, English).

Keywords of the systematic thesaurus:

3.25 General Principles – **Market economy**.
5.4.6 Fundamental Rights – Economic, social and cultural rights – **Commercial and industrial freedom**.

Keywords of the alphabetical index:

Market equality / Product, domestic / Producer, preference.

Headnotes:

Displaying the turnover of Macedonian products on fiscal receipts, along with the logo “buy Macedonian products” is a state measure encouraging the purchase of domestic products, and discouraging the turnover of foreign products. This is in breach of the principle of free market guaranteed by Article 55 of the Constitution. It does not provide for an equal position of the subjects within the market, instead favouring Macedonian products, at the expense of other products.

Summary:

The petitioner asked the Court to assess the constitutionality and legality of several provisions of the “Rulebook for issuing a cash register receipt for cancelled transactions and for the functional and technical characteristics that fiscal cash registers and the integral automatic management system should possess” (“Official Gazette of the Republic of Macedonia”, nos. 55/2001 and 25/2008) adopted by the Minister of Finance. He alleged that these provisions violated the freedom of market and entrepreneurship guaranteed by the Constitution, and claimed that they were contrary to the Stabilisation and Association Agreement between the Republic of Macedonia and the EU and the agreement concluded with the World Trade Organisation.

The provisions in question introduced changes to the appearance and content of fiscal receipts (invoices) by providing that fiscal receipts must contain the logo (including the symbol of a sun) and endorsements such as “Buy Macedonian Products!”, “For our well-being”, and “Made in Macedonia”. Invoices were also required to display separately the turnover from

Macedonian products and VAT from Macedonian products in addition to the total turnover and total tax.

The Court noted Articles 8.1.3, 8.1.6, 8.1.7, 33 and 55 of the Constitution and provisions of the Law on Registering Cash Payments ("Official Gazette of the Republic of Macedonia", nos. 31/2001, 42/2003, 47/2003, 40/2004-correction, 70/2006, 126/2006 and 88/2008), regulating the introduction and use of a fiscal system of equipment for registering cash payments. The Court found that the provisions of the Law on the basis of which the contested by-law was enacted did not allow the Minister of Finance to further classify the products according to their origin with a view to meeting tax obligations.

The Court noted that the state has the constitutional power to define economic and fiscal policies and to define appropriate measures for their implementation. Nevertheless, it was also under a duty to strike a balance between the general interests of the community to collect the planned income from taxes, and the rights of subjects within the market, particularly in terms of equality.

The Court concluded that the introduction of a requirement to present the turnover of Macedonian products on fiscal receipts, and to display the logo "buy Macedonian products" is a state measure encouraging the purchase of domestic products, and discouraging the turnover of foreign products. This stimulating measure violates the principle of freedom of market, and, in view of the state's role in the regulation of the market, contravenes Article 55 of the Constitution. It does not provide for an equal position of subjects in the market. The Court noted that the principle of equality applies to every product in legal circulation, irrespective of their origin, which is not the case with the disputed provision. This provision favours Macedonian products, at the expense of the other products on the market and discourages the turnover of foreign products, thus violating the principle of equality of the subjects within the market, which is in contradiction with one of the fundamental values of the constitutional order envisaged in Article 8.1.7 and the freedom of the market in Article 55 of the Constitution.

Supplementary information:

In a partially dissenting opinion the President of the Constitutional Court Mr. Trendafil Ivanovski emphasised that the provision whereby receipts had to display a logo and messages exhorting buyers to "buy Macedonian" was of descriptive character only. It did not impose legal obligations on consumers, neither were there any sanctions if they failed to respond to the message. The provision accordingly

had no legal consequences and did not breach the constitutional principles of the rule of law, legal protection of property, freedom of the market and equal legal position of subjects within the market.

In a concurring opinion, Constitutional Judge Mr. Igor Spirovski emphasised that the Court should have repealed the challenged provisions, not only because of their lack of conformity with the Constitution and the laws, but also because they ran counter to various provisions relating to quantitative restrictions of the Stabilisation and Association Agreement between the Republic of Macedonia and the European Communities and their member states which was ratified by Law and formed an integral part of the internal legal order of the Republic of Macedonia.

Languages:

Macedonian.



Turkey

Constitutional Court

Important decisions

Identification: TUR-2008-3-007

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 05.06.2008 / **e)** E.2008/16, K.2008/116 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 22.10.2008, 27032 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

1.3.4.11 Constitutional Justice – Jurisdiction – Types of litigation – **Litigation in respect of constitutional revision.**

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

4.1.2 Institutions – Constituent assembly or equivalent body – **Limitations on powers.**

5.2.2.6 Fundamental Rights – Equality – Criteria of distinction – **Religion.**

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

Keywords of the alphabetical index:

Constitution, amendment / Constitutional provision, interpretation / Right to education / Equality.

Headnotes:

The Constitutional Court has jurisdiction to review the constitutionality of laws amending the Constitution. If a law amending other articles of the Constitution alters the substance of an irrevocable provision of the Constitution, the Constitutional Court has competence to review the constitutional compliance of such legislation. Constitutional amendments aiming to lift a ban on university students wearing the headscarf are contrary to the principle of secularism which is an irrevocable provision of the Constitution.

Summary:

I. Law no. 5735 (Law amending some articles of the Constitution of Turkey) amended Articles 10 and 42 of the Constitution. The aim of the amendments was spelled out in the reasoning of the Law as being the

lifting of the ban on university students wearing the headscarf. The bill was prepared at the instigation of two political party groups (Justice and Development Party -AKP and Nationalist Movement Party-MHP) and was supported by certain other small parties. The bill was passed by 411 votes in favour out of 550 MPs in a secret ballot.

Article 1 of Law no. 5735 added the phrase “in using all forms of public service” following the phrase “in all their procedures” in Article 10.4 of the Constitution which became as “State organs and administrative authorities shall act in compliance with the principle of equality before the law in all their procedures and in using all forms of public service.”

Article 2 of Law no. 5735 added the following paragraph as the seventh paragraph to Article 42 of the Constitution “No one shall be deprived of the right to higher education for any reason not explicitly written in the law. Limitations on the exercise of this right shall be determined by the law.”

II. One hundred and ten deputies asked the Constitutional Court to rule upon the conformity with the Constitution of these amendments. The applicants argued that they contravened the principle of secularism stipulated in Article 2 of the Constitution which is an irrevocable provision. Article 4 of the Constitution rules out the amendment of Article 1 of the Constitution (establishing the form of the state as a Republic), Article 2 (on the characteristics of the Republic) and further states that the provisions of Article 3 “shall not be amended, nor shall their amendment be proposed.” The applicants argued that Parliament, as a constituent power, does not have the power to amend the substance of Article 2 by amending other articles of the Constitution. They accordingly asked the Constitutional Court to declare these amendments invalid and to repeal them.

III. Under Article 148 of the Constitution, constitutional amendments can be examined and reviewed only as to their form. The review of constitutional amendments is restricted to assessment of whether the requisite majorities were obtained for the proposal and in the ballot, and whether the prohibition on debates under urgent procedure was observed.

This provision bestows no competence on the Constitutional Court to review the constitutionality of constitutional amendments as regards their substance.

IV. The Constitutional Court ruled that non-existence of legislation may only arise where no wishes have been expressed by Parliament regarding the proposal or acceptance of legislation or where Presidential will has not been expressed as to its promulgation. This

was not the case here; both parliamentary and presidential will had been expressed as to the enactment and promulgation of the legislation. The Court rejected the demand as to the non-existence of the legislation.

V. The Constitutional Court then ruled that under Article 148 of the Constitution it has competence to review whether the requisite majority was obtained to propose a constitutional amendment. This competence includes the review of the competence of those proposing a constitutional amendment. Article 4 of the Constitution prohibits the proposal of amendments to the first three articles of the Constitution. Parliament therefore had no power to propose such an amendment. The Court accordingly decided that it was within its jurisdiction to examine whether a constitutional amendment directly or indirectly changed the irrevocable provisions of the Constitution. President Mr H. Kılıç and Justice Mr S. Adalı expressed dissenting opinions on this point, on the ground that the Constitution did not allow the Constitutional Court to review constitutional amendments with regard to their substance and such a decision can not be made without substantive review.

VI. The Court gave a ruling as to substance, stating that the aim of the legislation was revealed both in the reasoning of the law and during parliamentary debate on the lifting of the ban on wearing the headscarf at universities. The Court reiterated that the prohibition on the wearing of the headscarf at universities was found legitimate by the European Court of Human Rights in *Leyla Şahin* in order to protect the rights of others in a Muslim majority country. The Court therefore ruled that lifting the ban on wearing the headscarf at universities is contrary to principle of secularism, and that the amendments in Articles 10 and 42 of the Constitution indirectly amended Article 2 which is irrevocable. Therefore, Law no. 5735 is out of line with Articles 4 and 148 of the Constitution. The Constitutional Court overturned the contested provisions of Law no. 5735. President Mr H. Kılıç and Justice Mr S. Adalı expressed dissenting opinions on this point, to the effect that the amendments were not contrary to the principle of secularism.

Languages:

Turkish.



Identification: TUR-2008-3-008

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 12.06.2008 / **e)** E.2005/28, K.2008/122 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 13.11.2008, 27053 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

5.2.1.2.1 Fundamental Rights – Equality – Scope of application – Employment – **In private law.**

Keywords of the alphabetical index:

Journalist / Employee, unequal treatment / Equality, different circumstances.

Headnotes:

The fact that employees in the journalistic professions receive different treatment from that of other employees in terms of late payment of wages and overtime payments does not contravene the principle of equality.

Summary:

I. Several courts asked the Constitutional Court to assess the compliance with the Constitution of various provisions of Law no. 5953 (on the regulation of relations between employees of the press profession and their employers). Under Article 14.2 of the Law, employers who delay the payment of the salaries of journalists must pay a daily fine of 5 % in addition to their salaries. The eighth paragraph of Additional Article 1 also states that contingency allowances are to be paid with the following month's salary. If contingency allowances are not paid on time, they will incur an additional 5 % fine per day. The applicant courts argued that only press employees had this kind of penalty clause relating to late payment of salary. The above provisions of Law no. 5953 were discriminatory and in conflict with Articles 2, 5, 10, 11, 48, 49 and 55 of the Constitution.

II. The Constitutional Court ruled that journalism is a very special and significant profession in terms of the right to communicate information freely. Journalists' financial independence *vis-à-vis* their employers should be safeguarded. Journalists are not in a comparable position to other professions. The provisions of Law no. 5953 are not discriminatory and are not in breach of the Constitution. The Court rejected the claim.

Languages:

Turkish.

*Identification:* TUR-2008-3-009

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 19.06.2008 / **e)** E.2006/156, K.2008/125 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 26.11.2008, 27066 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Equality, different circumstances / Employment, contract, termination, conditions.

Headnotes:

Favourable conditions regarding the termination of contracts of employment for newly married women are not in conflict with equality.

Summary:

I. The İzmir 6th Labour Court asked the Constitutional Court to assess the compliance with the Constitution of Article 14.1 of Law no. 1475 (The Labour Law). Article 14.1 of the Labour Law stipulates that if a contract of employment is terminated by a woman at her request within one year from her marriage, the employer must pay severance allowance. The İzmir Labour court argued that although male and female workers are subject to equal conditions in employment under the Law, this particular provision provided favourable conditions for female employees in terms of entitlement to severance allowance. It was therefore discriminatory and contrary to Article 10 of the Constitution.

II. The Constitutional Court referred to Articles 41 and 50 of the Constitution in its assessment. Article 41 stipulates that “The state shall take the necessary measures and establish the necessary organisation

to ensure the peace and welfare of the family, especially where the protection of the mother and children is involved...” Article 50 includes the following provision: “Minors, women and persons with physical or mental disabilities, shall enjoy special protection with regard to working conditions.”

The Court ruled that the aim of the contested provision was to protect female workers wishing to terminate their contracts of employment upon their marriage and to protect family union. It was accordingly not discriminatory, neither was it contrary to the Constitution. Two female members of the Court Mrs F. Kantarcıoğlu and Mrs Z. A. Perkteş disagreed with the majority, expressing the dissenting opinion that the provision was discriminatory, in that it put women in a secondary position and encouraged married women not to work.

Languages:

Turkish.

*Identification:* TUR-2008-3-010

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 30.07.2008 / **e)** E.2008/1 (SPK), K.2008/2 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 24.10.2008, 27034 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

1.3.4.7.1 Constitutional Justice – Jurisdiction – Types of litigation – Restrictive proceedings – **Banning of political parties**.

4.5.10.4 Institutions – Legislative bodies – Political parties – **Prohibition**.

5.1.4 Fundamental Rights – General questions – **Limits and restrictions**.

5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression**.

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

5.3.28 Fundamental Rights – Civil and political rights – **Freedom of assembly**.

Keywords of the alphabetical index:

Political party, dissolution / Secularism, principle / Freedom of assembly, restriction, legitimate aim / Freedom of expression.

Headnotes:

A political party can be held responsible for the statements and activities of its leaders and members. Persistent statements by party leaders and members about the ban on wearing headscarves at universities, and the following of policies to lift this ban may result in a political party being the focal point for activities against the principle of secularism. The political party may then have to take responsibility. The intensity of activities against the principle of secularism will determine the sanctions to be applied. If the intensity and gravity of activities against secularism are not so severe, a political party may be sanctioned by loss of public financing, rather than facing dissolution.

Summary:

I. The Chief Public Prosecutor brought an action against the ruling Justice and Development Party (AKP) aimed at the dissolution of the party under various provisions of the Law on Political Parties and of the Constitution.

II. The Court began by examining and deciding the preliminary issues concerning procedure. The Constitutional Court reiterated that the case on the dissolution of a political party is a *sui generis* one which is predominantly criminal in essence. Under Article 33 of Law no. 2949, those cases should be decided upon in observance of the provisions of the legislation on criminal procedure. According to Article 149 of the Constitution the quorum for the decision on the dissolution of a political party is a three fifths majority of the members. The Court decided that the same quorum is required in the voting that takes place at the stage the evidence is assessed. The Court also decided that although members of parliament are immune from criminal charges for parliamentary statements and votes, such statements should be examined in cases of dissolution of political parties, if they explicitly reveal the aim of destroying the democratic libertarian order.

III. Article 69.6 of the Constitution states that "The decision to dissolve a political party permanently owing to activities violating the provisions of Article 68.4 may be rendered only when the Constitutional Court determines that the party in question has become a centre for the execution of such activities. A political party shall be deemed to

have become the centre of such actions only when such actions are carried out intensively by the members of that party or the situation is shared implicitly or explicitly by the grand congress, general chairmanship or the central decision-making or administrative organs of that party or by the group's general meeting or group executive board at the Turkish Grand National Assembly or when these activities are carried out in determination by the above-mentioned party organs directly." Article 68.4 states that "The statutes and programmes, as well as the activities of political parties shall not be in conflict with the independence of the state, its indivisible integrity with its territory and nation, human rights, the principles of equality and rule of law, sovereignty of the nation, the principles of the democratic and secular Republic; they shall not aim to protect or establish class or group dictatorship or dictatorship of any kind, nor shall they incite citizens to crime."

IV. Having assessed the evidence put forward, the Court found that activities contravening Article 68.4 of the Constitution had been carried out intensively and in a determined manner by the leader and members of the defendant party and it had become a centre for such activities. Although the Court accepted that there was social demand for the removal of the headscarf ban in universities, the age restrictions concerning the Quran courses, and the coefficient limitation applied to Religious Vocational High Schools, it found that the defendant party did not carry out its political struggle on these issues in line with the choice crystallised in the concrete rules of the Constitution. These problems were transformed into the basic problems of politics, to a degree that would create tensions and divisions within society. The religious sensitivities of the society were being exploited for the blatant pursuit of political gain, and it had become harder for the fundamental economic, social, and cultural problems of the society to rise to the forefront of the political agenda. The President, Mr H. Kılıç expressed a dissenting opinion on this point.

V. In terms of the sanction that was to be applied against activities contradicting the principles of a democratic and secular Republic, the Court took into consideration the fact that the defendant political party came to power in 2002, within one year of its establishment and ruled the country for almost six years alone. It had the majority necessary to amend the Constitution, and the government facilities to realise its programme and goals. A search for an anti-secular system was not observed in its statute and programme. Although all actions of the defendant party in power concerning the domestic and foreign policy and the use of legislative and executive power were known by the public, it gained 47 % of the votes in the elections of 22 July 2007, and the democratic will approved general

policies of the defendant party. Since the defendant party has been in power, efforts towards accession to the European Union, which has become the principal foreign policy of Turkey since the 1963 Ankara Treaty, have been sustained. Legal and political reforms that began in 1999 when candidacy status was granted have been accelerated; major changes have been effected both in the Constitution and laws. As a result the Court held that it had not been established that the objective of the defendant party was to destroy democracy and the secular state structure, or to damage the fundamental principles of the constitutional order through the use of violence and intolerance, or that it had carried out acts embodying these objectives. It did not uphold data that suggested that government facilities were used to support violence. The intensity of these activities had not occurred to a degree that would require dissolution. The defendant party was therefore stripped of half of its annual state assistance. The decision of the Court was published in the Official Gazette.

President Mr H. Kılıç arguing for the rejection of the case, and Vice-President Mr O. A. Paksüt, Judges Mrs F. Kantarcıoğlu, Mr M. Erten, Mr A. N. Özler, Mr Ş. Apalak, and Mrs A. Z. Perktaş, who argued for the dissolution of the defendant party, did not share this opinion.

Languages:

Turkish.



Identification: TUR-2008-3-011

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 24.09.2008 / **e)** E.2006/142, K.2008/148 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 25.12.2008, 27096 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

5.1.4.2 Fundamental Rights – General questions – Limits and restrictions – **General/special clause of limitation.**

5.3.9 Fundamental Rights – Civil and political rights – **Right of residence.**

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

Keywords of the alphabetical index:

Fundamental right, regulation exclusively by law / Fundamental rights, exempt from prescription / Right and freedom, statutory limitation, requirement / Residence, limit / Right to property.

Headnotes:

The right of residence cannot be limited for reasons which were not stipulated in the Constitution. Right of succession cannot be limited more than necessary in a democratic society.

Summary:

I. The main opposition party (CHP) parliamentary group asked the Constitutional Court to assess the compliance with the Constitution of several provisions of Law no. 5543 (The Settlement Law). Article 13 of this Law envisaged that "The settlement of families living in residence units to be set up due to national security reasons shall be performed according to the provisions of this Law within the framework of procedures and conditions to be set forth in the decree of the Council of Ministers, considering the advices of the National Security Council". Article 27.5 includes the following provision: "The Council of Ministers decides whether the families or individuals subjected to settlement on the grounds of national security shall be indebted (to treasury) and if they are indebted, the procedures and principles thereof." The applicant party group argued that these provisions delegated legislative power to the executive and were therefore in conflict with the Constitution.

II. Under Article 13 of the Constitution "Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence." Right of residence is guaranteed by Article 23 of the Constitution and under this provision "Freedom of residence may be restricted by law for the purpose of preventing offences, promoting social and economic development, ensuring sound and orderly urban growth, and protecting public property ...". The Constitutional Court ruled that the contested provisions restricted the freedom of residence for the purpose of national security which is not mentioned in Article 23. They were therefore contrary to Articles 13 and 23 of the Constitution. The Court overturned them.

III. Provisional Article 2 of the Settlement Law entitled persons who were subjected to settlement under the former Law to request settlement assistance within two years following entry into force of the Law.

However, the provision did not entitle the successors of settled persons to settlement assistance. The Constitutional Court ruled that the right to settlement assistance (a personal claim) constitutes property within the meaning of Article 35 of the Constitution. According to Article 13 restrictions to fundamental rights cannot be in conflict with the requirements of the democratic order of the society and the principle of proportionality. The Court found that depriving successors of right to settlement assistance wholly infringes the right to property and is contrary to Articles 13 and 35. It annulled the provision.

Languages:

Turkish.



Ukraine Constitutional Court

Important decisions

Identification: UKR-2008-3-016

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 10.09.2008 / **e)** 15-rp/2008 / **f)** On compliance with the Constitution of provisions of Articles 1, 7.1, 8, 9, 10, 14.4, 17, 20.1, 29.3 of the Law on Public Prosecution (case concerning powers of public prosecution pursuant to Section XV.9 “Transitional Provisions” of the Constitution) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 71/2008 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

2.1.1.1.1 Sources – Categories – Written rules – National rules – **Constitution**.
4.7.4.3.1 Institutions – Judicial bodies – Organisation – Prosecutors / State counsel – **Powers**.

Keywords of the alphabetical index:

Pre-trial, procedure / Prosecutor, office, authority.

Headnotes:

This case concerned the constitutional compliance of the role of the public prosecutor's office in the performance of pre-trial investigation, pending implementation of a system of pre-trial investigation and the enactment of legislation regulating its activities. It also dealt with the constitutional requirements for petitions requesting assessment of constitutional compliance; those that do not contain legal arguments to support their request are liable to be rejected. Parliament was reminded of the need to provide for legislative implementation of provisions of Chapter XV.9 “Transitional Provisions” of the Constitution.

Summary:

Forty six People's Deputies asked the Constitutional Court to pronounce certain provisions of the Law on Public Prosecution (hereinafter "the Law") to be unconstitutional.

The Constitutional Court has stressed on several occasions in its decisions that, under Article 19.2 of the Constitution, public authorities and their officials are obliged to act only on the grounds, within the parameters and in the manner envisaged by the Constitution and laws.

An exhaustive list of the constitutional functions of the office of the public prosecutor is contained within Article 121 of the Constitution. However, the organisation and procedure for its activities pursuant to Article 123 of the Constitution are determined both by the Law and by other legislative acts.

However, systematic analysis of the current legislation governing the activities of investigatory departments within agencies charged with the investigation of criminal offences reveals that further progress is needed on the establishment of the system of pre-trial investigation and the reform of those agencies involved.

Under such circumstances, there are grounds to use the provisions of Chapter XV.9 "Transitional Provisions" of the Constitution as the constitutional basis for regulating activities of public prosecution investigators during the transition period. Under these provisions, pending the setting-up of a pre-trial investigation system, and the enactment of appropriate legislation, the public prosecutor will continue to fulfil these functions, as provided for in the current legislation.

The above constitutional norm does not envisage the removal of or restrictions on human and citizens' rights and freedoms; rather, it protects and reflects the values provided for by the Constitution. In this regard, for the period of its effect, the provisions of Article 17 of the Law are constitutional.

Article 39.2.4 of the Law on the Constitutional Court stipulates that a constitutional petition must provide legal reasoning to back up statements concerning the unconstitutionality of the legal act or certain of its provisions. Hence, the Constitutional Court may consider a constitutional petition that does not simply request that a law be declared unconstitutional, but which also contains arguments in support of such a declaration. (Article 71.1 of the Law on the Constitutional Court). However, the subject of the right to constitutional petition did not provide legal arguments to support the provisions in question.

Consequently, where a constitutional petition does not include justification for the lack of compliance of a legal act or certain of its provisions with provisions of the Constitution pursuant to Article 45.2 of the Law on the Constitutional Court, this constitutes grounds to reject it.

Establishment of such grounds during consideration of the case at subsequent stages of the proceedings results in termination of consideration at a plenary session of the Constitutional Court.

Judges V. Bryntsev and M. Markush expressed dissenting opinions.

Languages:

Ukrainian.

*Identification: UKR-2008-3-017*

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 10.09.2008 / **e)** 2-v/2008 / **f)** On appeal of Parliament for Court's opinion concerning compliance of a draft law on introducing amendments to the Constitution (concerning deputy's immunity) with requirements of Articles 157 and 158 of the Constitution / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 71/2008 / **h)**.

Keywords of the systematic thesaurus:

1.3.2.1 Constitutional Justice – Jurisdiction – Type of review – **Preliminary / ex post facto review**.
 4.5.3.4.1 Institutions – Legislative bodies – Composition – Term of office of members – **Characteristics**.
 4.5.11 Institutions – Legislative bodies – **Status of members of legislative bodies**.

Keywords of the alphabetical index:

Member of Parliament / Immunity, parliament, deputy / Constitution, amendment.

Headnotes:

A constitutional amendment was proposed, whereby Article 80 of the Constitution would state that

People's Deputies do not incur legal liability for voting results or statements made in Parliament or its agencies except in cases of insult or defamation. The opinion of the Constitutional Court was sought, as to the conformity of the proposed new wording with the Constitution. Constitutional amendments are not permissible under Ukrainian law if they result in the removal of or restrictions on human and citizens' rights. The Constitutional Court concluded that the changes under consideration here would not have that impact, and therefore the proposed amendment was constitutionally compliant.

Summary:

A Resolution had been passed, to place draft legislation on introducing amendments to the Constitution (concerning restrictions on the immunity of members of parliament) and forwarding the draft law to the Constitutional Court on the agenda of the Second Session of Parliament of the Sixth Convocation no. 149-VI dated 20 March 2008. The Constitutional Court was asked to advise as to whether the draft law mentioned above (registration no. 1375 dated 18 January 2008) was in conformity with the provisions of Articles 157 and 158 of the Constitution.

The draft law sought to amend the Constitution with the following wording for Article 80:

"People's Deputies do not incur legal liability for voting results or statements made in Parliament or its agencies except in cases of insult or defamation".

Article 159 of the Constitution requires that draft legislation seeking to introduce amendments to the Constitution is to be considered by Parliament after the Constitutional Court has provided its opinion on the conformity of the draft law with the provisions of Articles 157 and 158 of the Constitution.

The Constitutional Court noted that it had already considered the issue of amending Article 80 of the Constitution in its Opinions no. 1-v/2000 dated 27 June 2000, no. 2-v/2000 dated 11 July 2000, no. 3-v/2000 dated 5 December 2000.

Under Article 158 of the Constitution, draft legislation seeking to introduce constitutional amendments, considered by Parliament, but not adopted, may be submitted to Parliament no sooner than one year from the day of the adoption of the decision on this draft legislation (Article 158.1). Parliament is not empowered to amend the same provisions of the Constitution twice (Article 158.2).

The Parliament of the current convocation did not consider the draft legislation; neither did it amend the provisions of Article 80 of the Constitution. The draft law accordingly satisfies the requirements of Article 158 of the Constitution.

Under Article 157 of the Constitution, the Fundamental Law may not be amended, if the amendments entail the removal of or restrictions on human and citizens' rights and freedoms.

The current wording of Article 80 of the Constitution accords guaranteed immunity to People's Deputies (Article 80.1). They do not incur legal liability for voting results or statements made in Parliament or its agencies except for cases of insult or defamation (Article 80.2); People's Deputies cannot be made subject to criminal liability, detained or arrested without the consent of Parliament (Article 80.3).

The Constitutional Court had examined in earlier proceedings the issue of the removal of Article 80.3 with regard to its conformity with the provisions of Article 157. It concluded then that this amendment concerned only the special status of People's Deputies; it had no impact on the contents of constitutional human and citizens' rights and freedoms, or the removal or restriction thereof. See Opinion of the Constitutional Court no. 1-v/2000 dated 27 June 2000 on the case concerning amendments to Articles 76, 80, 90 and 106 of the Constitution).

In view of this, the Constitutional Court believes that the suggested wording of Article 80 of the Constitution did not entail the removal of or restrictions upon human and citizens' rights and freedoms and thus does not run counter to the provisions of Article 157 of the Constitution.

Constitutional amendments are not permissible if they are aimed at curtailing independence or violating territorial indivisibility or if they occur in conditions of martial law or a state of emergency (Article 157 of the Constitution). The Constitutional Court concluded that the constitutional amendments contained in the draft law in the case before it were not aimed at curtailing independence or violating territorial indivisibility. At the time the opinion was being considered, Ukraine was not under martial law or a state of emergency. The draft law therefore satisfied the requirements of Article 157 of the Constitution.

Judges V. Bryntsev, I. Dombrovskiy and V. Kampo expressed dissenting opinions.

Languages:

Ukrainian.

*Identification:* UKR-2008-3-018

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 17.09.2008 / **e)** 16-rp/2008 / **f)** On official interpretation of provisions of Article 83.6, 83.7 and 83.9 of the Constitution (regarding the coalition of deputy factions in Parliament) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 72/2008 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Parliamentary group, establishment, rights / Parliamentary rule, legal force.

Headnotes:

In the light of the issue raised in the constitutional petition, the word combination “coalition of deputy factions in Parliament” contained in Article 83.6, 83.7 and 83.9 of the Constitution should be understood as an association that was formed as provided for in the Constitution and the Rules of Procedure of Parliament based on the results of election of several deputy factions, numeric strength of which makes up the majority of the constitutional composition of Parliament, which deputy factions agreed to carry out joint parliamentary activities upon reconciliation of their political positions.

The Constitutional Court was asked to recognise Temporary Rules of Procedure of Parliament, approved with the Resolution of Parliament, as being non-compliant with the Constitution and null and void from the day of adoption of this decision.

Summary:

Temporary Rules of Procedure of Parliament approved by Resolution of Parliament on some aspects of normative legal support of the activities of Parliament no. 247-VI dated 8 April 2008 defined the term “coalition of deputy factions in Parliament” (Article 61.1) and identify grounds for termination of activities of the coalition of deputy factions in Parliament (Article 66). Nonetheless, the Constitutional Court found that these provisions of Temporary Rules of Procedure could not be taken into consideration, because the Rules themselves had been approved by a Resolution of Parliament and not by a Law. As a result, they were not compliant with the Constitution. The Rules are not a law; their norms may not be seen as legislative regulations of the principles for formation, organisation of activities and termination of activities of the coalition of deputy factions in Parliament.

The coalition of deputy factions in Parliament (hereinafter “the coalition”) became a subject of constitutional legal relations after the Constitution was amended by the Law on Introducing Amendments to the Constitution no. 2222-IV dated 8 December 2004. However, the Constitution contains no definition of coalition of deputy factions. The phrase “coalition of deputy factions in Parliament” is mentioned not only in Article 83.6, 83.7 and 83.9 of the Constitution, interpretation of the contents of which is requested by People’s Deputies, but also in Articles 83.8, 83.10, 90.2.1, 106.1.9 and 114.3 of the Constitution. Its definition is to be founded on a constitutional basis uniting political and legal aspects for the formation of the coalition of deputy factions, organisation and termination of its activities, including the principal goal of its formation provided for in Articles 83.8, 106.1.9 and 114.3 of the Constitution – formation of the government.

The formation or non-formation of a coalition of deputy factions has specific constitutional and legal consequences. If within one month Parliament fails to form a coalition of deputy factions (or a coalition of deputy factions that meets the requirements of Article 83 of the Constitution is absent), the President has the right to terminate the authorities of the Parliament (Article 90.2.1 of the Constitution). The formation of the coalition of deputy factions directly determines the formation of the Cabinet of Ministers (Articles 83.8, 106.1.9 and 114.3 of the Constitution).

Pursuant to the Constitution, the constitutional membership of Parliament is 450 People’s Deputies (Article 76.1).

Under Article 83.6 of the Constitution, a coalition of deputy factions is formed in Parliament based on the results of an election and the reconciliation of political positions, which consists of the majority of People's Deputies making up the constitutional composition of Parliament. A requirement concerning the total number of People's Deputies who, as members of deputy factions, form the coalition of deputy factions applies both to the moment of formation of the coalition and to the whole period of its existence. Thus, members of the coalition of deputy factions may only be those People's Deputies who are members of deputy factions that formed the coalition. Affiliation of People's Deputies with a respective faction plays a decisive role in the process of formation of the coalition of deputy factions. Thus, pursuant to Article 83.10 of the Constitution, a deputy faction the members of which constitute the majority of the constitutional composition of Parliament has the same rights as that of a coalition of deputy factions in Parliament.

The Constitution also identified the subjects of the formation of a coalition of deputy factions – deputy factions. Hence, whereas a deputy faction is a group of People's Deputies elected on the election list of a respective political party (election bloc of political parties), the coalition of deputy factions consists of deputy factions that, according to the results of election and reconciliation of political positions formed a coalition of deputy factions.

According to the Constitution, the principles for the formation of the coalition of deputy factions are determined by the Constitution and the Rules of Procedure of Parliament (Article 83.9).

Article 83.6 and 83.7 of the Constitution contain the basic principles for the formation of the coalition of deputy factions: the coalition is based on the results of an election and the reconciliation of political positions of deputy factions from the majority of People's Deputies who make up the constitutional composition of the Parliament within one month.

The procedure for the termination of terms of office of deputy factions must also be determined by the Constitution and the Rules of Procedure of Parliament (Article 83.9 of the Constitution).

The Constitution defines individual grounds for the termination of the activities of the coalition of deputy factions. Specifically, the coalition of deputy factions will cease its activities simultaneously with the dissolution of the Parliament (Articles 81.1, 82.2 and 90.1). A decrease of the numeric strength of the coalition of deputy factions, (as a result of the exit of one or several deputy factions or the non-

replacement of People's Deputies whose terms of office were terminated early with the candidates for People's Deputies following them in the election list of a respective political party or election bloc of political parties) to a number lower than that provided for in the Constitution will entail the termination of the activities of the coalition directly when this decrease takes place (Article 83.6 of the Constitution).

The Fundamental Law does not provide for the procedure for termination of activities of the coalition of deputy factions. This means that there is a legislative gap on this issue. However, filling such gaps is outside the jurisdiction of the Constitutional Court. These issues are to be regulated in the Constitution and/or the Law on the Rules of Procedure of Parliament.

Judges V. Bryntsev, M. Markush and P. Tkachuk expressed dissenting opinions.

Languages:

Ukrainian.



Identification: UKR-2008-3-019

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 18.09.2008 / **e)** 17-rp/2008 / **f)** On compliance with the Constitution (constitutionality) of Article 3 of the Law of Approval of the Constitution of the Autonomous Republic of Crimea / **g)** *Ophitsyynyi Visnyk Ukrayiny* (Official Gazette), 73/2008 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

4.4.1.1 Institutions – Head of State – Powers – **Relations with legislative bodies.**

4.5.6.1 Institutions – Legislative bodies – Law-making procedure – **Right to initiate legislation.**

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

Keywords of the alphabetical index:

Constitutional amendments / Constitution, autonomy.

Headnotes:

The Constitutional Court was asked to assess the compliance with the Constitution of provisions of the Law on the approval of the Constitution of the Autonomous Republic of Crimea.

Summary:

Fifty People's Deputies submitted a petition to the Constitutional Court, requesting an assessment of the compliance with the Constitution of Article 3 of the Law on the Approval of the Constitution of the Autonomous Republic of Crimea no. 350-XIV dated 23 September 1998 (hereinafter "the Law"), in which it is established that amendments to the Constitution of the Autonomous Republic of Crimea are adopted by the Parliament of the Autonomous Republic of Crimea and approved by the law.

According to Articles 2.2 and 133.1 of the Constitution, Ukraine is a unitary state and the Autonomous Republic of Crimea, the status of which is established in particular by Chapter X of the Fundamental Law, forms its constituent part.

The Autonomous Republic of Crimea has its own Constitution (the Constitution of the Autonomous Republic of Crimea), adopted and amended by the Parliament of the Autonomous Republic of Crimea and approved by the Law of Parliament by no less than one-half of the constitutional composition of Parliament (Articles 85.1.37, 135.1 of the Constitution). The Constitutional Court in paragraph 2.2 of the motivation part of the Decision no. 1-rp/2001 dated 27 February 2001 (case on legal acts of Parliament of the Autonomous Republic of Crimea) and paragraph 1.3 of the motivation part of the Decision no. 1-rp/2003 dated 16 January 2003 (case on the Constitution of the Autonomous Republic of Crimea) defined the Constitution of the Autonomous Republic of Crimea as a fundamental normative legal act that has the highest legal force among the acts adopted by bodies of the Autonomous Republic of Crimea.

The Constitution of the Autonomous Republic of Crimea may be amended through regulation of the authorities of the Autonomy, established by it. In order to do so, subjects of the right of legislative initiative at the Parliament may initiate the introduction of amendments to the Constitution regarding this authority, or through the adoption of separate laws within the limits of the constitutional jurisdiction of the Autonomy prescribed by Articles 134 and 138 of the Constitution.

The right of legislative initiative of the Parliament pertains to the President, the People's Deputies and the Cabinet of Ministers (Article 93.1 of the Constitution), but these subjects are not entitled to submit drafts of normative legal acts to the Parliament of the Autonomous Republic of Crimea, in particular regarding amendments to the Constitution of the Autonomous Republic of Crimea.

The Constitution of the Autonomous Republic of Crimea and amendments to it are approved by laws adopted, according to the Constitution, under the special procedure. The ground for adoption by the Parliament of such laws is the adoption by Parliament of the Autonomous Republic of Crimea of the Constitution of the Autonomous Republic of Crimea or amendments to it. Under Articles 85 and 135 of the Constitution, without respective decisions of the Parliament of the Autonomous Republic of Crimea, such laws shall not be adopted.

Therefore, the procedure of introducing amendments to the Constitution of the Autonomous Republic of Crimea, determined in Article 3 of the Law, does not restrict a subjects' right to legislative initiative at Parliament. Article 3 of the Law therefore conforms to the Constitution.

Languages:

Ukrainian.

*Identification:* UKR-2008-3-020

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 18.09.2008 / **e)** 18-rp/2008 / **f)** On official interpretation of provisions of Articles 6.1, 19.3, 20.2 of the Law on the High Council of Justice / **g)** *Ophitsynyi Visnyk Ukrainy* (Official Gazette), 73/2008 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

4.7.4.1.4 Institutions – Judicial bodies – Organisation – Members – **Term of office**.
4.7.5 Institutions – Judicial bodies – **Supreme Judicial Council or equivalent body**.

Keywords of the alphabetical index:

Judicial council / Members, appointment / Age, appointment / Term, powers.

Headnotes:

The case concerned age limits for tenure of certain positions within the High Council of Justice, and procedures for re-election. Members of the High Council of Justice are elected to the office of the Chairperson, Deputy Chairperson and Section Secretary of the High Council of Justice for a three-year term, these roles are elected, and there is no provision within the Law for the possibility of early dismissal of members of the High Council of Justice from these offices once they have reached a certain age.

Summary:

Fifty three People's Deputies asked the Constitutional Court for an official interpretation of provisions of Articles 6.1 and 19.3 of the Law on the High Council of Justice (hereinafter "the Law") in the context of Article 23 of the Law on Civil Service, regarding age limits on tenure of the office of the Chairperson, Deputy Chairperson and Section Secretaries of the High Council of Justice. In particular, they questioned whether once the above-mentioned persons reached the age limit determined by Article 23 of the Law on Civil Service; this was grounds for early termination of their time in office. The applicants also sought clarification of the phrase "with no right to re-election" in Article 20.2 of the Law.

The High Council of Justice is a constitutional body composed of twenty members, of whom seventeen are appointed and three – Chairperson of the Supreme Court, Minister of Justice and Prosecutor General – are *ex officio* members (Article 131 of the Constitution).

Within the make-up of the High Council of Justice are representatives of state bodies, higher legal educational establishments and scientific institutions and public associations. Some are appointed as its members; others are *ex officio* members, which predetermines specific characteristics of the legal status of a member of the High Council of Justice.

With a view to accommodating the different legal standing of those persons, and in an endeavour to pursue the mission of the High Council of Justice as an independent collegiate body responsible for training a highly qualified judiciary, the legislator determined the legal status of those members holding office on a permanent basis and those holding office

on a temporary basis during their tenure. There is no provision within the Law to the effect that members appointed to the High Council of Justice on a permanent basis are civil servants.

Those who are appointed to the High Council of Justice (apart from People's Deputies) on a permanent basis are attached to the High Council of Justice, with the offices they hold and respective benefits are preserved (Article 19.3 of the Law).

The tenure for members of the High Council of Justice (except for *ex officio* members) is six years (Article 1.3 of the Law). Article 18 of the Law contains an exhaustive list of grounds for termination of office of a member of the High Council of Justice, and does not allow termination on other grounds.

Provisions of Article 6 of the Law, whereby a citizen not older than 65 years of age may be recommended for the office of a member of the High Council of Justice is a legal ground for somebody who has reached the age defined by Article 23.1 of the Law on Civil Service (60 years of age for men and 55 for women) to be appointed a member of the High Council of Justice. He or she may hold this office until the expiry of the six-year term for which he or she was appointed.

Other than that, pursuant to Articles 6, 7, 18 of the Law, age limits are not listed amongst requirements and restrictions for members of the High Council of Justice and grounds for early termination. However, the Law does set an age limit of 65 years; beyond that age, a person cannot be recommended and appointed a member of the High Council of Justice (see Article 6.1). A systematic analysis of these articles of the Law suggests that this age, by its legal nature, is a qualifying requirement, implying a special characteristic of the office of a member of the High Council of Justice.

Members of the High Council of Justice elected to the office of Chairperson, Deputy Chairperson or Section Secretary are there on a permanent basis (Article 19 of the Law). There is no age restriction within the Law over the election of a member of the High Council of Justice to the posts mentioned above although there is a stipulation concerning *ex-officio* members). Neither does the Law contain grounds for early dismissal from office for those elected to the positions of Chairperson, Deputy Chairperson or Section Secretary (Articles 20.2, 22.2, 23.2). Persons elected to the above positions are elected from the membership of the High Council of Justice (aside from *ex officio* members) for a three-year term (Articles 20.2, 22.2, 23.3).

The provisions of Article 20.2 of the Law constitute a legal guarantee of independence and provide for legal certainty in the performance by officials of the High Council of Justice of their rights and duties.

Analysis of the relevant provisions of the Law leads to the conclusion that members of the High Council of Justice are elected to the office of the Chairperson, Deputy Chairperson and Section Secretary of the High Council of Justice for a three-year term, these roles are elected, and there is no provision within the Law for the possibility of early dismissal of members of the High Council of Justice from these offices once they have reached a certain age.

The provisions of Articles 6.2, 19.3, 20.2 of the Law, in their systematic interpretation, are to be understood as saying that the Chairperson, Deputy Chairperson, Section Secretary of the High Council of Justice are not defined by the Law as civil servants, and therefore the provisions of Article 23 of the Law on Civil Service do not apply to them.

The Constitutional Court then examined the phrase “with no right to re-election” used by the legislator in Article 20.2 of the Law against the background of the provisions of Articles 19, 22 and 23 of the Law. The Constitutional Court took the stance that Article 20.2 of the Law provides for the election of the Chairperson of the High Council of Justice from among members of the High Council of Justice for three years with no right to re-election. The Law does not establish grounds for dismissal of the Chairperson, Deputy Chairperson, and Section Secretary, but it does establish term of their offices, and as a result, members of the High Council elected to these positions may not be re-elected to the same office during the term he or she carries out the responsibilities defined by Article 1.2 of the Law.

Judges V. Bryntsev and A. Stryzhak expressed dissenting opinions.

Languages:

Ukrainian.



Identification: UKR-2008-3-021

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 02.10.2008 / **e)** 19-rp/2008 / **f)** On compliance with the Constitution of provisions of Articles 23.3.3 and 23.3.5, 23.5, 24.1, 24.2, 25.1, 26.1 of the Law on Financial Services and State Regulation of Financial Services Markets / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 79/2008 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

4.4.1.1 Institutions – Head of State – Powers – **Relations with legislative bodies.**

Keywords of the alphabetical index:

Constitution, amendment / Presidential power / Executive bodies.

Headnotes:

The case concerned the compliance with the Constitution of the Law on Financial Services and State Regulation of the Financial Services Markets. The Constitutional Court found that since an amendment had been made to one of the articles of the Constitution, so that it no longer set out the authorities of the Head of State as to the formation of central bodies of executive power and the regulation of their activities, the provisions had been out of line with the Constitution.

Summary:

Sixty People’s Deputies lodged a petition with the Constitutional Court, seeking a declaration that certain provisions of the Law on Financial Services and State Regulation of the Financial Services Markets (hereinafter “the Law”) did not comply with the Constitution. The problem lay with that part of the provisions relating to the subordination of the special authorised body of executive power for the regulation of financial services markets (hereinafter “the Authorised Body”) and the appointment of executive employees of the Authorised Body. The specific provisions were:

- Article 23.3, 23.5 on the approval by the President of the Regulation on the Authorised Body, on appointment to offices and termination of office of the Chairperson, Deputy Chairpersons and members of the Authorised Body – Directors of Departments;
- Article 24.1, 24.2 regarding appointment to and dismissal from the office of the Chairperson of the Authorised Body by the President;

- Articles 25.1 and 26.1 regarding appointment to or dismissal from offices of Deputy Chairpersons, Directors of Departments of the Authorised Body by the President.

The Constitution has the highest legal force. Laws and other normative legal acts shall conform to it (Article 8.2). Under Article 19.2 of the Constitution, bodies of state power and bodies of local self-government, their officials, including Parliament and the President are obliged to act only on the grounds, within the limits of their powers and in the manner envisaged by the Constitution and laws. Authorities of the President are determined by the Fundamental Law.

In conferring on the President the powers stipulated in Articles 23.3, 23.5, 24.1, 24.2, and 26.1 of the Law, Parliament acted on the assumption of the scope of constitutional competence of the Head of State, determined in Article 106 of the Constitution, particularly regarding the possibility of participating in the process of setting up central bodies of executive power and regulating their activities.

However, the Law on introducing amendments to the Constitution no. 2222-IV dated 8 December 2004 (hereinafter "Law no. 2222-IV") made certain changes to Article 106 of the Constitution. This Article now no longer sets out the powers of the Head of State as to the formation of central bodies of executive power and the regulation of their activities. The President may only regulate activities of those bodies which he is authorised to establish under the Constitution.

The Fundamental Law does not provide for the powers of the President regarding the regulation of financial services markets. The Law determines the status of the Authorised Body as a body of executive power that performs state regulation of financial services markets and is vested with appropriate state powers.

Since the entry into force of Law no. 2222-IV, the impugned provisions, in particular, on approval by the President of Regulation on the Authorised Body, on appointment to offices and termination of office of the Chairperson, Deputy Chairpersons and members of the Authorised Body – Directors of Departments (Article 23.3, 23.5), regarding appointment to and dismissal from offices of Deputy Chairpersons, Directors of Departments of the Authorised Body by the President (Articles 25.1, 26.1) have been out of line with Articles 8, 19, 106, 116 of the Constitution.

During the consideration of this case, the Constitutional Court on the same grounds found signs of non-conformity with the Constitution of Article 24.6

of the Law regarding responsibility of the Chairperson of the Authorised Body before the President. Therefore, according to Article 61.3 of the Law on the Constitutional Court, there are grounds to recognise it as unconstitutional.

Cross-references:

- Decision of the Constitutional Court dated 10 April 2003 no. 7-rp/2003 on official interpretation of provisions of Article 17.2, 17.3, Article 27.2 of the Law "On Status of People's Deputy" (case on guarantees of People's Deputy), *Bulletin* 2003/1 [UKR-2003-1-007];
- Decision of the Constitutional Court dated 7 April 2004 no. 9-rp/2004 on conformity with the Constitution of Article 5.2.a.1, 5.2.a.2 and Article 23.2 of the Law on organisational and legal foundations of combating organised crime", the Decrees of the President on the Coordination Committee on combating corruption and organised crime and on increasing the efficiency of the proceedings of the Coordination Committee on combating corruption and organised crime (case on Coordination Committee);
- Decision of the Constitutional Court dated 16 May 2007 no. 1-rp/2007 on the official interpretation of the provisions of Article 20.5 of the Law on the Judiciary" (case on dismissal of a judge from administrative position), *Bulletin* 2007/2 [UKR-2007-2-001];
- Decision of the Constitutional Court no. 3-rp/2008 dated 1 April 2008 on conformity with the Constitution of the provisions of Articles 6.1, 6.5 and 6.12 of the Law on the State Regulation of the Securities Market, items 1, 9 of the Regulations on the State Commission on Securities and Stock Market approved by the Decree of the President dated 14 February 1997 (case on the State Commission on Securities and Stock Market);
- Decision of the Constitutional Court no. 14-rp/2008 dated 8 July 2008 on conformity with the Constitution of provisions of Article 11.1.1 and 11.1.2 and Article 11.2 of the Law on Natural Monopolies (case on national commissions regulating natural monopolies).

Languages:

Ukrainian.



Identification: UKR-2008-3-022

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 08.10.2008 / **e)** 20-rp/2008 / **f)** On compliance with the Constitution of provisions of Article 7.3.4.b of the Law on Insurance Tariffs for Mandatory State Social Insurance Against Occupational Accidents and Professional Diseases which Caused Disability, items 1, 5.3, 9, 10.2, 10.3, 11 Chapter I of the Law on Introducing Amendments to the Law on Mandatory State Social Insurance Against Occupational Accidents and Professional Diseases which Caused Disability (case on insurance payments) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 80/2008 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

3.5 General Principles – **Social State**.

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

5.4.14 Fundamental Rights – Economic, social and cultural rights – **Right to social security**.

Keywords of the alphabetical index:

Disease, occupational / Accident, work-related, compensation / Insurance, social, state.

Headnotes:

The Constitutional Court recognised as constitutionally compliant, provisions of legislation relating to state insurance and compensation for injuries and disability arising from industrial accidents and occupational diseases.

Summary:

The Authorised Human Rights Representative of Parliament lodged a petition with the Constitutional Court, requesting an assessment of the constitutionality of provisions of Article 7.3.4.b of the Law on Insurance Tariffs for General Mandatory State Social Insurance against an Industrial Accident and Occupational Disease which Caused Disability no. 2272-III dated 22 February 2001 (hereinafter “Law no. 2272-III”) and items 1, 5.3, 9, 10.2, 10.3 and 11 of Chapter I of the Law on Introducing Amendment to the Law on General Mandatory State Social Insurance against an Industrial Accident and

Occupational Disease which Caused Disability no. 717-V dated 23 February 2007 (hereinafter “Law no. 717-V”).

Under Articles 1, 3, 43.4, 46.1, 46.2 of the Constitution, Ukraine is a social state; the essence and orientation of its activity is determined by human rights and freedoms and their guarantees; citizens’ rights to proper, safe and healthy work conditions and to social protection that includes the right to provision in cases of complete, partial or temporary disability, the loss of a principal wage-earner are recognised by the State; the right to social protection is guaranteed by general mandatory state social insurance through insurance contributions by citizens, enterprises, institutions, organisations, budgetary and other sources of social security.

Under Article 1 of the Foundations of the Legislation On General Mandatory State Social Insurance no. 16/98-BP dated 14 January 1998 (hereinafter “the Foundations”), general mandatory state social insurance constitutes a system of rights, duties and guarantees including that material provision for citizens in cases of illness, complete, partial or temporary disability, the loss of the principal wage-earner, unemployment due to circumstances beyond their control, in old age and in other cases established by law from monetary funds accumulated through payment of insurance contributions by an owner or a body authorised by an owner and citizens, as well as from budgetary and other sources envisaged by law.

The Law on General Mandatory State Social Insurance against an Industrial Accident and Occupational Disease which Caused Disability no. 1105-XIV dated 23 September 1999 (hereinafter “Law no. 1105-XIV”), in line with the Constitution and the Foundations, determines a legal basis, economic mechanism and organisational structure for general mandatory state social insurance of citizens against industrial accident and occupational diseases resulting in the disability or death of the insured.

State guarantees for realisation by the insured citizens of their rights and legislative establishment of conditions and procedure for general mandatory state social insurance are the principles of general mandatory state social insurance (Article 5 of the Foundations). Under Article 22 of the Universal Declaration of Human Rights, every human being has the right to social security in accordance with the organisation and recourses of the State. Therefore, the type and amount of social services and payments to the injured realised and compensated by the Social Insurance Fund for Industrial Accidents and Occupational Diseases (hereinafter “the Fund”) are established by the state with account taken of the Fund’s financial resources.

In the Foundations (Article 25.1.4) and the original wording of the Law no. 1105-XIV (Article 21) provision is made for a “package” of the type of social services and payments (material provision) provided for victims of industrial accidents or occupational diseases in case of the occurrence of the insured event. In particular, the right of the injured to compensation for moral (non-material) damage from the Fund was enshrined in Articles 1.4.e, 21.1.1, 28.3, 34.3, 35.1.2 of the Law no. 1105-XIV.

However, items 1, 5.3, 9, 10.3 and 11 of Chapter I of Law no. 717-V introduced amendments to the above provisions of Law no. 1105-XIV.

Items 1, 5.3, 9, 10.3, 11 of Chapter I of Law no. 717-V abolished the right of insured citizens who were the victims of an industrial accident or an occupational disease to compensation for moral damage from the Fund to which they had previously been entitled under the original wording of Law no. 1105-XIV. Nonetheless, in the Constitutional Court’s view, the right of these citizens to compensation for moral damage itself is not violated as long as Article 1167 of the Civil Code and Article 237¹ of the Labour Code provide that they are entitled to compensation for moral damage from an owner or a body authorised by an owner (employer). The division of duties concerning compensation for moral damage to victims of an industrial accident and occupational disease established by the legislator do not contravene the requirements of Article 22 of the Constitution.

On 23 September 1999 Parliament adopted Law no. 1105-XIV; Article 34.2.1 of this Law provided that in case of a permanent professional disability the Fund makes a single insurance payment to an injured person in the amount calculated on the basis of the average monthly earnings for each percent of professional disability. The above provision, according to Chapter XI.1 “Final Provisions” of Law no. 1105-XIV, was to enter into force on 1 January 2001, but the Law on Introducing an Amendment to the Law on General Mandatory State Social Insurance against Industrial Accident and Occupational Disease which Caused Disability no. 2180-III dated 21 December 2000 postponed the date of its entry into force to 1 April 2001.

Before this date, on 22 February 2001, the mentioned provision of Article 34 of the Law no. 1105-XIV was supplemented by Article 7.3.4.b of the Law no. 2272-III. In particular, a limit was established for a single insurance payment, whereby it would not exceed fourfold the boundary amount of a wage (an income) from which contributions to the Fund are levied. According to Article 7.1 of Law no. 2272-III, this provision entered into force on 1 April 2001.

The Constitutional Court took the view that there were no grounds to declare Article 7.3.4.b of Law no. 2272-III unconstitutional, as it did not restrict the amount of a single insurance payment to industrial accident victims, but simply established it. Consequently, the requirements of Article 22 of the Constitution were not infringed.

The Constitutional Court also decided that the provisions of Chapter I.10.2 of Law no. 717-V, making certain changes to the provisions of Article 34.2.2, were also in line with the Constitution. The provisions under dispute established a limit of a single insurance payment for industrial accident victims in cases where, following further examinations, the Medical Social Expert Commission established another, higher level of permanent occupational disability, taking into account other illnesses or injuries arising from the performance of their work duties. This was not to exceed fourfold the boundary amount of a wage (an income) from which contributions to the Social Insurance Fund against Accidents are levied. Although Law no. 717-V entered into force on 20 March 2007, the amount of a single insurance payment was not restricted in cases provided by Article 34.2.2 of the Law no. 1105-XIV as in all instances a limit of a single insurance payment to industrial accident victims could not exceed fourfold the boundary amount of a wage (an income) from which contributions to the Fund were levied.

Judges V. Dzhun’, M. Markush and D. Lylak expressed dissenting opinions.

Languages:

Ukrainian.



Identification: UKR-2008-3-023

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 08.10.2008 / **e)** 21-rp/2008 / **f)** On compliance with the Constitution of provisions of Articles 17.2, 17.3, 20.1, 20.9 of the Law on Telecommunications; Article 2 of the Presidential Decree on national Commission on Regulation of Commissions in Ukraine / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 80/2008 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

4.4.3.2 Institutions – Head of State – Term of office – **Duration of office.**

4.5.7 Institutions – Legislative bodies – **Relations with the executive bodies.**

Keywords of the alphabetical index:

Constitution, amendment / President, powers / Executive bodies.

Headnotes:

The case concerned certain provisions of the Ukrainian Law on Telecommunications, and the authorities of the President over appointing and dismissing the Chairperson and members of the National Commission for Telecommunication Regulation, and the impact and conformity with the Constitution of certain changes to the wording of the Constitution. The provisions of the Law were declared null and void and would lose their legal effect on the date the Constitutional Court adopts this Decision.

Summary:

Subject of the right to constitutional petition – fifty five People's Deputies – lodged a petition with the Constitutional Court questioning the conformity with the Constitution of provisions of Articles 17.2, 17.3, 20.1, 20.9 of the Law on Telecommunications no. 1280-IV dated 18 November 2003 (hereinafter "the Law"). They also questioned the constitutionality of Article 2 of the Decree of the President on the National Commission for Communication Regulation" no. 943 dated 21 August 2004 (hereinafter "the Decree").

Under the Constitution, bodies of state power and their officials are obliged to act only on the grounds, within the limits of their powers and in the manner envisaged by the Constitution and laws (Article 19.2). Normative legal acts are adopted on the basis of the Constitution and shall conform to it (Article 8.2 of the Constitution).

In compliance with Article 106 of the Fundamental Law, the authorities of the President as the Head of State are determined by the Constitution. It makes it impossible to adopt laws that establish his other authorities.

Under the wording of Articles 106.1.10, 106.1.15 of the Constitution as of 28 June 1996, the President's powers included the establishment, reorganisation and winding-up of central bodies of executive power upon submission by the Prime Minister, as well as the

appointment of chairpersons of central bodies of executive power and the termination of their authorities upon such a submission. In this regard, in 2003 Parliament adopted the Law which stipulated that the Commission is a central body of executive power with a special status, and is under the control of the President who approves its Regulations (Article 17.2 and 17.3 of the Law). According to Article 20.1 and 20.9 of the Law, the Head of State appoints the Chairperson and seven members of the Commission (for the first time and in case there are vacancies) and terminates their authorities.

For the execution of the Law in 2004, the President issued the Decree on the basis of which the Commission was established and its Regulations were approved.

The Law on Introducing Amendments to the Constitution no. 2222-IV dated 8 December 2004 (effective from 1 January 2006) introduced certain amendments to the Constitution. The new wording of Article 106 of the Constitution does not contain any provision for presidential power over the formation of central bodies of executive power, appointment and dismissal of their chairpersons and regulation of their activities. These issues – under the altered wording of Article 116.1.9¹, 116.1.9² of the Constitution – fall within the competence of the Cabinet of Ministers, which is to establish, reorganise and wind up ministries and other central bodies of executive power, and, upon the submission of the Prime Minister, appoint and dismiss from office the chairpersons of bodies of executive power who are not members of the Cabinet of Ministers. Based on these provisions, Article 22.2 of the Law on the Cabinet of Ministers determines that ministries and other central bodies of executive power are responsible, accountable to and under the control of the Cabinet of Ministers. The above provisions of the law on presidential authorities are accordingly not compliant with Articles 8, 19, 106 and 116 of the Constitution.

While the case was under consideration, the President declared the Decree by which the Regulations were approved null and void (Decree of the President no. 845 dated 19 September 2008). The jurisdiction of the Constitutional Court extends only to effective normative legal acts. Therefore, there are no grounds for consideration of the issue regarding constitutionality of Article 2 of the Decree. Thus, constitutional proceedings in this part of the constitutional petition are to be terminated in accordance with Article 45.3 of the Law on the Constitutional Court and § 51 of the Rules of Procedure of the Constitutional Court.

Judge V. Kampo expressed a dissenting opinion.

Languages:

Ukrainian.

*Identification:* UKR-2008-3-024

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 09.10.2008 / **e)** 22-rp/2008 / **f)** On compliance with the Constitution of the Resolution of the Cabinet of Ministers on Procurement of Services Related to Formation of Information and Telecommunication System of the State Register of Voters / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 80/2008 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

4.5.2 Institutions – Legislative bodies – **Powers.**

4.6.2 Institutions – Executive bodies – **Powers.**

4.9.7.1 Institutions – Elections and instruments of direct democracy – Preliminary procedures – **Electoral rolls.**

Keywords of the alphabetical index:

Competition, rules, violation / Monopoly / Parliament, powers.

Headnotes:

The Constitutional Court here was considering the compliance with the Constitution of provisions of legislation and resolutions by the Cabinet of Ministers on government procurement of goods, works and services, and specifically the procurement of services relating to the development of the information and telecommunication system of the state register of voters.

Summary:

The President submitted a petition to the Constitutional Court, requesting an assessment of the conformity with the Constitution of the Resolution of the Cabinet of Ministers on the Procurement of Services Related to the Development of Information and Telecommunication System of the State Register of Voters no. 363 dated 17 April 2008 (hereinafter “Resolution no. 363”).

Under the Constitution, the will of the people is expressed through elections, referenda and other forms of direct democracy by participation of citizens in them (Articles 69, 70). The Fundamental Law guarantees that elections to bodies of state power and local-self government are free and are held on the basis of universal, equal, direct suffrage, by secret ballot; voters are guaranteed the free expression of their will (Article 71).

The State Register of Voters (hereinafter “the Register”) was set up as a state record of citizens who have the right to vote according to Article 70 of the Constitution.

Under the Law on the State Register of Voters, the maintenance of the above register is based in particular on the principles of publicity, accuracy, completeness and integrity of data, legality and prevalence of human rights (Article 3). The Law on the State Register determines a list of official personal data of the Register. These, in their turn, constitute the data that verify the facts related to participation of citizens in the process of election (Article 9). Under Article 35 of the Law, the Cabinet of Ministers establishes the procedure and terms for procuring, developing and adjustment of software and hardware for the establishment of information and telecommunication systems and maintenance of the Register. Article 36 states that the disponent of the Register performs the initial generation of the database of the Register with a view to the implementation of an automated information and telecommunication system by transferring personal data of voters from general lists of voters to the data base of the Register.

By stipulating that the procurement by the Central Election Commission of services for the development and adjustment of software needed for the establishment of information and telecommunication system and the maintenance of the Register would be done by one participant, the Cabinet of Ministers not only acted contrary to the above provisions of the Constitution and the Law on the State Register of Voters, but also to the requirements of Article 42.3 of the Constitution, by virtue of which the State ensures the protection of competition in entrepreneurial activity and does not allow the abuse of a monopolistic position in the market and unlawful restriction of competition.

By issuing Resolution no. 363, the Cabinet of Ministers violated the requirements of other provisions of the Fundamental Law, in particular Article 8.2, according to which normative legal acts are adopted on the basis of the Constitution and shall conform to it, and Articles 19.2 and 113.3, pursuant to which the Cabinet of Ministers is obliged to act on the grounds, within the limits of its powers and in the

manner envisaged by the Constitution and laws and to be guided by the Constitution and laws in its activities.

The duty of the State is to ensure protection of competition between subjects carrying out economic activities in the gaining and sharing of profits in order to achieve economic and social results.

Article 42.3 of the Fundamental Law outlaws abuse of monopolistic position in the market, the unlawful restriction of competition and unfair competition.

Although Article 42.1 and 42.3 of the Constitution guarantee the right to and protect competition within entrepreneurial activity, they do not exclude the possibility of restricting competition. However, they prohibit unlawful restriction of competition in entrepreneurial activity.

In order to create a competitive environment in the area of government procurement, to prevent corruption, to ensure transparency in the procedures of government procurement of goods, works and services and to achieve their optimum and rational use Parliament, in accordance with the constitutional provisions mentioned above, adopted the Law on Government Procurement of Goods, Works and Services no. 1490-III dated 22 February 2000 (hereinafter "Law no. 1490-III").

On 20 March 2008, the Parliament adopted the Law on Declaring the Law on Government Procurement of Goods, Works and Services null and void no. 150-VI (hereinafter "Law no. 150-VI"). As a result, Law no. 1490-III lost its legal force (Section I of the Law no. 150-VI) and the Cabinet of Ministers was entrusted with approval of the Temporary Regulation On Government Procurement of Goods, Works and Services on the basis of the Law On Government Procurement of Goods, Works and Services effective as of 17 November 2004 apart from those provisions which contradicted WTO requirements (Section II.2.1 and II.2.2 "Final Provisions").

On 28 March 2008, the Cabinet of Ministers issued Resolution no. 274 On Government Procurement of Goods, Works and Services (described here as Resolution no. 274).

Legal analysis of provisions of Resolution no. 274 suggests that it establishes certain rules of competition during government procurement of goods, works and services.

On 17 April 2008, the Cabinet of Ministers issued Resolution no. 363 whereby "the procurement by the Central Election Commission of services for the

development and adjustment of software needed for creation and administration of information and telecommunication system of the State register of voters shall be made under the procedure of procurement in one participant without the approval of the Ministry of Economy" referring to item 6 of the Temporary Regulation On Government Procurement of Goods, Works and Services approved by Resolution no. 274.

Thus, legal relations regarding the establishment of competition rules in the area of government procurement, which according to Article 92.1.8 of the Constitution shall be determined exclusively by law, are regulated by a subordinate legislative act i.e. the Resolution of the Government. The Constitutional Court took the view here that, in adopting Law no. 150-VI, Parliament delegated to the Cabinet of Ministers its own powers regarding the establishment of competition rules in the area of government procurement of goods, works and services determined by the Constitution. However, the Constitution makes no provision for the right of Parliament to delegate the legislative function to another body (in this case to the Cabinet of Ministers). Hence, Parliament violated Article 19.2 of the Constitution.

Item 2.2 of the Transitional Provisions of Law no. 150-VI does not comply with the requirements of Articles 1, 8.2, 19.2, 75 and 92.1.8 of the Constitution. Therefore, according to Article 152 of the Constitution, and Articles 15 and 61 of the Law on the Constitutional Court there are grounds to recognise it as unconstitutional.

The Constitutional Court concluded that item 2.2 of the Final Provisions of Law no. 150-VI was unconstitutional. Resolutions no. 274 and no. 363 adopted on the basis of this item do not therefore conform to Articles 1, 8.2, 19.2, 42.3, 92.1.8, 113.3 of the Constitution. Consequently, according to Article 152 of the Constitution, Articles 15, 61 of the Law "On the Constitutional Court", there are grounds to recognise them as unconstitutional.

Languages:

Ukrainian.



Identification: UKR-2008-3-025

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 15.10.2008 / **e)** 23-rp/2008 / **f)** On the official interpretation of provisions of Article 106.1.6 of the Constitution (the calling of an all-Ukrainian referendum upon people's initiative by the President) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 80/2008 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

4.4.1 Institutions – Head of State – **Powers.**

4.9.2.1 Institutions – Elections and instruments of direct democracy – Referenda and other instruments of direct democracy – **Admissibility.**

Keywords of the alphabetical index:

Referendum, organisation / Referendum, deadline / President.

Headnotes:

The Constitutional Court considered the procedure whereby the President is obliged to proclaim an All-Ukrainian referendum upon popular initiative. It was noted that there is no provision for time-limits for proclaiming such a referendum, and it was held that the issues raised in the petition in this respect did not fall within the jurisdiction of the Constitutional Court; it was not possible to eliminate this gap simply by interpretation of constitutional norms.

Summary:

According to the Constitution, human rights and freedoms and their guarantees determine the essence and orientation of the activity of the State; to affirm and ensure human rights and freedoms is the main duty of the State (Article 3.2); the people are the only source of power in Ukraine (Article 5.2).

The right of the Ukrainian people to directly exercise power through conducting an All-Ukrainian referendum (i.e. the expression of the will of the people) is enshrined in Article 69 of the Constitution. The right of a citizen to participate in such a referendum is provided by Articles 38.1 and 70.1 of the Constitution.

Thus, the Fundamental Law not only establishes the principle of realisation of power by the people, but also determines certain mechanisms of its implementation, foremost through a referendum.

According to Article 72.2 of the Constitution, an All-Ukrainian referendum upon popular initiative is proclaimed at the request of no less than three million citizens who have the right to vote on condition that signatures in favour of designating the referendum have been collected in no less than two-thirds of oblasts, with no less than one hundred thousand signatures in each oblast.

In compliance with the Constitution, the President is a guarantor of the observance of the Constitution, human and citizens' rights and freedoms (Article 102.2). The President is obliged to act only on the grounds, within the limits of authorities and in the manner envisaged by the Constitution and laws (Article 19.2).

Pursuant to Article 106.1.6 of the Constitution, the President not only designates referenda regarding amendments to the Constitution, but also proclaims an All-Ukrainian referendum upon popular initiative.

A systematic analysis of this constitutional norm and provisions of Articles 69 and 72 of the Constitution would suggest that the proclamation of an All-Ukrainian referendum upon popular initiative is an obligation of the President.

According to Article 5.2, 5.3 and 5.4 of the Constitution, the Ukrainian people are the only source of power, and they exercise it directly. No one may restrict or deprive the Ukrainian people of the right to express their will at an All-Ukrainian referendum.

The initiative of citizens regarding the designation of such a referendum provided that the constitutional procedure for organisation and holding of its initial stage has been observed, shall be realised in accordance with the effective legislation.

According to Article 92.1.20 of the Constitution, the organisation and procedure for conducting elections and referenda are determined exclusively by laws.

The Decision of the Constitutional Court no. 6-rp/2008 dated 16 April 2008 (case on adoption of the Constitution and laws at a referendum) stipulates that these issues are currently regulated by the Law on All-Ukrainian and local referenda, in the part that does not contradict the Constitution and by the Law on the Central Election Commission.

Nonetheless, since norms of the Constitution are norms of direct effect (Article 8.3) the absence of thorough regulation of the procedure for conducting referenda does not dispense the President from the obligation to proclaim them.

The grounds for the proclamation of an All-Ukrainian referendum upon popular initiative are based on constitutional foundations. The President is only obliged to proclaim such a referendum if the requirements determined by Article 72 of the Constitution have been observed. An appropriate presidential decree shall be issued in compliance with the procedure established by norms of the Regulation on the Procedure for Drafting and Submission of Drafts of Acts of the President approved by Decree of the President no. 970 dated 15 November 2006.

In the Constitutional Court's view, in order to realise the right to the expression of the will of the people, the proclamation of a referendum is recognised as a separate legal institution within referendum law. The word "proclamation" means in particular official proclamation, promulgation, notification and official declaration as to the commencement and occurrence of a certain event. Therefore, the authority of the President to proclaim an All-Ukrainian referendum upon popular initiative depends on the will of the citizens, whose number is determined by the Constitution; no one may deprive them of their right to realise their initiative.

From the perspective of the constitutional petition, provisions of Article 106.1.6 of the Constitution in a systematic link with the provisions of Article 5.2 of the Constitution, are to be understood as saying that the President cannot restrict the exclusive right of the people, as the bearers of sovereignty and the only source of power in Ukraine, to the expression of their will through an All-Ukrainian referendum upon popular initiative. He or she is obliged to promulgate the initiative of citizens determined according to Article 72.2 of the Constitution and verified by the Central Election Commission under the established procedure by proclamation of an All-Ukrainian referendum upon popular initiative.

The petition also states that upon the availability of grounds (a legal fact), i.e. signing by the Central Election Commission of a protocol on the final results of collecting signatures of citizens in favour of designating an All-Ukrainian referendum upon popular initiative, the President is obliged to issue a decree straightaway, proclaiming the referendum and the day upon which it is to be held.

In its deliberations on this issue, the Constitutional Court took account of the fact that neither the Constitution nor the Law on All-Ukrainian and Local Referenda no. 1286-XII dated 3 July 1991 with further amendments (in the part that is valid and effective under Chapter XV.1 "Transitional Provisions" of the Constitution) mention time limits for proclamation of an All-Ukrainian referendum upon popular initiative. Since the organisation and procedure for conducting

referenda are regulated exclusively by laws (Article 92.1.20) the term within which the President is obliged to issue a respective Decree shall be determined by law. It is impossible to eliminate this gap simply by interpretation of constitutional norms.

Languages:

Ukrainian.



Identification: UKR-2008-3-026

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 16.10.2008 / **e)** 24-rp/2008 / **f)** On compliance with the Constitution (constitutionality) of provisions of Articles 1, 2, 4, 6 of the Law "On Transferring the Fine Art Collection Belonging to Joint-Stock Company "Gradobank" to State Property", Resolution of Parliament "On Recognising Fine Art Collection National Heritage" / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 82/2008 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

3.9 General Principles – **Rule of law**.
5.1.1.5.1 Fundamental Rights – General questions – Entitlement to rights – Legal persons – **Private law**.
5.3.39.3 Fundamental Rights – Civil and political rights – Right to property – **Other limitations**.

Keywords of the alphabetical index:

Heritage, national and cultural, protection / Expropriation / Property, right.

Headnotes:

This case concerned the transfer of the fine art collection of the Joint Stock Company *Gradobank* to state ownership, its designation as a collection of national and cultural heritage, and the laws and resolutions governing its status and the transfer.

The legal status of the collection as an object of national and cultural heritage does not deprive the owner of the right to possess, use and dispose of his or her property, but rather implies certain special features of realisation by the owner of his or her rights over an object of this nature, which are established by other special laws.

However, in the legislation under scrutiny, whereby the property was transferred to state ownership, the public interest (the aim of the legislation) could have been safeguarded simply by the application of the first legal remedy (recognition of the collection as an object of national cultural heritage). Under such circumstances, the transfer of the collection to state ownership as prescribed by the Law could not be considered as an exceptional legal remedy. There was also no provision within the legislation for total reimbursement in advance for the alienated property.

Summary:

Under the Constitution and general principles and norms of international law, the State must recognise, observe and safeguard the right of property.

The State also ensures protection of the rights of all subjects of the right of property; no one shall be unlawfully deprived of the right of property; the right of private property is inviolable (Articles 13.4, 41.4 of the Constitution). Yet the right of property including the right of private property is not absolute. There are certain constitutional and legal limits on the realisation of this right; see, in particular Articles 13.3 and 41.7 of the Fundamental Law, according to which property entails responsibility and shall not be used to the detriment of the person and society or citizens' rights, freedoms and dignity. Moreover, the Constitution allows for compulsory alienation of objects of the right of private property for reasons of public necessity (Article 41.5).

Article 85.1.36 of the Constitution, which stipulates that the determination of the legal basis for expropriation of objects of the right of private property falls within the remit of Parliament, and Article 92.1.7 of the Constitution states that the legal regime of property is determined exclusively by laws.

The Constitutional Court has stated several times in its decisions that constitutional provisions specified in laws which may *inter alia* contain certain specific features of regulation of different forms of ownership underlie the legal regime of property (Decision no. 11-rp/2003 dated 10 June 2003 on the case on moratorium for compulsory disposal of property and no. 5-rp/2007 dated 20 June 2007 on the case on the creditors of enterprises of communal form of ownership).

One of the grounds for introducing specific features of the legal regime of property concerning certain objects is their cultural value. This is provided for in Article 319.8 of the Civil Code whereby the specific features of realisation of property rights concerning national, cultural and historical values are established by law.

The Law on Transferring the Fine Art Collection of Joint Stock Company "Gradobank" to State Ownership dated 24 June 2004 (hereinafter "the Law") set out the legal basis for the transfer of the fine art collection of Joint Stock Company "Gradobank" (hereinafter "the Collection") to state ownership. It recognised the collection as an object of national and cultural heritage, which is a part of the legal regime of ownership.

According to Article 8 of the Fundamental Law of the State, the principle of the rule of law is recognised and effective. One of the manifestations of this constitutional principle is inviolability of the right of private property and the prohibition of unlawful deprivation of this right.

Compulsory alienation of objects of the right of private property foreseen in Article 41.5 of the Constitution may be applied only in exceptional circumstances, for reasons of public necessity, on the grounds and under the procedure established by law and on condition of complete reimbursement in advance of the cost of such objects.

Having analysed the relevant provisions of the Law and the materials of the case, the Constitutional Court concluded that, in order to achieve the aim stipulated in the Law, i.e. the preservation of the collection as "unique treasures of the national cultural heritage" (see the Preamble to the Law) the legislator applied two legal remedies at the same time: the determination of the legal status of the collection as an object of national and cultural heritage and transferred the collection from private to state ownership. However, the public interest (the aim of this legislation) could have been safeguarded simply by the application of the first legal remedy (i.e. recognition of the collection as an object of national cultural heritage). Under such circumstances, the transfer of the collection to state ownership as prescribed by the Law may not be considered as an exceptional legal remedy in terms of the requirements of Article 41.5 of the Constitution for compulsory alienation of an object of the right of private property.

Moreover, there is no provision in the Law for total reimbursement in advance of the cost of the alienated object of private property, which according to Article 41.5 of the Constitution, is a *sine qua non* condition.

Thus, the legislator did not adhere to the principle of inviolability of the right of private property, which led to the unlawful deprivation of this right. As a result, the provisions of that part of Article 1 which transfer the collection to state ownership, Articles 2 and 6 of the Law concerning the assignment of the collection to the state part of the Museum Stock and its transfer for permanent storage to the National Fine Arts

Museum in Kyiv do not conform to Articles 8, 13.4 and 41.4 of the Constitution and are unconstitutional.

The provisions of Article 5 of the Law establishing the procedure for reimbursement by the state of the cost of the collection are in a systematic link with that part of Article 1 of the Law concerning the transfer of the collection to state ownership. Thus, under Article 61.3 of the Law on the Constitutional Court, there are grounds to recognise Article 5 of the Law as being non-compliant with the Constitution.

Ukraine as a social, law-based state promotes the development of the traditions and culture of the Ukrainian nation and provides for the satisfaction of the national and cultural needs of Ukrainians including those residing beyond the borders of the State (Articles 1, 11, 12 of the Constitution).

According to Article 54 of the Constitution, cultural heritage is protected by the law; the state ensures the preservation of historic memorials and other objects of cultural value. There is a universal obligation not to harm cultural heritage (Article 66 of the Constitution). Parliament established the legal guarantees of preservation of the works of the collection as unique cultural values of the Ukrainian people through the determination of its legal status as an object of national cultural heritage.

The possibility that objects of the right of private property may be recognised as national and cultural heritage is provided for by the Foundations of the Legislation on Culture. As concerns the correlation of the legal status of an object of national and cultural heritage and the right of private property, pursuant to the Regulation on the State Register of National and Cultural Heritage approved by the Resolution of the Cabinet of Ministers no. 466 dated 12 August 1992, the recognition of objects of the right of private property as national and cultural heritage does not aim to change the form of ownership.

Thus, the legal status of the collection as an object of national and cultural heritage does not deprive the owner of the right to possess, use and dispose of his or her property. It simply implies certain special features of realisation by the owner of his or her rights over an object of this nature, which are established by other special laws.

The Constitutional Court accordingly concluded that that part of Article 1 of the Law recognising the collection as an object of national and cultural heritage does not violate requirements of Articles 8, 13 and 41 of the Constitution.

The Cabinet of Ministers and the National Bank were entrusted by the Law (Article 4) to provide an inventory of the works of the collection, to provide art expertise and to calculate the estimated costs until 31 December 2004. This has already been accomplished, and so the provisions of the Law are no longer operative.

The Resolution of Parliament on Recognition of the Collection as National and Cultural Heritage dated 24 May 2001 covers the same area of regulation of the legal regime of ownership of the collection as the Law. Such legal relations, according to Article 92.1.7 of the Constitution, shall be regulated exclusively by laws. Therefore, the Resolution does not conform to requirements of Article 92.1.7 of the Constitution (is unconstitutional). These provisions would lose their legal force from the time of the Constitutional Court's decision.

Judges I. Dombrovskiy and M. Markush expressed dissenting opinions.

Languages:

Ukrainian.



Identification: UKR-2008-3-027

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 11.11.2008 / **e)** 25-rp/2008 / **f)** On compliance with the Constitution (constitutionality) of the Resolution of the Cabinet of Ministers "On Approval of Procedure for Holding Land Auctions in 2008" (case concerning land auctions) / **g)** *Ophitsynyi Visnyk Ukrayiny* (Official Gazette), 89/2008 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

4.5.2 Institutions – Legislative bodies – **Powers**.
4.6.2 Institutions – Executive bodies – **Powers**.
5.3.39 Fundamental Rights – Civil and political rights – **Right to property**.

Keywords of the alphabetical index:

Right to property / Expropriation.

Headnotes:

The case concerned the conformity with the Constitution of certain of the provisions of a resolution by the Cabinet of Ministers on the approval of the procedure for holding land auctions in 2008. These were found to be unconstitutional, and would consequently lose their legal force from the time of the Constitutional Court's decision.

However, the constitutional petition did not meet the requirements envisaged by the Constitution and the legislation governing the Constitutional Court; as a result, that part of the proceedings relating to certain other items of the resolution was terminated.

Summary:

Under the Fundamental Law, Ukraine is a law-based state (Article 1), bodies of legislative, executive and judicial power exercise their authority within the limits established by the Constitution and in accordance with the laws (Article 6.2), laws and other normative legal acts are adopted on the basis of the Constitution and shall conform to it (Article 8.2). Article 19.2 of the Constitution stipulates that bodies of state power and bodies of local self-government and their officials are obliged to act only on the grounds, within the limits of authority and in the manner envisaged by the Constitution and the laws.

The status of the Cabinet of Ministers is covered by other Constitutional provisions, aside from those enumerated above. More specifically, it is guided in its activity by the Constitution and laws as well as by decrees of the President and Resolutions of Parliament adopted in accordance with the Constitution and laws (Article 113.3). It exercises other powers determined by the Constitution and laws (Article 116.10), and, within the limits of its competence, issues resolutions and orders (Article 117.1).

The organisation, authority and operational procedure of the Cabinet of Ministers, and other central and local bodies of executive power, are determined by the Constitution and laws (Article 120.2).

A systematic analysis of the above norms of the Fundamental Law leads to the conclusion that the Cabinet of Ministers, in that sphere of its activity covering the issuing of resolutions and orders, must proceed from the authorities assigned to it exclusively by the Constitution and laws. These may not be established by other legal acts (decrees of the President, resolutions of Parliament or its own acts).

In view of the importance of the fundamental principles of the constitutional order, the Constitution provides for a system of guarantees ensuring the smooth operation of the right institution of the right of property, including rights to land which constitutes the fundamental national wealth under special protection of the state and is an object of the right of property of the Ukrainian people (Articles 13.1, 14.1).

Furthermore, according to the Fundamental Law, the state ensures the protection of the rights of all subjects of the right of property and economic management, and the social orientation of the economy; all subjects of the right of property are equal before the law (Article 13.4); the right of property in land is guaranteed; this right is acquired and exercised by citizens, legal entities and the state exclusively in accordance with the law (Article 14.2); the legal property regime is determined exclusively by laws (Article 92.1.7).

Pursuant to the Constitution, the legal property regime, the procedure and conditions for the acquisition or termination of the right of property and the right to possess, use and dispose of property in the form of land are determined by law.

The need to regulate the right of property, including the right to land, at legislative level has also been confirmed by the legal position of the Constitutional Court.

The Land Code, in its wording as at 17 April 2008, provides that the property right to land is acquired and exercised on the basis of the Constitution, the Code itself, and other legislation adopted pursuant thereto (Article 78.2).

One of the grounds for the acquisition of the property right to a plot of land is its purchase, on the basis of a purchase and sale agreement and other civil legal agreements (Articles 81, 82, 83 and 84 of the Land Code).

Under Article 124.1 of the Land Code, the right to lease plots of land which are within state or municipal ownership may only be acquired at auction. This does not apply to land plots where there are objects of immovable property belonging to citizens and legal entities with no shares or equity interests belonging to the state (see Article 134).

There is a similar provision within Article 16 of the Law on Lease of Land (in its wording as at 17 April 2008).

Article 137.5 of the Code envisages that land auctions are held pursuant to the procedure provided for by law.

On 17 April 2008 the Cabinet of Ministers issued the Resolution on Approval of the procedure for Holding Land Auctions in 2008, in which it approved the procedure for holding land auctions that year.

Item 1 of the above Resolution sets out the procedure for the preparation, organisation and conduct of land auctions in 2008 with a view to the sale of land plots or the granting of the right to lease them. It should be emphasised that the Resolution does not cover the sale or lease of plots of land on which objects that are subject to privatisation are located, neither does it cover plots of land in private ownership or the sale of plots of land for agricultural use.

This act accordingly regulates issues concerning the procedure of alienation, acquisition and exercise of the right of property, the right of temporary use (lease), and the functions and authorities of state bodies and local self-government.

However, these issues are to be regulated exclusively by law.

This conclusion is based on the provisions of Article 137 of the Land Code as quoted above and legal positions adopted by the Constitutional Court.

In view of the fact that the procedure and conditions for acquisition, termination and exercise of the property right to land are included within the general notion of the "legal property regime", which is determined exclusively by laws, the Cabinet of Ministers by issuing the Resolution (item 1) exceeded the limits of its authority provided for in the Constitution and laws, hence out of line with Articles 8.2, 19.2, 92.1.7, 113.1 and 117.1 of the Constitution.

The Constitutional Court therefore pronounced item 1 of the Resolution unconstitutional.

Under the Law on the Constitutional Court, a constitutional petition must give a legal reasoning for statements concerning the unconstitutionality of a piece of legislation or its provisions (Article 39.2.4); the subject for consideration of the Constitutional Court may be a constitutional petition containing arguments and statements as to the unconstitutionality of laws, other legal acts of Parliament, acts of the President, acts of the Cabinet of Ministers or legal acts of Parliament of the Autonomous Republic of Crimea (Article 71.1).

Where there is insufficient legal justification for the lack of conformity of a legal act with the Constitution, this constitutes grounds for the termination of constitutional proceedings in the case pursuant to Article 45.2 of the Law on the Constitutional Court; in that case, the constitutional petition does not satisfy the requirements of the Constitution and this Law.

The constitutional petition does not contain reasoning as to the unconstitutionality of items 2, 3, 4, 5 and 6 of the Resolution of the Cabinet of Ministers on the Approval of the Procedure for Holding Land Auctions in 2008, and this constitutes grounds for the termination of constitutional proceedings in that part of the case relating to the examination of the unconstitutionality of these items.

Judge V. Bryntsev expressed a dissenting opinion.

Cross-references:

- Decision of the Constitutional Court no. 14-rp/2000 dated 13.12.2000 (a case deciding upon a constitutional petition from an association of buyers of members of a labour collective of a hair studio "Cheremshyna" no. 163 (Kyiv), as to the official interpretation of separate provisions of Article 7 of the Law on Privatisation of Small State-Owned Enterprises (Small Privatisation) (the case on determination of the procedure of small privatisation);
- Decision of the Constitutional Court no. 5-rp/2005 dated 22.09.2005, deciding upon a constitutional petition from 51 People's Deputies as to the conformity with the Constitution (constitutionality) of provisions of Article 92, Section X.6 "Transitional Provisions" of the Land Code (the case on permanent use of land plots), *Bulletin* 2005/3 [UKR-2005-3-005];
- Decision of the Constitutional Court no. 5-rp/2007 dated 20.06.2007, deciding upon the constitutional petition of an open joint-stock company "Kirovohradoblenerho" concerning the official interpretation of provisions of Article 5.8 of the Law on Restoration of Solvency of Bankrupt or Recognition of Bankruptcy (the case on creditors of companies owned by the municipality), *Bulletin* 2007/2 [UKR-2007-2-005].

Languages:

Ukrainian.



Identification: UKR-2008-3-028

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 27.11.2008 / **e)** 26-rp/2008 / **f)** On official interpretation of provisions of Article 95.2 of the Constitution and a phrase “balance budget” as used in paragraph 3 of this Article (case concerning balance budget) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 93/2008 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Budget, balance.

Headnotes:

The phrase “the state aspires to a balanced budget” in the Constitutional provision under scrutiny in these proceedings was viewed by the Constitutional Court as an aspiration of the state during the budget process to observe a balance between income and expenditure in the State Budget and a duty upon the state to simultaneously implement the constitutional principles of development and strengthening of a democratic, social and law-based state, to guarantee its sovereignty and economic independence and to safeguard human rights and freedoms and a decent standard of living, based upon a fair and impartial distribution of social wealth among citizens and territorial communities.

Summary:

The Cabinet of Ministers lodged a petition with the Constitutional Court, seeking an official interpretation of provisions of Article 95.2 of the Constitution and the phrase “balanced budget” of Article 95.3.

The budgetary system in Ukraine is built on the principles of just and impartial distribution of social wealth among citizens and territorial communities (Article 95.1 of the Constitution).

Pursuant to the Fundamental Law, the State Budget and the budgetary system are established exclusively by the laws (Article 92.1.2). Such laws are the laws on the State Budget for each year and the Budget Code.

In Article 95.3 of the Constitution, the phrase “balanced budget” is used in the context “the State aspires to a balanced budget”.

The Constitutional Court took the view that the phrase “the state aspires” implies an aspiration and an obligation on the part of the state to direct its activities toward fulfilment of a certain task determined by the Constitution.

Analysis of the terms “balance”, “to balance” and “balanced budget” demonstrates that a balanced budget (at the state or regional level) implies equal (parity) correlation of its income and expenditure and the maintenance of a balance between income and expenditure. However, it does allow for the adoption of a budget where income exceeds expenditure (and vice versa – deficit or surplus). At the same time, the legal nature of the budget is not necessarily restricted to its financial and economic aspects. A budget is a way of formulating and utilising financial resources to support tasks and functions performed by state bodies, bodies of the Autonomous Republic of Crimea and local government authorities during the budget period.

Under Article 95.3 of the Constitution, the state aspires to a balanced budget. This is viewed by the Constitutional Court as an aspiration of the state during the budget process to observe a balance between income and expenditure in the State Budget and a duty upon the state to simultaneously implement the constitutional principles of development and strengthening of a democratic, social and law-based state, to guarantee its sovereignty and economic independence and to safeguard human rights and freedoms.

The Law on the State Budget as a legal act with a specific subject of regulation (determination of incomes and expenditures for the needs of society as a whole) creates adequate conditions for the implementation of laws and other normative legal acts, which impose a financial obligation on the state to its citizens and territorial communities. In the fulfilment of these obligations, the essence of the state as a social and a law-based one is confirmed.

Pursuant to Articles 1 and 3 of the Constitution and the principles of the budgetary system (Article 7 of the Budget Code), the state may not arbitrarily refuse to perform financial obligations it assumed pursuant to

laws and other normative legal acts. Rather, it must act efficiently and responsibly within the framework of applicable budget legislation.

Article 95.2 of the Constitution stipulates that any state expenditure for the needs of society as a whole and the extent and purpose of such expenditure are determined exclusively by the Law on the State Budget. It follows that this expenditure cannot be determined by any other normative legal acts. The needs of society as a whole, including the guarantees of a right to social protection for citizens as stated in Article 46 of the Constitution, are provided for in national programmes, laws and other normative legal acts. Identification of respective budget expenditure in the Law on the State Budget may not result in a restriction of general social needs, infringement of human and citizen's rights established in the Constitution. These include guarantees of a decent standard of living for individuals receiving pensions, and other social and welfare payments that form the main subsistence income at a level not lower than the minimum subsistence as established by law.

Judge P. Tkachuk expressed a dissenting opinion.

Languages:

Ukrainian.



Identification: UKR-2008-3-029

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 03.12.2008 / **e)** 27-rp/2008 / **f)** On official interpretation of provisions of Article 36.1.11 of the Law "On Insurance", Article 28.1.4 of the Law "On Financial Services and State Regulation of Financial Services Markets" (case concerning the authorities of the State Committee on Financial Services related to supervision of insurance activities) / **g)** *Ophitsiynyi Visnyk Ukrainy* (Official Gazette), 96/2008 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

4.10.6 Institutions – Public finances – **Auditing bodies.**

Keywords of the alphabetical index:

Insurance / Regulation / Regulatory power.

Headnotes:

Provisions within Ukrainian legislation on insurance, financial services and the state regulation of financial services markets are to be understood as providing for the authorities of the State Commission for Regulation of Financial Services Markets in the sphere related to supervision of insurance activities that it exercises by means of issuing normative legal acts.

Summary:

The State Commission for Regulation of Financial Services Markets (hereinafter "the Commission") appealed to the Constitutional Court for an official interpretation of the provisions of Article 36.1.11 of the Law on Insurance no. 85/96-BP dated 7 March 1996 (hereinafter Law no. 85/96-BP), Article 28.1.4 of the Law on Financial Services and State Regulation of Financial Services Markets no. 2664-III dated 12 July 2001 (hereinafter Law no. 2664-III).

Under Article 19.2 of the Constitution, bodies of state power and local authority institutions and their officials are obliged to act only on the grounds, within the limits of authority and in the manner envisaged by the Constitution and the laws.

The fundamental principles for the formation and operation of a financial market are established exclusively by laws (Article 92.2.1 of the Constitution). Law no. 2664-III directly determines that "financial institutions in Ukraine act in accordance with this Law and take into consideration the norms established by laws that regulate specific aspects of their activities" (Article 2.2). This provision of Law no. 2664-III applies to all financial services markets and participants therein, whereas norms of laws regulating specific sectors of the financial services market, including those of Law no. 85/96-BP, laws on non-state pension insurance, credit unions and financial leasing are specific. With regard to insurance services, according to Law no. 2664-III they are classified as belonging to the financial services market (Article 1.1.6).

According to Law no. 2664-III, one of the bodies exercising state regulation of financial services markets is a special authorised executive body in the sphere of regulation of financial services markets (Article 21.1), one of the main tasks of which is to exercise state regulation and supervision of provision of financial services and adherence to legislation in

this sphere (Article 27.1.2), development and approval of normative legal acts mandatory for the execution by central and local executive bodies, bodies of local self-government, participants of financial services markets and their associations, control of implementation thereof (Article 28.1.1). Presidential Decree no.1153 dated 11 December 2002 established the Commission as a central executive body with a special status.

The principal functions of the special authorised central executive body in the sphere of supervision of insurance activities are provided for in Article 36 of Law no. 85/96-BP (paragraph one). It also envisages that this body may carry out other functions necessary to perform the tasks it is charged with (paragraph two). Provisions of Article 36.1.5 and 36.1.11 of Law no.85/96-BP provide for the “development of normative and methodological documents related to insurance activities that are classified by this Law as belonging to the authorities of the Authorised Body” and “establishment of the rules for formation, reporting and placement of insurance reserves and reporting indicators”.

Analysis of the above provisions of Law no. 85/96-BP as special norms leads to the conclusion that they do not establish any limits for application of the stipulations of Article 28.1.4.4 of Law no. 2664-III as a general norm regulating relations in the financial services market. Pursuant to the aforementioned norms of Law no. 85/96-BP and Law no. 2664-III, the Commission has a right to establish the rules of exercising supervision of insurance activities within its authorities, to determine mandatory norms of capital adequacy as well as other indicators and requirements that reduce the risks related to transactions involving financial assets.

The constitutional proceedings in the part determining the principles of equality and identity of legal terms on the basis of Article 45.2 of the Law on the Constitutional Court were terminated on the basis that the constitutional petition failed to meet the requirements prescribed by the Constitution and the Law on the Constitutional Court.

Judge V. Kampo expressed a dissenting opinion.

Languages:

Ukrainian.



United Kingdom

House of Lords

Important decisions

Identification: GBR-2008-3-005

a) United Kingdom / **b)** House of Lords / **c)** / **d)** 12.03.2008 / **e)** / **f)** EM (Lebanon) v. Secretary of State for The Home Department / **g)** [2008] UKHL 64 / **h)** [2008] 3 *Weekly Law Reports* 931; CODICES (English).

Keywords of the systematic thesaurus:

5.3.11 Fundamental Rights – Civil and political rights – **Right of asylum.**

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

Keywords of the alphabetical index:

Asylum, request / Asylum, request, refusal / Persecution, country of origin / Expulsion, right to family life.

Headnotes:

The right to family life, protected by Article 8 ECHR, did not assume a pre-determined idea of what constituted a family or family life. The right was to be applied with respect to the circumstances of an individual applicant and the nature of family life as they enjoyed with those who constituted their family or took part in their family life. Where asylum was sought and removal of an asylum seeker to their country of origin was in issue, Article 8 ECHR would not be engaged unless the treatment the applicant would receive on return would give rise to a flagrant breach of the right.

Summary:

I. The appellant was a Lebanese national. She arrived in the United Kingdom in 2004, with her son who was born in 1996. On arrival she claimed asylum. She was married according to Muslim rites in Lebanon. It was accepted for the purposes of the present proceedings that during the marriage in Lebanon she had been subjected to violence, with at

least two attempts made to kill her viz., an attempt to throw her off a balcony and an attempt to strangle her. Her husband had also terminated her first pregnancy by hitting her stomach with a heavy vase. He had also been found guilty of theft from her father's shop. He had not seen his son since he attempted, with members of his family, to take him from her the day he was born and remove him to Saudi Arabia. A divorce was subsequently obtained. The father however retained lawful custody under Lebanese law, but the appellant was lawfully permitted to retain physical custody until her son's seventh birthday. The appellant left Lebanon in order to avoid having to surrender physical custody. If returned to Lebanon, she faced imprisonment and a charge of kidnapping her son.

II. Lord Bingham gave the lead judgment.

The appellant submitted that if returned to Lebanon her Article 8 ECHR right would be infringed and would be infringed by way of a breach of Article 14 ECHR i.e., because she was a woman. The infringement would arise, it was submitted, because of the treatment she would receive on return. Lord Bingham noted that in a case such as this, where the only conduct on the part of the UK authorities was removal from the UK, the burden on the appellant was a high one to discharge. The appellant submitted that she had discharged that burden given the exceptional circumstances that arose in her case and given the effect that removal would have on her son.

Lord Bingham noted that the relevant test to apply was whether, on the facts of the case, the appellant's and her son's removal to Lebanon would 'so flagrantly violate her, his and their Article 8 ECHR rights as to completely deny or nullify them.' He noted that this test was not just a hard one to satisfy, but one that had never been satisfied in any reported decision of the Strasbourg Court where a qualified right was concerned.

On the facts in this case the appellant and her son constituted the family protected by the Article 8 ECHR right. It was their family life which was in issue. The familial bond between mother and son was not one that could be replaced by one between the father, who had deliberately chosen never to see his son, and the son, who felt great antipathy towards the father; especially given the physical and psychological violence inflicted on the mother by the father. It was apparent, Lord Bingham held, that on these facts the mother's Article 8 ECHR right would not simply be flagrantly violated, but would (not that there was a legal distinction) completely denied or nullified.

Lord Bingham noted however that Lebanon was not a party to the European Convention on Human Rights. Moreover, neither the Lords nor the United Kingdom had any right to impose its values on Lebanon. In the premise it was questionable whether the appellant could have relied on, if it were necessary to seek to do so, any alleged arbitrary or discriminatory treatment she might be subjected to in Lebanon if returned there.

Languages:

English.



Identification: GBR-2008-3-006

a) United Kingdom / **b)** House of Lords / **c)** / **d)** 27.10.2008 / **e)** / **f)** R (RJM) v. Secretary of State for Work and Pensions / **g)** [2008] UKHL 63 / **h)** [2008] 3 *Weekly Law Reports* 1023; CODICES (English).

Keywords of the systematic thesaurus:

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

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

5.4.14 Fundamental Rights – Economic, social and cultural rights – **Right to social security.**

Keywords of the alphabetical index:

Disabled person, benefit, right / Homeless, voluntarily / Social benefit, accommodation, condition.

Headnotes:

The right to a disability premium was a possession within Article 1 Protocol 1 ECHR. Homelessness was a personal characteristic even if it arose through deliberate choice on the part of the homeless. It was therefore within the ambit of 'other status' protected by Article 14 ECHR. However, the restriction on the disability premium's availability to the deliberately homeless served a legitimate aim and its impact was proportionate.

Summary:

I. The claimant, as a consequence of mental health problems, was unable to work. He was therefore in receipt of income support, a form of unemployment benefit. Because of his disability he was also eligible for a supplementary benefit, a disability premium, under paragraphs 11 and 12 of Part II of Schedule 2 of the Income Support (General) Regulations 1987. He received the disability premium until August 2004, when he became voluntarily homeless. Schedule 7.6 of the 1987 Regulations did not permit such a premium to be paid where an individual was 'without accommodation.' As a consequence, the decision was taken to stop payment of the disability premium. The claimant sought judicial review of that decision. The House of Lords heard an appeal from the Court of Appeal upholding the initial decision to refuse to grant a judicial review of a decision of the Secretary of State to refuse to revise the decision to stop disability premium payments whilst the claimant was homeless. The issues that arose before the Lords were whether the disability premium was a possession within Article 1 Protocol 1 ECHR and whether the decision to withhold it was contrary to Article 14 ECHR.

II. Lord Neuberger gave the lead judgment, with which the other Lords agreed. He first noted that the effect of Schedule 7.6 of the 1987 Regulations was clearly discriminatory as between disabled persons who had accommodation and those who were without accommodation.

Against this background the Secretary of State advanced three arguments. First, that the claim was outwith the ambit of Article 1 Protocol 1 ECHR as there was no inherent or other right to receive the disability premium. Secondly, that the claim, if within the ambit of Article 1 Protocol 1 ECHR, did not give rise to discrimination per Article 14 ECHR as voluntary homeless was not a 'status' for the purposes of that Article. Thirdly, if Article 14 ECHR applies, such discrimination is justified.

Lord Neuberger rejected the first argument. He held that in light of the decision of the Grand Chamber of the European Court of Human Rights in *Stec v. The United Kingdom* (2005) European Human Rights Reports SE 295 (*Stec*), the disability premium was a possession for the purposes of Article 1 Protocol 1 ECHR as it formed part of the United Kingdom's social welfare system. He went on to state that it made no difference whether the disability benefit was either a funded or unfunded social benefit: see *Stec and Gaygusuz v. Austria* 23 European Human Rights Reports 364.

Turning to the second issue, Lord Neuberger noted that the claimant responded to the Secretary of State's argument in two ways. First, he submitted that there was no requirement to demonstrate that an individual was being discriminated against on the grounds of a particular status or personal characteristic for Article 14 ECHR to be engaged. Alternatively, if there was such a requirement, homelessness was such a characteristic. Lord Neuberger rejected the claimant's first submission. He did so as there was a consistent line of authority where the House of Lords had proceeded on the basis that for Article 14 ECHR to be engaged discrimination had to relate to a personal characteristic. In the premises the question for the Lords was whether homelessness was a personal characteristic, as the latter expression was understood in, for instance, *Kjeldsen v. Denmark* (1976) 1 European Human Rights Reports 711. Homelessness was a personal characteristic. Ascertaining what is a personal characteristic requires a court to assess what somebody is and not what they are doing or what is being done to them: see *Gerger v. Turkey* (no. 24919/94, 8 July 1999, unreported) at [69] and *Cliff* [2007] 1 Appeal Cases 484 at [28]. It was of no significance whether the characteristic was voluntarily adopted or not.

In the premises the third question arose. The Secretary of State submitted that discrimination was justified as it served a legitimate aim viz., to encourage the disabled homeless to seek shelter and therefore help. Helping the disabled homeless into accommodation was understood to be a better way to provide assistance than simply providing financial help. He further submitted that the benefit was designed to be spent on heating and household expenses, for which the homeless would have less need. The discrimination was held to be justified. The Secretary of State's policy was not unreasonable. It pursued a legitimate aim and given its potential impact was properly proportionate.

Languages:

English.



Identification: GBR-2008-3-007

a) United Kingdom / b) House of Lords / c) / d) 26.11.2008 / e) / f) R (L (A Patient)) v. Secretary of State for Justice / g) [2008] UKHL 68 / h) [2008] 3 *Weekly Law Reports* 1325; CODICES (English).

Keywords of the systematic thesaurus:

5.1.3 Fundamental Rights – General questions – **Positive obligation of the state.**

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

Keywords of the alphabetical index:

Detention, pending trial, suicide, prevention / Prisoner, attempted suicide / Suicide, in prison, investigation.

Headnotes:

Prison authorities are required to put in place both systematic measures to prevent prisoner suicide and operational measures to the same effect when they knew or ought to have known a particular prisoner was a real and immediate suicide risk. They were required do so as positive obligation that arose under the right to life under Article 2 ECHR had special application where, as with prisoners, there was a specific risk of suicide. An investigation into a suicide required by the Article 2 ECHR obligation was intended to:

- i. secure State accountability;
- ii. bring to light to circumstances behind it;
- iii. correct mistakes;
- iv. identify good practice; and
- v. learn lessons for the future.

As such the requirement to hold an investigation arose not only where there had been a suicide but also where there had been an attempted suicide that caused long term harm. Such an investigation had to be conducted by an independent person. It had to be instigated by the State. It need not be held in public, but it should involve the victim's family and be subject to a proper level of public scrutiny. It would be comparatively rare however for circumstances to require a full public enquiry.

Summary:

I. L was in custody in a young offenders institution following his arrest and charge for cocaine possession with the intent to supply. On 19 August 2002 he was found hanging from the bars of his cell

window. He had stopped breathing, but was resuscitated. Deprivation of oxygen had however caused serious brain damage. An investigation into what had occurred was initiated by the Prison Service and carried out by a retired prison governor. None of L's relatives were aware of the investigation, nor were his interests otherwise represented. The existence of the investigation and its report only came to light when the Official Solicitor, acting for L, sent a letter before action to the Secretary of State.

II. Lord Phillips gave the lead judgment, with which the other Lords agreed. Lord Phillips limited his judgment to the following situations:

- i. where a suicide attempt nearly succeeds; and
- ii. where it leaves the possibility of serious long-term injury.

It was common ground that where a suicide or near-suicide takes place in a prison the Prison authorities had to conduct an initial investigation to ascertain if a further investigation was required. It was also common ground that no stricter requirements regarding investigations of near suicides were needed than those required under Section 8.3 of the Coroners Act 1988, for suicide investigations. Lord Phillips noted however that differences between a suicide and a near-suicide justified the existence of a more stringent investigatory process for the former.

The Secretary of State submitted that the initial investigation could simply be an internal one and that unless that investigation demonstrated an arguable case for fault on the part of the authorities would a further, independent, investigation be justified. L submitted that Article 2 ECHR required there to be in all circumstances an independent investigation. Lord Phillips held in favour of L. From the outset the investigation to be carried out must be an 'enhanced investigation' as explained by the Strasbourg Court in *Edwards v. The United Kingdom* (2002) 35 *European Human Rights Reports* 487 and by the House of Lords in *R (Amin) v. Secretary of State for the Home Department* [2003] UKHL 51; [2004] 1 *Appeal Cases* 653 at [22]. An initial internal investigation was not sufficient to discharge the Article 2 ECHR obligation. The reasons for this were as follows:

First, the positive duty to protect life has particular application in respect of prisoners who are a category of individual that poses a particularly high suicide risk. Discharge of this duty requires reasonable steps to be taken through systematic precautions in prison to militate against suicide. Secondly, where a suicide, and the same holds for a near-suicide with long term serious consequences, occurs it is a matter of public concern. Where such takes place all the facts must

be thoroughly and impartially investigated in order to ensure that those at fault are held to account and so to ensure that lessons are learned for the future. An enhanced investigation must therefore always take place as: one, the determination of fault is required; and two, the nature of an investigation into a near-suicide will normally be considerable. In the premises the investigation must be impartial and seen to be so.

Lord Phillips went on to hold that in some circumstances an initial, enhanced, investigation will be inadequate to satisfy the Article 2 ECHR duty. In such a case, a further investigation will be required. That further investigation should comply with the procedure laid down in *R (D) v. Secretary of State for the Home Department* [2006] *All England Law Reports* 946. Such an enquiry may be required where the public interest requires it, due the nature of the death; where witnesses refuse to give evidence and the proceedings require conversion into a public inquiry; where the initial investigation discloses serious evidential conflicts. These bases were not exhaustive.

Cross-references:

- *Savage v. South Essex Partnership NHS Foundation Trust* [2008] *UKHL* 74, [2009] 2 *Weekly Law Reports* 115, *Bulletin* 2008/3 [GBR-2008-3-009].

Languages:

English.



Identification: GBR-2008-3-008

a) United Kingdom / **b)** House of Lords / **c)** / **d)** 10.12.2008 / **e)** / **f)** Regina (Wellington) v. Secretary of State for The Home Department / **g)** [2008] *UKHL* 72 / **h)** [2008] 3 *Weekly Law Reports* 48; CODICES (English).

Keywords of the systematic thesaurus:

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

5.3.3 Fundamental Rights – Civil and political rights – **Prohibition of torture and inhuman and degrading treatment.**

Keywords of the alphabetical index:

Extradition, condition / Extradition, guarantee / Death penalty, non-imposition, guarantee / Death penalty, abolition, reasons / Life sentence, irreducible, cruel, inhuman or degrading punishment.

Headnotes:

The imposition of a life sentence did not infringe the right arising under Article 3 ECHR. The imposition of an irreducible life sentence might however give rise to an issue of breach of that right. Where there was an executive power to commute, in exceptional circumstances, a life sentence that was otherwise irreducible no breach of the Article 3 ECHR right arose. Even where a sentence imposed by a foreign court were irreducible and might in principle breach Article 3 ECHR, in the context of extradition, such a breach would only arise if on the facts of the case such a sentence was clearly disproportionate.

Summary:

I. The State of Missouri alleged that the appellant committed two murders in Kansas City in 1997. He was charged with first degree murder, the penalty for which was death or life imprisonment without eligibility for parole or early release except by act of the State Governor. He was arrested in London in 2003 and the US authorities requested his extradition. An undertaking was given that the death penalty would not be sought.

II. Lord Hoffman gave the leading judgment, with which the other Lords agreed. The appeal raised two issues: first, whether a life sentence without eligibility for parole would, in the UK, amount to inhuman or degrading punishment; and secondly, if it makes any difference if the sentence were imposed in a US State rather than the UK.

Lord Hoffman first noted that, as a matter of principle, the abolition of the death penalty must have been based on an acceptance of the belief that every life has an inalienable value. He noted that, on the contrary, there were pragmatic reasons for its abolition i.e., its irreversibility where a miscarriage of justice occurs or that there is little evidence to its greater efficacy as a deterrent than other forms of punishment or that it is a degrading form of punishment both for the participants and society at large. The preservation of the whole life sentence is the price paid for accepting such views and the need to abolish the death penalty.

He then noted how in *Kafkaris v. Cyprus* (no. 21906/04, 12 February 2008, unreported) at [97] the Strasbourg Court held that a life sentence was not prohibited *per se* by Article 3 ECHR, but that an irreducible one may, but only may, raise Article 3 ECHR issues. If a life sentence was *de facto* and *de jure* reducible no Article 3 ECHR issue arose even if any particular sentence was served in full. It was however a matter for individual States to make their own arrangements for review such sentences and the court would not enquire too closely into how such systems operated.

Lord Hoffman accepted that this reasoning was to the effect that on the facts of any one case an irreducible sentence might be justified under Article 3 ECHR, but that where a life sentence was reducible it would not begin to raise any Article 3 considerations. It was further authority for the proposition that 'the bar for what counts as irreducible was set high.' It had to be shown that there was no real possibility of review and release. In *Kafkaris*, a presidential pardon was sufficient to render the sentence reducible: there was a *de facto* possibility of early release.

In the premises the imposition of a whole life sentence in the United Kingdom did not infringe Article 3 ECHR; it was to be noted however that there might come a time during the life of such a sentence that the issue might arise as to whether it did in fact infringe the right.

The leading authority in respect of the second, the extradition question, was *Soering v. The United Kingdom* (1989) *European Human Rights Reports* 439. In that case it was accepted that the imposition of a death sentence in the State of Virginia breached Article 3 ECHR due to the manner in which it was implemented i.e., due to long delay in carrying it out. In that case the court at [86] made clear that in extradition cases Article 3 ECHR did not apply simply as if the extraditing State was simply responsible for whatever punishment the receiving State imposed. In assessing whether there was an Article 3 ECHR breach, the Strasbourg Court had made clear that the desirability of extradition had to be taken account of in assessing whether the punishment to be imposed would attain 'the "minimum level of severity" which would make it inhuman and degrading.': see Lord Hoffman at [23]. Inhuman and degrading punishment in the domestic context would not necessarily amount to the same when assessed in the context of extradition. Article 3 ECHR only applied therefore in an attenuated fashion in extradition cases.

On the facts in the present case, applying the heightened standard required by extradition cases to Article 3 ECHR's application, and given that there is no other jurisdiction in which the appellant could be tried

unless extradited, he would remain in the United Kingdom as a fugitive from justice, the mandatory life sentence was not disproportionate to the crime for which he was accused.

Languages:

English.



Identification: GBR-2008-3-009

a) United Kingdom / **b)** House of Lords / **c)** / **d)** 10.12.2008 / **e)** / **f)** *Savage v. South Essex Partnership NHS Foundation Trust* / **g)** [2008] *UKHL* 74 / **h)** [2008] 3 *Weekly Law Reports* 115; CODICES (English).

Keywords of the systematic thesaurus:

5.1.1.4.2 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Incapacitated**.
5.1.1.4.3 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Detainees**.
5.1.3 Fundamental Rights – General questions – **Positive obligation of the state**.
5.3.2 Fundamental Rights – Civil and political rights – **Right to life**.

Keywords of the alphabetical index:

Detention, in hospital / Detention, risk of suicide, prevention, obligation.

Headnotes:

Where hospital staff members knew or ought to have known a particular mental patient presented a real and immediate suicide risk, a particular duty was imposed under Article 2 ECHR. That duty was additional to the more general duty imposed under the Article, which required appropriate general measures to be adopted in order to protect life e.g., the employment of competent staff, high professional standards and proper systems of work. Patients who posed a relevant suicide risk were particularly vulnerable and as such Article 2 ECHR required the adoption of measures suitable to meet that risk. Such measures required staff to take all reasonable measures possible to prevent a suicide attempt.

Summary:

I. An individual with a long history of mental illness was detained on an open acute psychiatric ward in an NHS hospital under Section 3 of the Mental Health Act 1983. Detention was ordered in order to provide treatment for paranoid schizophrenia. The individual made a number of escape attempts, the last of which was successful, following which she committed suicide. A damages claim was brought by her daughter. That claim was brought under Sections 6-8 of the Human Rights Act 1998. She claimed the hospital had breached her mother's rights under Article 2 ECHR. A preliminary issue arose as to what test was applicable in order to establish a breach of the Article 2 ECHR right.

II. Lord Rodger gave the lead judgment, with which the other Lords agreed. Lord Rodger began his judgment by reviewing the Strasbourg Court's approach to the Article 2 ECHR duty in the context of prisoners and conscripts.

He reviewed the influence of its decision in *Osman v. The United Kingdom* (1998) 29 *European Human Rights Reports* 245. He noted how it was well established that a positive obligation under Article 2 ECHR was imposed on States to protect the life of those in hospital and that that obligation required hospitals to make regulations to that end. If those were adopted and put in place, then casual acts of negligence on the part of hospital staff would not give rise to a breach of Article 2 ECHR, although they might give rise to a common law claim in negligence: see *Powell v. The United Kingdom* (2000) 30 *European Human Rights Reports* 362 at 364.

It was also well-established that the particular vulnerability of mental patients, as it gave rise to a higher suicide risk, was a factor that authorities had to take account of when assessing what measures to take to protect life. Where the individual concerned was also detained in hospital, the positive obligation required the same principles to be applied in hospital cases as applied in other cases of detention: see *Herczegfalvy v. Austria* (1992) 15 *European Human Rights Reports* 437 at [82]. There was thus an obligation to protect detained patients from self-harm and suicide.

In the premises, the hospital was under a general obligation pursuant to Article 2 ECHR to take precautions to prevent suicide amongst its detained patients.

Where such measures were taken and a member of the hospital staff negligently placed a detained patient on an open ward, from which they escaped and subsequently committed suicide, no breach of Article 2 ECHR would arise as the general obligation had been properly discharged: see *Powell*. A failure to properly discharge the general obligation would, on the other hand, give rise to a breach of Article 2 ECHR.

In addition to the general obligation, Article 2 ECHR imposed an operational obligation. This, distinct, obligation arose where a member of staff knew or ought to have known that a specific patient was at real and immediate risk of committing suicide. Where that was the case, a failure on the part of the hospital authorities and staff to take all reasonable preventative steps would give rise not just to a claim in negligence but a claim for breach of the Article 2 ECHR right as was envisaged in *Osman and Keenan v. United Kingdom* (2001) 33 EHRR 913.

Cross-references:

- *R (L (A Patient)) v. Secretary of State for Justice* [2008] UKHL 68, [2008] 3 *Weekly Law Reports* 1325, *Bulletin* 2008/3 [GBR-2008-3-007].

Languages:

English.



Inter-American Court of Human Rights

Important decisions

Identification: IAC-2008-3-008

a) Organisation of American States / b) Inter-American Court of Human Rights / c) / d) 05.08.2008 / e) Series C 182 / f) *Apitz Barbera v. Venezuela* / g) / h) CODICES (English, Spanish).

Keywords of the systematic thesaurus:

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

4.7.4.1.6.2 Institutions – Judicial bodies – Organisation – Members – Status – **Discipline.**

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.**

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

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

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:

Judge, disciplinary measure, motives, statement / Judge, appointment, provisional / Judge, independence, safeguards / Judge, disciplinary proceedings, hearing, oral.

Headnotes:

In order to ensure that provisional judges remain independent, States must grant them some form of stability and permanence in office. The fact that judges are appointed provisionally should not alter the safeguards in place to maintain the integrity of the judiciary.

Provisional judicial appointments should not extend indefinitely, but should depend upon a condition subsequent; they should be the exception rather than the rule, and should be subjected to the same conditions as tenured judges in order to ensure the independent exercise of the judicial office.

The State must guarantee the independence of judges both at the institutional level and with respect to each individual judge. The judicial system in general, and its members in particular, must not find themselves subjected to possible undue limitations on the exercise of their functions by reviewing judges or bodies alien to the judiciary.

Impartiality demands that a judge approach the facts of a case subjectively free of all prejudice and also offer sufficient objective guarantees to exclude any doubt the parties or the community might entertain as to his or her lack of impartiality.

The right to a hearing requires every person to be able to have access to the state body or tribunal in charge of determining his or her rights and obligations. This does not imply that the right to a hearing must necessarily be exercised orally in all proceedings.

Decisions regarding the disciplining of judges should state their grounds so that these may operate as a guarantee that judges will not be penalised for taking legal positions that are duly supported but do not correspond to those put forward by the reviewing organs.

Summary:

I. On 30 October 2003, three judges of the First Court of Administrative Disputes, charged with reviewing administrative acts, were deemed to have committed “serious legal error of an inexcusable character” after approving a request for *amparo* against an act related to the sale of real estate. Because the State was under a constitutional transition process, the three judges had been appointed to the court on a provisional basis by the Supreme Tribunal of Justice until such offices could be filled through a competitive selection process. However, after this ruling, the judges were subjected to criminal proceedings, a disciplinary investigation, precautionary suspension, and removal from office, despite that the State’s highest court referred to their acts as “common practice”. The judges attempted to challenge these proceedings through various judicial avenues.

On 29 November 2006, the Inter-American Commission on Human Rights (hereinafter, "the Commission") filed an application with the Inter-American Court of Human Rights (hereinafter, "the Court") against the State of Venezuela to determine its responsibility for the alleged violation of Article 8 ACHR (Right to Fair Trial) and Article 25 (Right to Judicial Protection), in relation to Article 1.1 ACHR (Obligation to Respect Rights) and Article 2 ACHR (Domestic Legal Effects). The representatives, for their part, alleged additional violations of Article 23 ACHR (Right to Participate in Government), Article 24 ACHR (Right to Equal Protection), and Article 29 ACHR (Restrictions Regarding Interpretation).

II. In its Judgment of 5 August 2008, the Court found that because the body reviewing the judges' actions had jurisdiction to hear all disciplinary proceedings against judges of the State, it was not an *ad hoc* tribunal, and was previously established by law. Additionally, it found no violation for the fact that the judges could not present orally before that body, as no arguments were submitted with respect to the necessity of oral proceedings. However, the Court held that the State did not effectively guarantee the right to have a hearing before an impartial tribunal, pursuant to Article 8.1 ACHR in relation to Articles 1.1 and 2 ACHR, because domestic law prevented the judges from requesting a review of the impartiality of the body that heard their appeals. Additionally, because its members were subject to discretionary removal, that body was not subject to sufficient guarantees of independence.

The Court also stated that the State violated Article 8.1 ACHR, in relation to Article 1.1 ACHR, due to the fact that the reviewing body did not state the grounds for its decision against the three judges. Additionally, the Court held that the State violated those same articles because a hierarchical recourse filed against the order for removal of the judges was ruled upon after three times the length of time allowed by law. Additionally, the State did not justify its delays in ruling upon an appeal for annulment of that order, taking into account the complexity of the case, the procedural activity carried out by the parties, and the activity of judicial authorities.

Furthermore, the Court also found that the State violated Article 25.1 ACHR, in relation to Article 1.1 ACHR, due to unjustified delays in the resolution of petitions for constitutional *amparo*, intended to be a prompt recourse under the State's domestic law, against two judges' suspensions and removal from office.

However, the Court found no violation of Article 24 ACHR because it did not have jurisdiction to rule on whether other judges of the First Court should have been sanctioned identically to the three victims in this case. It also rejected the representative's contention that the State violated Article 24 ACHR because an appeal for annulment filed by another judge was decided promptly, and stated that such allegations should be analysed under the non-discrimination clause in Article 1.1 ACHR, in relation to the substantive right found in Article 8.1 ACHR. However, the Court found no violation of these articles because the proceedings cited by the representative were different in nature.

Furthermore, the Court found no violation of Article 23 ACHR, since the prohibition of reincorporation into public office of those who have been dismissed is an objective and reasonable condition intended to guarantee the correct exercise of the judicial task. Additionally, the Court reasoned that because it lacked jurisdiction to determine whether a disciplinary sanction should have been imposed on other judges, it also lacked the competence to analyse the consequences that such imposition would have engendered. Finally, the Court rejected the alleged violation of Article 29 ACHR, stating that the interpretation principles contained therein can only result in the violation of a substantive right unduly construed in accordance with those principles.

Consequently, the Court ordered the State to reinstate the judges to their previous positions or to positions of the same rank, salary, and benefits. It also ordered the State to publish the pertinent parts of its Judgment, enact a judicial code of ethics, and ensure the impartiality of the disciplinary authority of the judiciary. Additionally, the State was ordered to pay the judges pecuniary and non-pecuniary damages, as well as legal costs and expenses.

Languages:

Spanish.



Identification: IAC-2008-3-009

a) Organisation of American States / b) Inter-American Court of Human Rights / c) / d) 06.08.2008 / e) Series C 184 / f) Castañeda Gutman v. Mexico / g) / h) CODICES (English, Spanish).

Keywords of the systematic thesaurus:

1.2.2 Constitutional Justice – Types of claim – **Claim by a private body or individual.**

3.3.1 General Principles – Democracy – **Representative democracy.**

3.16 General Principles – **Proportionality.**

3.18 General Principles – **General interest.**

4.7.1 Institutions – Judicial bodies – **Jurisdiction.**

4.9.5 Institutions – Elections and instruments of direct democracy – **Eligibility.**

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

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

5.3.29.1 Fundamental Rights – Civil and political rights – Right to participate in public affairs – **Right to participate in political activity.**

5.3.41.2 Fundamental Rights – Civil and political rights – Electoral rights – **Right to stand for election.**

Keywords of the alphabetical index:

Constitutional review, availability, obligation / Law, constitutional review, availability / Election, candidacy, presentation by political party, requirement / Constitutional claim, scope / Right, political, executive, effective.

Headnotes:

Limiting the recourse of *amparo* to certain subjects is not incompatible with the American Convention on Human Rights as long as another recourse of a similar nature exists to protect rights not covered by the former, particularly those of a political nature.

Judicial authorities must be legally competent to review the constitutionality of laws that allegedly infringe upon a person's rights.

The effective exercise of political rights is an end in itself, as well as a fundamental means of protection of all other rights in democratic societies.

States have a positive obligation to guarantee the right to participate in government, which includes the

right to participate in electoral processes, through legislation, the creation of infrastructure necessary to exercise such rights, and through other measures.

The American Convention on Human Rights establishes certain standards within which States can and should legitimately regulate political rights. Such regulations must comply with the principle of legality, further legitimate ends, and be necessary, proportional, and narrowly tailored to a public need, in accordance with the principles of representative democracy.

Summary:

I. On 5 March 2004, Jorge Castañeda Gutman filed a request to be registered as an independent candidate in the elections for the Presidency of Mexico. The Federal Electoral Institute (*Instituto Federal Electoral*, hereinafter, "IFE") replied that his candidacy could not be considered because it was submitted extemporaneously and because Article 175 of the Federal Code on Electoral Processes and Institutions (hereinafter, "electoral code") provides that only political parties may present candidates for elected offices. Mr Castañeda then sought a writ of *amparo* from the Seventh Administrative Court of the Federal District. That Court rejected the action, stating the application of the law in question could only be challenged through an action claiming its unconstitutionality. The Supreme Court of Justice confirmed the dismissal.

On 21 March 2007, the Inter-American Commission on Human Rights (hereinafter, "the Commission") filed an application with the Inter-American Court of Human Rights (hereinafter, "the Court") against the State of Mexico to determine the State's responsibility for the alleged violation of Article 25 ACHR (Right to Judicial Protection), in relation to Article 1 ACHR (Obligation to Respect Rights) and Article 2 ACHR (Domestic Legal Effects). Additionally, the representatives of the victims alleged violations of Article 23 ACHR (Right to Participate in Government) and Article 24 ACHR (Right to Equal Protection), in relation to Article 1.1 ACHR.

II. In its Judgment of 6 August 2008, the Court first rejected the State's preliminary objection that Article 175 was not applied to Mr Castañeda, citing his rejected registration as a candidate and the pronouncements of the domestic courts. It also rejected the State's second and third objections, holding that re-submitting a request at the appropriate time did not constitute a remedy to be exhausted, and that the effectiveness of a remedy provided for under Mexican law was an issue to be decided on the merits. Finally, the Court rejected the State's fourth objection, holding that the Commission had proceeded in

accordance with its rules of procedure and that the State's right of defence had not been impaired.

Additionally, the Court held that the State violated Article 25 ACHR, in relation to Article 1.1 ACHR, because it failed to offer Mr Castañeda any recourse for the protection of his political right to be elected, despite that the recourse of *amparo* was limited by subject matter and that no mechanism existed under Mexican law to allow an individual to initiate an action of unconstitutionality against the law in question. Thus, the lack of an effective judicial recourse also constituted a failure of the State to adapt its domestic legislation to the requirements of the American Convention on Human Rights, a violation of Article 2 ACHR.

On the other hand, the Court found that the State had shown that the registration of candidates for office through the organisation of political parties responds to the social necessities of Mexico. Thus, Article 175 of the Electoral Code pursued a legitimate end that addressed a public need, and was narrowly tailored and proportionate to that need, in accordance with Article 23 ACHR.

Finally, the Court held that because local and national elections are not of the same nature, differences in their organisation do not necessarily violate Article 24 ACHR. In this case, it was not shown that the differences in question were discriminatory.

Consequently, the Court ordered the State to adapt its legislation to the requirements of the American Convention on Human Rights and publish pertinent parts of the Judgment in its Official Gazette and another newspaper of national circulation, and to pay Mr Castañeda's legal costs and expenses.

Languages:

Spanish.



Identification: IAC-2008-3-010

a) Organisation of American States / **b)** Inter-American Court of Human Rights / **c)** / **d)** 12.08.2008 / **e)** Series C 186 / **f)** Heliodoro Portugal v. Panama / **g)** / **h)** CODICES (English, Spanish).

Keywords of the systematic thesaurus:

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

5.3.3 Fundamental Rights – Civil and political rights – **Prohibition of torture and inhuman and degrading treatment.**

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

5.3.5.1 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.**

5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression.**

Keywords of the alphabetical index:

Detention, lawfulness / Disappearance, forced, continuing nature / Judicial protection, right, essence, endangered / Disappearance, forced, crime, obligation to typify.

Headnotes:

The forced disappearance of persons is a continuing or permanent violation that infringes several rights protected in the American Convention on Human Rights and must be analysed integrally.

A situation will be treated as a forced disappearance as long as the location of an alleged victim has not been determined, nor the location or identification of the person's remains established.

In order to prevent impunity, States that have not typified forced disappearances as autonomous crimes have the duty to use the faculties of their criminal systems in a manner that protects the various rights in the American Convention on Human Rights that may be violated by such acts, such as the right to life, liberty, and personal integrity.

The Inter-American Convention to Prevent and Punish Torture requires that legislation typifying the crime of torture state the elements constituting that crime.

Summary:

I. On 14 May 1970, Heliodoro Portugal, a supporter of the Revolutionary Action Movement in Panama, was forced into a taxi by several individuals dressed as civilians and taken to an unknown destination. There is material and oral evidence to suggest that he was subjected to torture. Heliodoro Portugal was confined at the military base of Los Pumas, in Tocumén, where

he was subsequently executed. An analysis of his remains, which were recovered in September 1999, suggests that Mr Portugal passed away at least twenty years prior. The State of Panama ratified the American Convention on Human Rights in 1978 and accepted the contentious jurisdiction of the Inter-American Court on Human Rights (hereinafter, "the Court") on 9 May 1990.

On 23 January 2007, the Inter-American Commission of Human Rights (hereinafter, "the Commission") filed an application against the State of Panama alleging violations of Article 4 ACHR (Right to Life), Article 5 ACHR (Right to Personal Integrity), and Article 7 ACHR (Right to Personal Liberty), in relation to Article 1.1 ACHR (Obligation to Respect Rights) to the detriment of Heliodoro Portugal, as well as Article 8.1 ACHR (Right to a Fair Trial) and Article 25 ACHR (Right to Judicial Protection), to the detriment of Mr Portugal's next of kin. The Commission also alleged the State's international responsibility under Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture (hereinafter, "the IACPPT"), and Article III of the Inter-American Convention on Forced Disappearance of Persons (hereinafter, "the IACFDP"). The State responded that the application of the Commission was inadmissible because the Court lacked jurisdiction *ratione temporis* and *ratione materiae*, and because domestic remedies had not been exhausted.

II. In its Judgment of 12 August 2008, the Inter-American Court of Human Rights held that it did not have jurisdiction over the alleged extra-judicial execution of Heliodoro Portugal or the alleged acts of torture committed against him, as these would constitute instantaneous violations of his right to life and personal integrity completed before Panama accepted the Court's jurisdiction. Thus, the Court could not rule on the alleged violations of Articles 4 and 5 ACHR. Likewise, the Court held that any violation to Portugal's right to freedom of expression (Article 13 ACHR), alleged by the representatives, would have occurred while he was alive and was thus beyond its competence.

However, the Court also held that because forced disappearances are of a continuing or permanent nature, the Court has jurisdiction over alleged forced disappearances that occur before a State recognises its contentious jurisdiction if the whereabouts or fate of the alleged victim remain unknown at the time of recognition of jurisdiction. Thus, since Mr Portugal's remains were not identified until ten years after Panama accepted the Court's jurisdiction, the Court had competence over his alleged forced disappearance as a deprivation of liberty (Article 7 ACHR), the alleged violation of the right to personal

integrity of his next of kin (Article 5 ACHR), and the responsibility of the State regarding the investigation of the disappearance after Panama became a party to the American Convention on Human Rights.

The Court found the State in violation of Article 7 ACHR, in relation to Article 1.1 ACHR, and Article I IACFDP for the forced disappearance of Mr Portugal as of 9 May 1990, since such violation continued until 2000, when his remains were identified.

With respect to Mr Portugal's next of kin, the Court found violations of Articles 8 and 25 ACHR, in relation to Article 1.1 ACHR, because the State did not carry out a serious and impartial investigation into the disappearance of Mr Portugal after the family had presented a claim in 1990. Likewise, the Court found a violation of Article 5 ACHR for the effects that the State's failure to carry out measures to clarify the facts and punish those responsible had on their personal integrity. However, the Court did not find it necessary to analyse the State's omission in light of Articles 1, 6 and 8 IACPPT, as these rights were subsumed in the violations already declared.

Finally, the Court held, in light of Article 2 ACHR (Domestic Legal Effects), that the State has not complied with its obligation to typify the crime of forced disappearance within a reasonable time, in conformity with Articles II and III IACFDP, or its obligation, in conformity with Articles 1, 6 and 8 IACPPT, to typify the crime of torture so that it satisfies the principle of legality.

Consequently, the Court ordered the State to publish the judgment, perform a public act recognising its international responsibility, designate a street in memory of Mr Portugal, and offer psychological and medical attention to his next of kin. It also ordered the State to reform its legislation in order to identify the crimes of forced disappearance and torture in accordance with the demands of the IACFDP and IACPPT. Finally, the Court ordered, *inter alia*, that the State pay pecuniary and non-pecuniary damages and the reimbursement of costs and expenses.

Supplementary information:

Judge García-Ramírez wrote a separate opinion.

Languages:

Spanish.



Identification: IAC-2008-3-011

a) Organisation of American States / **b)** Inter-American Court of Human Rights / **c)** / **d)** 30.10.2008 / **e)** Series C 187 / **f)** Bayarri v. Argentina / **g)** / **h)** CODICES (English, Spanish).

Keywords of the systematic thesaurus:

5.3.3 Fundamental Rights – Civil and political rights – **Prohibition of torture and inhuman and degrading treatment.**

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

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

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.**

Keywords of the alphabetical index:

Denial of Justice / Investigation, effective, *ex officio*, requirement.

Headnotes:

An effective mechanism of control against illegal and arbitrary detentions must include, without delay, a judicial review that analyses those factors that would allow a conclusion on the legality of a person's detention.

A person in preventive detention has the right to be judged within a reasonable time or be freed, without prejudice to the continuation of the process. The State may impose other, less intrusive, measures to ensure that person's appearance in later proceedings.

Indications of torture or other cruel, inhumane, or degrading treatment must be investigated *ex officio* by State authorities.

Summary:

I. On 18 November 1991, Mr Bayarri was detained by police agents without a judicial order and taken to a secret detention facility for questioning on alleged kidnappings; one week later he was brought before a judge. On 6 August 2001, Mr Bayarri was sentenced to life in prison for the kidnappings, but this decision was appealed to the Federal Appellate Court, which absolved Mr Bayarri in 2004 and found that his confession was invalid because it was obtained through the use of torture. He was thus released from custody thirteen years after his initial deprivation of liberty. However, while still in custody, Mr Bayarri had filed a complaint in the domestic courts regarding his unlawful detention and illegal treatment; this action was still being tried at the time the case was submitted to the Inter-American Court of Human Rights (hereinafter, "the Court").

On 16 July 2007, the Inter-American Commission of Human Rights (hereinafter, "the Commission") filed an application to the Court to determine the responsibility of the State of Argentina for the lack of compliance with of Article 5 ACHR (Right to Humane Treatment), Article 7 ACHR (Right to Personal Liberty), Article 8 ACHR (Right to a Fair Trial), and Article 25 ACHR (Right to Judicial Protection), in relation to Article 1.1 ACHR, to the detriment of Mr Bayarri.

II. In its Judgment of 30 October 2008, the Court first held that the State violated Article 7.1, 7.2 and 7.5 ACHR because Mr Bayarri was detained without a judicial order although he was not *in flagrante delicto*, because he was not presented without delay before a competent judge, and because the judge that finally heard his case failed to exercise effective legal control over his detention. Furthermore, the Court considered that Mr Bayarri's preventive detention not only surpassed what would be a reasonable time limit in accordance with Article 7 ACHR, but was excessive in that he was deprived of liberty for thirteen years while waiting for a final judgment on his case.

Likewise, the Court held that the State violated Article 5 ACHR, in relation to Article 1.1 ACHR, based upon the evidence of Mr Bayarri's injuries, the conclusion by Argentine tribunals that he had been tortured by State agents, and the fact that the judge who first examined the case made no effort to investigate *ex officio* his visible wounds. In application of the principle of *jura novit curia*, the Court also found the State responsible for violations of Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture (IACPPT).

Additionally, the Court found that the State violated Article 8.1 ACHR because Mr Bayarri's case was not resolved within a reasonable time, as he was held in preventive detention for thirteen years, and Article 8.2 ACHR because he was not presumed innocent until proven guilty. Finally, the Court found violations of Articles 8.1 and 25.1 ACHR due to the fact that Mr Bayarri's criminal complaint regarding his torture and illegal detention had been in proceedings for approximately seventeen years as of the date of the Judgment.

Consequently, the Court ordered that the State conclude the criminal proceeding arising from the violations in the present case, guaranteeing Mr Bayarri's right to be heard by a competent tribunal, and that it expunge his criminal record. The Court also ordered the State to publish the pertinent parts of the Judgment in the Official Gazette and another national newspaper, to educate its security forces on torture and cruel, inhumane, and degrading treatment, and to provide Mr Bayarri free medical care. Finally, the State was ordered to pay pecuniary and non-pecuniary damages and legal costs and expenses.

Supplementary information:

Judge Garcia-Ramirez wrote a concurring opinion.

Languages:

Spanish.



Court of Justice of the European Communities and Court of First Instance

Important decisions

Identification: ECJ-2008-3-018

a) European Union / **b)** Court of Justice of the European Communities / **c)** Second Chamber / **d)** 07.07.2005 / **e)** C-208/03P / **f)** Le Pen v. Parliament / **g)** *European Court Reports* P I-6051 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

1.3.4.10 Constitutional Justice – Jurisdiction – Types of litigation – **Litigation in respect of the constitutionality of enactments.**

1.3.5 Constitutional Justice – Jurisdiction – **The subject of review.**

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

Keywords of the alphabetical index:

Actions for annulment / Measures against which actions may be brought / Concept, measures producing binding legal effects / European Parliament, seat, vacancy, application of national rules.

Headnotes:

In order to determine whether an act may be the subject of a challenge in an action for annulment under Article 230 EC what should be taken into account is the substance of the act in question and the intention of its author; since the form in which an act or decision is adopted is in principle irrelevant. It cannot therefore be excluded that a written communication, or even a mere oral statement, are subject to review by the Court under Article 230 EC.

However, the assessment of a declaration by the President of the Parliament in a plenary session that the seat of a member is vacant cannot be made in

breach of the rules and procedures governing the election of members of Parliament. Since no uniform electoral procedure for the election of Members of that institution had been adopted at the material time, that procedure continued to be governed, pursuant to Article 7.2 of the 1976 Act concerning the election of the representatives of the Assembly by direct universal suffrage, by the provisions in force in each Member State. Where, under the legislative provisions of a Member State ineligibility brings the term of office as a Member of Parliament to an end, that institution will have had no choice but to take notice without delay of the declaration by the national authorities that the seat was vacant – a declaration which concerned a pre-existing legal situation and resulted solely from a decision of those authorities.

It is clear from the wording of Article 12.2 of the 1976 Act, under which it was for the Parliament to ‘take note’ that a seat had fallen vacant pursuant to national provisions in force in a Member State, that the Parliament does not have any discretion in the matter. In that particular case, the role of the Parliament is not to declare that the seat is vacant but merely to take note that the seat is vacant, as already established by the national authorities, whereas in the other cases concerning, *inter alia*, the resignation or death of one of its members, that institution has a more active role to play since Parliament itself establishes that there is a vacancy and informs the Member State in question thereof. Furthermore, it was not for the Parliament – but for the competent national courts or the European Court of Human Rights as the case may be – to verify that the procedure laid down by the applicable national law or the fundamental rights of the person concerned were respected (see paragraphs 46-50, 56).

Summary:

The appellant, Mr Le Pen, had been declared ineligible following a criminal conviction in the French courts. The French authorities, taking note of the decree of disqualification adopted by the Prime Minister against the appellant, informed the European Parliament, and asked it to take note of this disqualification. The European Parliament considered it appropriate, on account of the irreversibility of the disqualification from office, to await the expiry of the time limit for appeal to the French *Conseil d'État* before taking note of the disqualification. On expiry of this time limit, on 23 October 2000, the President of the European Parliament noted the disqualification of the appellant.

The appellant asked the Court to annul the contested decision in the form of a declaration of the President of the European Parliament on his disqualification from holding office as a Member of the European Parliament. On 10 April 2005, the Court considered inadmissible his appeal for annulment of that decision.

The appellant therefore lodged an appeal against the Court's decision. He disputed *inter alia* the viewpoint that the contested act could not, given that it was not intended to produce legal effects, be the subject of an action for annulment under Article 230, taking the contrasting view that the act concerned had altered his legal situation by depriving him of his elective office.

The Court dismissed the appeal, taking the view that the European Parliament's obligation to “take note of” the vacancy already established by the national authorities did not give discretion to the Parliament, and was not therefore subject to review.

Languages:

Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovakian, Slovenian, Spanish, Swedish.



Identification: ECJ-2008-3-019

a) European Union / **b)** Court of First Instance / **c)** Second Chamber / **d)** 11.07.2005 / **e)** T-40/04 / **f)** Bonino e.a. v. Parliament and Council / **g)** *European Court Reports* II-2685 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

1.2.2 Constitutional Justice – Types of claim – **Claim by a private body or individual.**

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

1.2.2.4 Constitutional Justice – Types of claim – Claim by a private body or individual – **Political parties.**

Keywords of the alphabetical index:

Actions for annulment by natural or legal persons, measures of direct and individual concern to them, whether directly concerned / Political party, European level, funding, regulation / Action brought by Members of the Parliament belonging to a political formation, not directly concerned.

Headnotes:

Members of the European Parliament who belong to a political formation are not directly concerned, for the purpose of Article 230.4 EC, by Regulation no. 2004/2003 on the regulations governing political parties at European level and the rules regarding their funding, since even though it cannot be precluded that the conditions of funding of a political party may have consequences for the exercise of the mandate of the Members of the Parliament who belong to that party, the fact remains that the economic consequences of such funding as may be granted to a competing political formation and denied to the one to which the applicant MEPs belong must be classified as indirect. In reality, the direct economic effect impacts on the situation of the political formation and not on the situation of the Members of the Parliament elected on the political formation's list and those economic consequences do not concern the legal situation but only the factual situation of the applicant MEPs (see paragraphs 56, 59).

Summary:

The case relates to the admissibility of the actions for annulment started by a number of MEPs and by a political list.

On 4 November 2003, the European Parliament and the Council adopted Regulation (EC) no. 2004/2003 on the regulations governing political parties at European level and the rules regarding their funding. The appellants, a number of MEPs and the Emma Bonino list, started an action for annulment of this regulation.

The Parliament and Council considered the appeal inadmissible, in so far as, on the one hand, the appellants did not fulfil the conditions of being directly and individually affected by Article 230.4 EC, and, on the other hand, the contested regulation was not an act which could be challenged within the meaning of the same article.

The appellants, conversely, considered that, in pursuance of the *Les Verts v. Parliament* judgment, they should be regarded as being directly and individually affected by the contested regulation, and that a direct appeal against the regulation was the only remedy available.

The Court examined the admissibility conditions contained in Article 230.4 from two angles. It examined firstly the situation of the appellant MEPs, and secondly, that of the Emma Bonino list.

It reached the conclusion that the condition of being directly concerned was fulfilled by the Emma Bonino list, but not by the appellant MEPs.

In respect of the condition of being individually affected, the Court took the view that this was not fulfilled by the Emma Bonino list, because the contested regulation did not affect it on the grounds of any quality peculiar to it or any factual situation which would distinguish it from any other person and thereby confer on it individual character in a similar manner to that applying to the addressee of a decision.

The appeal was therefore dismissed as inadmissible.

Languages:

Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovakian, Slovenian, Spanish, Swedish.

*Identification:* ECJ-2008-3-020

a) European Union / **b)** Court of Justice of the European Communities / **c)** Grand Chamber / **d)** 12.07.2005 / **e)** C-304/02 / **f)** Commission v. France / **g)** *European Court Reports* I-6263 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Actions for failure to fulfil obligations, judgment of the Court establishing such a failure / Judgment, obligation to comply, breach, financial penalties, periodic penalty payment, lump sum, imposition of both penalties / No such infringement.

Headnotes:

The procedure laid down in Article 228.2 EC has the objective of inducing a defaulting Member State to comply with a judgment establishing a breach of obligations and thereby of ensuring that Community law is in fact applied. The measures provided for by that provision, namely a lump sum and a penalty payment, are both intended to achieve this objective.

Application of each of those measures depends on their respective ability to meet the objective pursued according to the circumstances of the case. While the imposition of a penalty payment seems particularly suited to inducing a Member State to put an end as soon as possible to a breach of obligations which, in the absence of such a measure, would tend to persist, the imposition of a lump sum is based more on assessment of the effects on public and private interests of the failure of the Member State concerned to comply with its obligations, in particular where the breach has persisted for a long period since the judgment which initially established it.

That being so, recourse to both types of penalty provided for in Article 228.2 EC is not precluded, in particular where the breach of obligations both has continued for a long period and is inclined to persist, the conjunction 'or' in Article 228.2 EC having to be understood as being used in a cumulative, and not an alternative, sense.

It follows that imposition of both a penalty payment and a lump sum cannot infringe the principle *ne bis in idem*, since the duration of the breach is taken into consideration as one of a number of criteria, in order to determine the appropriate level of coercion and deterrence, and that the imposition of both those financial penalties likewise cannot compromise equal treatment if, having regard to the nature, seriousness and persistence of the breach of obligations established, that appears appropriate, the fact that they have not previously been imposed together not constituting an obstacle in this regard (see paragraphs 80-86).

Summary:

In this case, the Court had to decide whether it was possible to impose on a member State payment of both a lump sum and a penalty payment in the context of proceedings brought under Article 228.2 EC.

In the *Commission v. France* Judgment of 1991, the Court of Justice had ruled that, between 1984 and 1987, France had broken Community law by failing to carry out controls ensuring compliance with technical Community measures for the conservation of fishery resources. Following this judgment, the Commission had asked the French authorities to inform it of the measures taken to comply with the Court's judgment. After numerous inspections, and holding that France had not taken the requisite measures to comply with the judgment, particularly because of the inadequacy of the controls, enabling undersized fish to be offered for sale, and the laxness on the part of the French authorities in taking action in respect of infringements, the Commission again brought action in the Court to obtain a ruling that France had failed to fulfil its obligation to comply with the 1991 judgment, and to have a penalty payment imposed.

France took the view that, whereas the Court considered that it had not implemented the measures required by the 1991 judgment, it could not have imposed on it, in addition to the penalty payment proposed by the Commission, the payment of a lump sum. France relied on three pleas in law in particular in support of its argument. Firstly, the fact that the purpose of Article 228 EC was not punitive, but only to induce compliance with a judgment. Secondly, the fact that imposing both a penalty payment and a lump sum would be contrary to the principle that there should not be two punishments for a single act. Lastly, in the absence of guidelines from the Commission concerning the criteria applicable to the calculation of a lump sum, the imposition of such a sum by the Court would conflict with the principles of legal certainty and transparency. It would also compromise equal treatment between member States, since such a measure had not been envisaged in the Court's previous judgments. The Court rejected France's arguments, stating that recourse to both types of penalty provided for in Article 228.2 EC is not precluded, in particular where the breach of obligations both has continued for a long period and is inclined to persist. It therefore imposed on France a penalty payment and a lump sum, taking the view that these measures were both intended to achieve the same purpose, namely to ensure effective application of Community law, and that there was no violation of the *ne bis in idem* principle or of the principles of legal certainty, transparency and equal treatment.

Languages:

Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovakian, Slovenian, Spanish, Swedish.

*Identification:* ECJ-2008-3-021

a) European Union / **b)** Court of First Instance / **c)** Fourth Chamber / **d)** 19.09.2005 / **e)** T-247/04 / **f)** Aseprofar and Edifa v. Commission / **g)** *European Court Reports* I-04967 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

1.3.4.10 Constitutional Justice – Jurisdiction – Types of litigation – **Litigation in respect of the constitutionality of enactments.**

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

5.3.25 Fundamental Rights – Civil and political rights – **Right to administrative transparency.**

Keywords of the alphabetical index:

Actions for annulment, actionable measures / Definition, measures producing binding legal effects, pre-litigation phase of infringement proceedings / Commission decision to close its file on a complaint, not included.

Headnotes:

Decisions whereby the Commission closes the case definitively on complaints of a State's conduct capable of giving rise to the initiation of infringement proceedings are not challengeable acts and an action for annulment brought against them must be dismissed as inadmissible, without there being any need to consider whether it satisfies the other requirements of Article 230 EC.

Challengeable acts for the purposes of that provision are measures whose legal effects are binding on, and are capable of affecting the interests of, the applicant, by bringing about a distinct change in his legal position.

Decisions to close the file on complaints concerning State conduct liable to give rise to proceedings under Article 226 EC form part of the actions undertaken by the Commission in the interests of sound administration of the pre-litigation phase of infringement proceedings, as is indicated by Commission Communication no. 2002/C 244/03 on relations with the complainant in respect of infringements of Community law.

Since the sole purpose of the pre-litigation phase of the procedures for non-compliance is to enable the Member State to comply of its own accord with the requirements of the Treaty or, as the case may be, to give it the opportunity to justify its position, no measures adopted by the Commission in that context are binding (see paragraphs 44, 46-48, 56, 60).

Summary:

In this case, the question arose of precisely which decisions are challengeable under Article 230 EC, and particularly whether decisions by the Commission to close cases definitively are subject to appeal.

On 31 October 2001, the Spanish Ministry of Health and Consumer Affairs had concluded an agreement with an association representing the interests of pharmaceutical laboratories present in Spain. In a letter of 28 November 2001, Aseprofar, a representative association based in Spain, informed the Commission about the agreement, taking the view that it might infringe Article 28 EC, and possibly Article 29 EC. In a letter of 22 May 2002, the European Association of Euro-Pharmaceutical Companies, a representative association of which Aseprofar is a member, lodged a complaint claiming that the agreement infringed Articles 28 to 30 EC. The Commission registered the complaint. Also, in a letter of 29 September 2003, Aseprofar and Edifa, another representative association also based in Spain, lodged a complaint claiming that the Royal Decree on medicinal products, adopted by the Spanish authorities on 13 June 2003, infringed Articles 29, 10 and 81 EC. The Commission also registered that complaint. At its meeting of 30 March 2004, the College of Commissioners decided to close the representative associations' cases definitively, and so informed them.

The applicants, two associations known as Aseprofar and Edifa, lodged an application with the Court for annulment of the Commission's decisions to close their cases definitively.

The Commission considered the application inadmissible on two grounds. Firstly, the decisions against which it was directed did not constitute challengeable acts. Secondly, Aseprofar and Edifa lacked standing to apply for annulment.

The applicants, in contrast, considered the application to be admissible, in so far as it was for annulment of the Commission's decisions to close their cases, and not against the Commission's refusal to institute proceedings against the Kingdom of Spain. In their view, these decisions were challengeable, for they had legally binding effects capable of significantly affecting their legal position, and they did have standing to apply for annulment of these decisions, which were addressed to them and which concerned them directly and individually. In support of their argument, the applicants relied *inter alia* on Commission Communication 2002/C 244/03 on relations with the complainant in respect of infringements of Community law, and on the case-law of the Court relating to the admissibility of actions for annulment of refusals by the Commission to take action on agreements and against its decisions to take no further action on complaints submitted under Regulation no. 17. They also relied on the principles of sound administration and effective legal protection.

The Court dismissed the action, taking the view that decisions by which the Commission closed cases definitively on complaints of a State's conduct capable of giving rise to the initiation of infringement proceedings did not have binding force and were not challengeable acts.

Languages:

Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovakian, Slovenian, Spanish, Swedish.



Identification: ECJ-2008-3-022

a) European Union / **b)** Court of First Instance / **c)** Second Enlarged Chamber / **d)** 21.09.2005 / **e)** T-306/01 / **f)** Ahmed Ali Yusuf et Al Barakaat International Foundation v. Council and Commission / **g)** *European Court Reports* II-3649 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

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.**

2.1.1.4.1 Sources – Categories – Written rules – International instruments – **United Nations Charter of 1945.**

2.1.2.3 Sources – Categories – Unwritten rules – **Natural law.**

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

3.16 General Principles – **Proportionality.**

3.26 General Principles – **Principles of Community law.**

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

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

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

Keywords of the alphabetical index:

Public international law / Decisions of the Security Council, obligations, Member States / European Communities, judicial review of the lawfulness of the acts of the institutions / Community law, act implementing resolution of the United Nations Security Council / Fundamental rights of the persons concerned, freezing of funds, review in light of *jus cogens* / Actions for annulment / Judicial review, limits, lacuna in the judicial protection of the applicants.

Headnotes:

1. From the standpoint of international law, the obligations of the Member States of the United Nations under the Charter of the United Nations clearly prevail over every other obligation of domestic law or of international treaty law including, for those of them that are members of the Council of Europe, their obligations under the European Convention for the Protection of Human Rights and Fundamental Freedoms and, for those that are also members of the Community, their obligations under the EC Treaty. That primacy extends to decisions contained in a resolution of the Security Council, in accordance with Article 25 of the Charter of the United Nations, under which the Members of the United Nations are bound to accept and carry out the decisions of the Security Council.

Although it is not a member of the United Nations, the Community must be considered to be bound by the obligations under the Charter of the United Nations in the same way as its Member States, by virtue of the Treaty establishing it. First, it may not infringe the obligations imposed on its Member States by that charter or impede their performance. Second, in the exercise of its powers it is bound, by the very Treaty by which it was established, to adopt all the measures necessary to enable its Member States to fulfil those obligations (see paragraphs 231, 234, 242-243, 254).

2. The freezing of funds provided for by Regulation no. 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Osama Bin Laden, the Al-Qaeda network and the Taliban, as amended by Regulation no. 561/2003, and, indirectly, by the resolutions of the Security Council put into effect by those regulations, does not infringe the fundamental rights of the persons concerned, measured by the standard of universal protection of the fundamental rights of the human person covered by *jus cogens*.

In that regard, the express provision of possible exemptions and derogations attaching to the freezing of the funds of the persons in the Sanctions Committee's list clearly shows that it is neither the purpose nor the effect of that measure to submit those persons to inhuman or degrading treatment.

In addition, in so far as respect for the right to property must be regarded as forming part of the mandatory rules of general international law, it is only an arbitrary deprivation of that right that might, in any case, be regarded as contrary to *jus cogens*. Such is not the case here.

In the first place, the freezing of their funds constitutes an aspect of the sanctions decided by the Security Council against Osama Bin Laden, members of the Al-Qaeda network and the Taliban and other associated individuals, groups, undertakings and entities, having regard to the importance of the fight against international terrorism and the legitimacy of the protection of the United Nations against the actions of terrorist organisations. In the second place, freezing of funds is a precautionary measure which, unlike confiscation, does not affect the very substance of the right of the persons concerned to property in their financial assets but only the use thereof. In the third place, the resolutions of the Security Council provide for a means of reviewing, after certain periods, the overall system of sanctions. Finally, the legislation at issue settles a procedure enabling the persons concerned to present their case at any time to the Sanctions Committee for review, through the Member State of their nationality or that of their residence.

Having regard to those facts, the freezing of the funds of persons and entities suspected, on the basis of information communicated by the Member States of the United Nations and checked by the Security Council, of being linked to Osama Bin Laden, the Al-Qaeda network or the Taliban and of having participated in the financing, planning, preparation or perpetration of terrorist acts cannot be held to constitute an arbitrary, inappropriate or disproportionate interference with the fundamental rights of the persons concerned (see paragraphs 289, 291, 293-296, 299-302),

3. The right of the persons concerned to be heard has been infringed neither by the Sanctions Committee before their inclusion in the list of persons whose funds must be frozen pursuant to the Security Council's resolutions at issue nor by the Community institutions before the adoption of Regulation no. 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Osama Bin Laden, the Al-Qaeda network and the Taliban.

First, the right of the persons concerned to be heard by the Sanctions Committee before their inclusion in the list of persons suspected of contributing to the funding of terrorism whose funds must be frozen pursuant to the resolutions of the Security Council in question is not provided for by those resolutions, and it appears that no mandatory rule of public law requires such a prior hearing. In particular, when what is at issue is a temporary precautionary measure restricting the availability of the property of the persons concerned, observance of their fundamental rights does not require the facts and evidence adduced against them to be communicated to them, once the Security Council or its Sanctions Committee is of the view that there are grounds concerning the international community's security that militate against it.

Second, the Community institutions were not obliged to hear the persons concerned before the contested regulation was adopted either, because they had no discretion in the transposition into the Community legal order of resolutions of the Security Council or decisions of the Sanctions Committee, with the result that to hear the person concerned could not in any case lead the institution to review its position (see paragraphs 306-307, 320, 328-329, 331).

4. In dealing with an action for annulment directed at Regulation no. 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Osama Bin Laden, the Al-Qaeda network and the Taliban, the Court carries out a complete review of the lawfulness of that regulation with regard to observance by the

Community institutions of the rules of jurisdiction and the rules of external lawfulness and the essential procedural requirements which bind their actions. The Court also reviews the lawfulness of that regulation having regard to the Security Council's regulations which that act is supposed to put into effect, in particular from the viewpoints of procedural and substantive appropriateness, internal consistency and whether the regulation is proportionate to the resolutions. What is more, it reviews the lawfulness of that regulation and, indirectly, the lawfulness of the resolutions of the Security Council at issue, in the light of the higher rules of international law falling within the ambit of *jus cogens*, in particular the mandatory prescriptions concerning the universal protection of the rights of the human person.

On the other hand, it is not for the Court to review indirectly whether the Security Council's resolutions in question are themselves compatible with fundamental rights as protected by the Community legal order. Nor does it fall to the Court to verify that there has been no error of assessment of the facts and evidence relied on by the Security Council in support of the measures it has taken or, subject to the limited extent of the review carried out in light of *jus cogens*, to check indirectly the appropriateness and proportionality of those measures. To that extent, there is no judicial remedy available to the applicants, the Security Council not having thought it advisable to establish an independent international court responsible for ruling, in law and on the facts, in actions brought against individual decisions taken by the Sanctions Committee.

However, that lacuna in the judicial protection available to the applicants is not in itself contrary to *jus cogens*. As a matter of fact, the right of access to the courts is not absolute. The limitation of the applicants' right of access to a court, as a result of the immunity from jurisdiction enjoyed as a rule by resolutions of the Security Council adopted under Chapter VII of the Charter of the United Nations, is inherent in that right as it is guaranteed by *jus cogens*. The applicants' interest in having a court hear their case on its merits is not enough to outweigh the essential public interest in the maintenance of international peace and security in the face of a threat clearly identified by the Security Council in accordance with the Charter of the United Nations. Consequently, there has been no breach of the applicants' right to an effective judicial remedy (see paragraphs 334-335, 337-344, 346).

Summary:

This case is among those concerning the measures taken by the Community in order to comply with a number of resolutions adopted by the UN Security Council to combat international terrorism, and

particularly the Al-Qaeda movement. Both before and after the terrorist attacks of 11 September 2001, the Security Council had in fact adopted several resolutions against the Taliban, Osama Bin Laden, the Al-Qaeda network and the persons and entities associated with them [see *inter alia* UN Security Council Resolution 1390, of 16 January 2002]. All United Nations member States had thus been asked to freeze the funds and other financial assets controlled directly or indirectly by these persons and entities. A Sanctions Committee had also been instructed both to identify the subjects concerned and the financial resources to be frozen, and to examine any applications for exemption which were made.

These resolutions were implemented in the Community by Council regulations ordering the freezing, or continuation of the freezing, of the assets of the persons and entities concerned. [See *inter alia* Council Regulation (EC) no. 881/2002, of 27 May 2002, imposing certain specific restrictive measures directed against certain persons and entities associated with Osama Bin Laden, the Al-Qaeda network and the Taliban, and repealing Council Regulation (EC) no. 467/2001 (OJ 2002 L 139, p. 9)]. These are included on a list which is appended to the regulations, which is regularly revised by the Commission on the basis of the updating work of the Sanctions Committee. Exceptions to the freezing of funds may, nevertheless, be allowed by States on humanitarian grounds.

Several of the persons and entities concerned brought action in the Court of First Instance seeking annulment of these regulations. The Court issued its first ruling in both cases on the same date, one of which is presented here, whereas the other will only be referred to.

Cross-references:

- Judgment of 21.09.2005, *Yassin Abdullah Kadi v. Council and Commission* (T-315/01, Reports p. II-03649).

Languages:

Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovakian, Slovenian, Spanish, Swedish.



Identification: ECJ-2008-3-023

a) European Union / **b)** Court of First Instance / **c)** Fourth Enlarged Chamber / **d)** 06.10.2005 / **e)** T-22/02 and T-23/02 / **f)** Sumitomo Chemical Co. Ltd and Sumika Fine Chemicals Co. Ltd v. Commission / **g)** *European Court Reports* II-40659 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

2.1.1.1 Sources – Categories – Written rules – **National rules.**

2.1.2.2 Sources – Categories – Unwritten rules – **General principles of law.**

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

3.26 General Principles – **Principles of Community law.**

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

Keywords of the alphabetical index:

Community law, legal certainty, no rule laying down a time-limit on the exercise of the Commission's powers / Actions for annulment / Compliance with requirements of legal certainty / Judicial review, limits / Legal systems of all the Member States, existing rule, insufficient for recognition / Community law, interpretation / Principles, independent interpretation, limits / Reference in certain case to the law of the Member States / Fundamental rights, presumption of innocence / Procedure in competition matters, applicability.

Headnotes:

1. In order to fulfil its function of ensuring legal certainty, a limitation period must be fixed in advance and the fixing of its duration and the detailed rules for its application fall within the competence of the Community legislature.

The limitation period, by preventing situations which arose a long time previously from being indefinitely brought into question, tends to strengthen legal certainty but can also allow the acceptance of situations which at least in the beginning were unlawful. The extent to which provision is made for it is therefore the result of a choice between the requirements of legal certainty and those of legality, on the basis of the historical and social circumstances prevailing in a society at a given time. It is therefore a matter for the legislature alone to decide.

It is not therefore open to the Community judicature to criticise the Community legislature for the choices it makes concerning the introduction of rules on limitation and the setting of the corresponding time-limits. The failure to set a limitation period for the exercise of the Commission's powers to find infringements of Community law is not therefore in itself unlawful from the point of view of the principle of legal certainty (see paragraphs 81-83).

2. It is not for the Community judicature to fix the time-limits, scope or detailed rules for the application of the limitation period in respect of an infringement, whether generally or in relation to specific cases of which they are seised. Nevertheless, the absence of legislative limitation does not preclude censure of the Commission's action, in a specific case, in the light of the principle of legal certainty. In the absence of any provision laying down a limitation period, the fundamental requirement of legal certainty has the effect of preventing the Commission from indefinitely delaying exercise of its powers.

Accordingly, the Community judicature, when examining a complaint alleging that the Commission's action was too late, must not merely find that no limitation period exists, but must establish whether the Commission acted excessively late.

However, the question whether the Commission acted excessively late must not be assessed solely on the basis of time which elapsed between the events which form the subject-matter of the action and the commencement of the action itself. On the contrary, the Commission cannot be regarded as having acted excessively late if there is no delay or other negligent act imputable to it and account should be taken in particular of the time when the institution became aware of the acts constituting the infringement and of the reasonableness of the duration of the administrative procedure (see paragraphs 87-89).

3. The fact the legal systems of all the Member States contain the same rule cannot suffice for its recognition in Community law as general principle of Community law (see paragraphs 97, 99).

4. The terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an independent interpretation and that interpretation must take into account the context of the provision and the purpose of the relevant rules.

In particular, in the absence of an express reference, the application of Community law may necessitate a reference to the laws of the Member States where the

Community judicature cannot identify, in Community law or in the general principles of Community law, criteria enabling it to define the meaning and scope of a Community provision by way of independent interpretation (see paragraphs 100-101).

5. The presumption of innocence as contained in particular in Article 6.2 ECHR is among the fundamental rights which, according to Article 6.2 EU, are protected in the Community legal order.

It applies to the procedures relating to infringement of the competition rules applicable to undertaking that may result in the imposition of fines or periodic penalty payments.

The presumption of innocence implies that every person accused is presumed to be innocent until his guilt has been established according to law. It thus precludes any formal finding and even any illusion to the liability of an accused person for a particular infringement in a final decision unless that person has enjoyed all the usual guarantees accorded for the exercise of the rights of the defence in the normal course of proceedings resulting in a decision on the merits of the case.

The presumption of innocence does not, on the other hand, preclude a person accused of a particular infringement being found liable at the end of proceedings which have fully taken place, in accordance with the rules prescribed and in the course of which the rights of the defence could thus be fully exercised, and this is so even if a penalty cannot be imposed on the person committing the infringement because the relevant power of the competent authority is time-barred (see paragraphs 104-107).

Summary:

By Decision no. 2003/2/EC, of 21 November 2001, relating to a proceeding pursuant to Article 81 EC and Article 53 of the EEA Agreement (Case COMP/E-1/37.512 – Vitamins) (OJ 2003 L 6, p. 1), the Commission had found that several undertakings had infringed Article 81.1 EC by participating in a number of separate agreements affecting 12 different markets in vitamin products. Under these agreements, the undertakings concerned had, in particular, fixed the prices of various products, allocated sales quotas, agreed on and implemented price rises, published price announcements in accordance with their agreements, sold the products at the agreed prices, set up a mechanism to monitor and enforce compliance with their agreements, and participated in a system of regular meetings to implement their plans (Judgment, point 1).

Among these undertakings were, in particular, the Japanese undertakings *Sumitomo Chemical Co. Ltd* and *Sumika Fine Chemicals Co. Ltd*, which were found to be responsible for infringements on the Community markets for vitamin H (also known as biotin) and folic acid respectively (Judgment, point 2).

In its decision, the Commission ordered the undertakings found to be responsible for the infringements to bring them to an end immediately in so far as they had not already done so and to refrain henceforth from any act or conduct found to be an infringement and from any measure having the same or equivalent object or effect (Judgment, point 4).

Whereas the Commission imposed fines for the infringements found in the markets for vitamins A, E, B2, B5, C and D3 and beta-carotene and carotinoids, it did not impose fines in respect of the infringements found in the markets for vitamins B1, B6 and H and folic acid (Judgment, point 5).

Thus no fines were imposed on *Sumitomo* and *Sumika*, in particular (Judgment, point 7).

These two undertakings argued, in their respective replies to the statement of objections, that the infringements which they were alleged to have committed, being time-barred, could no longer be the subject of a Commission decision (Judgment, point 8).

The Commission having rejected this argument, *Sumitomo* and *Sumika* then lodged separate applications bringing the actions which gave rise to the present joined cases (Judgment, points 9-11).

In support of their actions, the applicants raised two pleas in law alleging, respectively, that the Commission's power to find the infringements was time-barred, and that the Commission lacked competence (Judgment, point 19).

In their first argument, the applicants asserted that, on the one hand, the Commission could not adopt a prohibition decision in regard to them because it was time-barred by reason of certain general principles of Community law, relying *inter alia* on the principle of legal certainty (Judgment, points 65 and 66).

They had, on the other hand, collected a number of references to academic works or decisions of national courts dealing with limitation, extracted from the law of certain member States, with which they sought to demonstrate essentially that the rationale for the limitation periods set in the laws of the member States required that those periods, once elapsed, precluded not only the imposition of penalties but also the finding of infringements (Judgment, point 92).

The applicants finally invoked also the presumption of innocence, as enshrined in Article 48.1 of the Charter and Article 6.2 ECHR (Judgment, point 103).

The Court nevertheless rejected as ill-founded the first plea in law in its entirety, while the second was upheld (Judgment, points 112, 140).

Cross-references:

Also see, concerning the independent interpretation of Community law:

- Judgment (Fifth Chamber) of 30.06.2005, *Sanni Olesen v. Commission* (T-190/03, unpublished, points 36, 38);
- Judgment (First Chamber) of 13.09.2005, *Sonja Hosman-Chevalier v. Commission* (T-72/04, Reports p. II-03265, point 40).

Languages:

Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovakian, Slovenian, Spanish, Swedish.



Identification: ECJ-2008-3-024

a) European Union / **b)** Court of Justice of the European Communities / **c)** Third Chamber / **d)** 20.10.2005 / **e)** C-511/03 / **f)** Ten Kate Holding Musselkanaal e.a / **g)** *European Court Reports* P I-8979 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

1.4 Constitutional Justice – **Procedure**.
 1.4.1 Constitutional Justice – Procedure – **General characteristics**.
 4.7.1 Institutions – Judicial bodies – **Jurisdiction**.
 4.7.16.1 Institutions – Judicial bodies – Liability – **Liability of the State**.

Keywords of the alphabetical index:

Community law / Action for annulment, action for failure to act, no obligation, Member State / Action, obligation, state, liability, permissible, limits.

Headnotes:

Community law does not impose any obligation on a Member State to bring an action for annulment, pursuant to Article 230 EC, or for failure to act, pursuant to Article 232 EC, for the benefit of one of its citizens. Community law does not, however, in principle preclude national law from containing such an obligation or providing for liability to be imposed on the Member State for not having acted in such a way.

With regard to the latter, it is not apparent how Community law could be infringed if national law contained such an obligation or provided that the Member State would be liable in such a case. A Member State could, however, be in breach of the obligation of sincere co-operation laid down in Article 10 EC if it did not retain a degree of discretion as to the appropriateness of bringing an action, thereby giving rise to a risk that the Community Courts might be inundated with actions, some of which would be patently unfounded, thereby jeopardising the proper functioning of the Court of Justice (see paragraphs 31-32, operative part 1).

Summary:

The preliminary questions referred in this case had arisen in the course of a dispute between the state of the Netherlands and Ten Kate and Others, companies producing proteins used in the manufacture of milk substitute for calves and obtained through the processing of pig fat.

Ten Kate and Others had brought an action before the *Rechtbank's-Gravenhage* (District Court, The Hague) in which they sought an order requiring the state of the Netherlands to compensate them for the harm which they had suffered by reason of the fact that they had not been manufacturing proteins derived from pig fat since 30 July 1997 and that the stocks established prior to 30 July 1997 could no longer be sold after that date. In support of this action, they argued that the state had erred with regard to the measures which had to be taken in order to ensure that the Commission would grant the authorisation requested. Under Community law, in particular Decision no. 94/381, it is indeed for the Commission to authorise the use of protein derived from mammalian tissues in feeding ruminants. Ten Kate and Others submitted that the state ought to have brought proceedings against the Commission under Article 175 of the EC Treaty (now Article 232 EC) on grounds of failure to act.

The first instance court had dismissed the application. The *Gerechtshofte's Gravenhage* (Regional Court of

Appeal, The Hague) had allowed the appeal brought against that decision.

The *Hoge Raad der Nederlanden* (Supreme Court of the Netherlands) deemed it appropriate to refer preliminary questions to the Court so as to ascertain which law is applicable for the purpose of determining whether a Member State is under an obligation towards one of its citizens to bring an action for annulment under Article 230 EC or an action under Article 232 EC for failure to act, and whether that Member State may incur liability by reason of not having done so. The Hoge Raad also asked whether Community law imposes an obligation of that kind and whether it may give rise to such liability.

The Court, after pointing out that it has no jurisdiction to interpret the law of a Member State, held that Community law does not impose any obligation on a Member State to bring an action for annulment, pursuant to Article 230 EC, or for failure to act, pursuant to Article 232 EC, for the benefit of one of its citizens and that Community law does not in principle preclude national law from containing such an obligation or providing for liability to be imposed on the Member State for not having acted in such a way.

Languages:

Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovakian, Slovenian, Spanish, Swedish.



Identification: ECJ-2008-3-025

a) European Union / **b)** Court of Justice of the European Communities / **c)** Grand Chamber / **d)** 06.12.2005 / **e)** C-453/03, C-11/04, C-12/04 and C-194/04 / **f)** ABNA e.a. / **g)** *European Court Reports* I-10423 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

1.3.4.10 Constitutional Justice – Jurisdiction – Types of litigation – **Litigation in respect of the constitutionality of enactments.**

1.6 Constitutional Justice – **Effects.**

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

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

Keywords of the alphabetical index:

Act, institutions / Legal basis, choice, criteria / Measure, compound feedingstuff, measure, public health, protection / National Court, application of a Community measure, suspension, judge, national / Court, referral, reference for a preliminary ruling on appraisal of validity / Administrative authority, Member State, power, lack, suspension of application of measure pending judgment of Court.

Headnotes:

1. In the context of the organisation of the powers of the Community, the choice of the legal basis for a measure must rest on objective factors which are amenable to judicial review. Those factors include, in particular, the aim and content of the measure. Directive 2002/2 on the circulation of compound feedingstuffs is based on Article 152.4.b EC, which allows the adoption of measures in the veterinary and phytosanitary fields having as their direct objective the protection of public health. It follows from an examination of the recitals in the preamble to that directive that the objective pursued by the Community legislature, when it adopted, in Article 1.1.b and 4, the provisions relating to the indication of feed materials for animal feedingstuffs, was to respond to the need to have more detailed information in regard to the indication of the components of feedingstuffs in order to ensure, *inter alia*, the traceability of potentially contaminated feed materials for the purpose of identifying specific batches, a matter beneficial to public health. Those provisions are therefore likely to contribute directly to the pursuit of the objective of safeguarding public health and could therefore be deemed valid on the basis of Article 152.4.b EC (see paragraphs 54-57, 60).

2. Even in a case where a court of a Member State forms the view that the conditions have been satisfied under which it may suspend application of a Community measure, in particular where the question of validity of that measure has already been referred to the Court of Justice, the competent national administrative authorities of the other Member States cannot suspend application of that measure until such time as the Court has ruled on its validity. National courts alone are entitled to determine, taking into consideration the specific circumstances of the cases brought before them, whether the conditions governing the grant of interim relief have been satisfied.

The coherence of the system of interim legal protection requires that national courts should be able to order suspension of enforcement of a national administrative measure based on a Community regulation, the legality of which is contested. However, the uniform application of Community law, which is a fundamental requirement of the Community legal order, means that the suspension of enforcement of administrative measures based on a Community regulation, whilst it is governed by national procedural law, in particular as regards the making and examination of the application, must in all the Member States be subject, at the very least, to conditions which are uniform so far as the granting of such relief is concerned and are the same as those of an application for interim relief brought before the Court. In order to determine, in particular, whether the conditions relating to urgency and the risk of serious and irreparable damage have been satisfied, the judge dealing with an application for interim relief would need to consider whether it would be likely to result in irreversible damage to the applicant which could not be made good if the Community measure were to be declared invalid. As the court responsible for applying, within the framework of its jurisdiction, the provisions of Community law and consequently under an obligation to ensure that Community law is fully effective, the national court, when dealing with an application for interim relief, must take account of the damage which the interim measure may cause to the legal regime established by a Community measure for the Community as a whole. It must consider, on the one hand, the cumulative effect which would arise if a large number of courts were also to adopt interim measures for similar reasons and, on the other, those special features of the applicant's situation which distinguish it from the other economic operators concerned. In particular, if the grant of interim relief may represent a financial risk for the Community, the national court must be in a position to require the applicant to provide adequate guarantees.

National administrative authorities are not in a position to adopt interim measures while complying with the conditions for granting such measures as defined by the Court. In the first place, the actual status of those authorities is not in general such as to guarantee that they have the same degree of independence and impartiality as that which national courts are recognised as having. Likewise, it is not certain that such authorities would benefit from the exercise of the adversarial principle inherent to judicial proceedings, which allows account to be taken of the arguments put forward by the different parties before the interests in issue are weighed against each other at the time when a decision is being taken.

Summary:

In these joined cases the references for preliminary rulings centred essentially on the validity of Directive 2002/2/EC of the European Parliament and of the Council of 28 January 2002, amending Council Directive 79/373/EEC on the circulation of compound feedingstuffs and repealing Commission Directive 91/357/EEC (OJ 2002 L 63, p. 23), in particular Article 1.1.b and 4 thereof.

These references had been made in the context of the examination of requests by manufacturers of compound feedingstuffs for animals or representatives of that industry for the annulment or suspension of the rules adopted for the purpose of transposing in national law the contested provisions of Directive 2002/2 (Judgment, points 1 and 2).

These references for preliminary rulings had been brought respectively by the High Court of Justice (England & Wales), Queen's Bench Division (Administrative Court), the *Consiglio di Stato* and the urgent applications judge of the *Rechtbank's-Gravenhage*.

Among the questions referred, the respective referring courts, firstly, essentially asked the Court to rule on the validity of Article 1.1.b and 4 of Directive 2002/2, on the ground that Article 152.4.b EC is not an appropriate legal basis for the adoption of those provisions, having particular regard to the fact that they relate to the labelling of plant-based animal feedingstuffs (Judgment, point 52).

The Court replied that these provisions of Directive 2002/2 are likely to contribute directly to the pursuit of the objective of safeguarding public health and were therefore validly adopted on the basis of Article 152.4.b EC (Judgment, point 60).

The *Rechtbank's-Gravenhage* had, secondly, asked whether, if the conditions are satisfied under which a national court of a Member State is entitled to suspend implementation of a contested measure of the Community institutions, in particular where the question concerning the validity of that contested measure has already been referred by a national court of that Member State to the Court of Justice, the competent national authorities of the other Member States are themselves also entitled, without judicial intervention, to suspend application of that measure until such time as the Court of Justice has given a ruling on its validity (Judgment, point 99).

The Court held that even in the case where a court of a Member State forms the view that the conditions have been satisfied under which it may suspend

application of a Community measure, in particular where the question of the validity of that measure has already been referred to the Court, the competent national administrative authorities of the other Member States cannot suspend application of that measure until such time as the Court has ruled on its validity. National courts alone are entitled to determine, taking into consideration the specific circumstances of the cases brought before them, whether the conditions governing the grant of interim relief have been satisfied (Judgment, point 111; operative provisions).

Languages:

Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovakian, Slovenian, Spanish, Swedish.



Identification: ECJ-2008-3-026

a) European Union / **b)** Court of Justice of the European Communities / **c)** Grand Chamber / **d)** 06.12.2005 / **e)** C-461/03 / **f)** Gaston Schul Douane-expediteur / **g)** *European Court Reports* I-10513 / **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.**
 3.10 General Principles – **Certainty of the law.**

Keywords of the alphabetical index:

Preliminary rulings / Community provisions, comparable to provisions previously declared invalid, validity assessment / Jurisdiction, national courts, lack, duty to refer.

Headnotes:

Article 234.3 EC requires a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law to seek a ruling from the Court of Justice on a question relating to the validity of the provisions of a regulation even where

the Court has already declared invalid analogous provisions of another comparable regulation. National courts have no jurisdiction themselves to determine that acts of Community institutions are invalid.

Although the rule that national courts may not themselves determine that Community acts are invalid may have to be qualified in certain circumstances in the case of proceedings relating to an application for interim measures, the interpretation adopted in *Cifit and Others*, referring to questions of interpretation, cannot be extended to questions relating to the validity of Community acts.

That solution is imposed, first, by the requirement of uniformity in the application of Community law. That requirement is particularly vital where the validity of a Community act is in question. Differences between courts of the Member States as to the validity of Community acts would be liable to jeopardise the essential unity of the Community legal order and undermine the fundamental requirement of legal certainty.

It is imposed, secondly, by the necessary coherence of the system of judicial protection instituted by the EC Treaty. References for a preliminary ruling on validity constitute, on the same basis as actions for annulment, a means of reviewing the legality of Community acts. By Articles 230 EC and 241 EC, on the one hand, and Article 234 EC, on the other, the Treaty established a complete system of legal remedies and procedures designed to ensure review of the legality of acts of the institutions and has entrusted such review to the Community Courts (see paragraphs 17-19, 21-22, 25, operative part 1).

Summary:

This case, a request for a preliminary ruling, concerned proceedings between Gaston Schul and the Minister van Landbouw, *Natuur en Voedselkwaliteit* (Minister for Agriculture) regarding the import of cane sugar.

On 6 May 1998 Gaston Schul, declared the import of 20 000 kg of raw cane sugar from Brazil. On 4 August 1998 the inspector of the Tax Department of Roosendaal Customs District, on behalf of the Ministry of Agriculture, sent Gaston Schul a tax notice requesting payment of a certain sum in respect of an 'agricultural levy'. After making an unsuccessful claim against that notice, Gaston Schul brought an action before the *College van Beroep.het bedrijfsleven* (the Netherlands national court).

By its first question, the *College van Beroep.het bedrijfsleven* essentially asked whether Article 234.3 EC requires a national court against whose decisions there is no judicial remedy under national law to seek a ruling from the Court of Justice on a question relating to the validity of the provisions of a regulation even where the Court has already declared invalid analogous provisions of another comparable regulation.

Contrary to the solution proposed by Advocate General Ruiz Jarabo, the Court ruled that the interpretation adopted in the *Cilfit* and *Others* judgment (“the clear act theory”), referring to questions of interpretation, cannot be extended to questions relating to the validity of Community acts. Article 234.3 EC accordingly requires a national court against whose decisions there is no judicial remedy under national law to seek a ruling from the Court of Justice on a question relating to the validity of the provisions of a regulation even where the Court has already declared invalid analogous provisions of another comparable regulation.

Languages:

Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovakian, Slovenian, Spanish, Swedish.



Identification: ECJ-2008-3-027

a) European Union / **b)** Court of First Instance / **c)** Second Enlarged Chamber / **d)** 14.12.2005 / **e)** T-210/01 / **f)** General Electric Company v. Commission / **g)** *European Court Reports* II-5575 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

2.1.1.1.1 Sources – Categories – Written rules – National rules – **Constitution.**

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950.**

3.26 General Principles – **Principles of Community law.**

5 Fundamental Rights. – **Fundamental Rights.**

Keywords of the alphabetical index:

Community law / Community judicature, European Convention on Human Rights, observance.

Headnotes:

Fundamental rights form an integral part of the general principles of Community law whose observance the Community judicature ensures. For that purpose, the Court of Justice and the Court of First Instance draw inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories. The European Convention on Human Rights has special significance in that respect. Moreover, according to Article 6.2 EU, ‘the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights ... and as they result from the constitutional traditions common to the Member States, as general principles of Community law’ (see paragraph 725).

Summary:

This case concerned the acquisition by General Electric Company of the share capital of Honeywell International Inc.

General Electric Company is a diversified industrial undertaking active in the following fields: aircraft engines, domestic appliances, information services, power systems, lighting, industrial systems, medical systems, plastics, broadcasting, financial services and transportation systems (Judgment, point 2).

Honeywell International Inc. is an undertaking active in, *inter alia*, the following markets: aeronautical products and services, automotive products, electronic materials, speciality chemicals, performance polymers, transportation and power systems as well as home and building controls and industrial controls (Judgment, point 3).

In October 2000 GE and Honeywell had entered into an agreement under which GE would acquire Honeywell’s entire share capital, Honeywell becoming a wholly-owned subsidiary of GE (Judgment, point 4).

The two entities had notified the Commission of the merger pursuant to Article 4 of Regulation no. 4064/89.

Taking the view that the merger fell within the scope of Regulation no. 4064/89, the Commission had decided to initiate proceedings under Article 6.1.c of that regulation (Judgment, point 6).

Although the Commission had sent a statement of objections to GE, GE and Honeywell had jointly proposed two sets of commitments designed to render the merger acceptable to the Commission, the latter had nonetheless adopted Decision no. 2004/134/EC (Case no. COMP/M.2220 – General Electric/Honeywell) (OJ 2004 L 48, p. 1) declaring the merger incompatible with the common market (Judgment, points 8, 10-11).

The case under consideration here had its origin in GE's appeal against this decision, an appeal which the Court dismissed. In response to one of the arguments raised by the appellant, it was, however, able to reaffirm the special significance which it attaches to the European Convention on Human Rights (Judgment, point 725).

Languages:

Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovakian, Slovenian, Spanish, Swedish.



Identification: ECJ-2008-3-028

a) European Union / **b)** Court of First Instance / **c)** Grand Chamber / **d)** 14.12.2005 / **e)** T-383/00 / **f)** Beamglow v. Parliament e.a. / **g)** *European Court Reports* II-5459 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

2.1.1 Sources – Categories – **Written rules.**
 2.1.1.4 Sources – Categories – Written rules – **International instruments.**
 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:

Actions for damages / World Trade Organisation, WTO agreements, challenge legality of Community measure, basis, exceptions / Community measure, ensure implementation of WTO obligation / Community regime, import of bananas, WTO Dispute Settlement Body / Judicial review, WTO rules, exclusion.

Headnotes:

The World Trade Organisation (WTO) agreements are not in principle, given their nature and structure, among the rules in the light of which the Community courts review the legality of action by the Community institutions.

Consequently, the Community cannot in principle incur non-contractual liability by reason of any infringement of the WTO rules by the institutions.

It is only where the Community intends to implement a particular obligation assumed in the context of the WTO or where the Community measure refers expressly to specific provisions of the WTO agreements that the Community courts can review the legality of the conduct of the institutions in the light of the WTO rules.

However, notwithstanding the existence of the decision of the WTO Dispute Settlement Body finding that the regime governing the import of bananas into the Community, as established by Regulation no. 404/93 on the common organisation of the market in bananas and subsequently amended by Regulations nos. 1637/98 and 2362/98, was incompatible with WTO rules, neither of those exceptions is applicable so as to allow the Community courts to review the legality of the Community legislation in question in the light of WTO rules.

Neither expiry of the period of time set by the WTO for the Community to bring the measure declared incompatible into conformity with WTO rules nor authorisation given by the WTO to the member harmed to adopt, vis-à-vis the Community, measures granting compensation and suspending trade concessions has any bearing in this regard (see paragraphs 127, 130-132, 142).

Summary:

The claim for compensation in which this case had its origin was aimed at obtaining reparation for the damage allegedly sustained by the applicant, Beamglow Ltd, as a result of the increased duty levied by the United States of America to offset the

impairment suffered as a result of the implementation of the European banana import regime, concerning the common organisation of the market in bananas, as instituted by Regulation (EEC) no. 404/93. The applicant, a UK company producing folding boxes made of paperboard, had been required to pay increased duties on its products by the United States of America following a finding by the Dispute Settlement Body of the World Trade Organisation that the Community regime governing the import of bananas was incompatible with the WTO rules. By a decision of 19 April 1999 the DSB had authorised the United States to take retaliatory measures against the Community. This resulted in the levy, by the US authorities, of increased duties on certain European products.

The applicant essentially argued that it had suffered damage, firstly, due to a failure to change the Community banana import regime so as to bring it into conformity with the Community's obligations under the WTO agreements within the time-limit set by the Dispute Settlement Body and, secondly, due to the lack of Community action to protect it against the US trade reprisals.

The Court was accordingly asked to rule whether the Community could be held liable for having violated the WTO agreements. The Council and the Commission contested the imposition of liability.

The Court upheld the standpoint of the Council and the Commission, considering that parties within the Community could not derive a right to bring a legal action from the WTO agreements, except where the Community had intended to implement a particular obligation assumed in the context of the WTO or where a Community measure referred expressly to specific provisions of the WTO agreements. Consequently, the Community cannot in principle incur non-contractual liability by reason of an infringement of the WTO rules by the Community institutions. Lastly, as the Court pointed out, this conclusion was not called into question by the Dispute Settlement Body's involvement.

Languages:

Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovakian, Slovenian, Spanish, Swedish.



Identification: ECJ-2008-3-029

a) European Union / **b)** Court of First Instance / **c)** Second Enlarged Chamber / **d)** 22.12.2005 / **e)** T-146/04 / **f)** Koldo Gorostiaga Atxalandabaso v. European Parliament / **g)** *European Court Reports* P II-5989 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

3.13 General Principles – **Legality**.
 4.17 Institutions – **European Union**.
 4.17.1.1 Institutions – European Union – Institutional structure – **European Parliament**.
 5.2 Fundamental Rights – **Equality**.

Keywords of the alphabetical index:

European Parliament, rules, payment of expenses and allowances to Members of the European Parliament / Decision, Secretary-General, recovery of sums unduly paid, no authority / Community law, principles, equal treatment, limits, advantage, unlawfully granted.

Headnotes:

1. A decision of the Secretary-General of the European parliament must be annulled where it, first, finds that that the sums mentioned have been improperly paid to a Member by way of expenses and parliamentary allowances and that they have to be recovered and, secondly, states that recovery should be effected by means of offsetting against allowances payable to the Member insofar as it requires recovery of the amount owed by the Member by means of offsetting.

In that regard, Article 27.4 of the Rules Governing the Payment of Expenses and Allowances to Members of the European Parliament ('the Rules Governing the Payment of Expenses and Allowances') does in fact describe an offsetting procedure. First, that provision refers to Article 73 of the Financial Regulation no. 1605/2002 and to the rules for implementing that article, paragraph 1.2 of which places an obligation on the accounting officer of each institution to recover amounts by offsetting them up to the amount of the Communities' claims on any debtor who himself has a claim on the Communities that is certain, of a fixed amount and due. Furthermore, it is clear from Article 78.3.d to 78.3.f and from Articles 83 and 84 of Regulation no. 2342/2002 on the rules for the implementation of Articles 71 and 73 of the Financial Regulation that each institution must first attempt to recover Community claims by means of offsetting and that, if recovery is not achieved, it must initiate the

procedure for recovery by any other means offered by the law.

However, as regards the special relationship between Article 16.2, Article 27.3 and Article 27.4 of the Rules Governing the Payment of Expenses and Allowances, the latter article lays down the procedure to be followed if it is intended to apply a recovery method (offsetting) that involves the allowances payable to a Member so that he can effectively perform his representative duties by ensuring that he can exercise his mandate in an effective manner. For that reason it provides for a series of procedural and substantive guarantees. Since this provision concerns a particular method of recovering one or several allowances that have been improperly paid, it must be considered to be a *lex specialis vis-à-vis* Articles 16.2 and 27.3 of the Rules Governing the Payment of Expenses and Allowances, which moreover justifies its insertion after the last-mentioned paragraph. In this light the term 'in exceptional cases' at the beginning of Article 27.4 of the Rules Governing the Payment of Expenses and Allowances confirms that offsetting can be carried out only after those guarantees have been complied with.

Therefore, when it amended its Rules Governing the Payment of Expenses and Allowances by adding a new paragraph 4, the Parliament intended to provide that, if it is necessary to recover a claim from a Member by offsetting it against parliamentary allowances owed to that Member, that can be done only in accordance with the procedure laid down in paragraph 4 of the said article. Hence, since the Secretary-General was not competent to order the offsetting in question without having been instructed to do so by the Bureau in accordance with the procedure laid down in that provision, his decision must be annulled insofar as it orders such offsetting (see paragraphs 86-87, 95-97, 99).

2. The principle of equality of treatment must be reconciled with the principle of legality, according to which no person may rely, in support of his claim, on an unlawful act committed in favour of another (see paragraph 141).

Summary:

This case had its origin in an appeal lodged by Mr Koldo Gorostiaga Atxalandabaso, a former Member of the European Parliament, against a decision by the Secretary-General of the Parliament that a sum allegedly due by the appellant was to be recovered by means of offsetting it against the parliamentary allowances least necessary to the exercise of the appellant's duties as an elected representative (Judgment, point 52).

In support of his action, the appellant relied on a number of arguments. Although the Court accepted part of one of his pleas, alleging a breach of the rules governing the payment of expenses and allowances to members of the European Parliament (Judgment, point 8), and annulled the contested decision in so far as it required recovery of the amount at issue by means of offsetting (Judgment, point 99), it dismissed all the other arguments, notably the plea based on an infringement of the principle of equality and non-discrimination. In this connection, Mr Koldo Gorostiaga Atxalandabaso pointed out that, even though he had not been accused of an abuse similar to those regularly discovered, particularly by the Court of Auditors, the measures taken against him were unprecedented and, in his opinion, constituted an infringement of the principle of equality and non-discrimination (Judgment, point 139).

In reply, the Court reiterated that the principle of equality of treatment must be reconciled with the principle of legality, according to which no person may rely, in support of his claim, on an unlawful act committed in favour of another, and, hence, even supposing that the applicant's complaints concerning unlawful acts committed in favour of other Members, on account of the absence or inadequacy of checks on the use of parliamentary allowances, were well founded, the applicant could not benefit from them (Judgment, points 141-142).

Languages:

Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovakian, Slovenian, Spanish, Swedish.



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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.

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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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³⁶ Only for issues concerning applicability and not simple application.

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³⁷ This keyword allows for the inclusion of enactments and principles arising from a separate constitutional chapter elaborated with reference to the original Constitution (declarations of rights, basic charters, etc.).

³⁸ Including its Protocols.

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³⁹ Presumption of constitutionality, double construction rule.

⁴⁰ Including the principle of a multi-party system.

⁴¹ Includes the principle of social justice.

⁴² See also 4.8.

⁴³ Separation of Church and State, State subsidisation and recognition of churches, secular nature, etc.

⁴⁴ Including maintaining confidence and legitimate expectations.

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⁴⁵ Principle according to which sub-statutory acts must be based on and in conformity with the law.

⁴⁶ Prohibition of punishment without proper legal base.

⁴⁷ Including compelling public interest.

⁴⁸ Only where not applied as a fundamental right (e.g. between state authorities, municipalities, etc.).

⁴⁹ Including questions of treason/high crimes.

⁵⁰ Including prohibition on monopolies.

⁵¹ For the principle of primacy of Community law, see 2.2.1.6.

⁵² Including the body responsible for revising or amending the Constitution.

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⁵³ For example, presidential messages, requests for further debating of a law, right of legislative veto, dissolution.

⁵⁴ For example, nomination of members of the government, chairing of Cabinet sessions, countersigning.

⁵⁵ For example, the granting of pardons.

⁵⁶ For regional and local authorities, see chapter 4.8.

⁵⁷ Bicameral, monocameral, special competence of each assembly, etc.

⁵⁸ Including specialised powers of each legislative body and reserved powers of the legislature.

⁵⁹ In particular, commissions of enquiry.

⁶⁰ For delegation of powers to an executive body, see keyword 4.6.3.2.

⁶¹ Obligation on the legislative body to use the full scope of its powers.

⁶² Representative/imperative mandates.

⁶³ Presidency, bureau, sections, committees, etc.

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⁶⁴ Including the convening, duration, publicity and agenda of sessions.

⁶⁵ Including their creation, composition and terms of reference.

⁶⁶ State budgetary contribution, other sources, etc.

⁶⁷ For the publication of laws, see 3.15.

⁶⁸ For example, incompatibilities arising during the term of office, parliamentary immunity, exemption from prosecution and others. For questions of eligibility, see 4.9.5.

⁶⁹ For local authorities, see 4.8.

⁷⁰ Derived directly from the constitution.

⁷¹ See also 4.8.

⁷² The vesting of administrative competence in public law bodies having their own independent organisational structure, independent of public authorities, but controlled by them. For other administrative bodies, see also 4.6.7 and 4.13.

⁷³ Civil servants, administrators, etc.

⁷⁴ Practice aiming at removing from civil service persons formerly involved with a totalitarian regime.

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⁷⁵ Other than the body delivering the decision summarised here.

⁷⁶ Positive and negative conflicts.

⁷⁷ Notwithstanding the question to which to branch of state power the prosecutor belongs.

⁷⁸ For example, Judicial Service Commission, *Haut Conseil de la Justice*, etc.

⁷⁹ Comprises the Court of Auditors in so far as it exercises judicial power.

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80

See also 3.6.

81

And other units of local self-government.

82

See also keywords 5.3.41 and 5.2.1.4.

83

Organs of control and supervision.

84

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.

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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.

⁹⁵ This keyword covers property of the central state, regions and municipalities and may be applied together with Chapter 4.8.

⁹⁶ For example, Auditor-General.

⁹⁷ Includes ownership in undertakings by the state, regions or municipalities.

⁹⁸ Parliamentary Commissioner, Public Defender, Human Rights Commission, etc.

⁹⁹ For example, Court of Auditors.

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¹⁰⁰ The vesting of administrative competence in public law bodies situated outside the traditional administrative hierarchy. See also 4.6.8.

¹⁰¹ *Staatszielbestimmungen*.

¹⁰² Institutional aspects only: questions of procedure, jurisdiction, composition, etc. are dealt with under the keywords of Chapter 1.

¹⁰³ Including state of war, martial law, declared natural disasters, etc.; for human rights aspects, see also keyword 5.1.4.1.

¹⁰⁴ Positive and negative aspects.

¹⁰⁵ For rights of the child, see 5.3.44.

¹⁰⁶ The criteria of the limitation of human rights (legality, legitimate purpose/general interest, proportionality) are indexed in Chapter 3.

¹⁰⁷ Includes questions of the suspension of rights. See also 4.18.

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¹⁰⁹ Universal and equal suffrage.

¹¹⁰ 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).

¹¹¹ For example, discrimination between married and single persons.

¹¹² This keyword also covers "Personal liberty". It includes for example identity checking, personal search and administrative arrest.

¹¹³ Detention by police.

¹¹⁴ Including questions related to the granting of passports or other travel documents.

¹¹⁵ May include questions of expulsion and extradition.

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¹¹⁶ 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.

¹¹⁷ This keyword covers the right of appeal to a court.

¹¹⁸ Including the right to be present at hearing.

¹¹⁹ Including challenging of a judge.

¹²⁰ Covers freedom of religion as an individual right. Its collective aspects are included under the keyword "Freedom of worship" below.

¹²¹ This keyword also includes the right to freely communicate information.

¹²² Militia, conscientious objection, etc.

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Aspects of the use of names are included either here or under "Right to private life".

124

Including compensation issues.

125

This keyword also covers "Freedom of work".

126

Includes rights of the individual with respect to trade unions, rights of trade unions and the right to conclude collective labour agreements.

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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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