

THE BULLETIN

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

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

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

*The Venice Commission thanks the **International Organisation of the Francophonie** for their support in ensuring that contributions from its member, associate and observer states can be translated into French.*

The decisions are presented in the following way:

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

T. Markert

Secretary of the European Commission for Democracy through Law

THE VENICE COMMISSION

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

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

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

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There was no relevant constitutional case-law during the reference period 1 January 2009 – 30 April 2009 for the following countries:

Denmark, Japan, Luxembourg, Morocco.

Précis of important decisions of the reference period 1 January 2009 – 30 April 2009 will be published in the next edition, *Bulletin 2009/2*, for the following countries:

Andorra, Norway.

Algeria

Constitutional Council

Important decisions

Identification: ALG-2009-1-001

a) Algeria / b) Constitutional Council / c) / d) 20.08.1989 / e) 1-DL-CC-89 / f) Electoral Code / g) *Journal officiel de la République algérienne démocratique et populaire*, no. 32, 07.08.1989 / h) CODICES (French).

Keywords of the systematic thesaurus:

2.2.1.2 Sources – Hierarchy – Hierarchy as between national and non-national sources – **Treaties and legislative acts.**

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

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

4.9.7.2 Institutions – Elections and instruments of direct democracy – Preliminary procedures – **Registration of parties and candidates.**

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

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

5.3.41.2 Fundamental Rights – Civil and political rights – Electoral rights – **Right to stand for election.**

Keywords of the alphabetical index:

Election, polling method, ineligibility, conditions / Election, certificate of nationality at birth / Election, candidate for election, approval and sponsoring / Election, free choice / Election, candidate, nomination by political party, obligatory / Election, candidate, citizenship of origin, obligation.

Headnotes:

The polling methods adopted carry no discriminatory features that conflict with the constitutional principles concerning the citizens' political rights. Proportional list voting in one round with a bonus of seats for the majority is merely a method of apportioning the seats to be filled and does not vitiate the citizen's electoral

choice. This bonus is not discriminatory. It stems from the sovereign intent of the legislator to reconcile the necessities of the people's equitable representation with the demands of effective management of public affairs.

The requirement that candidates and spouses of candidates for election to the National People's Assembly and the office of President of the Republic be of Algerian nationality at birth conflicts with the principle of equality of citizens enshrined in the Constitution and in the international legal instruments ratified by Algeria.

The requirement that a presidential election candidate be approved by a political party and stand for election under the aegis of that party forms an impediment to the exercise of the constitutional right to elect and be eligible.

The exemption of the serving President of the Republic and of outgoing members of parliament from certain statutory conditions of candidacy is a breach of the principle of equality.

Summary:

The President of the Republic had applied for a ruling on the constitutionality of certain provisions of Law no. 89-13 on the Election Code.

Concerning Articles 61, 62 and 84 of the above-mentioned statute dealing with polling methods for the election of people's assemblies (at municipal and provincial levels) and the manner of apportionment of seats, the Constitutional Council held that these provisions did not conflict with any constitutional provision as long as the polling methods adopted embodied no discriminatory, features incompatible with the constitutional principles concerning the citizens' political rights, that proportional list voting in one round with a bonus of seats for the majority was merely a method of apportioning the seats to be filled and did not vitiate the citizen's electoral choice, and that the bonus was not discriminatory, but stemmed from the sovereign intent of the legislator to reconcile the necessities of the people's equitable representation and the demands of effective management of public affairs.

Concerning Articles 82 and 85 dealing respectively with grounds of ineligibility for municipal people's assemblies and the National People's Assembly (parliament), the Constitutional Council held that in rendering persons discharging the offices specified in the Election Code ineligible for both these institutions, the legislator's intention had been to prevent their seeking an electoral mandate during their term of office and for one year thereafter, and from putting

themselves up as candidates for an electoral mandate in the last remit in which they had served. The Constitutional Council declared these two provisions consistent with the Constitution subject to reservations, since any other interpretation such as would extend that stipulation to all remits in which they might have served earlier would be discriminatory and unfounded.

Concerning Article 86 on the conditions of eligibility for membership of the National People's Assembly (parliament), the Constitutional Council held that the stipulation of Algerian nationality at birth for candidates and their spouses was not in accordance with the Constitution on the ground that the Nationality Code had secured certain rights, particularly the right to be vested with an electoral mandate five years after obtaining Algerian nationality, that the aforesaid statutory provision could not be applied in a selective or partial manner, that international legal instruments such as the 1966 United Nations Covenants, approved and acceded to by Algeria, and the ratified African Charter on Human and Peoples' Rights, strictly prohibited discrimination of all kinds, and consequently these provisions laid down a condition which was both extrinsic and discriminatory.

Concerning Article 108 of the Election Code stipulating that notification of candidacy for the office of President of the Republic should be accompanied by a certificate of the spouse's nationality at birth, the Constitutional Council pointed out that having regard to the nature and importance of the functions assigned to the President of the Republic, those drafting the Constitution had decided that the President's conditions of eligibility should be established by a procedure of a higher order than the one laying down the conditions to be met by candidates for any other electoral mandate, and that in this matter Article 70 of the Constitution had given a limitative definition of the conditions of eligibility for the office of President of the Republic. Moreover, the requirement at issue gave rise to discrimination contrary to the provisions of the Constitution and of the Covenants mentioned above.

Concerning Articles 111 and 91 exempting the serving President of the Republic from certain stipulated conditions of candidacy, and outgoing members of parliament from the obligation to have their candidacy backed by the signatures of 10% of the elected representatives of their constituency or 500 signatures of voters in that constituency unless they were standing for election under the aegis of a political party, the Constitutional Council held that an exemption of this kind was liable to be assessed as

constituting a breach of the principle of equal treatment of candidates, and thus as unconstitutional.

Languages:

Arab.



Identification: ALG-2009-1-002

a) Algeria / **b)** Constitutional Council / **c)** / **d)** 30.08.1989 / **e)** 2-DL-CC-89 / **f)** Parliament, member, status / **g)** *Journal officiel de la République algérienne démocratique et populaire*, no. 33, 09.08.1989 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

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

4.5.3.1 Institutions – Legislative bodies – Composition – **Election of members.**

4.5.7 Institutions – Legislative bodies – **Relations with the executive bodies.**

4.5.11 Institutions – Legislative bodies – **Status of members of legislative bodies.**

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

Keywords of the alphabetical index:

Parliament, control by the people / Parliament, injunction to the executive / Parliament, member, incompatibilities / Parliament, member, diplomatic passport.

Headnotes:

The definition by law of the rules on incompatibilities should not create situations of inequality between citizens or discrimination between persons vested with identical functions discharged in different legal contexts.

In providing that members of parliament must at all times be attentive to the people, the Constitution does not empower the legislator to vest them with functions exceeding the limits of their constitutional prerogatives and to confer on them a degree of dignity and travel documents whose issuance rests with the executive.

Summary:

The President of the Republic had applied for a ruling on the constitutionality of Law no. 89-14 defining the status of members of parliament.

Concerning the provision on the compatibility of duties as teacher in higher education or as public-sector medical practitioner with parliamentary office, the Constitutional Council held that to lift incompatibility in respect of certain public functions gave rise to a discriminatory situation towards persons performing identical functions in different legal contexts.

Concerning the provision on the temporary assignments which might be conferred on members of parliament by the higher political bodies, the Council held that not only was the notion of "higher political bodies" alien to the current constitutional terminology, but such a provision was apt to generate situations prejudicial to the necessary independence of each constitutional body.

As to the provisions on the role of members of parliament in their constituencies, the Council held that each State power should remain within the limits of its allotted functions in order to guarantee the institutional balance established, and that by authorising a member to attend, in an individual capacity, to matters regarding the application of the laws and regulations and the exercise of control by the people and to matters regarding the activity of the various public services, the law on the status of members of parliament had given them assignments exceeding the limits of their constitutional prerogatives.

Concerning the provision on a member of parliament's participation in the proceedings of the *wilaya* people's assembly (provincial assembly) attaching to his/her constituency, the Council held that under the Constitution, the parliamentary mandate was national and should be discharged within the ambit of legislative power, and that the function of control by the people conferred by the Constitution on the National People's Assembly should be exercised under the conditions defined by the Constitution.

Likewise, the Council held that the possibility for members of parliament to demand that the executive body of their constituency be heard as an injunction to the national executive was in no way part of their constitutional prerogatives, and that in so providing the law had infringed the principle of separation of powers.

Lastly, as regards the provision enabling members of parliament to enjoy first place in the order of dignity at official events staged in their constituencies, the Council held that such a provision disclosed a concept not defined by any legal instrument and not written into the sphere of law by the Constitution. The same applied to the provision on members' travel with diplomatic passports, given that the conditions of issuance of travel documents were not for the law to establish.

Languages:

Arab.



Armenia

Constitutional Court

Statistical data

1 January 2009 – 30 April 2009

- 100 applications have been filed, including:
 - 17 applications, filed by the President
 - 82 applications, filed by individuals
 - an application, filed by deputies of the National Assembly
- 28 cases have been admitted for review, including:
 - 18 applications, concerning the compliance of obligations stipulated in international treaties with the Constitution
 - 9 individual complaints, concerning the constitutionality of certain provisions of laws
 - 1 application, filed by deputies of the National Assembly
- 16 cases heard and 16 decisions delivered (including decisions on the applications filed before the relevant period), including:
 - 1 decision on individual complaints (on applications filed before the relevant period)
 - a decision on an application, filed by an ordinary court (the application was filed before the relevant period)
 - 14 decisions concerning the compliance of obligations stipulated in international treaties with the Constitution (on applications filed before the relevant period)

Important decisions

Identification: ARM-2009-1-001

a) Armenia / b) Constitutional Court / c) / d) 03.02.2009 / e) DCC-787 / f) On the conformity with the Constitution of Article 8.1 of the Administrative Procedural Code / g) To be published in *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.**

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

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

4.7.9 Institutions – Judicial bodies – **Administrative courts.**

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.**

Keywords of the alphabetical index:

Procedure, administrative / Hearing, right.

Headnotes:

The right of everyone to be heard by a competent court established by law is a component part of the right to judicial protection.

Filing correlated lawsuits directed at the restoration of the same violated right as grounds for filing unconnected, independent and separate cases may result in the breach of procedural guarantees that provide for an effective, complete and comprehensive examination of an individual's case.

Summary:

The applicant disputed the constitutionality of the provisions of Article 8.1 of the Administrative Procedural Code. The provisions in point did not allow the Administrative Court to examine the civil lawsuit from which the main administrative case within the same proceedings was derived and with which it was inter-connected. The applicant pointed out that if inter-connected cases which fall within the remit of different courts are then examined by those different courts, the rights to an effective remedy and to have one's case heard within a reasonable time are compromised.

The Constitutional Court began by examining the contents of the right to an effective judicial protection, stipulated in Article 19 of the Constitution. A comparative analysis of the phrases "to restore his/her violated rights" and "...his/her case" provided for in the provision of Article 19 of the Constitution, which says "in order to restore his/her violated rights ... has a right of hearing ... of her/his case", leads to the conclusion that the concept of "the hearing of

his/her case” includes the combined examination of all those interconnected lawsuits which are aimed at the resolution of one general issue, i.e. the restoration of somebody’s violated right in the framework of the same case.

This means that the procedural safeguards provided for in Article 19 of the Constitution, Article 6 ECHR and national procedural legislation are protected not only in the context of the hearing of a specific concrete lawsuit but also in the context and framework of the examination of diverse interrelated lawsuits aimed at the restoration of a violated right, as the final and only target of these lawsuits is the complete restoration of the same violated right. Consequently, the observation of correlated lawsuits directed at the restoration of the same violated right as grounds for filing disconnected, independent and separate cases may result in the breach of procedural guarantees providing for an effective, complete and comprehensive examination of a person’s case.

The Constitutional Court held that if a lawsuit derived from the original proceedings is filed in another court, separately from the original proceedings, the Court is in effect deprived of the opportunity to render a fair decision. It violates the right to a fair trial as, in order to render a fair decision, the Court needs to implement a thorough, objective and comprehensive examination of the circumstances of the case, and to do so, it has to turn to the basic legal relations.

The Constitutional Court also considered that the disputed legal regulation could result in breaches of the right to a hearing within a reasonable time and effective judicial protection as set out in Articles 18.1 and 19.1 of the Constitution.

Article 6 of the Administrative Procedural Code stipulates the principle of *ex-officio* clarification of the circumstances of the case. The rationale behind the latter can be summarised thus. In disputes arising from administrative-legal relations, where a citizen takes proceedings against the administrative body, some sort of favourable condition should be created for the citizen. This presupposes that in the process of resolving disputes arising from administrative-legal relations, citizens should not be overburdened with disproportionate responsibilities.

The Constitutional Court held that the disputed regulation overburdens the plaintiff with disproportionate responsibilities. By preventing the resolution of civil disputes arising from administrative legal relations within the same proceedings, litigants faced with judicial acts arising from their original proceedings are forced to apply to different courts.

This state of affairs complicates the protection of individual rights.

Languages:

Armenian.



Identification: ARM-2009-1-002

a) Armenia / **b)** Constitutional Court / **c)** / **d)** 24.02.2009 / **e)** DCC-792 / **f)** On the conformity with the Constitution of Articles 113.1.9 and 114.4.5 of the Labour Code / **g)** To be published in *Tegekagir* (Official Gazette) / **h)**.

Keywords of the systematic thesaurus:

3.9 General Principles – **Rule of law**.
 5.2.1.2.1 Fundamental Rights – Equality – Scope of application – Employment – **In private law**.
 5.2.2.7 Fundamental Rights – Equality – Criteria of distinction – **Age**.
 5.4.3 Fundamental Rights – Economic, social and cultural rights – **Right to work**.

Keywords of the alphabetical index:

Employment, contract, termination, conditions / Age, retirement / Age, discrimination.

Headnotes:

Freedom of choice of employment prescribed in Article 32 of the Constitution affords everybody the opportunity for free expression of their professional and other capacities and entry into the workforce without discrimination.

Articles 14.1 and 32 of the Constitution prescribe the free and non discriminatory realisation of the right to work in all spheres of labour relations.

Conditions such as appropriateness or other subjective factors should not be imposed on employers’ rights to dissolve employment contracts. Instead, the implementation of such a right should follow a fair, definite and lawful aim in accordance with the constitutionally prescribed principles of the right to work.

Summary:

The judge at the general jurisdiction court lodged an application with the Constitutional Court challenging various provisions of the Labour Code, the application of which arose during a specific case. The provisions in question allow early dissolution of employment contracts where the employee has reached pension age – this being 65 for the purposes of the Code. The applicant raised concern that such a legal regulation violates the constitutional principle of equality before the law, which forbids discrimination on the basis of the age or personal, social or other circumstances.

The Constitutional Court stated that freedom of choice of employment prescribed in Article 32 of the Constitution affords everybody the opportunity for free expression of their professional and other capacities and entry into the workforce without discrimination.

Under Articles 14.1 and 32 of the Constitution, the free and non-discriminatory realisation of the right to work shall be guaranteed in all spheres of labour relations.

Freedom of choice of employment is conditional upon the availability of distinct legislative guarantees surrounding the formation and termination of employment contracts, on the basis of bilateral expression of will, which are necessary for the realisation of the individual's right prescribed in Article 32.1 of the Constitution, and the development of free and comprehensive market relations of management in accordance with the principle prescribed in Article 8.2 of the Constitution.

Employment contracts are formed on the basis of the free expression of will; consequently, parties to these contracts are free to end them. The contractual nature of the regulation of labour relations demands not only the realisation of the right, but also the necessity to implement duties. The implementation of the right of the parties (especially that of the employer) to terminate a employment contract should not be made conditional on appropriateness or other subjective factors. Rather, it should follow fair, lawful and definitive goals, in accordance with the constitutionally prescribed principles of the realisation of the right to work.

Pursuant to Article 3.2 of the Constitution, the state shall ensure the protection of fundamental human and civil rights and freedoms in accordance with the principles and norms of international law.

In view of the international experience of free, non-discriminatory choice of employment and the realisation of this right, the Constitutional Court stated

that any discrimination (including that on the grounds of age), or illegal restrictions of freedom of employment in domestic legislative practice contravene the fundamental principles of the democratic and social state, based on the rule of law.

Languages:

Armenian.



Azerbaijan

Constitutional Court

Important decisions

Identification: AZE-2009-1-001

a) Azerbaijan / b) Constitutional Court / c) / d) 16.01.2009 / e) / f) / g) *Azerbaijan, Respublika, Khalq gazetesi, Bakinski rabochiy* (Official Newspapers); *Azerbaycan Respublikasi Konstitusiyası Mehkemesinin Melumatı* (Official Digest) / h) CODICES (English).

Keywords of the systematic thesaurus:

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

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

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

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

Keywords of the alphabetical index:

Appeal, time limit, expiry.

Headnotes:

Justice is to be exercised based on facts, the adversarial principle and equality before the law. The judge should base his or her decision solely upon reasons discussed in compliance with the adversarial principle explanations and documentation submitted by parties. Courts are to evaluate evidence in a fair, impartial, complete and all-embracing manner and shall thereafter evaluate the norms of law that apply to this evidence. Court decisions shall be legal and reasoned. Decisions are to be based on the actual circumstances established with respect to the case and the relationships between the parties (Articles 9.1, 9.3, 88, 217.1, 217.3 of CCP).

One of the most important elements of a fair trial is the possibility to appeal a decision by an inferior court

through a procedure established by law to a superior court.

Summary:

I. The complainants Halil Halilov and Mammad Mammadov, co-founders of Manufacturing Commercial Firm “Tabriz” (described here as “Tabriz” MCF) brought a suit to the court against the State Notary Office N1, State Notary Office N12, the founder of “Shahinlar” Limited, Teymur Guliyev, and, as third party the Baku District Department of the State List of Record of Legal Persons of the Ministry of Justice concerning the liquidation of “Shahinlar” LTD. They sought the cancellation of the contract of sale, the restoration of Tabriz MCF to the register of companies, and its return to its plot.

H. Halilov and M. Mammadov had set up, legally registered and proceeded to trade as “Tabriz” MCF. An action by the Head of Baku City executive power resulted in the firm receiving 0,49 of a hectare, in order to plan and construct a compact administrative hotel and trade complex. The construction began as planned and to budget, but for various objective and subjective reasons the construction was not completed.

No activity took place for a considerable period of time on the land belonging to “Tabriz” MCF. However, the plot was constantly observed and guarded.

In 2007, it became known that the land belonging to H. Halilov and M. Mammadov had been conveyed to Shahin Guliyev by some person on the basis of false documents and then by the successor of R. Agayarova, it was illegally sold to Teymur Guliyev.

On 16 January 2007, the Nizami District Court of Baku City declined to accept the matter for consideration.

On 7 June 2007, the Civil Board of the Court of Appeal overturned the decision of the Nizami District Court and ruled that the sale contract concluded between M. Mammadov and Sh. Guliyev was null and void. The sale of part of the capital and usage of the ground area contract concluded between Rafiga Agayarova and Teymur Guliyev was also to be deemed null and void. The status of Tabriz MCF was restored, and H. Halilov and M. Mammadov were recognised as founders of the firm. The legal registration of the firm was restored, as were the rights over the ground area and the right to construction. The certificate of inheritance right given to R. Agayarova was pronounced null and void, and, finally, that part of the claim relating to the liquidation of Shahinlar Limited was rejected.

On 11 October 2007, the Civil Board of the Supreme Court overturned the above Appeal Court judgment, and referred the matter to the Court of Appeal of Baku city for re-examination.

On 8 February 2008, the Civil Board of the Court of Appeal of Baku city upheld the decisions of the Nizami District Court, the Civil Board of the Supreme Court, and that of the Court of Appeal.

H. Halilov applied to the Constitutional Court for an assessment of the compatibility of the above-mentioned decision of the Civil Board of the Supreme Court with the Constitution and laws of the Republic.

In his complaint, H. Halilov indicated that his property had been illegally appropriated by third parties. The court had confirmed this in a definitive manner, but his claim was rejected as the time span in which to complain had expired.

II. The Plenum of the Constitutional Court made the following points in relation to H. Halilov's complaint.

Article 60.1 of the Constitution guarantees legal protection of the rights and freedoms of every citizen.

The main principles for the implementation of justice enshrined in the Constitution are the impartial and fair consideration of legal cases, equality before the law, action based on facts and according to the law (Article 127.2 of the Constitution), and legal proceedings based on the adversarial principle (Article 127.7 of the Constitution).

Article 6.1 ECHR provides that in the determination of civil rights and obligations, everyone is entitled to a fair and public hearing by an independent and impartial tribunal established by law.

According to the legal position of the Constitutional Court expressed in the case in point, the court had no right to reject the complaint as being time-barred, until the right of the complainant under corresponding subjective law had been established, whether the law in question had been infringed, and whether the respondent had carried out this infringement. Rejection of the complaint as being time-barred without having investigated the infringement of subjective civil law is clearly inconsistent and groundless; there is no basis to justify the court's conclusion regarding the expiry of the deadline for filing claims.

The Constitutional Court concluded that the decision of the Civil Board of the Supreme Court of 18 June 2008 ran counter to Article 60.1 of the Constitution and Articles 416, 418.1 and 418.3 of the CCP, and should accordingly be considered as null and void. Therefore, the case must be re-examined in the manner and in the time frame prescribed by the civil procedure legislation of the Republic.

Languages:

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



Belarus

Constitutional Court

Statistical data

1 January 2008 – 31 December 2008

Total number of decisions: 124 (including 102 within the procedure of the obligatory preliminary constitutional control)

Important decisions

Identification: BLR-2009-1-001

a) Belarus / b) Constitutional Court / c) / d) 12.06.2008 / e) D-204/08 / f) / g) / *Vesnik Kanstytucijnaga Suda Respubliki Belarus* (Official Digest), no. 2/2008 / h) CODICES (English, Belarusian, Russian).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Income, national / Legislative omission.

Headnotes:

Certain difficulties were revealed, with the substantive definition of “notional income” in the context of the imposition of an administrative penalty. It was proposed that the legislature should fill this gap.

Summary:

An application before the Constitutional Court highlighted certain imperfections in the legislative norms defining “notional income” in connection with imposing an administrative penalty for illegal entrepreneurial activities.

The Constitutional Court made the following ruling.

The norms of Article 12.7 of Code of Administrative Offences (hereinafter “CAO”) envisage a basic administrative penalty (a fine and an extra penalty); specifically, confiscation of the income derived from engagement in unlawful entrepreneurial activities.

However, there is no definition of “substantive income” for the purpose of putting into effect the sanction contained in Article 12.7 of CAO, envisaging confiscation of such income. Other articles of the CAO contain a definition of notional income, as do other legislative norms. However, its substance is defined in different ways, according to the purpose of the legal regulation.

An example can be seen in the note to Article 13.2 of the CAO – “realisation of activity without registration with the tax authorities”. In the context of the given components of an administrative offence it is necessary to understand an economic benefit in cash or in kind as income, defined as the proceeds less the expenses (confirmed in documentary form) of the business activity.

A note to Article 233 of the Criminal Code stresses the importance of viewing all proceeds, whether in cash or in kind, without expenses, when considering the question of income derived from unlawful entrepreneurial activities.

The Constitutional Court considers the definition of “income” in Article 233 of the Code only applies for the purpose of distinguishing between an administrative offence envisaged by part one of Article 12.7 of CAO from a crime envisaged by Article 233 of the Code. It suggested that the House of Representatives of the National Assembly of the Republic of Belarus might add the to Code of Administrative Offences of the Republic of Belarus the provision defining notional income with a view to imposition of an administrative penalty, in accordance with Article 12.7 of the Code.

Languages:

Belarusian, Russian, English (translation by the Court).



Identification: BLR-2009-1-002

a) Belarus / b) Constitutional Court / c) / d) 03.12.2008 / e) D-299/08 / f) / g) / *Vesnik Kanstytucijnaga Suda Respubliki Belarus* (Official Digest), no. 1/2009 / h) CODICES (English, Belarusian, Russian).

Keywords of the systematic thesaurus:

3.5 General Principles – **Social State.**

5.4.14 Fundamental Rights – Economic, social and cultural rights – **Right to social security.**

Keywords of the alphabetical index:

Social security / Conflict of rules.

Headnotes:

Questions had arisen over the period of validity of powers of attorney governing the reception of money into bank accounts to which pensions or other allowances were transferred. The Constitutional Court suggested ways in which the Government could fill this legislative gap.

Summary:

On 6 November 2008 the Constitutional Court examined an application from the public joint-stock company “Savings Bank “Belarusbank” seeking revision of the norms of the normative legal act that stipulated that powers of attorney governing the reception of monetary resources from a bank deposit account into which the labour and social protection authorities transfer pensions and allowances would be valid for a maximum of one year. The application came about as many pensioners had applied to the above bank, believing that they were entitled to set up powers of attorney for periods of a maximum of three years, as was stipulated in the Civil Code.

The Constitutional Court examined the provisions of the Constitution, laws and other normative legal acts regulating issues of pension security, as well as the positions of state bodies, and concluded that legal relations arising from powers of attorney concluded that the issue of a power of attorney dealing with the reception of money kept in an account to which a pension is transferred is inherently a civil law matter and therefore regulated by Article 187.1 of the Civil Code to the effect that the maximum period of validity for a power of attorney is three years. Thus, Article 87 of the Law on Pension Security, which sets the maximum period of validity of a power of attorney at one year cannot be applied to these particular legal relations.

The Constitutional Court accordingly suggested that the Government might deal with the issue of perfection of the norms of the pension legislation by amending Article 87 of the Law on Pension Security to the effect that the term of validity of a power of attorney specified in it does not apply to cases of reception of monies from the bank deposit account of a citizen to which his pension or allowances are transferred. Alterations were also proposed to the normative legal act of the Ministry of Labour and Social Protection, regarding the above matters.

Languages:

Belarusian, Russian, English (translation by the Court).

*Identification:* BLR-2009-1-003

a) Belarus / b) Constitutional Court / c) / d) 03.12.2008 / e) D-300/08 / f) / g) / *Vesnik Kanstytucijnaga Suda Respubliki Belarus* (Official Digest), no. 4/2008 / h) CODICES (English, Belarusian, Russian).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Legislative omission / Administrative procedure, deadline.

Headnotes:

A legislative omission was identified with regard to the calculation of deadlines in administrative processes. The Constitutional Court suggested various amendments the Council of Ministers could make to the relevant legislation, to rectify this situation.

Summary:

On 3 December 2008, the Constitutional Court examined the issue of the lawfulness of the rejection without consideration of complaints against rules on administrative offences due to a gap in the procedure set out in part three of Article 12.11 of the Administrative Procedural Code of Execution (hereinafter "APCE").

The Constitutional Court made the following observations.

Part three of Article 12.11 of APCE allows for a complaint to be lodged against a ruling on an administrative offence which has entered into legal force within six months of the day after the ruling. Complaints filed after this deadline will not be considered. (Part four of Article 12.11).

The Constitutional Court emphasised that the calculation of procedural terms is established in the special chapters of the Civil Code of Procedure (CvCP), the Criminal Code of Procedure (CrCP) and the Economic Code of Procedure (ECP). These norms deal in particular with procedures for calculating, extending, reducing, ending and (in cases of complaint or appeal) reinstatement of procedural terms. See Articles 150-156 of Chapter 17 of CvCP. On calculation, confirmation, extension and reinstatement see Articles 158-161 of Chapter 18 of CrCP); on establishment and calculation, commencement and ending, suspension, reinstatement and extension and ramifications of missing the deadline (Articles 134-139 of Chapter 12 of ECP).

For example, part three of Article 150 of CvCP states that procedural terms will begin to run on the day after the calendar date or the occurrence of the event determining their commencement dates. If the last day of a procedural term falls on a non-working day, the final day of the term shall be deemed the next working day following it.

Norms governing the calculation of the beginning, operation and end of the time span for performing procedural actions are set out in CvCP, CrCP and ECP.

However, there is no specific provision in the ACPE setting out the procedure for calculating the time span for performing procedural actions covering the eventuality of the last day of a procedural term occurring on a non-working day or when a procedural action is performed up to midnight on the last day of the established term.

The ACPE is the unique effective law in the territory of the Republic of Belarus establishing the procedure of administrative process (Article 1.1.2 of the specified Code). The absence of detailed provision for special issues of calculation of procedural terms does not secure the uniform understanding and application of the normative provisions concerned and entails a restriction of the constitutional rights of citizens with regard to judicial protection and appeals against rulings.

In its decision in the case in point, the Constitutional Court suggested that the Council of Ministers should consider amendments to the ACPE with a view to overcoming the omission in the legislative regulation with regard to the calculation of procedural terms.

Languages:

Belarusian, Russian, English (translation by the Court).

*Identification:* BLR-2009-1-004

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 18.12.2008 / **e)** D-303/08 / **f)** / **g)** *Vesnik Kanstytucijnaga Suda Respubliki Belarus* (Official Digest), no. 4/2008 / **h)** CODICES (Belarusian, Russian, English).

Keywords of the systematic thesaurus:

3.11 General Principles – **Vested and/or acquired rights**.
5.1.4 Fundamental Rights – General questions – **Limits and restrictions**.

Keywords of the alphabetical index:

Normative act / Right, subjective, protection / Annulment, effect.

Headnotes:

The repeal of a legal norm can result in the removal of rights which were already in the process of realisation. Where this is the case, the legislator should define the facilities and procedure for the realisation of the subjective right, and make the appropriate alterations and addenda to the relevant

regulations, so that citizens can enjoy a full realisation of their rights where a norm has been repealed.

Summary:

The Constitutional Court examined an application by a citizen concerning the implementation of Decree no. 17 by the President of the Republic of Belarus on the procedure for providing housing quarters for servicemen, enlisted and senior ranks of the Ministry of Internal Affairs, Financial Investigation Agencies, and emergency services and units dated 13 June 2001. Under this decree, the applicant had been awarded free financial assistance to repay a preferential loan for housing construction. Decree no. 17 was subsequently declared invalid. The free financial aid was not provided in full. The applicant contended that he was entitled to financial aid in full, having applied for and having been granted the assistance before the Decree was repealed.

When considering the issue of subjective right realisation in instances where legal norms become invalid the Constitutional Court formulated its legal position in its decision as follows:

When a normative legal act, which has conferred certain rights and duties on a citizen or an organisation, loses its legal effect, it sometimes becomes necessary to regulate for a certain period of time the relations that had arisen before the norm became invalid. This type of action promotes the realisation of subjective rights and legal duties in full in such a way as to conform to the constitutional principles of human rights guarantee and mutual responsibility of the state and the citizen. If the repeal of a normative legal act terminates a right, the realisation of which is already under way, the legislator should define the facility, procedure and conditions for a full realisation of the subjective right.

The Constitutional Court suggested that certain additions were now needed to the Law on Normative Legal Acts of the Republic of Belarus, and proposed that the Council of Ministers of the Republic of Belarus should put forward a draft legislation.

Languages:

Belarusian, Russian, English (translation by the Court).



Identification: BLR-2009-1-005

a) Belarus / b) Constitutional Court / c) / d) 27.12.2008 / e) D-308/08 / f) / g) *Vesnik Kanstytucijnaga Suda Respubliki Belarus* (Official Digest), no. 4/2008 / h) CODICES (Belarusian, Russian, English).

Keywords of the systematic thesaurus:

4.5.6.3 Institutions – Legislative bodies – Law-making procedure – **Majority required.**

Keywords of the alphabetical index:

Amendment, legislative.

Headnotes:

Any alterations and addenda to a legislative programme should be adopted by a special procedure similar to that applicable to the legislative programme itself.

Summary:

In the exercise of obligatory preliminary control, the Constitutional Court examined the constitutionality of the Law on Making Alterations and Addenda to Some Laws of the Republic of Belarus Regarding State and Mobilisation Material Reserves. This particular Law introduces alterations and addenda to the military doctrine of the Republic of Belarus (confirmed by the Law of 3 January 2002), to its national “Law on Defence”, “On the Exclusive Property of the State”, “On Mobilisation and Preparation thereof”, “On State of Emergency”, “On State of Martial Law” and “On Civil Defence”.

The Constitutional Court noted that the alterations and addenda resulted in a more precise specification of the powers of state bodies as to the creation, use and conservation of material values in state and mobilisation material reserves. The contents of these alterations and addenda are in line with the Constitution.

The Constitutional Court noted, however, that by virtue of part four of Article 104 of the Constitution, laws forming part of a legislative programme require a special procedure for their adoption as do the introduction of any alterations and addenda. Owing to the constitutional norms, laws on the basic direction of internal and foreign policy or military doctrine are “programme ones”. Their adoption is conditional upon being adopted by a vote of at least

two thirds of elected deputies of the Parliament of the full composition of the two chambers. The Constitutional Court took the view that legislation making alterations and addenda to legislation forming part of a programme should also be adopted by at least two thirds of the elected deputies' votes of the House of Representatives and the Council of the Republic of the full composition of the two chambers.

The Constitutional Court also noted that a separate law should have been drafted, in order to make amendments to the Military Doctrine of the Republic of Belarus confirmed by the Law of 3 January 2002.

However, in view of the fact that the Law was adopted by more than two thirds of the deputies' votes of the full composition of two chambers of the Parliament, the Constitutional Court found no basis to declare the procedure of its adoption to be in conflict with the Constitution.

Languages:

Belarusian, Russian, English (translation by the Court).



Identification: BLR-2009-1-006

a) Belarus / b) Constitutional Court / c) / d) 29.12.2008 / e) D-312/08 / f) / g) *Vesnik Kanstytucijnaga Suda Respubliki Belarus* (Official Digest), no. 4/2008 / h) CODICES (Belarusian, Russian, English).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Proceedings, administrative / Penalty, determination.

Headnotes:

In the legislation under dispute, the list of administrative offences carrying longer terms of administrative penalties was neither defined in full nor enshrined at the legislative level. The general wording of the list may give rise to a broad interpretation by practitioners. It was suggested that the legislator should make appropriate alterations and addenda.

Norms that specify an exception to the general rule require the fullest possible definition in order to rule out any ambiguous interpretation and application.

Summary:

The Constitutional Court considered a request regarding the validity of the application of longer terms of administrative penalties set forth in Article 7.6.1.4 of the Code of Administrative Offences of the Republic of Belarus.

The Code imposes longer terms for administrative penalties by comparison with ordinary terms for the commission of administrative offences in certain spheres of activity. These include administrative offences in the financial area, bond market, banking and entrepreneurship or offences against the fiscal regime and customs regulation. It is also established that administrative penalties may be imposed in the form of longer terms and for the commission of "other administrative offences expressed in non-execution or improper execution of legislative acts regulating economic relations".

The Constitutional Court noted in its decision that the legislation of the Republic of Belarus does not explain the concept of "economic relations", giving rise to the possibility of ambiguous interpretation of the provision "other administrative offences". This could in turn give rise to an unreasonably large list of administratively punishable acts at the legal practitioner's discretion.

The Constitutional Court stated that norms that specify an exception to a general rule require the fullest possible definition in order to rule out any ambiguous interpretation and application. The list of constituent elements of administrative offences carrying longer terms of administrative penalties to be imposed should be enshrined directly in the above Code. The Constitutional Court therefore proposed that the House of Representatives should make the necessary alterations and addenda to this Code.

Languages:

Belarusian, Russian, English (translation by the Court).



Belgium Constitutional Court

Important decisions

Identification: BEL-2009-1-001

a) Belgium / b) Constitutional Court / c) / d) 12.05.2009 / e) 17/2009 / f) / g) *Moniteur belge* (Official Gazette), 12.03.2009 / h) CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

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

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

2.1.1.4.7 Sources – Categories – Written rules – International instruments – **International Convention on the Elimination of all Forms of Racial Discrimination of 1965.**

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

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

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

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

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

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

5.2.3 Fundamental Rights – Equality – **Affirmative action.**

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

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

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

5.3.27 Fundamental Rights – Civil and political rights – **Freedom of association.**

5.4.6 Fundamental Rights – Economic, social and cultural rights – **Commercial and industrial freedom.**

5.4.8 Fundamental Rights – Economic, social and cultural rights – **Freedom of contract.**

Keywords of the alphabetical index:

Discrimination, list, prohibited grounds / Discrimination, incitement, prohibition / Directive, execution / Discrimination, definition / Fundamental right, effect, horizontal / Legal persons, public law, immunity, criminal / Authorities, discrimination, criminal responsibility / Hatred, incitement / Trade union, discrimination / Burden of proof.

Headnotes:

In enforcing European directives, the legislator may prescribe civil and criminal law measures to combat discrimination between private individuals on a series of “grounds protected by statute”, i.e. expressly stipulated criteria for which prohibition of discrimination is the strict principle (known as the “closed” system of grounds of discrimination).

“Measures of affirmative action” (positive discrimination or corrective inequality) may be taken by the legislator under specific circumstances.

The impugned criminal justice measures contain definitions and criteria whose precision, clarity and legal certainty suffice to comply with the principle that offences and punishments must be strictly defined by law (Articles 12 and 14 of the Constitution), subject to certain concordant interpretations.

Outlawing “incitement to discrimination” and “incitement to hatred” towards a person constitutes interference with freedom of expression, but in the case in point this interference can be deemed necessary in a democratic society within the meaning of Article 10.2 ECHR and does not disproportionately infringe the freedom of expression, nor the freedom of thought, conscience and religion, secured by Article 9 ECHR, nor freedom of association (Article 27 of the Constitution), freedom of petition (Article 28 of the Constitution) and the right of the cultural and social fulfilment (Article 23.3 and 23.5 of the Constitution).

In non-criminal proceedings and in certain circumstances, reversing the burden of proof to place it on the defendant charged with discriminatory conduct according to sufficiently serious and cogent facts which seem to indicate that the unfavourable treatment was prompted by unlawful motives, does not mean that the legislator has disregarded either the balance between the parties to the proceedings, or the right of all parties to a fair trial, or the presumption of innocence.

Summary:

A hundred or so natural persons had lodged an application to set aside three laws of 10 May 2007 constituting the “trptych” of the reform to Federal legislation against discrimination. The reform primarily sought to transpose more adequately than before into the Federal authority’s spheres of competence the European Community directives on prevention of discrimination.

In their submission, the first law, called the “anti-racism law”, seeks to transpose Council Directive no. 2000/43/EC of 29 June 2000 “implementing the principle of equal treatment between persons irrespective of racial or ethnic origin”. It also fulfils the obligations imposed on Belgium by the International Convention of 21 December 1965 on the Elimination of All Forms of Racial Discrimination. This Law’s scope is to provide a general framework in which to combat discrimination founded on nationality, purported race, skin colour, ancestry or national or ethnic origin.

The second Law, called the “General anti-discrimination Law”, seeks to transpose Council Directive no. 2000/78/EC of 27 November 2000 “establishing a general framework for equal treatment in employment and occupation”. This Law’s scope is to provide a general framework in which to combat discrimination founded on age, sexual orientation, civil status, birth, wealth, religious or philosophical convictions, political convictions, language, present or future state of health, disability, a physical or genetic characteristic, or social background.

The third Law, called the “Gender” Law, seeks to transpose seven EC Directives all concerning equal treatment for men and women. This Law’s scope is to provide a general framework in which to combat discrimination founded on gender. For the purposes of enforcing the Law, a distinction based on pregnancy, confinement or maternity, and a distinction based on sex change, is assimilated to a direct gender-based distinction.

The three laws seek to transpose the prohibition of discrimination into private legal relationships in order to uphold equality between persons and promote equal opportunities. In several areas of social life, they introduce a fundamental prohibition of discrimination, whether direct or indirect, on one or more of the grounds mentioned in the impugned laws, and prescribe several measures intended to make the enforcement of this prohibition possible. Furthermore, they punish several acts.

By means of the impugned laws, the legislator also wishes to comply with Judgment no. 157/2004 of 6 October 2004 in which the Court set aside in part or in their entirety several provisions of the Law of 25 February 2003 “preventing discrimination and amending the Law of 15 February 1993 instituting a Centre for Equal Opportunities and Prevention of Racism” (see *Bulletin* 2004/3 [BEL-2004-3-009]).

In a preliminary argument for the repeal of the laws, the applicants claimed that they not only compelled private individuals and public authorities alike to abide by the prohibition of discrimination, but also dealt more harshly with the citizens than with the public authorities, as a citizen infringing the prohibition of discrimination incurred severe civil law sanctions and penalties.

The Court replied, concerning the obligation to abide by the prohibition of discrimination, that public authorities and private individuals were not in a fundamentally different position. Public law legal persons were also criminally responsible, except those “having a body directly elected according to democratic rules”. In that respect the Court drew attention to the legislator’s possible fear that making these legal persons criminally responsible would extend a collective criminal responsibility to situations where it had more disadvantages than advantages, especially by raising complaints whose real purpose would be to use criminal justice as an avenue for conducting disputes which should be dealt with through the political process. Moreover, a public authority’s breaches of the constitutional principle of equality and non-discrimination could be sanctioned by applying the remedies available before the Constitutional Court and before the Council of State, and by claiming compensation.

According to a second argument, the impugned laws were discriminatory in that they applied only in the event of discrimination on the grounds which they specified.

The impugned laws prohibited all discrimination founded on nationality, purported race, skin colour, ancestry or national or ethnic origin (anti-racism law), on age, sexual orientation, civil status, birth, wealth, religious or philosophical convictions, political convictions, language, present or future state of health, disability, a physical or genetic characteristic, or social background (general anti-discrimination law) and on “gender” (“gender” law). The legislator had thus opted for a “closed list” of grounds of discrimination, adding by comparison with earlier legislation the grounds based on “language” and “political convictions”, whose absence had been condemned by the Constitutional Court in the aforementioned Judgment no. 157/2004.

The Court observed firstly that even in the case of relations between private individuals, the legislator could not waive the general prohibition of discrimination, expressly guaranteed by the constitutional principle of equality and non-discrimination (Articles 10 and 11 of the Constitution), whether or not in conjunction with Article 14 ECHR and with Article 26 of the International Covenant on Civil and Political Rights. Thus the adoption of a closed list could on no account be construed as permitting forms of discrimination on grounds not specified in the list. But the Court conceded that where the legislator, in order to comply with the requirements of European directives, instituted a specific procedure departing from the ordinary rules of civil procedure by providing for action to desist, reversing the burden of proof and empowering institutions and bodies to bring legal action under conditions departing from the rules of admissibility developed by case-law, it could confine this exceptional procedure to the types of discrimination concerned by the aforementioned directives, adding those against which the same protection must be provided in the legislator’s estimation. Indeed, it was a matter of the legislator’s discretion to take express measures of the greatest stringency against discrimination where the grounds for it were deemed the most reprehensible by the legislator. The Court added that since discrimination was an ingredient of the offences punishable under Articles 21-23 of the general anti-discrimination law, the legislator needed to define the grounds of discrimination concerned by these provisions to avoid infringing the principle that the definition and prosecution of criminal offences must be strictly in accordance with the law, as the Court had found in its aforementioned Judgment no. 157/2004.

The Court further observed that the list’s omission of a ground of discrimination did indeed signify that the specific protection afforded by the impugned laws was inapplicable, but not that victims of discrimination on any such ground were utterly without legal protection. All unequal treatment in relations between citizens for which no justification could be given in fact constituted discrimination and thus a wrongful act which could occasion a civil law sanction, notably compensation. Besides, a court could set aside a discriminatory contractual clause on the basis of Articles 6, 1131 and 1133 of the Civil Code as being contrary to public policy. These sanctions were of course not identical to the specific measures of protection prescribed by the impugned laws, but the difference in the nature of the sanctions was not disproportionate and thus no discrimination could be inferred.

The Court also dismissed a series of other pleadings, in a very closely reasoned, 148 page judgment:

- It conceded that the legislator might, without disregarding freedom of association and free choice of employment, lay down conditions with regard to the obligation to abide by the principle of prohibition of discrimination bearing in mind the dominant position *de facto* or *de jure* held by employers and the persons making up a society or association of independent professions. The same reasoning held for persons offering goods and services, providers of health care and persons organising economic, social, cultural or political activities.
- The Court also conceded that “measures of affirmative action” could have been taken by the legislator under special circumstances.
- The Court acknowledged the constitutionality of a series of non-criminal measures sanctioning certain acts and defined in detail so that they were not to be considered too vague or too general. It also acknowledged the constitutionality of criminal justice measures founded on sufficiently clear, precise definitions and criteria affording legal certainty in order to comply with the principle of offences being defined and prosecuted strictly in accordance with the law (Articles 12 and 14 of the Constitution), subject to certain concordant interpretations.
- The Court accepted that to make an offence of “inciting discrimination” and of “inciting hatred” towards a person constituted interference with freedom of expression (Article 19 of the Constitution, Article 10 ECHR), but held – relying on several judgments of the European Court of Human Rights and on various international conventions, especially the International Convention on the Elimination of All Forms of Racial Discrimination – that the criminal law provisions in question could be regarded as measures necessary in a democratic society within the meaning of Article 10.2 ECHR in order to protect other people’s reputation and rights. The impugned provisions were furthermore criminal law provisions and thus did not in themselves purport to place preventive restrictions on freedom of expression. These interferences were prescribed by law, and the impugned categorisation as an offence did not disproportionately interfere with freedom of expression. Neither did the measure violate freedom of thought, conscience and religion, secured by Article 9 ECHR, nor freedom of

association (Article 27 of the Constitution), freedom of petition (Article 28 of the Constitution) and the right to cultural and social development (Article 23.3 and 23.5 of the Constitution).

- The Court finally acknowledged the constitutionality of the legislative measure reversing the burden of proof: where a person considering himself discriminated against, or an organisation having been granted the capacity to take part in legal action against discrimination, pleaded before the competent court facts pointing to discrimination (direct discrimination, indirect discrimination, compulsion to discriminate or harassment) on one of the grounds specified in the impugned laws, it was for the defendant to prove that there had been no discrimination. In the Court’s view, this reversal of the burden of proof was appropriate in order to guarantee effective protection against discrimination. The victim must substantiate that the defendant had committed acts or issued instructions that might ostensibly be discriminatory, and must prove facts of sufficient gravity and relevance seeming to indicate that the unfavourable treatment had been prompted by unlawful motives. The Court concluded that the impugned provisions had struck a fair balance between the parties to the proceedings, having regard to the victim’s initial disadvantage. Moreover, a series of conditions applied to the situations where the burden of proof could be shifted to the defendant. Thus it was not apparent that the legislator placed a discriminatory limitation on the right to a fair hearing. The Court further explained that reversal of the burden of proof was not applicable to criminal proceedings, so there could not have been any disregard for the presumption of innocence.

Subject to concordant interpretations in several recitals of the judgment, the Court dismissed the appeal.

Supplementary information:

Judgments nos. 41/2009 of 11 March 2009 and 64/2009 of 2 April 2009 dismiss another application to set aside the “general anti-discrimination law”.

A Judgment, no. 64/2009 of 2 April 2009, reiterates a series of recitals to Judgment no. 17/2009 of 12 February 2009 in order to refute similar arguments, albeit differing in one significant respect: on an application by some trade union associations, the Court set aside the law of 10 May 2007 for the prevention of certain forms of discrimination, in so far as “trade union affiliation” had not been included by the legislator in the “grounds protected by statute”.

Cross-references:

- See the Court's Judgment no. 157/2004 of 06.10.2004, *Bulletin* 2004/3 [BEL-2004-3-009].

Languages:

French, Dutch, German.

*Identification:* BEL-2009-1-002

a) Belgium / b) Constitutional Court / c) / d) 11.03.2009 / e) 42/2009 / f) / g) *Moniteur belge* (Official Gazette), 06.05.2009 / 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.**

3.16 General Principles – **Proportionality.**

3.19 General Principles – **Margin of appreciation.**

3.20 General Principles – **Reasonableness.**

5.2 Fundamental Rights – **Equality.**

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

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

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

Keywords of the alphabetical index:

Fine, administrative / Criminal law, circumstance, mitigating / Court, power / Penalty, mitigation / Penalty, minimum / Penalty, maximum / Right to a fair trial, court, power to take account of a mitigating circumstance / Sanction, administrative / Penalty, determination.

Headnotes:

Where administrative fines are of a criminal law nature within the meaning of Article 6 ECHR, the Court's review should take account of the guarantees embodied in this provision, in particular the guarantee of an independent and impartial tribunal's full jurisdiction in reviewing the imposition of a fine by the competent administrative authority.

Where the legislator considers that certain breaches of legislative provisions should be punished, it is within the legislator's discretion to decide whether it is expedient to opt for criminal sanctions in the strict sense, or for administrative sanctions.

Assessing the gravity of an infringement and the severity with which it can be punished is also a matter of the legislator's discretion.

Summary:

The Constitutional Court had before it a preliminary question raised by the Brussels Court of First Instance about the Law of 10 April 1990 governing private and personal security. The question concerned the Law's consistency with the rules of equality and non-discrimination (Articles 10 and 11 of the Constitution), if it were construed to the effect that the Court, hearing an appeal against an administrative fine, could not grant the offender suspension of delivery of judgment or stay of execution, whereas criminal courts could avail themselves of this possibility when ruling in criminal proceedings against the same infringing acts. The Court was also asked whether it was not discriminatory that the Law furthermore precluded a reduction of the fine below the statutory minimum amounts, as was permitted by Article 85 of the Penal Code.

The Court firstly found that the fines prescribed by the Law were intended to prevent and punish offences committed by companies operating in the field of private and personal security, or members of their staff, in disregarding the obligations imposed by Law.

The Court held that the administrative fines concerned by the Law were of a criminal kind within the meaning of Article 6 ECHR, and therefore its verification of constitutionality should take account of the guarantees prescribed by this provision.

After determining the extent of the legislator's discretion in matters of law enforcement, the Court further specified that it lay with the legislator to set the limits and amounts within which the discretion of the administration, hence that of the Court, was to be

exercised. Recalling several judgments delivered earlier, the Court held that it could not censure such a system unless it was manifestly unreasonable, particularly in disproportionately derogating from the general principle that in the matter of penalties, nothing within the discretion of the administration must be exempt from judicial review or from the right to respect for property where the Law prescribed a set amount and therefore did not offer a choice ranging from a minimum penalty up to that amount as a maximum penalty.

Apart from the above considerations, the Court would encroach on the legislator's preserve unless, in querying the justification of the differences between the many legislative texts prescribing criminal or administrative sanctions, it limited its review regarding the scale of penalties and measures for mitigating them to the cases where the legislator's choice involved such incoherence as to result in manifestly unreasonable difference of treatment.

Also recalling its previous practice, the Court added that where the culprit of a given act could be punished in alternative ways (brought before the criminal court or subjected to an administrative fine against which a remedy was available before a non-criminal court), a parallel should normally exist between measures to personalise the penalty. Where, for the same acts, the criminal court could impose a lesser fine than the statutory minimum in the presence of mitigating circumstances, or where it could grant a stay of execution, the labour court, hearing an appeal against a decision to impose an administrative sanction, must in principle have the same scope for personalising the penalty.

In testing the provision submitted to it, the Court observed that it had been amended by the legislator in 2005 for fuller compliance with the principle that offences must be defined and prosecuted strictly in accordance with the law, but that as a result of this improvement, the scope for personalising the penalty available to the civil servant responsible, under the supervision of a court, differed considerably from that available to the criminal court when imposing a criminal law fine. It was apparent from the drafting history of the Law that the legislator's concern had been to strengthen the deterrent effect of the provision by prescribing a sufficiently heavy fine. The Court found that such a consideration could justify a possible maximum level of 25 000 euros for fines. That, however, could not account for the possibility under the same law of penalties for criminal offences, supposedly more serious than those punishable by administrative fine, being reduced to far lower levels than these fines. Such a situation regarding the levels of penalisation and measures for its mitigation must

be considered so incoherent as to result in a manifestly unreasonable difference of treatment.

Cross-references:

- See *Bulletin* 2007/2 [BEL-2007-2-004].

Languages:

French, Dutch, German.



Identification: BEL-2009-1-003

a) Belgium / **b)** Constitutional Court / **c)** / **d)** 19.03.2009 / **e)** 58/2009 / **f)** / **g)** *Moniteur belge* (Official Gazette), 19.05.2009 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

1.3.5.1 Constitutional Justice – Jurisdiction – The subject of review – **International treaties**.
 1.4.2 Constitutional Justice – Procedure – **Summary procedure**.
 2.1.1.4.18 Sources – Categories – Written rules – International instruments – **Charter of Fundamental Rights of the European Union of 2000**.
 3.3 General Principles – **Democracy**.
 3.21 General Principles – **Equality**.
 4.8.4 Institutions – Federalism, regionalism and local self-government – **Basic principles**.
 4.9.2 Institutions – Elections and instruments of direct democracy – **Referenda and other instruments of direct democracy**.
 4.16 Institutions – **International relations**.

Keywords of the alphabetical index:

Federal state, entity, powers / Referendum / Federal state, treaty, assent / Constitution, revision, treaty, assent / Treaty, assent, federate entities / Treaty, European Union / Treaty, ratification.

Headnotes:

In assenting to the Treaty of Lisbon amending the Treaty on European Union and the Treaty instituting the European Community, the Flemish Community

legislator has neither infringed the constitutional provisions whose observance the Court may verify, nor the rules apportioning powers between Belgium's Federal State and federate entities.

Summary:

Three persons had lodged an appeal to set aside the Flemish Region's decree of 10 October 2008 assenting to the Treaty of Lisbon of 13 December 2007.

They relied on four arguments.

The first (B.2) was that the impugned decree contravened the principle of equality and non-discrimination (Articles 10 and 11 of the Constitution) on the ground that the difference in treatment between, on the one hand, nationals of European Union Member States where the aforementioned Treaty was approved or rejected by the citizens at referendum and, on the other hand, nationals of European Union Member States approving the Treaty through the national parliaments, was not objectively and reasonably justified.

The Court pointed out that the impugned decree had been issued in accordance with the provisions governing approval of treaties in Belgium and providing in particular that assent to treaties was given by the parliament concerned. The position in another Member State of the European Union where the aforementioned Treaty was ratified at referendum was governed by the constitutional system of the Member State in question. The Court therefore replied that the difference in treatment arose from the law of that Member State, on which it could not rule.

In a second contention, the applicants considered that assent to the treaty could not be given without a declaration on revision of the Constitution, provided for in Article 195 thereof.

The Court replied that it lacked jurisdiction to rule directly on the decree's compatibility with the constitutional provision invoked.

Thirdly, the applicants criticised the Flemish Community legislator for having assented to the Treaty without the houses of Federal parliament and the parliaments of the communities and regions having concluded a prior co-operation agreement under which these legislative assemblies would settle the implementing arrangements for the protocol "on application of the principles of subsidiarity and proportionality" annexed to the Treaty.

The Court replied, without needing to rule on the expediency of a co-operation agreement in the matter, that the absence of an agreement was not apt to affect the validity of the decree. The aforementioned protocol to the Treaty, providing for the possibility, with regard to a draft legislative act, of transmitting to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion stating the reasons why the draft did not comply with the principle of subsidiarity, could be applied after the impugned decree had expressed assent to the Treaty of Lisbon.

In a final pleading, the applicants submitted that the impugned decree was contrary to the principle of equality and non-discrimination (Articles 10 and 11 of the Constitution) and Articles 20 and 21 of the Charter of Fundamental Rights of the European Union in that the Treaty did not apply in the same way to all European Union Member States.

The Court replied firstly that, failing the embodiment of the European Union Charter of Fundamental Rights in a prescriptive text with binding force for Belgium, the contention was inadmissible in so far as founded on violation of Articles 20 and 21 of the Charter. It added that the different treatment complained of in the pleading arose from the fact that in some European Union Member States different rules of law would be applied than in other Member States, and that it could not make a pronouncement on this difference in treatment.

The Court therefore dismissed the application.

This judgment was delivered by the Court under what is known as a preliminary procedure prescribed by Article 72 of the Organic Law of 6 January 1989 on the Court, under which manifestly ill-founded applications to set aside can be dealt with quickly and without a hearing.

Languages:

French, Dutch, German.



Identification: BEL-2009-1-004

a) Belgium / b) Constitutional Court / c) / d) 25.03.2009 / e) 60/2009 / f) / g) *Moniteur belge* (Official Gazette), 29.05.2009 / h) CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

5.2 Fundamental Rights – **Equality**.

5.4.14 Fundamental Rights – Economic, social and cultural rights – **Right to social security**.

Keywords of the alphabetical index:

Marriage / Cohabitation, surviving partner, pension / Pension, surviving spouse / Pension, determination, equality.

Headnotes:

The provisions of the Civil Code applicable to registered cohabitants institute a limited pecuniary protection partly inspired by the provisions applicable to spouses. This protection does not imply that the legislator is compelled to treat registered cohabitants as spouses in respect of survivors' pensions.

However, a provision denying spouses the benefit of survivors' pension on the ground that they have not been married for a whole year discriminates against those spouses where the marriage has been preceded by registered cohabitation and the combined duration of this cohabitation and of marriage is at least one year.

Summary:

The Constitutional Court had before it a preliminary question put by the Liège labour court concerning Article 17 of Royal Order no. 50 of 24 October 1967 on retirement and survivors' pension for wage-earners, having force of law. The preliminary question bore on the consistency of this provision with the rules of equality and non-discrimination (Articles 10 and 11 of the Constitution) in granting the benefit of survivors' pension only to a surviving spouse married for over a year to the deceased worker, without granting the same entitlement to a surviving spouse married for less than a year to the worker, but having made a declaration of registered cohabitation more than a year before the latter's death.

The Constitutional Court stated at the outset that its examination was confined to the above eventuality. It then applied itself to clarifying the aim pursued by the legislator in imposing a minimum period of one year

of marriage for the award of survivors' pension, namely that the intention had been to discourage certain abuses, such as marriage at the last moment, contracted solely in order to enable the surviving spouse to draw survivors' pension.

In its review of compliance with the rules of equality and non-discrimination, the Court established that the difference in treatment was founded on an objective criterion, namely the family situation of persons, which differed depending whether they were married or registered cohabitants. The situation differed with regard both to mutual obligations and to their pecuniary situation.

The Court concluded from its examination of the provisions of the Civil Code that the pecuniary protection granted to registered cohabitants was partially inspired by the protection applicable to spouses, but limited. Such protection did not mean that the legislator was compelled to treat registered cohabitants as spouses in respect of survivors' pensions. Next, the Court found that the legislator, in the matter of work accidents or occupational diseases, granted an allowance not only to the victim's spouse, but also to the registered cohabitant where the domestic partners, in accordance with the Civil Code, had entered into a contract placing them under an obligation of mutual assistance which, even after a possible estrangement, could have financial implications. It considered that establishing whether this situation should also be taken into account for the award of a survivor's pension was for the legislator. The Court nonetheless considered that in the case before it, that of marriage preceded by registered cohabitation, the combined duration of which was at least one year, the spouses were in a situation such that the risk of abuse apprehended by the legislator could be deemed non-existent. The Court therefore concluded that the legislative provision was contrary to the principle of equality and non-discrimination (Articles 10 and 11 of the Constitution) in denying a survivors' pension to a surviving spouse who had been married for less than a year to the deceased worker with whom he or she had previously made a declaration of registered cohabitation, where the duration of cohabitation and marriage added up to less than one year.

Languages:

French, Dutch, German.



Bosnia and Herzegovina Constitutional Court

Important decisions

Identification: BIH-2009-1-001

a) Bosnia and Herzegovina / **b)** Constitutional Court / **c)** Plenary session / **d)** 31.01.2009 / **e)** AP 1311/06 / **f)** / **g)** *Službeni glasnik Bosne i Hercegovine* (Official Gazette), 20/09 / **h)** CODICES (Bosnian, English).

Keywords of the systematic thesaurus:

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

3.13 General Principles – **Legality.**

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

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

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

Keywords of the alphabetical index:

Property, interference.

Headnotes:

The appellant's expectation to receive legally prescribed default interest from the insurance company for the time covered by law constitutes a claim corresponding to the property under Article II.3.k of the Constitution of Bosnia and Herzegovina and Article 1 Protocol 1 ECHR.

The write-off of the appellant's legal default interest rate in respect of the war period, based on Article 2.2 of the Law on the Default Interest Rate Applicable to the Unsettled Debts, is unconstitutional and, therefore, "unlawful" as the Law has modified the conditions for payment of legally binding adjudicated default interest retroactively.

Summary:

I. The appellant lodged an appeal with the Constitutional Court against the ruling of the Cantonal

Court of Mostar that concluded enforcement proceedings for the collection of a debt arising from compensation for damage. In the ruling under dispute, the Cantonal Court decided to allow enforcement to proceed upon the motion the appellant filed against the Insurance Company "Sarajevo osiguranje" d.d. Sarajevo. The principal amount was KM 1025 with default interest and KM 36,5 was awarded by way of compensation for the costs of the proceedings with default interest accrued as at 23 November 1995 until finalisation of the payment.

In order to calculate the legally prescribed default interest, the Cantonal Court applied the Law on the Default Interest Rate Applicable to Unsatisfied Debts (Official Gazette of the Federation of BiH, nos. 56/04, 68/04 and 29/05). This Law prescribes that it applies to all debts incurred in relation to damage compensation based on compulsory insurance in the period between 1 November 1989 and the coming into force of the legislation amending the Law on the Default Interest Rate (Official Gazette of the Federation of BiH, no. 51/01). However, it also states that the legally prescribed default interest shall not be applicable to the period of the state of war (from 18 September 1992 to 23 November 1995), and that the legally prescribed default interest shall be calculated by the commercial banks at which the debtor has opened a bank transfer account. By applying the above provisions, the Cantonal Court concluded that the appellant, following the denormalisation of HRD into KM, was entitled to receive default interest on the denormalised debt amount, but only as of 23 November 1995 at a rate of 12% to be calculated by the commercial banks.

The appellant argued that the final ruling of the Cantonal Court violated his right to property. He contended that the Law in question was not applicable to his case for two reasons. Firstly, this Law applies solely to business agreements, which is not the case here. Secondly, the amendments to that Law entered into force on 18 May 2005 whilst the "last" hearing in the present case was held on 18 April 2005. Therefore, these Amendments could not have been applied. The appellant also pointed out that the Law that was applied contravened the Constitution of Bosnia and Herzegovina for the same reasons as those stated in the Decision of the Constitutional Court, no. U-50/01.

II. The Constitutional Court held both allegations to be groundless. Firstly, from a linguistic interpretation of the challenged provisions, there is nothing to justify the appellant's allegations. The Law mentions the debtor-creditor relations and stipulates the period of time to which the Law relates. The Constitutional

Court accordingly found no arbitrariness in the interpretation of these provisions by the courts.

As to the appellant's second argument, in accordance with its case-law and that of the Human Rights Commission within the Constitutional Court which dealt with the issue of time-related application of the relevant provisions, the Constitutional Court observes that the Cantonal Court correctly interpreted and applied the challenged provisions. The ruling in question was issued on 2 March 2006. Article 4 of the Law on the Default Interest Rate Applicable to Unsatisfied Debts regulates the time-related application of that Law so as to extend the application to all proceedings "(...) for determination of the amount of default interest referred to in Article 1 of this Law, which are not completed by the date of entry into force of this Law or are completed but not enforced (...)". Thus, the challenged ruling reflects the legal status on the date of its adoption, 2 March 2006.

However, this kind of "law related arrangement" could be a reason for considering whether the ruling of the Cantonal Court interferes with the property right of the appellant. By applying Article 2.2 of the Law on the Default Interest Rate Applicable to Unsatisfied Debts, the Cantonal Court was imposing a condition which was clearly not 'provided for by law' within the meaning of the second sentence of Article 1 Protocol 1 ECHR. The Constitutional Court held that an act of interference cannot be 'provided for by law' unless it is consistent with relevant constitutional requirements. In the legal and constitutional order of Bosnia and Herzegovina, the Constitution of Bosnia and Herzegovina contains the highest norms of the system. A provision in a Law of Bosnia and Herzegovina or of an Entity which is incompatible with a relevant provision of the Constitution of Bosnia and Herzegovina or a right or freedom set out in the European Convention on Human Rights is unconstitutional, and lacks the necessary quality of legality to justify the interference with one of those rights or freedoms.

In applying that principle to the present case, the Constitutional Court considers that the ruling of the Cantonal Court relying on Article 2.2 of the Law on the Default Interest Rate Applicable to Unsatisfied Debts imposes conditions which are not 'provided for by law', for two reasons. First, the Constitutional Court has already established that the provision violated the right to property under Article II.3.k of the Constitution of Bosnia and Herzegovina and Article 1 Protocol 1 ECHR (see the Decision of the Constitutional Court, no. U-50/01). Secondly, the European Court of Human Rights has consistently held that legislation which retrospectively deprives a

successful litigant of the full enforcement of an award made in a final and binding judgment of a competent court violates the right to a fair hearing under Article 6.1 ECHR. As the appellant was entitled to the full amount of interest, with no limitations, at the time of legal validity of the decision in his case, the issuance of subsequent provisions modifying these conditions represents the violation of the right to fair trial. The appellant has the right to interest in the manner prescribed by law at the moment the judgment was legally binding.

Bearing in mind that the Cantonal Court, by applying Article 2.2 of the Law on the Default Interest Rate Applicable to Unsatisfied Debts, imposed conditions on the recognition of the appellant's property right which were not 'provided for by law' within the meaning of that phrase in this decision, the ruling of the Cantonal Court violated the appellant's right to property.

Languages:

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



Brazil

Federal Supreme Court

Important decisions

Identification: BRA-2009-1-001

a) Brazil / **b)** Federal Supreme Court / **c)** / **d)** 03.06.1997 / **e)** RE 153.531 / **f)** / **g)** *Diário da Justiça* (Justice Gazette), 13.03.1998 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

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

5.5.1 Fundamental Rights – Collective rights – **Right to the environment.**

Keywords of the alphabetical index:

Manifestation, cultural, protection / Heritage, cultural, protection / Animal, treatment, cruel / Animal, cruelty, prohibition.

Headnotes:

The constitutional duty of the State to grant to all citizens the full exercise of cultural rights, by promoting the appreciation and diffusion of cultural manifestations, does not exempt the State from observing the Constitutional provision which bars the practice of cruelty to animals.

Summary:

I. Organisations for the protection of animals filed a Special Appeal before the Federal Supreme Court seeking to reform the decisions of lower courts, which rejected their suit for a court order to outlaw the annual popular festival called “*Farra do Boi*” (Festival of the Oxen). The festival involves the whipping and beating to death of bulls and is traditionally celebrated by sea-side communities of Azorean descendents in the State of Santa Catarina. The organisations claimed the practice to be cruel and to damage the image of the country abroad. They argued that the State of Santa Catarina would be in violation of Article 225.1.VII of the Constitution, which determines it to be a duty of the government “to protect the fauna

and the flora, with prohibition, in the manner prescribed by law, of all practices which . . . subject animals to cruelty.”

II. The Second Chamber of the Court discussed the issue of whether the festival was simply a cultural manifestation that led to the episodic abuse of animals or a violent and cruel practice with animals. In this discussion, it also considered the argument that appeals should deal only with legal – and not factual – matter. It was argued that fact and law are many times inextricably connected, as the Tridimensional Theory of Law demonstrated.

By a majority of the vote, the Second Chamber decided that the “*Farra do boi*” festival constitutes a practice which subjects animals to cruel treatment, in violation of Article 225.1.VII of the Constitution. In a dissenting vote, one Minister (judge) argued that the festival was a legitimate cultural expression to be protected as such by the State according to Article 215.1 of the Constitution, and that cruelty to animals during the festival was attributable to excesses that should be punished by police authorities.

Supplementary information:

Legal norms referred to:

- Articles 225.1.VII and 215.1 of the Constitution.

Languages:

Portuguese.



Identification: BRA-2009-1-002

a) Brazil / **b)** Federal Supreme Court / **c)** / **d)** 30.06.1997 / **e)** HC 74.983 / **f)** / **g)** *Diário da Justiça* (Justice Gazette), 29.08.1997 / **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 before the entry into force of the Constitution.**

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

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

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

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

Keywords of the alphabetical index:

Minor, sexual crime, victim / Minor, rape / Minor, consent / Violence, presumption / Penal responsibility, subjective / *Habeas corpus*, scope.

Headnotes:

The presumption of violence in a rape crime against a minor does not violate the constitutional principle of subjective penal responsibility, as a minor is not capable of offering consent for such action.

The allegation of lack of just cause for a condemnation requires a thorough examination of every single piece of evidence, which is not admitted in a writ of *habeas corpus* according to the jurisprudence of the Federal Supreme Court.

Summary:

I. A request for a writ of *habeas corpus* was filed before the Federal Supreme Court on behalf of Mario Somensi, who had been sentenced to a jail term of eight years for the crime of rape, and to one year and ten months for the crime of child abuse. The petitioner requested to be allowed to wait in liberty for the judgment of the appeal and to have his sentence annulled, alleging that he had committed no violence. He also claimed that Article 224.a of the Penal Code, which establishes the presumption of violence for sexual crimes against minors, was unconstitutional.

II. The Court examined the question of whether the constitutional principle of subjective penal responsibility was violated by Article 224 of the Penal Code and concluded that it was not. As the victim was a minor, she had not been in a position to offer consent. The Court also affirmed that Article 224 of the Penal Code (Decree-Law no. 2.848 of 1940) could not be “unconstitutional” as it predated the 1988 Constitution. Upon examining whether it was duly received by the 1988 Constitution, the Court decided that indeed it was, recalling that Article 227.4 of the Constitution (“The law shall severely punish abuse, violence and sexual exploitation of children and

adolescents.”) clearly indicates that Article 224 should be interpreted as broadly as possible. Moreover, the Court recalled that the allegation of lack of just cause for the condemnation of the petitioner would require a thorough examination of every single piece of evidence, which is not admitted in a writ of *habeas corpus*. Thus, the Plenary of the Court denied the writ by unanimous vote.

Supplementary information:

Legal norms referred to:

- Article 227.4 of the Constitution and Article 224 of the Penal Code (Decree-Law 2.848/1940).

Cross-references:

- HC 70.496, HC 72.260, HV 73.662, HC 74.136 and Special Appeal REsp 46.424.

Languages:

Portuguese.



Identification: BRA-2009-1-003

a) Brazil / b) Federal Supreme Court / c) / d) 11.12.1997 / e) ADI 1.724 / f) / g) *Diário da Justiça* (Justice Gazette), 22.10.1999 / h) CODICÊS (Portuguese).

Keywords of the systematic thesaurus:

2.1.2.2 Sources – Categories – Unwritten rules – **General principles of law.**
 3.13 General Principles - **Legality.**
 3.16 General Principles – **Proportionality.**
 4.10.8.1 Institutions – Public finances – Public assets – **Privatisation.**

Keywords of the alphabetical index:

Privatisation, oversight / Privatisation, conditions / Privatisation, purpose / Privatisation, safeguards, judicial review.

Headnotes:

The principle of proportionality is not violated when a State Law grants ample powers to the Governor of the State to implement a privatisation programme, provided that the statute establishes transparent procedures subject to judicial review and to other oversight mechanisms enshrined in the Federal Constitution.

Summary:

I. The Worker's Party ("*Partido dos Trabalhadores*") filed a Direct Unconstitutionality Action (hereinafter "ADI") against Complementary Law no. 143 of the State of Rio Grande do Norte, which created the privatisation programme in that State, seeking a preliminary injunction against it. The petitioner claimed that the broad powers conferred upon the Governor of Rio Grande do Norte to privatise any state-owned company violated the principle of proportionality, an "implicit rule" of the Constitution. The Court's ruling on ADI 234 was invoked, where it decided that state law should establish:

- a. specific conditions under which state-owned companies can be alienated;
- b. the relevant public interest or the public order imperative in doing so;
- c. that the activity which is being privatised is unduly and unnecessarily explored by the public sector.

II. The Court assessed initially whether the principle of proportionality had been violated by the State of Rio Grande do Norte. It took into consideration the discipline established by Article 1 of Complementary Law no. 143, which sets the goals for the privatisation programme of that State and thus narrows the powers granted to the Governor. Moreover, Article 6 of the same Law creates a Directing Committee with ample oversight powers over the implementation of the programme, allowing for judicial review on a case by case basis. Finally, as the programme of privatisation of the State of Rio Grande do Norte is open to the public, political parties and the society in general have recourse to the procedure envisaged in Article 5.XXV of the Constitution, according to which "in case of imminent public danger, the competent authority may make use of private property, provided that, in case of damage, subsequent compensation is ensured to the owner".

The Court dismissed the parallel sought with its ruling on ADI 234, on the privatisation programme of the State of Rio de Janeiro, as in that case there was no general law governing the programme of privatisation,

and the State Constitution clearly demanded that the alienation of the shares of any public company be subject to legislative authorisation.

For these reasons, the plenary of the Court, by unanimous vote, denied the injunction sought by the petitioner.

Supplementary information:

The procedure envisaged in Article 5.XXV of the Constitution was further regulated by Law no. 8.031/90, later amended by Law no. 9.491/97.

Legal norms referred to:

- Articles 5.XXV and 103.VII of the Constitution;
- Law no. 143/96 of the State of Rio Grande do Norte.

Cross-references:

- ADI 234/90.

Languages:

Portuguese.

*Identification: BRA-2009-1-004*

a) Brazil / **b)** Federal Supreme Court / **c)** / **d)** 04.03.1998 / **e)** Ext 700 / **f)** / **g)** *Diário da Justiça* (Justice Gazette), 05.11.1999 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

3.1 General Principles – **Sovereignty**.
5.3.14 Fundamental Rights – Civil and political rights
– **Ne bis in idem**.

Keywords of the alphabetical index:

Extradition, guarantees / Political crime, concept / State, security, external.

Headnotes:

The concept of political crime is based on the identification of the legal object that is damaged by it. A crime against the external security of a State constitutes a political crime and thus falls into the ban established by the Article 5.LII of the Constitution, according to which the extradition of a foreigner shall not be granted on the basis of a political or ideological crime.

Summary:

I. The Government of the Federal Republic of Germany filed a request, before the Federal Supreme Court (hereinafter: "the Court"), for the extradition of Karl-Heinz Schaab, a German citizen accused of high treason and of violating the External Economy Law of that country. The accused was being prosecuted in Germany for allegedly having passed on state secrets on uranium enrichment and related equipment to Iraq's nuclear programme, in an undetermined period in the years 1989-90. The request intended to serve an arrest warrant issued by the German Federal Supreme Court in Karlsruhe, on 23 February 1996.

II. The Court asserted, initially, that the facts described in the arrest warrant would indeed be punishable in the Brazilian legal system (Article 23 of Law 6.453 of 17.10.1977). It was also established that the statute of limitations would not apply to the imputed facts. Moreover, the Court also examined whether the request would constitute a violation of *res judicata*, since the extraditee had already been condemned, by a German court, for the same facts, on 16 April 1993 – but that sentence was suspended. Even though the new penal proceeding in Germany was in fact a reopening of the previous one against Karl-Heinz Schaab, the Court recalled that, according to Brazilian law, only the acquittal or condemnation of an extraditee by a Brazilian court – not a foreign one – would have constituted valid ground not to grant the extradition.

The Court then proceeded to discuss the crucial question of whether the alleged facts would amount to political crimes. Article 5.LII of the Constitution bars the extradition of foreigners accused of political or ideological crimes. According to the objective theory, the concept of a political crime is based upon the identification of the legal object that has been damaged by it. In this case, it was the external security of the State. There were no additional facts alleged against the extraditee that might characterise a common crime, and the conduct imputed to him by the State requesting the extradition was clearly presented as political crime.

The Plenary of the Court, by unanimous vote recognised that the alleged crimes were political ones, as these encompass not only those committed against the internal, but also the external security of a State. Therefore, it denied the extradition request based upon the guarantee enshrined in Article 5.LII of the Constitution.

Supplementary information:

In a concurring vote, Minister (judge) Neri da Silveira expressed reservations to the thesis that crimes against the external security of a State fall into the "political crime" category for the purpose of denying a request for extradition, as it would render unpunishable the crimes committed against the State that made the request, hindering international co-operation in the fight against crime.

Legal norms referred to:

- Article 5.LII of the Constitution and Article 23 of Law 6.453 of 17.10.1977.

Languages:

Portuguese.

*Identification:* BRA-2009-1-005

a) Brazil / b) Federal Supreme Court / c) / d) 24.03.1999 / e) ADI 1926 / f) / g) *Diário da Justiça* (Justice Gazette), 10.09.1999 / h) CODICÊS (Portuguese).

Keywords of the systematic thesaurus:

4.8.6.3 Institutions – Federalism, regionalism and local self-government – Institutional aspects – **Courts.**

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

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

Keywords of the alphabetical index:

Judicial fee, *ad valorem*, constitutionality / Judicial fee, ceiling / Judicial costs, *ad valorem*, constitutionality / Judicial costs, ceiling.

Headnotes:

Although courts may charge *ad valorem* fees and costs, the charging of excessive rates and the inexistence of a ceiling for the fees can infringe the constitutional guarantee of full access to the courts if they make those fees disproportionately more costly than the service they were supposed to pay for.

Summary:

I. The Federal Council of the Brazilian Bar Association filed a direct action of unconstitutionality, with a request for *ad interim* measures, against various articles of Law no. 11.404/96 of the State of Pernambuco, which established that court fees and costs should be calculated as a percentage of the value of a case. The petitioner argued that the State Law violated Article 145.II of the Constitution (which lays the principles for charging fees), for employing, as the basis for the assessment of the court fees, a criterion that could only have been used by a tax. Also, another provision of that State Law, by revoking a previous ceiling for the *ad valorem* court fees, would be in violation of the guarantees established in Articles 5.XXXV and Article 5.LV (which ensure full access to courts and due process), Article 145.II (which defines fees), and Article 150.IV of the Constitution (which bars taxation as confiscation). Finally, the petitioner claimed that the State Law, by regulating the use of resources obtained by court fees, also violated Article 236.II of the Constitution, which allegedly required that such regulation be established by federal law.

II. The Plenary of the Court examined the legitimacy of the *ad valorem* court fees and their possible violation of the principle of free access to the justice system. Following precedent (Representation 1077/84), the Court concluded that, although the *ad valorem* fees and costs were in principle legitimate, the charging of excessive rates and the inexistence of a ceiling for the fees could infringe the constitutional guarantee of full access to the courts (Article 5.XXXV of the Constitution) if they would make those fees disproportionately more costly than the service they were supposed to pay for.

Therefore, the Court decided, by unanimous vote, to dismiss the direct action of unconstitutionality, for absence of objective interest in the proceeding, and

to partially grant the *ad interim* measures requested. Though ruling the ceiling of 5% established by State Law no. 11.404/96 to be unconstitutional, the Court expressly rejected interim measures that would repeal it, because that would reinstate the previous ceiling of 20%, worsening the state of unconstitutionality.

Supplementary information:

Legal norms referred to:

- Articles 5.XXXV, 5.LV, 145.II, 150.IV and 236.II of the Constitution;
- Law 11.404/96 of the State of Pernambuco.

Cross-references:

- Representation 1077/84 and Direct Actions of Unconstitutionality (ADIs) 948/95, 1378/95, 1651/98, 1772/98.

Languages:

Portuguese.

*Identification: BRA-2009-1-006*

a) Brazil / **b)** Federal Supreme Court / **c)** / **d)** 04.08.1999 / **e)** ADI 869 / **f)** / **g)** *Diário da Justiça* (Justice Gazette), 04.06.2004 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

1.2.1.7 Constitutional Justice – Types of claim – Claim by a public body – **Public Prosecutor or Attorney-General.**

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.**

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

2.1.1.1.1 Sources – Categories – Written rules – National rules – **Constitution.**

2.3.6 Sources – Techniques of review – **Historical interpretation.**

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

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

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

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

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

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

Keywords of the alphabetical index:

Privacy, right, minor, accused / Censorship, punishment.

Headnotes:

A constitutional framework that grants that freedom of thought, creation and expression will not suffer any restriction and explicitly forbids any law to create obstacles to the freedom of the press, as long as individual rights are observed, will not tolerate the establishment of penalties for media which disclose, without authorisation, data about a minor accused of breaking the law.

Penalties such as the suspension of the circulation of newspapers or of radio and TV broadcast would amount to a violation of the freedom of the press, as they would hinder the freedom of the public to be informed.

Summary:

I. The Attorney General of the Republic filed a direct unconstitutionality action before the Federal Supreme Court against Article 247.2 of Law no. 8.069/90, which establishes penalties for any media which, without authorisation, discloses data about a minor accused of breaking the law. The petitioner, acting upon request of the *Associação Nacional de Jornais – ANJ* (“National Newspapers Association”), specifically claimed that the penalty of “suspension of a TV or radio station for up to two days and of a periodical for up to two issues” violated Article 220.1 and 220.2 of the Constitution. Those provisions bar any law which “may represent a hindrance to full freedom of press” and forbid any form of censorship. The petitioner also argued that the impugned provision, besides infringing the principle of due-process, also violated Article 5.XLV of the

Constitution, which ascertains that “no punishment shall go beyond the person of the convict.”

II. The Court examined the guarantees to freedom of expression granted by the 1988 Constitution, comparing them with those granted by the 1891 Constitution and the Constitutional Amendment 1 of 1969. It concluded that, contrary to previous regimes, the 1988 Constitution clearly establishes that freedom of thought, creation and expression will not suffer any restriction and explicitly forbids any law to create any obstacle to freedom of the press, as long as the individual rights enshrined in Article 5.IV, V, X, XII and XIV are observed. The disclosure of data about a minor who is accused of breaking the law was not included among those individual rights by the framers of the Constitution.

The Court also determined that the provisions of Article 247.2 of Law no. 8.069/90 were inadequate as sanctions, as they would amount to a violation of the public freedom of information, which is not tolerated by the Constitution. Furthermore, those penalties would be applied in violation of due-process, as the defendants would not be granted the right to defend themselves before the imposition of the penalties.

Thus, the Court decided, by unanimous vote, to declare unconstitutional the expression “suspension of a TV or radio station for up to two days and of a periodical for up to two issues” contained in the aforementioned Law.

Supplementary information:

Legal norms referred to:

- Articles 5.IV, V, X, XII, XIV and XLV and 220.1 and 220.2 of the Constitution;
- Article 247.2 of Law no. 8.069/90.

Languages:

Portuguese.



Identification: BRA-2009-1-007

a) Brazil / b) Federal Supreme Court / c) / d) 07.06.2001 / e) ADI 1086 / f) / g) *Diário da Justiça* (Justice Gazette), 10.08.2001 / h) CODICÊS (Portuguese).

Keywords of the systematic thesaurus:

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

4.8.2 Institutions – Federalism, regionalism and local self-government – **Regions and provinces.**

4.8.8.1 Institutions – Federalism, regionalism and local self-government – Distribution of powers – **Principles and methods.**

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

5.5.1 Fundamental Rights – Collective rights – **Right to the environment.**

Keywords of the alphabetical index:

Assessment, impact, environmental, waiver / Forest, competence / Protection, environmental, competence / Constitution, federal, entity, relationship.

Headnotes:

According to the systematic logic of the distribution of legislative power, only federal law can introduce a waiver to a general precept established in the Federal Constitution. Therefore, issues which fall under the category of general rules of environmental conservation, such as a constitutional requirement for an environmental impact assessment, cannot be subject to exceptions established at the level of State constitutions.

Summary:

I. The Attorney General of the Republic filed a direct action of unconstitutionality against Article 182.3 of the Constitution of the State of Santa Catarina, which waived the requirement of a prior environmental impact assessment for corporate projects of forestation and reforestation. The petitioner argued that such provision violated Article 225.1.IV of the Federal Constitution, which determines that the Government should demand a prior environmental impact assessment for the installation of works and activities which may potentially cause significant degradation of the environment.

The Legislative Assembly of State of Santa Catarina, in turn, claimed that the framers of the State Constitution were acting well within the power granted to states to regulate environmental matters (Article 24.VI of the Federal Constitution). Moreover, the same Article 182.3 of the State Constitution also demanded that the plan for sustainable management of a forestation or reforestation project include rules regulating the exploitation of the areas in order to preserve environmental quality.

II. In its ruling, the Plenary of the Court asserted that the activities of forestation and reforestation may indeed have negative environmental impacts (e.g. when an indigenous species is replaced with a more lucrative one from a totally different ecosystem). Therefore, the waiver of Article 182.3 of the Constitution of the State of Santa Catarina violated the constitutional requirement of a prior environmental assessment.

Also, considering the systematic logic in the distribution of legislative power, only federal law could introduce waivers to the general precept established in the Federal Constitution, as the issue at hand clearly falls under the category of the general rules of environmental conservation – and not under the category of complementary rules, which are indeed a constitutional attribution of member states.

Thus, the Plenary of the Court, by unanimous vote, declared the unconstitutionality of Article 182.3 of the Constitution of the State of Santa Catarina.

Supplementary information:

Legal norms referred to:

- Article 24.VI and 225.1.IV of the Federal Constitution;
- Article 182.3 of the Constitution of the State of Santa Catarina.

Languages:

Portuguese.



Identification: BRA-2009-1-008

a) Brazil / **b)** Federal Supreme Court / **c)** / **d)** 17.12.2001 / **e)** HC 81.288 / **f)** / **g)** *Diário da Justiça* (Justice Gazette), 25.04.2003 / **h)** CODICÊS (Portuguese).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Crime, heinous, elements / Rape, qualification, sexual abuse, violent.

Headnotes:

In order for rape and violent sexual abuse to be considered heinous crimes it is not necessary that they result in severe bodily injury or death. In the Brazilian legal system, qualifying a crime as “heinous” entails more severe penalties and bars the granting of pardon and the reduction of a sentence of a felon convicted for such crimes.

Summary:

I. The Service of Criminal Review of the state of Santa Catarina filed a writ of *habeas corpus* before the Federal Supreme Court on behalf of Valdemiro Gutz, alleging that he was suffering an illegal constraint by the Superior Court of Justice in the Special Appeal filed on his behalf before that Court. Mr Gutz had been sentenced to 16 years and 8 months in jail for the crime of raping, over a period of five years, his two minor daughters, both under 14 years old. Subsequently, a lower court extended to Mr Gutz a reduction of $\frac{1}{4}$ of his sentence in light of Decree no. 3.226/99, which granted pardons and reduced some penal sentences. The lower court judged that the Decree did not bar the reduction of sentences of those condemned for heinous crimes such as rape. The Court of Justice of the State of Santa Catarina granted the appeal filed by the Public Attorney’s Office arguing that Article 7.I of the aforementioned Decree indeed barred such reduction. The Service of Criminal Review of the state of Santa Catarina then filed a Special Appeal before the Superior Court of Justice, which was denied. So the Service decided to petition for a writ of *habeas corpus* in order to reinstate the original decision of the lower court commuting Mr Gutz jail sentence. It

argued that, according to precedent of the Federal Supreme Court, rape and violent sexual abuse would only constitute a heinous crime if they caused severe bodily injury or death.

II. The Court examined whether the legislation classified rape and violent sexual abuse as a heinous crimes *per se* or only if they result in severe bodily injury or death. The controversy revolved around the text of Article 1.V of Law no. 8.072/90, with the amendments introduced by Law 8.930/94, which classifies as heinous crimes, among others: “rape (Article 213 [of the Penal Code] and its combination with Article 223, ‘caput’ and sole paragraph).”

The Ministers (judges) of the Supreme Court debated whether the conjunction “and” in the expression “and its combination with” in the text of the Law meant that severe bodily injury or death were cumulative requirements for a crime of rape to be considered heinous or not. By a majority vote, the Court decided that those were not cumulative requirements and thus that the legislation had indeed already established that rape is by itself a heinous crime. Consequently, the Court denied the writ requested.

Supplementary information:

Legal norms referred to:

- Articles 213 and 223 of the Penal Code;
- Article 1.V of Law no. 8.072/90, with the amendments introduced by Law no. 8.930/94;
- Decree no. 3.226/99.

Cross-references:

- HC 78.305/99, HC 80.223/00, HC 80.353/00, HC 80.479/00.

Languages:

Portuguese.



Identification: BRA-2009-1-009

a) Brazil / **b)** Federal Supreme Court / **c)** / **d)** 12.02.2004 / **e)** ADI 1.570 / **f)** / **g)** *Diário da Justiça* (Justice Gazette), 22.10.2004 / **h)** CODICÊS (Portuguese).

Keywords of the systematic thesaurus:

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

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

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

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

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

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

Keywords of the alphabetical index:

Privacy, financial data, protection / Privacy, fiscal data, protection / Judge, investigating.

Headnotes:

In cases of criminal prosecution where there is a possibility of violation of privacy or confidentiality rights, concerning fiscal, banking, financial or electoral information, investigation and evidence gathering carried out by judges violates the principles of the impartiality of the judge and of the publicity of proceedings, as enshrined in the Constitution. Allowing the judge to personally engage in the collection of evidence that may later serve as the foundation of his own ruling would jeopardise the judge's impartiality and therefore due process in the criminal justice system.

Summary:

I. The Attorney General of the Republic filed a direct action of unconstitutionality against Article 3 of Law no. 9.034/95, which determined that judges should carry out the investigation and evidence gathering in cases of criminal prosecution where there is a possibility of violation of privacy or confidentiality rights, granted by the Constitution or by law, concerning fiscal, banking, financial or electoral information. The petitioner claimed that the impugned provision, by introducing the figure of the inquisitor judge in Brazilian judicial proceedings, violated the

principles of the impartiality of the judge and of the publicity of proceedings, as enshrined in Articles 5.LIV, 5.LV, 93.IX and 129.I of the Constitution. It would therefore jeopardise due process in the criminal justice system.

II. The Court established, initially, that the impugned provision of Law no. 9.034/95 had already been partially repealed by subsequent legislation of a higher rank (Complementary Law no. 105 of 10.01.2001), specifically concerning the privacy protection of banking and financial data. Thus it remained before the Court the question of the constitutionality of the provisions related to the gathering of fiscal and electoral information that might amount to a violation of Constitutional and legal guarantees. In this respect, the Court considered that Article 3 of Law no. 9.034/95 had created an exceptional penal proceeding alien to Brazilian law, by instituting the figure of the “instructing judge”, conferring upon judges functions which are normally performed by the attorney general's office and police authorities. By allowing the judge to personally collect the evidence that may later serve as the foundation of his own ruling, that provision undermined the judge's impartiality and therefore the principle of due process.

For these reasons, the Court decided, by a majority vote, to partially accept the action, declaring the unconstitutionality of the Article 3 of Law no. 9.034/95 in its references to fiscal and electoral data.

Supplementary information:

Legal norms referred to:

- Articles 5.LIV, 5.LV, 93.IX and 129.I of the Constitution;
- Complementary Law no. 105/2001;
- Article 3 of Law no. 9.034/95.

Cross-references:

- Direct Action of Unconstitutionality (ADI) 1.517.

Languages:

Portuguese.



Identification: BRA-2009-1-010

a) Brazil / b) Federal Supreme Court / c) / d) 29.06.2005 / e) ADI 2.514 / f) / g) *Diário da Justiça* (Justice Gazette), 09.12.2005 / h) CODICES (Portuguese).

Keywords of the systematic thesaurus:

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

5.5.1 Fundamental Rights – Collective rights – **Right to the environment.**

Keywords of the alphabetical index:

Manifestation, cultural, protection / Animal, cruel treatment, cockfighting / Fauna, protection.

Headnotes:

The subjection of animal life to cruel practices, such as cockfighting, is not compatible with the Constitution, as established in previous decisions of the Federal Supreme Court.

Summary:

I. The Attorney General of the Republic filed a direct unconstitutionality action against Law no. 11.366/00 of the State of Santa Catarina, which regulates the breeding, exhibition and competition of birds of the genus "*Galus-galus*". According to the petitioner, the impugned law violated Article 225.1.VII of the Constitution for authorising a competition that submits animals to cruelty. The Legislative Assembly of the State of Santa Catarina argued that cockfight among birds bred exclusively for that purpose was well established in popular culture. It added that such birds, besides being genetically predisposed to fighting, are not appropriate for human consumption. Moreover, there would be no "cruelty when they fight among themselves".

II. The Court examined the allegation in light of Article 225.1.VII of the Constitution and bearing in mind that in previous decisions it considered the preservation of the fauna as a desirable goal, barring cruel practices against animal life. The Court recalled its decisions in ADI 1856/00 and RE 153.531, affirming that their same rationale, applied to the present case, would be enough to dismiss the arguments of the Legislative Assembly of the State of Santa Catarina. Thus, the Court unanimously accepted the suit and declared Law no. 11.366/00 of the State of Santa Catarina to be unconstitutional.

Supplementary information:

Legal norms referred to:

- Article 225.1.VII of the Constitution;
- Law no. 11.366/00 of the State of Santa Catarina.

Cross-references:

- ADI 1.856, RE 153.531.

Languages:

Portuguese.



Canada

Supreme Court

Important decisions

Identification: CAN-2009-1-001

a) Canada / b) Supreme Court / c) / d) 09.04.2009 / e) 32354 / f) R. v. Patrick / g) *Canada Supreme Court Reports* (Official Digest), [2009] 1 S.C.R. xxx / h) <http://scc.lexum.umontreal.ca/en/index.html>; [2009] S.C.J. no. 17 (*Quicklaw*); CODICES (English, French).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Search and seizure, content of garbage bags / Privacy interest, abandonment.

Headnotes:

The police did not breach the accused's constitutional right to be free from unreasonable search and seizure when they took the garbage bags placed at the edge of his property without a warrant. In placing his garbage bags for collection in a location where they were accessible to any passing member of the public, the accused abandoned his privacy interest in the contents of the garbage bags. The evidence of criminal activity taken from the contents of the accused's garbage bags, as well as the fruits of the search warrant obtained in reliance on such evidence, was properly admissible.

Summary:

I. The police suspected that P was operating an ecstasy lab in his home. On several occasions, they seized bags of garbage that P had placed for collection at the rear of his property adjacent to a public alleyway. The police did not have to step onto P's property to retrieve the bags but they did have to reach through the airspace over his property line. The police used evidence of criminal activity taken from

the contents of P's garbage to obtain a warrant to search P's house. More evidence was seized during the search. At his trial, P argued that the taking of his garbage bags by the police constituted a breach of his right guaranteed by Section 8 of the Canadian Charter of Rights and Freedoms to be free from unreasonable search and seizure. The trial judge held that P did not have a reasonable expectation of privacy in the items taken from his garbage and, therefore, the seizure of the garbage bags, the search warrant and the search of P's dwelling were lawful. He admitted the evidence and convicted P of unlawfully producing, possessing and trafficking in a controlled substance. A majority of the Court of Appeal and the Supreme Court of Canada upheld the convictions.

II. Expectation of privacy is a normative standard. Privacy analysis is laden with value judgments which are made from the independent perspective of the reasonable and informed person who is concerned about the long-term consequences of government action for the protection of privacy. In assessing the reasonableness of a claimed privacy interest, a court must look at the "totality of the circumstances" and this is so whether the claim involves aspects of personal privacy, territorial privacy, or informational privacy. Frequently, the claimant will assert overlapping interests. The assessment always requires close attention to context and first involves an analysis of the nature or subject matter of the evidence in issue. Here, both P and the police rightly regarded the subject matter to be information about what was going on inside his home. The Court must then consider whether the claimant had a direct interest in the evidence and a subjective expectation of privacy in its informational content. The "reasonableness" of that belief in the totality of the circumstances of a particular case is to be tested only at the second objective branch of the privacy analysis. The reasonableness of an expectation of privacy varies with the nature of the matter sought to be protected, the circumstances in which and the place where state intrusion occurs, and the purposes of the intrusion. In this case, P's garbage was put out for collection in the customary location for removal at or near his property line and there was no manifestation of a continuing assertion of privacy or control. Territorial privacy is implicated in this case because the police reached across P's property line to seize the bags; however, the physical intrusion by the police was relatively peripheral and, viewed in context, is better seen as pertaining to a claim of informational privacy. P's concern was with the concealed contents of the garbage bags which, unlike the bags, were clearly not in public view.

While P had no further interest in the physical possession of the garbage bags, he had a continuing interest (viewed subjectively) in keeping private the information embedded in the contents. In such a case, the question becomes whether he so dealt with the items put out for collection in such a way as to forfeit any reasonable expectation (objectively speaking) of keeping the contents confidential, i.e. whether there had been abandonment. Abandonment is a conclusion inferred from the conduct of the individual claiming the Section 8 right that he or she had ceased to have a reasonable expectation of privacy with regard to it at the time it was taken by the police or other state authority. Being an inference from the claimant's own conduct, a finding of abandonment must relate to something done or not done by that individual, and not to anything done or not done by the garbage collectors, the police or anyone else involved in the subsequent collection and treatment of the "bag of information". In this case, objectively speaking, P abandoned his privacy interest in the information when he placed the garbage bags for collection at the back of his property adjacent to the lot line. He had done everything required of him to commit the bags to the municipal collection system. The bags were unprotected and within easy reach of anyone walking by in the public alley way, including the police. However, until garbage is placed at or within reach of the lot line, the householder retains an element of control over its disposition. It could not be said to have been unequivocally abandoned if it is placed on a porch or in a garage or within the immediate vicinity of a dwelling. Abandonment in this case is a function both of location and P's intention.

Therefore, the police did not breach P's right to be free from unreasonable search and seizure. Since P had abandoned his garbage before it was seized by the police, he had no subsisting privacy interest at the time it was seized. The police conduct was objectively reasonable. P's lifestyle and biographical information was exposed, but the effective cause of the exposure was the act of abandonment by P, not an intrusion by the police into a subsisting privacy interest. The search of the contents of P's garbage and the subsequent search of P's dwelling were both lawful and the evidence seized in both searches was admissible at P's trial.

III. In a concurring opinion, one judge disagreed with the characterisation of the privacy issues at stake. The home is the most private of places. Personal information emanating from the home that has been transformed into household waste is entitled to protection from indiscriminate state intrusion. Household waste left for garbage disposal is "abandoned" for a specific purpose – so that garbage

will reach the waste disposal system. What has not been abandoned is the homeowner's privacy interest attaching to personal information. Individuals do not intend that this information will be generally accessible to public scrutiny, let alone to the state. The fact that what is at issue is waste left out for collection, however, argues for a diminished expectation of privacy. But the state should have at least a reasonable suspicion that a criminal offence has been or is likely to be committed before conducting a search. In this case, the evidence amply supported such a suspicion.

Languages:

English, French (translation by the Court).



Croatia

Constitutional Court

Important decisions

Identification: CRO-2009-1-001

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 10.02.2009 / **e)** U-II-2821/2006 / **f)** / **g)** *Narodne novine* (Official Gazette), 28/09 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

3.13 General Principles – **Legality**.
4.6.3.2 Institutions – Executive bodies – Application of laws – **Delegated rule-making powers**.

Keywords of the alphabetical index:

Regulation, scope / Regulation, issue, competence.

Headnotes:

In proceedings to review the constitutional compliance and legality of a delegated regulation, there will be an assessment as to whether it was enacted by a competent body, with the legal authority to enact such regulations, and whether its contents fall within the limits set out by law.

In this case, the legislator had defined a procedure in a particular administrative field as falling within its exclusive competence. The body enacting this particular regulation exceeded its legal competence to enact delegated regulations by stipulating certain procedural issues in the provisions under dispute. It also extended it, contrary to the relevant general administrative procedural law, to the substantive violations of the law governing this administrative field.

Summary:

I. The Constitutional Court accepted the request of the Administrative Court for a constitutional review of Article 11 of the Statute of the Croatian Chamber of Architects and Civil Engineers (*Narodne novine* nos. 40/99, 112/99 and 85/05) and repealed it.

Article 11 of the Statute stipulates that if, after enrolment has been granted, it becomes clear that the applicant failed to meet the requirements for enrolment in the Register of Licensed Architects or in the Register of Licensed Civil Engineers, enrolment proceedings will be renewed at the instigation of the disciplinary prosecutor, the Management Board or the Minister of Physical Planning, Construction and Housing.

The applicant argued that the provision of the delegated regulation could not regulate particular procedural issues; neither could it regulate the renewal of administrative proceedings due to the erroneous application of a substantive law, i.e. the Croatian Chamber of Architects and Civil Engineers Act (*Narodne novine*, no. 47/98). Since this is exactly what has been done in the disputed provision of the Statute, it found it to be in breach of the provision of Article 2 of the General Administrative Procedure Act (*Narodne novine* nos. 53/91 and 103/96; referred to hereinafter the "GAPA").

II. Article 5 of the Constitution (the principle of constitutionality and legality) is relevant to the constitutional review of the disputed Article of the Statute.

When the subject of constitutional review is another, i.e. sub-law, regulation, which is normally passed in order to implement a law, it must not only comply with the legislation pursuant to which it was passed, but also with the Constitution. In proceedings to review the constitutionality and legality of such a regulation an assessment will accordingly take place, as to whether it was enacted by a competent body, with the legal authority to enact it, and whether the contents of the delegated regulation are within the limits set by the law.

For these reasons the Constitutional Court also reviewed the disputed Article against the background of Article 2 of the GAPA, which allows for different regulation within a specific administrative field by special legislation, if this is necessary for administrative procedure in that field. The Court noted Article 249 GAPA, which sets out the requirements for the renewal of administrative proceedings. It also established that under Article 9.1 of the Act the Chamber's Assembly is competent to pass the Statute, and that Article 3 of the Statute explicitly calls for the application of the GAPA.

The Constitutional Court found that the Assembly of the Croatian Chamber of Architects and Civil Engineers, the body that passed the regulation under dispute, had overstepped the authority stipulated in the Act, since it established that the legislator had

defined a procedure in a particular administrative field as falling within the legislator's exclusive competence. As a result, only the legislator had the power to regulate the issue of procedure in a particular administrative field. Furthermore, the Constitutional Court established that the normative content of Article 11 of the Statute also extends to substantive violations of the law, contrary to the reasons for renewing proceedings laid down in Article 249 GAPA.

The Constitutional Court accordingly found Article 11 of the Statute to be in breach of Article 5 of the Constitution.

Languages:

Croatian, English.



Identification: CRO-2009-1-002

a) Croatia / b) Constitutional Court / c) / d) 05.03.2009 / e) U-III-1297/2006 / f) / g) *Narodne novine* (Official Gazette), 36/09 / 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**.

Keywords of the alphabetical index:

Judgment, execution / Real estate, value / Law, interpretation, principle, binding, universally / Interpretation, of the legal rules applicable to the facts of the case / Interpretation, erroneous, sufficiently serious.

Headnotes:

A debtor's property with an estimated value of 410,300.00 kunas was sold at public auction for only 10,000.00 kunas. This was found to contravene the principle of proportionality, or the purpose and the aim of the enforcement proceedings.

The provision of the Execution Act, which enables the Court, during enforcement proceedings, to sell real estate without limiting the lowest price in relation to the established value at the third public auction, is not a *jus cogens* norm and it does not exclude the principle of proportionality. Therefore, the Court must bear in mind the purpose of execution, which is to satisfy the claim of the creditor.

All entities of state power, and therefore also the competent courts, are under a duty to interpret the provisions of the Execution Act in accordance with the highest values of the constitutional order such as the rule of law and respect for human rights.

Summary:

I. The applicant lodged a constitutional complaint against the Sisak County Court ruling of 28 November 2005 which confirmed two rulings of the Sisak Municipal Court. The first one, on 14 December 2004, established that the execution proceedings had been completed. The second, on 4 January 2005, dismissed as time-barred the applicant's appeal against the ruling on adjudication of 16 June 2003.

The applicant argued that the enforcement proceedings were groundless, immoral and unlawful, because the value of his property had been estimated at a value of 410,000.00 kunas. Yet it was sold at public auction under Article 97 of the Execution Act for only 10,000.00 kunas. He suggested, *inter alia*, that his rights to equality before the law and a fair trial had been breached, along with the principle of proportionality (see Articles 14.2, 16 and 29.1 of the Constitution).

The enforcement proceedings were based on an agreement to safeguard a monetary claim, by establishing the execution creditor's statutory lien over the real estate of the lien debtor (the applicant to the Constitutional Court in this matter). This was entered in the land registry for payment to the lien creditor of a total sum of 195,757.78 kunas. During the execution proceedings the expert witness estimated the value of the real estate of the applicant (consisting of a house of area 137 m², a garage of area 66 m², a courtyard of area 500 m² and an orchard of area 150 m²), as 410,300.00 kunas. The First Instance Court carried out three public auction hearings. At the first and second public auctions the applicant's property remained unsold. However, at the third auction, it was sold to the highest bidder for 10,000.00 kunas. The third public auction was carried out in accordance with Article 97.4 of the Execution Act under which, if real estate is not sold at a second public auction, the Court shall, within a minimum of fifteen and a maximum of thirty days, call a third

public auction. The real estate can then be sold without the need to set a limit on the lowest price relative to the established value.

II. The Constitutional Court observed that it is the duty of all the bodies of state power and therefore also the competent courts in this case, to interpret the provisions of the Execution Act in accordance with the highest values of the constitutional order, provided in Article 3 of the Constitution (the rule of law and the respect for human rights) and that the provision of Article 97.4 of the Execution Act is not *jus cogens*. It pointed out that the legal authority in Article 97.4 of the Execution Act does not exclude the principle of proportionality, i.e. that when real estate was sold at the third public auction without limitation on the lowest price relative to the established value of the real estate the Court must bear in mind the purpose of execution, which is to fulfil the execution creditor's claim.

The Constitutional Court found that in this case the courts, in their conduct of the enforcement proceedings, had breached the principle of proportionality set out in Article 16 of the Constitution by selling the applicant's real estate at the third public auction at a price far below its established value. The purpose of the enforcement proceedings was not achieved. In the process, the applicant's right to a fair trial was also violated.

Languages:

Croatian, English.



Identification: CRO-2009-1-003

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 17.03.2009 / **e)** U-III-4182/2008 and U-III-678/2009 / **f)** / **g)** *Narodne novine* (Official Gazette), 38/09 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

5.1.1.4.3 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Detainees**.
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.**

5.3.5.1.3 Fundamental Rights – Civil and political rights – Individual liberty – Deprivation of liberty – **Detention pending trial.**

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

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

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

Keywords of the alphabetical index:

Detention, order, reasons / Detainee, rights / Prisoner, rights, violation, remedy / Effective remedy, right, scope.

Headnotes:

Where a statute indirectly correlated the objective of the detention to the gravity of the penalty envisaged for a criminal offence, criminal prosecution authorities must, when applying such a measure, “test” it against the principle of proportionality with special care: it must establish not only the suitability of the measure (whether the offence is one from the list of criminal offences), but also whether pre-trial deprivation of liberty is necessary (because a more lenient measure cannot be substituted) and whether it is proportionate to the punishment the defendant may expect in the specific case (balance). The prosecution authority must give reasons why it considers that a correlation of all the above circumstances exists.

In view of the requirement that every legal expedient enjoyed by persons deprived of liberty and placed in prisons or penitentiaries must correspond with the same purpose of the law – more efficient protection of the rights of such persons – the Constitutional Court has set out the binding legal standard that courts, when applying the powers of the judge responsible for the execution of sentences in connection with the request for the protection of prisoners' rights, shall apply the same powers also in connection with the protection of the right of detainees to complain about arguable violations of their rights during detention. Thus, the legal remedy prescribed in the Enforcement of Prison Sentences Act, which is at the disposition of prisoners, was placed *mutatis mutandis*, at the disposal of detainees too, because it was established in the Constitutional Court proceedings that the complaints which detainees may lodge under the Criminal Procedure Act over detention conditions

cannot be considered a legal remedy in the standard sense since the judge is not obliged to render a decision upon it.

Summary:

I. In the first part of his constitutional complaint, the applicant challenged the second instance ruling of the Supreme Court of 4 February 2009, which upheld the first instance judgment of the Zagreb County Court of 19 November 2008 on the continuation of the detention after the indictment for the criminal offence related to the abuse of power and other matters. He argued that his detention had lasted over twenty months and that, among other things, the bodies responsible for criminal proceedings had not considered whether the time he had spent in detention was reasonable in relation to the time that had been necessary for the trial proceedings undertaken so far. This was of special relevance considering the length of time that had elapsed since the indictment was pronounced and the difficulty in predicting with any certainty when the trial would end as it involved the examination of a large number of witnesses and the presentation of much evidence.

In the second part of his complaint, the applicant alleged inhumane and degrading treatment in Zagreb Prison where he was being detained. He made complaints about his prison accommodation, lack of hygiene, food, health care and medical assistance, recreation and special activities, opportunities for contact with his attorney and family and overcrowding conditions in the prison. The applicant pointed out that he had regularly informed the judges of Zagreb County Court, who visit the Prison once a week, about his situation. He was told that this had no bearing on his situation, as problems of this kind are within the jurisdiction of the prison administration, which affords less protection to the rights of detainees than to those of prisoners, who have separate legal remedies at their disposal for the protection of these rights before the judge responsible for the execution of sentences.

II. The Constitutional Court determined that the applicant's constitutional right to personal freedom has been violated by the failure of the Supreme Court to assess the necessity, appropriateness and suitability of prolonging the applicant's detention under Article 102.1.4 of the Criminal Procedure Act (for the explicitly listed criminal offences and for the particularly grave circumstances of the offence).

The Constitutional Court noted that Article 102.1.4 of the Criminal Procedure Act does not stipulate which legitimate objective is to be achieved by detaining the defendant on its grounds, as in the case of the other

grounds for detention. This makes it especially important for the bodies engaged in criminal proceedings to correctly assess the necessity for its application especially in relation to the sentence the defendant may expect, rather than the maximum sentence; otherwise their assessment will not be based on a proper application of the principle of proportionality under the Criminal Procedure Act. The extent of every encroachment on a human right must be proportional to its legitimate objective. Thus, when this Act indirectly correlated the objective of the detention under Article 102.1.4 of the Criminal Procedure Act with the gravity of the penalty envisaged for some of the "catalogue" criminal offences, the body engaged in criminal proceedings must, when applying such a measure, "test" it against the principle of proportionality with special care: it must establish not only the suitability of the measure (whether the offence is one from the list of offences), but also whether pre-trial deprivation of liberty is necessary (because a more lenient measure cannot be substituted), and whether it is proportionate with the punishment that the defendant may expect in the specific case (balance). This means that it must take into account all the known circumstances that would, in the case of a guilty verdict, be taken into account under the Criminal Act when determining the punishment for the perpetrator. In so doing, it must not infer that the defendant is guilty, because under the Constitution and procedural law this can only be decided at trial and in the judgment. The body engaged in criminal proceedings, of course, has the obligation to state why such a correlation exists.

The Constitutional Court noted that the Criminal Procedure Act affords defective regulation of detainees' rights in pre-trial detention. However, there are effective legal remedies within the Croatian legal order that afford adequate protection of many prisoners' rights, listed in an exhaustive catalogue contained in the Enforcement of Prison Sentences Act. The Constitutional Court accordingly found no acceptable reason under constitutional law why the competent courts should not be obliged to appropriately apply these remedies in criminal proceedings in relation to detainees as well.

The extensive and broadened interpretation of the relevant provisions of the Enforcement of Prison Sentences Act is undoubtedly a permissible method of interpreting criminal laws to the benefit of the perpetrator of a criminal offence (*analogia in bonam partem*).

Bearing in mind also the requirement that every legal expedient enjoyed by persons deprived of liberty and placed in prisons or penitentiaries must correspond with the same *purpose of the law* – this being a more

effective protection of the rights of such persons – the Constitutional Court set out the following legal standpoint. Courts, when applying the powers of the judge responsible for the execution of sentences in connection with the request for the protection of prisoners' rights, shall apply the same powers in connection with the protection of the right of detainees to complain about alleged violations of their rights during detention.

This removes the defects in the regulation of the regime of legal remedies in the detention enforcement system and allows detainees to lodge complaints over the procedures and decisions of penitentiary or prison employees by submitting them to the prison governor or the judge responsible for the execution of the sentence, who must reply in writing within thirty days. It also allows them to lodge requests for judicial protection against the procedure and decisions of the penitentiary or prison board (which are decided by a judge responsible for the execution of the sentence) provided by the Enforcement of Prison Sentences Act. These two legal remedies shall be decided, after the prison governor has decided on the complaint in the first instance, by the judge or panel competent to rule on detention at the Court where the trial is being held.

This legal standpoint of the Constitutional Court, which is binding on the competent judicial and administrative bodies under Article 77.2 of the Constitutional Act, has from the perspective of effective legal remedies placed the legal protection of detainees on an equal footing with the legal protection of prisoners' rights. Accordingly, the constitutional complaint for the violation of constitutional rights under Article 25.1 of the Constitution has become a subsidiary remedy in constitutional law which may only be lodged after all the above legal remedies have been exhausted.

The Constitutional Court also found that accommodation and living conditions in the detention prison, which in their totality constitute degrading treatment, violated the applicant's constitutional rights under Articles 23 and 25.1 of the Constitution, and his rights under Article 3 ECHR.

The Constitutional Court did not examine the possibility of granting the applicant fair compensation for these violations of constitutional and Convention rights, because the Croatian legal system has another, effective legal remedy for doing so (see Decision of the Constitutional Court no. U-III-1437/07 of 23 April 2008).

The Constitutional Court's findings as to accommodation and living conditions in the prison were reasons to direct the Government to adapt the

capacities of Zagreb Prison within an appropriate timescale not to exceed five years to the needs of accommodating persons deprived of freedom, in accordance with the standards of the Council of Europe and the case-law of the European Court of Human Rights, so that it is no longer inhuman and degrading for detainees and prisoners.

Cross-references:

- U-III-1437/2007 of 23.04.2008, *Bulletin* 2008/2 [CRO-2008-2-007].

Languages:

Croatian, English.



Identification: CRO-2009-1-004

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 31.03.2009 / **e)** U-I-2767/2007 / **f)** / **g)** *Narodne novine* (Official Gazette), 51/09 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

2.1.1.4.16 Sources – Categories – Written rules – International instruments – **Framework Convention for the Protection of National Minorities of 1995**.
 5.1.3 Fundamental Rights – General questions – **Positive obligation of the state**.
 5.2.1.2.2 Fundamental Rights – Equality – Scope of application – Employment – **In public law**.
 5.2.2.3 Fundamental Rights – Equality – Criteria of distinction – **Ethnic origin**.
 5.3.45 Fundamental Rights – Civil and political rights – **Protection of minorities and persons belonging to minorities**.

Keywords of the alphabetical index:

National or ethnic community, special rights / Minority, discrimination, positive, appropriate measures / Treatment, privileged.

Headnotes:

Preference given to the employment of members of national minorities in judicial bodies, as stipulated in the provisions of the Judiciary Act, is in fact a separate positive measure that implies intentionally giving priority to a specific group or groups (ethnic, gender, social, political etc.) with the aim of removing existing inequality and differentiation among persons according to the stated or other characteristics, thereby preventing different forms of open (direct) and concealed (indirect) discrimination, provided that the legislator has established that such discrimination exists. The stipulated preference in the employment of members of national minorities in the given case is not automatic or unconditional and it is only applied if the stipulated requirements are met, and its application secures proportionality in the representation of the members of national minorities in administrative and judicial bodies in a manner which ensures their equal position with other citizens of the Republic of Croatia.

Summary:

The Constitutional Court did not accept a proposal submitted by a natural person to institute proceedings to review the conformity with the Constitution of Article 74.7 and 74.8 of the Judiciary Act (*Narodne novine*, no. 150/05, 16/07 and 113/08; hereinafter the "JA").

The disputed provisions stipulate that in the appointment of judges, account is to be taken of the representation of judges belonging to national minorities, in accordance with the provisions of the Constitutional Act on the Rights of National Minorities, and that when applying for an announced position of a judge national minority members have the right to call upon the realisation of their rights in compliance with the provisions of the Constitutional Act on the Rights of National Minorities.

The applicant deems that, in this case, the matter concerns so-called positive discrimination, which is nevertheless, by its definition, discrimination. She further notes that application of the disputed provisions, regardless of the legislator's good intentions in passing them, resulted in discrimination on the grounds of a person belonging to a national minority.

The Constitutional Court finds relevant for the review of constitutionality of the disputed provisions of the Judiciary Act, provisions of Article 3 (equality and respect for human rights and the rule of law as the highest values of the constitutional order); Article 14 (prohibition of discrimination and equality of all before

the law), Article 15.1 (equal rights to members of all national minorities), Article 15.2 (equality and protection of rights of national minorities shall be regulated in a Constitutional Act) of the Constitution. Furthermore, it has also taken into account the provisions of Articles 1, 4.2, 4.3 and 15 of the Framework Convention for the Protection of National Minorities (Ratification Law, *Narodne novine – međunarodni ugovori*/International Agreements, no. 14/97, entered into force on 17 October 1997; hereinafter "the Framework Convention"), as well as the provision of Articles 22.2 and 22.4 of the Constitutional Act on the Rights of National Minorities (*Narodne novine* no. 155/02; hereinafter "the Constitutional Act"), under which provisions the members of national minorities are granted the right to representation in the state administration and judicial bodies, taking into consideration the participation of members of national minorities in the total population at the level on which the state administration or judicial body has been formed, and taking into account their acquired rights and in filling vacancies in the above-mentioned bodies, preference under the same conditions, is given to the representatives of national minorities.

According to the Constitutional Court the preference, as stipulated in the disputed provisions, is in fact a separate positive measure that implies intentionally giving priority to a specific group or groups (ethnic, gender, social, political, etc.) with the aim of removing existing inequality and differentiation among persons according to the stated or other characteristics, thereby preventing different forms of open (direct) and concealed (indirect) discrimination, provided that the legislator has established that such discrimination in their respect indeed exists. However, the preference in the employment of members of national minorities in the given case is not automatic or unconditional and it is only applied if the stipulated requirements are met, and its application secures proportionality in the representation of the members of national minorities in administrative and judicial bodies in a manner which insures their equal position with other citizens of the Republic of Croatia. Therefore, the preference in employment should be seen as a separate positive measure which benefits the members of national minorities (minority groups) with the aim of enabling them to effectively participate in public affairs through their employment also in judicial bodies, within the meaning of Articles 4.2, 4.3 and 15 of the Framework Convention, which stipulate that the parties have to undertake to adopt, where necessary, adequate measures in order to promote, in all areas of economic, social, political and cultural life, full and effective equality between persons belonging to a national minority and those belonging to the majority and their effective participation in public affairs.

The Constitutional Court noted that the regulation of the above positive measure in the employment of the members of national minorities falls within the legislator's free assessment zone and is to be considered justified and allowed as long as the reasons for its introduction persist, which is in the first place decided by the legislator, i.e. until it starts to violate the principle of proportionality laid down in Article 16 of the Constitution, which is in the first place the subject of constitutional court control. Therefore, as long as the positive measure in Article 22 of the Constitutional Act can be considered justified, allowed and proportional, it shall not be taken as a form of discrimination prohibited in Article 14.2 of the Constitution.

For the above reasons the Constitutional Court found that, in the context of the relevant constitutional provisions and the provisions of the relevant international agreements, the allegations in the applicant's proposal about the unconstitutionality of the disputed provisions of the Judiciary Act were not well founded.

Cross-references:

- U-I-402/2003 and U-I-2812/2007 of 30.04.2008, *Bulletin* 2008/2 [CRO-2008-2-008].

Languages:

Croatian, English.



Identification: CRO-2009-1-005

a) Croatia / b) Constitutional Court / c) / d) 08.04.2009 / e) U-III-429/2005 / f) / g) *Narodne novine* (Official Gazette), 55/09 / h) CODICES (Croatian, English).

Keywords of the systematic thesaurus:

5.3.13.1.1 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Constitutional proceedings.**
5.3.16 Fundamental Rights – Civil and political rights – **Principle of the application of the more lenient law.**

Keywords of the alphabetical index:

Criminal code / Amendment, legislative / Defamation.

Headnotes:

The Court of Appeal is under an obligation to apply the more lenient law in situations where the law has been changed between the handing-down of a disputed first-instance decision and the rendering of the appellate court judgment. The application of the principle of the specific situation requires that only the provisions of the new and old law with a bearing on the specific individual case that is before the court are taken into account, not provisions that have nothing to do with the case.

Summary:

The applicant lodged a constitutional complaint against the Pula County Court judgment of 18 November 2004, which upheld the Pula Municipal Court judgment. The applicant was found guilty of a criminal offence against honour and reputation, defamation, in Article 200.2 of the Criminal Act, and was sentenced to a fine of 7,500.00 kuna. She was also required, at her own expense, to publish the pronouncement of the first-instance judgment in the daily paper *Jutarnji list*.

The applicant pointed out that during the second-instance proceedings, amendments were made to Article 203 of the Criminal Act, which sets out the reasons for the exclusion of unlawfulness of criminal offences against honour and reputation. As the law was amended before the second-instance court passed judgment, the applicant argued that the second-instance court should have applied the amended provision. Had the new and more lenient provision of Article 203 of the Criminal Act been applied, she would have been freed of the charge of defamation.

Elaborating on the constitutional provision of Article 31.1 of the Constitution, which stipulates that if a less severe penalty is determined by law after the commission of an act, such a penalty shall be imposed, the Criminal Act stipulates in Article 3.2 the obligation to apply the more lenient law if the law changes one or more times after the criminal offence has been committed. The Criminal Act broadened the application of this constitutional provision by foreseeing that the law may change several times. It stipulated the application of the more lenient law, not simply the more lenient punishment. When reviewing the compliance of this provision with the Constitution, the Constitutional Court, in Ruling no. -I-1194/1997

(*Narodne novine*, no. 0/99), expressed the opinion that the provision of Article 31.1 of the Constitution also refers to the obligation to apply the more lenient law.

The Constitutional Court observed that when deciding on which law is more lenient for the perpetrator the principle of the specific situation must, *inter alia* be applied. This means that the question cannot be answered by an abstract comparison of the two laws without considering whether the facts of the specific case justify making use of the possibilities provided by the new law. In specific comparison only the provisions of the new and old law with a bearing on the specific individual case that is before the court are taken into account, not provisions with nothing to do with the case.

The Constitutional Court confirmed that the Court of Appeal undoubtedly has a duty to apply the more lenient law in cases when the law changed in the period between passing the disputed first-instance decision and the decision of the second-instance court. In this particular case, between the handing down of the first instance judgment and the rendering of the appellate one, Article 203 of the Criminal Act was amended. This Article sets out the reasons for excluding the unlawfulness of criminal offences against honour and reputation.

The Constitutional Court established that amendments were made to the provision of the Criminal Act that was connected with the specific case. However, the second-instance judgment does not show whether that court took this fact into consideration, or assessed whether the change in the law gave rise to a need for an evaluation as to which law is more lenient, and pursuant to this to apply the more lenient law in the applicant's case (which it was obliged to do). The Constitutional Court found that the applicant's right guaranteed in Article 31.1 of the Constitution was violated.

The Constitutional Court did not assess whether the amended law was more lenient from the applicant's perspective, as this is not part of its remit when deciding on constitutional complaints. Rather, this task falls within the remit of the competent courts, to assess which law is more lenient for the applicant, and pursuant to this assessment to apply the more lenient law. The second-instance court did not do so in the specific case (or this is not in any case apparent from the judgment). The Constitutional Court accordingly overturned the second-instance judgment and referred the case back to that court for a retrial.

Having found the violation of the constitutional right guaranteed in Article 31.1 of the Constitution, the Constitutional Court did not review whether there had been a violation of the other constitutional rights contained in the constitutional complaint.

Cross-references:

- U-I-402/2003 and U-I-2812/2007 of 30.04.2008, *Bulletin* 2008/2 [CRO-2008-2-008].

Languages:

Croatian, English.



Czech Republic

Constitutional Court

Statistical data

1 January 2009 – 30 April 2009

- Judgments of the Plenary Court: 6
- Judgments of panels: 97
- Other decisions of the Plenary Court: 7
- Other decisions of panels: 1 027
- Other procedural decisions: 61
- Total: 1 198

Important decisions

Identification: CZE-2009-1-001

a) Czech Republic / **b)** Constitutional Court / **c)** First Chamber / **d)** 26.02.2009 / **e)** I. US 1169/07 / **f)** Obligation to take into account preclusion of the right to assessment of tax *ex officio* / **g)** *Sbírka nálezů a usnesení* (Collection of decisions and judgments of the Constitutional Court) / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

2.1.1.1.2 Sources – Categories – Written rules – National rules – **Quasi-constitutional enactments**.
 5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts**.
 5.3.42 Fundamental Rights – Civil and political rights – **Rights in respect of taxation**.

Keywords of the alphabetical index:

Tax, assessment, objection / Tax, value added.

Headnotes:

When considering a complaint against a decision by an administrative body, the court must take into account, *ex officio*, facts that are significant in terms of material law, such as the absolute invalidity of a contract, or preclusion. This remains the case even where the plaintiff did not raise the issues at all in the complaint or did so only after the deadline for filing a complaint. This also applies to preclusion of the

state's right to assess or make a supplementary assessment of tax: if the deadline provided in § 47 of the Tax Procedure Code expires and the tax or supplemental tax has not been assessed with legal effect by then, the subjective right of the state to assess or make supplementary assessments will expire. The expiration of this right is taken into account *ex officio* not only in tax proceedings, but also as part of judicial review of a decision in proceedings before the administrative courts.

Summary:

I. The financial directorate turned down an appeal by the complainant (a limited liability company) against a supplemental tax assessment by the financial office, which assessed the complainant's value added tax for the tax period December 1997. The company lodged a complaint against the financial directorate's decision at the municipal court, but it was rejected. The Supreme Administrative Court denied a cassation complaint. The Supreme Administrative Court did not take into account the argument that the preclusive deadline for assessing tax had expired. The SAC observed that the complainant should have raised that objection in the complaint; if it did not do so, it could not then use it for the first time in the proceedings on the cassation complaint. The SAC argued that proceedings in the administrative courts are based on the dispositive principle, under which courts review contested decisions within the bounds of the points in the complaint. In its constitutional complaint, the complainant sought the annulment of the above decisions.

II. The Constitutional Court noted that the SAC's contention that it is necessary to raise the objection of preclusion of the right to make supplementary assessments of tax relies exclusively on the text of the Administrative Procedure Code, overlooking the wider context, arising from the systematic nature of the law, as well as the starting points on which the dispositive principle is based. It follows from the systematic nature of the legal order that its individual components (sub-systems and elements) form certain functional connections. This creates the natural requirement that a body interpreting a particular provision of a legal regulation should not simply limit its perspective to one or several provisions, but should understand them as part of a whole (a system) which, in the light of the principles of unity and non-inconsistency of the legal order, forms, together with the other parts, a logical, or logically harmonious whole. The systematic concept of the legal order also requires respect for the fact that institutions governed by various legal regulations that are common to the entire legal order, or at least to several of its branches, were thoroughly theoretically conceived by

doctrine. Thus, when using them, it is necessary to take as a starting point the doctrinal conclusions and features that they have in common.

The above also applies to preclusion, which appears in various branches of the law. The common elements include, first of all, the construction of the preclusion, based on two legal facts: the passage of a period of time, and failure to exercise a right in that period. The consequence of preclusion is always the expiration of the subjective right itself. Finally, it can also be considered a common feature of preclusion that the public authority is supposed to take it into account *ex officio*; this requirement is a logical consequence of the serious consequences connected to preclusion.

Regarding the nature of the deadline for assessing or making supplementary tax assessments under § 47 of the Tax Procedure Code, case law agrees on the conclusion that its nature is preclusive. If this is a preclusive deadline, then it is necessary to maintain the requirement of applying the above conceptual elements of preclusion, provided, of course, that they are not limited or modified by statute or by the nature of the right to assess or make supplementary tax assessments. However, neither the Tax Procedure Code nor the nature of the right to assess or make supplementary tax assessments as a subjective public right of the state vis-à-vis a taxpayer, provide any support for such a conclusion.

Thus, the provision of the Administrative Procedure Code (the first sentence of § 75.2) under which courts are to review the contested statement of decision, within the bounds of the points of the complaint, can be interpreted not literally, but restrictively. It is basically correct that judicial review is tied to the points in the complaint, but this cannot be made absolute. Application of the dispositive principle in the administrative judiciary cannot be in conflict with the nature of rights that are provided protection, or, ultimately, with the very purpose of the proceeding, which is the just protection of actual subjective public rights; individual provisions of the Administrative Procedure Code, in which the dispositive principle is reflected, must also be interpreted in that spirit.

The Constitutional Court concluded that the Supreme Administrative Court, by refusing to consider the complainant's objection as to the expiration of the preclusive deadline for assessing tax, violated the complainant's right to access to the courts under Article 36.1 of the Charter, and therefore it annulled the contested decision. The constitutional complaint, to the extent that it was directed against the decision of the municipal court and the decisions of the financial directorate and the financial office, was denied.

The judge rapporteur in the matter was Ivana Janů. None of the judges filed dissenting opinions.

Languages:

Czech.



Identification: CZE-2009-1-002

a) Czech Republic / **b)** Constitutional Court / **c)** Fourth Chamber / **d)** 17.03.2009 / **e)** IV. US 2239/07 / **f)** Measure of a general nature / **g)** *Sbírka nálezů a usnesení* (Collection of decisions and judgments of the Constitutional Court) / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

1.3.5.12 Constitutional Justice – Jurisdiction – The subject of review – **Court decisions**.
3.9 General Principles – **Rule of law**.

Keywords of the alphabetical index:

Plan, land-use / Measure of a general nature / Judicial review.

Headnotes:

The standard of review (including the standard in terms of review of constitutionality) of a measure of a general nature may not be lower than that pertaining to cases of individual administrative acts and normative administrative acts. Article 36.2 of the Charter is also applicable to a measure of a general nature, because such a measure, in a material sense, can be classified as a “decision” within the meaning of that provision of the constitutional order.

Summary:

I. Certain individuals filed a petition with the Supreme Administrative Court (hereinafter, “SAC”), seeking the annulment of a zoning plan, as a measure of a general nature. The SAC, in the decision contested by the constitutional complaint, denied the petition on the grounds that the change to the zoning plan in question was not a measure of a general nature, and the court did not have the authority to review it in a

proceeding under § 101a et seq. of the Administrative Procedure Code. The petitioners did not agree with the legal opinion of the SAC. They pointed to the SAC's previous case law, in which it concluded that approvals or changes to zoning documentation are measures of a general nature, and that the SAC is authorised to review them. However, in the reasoning of the decision contested by the constitutional complaint the SAC stated that the legal conclusions formulated in its case law had been overruled by an expanded panel of the SAC, which concluded that the decisive element for evaluating a court's authority is the legal form of an act, not its material content.

II. The Constitutional Court stated that in the adjudicated matter the provision contested by the constitutional complaint was based on a legal opinion accepted by an expanded panel of the SAC, in which the SAC concluded that the Administrative Procedure Code does not materially define a measure of a general nature, and, in view of the great variety of possible cases, leaves it up to the legislature to specify in special laws which authoritative measures by administrative bodies are, in the legal sense, measures of a general nature. Using argument *a contrario*, the SAC then concluded that administrative bodies cannot themselves, at their own discretion, subordinate certain measures to the regime of § 171 et seq. of the Administrative Procedure Code if they are not required to do so by special legislation. The SAC concluded that the material elements are not the decisive criterion for evaluating whether a particular administrative act is a measure of a general nature, but that the decisive factor is whether a special act prescribes this legal form for the issuance of an act. In its judgment of 19 November 2008, file no. Pl. ÚS 14/07 the plenum of the Constitutional Court found that interpretation to be unconstitutional. The Constitutional Court concluded that it is necessary to give priority to the material concept of the institution of a measure of a general nature, i.e. to the interpretation that was applied previously. The Constitutional Court emphasised that if two possible interpretations of a public law norm are available, for the purposes of a fair trial it is necessary to choose that interpretation which does not interfere, or interferes as little as possible, with an individual's fundamental rights and freedoms. This approach respects the doctrine of a material law-based state, and meets the imperative of interpreting domestic law in harmony with the international legal obligations of the Czech Republic, especially its obligations under the Aarhus Convention. The legal conclusions of the plenum of the Constitutional Court expressed in Judgment file no. Pl. ÚS 14/07 applied fully to the adjudicated matter.

Regarding the argument of priority for the material understanding of a measure of a general nature in a situation where two interpretations of a public law norm are available, and one of the chosen interpretations does not provide effective protection to an individual's fundamental rights, the Constitutional Court stated that this argument would cease to make sense if the level of protection of public subjective rights in proceedings on annulling a measure of a general nature did not differ from the level of their protection in related administrative proceedings. In that case, both interpretations of a public law norm would interfere in a comparable manner in the fundamental right to judicial protection. However, the Constitutional Court believes that the level of protection of public subjective rights is less effective in the later phases of construction proceedings than in proceedings on annulment of a measure of a general nature.

According to the Constitutional Court, measures of a general nature are not exclusively normative or individual acts, but rather a certain combination of them; they are administrative acts of a mixed nature, with a specifically determined subject matter for regulation and generally defined circle of affected parties. Thus, a measure of a general nature is not a decision in the sense of an individual legal act. However, in view of the foregoing, that fact is not decisive. When interpreting Article 36.2 of the Charter it is necessary to proceed so that, within the protection of public subjective rights against administrative acts, a gap does not arise between normative and individual acts.

The Constitutional Court also took into consideration that a zoning plan significantly limits the opportunity of complainants (or, generally, owners of the affected properties) to decide on the manner in which an asset is used, e.g. by determining whether a plot of land may or may not be used for construction, or by another binding determination of the manner in which a plot of land can be used, and that for that reason as well a measure of a general nature cannot be excluded from judicial review.

Because of its unconstitutional interpretation of the relevant legal provisions, the SAC denied the complainants legal protection in proceedings on annulment of a measure of a general nature, and thus violated their rights guaranteed in Article 36.1 and 36.2 of the Charter and Article 6.1 of the Convention on Fundamental Rights and Freedoms. Therefore, the Constitutional Court upheld the constitutional complaint and annulled the contested SAC decision.

The judge rapporteur in the matter was Miloslav Výborný. None of the judges filed a dissenting opinion.

Languages:

Czech.



Identification: CZE-2009-1-003

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 21.04.2009 / **e)** Pl. US 29/08 / **f)** On the constitutionality of the real estate transfer tax / **g)** *Sbírka zákonů* (Official Gazette); *Sbírka nálezů a usnesení* (Collection of decisions and judgments of the Constitutional Court) / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

3.9 General Principles – **Rule of law**.
 3.16 General Principles – **Proportionality**.
 3.18 General Principles – **General interest**.
 5.3.39.3 Fundamental Rights – Civil and political rights – Right to property – **Other limitations**.
 5.3.42 Fundamental Rights – Civil and political rights – **Rights in respect of taxation**.

Keywords of the alphabetical index:

Tax, real estate / Taxation, decision, review / Taxation, legal basis.

Headnotes:

Evaluating the suitability and necessity of individual components of tax policy is left to the discretion of the democratically elected legislature, insofar as the effect of tax on persons does not have a strangulatory effect (is not extremely disproportional) and does not violate the principle of accessory and non-accessory equality. In the Constitutional Court's opinion, these constitutional demands on the legal regulation of taxes fully ensure that reviewed provisions, if they meet this test, can be designated as legitimate.

Summary:

The Supreme Administrative Court, in the course of its decision-making activity, suspended proceedings on a cassation complaint, and, in accordance with Article 95.2 of the Constitution, submitted a petition to the Constitutional Court, seeking a declaration that certain provisions of the Act on Inheritance Tax, Gift Tax, and Real Estate Transfer Tax be declared unconstitutional, in the version before it was amended. The SAC believed that real estate transfer tax was unconstitutional. It suggested that the Constitutional Court expand the test for constitutionality of taxes, to include a legitimacy and rationality test. According to the SAC the real estate transfer tax is an anti-social, demotivating tax that is unequal in terms of ownership of different kinds of property and limits flexibility on the real estate market. As a result, it hinders flexibility on the labour market, and ultimately has a negative impact on family life.

Under Article 11.5 of the Charter of Fundamental Rights and Freedoms taxes and fees can only be imposed on the basis of law. This provision rules out the possibility for the executive branch to impose tax obligations. On the contrary, taxes are the prerogative of Parliament, which is endowed with exclusive competence to impose taxes. Thus, Article 11.5 also expresses the constitutional authority for Parliament to legitimately limit property rights through the legislation it adopts. Thus, the public authorities can interfere in the private sphere of an individual, which is also co-defined by property rights, for reasons of a constitutionally approved public interest, the essence of which, in the case of taxes, consists of collecting funds to secure various kinds of public values. The legitimacy of taxation arises *inter alia* from the fact that the proceeds of taxation are also used to protect ownership and create conditions for the development of ownership, and this protection and creation of conditions must, obviously, be paid for somehow. However, this is not the only purpose of taxation; tax interference in the property and legal sphere of an individual acquires additional justification precisely from the balanced allocation of these burdens.

The Constitutional Court stated that under Article 1.1 of the Constitution the Czech Republic is a democratic state governed by the rule of law, founded on respect for the rights and freedoms of man and of citizens. Fundamental rules for the operation of state power can be derived from the principle of a law-based state; they include the principle of proportionality. This principle arises from the premise that interference in fundamental rights or freedoms, even if it is not foreseen by constitutional regulation, may occur in the event of conflict between them, or in the event of conflict with another constitutionally

protected value that does not have the nature of a fundamental right and freedom. Thus, in the case of taxes, this will mean evaluation of the limitation of the fundamental right to property guaranteed by Article 11.1 of the Charter, for reasons of the public interest in meeting the state budget approved by Article 11.5 of the Charter, for purposes related to fulfilling the functions of the state.

The Constitutional Court stated that it did not intend to deviate from its case law when reviewing the constitutionality of the contested provisions, and would accordingly take as its starting point a modified version of the principle of proportionality. It would review any violation of the prohibition on extreme disproportionality in connection with criteria that arise from the constitutional principle of equality. An evaluation of the matter from the viewpoint of observing the constitutional safeguards of accessory and non-accessory equality allows for the implementation of the requirement that the legislature should be prevented from selecting its subjects of taxation on a totally irrational basis. If it were allowed to do this, it would commit an obvious, or arbitrary, violation of the constitutional principle of equality; and it should be emphasised that violation of accessory equality is conceptually tied to violation of another fundamental right.

As regards the test of ruling out extreme disproportionality, the Constitutional Court stated that the tax assessment should not result in a limitation on the property rights if somebody obliged to pay tax, causing fundamental changes to their property relationships in such a way as to frustrate the very essence of property, or resulting in a choking, strangulatory effect on the limit of an individual's mandatory public law financial performance *vis-à-vis* the state. However, the Constitutional Court observed that this was certainly not the case with a real estate transfer tax of 5%.

Having examined whether the real estate transfer tax was conflict with safeguards arising from the principle of accessory equality; the Constitutional Court stated that differentiation leading to violation of the principle of equality is impermissible on two counts. Firstly, it can function as an accessory principle, which prohibits discriminating against persons in the exercise of their fundamental rights, and as a non-accessory principle enshrined in Article 1 of the Charter, which consists of ruling out arbitrariness by the legislature when distinguishing the rights of certain groups of subjects. In other words, the second case involves the principle of equality before the law, which is, through Article 26 of the International Covenant on Civil and Political Rights, a component of the Czech constitutional order.

According to the SAC, arbitrariness was exercised in the case of taxing the transfer of only one kind of property. In that regard, the Constitutional Court stated that taxing the transfer of real estate will not be considered arbitrary, if substantial differences can be determined between the transfer of that kind of property (i.e. immovable property, real estate) and other kinds of property (moveable property, personal property), that make the transfers of property in both groups non-comparable. On the contrary, although again for reasons of observing the principle of equality, the regimes for unlike matters and unlike processes cannot be governed the same way. Dividing assets into immovable and moveable is not only fundamentally significant for private law, but the legislature attaches significant consequences to it in public law as well. A tax differentiation between the transfer of personal property (moveable assets) and real estate (immovable assets) is based on substantial differences that distinguish real estate from personal property, and therefore different tax regimes in connection with the transfer do not contravene the principle of non-accessory equality.

The Constitutional Court also considered its own competence to evaluate the real estate transfer tax in terms of the function of taxes. In the Constitutional Court's opinion, evaluation of taxes in terms of three fundamental functions of taxes and the tax system, the allocation, distribution and stabilisation functions falls within the competence of the democratically elected legislature. If the Constitutional Court were to do this, it would step into the field of individual policies, the rationality of which cannot be very well evaluated in terms of constitutionality. Likewise, the Constitutional Court does not, as a rule, review the effectiveness of taxes, except in cases where the ineffectiveness of a particular tax would establish obvious inequality in the tax burden on individual taxpayers. The Constitutional Court is only competent to review whether given tax measures interfere in the constitutionally guaranteed property substratum of the owner, or whether they groundlessly conflict with the principle of equality, i.e. they are arbitrary.

The Constitutional Court also declined to review whether the tax policy harmonised with other policies, e.g. with housing policy, as the SAC proposed. The Constitutional Court would not allow its judgment on the suitability of public policies to replace the judgment of the democratically elected legislature, which has wide room for discretion in the sphere of public policy, and also bears political responsibility for any failure of its chosen solutions. In other words, the legislature may take irrational steps in the area of taxes, but this does not *per se* constitute grounds for intervention by the Constitutional Court. The Constitutional Court will intervene only if there is a

limitation of property rights with the intensity of a so-called suffocating effect, or if there is a violation of the principle of equality, in its accessory (in connection with other fundamental rights) or non-accessory form.

The Constitutional Court concluded that grounds for granting the petition of the SAC to declare unconstitutional the contested provisions of the Act, applicable in this case, were not found, and therefore the petition was denied in that scope; the remainder of the petition was denied as a petition filed by an obviously unauthorised person.

The judge rapporteur in this matter was Eliška Wagnerová. None of the judges filed a dissenting opinion.

Languages:

Czech.



Estonia

Supreme Court

Important decisions

Identification: EST-2009-1-001

a) Estonia / **b)** Supreme Court / **c)** Supreme Court (*En banc*) / **d)** 28.05.2008 / **e)** 3-4-1-4-08 / **f)** Review of constitutionality of Section 2.8 and 2.9 of Ministry of Justice Regulation no. 71 of 18 December 2003 “Limits of remuneration of trustees and interim trustees in bankruptcy and the procedure for calculating the expenses subject to reimbursement” / **g)** *Riigi Teataja III* (Official Gazette), 2008, 26, 171 / **h)** www.riigikohus.ee; CODICES (Estonian, English).

Keywords of the systematic thesaurus:

1.3.2.2 Constitutional Justice – Jurisdiction – Type of review – **Abstract / concrete review**.
 3.13 General Principles – **Legality**.
 3.18 General Principles – **General interest**.
 5.3.13.1.1 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Constitutional proceedings**.

Keywords of the alphabetical index:

State, interest / Proceedings, appropriate / Norm control, concrete, purpose.

Headnotes:

The initiation of constitutional review proceedings for the protection of the interests of the state is not in conformity with the objective of concrete norm control, which is first and foremost to serve the interests of parties to proceedings. Within concrete norm control, only a violation of the rights and freedoms of a person by an act of general application can be verified.

Summary:

I. According to the principle of requirement of legality legal acts issued by a minister should be in conformity with the laws. In the current case, the Circuit Court held that the Minister of Justice had without legal justification, regulated the payment of,

remuneration and expenses of an interim trustee in bankruptcy out of state funds. The disputed regulation of the Minister of Justice, establishing the amounts of remuneration of interim trustees and the procedure for calculation of such expenses, was issued on the basis of Articles 23.2 and 65.5 of the Bankruptcy Act. The regulation also established the prerequisites for the payment of remuneration to an interim trustee in bankruptcy out of state funds, although the referred legislation did not contain authorization to establish such legislation of general application. Therefore the Circuit Court held it unconstitutional and thereby launched in concrete norm control the constitutional review procedure at the Supreme Court.

II. The Constitutional Review Chamber found that the objective of the court's petition was not to protect the rights and freedoms of parties to the proceedings. Instead, its objective was the declaration of unconstitutionality of the norm, which gave rise to the obligation of the state, to reimburse an interim trustee's remuneration and expenses in the case of abatement of bankruptcy proceedings. Thus, the objective of the court was to protect the interests of the state. The Chamber was of the opinion that the initiation of constitutional review proceedings for the protection of the interests of the state is not in conformity with the right to the protection of the courts – arising from Article 15.1 of the Constitution and with the objective of concrete norm control. The objective of concrete norm control is first and foremost to serve the interests of parties to proceedings. Should the state find that the payment of remuneration to an interim trustee within the limits established in this legal act is not justified, both the Minister of Justice and Parliament could amend the legislation which allegedly undermines the interest of the state. The Chamber emphasised that within concrete norm control an assessment will take place as to whether an act of general application violates the rights and freedoms of a person. The courts do not have the competence to initiate concrete norm control if the legislation does not violate the rights and freedoms of the parties to the proceedings. The petition by the Tallinn Circuit Court was accordingly held not permissible and was dismissed.

Cross-references:

- Decision 3-4-1-9-00 of 06.10.2000, *Bulletin* 2000/3 [EST-2000-3-008];
- Decision 3-4-1-7-01 of 11.10.2001, *Bulletin* 2001/3 [EST-2001-3-005];
- Decision 3-4-1-2-01 of 05.03.2001, *Bulletin* 2001/1 [EST-2001-1-003];
- Decision 3-4-1-1-02 of 06.03.2002, *Bulletin* 2002/1 [EST-2002-1-001];
- Decision 3-4-1-2-05 of 27.06.2005;
- Decision 3-4-1-5-05 of 13.06.2005.

Languages:

Estonian, English.



Identification: EST-2009-1-002

a) Estonia / **b)** Supreme Court / **c)** Supreme Court (*En banc*) / **d)** 23.02.2009 / **e)** 3-4-1-18-08 / **f)** Petition of the President of the Republic for declaration of unconstitutionality of the Temporary Procedure for Remuneration of Members of the Parliament Act / **g)** *Riigi Teataja III* (Official Gazette), 2009, 9, 55 / **h)** www.riigikohus.ee; CODICES (Estonian, English).

Keywords of the systematic thesaurus:

2.3.6 Sources – Techniques of review – **Historical interpretation.**

2.3.7 Sources – Techniques of review – **Literal interpretation.**

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

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

4.5.6.4 Institutions – Legislative bodies – Law-making procedure – **Right of amendment.**

4.5.11 Institutions – Legislative bodies – **Status of members of legislative bodies.**

Keywords of the alphabetical index:

Parliament, member, salary / Remuneration, temporary procedure.

Headnotes:

Legislation enacting temporary procedures for the remuneration of members of parliament is unconstitutional.

Summary:

I. On 19 November 2008 Parliament (*Riigikogu*) passed the Temporary Procedure for Remuneration of Members of Parliament Act, described here as “the Act”. The President of the Republic refused to proclaim the Act, suggesting that instead Parliament should deliberate again and bring it into conformity

with the Constitution. On 2 December 2008 Parliament passed the Act again, leaving it unchanged. The President of the Republic sought a declaration from the Supreme Court that the Act was unconstitutional.

The Act changed the principles of calculating the remuneration of members of parliament, with the aim of precluding an increase in 2009. Under Article 75 of the Constitution the remuneration of MPs and restrictions on the receipt of other employment income are provided by law (Article 75.1), which may be amended for the next parliamentary session (Article 75.2).

The President took the view that the word “amendment” in Article 75 of the Constitution covers increases and decreases in remuneration, as well as changes in the basis of remuneration. The President emphasised that the rationale behind the provision is to bring about a situation whereby no institution can determine its own remuneration, in order to avoid conflict of interests and dealing with remuneration issues for political considerations. Another purpose of the provision is the protection of the parliamentary minority against the majority who may wish to worsen the situation of its political opponents by decreasing their remuneration. This may suppress the important role of the opposition in a democratic society.

II. The Supreme Court en banc first analysed whether Article 75 of the Constitution contains a prohibition on amendments to the remuneration of a MP for the duration of the parliamentary session.

Parliament’s general competence to pass, amend and repeal laws stems from Article 65.1 of the Constitution. The Court concluded that if this provision also allowed Parliament to amend remuneration for the duration of the parliamentary session, Article 75.2 of the Constitution would have no independent meaning. An Act cannot be interpreted in a manner that renders the Act or its provisions meaningless. A reasonable interpretation would give an independent meaning to the phrase “for the next membership of Parliament” The Court concluded that Article 75.2 of the Constitution should be interpreted as a prohibition on amending the remuneration of MPs for the duration of the parliamentary session. This opinion of the Court was supported by comparison with the Constitutions from the years 1920 and 1937, and by historical and systematic interpretation of the current Constitution.

The Court agreed with the objective purposes the President had attributed to the prohibition included in Article 75 of the Constitution. To determine the content of the prohibition, the Court clarified the meaning of words ‘to amend’ and ‘remuneration’ used

in Article 75. First and foremost, a linguistic interpretation of the words must be based on their ordinary meaning. This helps to guarantee legal clarity and certainty, and to safeguard against differences in interpretation by decision-makers.

In the general language the verb ‘muutma’ [to amend] means to dissimilate or make totally different. The Court concluded that neither the genesis of Article 75 of the Constitution, the intent of the constitutional draftsmen nor the purposes of the provision have scope for a conclusion that the word ‘muutma’ should be given a meaning different from the ordinary meaning in general language.

The intent of those drafting Article 75 of the Constitution indicated that the word ‘remuneration’ should be interpreted as the remuneration payable for the work of the MP.

The Court concluded that Article 75.2 of the Constitution must be understood to mean that Parliament is not authorised to increase and decrease MPs’ salaries, alleviate or impose other restrictions on their income; neither is it allowed to alter the basis for calculating remuneration for the duration of the parliamentary session.

Nonetheless, the Court stressed that other provisions of the Constitution must be taken into account when applying Article 75 of the Constitution. Articles 60.2, 62 and 130 of the Constitution in their conjunction would allow the sitting membership of the parliament to amend the remuneration of the MPs in extreme cases of endangerment of the MPs’ independence and freedom of mandate or in a state of war for the national defence.

The contested amendment was deemed as a reorganisation of the basis for calculating remuneration – in other words. amendment of remuneration for the purposes of Article 75 of the Constitution. It was clear immediately the Act came into force that the basis for calculating the remuneration of the MPs had been amended for the duration of the parliamentary session. Yet no such situation existed which would have justified the non-application of Article 75 of the Constitution. Therefore no exceptions could have been made upon its application.

The Court upheld the petition of the President of the Republic and declared the Temporary Procedure for Remuneration of Members of the Parliament Act unconstitutional.

Supplementary information:

Five justices out of eighteen presented one dissenting opinion to the judgment, contending that the contested Act was not in conflict with the Constitution and the petition of the President of the Republic should have been dismissed.

Cross-references:

- Decision III-4/A-6/94 of 02.11.1994 of the Constitutional Review Chamber.

Languages:

Estonian, English.

*Identification:* EST-2009-1-003

a) Estonia / **b)** Supreme Court / **c)** Supreme Court (*En banc*) / **d)** 19.03.2009 / **e)** 3-4-1-17-08 / **f)** Petition of the Tallinn City Council for the declaration of invalidity of Article 7.1.3, 7.2 and 7.2-1 of the National Audit Office Act / **g)** *Riigi Teataja III* (Official Gazette), 2009, 14, 100 / **h)** www.riigikohus.ee; CODICES (Estonian, English).

Keywords of the systematic thesaurus:

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

3.16 General Principles – **Proportionality.**

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

4.10.6 Institutions – Public finances – **Auditing bodies.**

4.10.8 Institutions – Public finances – **Public assets.**

Keywords of the alphabetical index:

Municipality, property, audit / Local authority, finances.

Headnotes:

Articles of the National Audit Office Act enabling the National Audit Office to exercise economic and performance control over local government are

reasonable and proportional for the achievement of the desired aim, and therefore constitutional.

Summary:

I. On 11 May 2005 Parliament passed the Act amending the National Audit Office Act and the Local Government Organisation Act. Article 7.1 and 7.2 of the National Audit Office Act (described here as “the NAOA”) were amended and Article 7.2-1 was added. On 19 November 2008 the Supreme Court received a petition from the Tallinn City Council seeking a declaration of the invalidity of these provisions of the NAOA on the basis that they ran counter to the constitutional guarantees of local government and the principle of legal clarity.

The above provisions extended the functions of the National Audit Office. Article 7.2 empowered it to exercise economic control over local government bodies to the extent that they possess, use and preserve municipal property. Article 7.2-1 enabled it to exercise performance control over local government bodies to the extent that they use immovable and movable state property transferred into their possession, allocations for specific purposes, subsidies granted from the state budget, and funds allocated for the performance of state functions.

The Tallinn City Council argued that Article 7.2 of the NAOA was in conflict with the Constitution, because the National Audit Office could not exercise any control over municipal property. The petitioner pointed out that Article 7.2-1 unconstitutionally allowed the National Audit Office to exercise management and performance control over state assets, although the audit referred to in the Constitution can only consist in the control of lawfulness and legality, not performance control. The petitioner claimed that if the Constitution allows this power to be conferred on the National Audit Office, the contested norms still disproportionately infringed the autonomy of local governments enacted in Article 154 of the Constitution. Also, the provisions were in conflict with the principle of legal clarity because the extent, object and limits of control were worded unambiguously.

II. The Constitutional Review Chamber agreed that auditing conducted on the basis of the contested provisions imposed procedural obligations on local government which unfavourably affected its right to self-organisation. However, the restriction of constitutional guarantees of local government was permissible when it is lawful in the formal and substantive sense.

The Chamber was of the opinion that the contested provisions were formally constitutional and in accordance with the principle of legal clarity. The addressees of these norms were public servants with appropriate professional training ensuring their capability to overcome – through interpretation – any possible ambiguities. Also, the required level of legal clarity of provisions depends on the consequences of application of these norms. In the current case these consequences were not very extensive.

Relying on the notes of the constitutional draftsmen and the wording of Article 133 of the Constitution, the Chamber noted that the Constitution does not restrict the possibilities of the National Audit Office to exercise economic control over state assets and their users. The Constitution does not specify the content of the economic control exercised by the National Audit Office. Since its extent and organisation has been left for the legislator to decide, it was allowed to exercise performance control. Consequently, Article 7.2-1 of the NAOA was not in conflict with Article 133 of the Constitution.

The Chamber was of the opinion that as long as the purpose of Article 133 of the Constitution is achieved, the article does not preclude the possibility of imposing duties on the National Audit Office. Furthermore, the control described in Article 7.2 of the NAOA was justified by the necessity to guarantee the transparency and lawfulness of the exercise of public authority and to support the principles of unitary state and legality. Therefore, Article 7.2 of the NAOA was not in conflict with Article 133 of the Constitution.

The Chamber noted that Article 160 of the Constitution, pursuant to which “the administration of local governments and the supervision of their activities shall be protected by law” established a basis for Parliament to interfere with the autonomy of a local government and that the legislator was free to determine the aims for the achievement of which the right to self-organisation might be restricted. Nevertheless, the legislator must bear in mind that the infringement of the right to self-organisation caused by the supervision must be proportional.

Taking into account the low intensity of the infringement of constitutional guarantees of local government and the importance of the aims that justified the infringement, the exercise of the control established by the contested provisions was a reasonable solution and proportional for the achievement of the desired aim. Therefore the Chamber came to the conclusion that Article 7.1.3, in conjunction with Article 7.2 and 7.2-1 of the NAOA, was constitutional.

Supplementary information:

Justice Koolmeister delivered a dissenting opinion to the judgment, stressing that the exercise of control (supervision) of lawfulness of the use and disposal of municipal property does not *per se* infringe the right to self-organisation of local government, but entrusting the supervisory competence to the National Audit Office is unconstitutional.

Cross-references:

- Decision 3-4-1-9-06 of 16.01.2007, of Constitutional Review Chamber, *Bulletin* 2007/1 [EST-2007-1-007].

Languages:

Estonian, English.



Identification: EST-2009-1-004

a) Estonia / **b)** Supreme Court / **c)** Supreme Court (*En banc*) / **d)** 26.03.2009 / **e)** 3-4-1-16-08 / **f)** Review of constitutionality of Article 43.1.2 of the Weapons Act / **g)** *Riigi Teataja III* (Official Gazette), 2009, 15, 109 / **h)** www.riigikohus.ee; CODICES (Estonian, English).

Keywords of the systematic thesaurus:

- 3.16 General Principles – **Proportionality.**
- 3.18 General Principles – **General interest.**
- 3.19 General Principles – **Margin of appreciation.**
- 5.3.12 Fundamental Rights – Civil and political rights – **Security of the person.**
- 5.3.43 Fundamental Rights – Civil and political rights – **Right to self fulfilment.**

Keywords of the alphabetical index:

Weapon, licence to carry, granting / Weapon, acquisition, permit / Weapon, prohibition / Suspension of rights / Police, administration, discretion, absence.

Headnotes:

Provisions of Estonian weapons legislation were unconstitutional in that they did not allow a police prefecture, upon suspension of a weapons permit or a weapons' acquisition permit, to take into account the personality of the suspect or the accused at trial or the circumstances of the suspicion or the accusation.

Summary:

I. A. Sarri had been issued with eighteen weapons permits and four weapon acquisition permits.

He was then declared a suspect in a criminal case involving the giving and promising of bribes. The Police Prefecture suspended the weapons permits and acquisition permits issued to him on the basis of Article 43.1.2 of the Weapons Act. Under this provision, a police prefecture that has issued a weapons or acquisition permit must suspend the permit if the holder of it is declared a suspect or an accused at trial on grounds arising from criminal proceedings.

A. Sarri applied to the Tallinn Administrative Court for a declaration that the Police Prefecture decision was unlawful and that Article 43.1.2 was not applicable and unconstitutional. The Tallinn Administrative Court upheld his action, declared the provision unconstitutional and non-applicable to the extent that it gave no scope for the discretion of a police prefecture in deciding on the suspension of a weapons permit, and initiated constitutional review proceedings in the Supreme Court. The court agreed with the applicant that Article 43.1.2 of the Weapons Act, requiring the authorities to suspend the weapons or acquisition permits of a suspect or an accused at trial with no regard for the circumstances of a concrete case, infringed the freedom of self-realisation established in Article 19.1 of the Constitution and was not proportional to the aim of protecting the health and lives of others.

The Parliamentary Constitutional Committee, the Chancellor of Justice and the Minister of Justice agreed with the opinion of the administrative court. The Police Prefecture and the Minister of Internal Affairs considered Article 43.1.2 of the Weapons Act to be in conformity with the Constitution.

II. The Constitutional Review Chamber of the Supreme Court held Article 43.1.2 to be relevant for the adjudication of the matter. The Chamber deemed the relevant legislation formally constitutional. Nevertheless, since the suspension of weapons permits deprived A. Sarri of the possibility to use a weapon for hunting and to protect himself and his property, the state authority

had infringed the petitioner's right to the fundamental freedom of self-realisation established in Article 19.1 of the Constitution.

The objective of the infringement was to prevent danger to the life and health of people. The Chamber found that although the imposed restriction was suitable and necessary for the achievement of the aim, it intensely infringed the freedom of self-realisation of a suspect or an accused at trial.

The Chamber noted that the necessity of preventing danger to the life and health of others by suspending weapons or acquisition permits is particularly relevant in cases where criminal offences have been committed that endanger life and health, or those committed by using weapons. However, not all criminal offences endanger the life and health of others or involve the use of a weapon. The Chamber also observed that the mere fact that somebody is a suspect or an accused at a trial does not presuppose that they will avail themselves of a weapon. Therefore the restriction established in Article 43.1.2 of the Weapons Act was not a reasonable measure for the protection of the life and health of others.

The Chamber declared Article 43.1.2 of the WA unconstitutional and invalid to the extent that it did not allow a police prefecture, upon suspension of a weapons or an acquisition permit, to take into account the personality of the suspect or the accused at trial or the circumstances of the suspicion or the accusation.

The Chamber also suggested that the best way to safeguard the life and health of the public on the one hand and the general fundamental freedom of a suspect or accused on the other would be to allow those applying the weapons legislation a degree of discretion. It would also prevent a person being turned into an object of state authority and would make it easier to guarantee human dignity.

This would not stop the legislator providing for situations where the police prefecture has no discretion. Even non-discretionary legislation may yield a proportional result upon application if the legislator itself exercised its margin of appreciation when passing the law.

Cross-references:

- Decision 3-4-1-9-00 of 06.10.2000, *Bulletin* 2000/3 [EST-2000-3-008];
- Decision 3-4-1-7-01 of 11.10.2001, *Bulletin* 2001/3 [EST-2001-3-005];
- Decision 3-4-1-2-01 of 05.03.2001, *Bulletin* 2001/1 [EST-2001-1-003];
- Decision 3-4-1-1-02 of 06.03.2002, *Bulletin* 2002/1 [EST-2002-1-001];

- Decision 3-4-1-2-05 of 27.06.2005;
- Decision 3-4-1-5-05 of 13.06.2005.

Languages:

Estonian, English.



Identification: EST-2009-1-005

a) Estonia / b) Supreme Court / c) Supreme Court (*En banc*) / d) 14.04.2009 / e) 3-3-1-59-07 / f) Action of Ardi Šuvalov (AŠ) for the annulment of the Minister of Justice directive no. 233-k of 26 June 2006 / g) *Riigi Teataja III* (Official Gazette), 2009, 20, 146 / h) www.riigikohus.ee; CODICES (Estonian, English).

Keywords of the systematic thesaurus:

1.3.5.15 Constitutional Justice – Jurisdiction – The subject of review – **Failure to act or to pass legislation**.
 2.1.1.4 Sources – Categories – Written rules – **International instruments**.
 3.11 General Principles – **Vested and/or acquired rights**.
 4.7.4.1.6 Institutions – Judicial bodies – Organisation – Members – **Status**.
 4.7.16.2 Institutions – Judicial bodies – Liability – **Liability of judges**.
 5.1.3 Fundamental Rights – General questions – **Positive obligation of the state**.
 5.3.13.14 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Independence**.
 5.4.18 Fundamental Rights – Economic, social and cultural rights – **Right to a sufficient standard of living**.

Keywords of the alphabetical index:

Judge, independence, remuneration / Judge, suspension / Measure, arbitrary.

Headnotes:

Failure to pass legislation which would allow for the payment of a salary or another equivalent compensation to a judge whose service agreement has been suspended for the period of criminal proceedings is unconstitutional.

Summary:

I. On 13 June 2006, the President of the Republic granted consent to instigate criminal charges against Judge AŠ. AŠ was temporarily suspended from professional judicial duties.

On 26 June 2006 the Minister of Justice issued a directive for the suspension of payment of judge AŠ's salary, pending an assessment of the circumstances of the criminal case. AŠ contested the directive in court. The Tallinn Administrative Court and later the Tallinn Circuit Court both dismissed the application. In the appeal in cassation to the Supreme Court, AŠ requested the repeal of the directive, and compensation for unpaid salary for the period of suspension of his official duties.

The appellant contended that there was no provision in the legislation for the cessation of payment of salary for the period of suspension of the performance of official duties. Temporary removal from office does not release a judge from the duty to observe the restrictions on holding office when being otherwise employed. Due to that restriction, denying a judge a salary during suspension from duties would deprive him or her of any income whatsoever. This is not in accordance with the state's obligation to establish the guarantees for the independence of judges. Therefore, the denial of salary or other compensation to a judge during the period of suspension of official duties is unconstitutional.

The Minister of Justice and the Constitutional Committee of the Parliament considered the Courts Act, Public Service Act and the Penal Code to be in line with the Constitution. They found that the laws did not allow for the payment of a salary to a judge for the period of the suspension of duties. However, the Chancellor of Justice concurred with the appellant and found that the legislation did not conform to the guarantee of independence of judges and the right to state assistance in case of need.

II. The matter was referred for adjudication to the Supreme Court *en banc* for ensuring uniform application of law. The application was interpreted as a request for the retention and payment of salary or other equivalent compensation during the period of suspension from duties.

The Court ascertained that the valid laws did not regulate the state's obligation to pay salary or other compensation for the period of suspension of the performance of a judge's official duties during criminal proceedings. Due to the lack of relevant provisions (failure to pass legislation), the valid laws would not allow the satisfaction of AŠ's claim.

The Court agreed with the applicant that the restrictions on employment provided in Article 49 of the Courts Act applied to all judges who had been appointed to the office, irrespective of the fact that the performance of their duties might have been suspended.

As AŠ associated the necessity of ensuring means of subsistence with the issue of independence of judges, the Court examined whether the lack of legislation that would have allowed a salary or other equivalent compensation to be paid to AŠ was in conformity with the principle of the independence of judges. Article 147.4 of the Constitution establishes that the legal status of judges and guarantees for their independence shall be provided by law. The Court was of the opinion that this provision requires the legislator to provide for these guarantees.

The Court stated that the independence of judges means, on the one hand, a privilege for each judge, which is necessary in order for them to perform the duties expected of them, but on the other hand, it also serves the interest of all those who count on the fairness of the administration of justice. The Court referred to Article 6.1 of the European Charter on the Statute for Judges which provides that judges are entitled to a fixed remuneration in order to shield them from pressures that might influence their decisions or judicial comportment, thereby impairing their independence and impartiality. The Court took the view that a sufficient salary as a guarantee for the independence of judges is within the sphere of protection of Articles 15, 146 and 147.4 of the Constitution. The Court noted that the Constitution does not allow for a conclusion that guarantees of judicial independence do not apply during suspension from judicial duties.

At the same time, the Court was of the opinion that the salary should be in correlation with the actual work contribution of the judge. Entitlement of a suspended judge to full salary would not be justified. By comparison, during the hearing of a disciplinary matter it is possible to reduce the salary of a judge who is removed from service by up to 50 %. The Court deemed that an excessive reduction of salary can be regarded, inter alia, as an infringement bordering on the violation of the presumption of innocence. Nonetheless, a salary reduction of up to one half would not be unreasonable.

The Court declared unconstitutional the failure to pass legislation which would allow for the payment of salary or other equivalent compensation to a judge who had been suspended from duties whilst criminal proceedings took place.

The Court upheld the appeal in cassation of AŠ, overturned the previous judgments and handed down a new judgment, satisfying in part the action of AŠ. The Ministry of Justice was ordered to pay AŠ 50% of his salary and additional remuneration, for the period of the suspension of judicial duties during criminal proceedings.

Supplementary information:

Five of the seventeen judges delivered three dissenting opinions to the judgment.

Justices Pöld, Järvesaar and Laarmaa contended that the Supreme Court should have discerned salary as an element of service relationship and salary as a guarantee of the judges' independence in the interests of parties to proceedings. The European Charter on the Statute for Judges could not be used to justify the payment of a salary to a judge removed from office for the duration of criminal proceedings. On the abstract level, anybody removed from office for the duration of criminal proceedings who is in need as a result is entitled to claim state assistance. Failure to pass such legislation is unconstitutional. But in this case, within concrete norm control, the court could not have formed an opinion on the constitutionality of the lack of legal regulation.

Justice Tampuu argued that, by analogy, Article 95.4 of the Courts Act establishing the possibility to reduce judge's salary during the hearing of a disciplinary matter, should have been used to resolve the issue now before the court.

Justice Kivi did not agree with the part of the judgment whereby the Court required the Ministry of Justice to pay AŠ 50 % of his salary and additional remuneration for the period of the suspension of his duties due to criminal proceedings. In so doing, the Court assumed the role of legislator and chose, instead of the parliament, a possible solution having found an unconstitutional legislative omission.

Languages:

Estonian, English.



Georgia

Constitutional Court

Important decisions

Identification: GEO-2009-1-001

a) Georgia / **b)** Constitutional Court / **c)** First Chamber / **d)** 15.12.2006 / **e)** 1/3/393/397 / **f)** Citizens of Georgia – Ivane Masurashvili and Vakhtang Mebonia v. the Parliament of Georgia / **g)** *Sakartvelos Respublika* (Official Gazette) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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:

Contempt of court.

Headnotes:

The possibility of issuing orders for arrest for showing gross and manifest disrespect for the Court established in the Criminal and Civil Procedure Codes violates the right to a fair trial.

Summary:

The claimants were Georgian lawyers who were charged with showing gross and manifest disrespect for the Court. They challenged the constitutionality of Article 208.6.7 of Criminal Procedure Code and Article 212.5.6 of Civil Procedure Code.

These particular rules allowed the presiding judge or chairman of a court to order the imposition of thirty days arrest for those showing gross and manifest disrespect for the Court. Any such orders could only be made after a court hearing, and the chairman of the Court in these proceedings had been issuing orders for arrest without holding oral hearings. The orders were final and not subject to challenge. The claimants argued that judges issuing orders for arrest as punishment for gross and manifest disrespect for court were acting as victims, prosecutors and arbitrators and could not therefore be perceived as

impartial. Another problem with the orders was that they were issued without oral hearing, so that those on the “receiving end” had no possibility of defending themselves, either in person or through legal counsel. This cast doubt over the compatibility of this procedure with the right to defence enshrined in Articles 18.1 and 42.1.3 of the Constitution. Moreover, the restrictions on the possibility of challenges to the order potentially ran counter to the right to a fair trial.

The Constitutional Court declared that the guiding principle for assessing the constitutionality of the above normative acts was the principle of proportionality, which gave the Constitutional Court the criteria to determine whether the restriction of human rights was proportional and thus constitutional. This was the first judgment, where the Constitutional Court identified the proportionality principle and expressly engaged in a balancing exercise based on it.

The Constitutional Court adopted the autonomous concept of the “criminal charge” adhered to by the European Court of Human Rights in respect of fair trial rights. It found that arrest for showing gross and manifest disrespect for court fell within the definition of “criminal proceedings” for the purposes of Article 42 of the Constitution in view of the severity and length of the sanction (thirty days). Subsequently, the Constitutional Court found that an indictment with gross and manifest disrespect for court after deliberations in the courtroom in one case and without an oral hearing in the other restricted the persons concerned from attending the proceedings and presenting their arguments to the Court. The Court also interpreted the right to defence as a guarantee not only of the right to have legal counsel physically present, but also to be provided with adequate conditions for preparing one’s defence, including a reasonable amount of time to defend oneself in person or through legal counsel.

As for the fact that decisions imposing arrest in these circumstances were not open to challenge, the Constitutional Court stated that such a restriction violated both the right to liberty and security enshrined in Article 18 of the Constitution and the right to fair trial enshrined in Article 42.1. The restriction on challenges to decisions, so that they were made after deliberations in the courtroom or without oral hearings, and without having secured the due conditions for preparation of defence, was not proportionate to the legitimate aim of securing the authority of the judiciary. These restrictions accordingly breached the rights to liberty and fair trial.

The members of the First Chamber of the Constitutional Court were divided over the issue as to whether the judge or judges in contempt of court cases could be described as partial simply because the object of the disrespect and criticism expressed by the potential offender might be a judge. Two Judges of the Chamber pointed out that the existence of bias and partiality was usually determined by the facts of each given case and the personal qualities of the judge; the problem was not limited to contempt matters. The duty of self-disqualification exists in order to prevent biased judges from trying cases. It is always applicable to judges, including those involved in this type of case. A strong recommendation was made for separate regulation of cases of gross and manifest disrespect addressed to a judge and the rules related to disqualification and self-disqualification in this case. The other two Judges of the First Chamber considered that the manner of making the resolution and its immediate implementation presented the normative basis for presuming partiality on the part of the Court. This problem could not be addressed by introducing the right to challenge a decision imposing arrest. Where the opinions of judges are equally split, the constitutional claim is presumed not to be upheld.

Languages:

English.



Identification: GEO-2009-1-002

a) Georgia / **b)** Constitutional Court / **c)** Second Chamber / **d)** 18.05.2007 / **e)** 2/1/370, 382, 390, 402, 405 / **f)** Citizens of Georgia – Zaur Elashvili, Suliko Mashia, Rusudan Gogia and Others and Public Defender of Georgia v. The Parliament of Georgia / **g)** *Sakartvelos Respublika* (Official Gazette) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Property, deprivation / Shareholder, right.

Headnotes:

The rights of minority shareholders, whose shares were acquired for an equitable price by majority shareholders, are not automatically considered to be violated. Corporate relations are “asymmetric” by nature; particularly in capital-based companies. The nature of corporate relationships determines differentiation of the rights, obligations and liabilities of the participants on the ground of their stockholding in a company. This is the basic principle of a joint stock company; individuals are informed about it before they enter into such transactions. Thus, differentiation of the rights and duties of parties within joint stock companies cannot be considered as differential treatment of analogous situations and unequal approach to essentially analogous subjects.

Summary:

The Constitutional Court was asked to determine whether the rule of the Law on Entrepreneurs (Article 53³) authorising a majority stockholder owning 95 % of stocks in a joint stock company to acquire 5 % of the voting stock for an equitable price (compulsory sale of stocks of minority stockholder), represented restriction or deprivation of property for the purposes of Article 21 of the Constitution and whether it met the constitutional criteria for either restriction or deprivation of property.

The claimants, minority shareholders of four Georgian joint stock companies and the Public Defender considered the impugned norm to be unconstitutional, as both Article 21.2 and Article 21.3 refer to pressing social need as the condition for restriction of the right, whereas in the given case, the decisive factor was not social need, but rather the whim of the majority stockholder to own all the stocks of the company. Several claimants argued that the above rule should be qualified as expropriation for the purposes of Article 21.3, as the state had interfered in private relationships, though it did not directly deprive the minority stockholder of his property. The representative of the Public Defender took the view that the rule fell within the scope of Article 21.2, as in this case the state did not deprive the stockholder of his actual property, as would be the case in expropriation, but merely restricted one component of the right to property – disposal. All the complainants acknowledged that there was a vague legitimate aim for the impugned rule – the attraction of investments – and that the squeeze-out of minority stockholders

was not necessary in order to achieve the named aim. One of the claimants asserted that Article 53³ of the Law on Entrepreneurs violated Article 14 of the Constitution. A minority stockholder was placed on an unequal footing by comparison with a majority stockholder, simply because of his modest holding, thereby conferring advantage on the grounds of property.

The Court drew a distinction between the institution of compulsory sale of stocks and its procedure incorporated in legislation. It considered the possibility of assessing the constitutionality of Article 53³ of the Law on Entrepreneurs in respect of Article 14 of the Constitution of the Democratic Republic of 1921, which regulated the issues related to expropriation of the property. The Court decided that the Preamble of the 1995 Constitution refers to the basic principles, rather than specific norms of the 1921 Constitution and reference was made, along with the “centuries-old” traditions of the Statehood of the Georgian Nation.

The Constitutional Court then considered whether the challenged rule fell within the scope of expropriation of property (Article 21.3) or restriction of property (Article 21.2). The Court observed that expropriation does not encompass every case where somebody is deprived of their property against their will. Expropriation is characterised by direct or indirect participation of the state in a particular process of deprivation; the state does not circumscribe itself with mere determination of the legal regime for deprivation of property. In cases of compulsory sale of stocks, the state, (the legislative branch) determined the legal regime, but was not a participant in the relationship. As a result, although minority shareholders lost the ownership of their shares, the relationships regulated in Article 53³ of the Law on Entrepreneurs may not be considered as expropriation. At the same time, the Court stressed that the term “restriction” in Article 21.2 of the Constitution should not be understood literally, as merely describing negative interference by the state.

The Court examined the procedure of compulsory sale of stocks of minority stockholders in order to determine whether the legislator managed to strike a fair balance between the interests of private persons and the general public. It ascertained that minority shareholders were merely informed by letter about the transfer of their stock into the ownership of majority shareholders.

The second difficulty with the rule under dispute was the determination of an equitable price for the stocks of minority stockholders. Where an equitable price was determined by the charter of the joint stock

Company, and not by independent experts or brokerage companies, minority stockholders were deprived of the chance to challenge the price before the Court.

Dealing with the question of the rule’s compatibility with the principle of equality before the law and entrenched differentiated treatment on the ground of property, the Court stated that, by their nature, corporate relations are asymmetric relationships, particularly in capital-based companies. The nature of corporate relationships determines differentiation of the rights, obligations and liabilities of the participants on the ground of their stockholding in a company. This is the basic principle of a joint stock company, about which individuals are informed before they enter into such transactions. Thus, differentiation of the rights and duties of parties within joint stock companies cannot be considered as differential treatment of analogous situations and unequal approach to essentially analogous subjects.

The Court therefore declared Article 53³ of the Law on Entrepreneurs unconstitutional, on the grounds of its incompatibility with Article 21.1 and 21.2 of the Constitution. The Court rejected the claim that Article 53³ of the Law on Entrepreneurs violated principle of equality before the law entrenched in Article 14 of the Constitution.

Languages:

English.



Identification: GEO-2009-1-003

a) Georgia / **b)** Constitutional Court / **c)** First Chamber / **d)** 02.07.2007 / **e)** 1/2/384 / **f)** Citizens of Georgia – Davit Jimsheleishvili, Taniel Gvetadze and Neli Dalalishvili v. The Parliament of Georgia / **g)** *Sakartvelos Respublika* (Official Gazette) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Expropriation, compensation.

Headnotes:

The right to property is not absolute. The legislator cannot ignore the social function of property as the task, position, role and significance of property can be identified through this function. The Constitution has achieved a balance between private and public interests so that in cases of conflict of interests the public interest will prevail, and owners must tolerate certain interference with their property.

Summary:

The claimants entrusted various goods, costing 537 947 GEL to a shipping company in Turkey. Having received this payment, the shipping company undertook to import the goods to Georgia. While crossing the border a driver committed a crime envisaged by Article 214.2 of the Criminal Code of Georgia. Consequently, under Article 52.2 of the Criminal Code of Georgia, the object of the crime being in the legal possession of the driver was confiscated together with the various goods valued at 537 947 GEL in the ownership of the applicants. No compensation was paid.

Under Article 21.1 of the Constitution, “property... is recognised and guaranteed.” Furthermore, guaranteeing property does not only cover the right to protect oneself against the state; it also places the state under a duty to protect this right, primarily by incorporating the regulation of the content of property in legislation in conformity with the constitutional stipulations.

The right to property is not absolute. The legislator cannot ignore the social function of property as the task, position, role and significance of property can be identified through this function. The Constitution has achieved a balance between private and public interests so that in cases of conflict of interests the public interest will prevail, and owners must tolerate certain interference with their property. The Constitution provided this balance in Article 21.2 and 21.3, under which interference with property by the state in the form of restricting or expropriating property is permissible only when there appears to be pressing social need. It is not acceptable to introduce stricter limitations than those that are required by certain pressing social need. The legislature must balance both requirements through the proportionality principle.

There is no definition of pressing social need. This is an abstract legal term which acquires a different essence at different times and in different historical periods. Under the Constitution of Georgia, only the legislature is vested with the power to determine what the pressing social need is. However, the legislature does not enjoy absolute discretion in determining the essence of this concept. Article 2.2 of the Law on the Procedure for Expropriation of Property in the Interests of Pressing Social Need and Article 2 of the Organic Law on the Procedure for Expropriation of Property in a State of Emergency in the Interests of Public Need provide an exhaustive enumeration of cases of necessary public need when the expropriation of property is permissible.

Under the impugned rule, where property is confiscated when in the lawful possession of the suspect, the defendant and the convicted are in this position due to certain public need since the object, the means of crime or the item intended for the commission of crime poses a threat to state and public interests. The ownership of the property, whether it be the suspect, the defendant, the convicted person or a third party – is irrelevant.

Generally, there is a very close link between the right to fair trial and full enjoyment of the right to property together with all other rights and their effective protection. This means that the legislator must provide owners with all necessary possibilities and adequate procedures in order to protect their property rights. Owners do have the opportunity of redressing their rights through civil law procedures, but they must be able to examine whether a decision to confiscate their property is well-founded and complies with legislative and constitutional requirements.

The facts of the present case presented no problems over the compliance of the impugned rule with Article 21 of the Constitution. Nonetheless, detailed analysis of its content indicated a need for certain refinements. The Court found that the rules governing decision-making on confiscation as an extra sentence were vague and procedurally flawed. The claim was dismissed, but the Court referred the matter to the legislature with the suggestion that the rule be refined according to the directives of the constitutional principles.

Languages:

English.



Identification: GEO-2009-1-004

a) Georgia / **b)** Constitutional Court / **c)** First Chamber / **d)** 27.12.2007 / **e)** 1/3/407 / **f)** Georgian Young Lawyers Association and citizen of Georgia – Ekaterine Lomtadze v. the Parliament of Georgia / **g)** *Sakartvelos Respublika* (Official Gazette) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Norm, interpretation, ambiguity.

Headnotes:

A norm can only be deemed unconstitutional if one of its interpretations could give rise to a threat of a violation of a constitutionally entrenched right.

Summary:

The claimants disputed the constitutionality of the first sentence of Article 9.2 of the Law on Operative-Investigatory Activity, pursuant to which “undertaking of such an operative-investigatory activity which limits legally protected confidentiality of communication through telephone or through other technical means, is allowed only by the order of a judge and by the resolution of a prosecutor, or on the basis of a written application of a person, who is a victim of illegal conduct, or if there is data of an illegal conduct, for which criminal code establishes imprisonment for not less than 2 years”. According to the constitutional claim, the mentioned norm is incompatible with Article 20 of the Constitution, pursuant to which “Everyone’s private life, place of personal activity, personal records, correspondence, communication by telephone or other technical means, as well as messages received through technical means shall be inviolable. Restriction of the aforementioned rights shall be permissible by a court decision or also

without such a decision in the case of an urgent necessity provided for by the law.”

The claimants suggested that the norm under dispute could allow for different interpretations. The conditions, following the conjunction “or”, could each be applied cumulatively with the first condition of the same norm or as independent alternatives. In the claimants’ view, two possible interpretations of a norm may indicate that the norm is vague, but that does not necessarily mean that it is unconstitutional. A norm can only be deemed unconstitutional if one of its interpretations could give rise to a threat of a violation of a constitutionally entrenched right. Problems of vagueness should be resolved through interpretation, but the obligation of faithful interpretation is an insufficient guarantee for the protection of a right. The claimants pointed out that the problem with the vagueness of this particular norm could not be resolved by reading it in conjunction with other norms of the law.

The Court decided that the legislator is, as a general rule, under a duty to pass legislation that is foreseeable and unambiguous. The legislator’s work product can only be deemed to be the law if it satisfies quality requirements of law. The latter implies that the law should be compatible with the principle of the rule of law and legal certainty. The quality of a law requires that legislative regulation is so clear that an individual, whose rights are interfered with, could comprehend his or her legal situation and act accordingly.

In the present case, the Constitutional Court had to consider whether the norm was of sufficient certainty to rule out any possibility of violation of constitutional right. Obviously, this does not concern cases where constitutional rights have been breached due to illegal acts. The examination of such issues is outside the competence of the Constitutional Court. The deciding factor is whether a norm, read and applied adequately to its texts and contents, could give rise to a risk of violation of a constitutional right.

Included within the accuracy, foreseeability and accessibility of a law is another essential condition, that the scope of permissible action by authorities to interfere with the right must be specific and clear. This requirement is necessary for limiting and controlling the authority to interfere. In order a law to be compatible with the principle of rule of law, it should ensure effective protection of the right against arbitrary interference by the state. This primarily means that the law itself should clearly and in sufficient detail define the powers of public authorities in this sphere. The legislation should not allow the public authority itself to define the scope of its

permissible actions. If the person responsible for the interference in the right does not know clearly and accurately the scope of his or her authority, the risk of exaggerated interference and also the temptation to abuse the power will rise. To ensure the realisation of a state authority within the confines set by the Constitution, the norm should be sufficiently clear to rule out any subjective interpretation and application.

Foreseeability is also important for timely and effective judicial review. Citizens should know in what circumstances and on the basis of what grounds their rights may be impinged upon. They should be able to enjoy the right to apply to the Court, which has a decisive importance for full protection of the right. Therefore, the following legal guarantee is very important: pursuant to Article 6.2 of the Law on Operative-Investigatory Activity, "person, who thinks that as a result of an action of the operative-investigatory body his/her rights and freedoms have been violated, can appeal lawfulness of such an action to the higher state body, to the prosecutor or to the Court".

If the law lacks sufficient clarity, it will not be possible to foresee what is deemed unlawful and the right to access to the Court will also be fragile.

The Court established that there were several reasonable interpretations of the norm. Therefore, it did not comply with the requirements of transparency and accessibility and, through its reasonable interpretation using legal methodology, one version of its meaning was not compatible with the Constitution. In particular the disputed word "or", which causes problems with the norm, resulted in non compliance with the requirements of the principles of foreseeability and legal certainty and was accordingly incompatible with Article 20.1 of the Constitution.

Languages:

English.



Germany

Federal Constitutional Court

Important decisions

Identification: GER-2009-1-001

a) Germany / **b)** Federal Constitutional Court / **c)** Third Chamber of the First Panel / **d)** 05.02.2002 / **e)** 1 BvR 2029/00 / **f)** / **g)** / **h)** *Neue Juristische Wochenschrift* 2002, 1863-1864; *Zeitschrift für das gesamte Familienrecht* 2002, 809-810; *Forum Familien- und Erbrecht* 2002, 92-93; *Familie-Partnerschaft-Recht* 2002, 265; *Zentralblatt für Jugendrecht* 2002, 349-350; *Familie und Recht* 2002, 414-415; CODICES (German).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Child, custody, parental / Parent, non-custodial, contact / Parent, non-custodial, contact, arrangement / Child, best interests / Parent, non-custodial, contact, *de facto* hindrance.

Headnotes:

If the parents are unable to agree upon the exercise of the rights of access, the courts must reach a decision which takes into account both of the parents' fundamental rights as well as the child's well-being and his or her individuality as the subject of fundamental rights.

Summary:

I. The complainant is the father of two children who were born in 1991 and 1993. In 1995 the complainant's wife moved out of the family home in Berlin and since then has lived in Munich. The complainant and his wife were divorced and the wife was granted sole custody of the children.

In 2000, the competent Family Court granted the complainant's application to have the existing access arrangements changed and made an order requiring his ex-wife to bring the children to the Munich airport and pick them up from there if the complainant wished to transport them by air and had given notice of this at least one week in advance. The Court found this arrangement to be practicable and in the best interests of the children. The relatively small additional burden to the mother was reasonable.

The ex-wife complained to the court of appeal, which overturned the decision. Its reasoning was essentially that the order made against the ex-wife should not have been made since there was no statutory basis for it. In its view, there is no provision under prevailing law which requires a mother who has custody to provide services at her own expense so as to relieve the financial burden on a father with access rights.

Thereafter the complainant lodged a constitutional complaint alleging a violation of Article 3 of the Basic Law (equality before the law), Article 6 of the Basic Law (protection of marriage and the family), Article 101 of the Basic Law (right to one's lawful judge) and Article 103.1 of the Basic Law (right to a hearing in court).

He claimed that by moving to Munich, the children's mother had made it extremely difficult for him to exercise his rights of access. Her bringing the children to the airport and picking them up again would reduce the strain of travelling on the children and improve the predictability and reliability of their arrival and departure times. He further claimed that the custodial parent has a duty to take an active part in enabling the other parent to have access to the children and that accordingly an obligation to hand over the children at the airport could be imposed on the mother. In his view the court of appeal had based its decision simply on the question of the financing of the costs associated with access and the fact that these could not be imposed on the mother.

II. The Third Chamber of the First Panel admitted the constitutional complaint for decision and found that there had been a violation of the complainant's fundamental rights under Article 6.2 of the Basic Law:

1. The protection of Article 6.2.1 of the Basic Law extends just as much to the access rights of the non-custodial parent as it does to the parental custody of the custodial parent. Both legal positions arise from the natural rights of parents and the associated responsibility; they must be respected by both parents in their treatment of each other. Accordingly, the custodial parent must in principle enable the child to have personal access to the other parent. If the

parents are unable to agree upon the exercise of the rights of access, the courts must reach a decision which takes into account both of the parents' fundamental rights as well as the child's well-being and his or her individuality as the subject of fundamental rights.

In this context, they are also bound to consider whether the specific access arrangement in an individual case makes access for the non-custodial parent so unreasonable that it is *de facto* impossible. This can be the case especially where as a result of the parents' living in different locations rights of access can only be exercised with the expenditure of considerable time and money. In these cases the courts are bound to examine whether the custodial parent should be obliged to share in the organisational tasks and the time involved in the logistics of bringing and fetching the children so that the other parent can exercise his or her rights of access and thus prevent the *de facto* hindrance of the exercise of these rights.

Judged by these standards, the challenged decision of the Higher Regional Court (*Oberlandesgericht*) is not in conformity with Article 6.2 of the Basic Law. In particular, the challenged decision fails to tackle the problem of rights of access being made *de facto* impossible. The Higher Regional Court rejected the application by the complainant to have the mother ordered to bring the children to the airport and pick them up again, which the court of first instance had granted, simply by pointing out that there was no legal foundation for the order. However, in view of the complainant's submissions and the significant distance between the parents' residences, the Higher Regional Court should have examined whether the complainant's exercise of his rights of access were made *de facto* impossible or made unreasonably difficult to exercise by his being forced to collect the children from their mother's home and return them to it even when he was travelling by airplane.

Languages:

German.



Identification: GER-2009-1-002

a) Germany / b) Federal Constitutional Court / c) Third Chamber of the Second Panel / d) 24.03.2002 / e) 2 BvR 2175/01 / f) / g) / h) *Deutsches Verwaltungsblatt* 2002, 836-838; *Neue Juristische Wochenschrift* 2002, 2023-2025; *Der Strafverteidiger* 2002, 374-376; *Neue Zeitschrift für Strafrecht* 2003, 109-111; CODICES (German).

Keywords of the systematic thesaurus:

3.19 General Principles – **Margin of appreciation.**
 3.20 General Principles – **Reasonableness.**
 5.3.1 Fundamental Rights – Civil and political rights – **Right to dignity.**
 5.4.5 Fundamental Rights – Economic, social and cultural rights – **Freedom to work for remuneration.**

Keywords of the alphabetical index:

Prisoner, remuneration for work / Prison, compulsory labour / Prisoner, rehabilitation.

Headnotes:

Regarding the requirements deriving from the rehabilitation principle as far as the amount of remuneration a prisoner should receive is concerned. [Official headnotes]

The Federal Constitutional Court only has limited powers to review decisions by Parliament on questions of how and to what extent the compulsory labour of prisoners should be remunerated.

It is not the task of the Federal Constitutional Court to decide whether it is necessary from the point of view of prison policy to increase the amount of work remuneration. Instead, Parliament is entitled, under the Basic Law, to a wide organisational discretion with regards to developing an effective concept for fixing the remuneration of prisoners.

The exercise of its discretion is restricted by the lower productivity rate of prisoners and the overall economic situation in the labour market, which is characterised by high unemployment and a high national debt. If there were a threat that operations run by penal institutions for prisoners would be closed down due to sinking productivity as a result of the discrepancy between wage costs and returns, this would run counter to the concept of rehabilitation through work.

The amount of work remuneration will only then be constitutionally objectionable if – together with the

other advantages granted in relation to prisoner work – it is not suitable for convincing prisoners at the minimum level required that paid work is useful for establishing a basis for life. [Unofficial headnotes]

Summary:

I. According to the provisions of the *Strafvollzugsgesetz* (StVollzG, Treatment of Offenders Act) prisoners are entitled to be paid remuneration for compulsory labour carried out by them while in jail (§ 43 of the Treatment of Offenders Act). The starting point for calculating the remuneration is the average amount paid by the state old age insurance in the year prior to the previous calendar year. Five percent of the amount of social insurance payment is used as the annual average earning for the calculation of the average daily rate (1/250th of the average annual earnings). As a result, a prisoner's average monthly wage in 1995 was approximately DM 250 (State of Baden-Württemberg).

As a result of several constitutional complaints made by prisoners, the Federal Constitutional Court already had determined (decision of 1 July 1998) that the fixation of the minimum salary at five percent of the social insurance amount applicable at that time was not in conformity with the constitutional rehabilitation principle.

Thereupon Parliament passed several new regulations in an amending law. Among other things, the amount used for calculating the minimum salary should be increased from five percent to nine percent and prisoners should be offered the opportunity of working as a way of shortening the period of their incarceration or of obtaining other advantages during their prison term.

The complainant in the present case is serving a total prison sentence of 15 years with an extended term of imprisonment thereafter. He has been working in the prison kitchen since 5 June 2000. He is of the view that his remuneration does not meet the constitutional requirements even after the introduction of the new statutory regulations.

After exhausting his appeals to the ordinary courts, he lodged a constitutional complaint and alleged a violation of his rights under Article 2.1 in conjunction with Article 1.1 and Article 20.1 of the Basic Law.

II. The Third Chamber of the Second Panel regarded the constitutional complaint as unfounded: the Court stated that the challenged decisions were not open to objection under constitutional law and the provisions of the Treatment of Offenders Act directly challenged regarding the remuneration of prisoners were indeed constitutional.

The new regulations still conform to the constitutional rehabilitation principle.

This is all the more so considering that – in addition to the regulations on the remuneration of prisoners – the regulations which have special significance are those making early release dependent on work. The prospect of early release is of such great value to a prisoner that it is suitable as a means of remuneration for implementing the rehabilitation principle.

At the same time, the upper limit for the level of remuneration permissible under the Basic Law will still not be exceeded by a moderate increase in the amount of existing additional expenses, which represents a considerable improvement for the prisoners (nominal increase of the remuneration amount by 80%).

However, the Federal Constitutional Court urged Parliament not to fix the amount of the financial remuneration and the length of the early release to be expected. Instead, it must constantly review the framework conditions applicable for the remuneration of prisoners – particularly in view of the continually changing economic situation.

Cross-references:

The decision of 01.07.1998, to which reference is made (nos. 2 BvR 441/90, 493/90, 618/92, 212/93, 2 BvL 17/94) is printed in volume 98, pp. 169 *et seq.*, of the Official Digest.

Languages:

German.



Identification: GER-2009-1-003

a) Germany / **b)** Federal Constitutional Court / **c)** First Chamber of the First Panel / **d)** 17.06.2002 / **e)** 1 BvR 1594/99 / **f)** / **g)** / **h)** *Veröffentlichungen der Kultusministerkonferenz-HSchR/NF* 11E no. 16; *Deutsches Verwaltungsblatt* 2002, 1403-1404; *Zeitschrift für das gesamte Familienrecht* 2002, 1463-1464; *Neue Zeitschrift für Verwaltungsrecht – Rechtsprechungsreport* 2002, 838-839; *Sofortinformation zur Entscheidungssammlung zum Familienrecht* 2002, 306-307; CODICES (German).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.

5.2 Fundamental Rights – **Equality**.

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

Keywords of the alphabetical index:

Education, promotion, concept / Education, financing, loan / Good faith, protection.

Headnotes:

Parliament can amend an existing concept to promote education if the resulting disadvantages incurred by students are justified by important reasons related to the public good.

Summary:

I. The *Bundesausbildungsförderungsgesetz* (BAFöG, Federal Act concerning the Promotion of Education) contains – in addition to a provision for financing the promotion of studies for a standard maximum period – a provision for financing the promotion to complete a course of study. According to the Act, students at universities and colleges may receive, under certain circumstances, financing for their education for a maximum period of twelve months after the end of the standard maximum period for which financing is available.

As a matter of principle, one half of the financing is a grant and the other half is a loan. At the same time under the *Achtzehnte Gesetz zur Änderung des Bundesausbildungsförderungsgesetzes* (18. BAFöGÄndG, Eighteenth Act to Amend the Federal Act Concerning the Promotion of Education) financing for education will be paid in the form of an interest-bearing bank loan if the standard maximum period for which financing is available is exceeded.

The complainant had received financing for her education to commence university studies in the summer semester of 1992, half in the form of a grant and half in the form of an interest-bearing loan pursuant to the Federal Act Concerning the Promotion of Education. She was granted financing to promote the completion of her course of studies between October 1996 and September 1997, following the entry into force of the applicable legislation – the Eighteenth Act to Amend the Federal Act Concerning the Promotion of Education.

After she was served with the relevant notification, the complainant attempted in vain to continue to obtain financing for her education, half in the form of a grant and half in the form of a loan, through recourse to the administrative courts.

In the present constitutional complaint, the student directly contests the decisions of the administrative courts and indirectly challenges Article 17.3 (1) number 3 and Article 18c of the Federal Act Concerning the Promotion of Education in the version of the Eighteenth Act to Amend the Federal Act Concerning the Promotion of Education. On the one hand, she considers the introduction of an interest-bearing loan as an additional form of subsidy as a violation of the legal protection of persons relying on the principle of good faith. On the other hand, she alleges a violation of her fundamental rights under Article 3.1 of the Basic Law.

II. The First Chamber of the First Panel rejected the constitutional complaint because it was unlikely to succeed.

No objections can be made under constitutional law to making available the financing of studies only as an interest-bearing loan. There are sufficient reasons relating to the public good such as the desirability of justly distributing funds to finance education which justify changing the promotion concept. A shift in the use of public monies in favour of the promotion of studies during the standard period for which financing is available does not amount to a violation of the legal protection of persons relying on the principle of good faith.

The complainant's interest in the retention of the previous half-grant/half interest-free loan type of financing for education after the expiry of the maximum study period is secondary to the public interest which caused Parliament to immediately change the type of financing. Financing for education at the expiration of the standard maximum period for which financing is available is right from the start more likely to be subject to statutory restrictions than financing during the standard maximum study period, since it can be seen as a form of "additional benefit". The only reliance protected, if at all, is the reliance of students that they will still receive financing for their education which will enable them to finish their studies without any significant reduction in the monthly sum of money available to them. The level of promotion was not reduced, thus the new statutory regulation did not directly worsen the position of the claimant. Any more far-reaching reliance on a certain kind of promotion or its taking a certain legal form does not enjoy any protection under the Constitution.

Languages:

German.



Identification: GER-2009-1-004

a) Germany / b) Federal Constitutional Court / c) First Panel / d) 26.06.2002 / e) 1 BvR 558/91, 1 BvR 1428/91 / f) Glycol Warning / g) *Entscheidungen des Bundesverfassungsgerichts* (Official Digest) 105, 252-279 / h) *Neue Juristische Wochenschrift* 2002, 2621-2625; *Neue Landwirtschaft-Briefe zum Agrarrecht* 2002, 394-395; *Umwelt- und Planungsrecht* 2002, 383-387; *Deutsches Verwaltungsblatt* 2002, 1358-1362; *Gewerbearchiv* 2002, 415-419; *Europäische Grundrechte Zeitschrift* 2002, 458-466; *Zeitschrift für Umweltrecht* 2003, 37-42; *Zeitschrift für das gesamte Lebensmittelrecht* 2002, 614-631; *Juristenzeitung* 2003, 307-310; *Sammlung lebensmittelrechtlicher Entscheidungen* 44, 18-30; CODICES (German).

Keywords of the systematic thesaurus:

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

5.4.6 Fundamental Rights – Economic, social and cultural rights – **Commercial and industrial freedom.**

5.4.7 Fundamental Rights – Economic, social and cultural rights – **Consumer protection.**

Keywords of the alphabetical index:

Government, duty to direct the state / Government, duty to provide information / Information, market-related, provision by the state.

Headnotes:

Federal Government, duty to direct the state / Federal Government duty to provide information / Market-related information, provision by the State. [Official headnotes]

A firm active in a market will be subject to criticism in respect of the quality of its products and it will have to accept the effects of such criticisms on its position in the market place. Article 12.1 of the Basic Law does

not grant a firm the right only to be depicted by others as it wishes to be seen or as it sees itself and its products.

Article 12.1 of the Basic Law does not protect market participants against the dissemination of accurate information in the market place as long as the information simply states facts. The state may also disseminate market-related information. The legal system aims to encourage market transparency in that it is orientated towards the existence of a high degree of market-relevant information.

Because it is the federal government's duty to direct the state, it is justified in providing information wherever it has federative responsibility which can be fulfilled with the help of the information. [Unofficial headnotes]

Summary:

I. In spring 1985, it became known that wines were being sold in the Federal Republic of Germany, which had been mixed with diethylenglycol (DEG) – a substance normally used as an antifreeze and as a chemical solvent.

The events became known as the "Glycol scandal" and were the subject of numerous press reports. After May 1985 they were the subject of debates held in the German Bundestag (parliament) and by various specially-appointed committees. There was a considerable degree of anxiety among the population – particularly since the wines which had been mixed with DEG and the health consequences of drinking such wine were not exactly known. Uncertainty among the population led to a massive decline in wine consumption – especially of Austrian and German wines. It was feared that the livelihood of the firms in the wine industry were threatened. It was against this background that the *Bundesministerium für Jugend, Familie und Gesundheit* (Federal Ministry for Youth, Family Affairs and Health) published a list at the end of July 1985 entitled "*Vorläufige Gesamt-Liste der Weine und anderer Erzeugnisse, in denen Diethylenglykol (DEG) in der Bundesrepublik Deutschland festgestellt worden ist*" (Provisional General List of Wines and other Products which have been found to contain Diethylenglycol (DEG) in the Federal Republic of Germany). The last time the list was updated was on 17 December 1985. On page 1 of the list, there was the following information under the caption "Important Advice":

"The results listed refer only to the wines examined. Thus, it is possible that there is wine on the market with the same description and appearance from the same bottler, which is not mixed with diethylenglycol.

One may not draw the conclusion from the inclusion of a series number for the German wines listed that all of the wines of that series contain diethylenglycol. It is only if the name of the bottler and the official examination number given in the list appear on the label in addition to the series number that diethylenglycol was found to be present when the wine was examined. The names of the bottlers are only stated in this list in order to enable consumers to identify the contaminated wine."

The list was published and anyone could request a copy.

Thereafter, several wineries challenged the publication of the so-called "Glycol Wine List" and requested the deletion of their firms' name from the list of wines concerned.

After unsuccessful recourse to the administrative courts, the bottling firms lodged a constitutional complaint and alleged an infringement of Articles 12 and 14 of the Basic Law.

II. The First Panel remanded the constitutional complaint and confirmed that the state is permitted to provide information for consumers. In giving reasons for its decision, the Panel commented, in particular, on the scope of the occupational freedom contained in Article 12.1 of the Basic Law and the Government's provision of information. The Panel stated essentially the following:

1. The protection of the occupational freedom of firms is also influenced by the legal rules which permit and limit competition. The competitive position and, thus also the turnover of firms active in a particular market, are continually vulnerable to change depending on whatever the market conditions may be.

2. The accuracy of the information affecting competition is, as a rule, a prerequisite for promoting market transparency and thus the functioning of the market. If there are still doubts as to the accuracy of the information even after careful governmental investigation, market participants should be advised of this. Even if governmental information is accurate, it must be objective and may not be disparaging.

3. The government's task of directing the state also includes assisting in coping with conflicts within the state and society by the timely publication of information, reacting quickly and properly to crises and helping citizens to find their bearings. Present-day crises in the agricultural and food areas are good examples of the importance of government-authorised, publicly accessible information in coping with such situations.

In its provision of information, the federal government must respect the division of powers between the federation and the *Länder* (states). It is justified in disseminating information if the information covers events of national importance and the provision of such information nation-wide by the federal government would lead to better handling of the problem. Providing information in such a way does not exclude or impair the powers of the *Länder* governments to provide information nor does it prevent the administrative authorities from fulfilling their administrative duties.

4. In the specific case to be decided, the published list, which is the subject of the constitutional complaints, satisfies constitutional standards:

The statements contained in the list were accurate. The publication did not amount to an impairment of the occupational and professional freedom of the wineries. This also applies to the fact that they were identified by name.

The list was distributed for the purposes of coping with a crisis, in particular the restoration of faith in the national wine market. The information about the breach of quality requirements in the case of wines from certain places and bottlers created market transparency. It enabled suppliers and customers in the wine market to deal with an undesirable – perhaps even -dangerous situation in an informed and thus independent way. The list was a warning to consumers with respect to the wines containing glycol and provided them with an all-clear signal in the case of other wines. It was left up to market participants to choose how to react to the information.

The dissemination of information by the federal government did not prevent the *Länder* from disseminating additional information or adopting administrative measures to protect against risks.

Languages:

German.



Identification: GER-2009-1-005

a) Germany / **b)** Federal Constitutional Court / **c)** Third Chamber of the Second Panel / **d)** 04.07.2002 / **e)** 2 BvR 2168/00 / **f)** / **g)** / **h)** *Praxis Steuerstrafrecht (Beilage)* 2002, 196; *Deutsches Autorecht* 2002, 411-414; *Neue Juristische Wochenschrift* 2002, 3534-3535; *Zeitschrift für Wirtschafts- und Steuerstrafrecht* 2002, 417-420; *Computer und Recht* 2003, 28-30; CODICES (German).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Appeal, requirements, formal / Appeal, written form / Appeal, facsimile / Appeal, deadline / Appeal, signature, requirement, handwritten.

Headnotes:

The application of the relevant standards for the lodging of an appeal to be valid will be considered to be applied unreasonably if a court rejects an appeal sent by computer fax simply because it does not contain the sender's handwritten signature.

Summary:

I. On 11 July 2000, the competent *Amtsgericht* (Local Court) issued an order imposing summary punishment in respect of an environmental offence. The order contained instructions about the available remedies. On the last day for lodging an appeal, the complainant faxed the court a letter appealing against the order imposing summary punishment and stated, in his facsimile, that he was forwarding the court a registered letter containing the appeal on the same day. The facsimile bore the typewritten name of the complainant, but was not signed since the complainant had sent it directly from his computer to the Local Court without first printing a copy of it.

It was not until 31 July 2000 that the Court received another undated letter containing the appeal. Its content was identical to the content of the facsimile already received, but the letter was also signed by the complainant.

In an order dated 31 July 2000, the Local Court set down an oral hearing for 21 September 2000. At the oral hearing it made a declaration that the appeal lodged by facsimile had not been signed. Following a discussion of the legal prerequisites for an appeal, the complainant filed by way of precaution an application to have the case reinstated. He asserted in his application that both the letter received by the Local Court on 31 July 2000 and the form of the instructions about the available remedies, which did not state that a personal signature was necessary, indicated that there had been no fault on his part in (possibly) missing the deadline for lodging an objection.

The Local Court thereupon dismissed the objection as inadmissible. The facsimile did not comply with the requirements for the written form and the objection received four days later did not comply with the deadline for lodging an objection. The court elaborated by saying that the complainant had not been prevented from lodging an objection due to no fault of his own. As a result, the application for reinstatement was unsuccessful.

After his appeal to the *Landgericht* (Regional Court) was unsuccessful, the complainant lodged a constitutional complaint and argued that the court's interpretation of the requirements for the written form had deprived him of his right to a hearing in judicial proceedings and had denied him access to the courts.

II. The Third Chamber of the Second Panel overturned the decision of the Regional Court because it did not do justice to the meaning and scope of the constitutional guarantees of protection. The matter was remitted to the Regional Court for a decision on the complaint.

Pursuant to Article 19.4 of the Basic Law, a citizen has a real right to effective judicial control of the acts of public authorities. The right to a hearing in accordance with the law guarantees in addition the right to state one's case in judicial proceedings and to have it heard on the merits by a judge. However, neither of these two constitutional guarantees exclude the possibility that the codes of procedure might make the success of an application for legal protection depend on compliance with formal prerequisites.

This also applies to written form requirement for lodging an appeal contained in the *Strafprozessordnung* (StPO, Code of Criminal Procedure). It promotes legal certainty and does not unnecessarily burden the accused. At the same time, however, the courts must respect the rule of law principles governing the organisation of

proceedings when they interpret and apply rules of procedure. In doing so, they may not set any extravagant standards. In particular, when they are interpreting and applying rules of procedure they may not make the access provided for in such rules to different court levels more difficult in a manner which is unreasonable and unjustified.

The challenged decision does not meet the described standard: as a matter of principle, the written form requirements will be satisfied if a document is signed by hand by the sender. However, the requirements will not always be unfulfilled if the document is not signed by hand, but instead bears the typewritten name of the complainant.

The purpose of writing is to make the content of a declaration and the identity of its author sufficiently clear. Furthermore, it should ensure that the document is forwarded to the court with the knowledge and consent of its author. Based on the above, the case law of the *Bundesgerichtshof* (BGH, Federal Court of Justice) does not consider signature by hand an essential prerequisite for writing in criminal matters. Instead, the Federal Court of Justice waives the necessity for signature by hand when the identity of a document's author and the fact it is not merely a draft are otherwise perfectly apparent. The Federal Constitutional Court also wishes to follow the case law of the Federal Court of Justice.

In the case to be decided, the original court should have examined whether the objection raised in the facsimile stemmed from the sender named and had been put into circulation with his knowledge and consent. The information contained in the letter indicates that this was the case since, as a rule, such information could only have been known to the person concerned. In order to guarantee legal protection the original court should have examined the case on its own individual facts. However, it failed to do so. The only way the complainant could have obtained a proper hearing for the very first time in a trial was by lodging the objection.

Finally, the Federal Constitutional Court stated that the complainant should have had his case reinstated. The court of appeal had overextended the prerequisites for reinstating the case by expecting the complainant to find out for himself whether his actions were sufficient to meet the requirements of the German legal system.

Languages:

German.



Identification: GER-2009-1-006

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 17.07.2002 / **e)** 2 BvR 1027/02 / **f)** Seizure of computer files / **g)** *Entscheidungen des Bundesverfassungsgerichts* (Official Digest) 105, 365-373 / **h)** *Neue Juristische Wochenschrift* 2002, 2458-2459; *Praxis Steuerstrafrecht (Beilage)* 2002, 191; *Die Steuerberatung* 2002, 413-420; *Wirtschafts- und Steuerstrafrecht* 2002, 378-380; *Bundesrechtsanwaltskammer-Mitteilungen* 2002, 226-228; *Europäische Grundrechte Zeitschrift* 2002, 470-472; *Deutsches Steuerrecht Entscheidungsdienst* 2002, 1351-1352; *Kommunikation und Recht* 2002, 595-598; *Der Rechtsbeistand* 2002, 118-119; *Computer und Recht* 2003, 172-174; *Steuerrechtsprechung in Karteiform* AO 1977 § 395 R.5; CODICES (German).

Keywords of the systematic thesaurus:

3.17 General Principles – **Weighing of interests.**
5.3.42 Fundamental Rights – Civil and political rights
– **Rights in respect of taxation.**

Keywords of the alphabetical index:

Lawyer, professional secret / Lawyer, office, electronic data, seizure / Secrecy, obligation, observation / Tax consultant, professional secret.

Headnotes:

In the case of the grant of a temporary injunction against a search and seizure order in respect of lawyers' and tax consultants' premises, where both members of the law firm involved in the offence as well as those not accused of involvement are affected by the seizure order, the consequences have to be weighed.

Summary:

I. The complainants, a lawyer and tax consultants, are respectively partners of a law firm and of a firm of tax consultants with offices at the same address. The tax investigation department of the revenue authority instituted preliminary investigations into the affairs of one of the lawyers belonging to the law firm, on suspicion that he had assisted in the commission of several revenue offences.

Since there was probable cause, the competent *Amtsgericht* (Local Court) issued a search warrant for the office of the accused lawyer and the premises of the tax consultancy firm. During the search, pieces of evidence and computers were seized and copies were made of all the computer files of the law firm and tax consultancy firm. The Local Court confirmed the seizure of the pieces of evidence and the data only in part. As the result of a complaint by the public prosecutor's office, the locally competent *Landgericht* (Regional Court) again extended the scope of the search warrant to all of the copies made of computer files and to nearly all of the pieces of evidence.

Both the accused lawyer as well as the other partners of the law firm objected to the search and seizure by lodging a constitutional complaint and alleging an infringement of Articles 12 and 14 of the Basic Law.

II. Essentially, the Second Panel granted the application for a temporary injunction and ordered that the computer and data media as well as all the copied data seized should be put under seal and deposited with the competent Local Court. The court ordered that only copies of those files, which were clearly related to the case and the description of which showed a connection to the alleged offence, should be made, retained and used.

Its reasoning was as follows:

The constitutional complaint is neither inadmissible nor obviously unfounded. It raises the question of the constitutional significance of a seizure of data resources from someone required to observe professional secrecy when the seizure affects both accused and non-accused persons and when the compiled data is in part subject to a seizure order due to its connection with the alleged offence and in part subject to special legal protection.

Whether or not the constitutional complaint will succeed is open. Therefore, a decision regarding the temporary injunction depends on how the consequences are weighed.

If the temporary injunction was not granted, but the constitutional complaint in respect of the confirmation of the seizure order for the data records were later successful, then the complainants' legally protected fiduciary relationship to their clients, who had no connection with the investigative proceedings against the accused lawyer, could possibly be irreparably damaged. The fear that prosecution authorities might view the data could damage the trust between the lawyers and their clients to such an extent that the clients might decide to cancel the lawyers' retainers.

On the other hand, if the temporary injunction was granted, but the constitutional complaint in relation to the seizure of data media and files were later unsuccessful, then there would be reason to fear that evidence in the criminal proceedings against the accused lawyer would be lost. Nonetheless, the investigative authorities would only initially be denied the chance to carry out additional investigations with the assistance of this information.

When one weighs the respective consequences, the potential disadvantages for the lawyers affected by the seizures prevail, as far as data belonging to persons required to observe professional secrecy or clients not involved in the current investigation proceedings are concerned.

Thus, the Court made a temporary order that the data media seized and the data media with official copies of files should be deposited with the Local Court.

In respect of certain files the description of which alone indicates a connection with the alleged offence, the weighing of interests was decided in favour of the state's interest in prosecuting offenders. To this degree additional copies may be made, retained and used.

Cross-references:

The decision in the main proceeding dates of 12.04.2005 and is printed in volume 113, pp. 23 *et seq.*, of the Official Digest.

Languages:

German.



Identification: GER-2009-1-007

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 09.10.2002 / **e)** 1 BvR 1611/96, 1 BvR 805/98 / **f)** Listening device / **g)** *Entscheidungen des Bundesverfassungsgerichts* (Official Digest) 106, 28-51 / **h)** *Neue Juristische Wochenschrift* 2002, 3619-3624; *Wertpapiermitteilungen* 2002, 2290-2295; *Zeitschrift für das gesamte Familienrecht* 2003, 21-25; *Europäische Grundrechte Zeitschrift* 2002, 624-631; *Arbeitsrechtliche Praxis* no. 34 zu § 611 BGB

Persönlichkeitsrecht; MultiMedia und Recht 2003, 35-40; *Deutsches Verwaltungsblatt* 2003, 131-137; *Recht der Datenverarbeitung* 2003, 22-27; *Entscheidungssammlung zum Arbeitsrecht* § 611 BGB *Persönlichkeitsrecht* no.15; *Archiv für Presserecht* 2003, 36-41; *Telekommunikations- und Medienrecht* 2003, 28-36; *Datenschutz und Datensicherheit* 2003, 170-175; *Arbeitsrecht-Blattei ES* 1260 no. 17; *Juristenzeitung* 2003, 1104-1109; *Zeitschrift für Urheber und Medienrecht – Rechtsprechungsdienst* 2003, 57-65; CODICES (German).

Keywords of the systematic thesaurus:

5.1.1.5.1 Fundamental Rights – General questions – Entitlement to rights – Legal persons – **Private law**.
5.3.32 Fundamental Rights – Civil and political rights – **Right to private life**.
5.3.36.2 Fundamental Rights – Civil and political rights – Inviolability of communications – **Telephonic communications**.

Keywords of the alphabetical index:

Legal person, spoken word, privacy, right, entitlement / Telephone, tapping / Personality, general right / Civil litigation, evidence, collection / Privacy, spoken word.

Headnotes:

1. Under Article 10.1 of the Basic Law, the protection of telecommunications privacy extends to telecommunications systems operated by private individuals.
2. This article establishes a right of defence against the state gaining knowledge of details of the content and circumstances of a telecommunication and charges the state with the task of providing protection against third parties access to the communication.
3. The guarantee of the right to privacy of the spoken word as part of the general right of personality in Article 2.1 in conjunction with Article 1.1 of the Basic Law, provides protection against the use of listening devices which one of the parties to a conversation makes available to a third party who is not involved in the conversation. Article 10.1 of the Basic Law does not include this protection.
4. A legal person under private law can also rely on the protection given by the right to privacy of the spoken word.

5. Constitutional decision on the use of witness statements in civil proceedings where the statements are based on listening to phone calls of third parties illegally.

Summary:

I. Proceedings no. 1 BvR 1611/96

In February 1995, the complainant sold the plaintiff, in the original proceedings, a used car for DM 4,800 without any warranties whatsoever. The day after the car was handed over the plaintiff alleged that the car had defects. In the following period the parties had numerous phone calls the exact details of which are disputed. Thereafter, the parties became involved in a civil case before the law courts in which the buyer alleged *inter alia* that the contract had been rescinded by mutual agreement of the parties in a telephone conversation on 18 February 1995. As evidence he offered that his mother would give a statement. He claimed that she had been able to hear the conversation because the phone had been switched to speakerphone.

As a result, the Local Court (*Amtsgericht*) examined the plaintiff's mother as a witness, but dismissed the action since it found her evidence lacking in credibility.

On appeal, the Regional Court (*Landgericht*) examined the plaintiff's mother again as a witness. In its judgment, it reversed the judgment at first instance and ordered the complainant to pay the purchase price with interest back to the plaintiff. The Chamber found the witness statement of the plaintiff's mother credible the second time she was examined; it had no doubts about using her testimony.

In lodging the constitutional complaint, the complainant alleges a violation of his general right of personality pursuant to Article 2.1 in conjunction with Article 1.1 of the Basic Law. The complainant argued that the right to the privacy of one's own words protects one's power to determine for oneself who the circle of addressees of one's words will be. He further argued that he neither consented to the mother of his contractual partner, to listen nor was he able to detect this.

II. Proceedings no. 1 BvR 805/98

The complainant, which was a limited company, had rented business premises from the plaintiff in the original proceedings. After the company vacated the business premises, the landlord claimed compensation from the company because it had made alterations to the "rental object".

Thereafter, there were negotiations and conversations, including telephone conversations, between the parties in which one of the complainant's employees acted for it.

In the civil court case that followed, the landlord sought to rely *inter alia* on a phone call on 5 October 1995 in which the parties had agreed that the former tenant would pay the sum sued for. As evidence, the plaintiff offered the statement to be given by his daughter who had listened to the telephone conversation over the speakerphone.

After the case was dismissed by the Court at First Instance, the plaintiff appealed. The appellate court took evidence again and examined the plaintiff's daughter and the complainant's employee who had been involved in the negotiations. In its judgment the court reversed the decision at first instance and ordered the defendant company to make the payment for which the plaintiff had applied. The Court found, after taking evidence, that it was certain that the complainant's employee had agreed in the telephone conversation with the plaintiff on 5 October 1995 to pay the sum of money demanded. The court based its findings on the statement of the witness called by the plaintiff. In the court's view there could be no doubts about using her statement because listening in on telephone conversations was nowadays so widespread in business life that it could be assumed that persons in the circles involved were aware of this. If one of the parties to the conversation did not wish the conversation to be heard by a third party he or she could be expected to state this wish expressly to the other party. Therefore, there was no prohibition on the use of a corresponding witness statement as evidence.

Both the defendant company and its employee lodged constitutional complaints against this decision. They allege a violation of their rights under Article 2.1 of the Basic Law in conjunction with Article 1.1 of the Basic Law as well as a violation of privacy while using telecommunications services.

III. The First Panel of the Federal Constitutional Court allowed both constitutional complaints and found that, by interrogating the witnesses and by using their statements, the courts had violated the constitutionally guaranteed right in respect to the privacy of the spoken word which is part of a person's general right of personality. The decisions were reversed and referred to each of the appellate courts for a retrial.

The Panel's reasoning was essentially as follows:

1. The complainants' fundamental right to privacy while using telecommunications services was not violated. The fundamental right to privacy while using telecommunications services establishes a right of defence against the state gaining knowledge of the details of the contents and circumstances of the telecommunication and charges the state with the task of providing protection against third parties access to the communication. This protection extends to telecommunications systems operated by private individuals. The scope of protection will not, however, be affected if one of the parties to the conversation uses a technical device to allow a third party to listen to the conversation. To be exact, the fundamental right to privacy while using telecommunications services does not protect the mutual confidence of the two persons communicating, but instead the confidentiality of the technical medium employed for conveying the information.

2. Apart from the privacy right in respect of one's image, the Basic Law protects the privacy right in respect of the spoken word. This right, which a legal person under private law can also assert, guarantees the right to determine one's own portrayal in communications with others. This includes the right to determine who should have access to the content of the conversation. Therefore, the Basic Law provides protection against the secret recording of conversations and does not allow the recordings to be used without the consent of the author of the words or against his or her express wishes. The protection of the spoken word is independent of the communication's content or an agreement regarding its confidentiality.

The questioning of witnesses and the analysis of their statements by the courts encroach upon the scope of protection of the spoken word. The parties to conversations with the complainants (addressees) disregarded the right of the complainants (speakers) to determine when they allow third parties to listen to their conversations without the complainants' knowledge. With regard to answering the question whether the complainants had tacitly agreed to being listened to or should have expected that they would be listened to, the courts did not sufficiently take into account the constitutional protection of the parties' right to determine when to allow third parties access to their private conversations. In order to be able to accept that there had been tacit consent the court would have had to have found that according to the existing way that social, business and private communications are conducted, the existence of a technical opportunity to listen to a conversation is understood as meaning that it is possible to allow

conversations to be listened to secretly without the consent of all persons involved as long as they have not all objected to being listened to as a matter of caution. This is not the case here.

The encroachment upon the complainants' general right of personality is not constitutionally justified. This is the result when one weighs, the general right of personality, on the one hand, which is not in favour of using a conversation listened to secretly against, on the other hand, a legally protected interest, which is in favour of allowing access to such a conversation. However, as a rule, the general interest in having the administration of civil and criminal justice function properly does not alone take precedence over the general right of personality. Instead, it must be apparent for other reasons that the interest in the collection of evidence needs protection even though this would involve impairment of the right of personality. This may be the case where it is necessary for solving serious criminal cases or in emergency situations or situations resembling emergency situations. An interest in securing evidence for civil law claims is not, however, alone sufficient. There are no indications of such a special situation in the present cases.

Languages:

German.



Identification: GER-2009-1-008

a) Germany / **b)** Federal Constitutional Court / **c)** First Chamber of the First Panel / **d)** 07.11.2002 / **e)** 1 BvR 580/02 / **f)** Lawyer's rating II / **g)** / **h)** *Zeitschrift für Wirtschaftsrecht und Insolvenzpraxis* 2002, 2230-2232; *Neue Juristische Wochenschrift* 2003, 277-279; *Betriebsberater* (Beilage) 2003, 11-13; *Wettbewerb in Recht und Praxis* 2003, 69-72; *Kommunikation und Recht* 2003, 28-31; *Deutsches Verwaltungsblatt* 2003, 137-139; *Der Betrieb* (Beilage) 2003, 275-276; *Anwaltsblatt Sonderheft* 2003, 107-108; *Zeitschrift für Urheber und Medienrecht-Rechtsprechungsdienst* 2003, 1-3; *Monatsschrift für Deutsches Recht* 2003, 344-345; *Die Steuerberatung* 2003, 292-294; *Juristenzeitung* 2003, 841-843; CODICES (German).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Lawyer, competition, unfair / Lawyer, rating list /
Lawyer, advertising, camouflaged.

Headnotes:

A prohibition on the publication of lists showing the rating of lawyers will in any case violate the fundamental right to freedom of expression if the publication contains a notice that the choice of law firms was made subjectively and simply reflects research based on numerous interviews conducted by the editorial office.

Summary:

I. The complainant is a publishing house domiciled in Germany; it has been publishing the JUVE handbook (*JUVE-Handbuch*) annually since 1998. The handbook chiefly provides information on the activities of law firms specialising in commercial law. Its distinctive and only disputed feature are its highlighted lists of names of law firms with an accompanying rating for the firm. The introduction to the handbook explains that the printed information is based on questions posed to the market participants, lawyers, clients and legal academics. There is also a note to the same effect under every individual rating list. In addition, the handbook contains an advertising section where lawyers can place advertisements for a fee.

In the original civil proceedings, the plaintiffs (two lawyers in private practice) sought an injunction pursuant to Article 1 of the Unfair Competition Act (*Gesetz gegen den unlauteren Wettbewerb*) against the publishing house responsible for the handbook because it contained the rating list for lawyers.

At the conclusion of the first instance trial, the competent appellate court (Higher Regional Court, *Oberlandesgericht*) granted the injunction and affirmed a violation of Article 1 of the Unfair Competition Act from the point of view of “camouflaged advertising”.

The complainant’s appeal was unsuccessful.

In lodging its constitutional complaint, the complainant alleges a violation of its fundamental right to freedom of expression. In the course of the proceedings, the publishing house advised that in the planned fifth

edition of the handbook it would give detailed explanations of the bases for the evaluations of the law firms discussed and also set out more clearly the subjective character of those evaluations under every rating list.

II. The First Chamber of the First Panel granted the relief sought by allowing the constitutional complaint against the civil decisions and referring the matter to the Higher Regional Court for retrial.

In its decision, the First Chamber referred to the case law of the Federal Constitutional Court and decided essentially as follows:

The challenged order to refrain violates the complainant’s fundamental freedom of expression.

In particular, the prohibited rating lists – contrary to the opinion of the Higher Regional Court – do not contain facts, but rather performance evaluations for the listed law firms. According to the case law of the Federal Constitutional Court, the classification of a statement as a value judgment or an allegation of fact is of crucial significance for its legal assessment. Every person is free, in principle, to make value judgments. This freedom can only be restricted under special circumstances.

The elaborations of the courts so far are not sufficient to establish that the rating lists endanger a legal interest protected by § 1 of the Unfair Competition Act, the protection of which takes priority over the freedom of expression. The interest protected by § 1 of the Unfair Competition Act is, in particular, the aspect of competition in performance within the market. The competition between lawyers is at issue in this case. The rating lists concern the transparency and openness of the legal profession. By restricting themselves to relatively few law firms, in particular, to the large ones, they give such firms a competitive lead; newly-established law firms are at best included after a considerable delay.

Since the Higher Regional Court only emphasises the group of competition law cases dealing with “camouflaged advertising”, it fails to take into account the meaning and scope of Article 5.1.1 of the Basic Law. This group of cases depends to a large extent on value judgments and prognoses. Therefore, in this specific case it must also be determined whether the legal interest protected by § 1 of the Unfair Competition Act is endangered. This was not done here.

In particular, the Higher Regional Court did not deal with questions such as whether the advertising resulting from press attention reduces the competition

in performance between lawyers or whether the handbook's circle of readers would not themselves be capable of assessing the bases used in the handbook for evaluation or whether the publishing house had unconscionably sought to increase the number of advertisements which lawyers placed with it.

In the event that ultimately sufficient danger to the protected interest is found to exist, there would be no sound reasons for considering the injunction to be within the bounds of the proportionality principle. It is possible that clear indications of the information sources for the rating lists would be sufficient to eliminate such danger. From this point of view, the additional elaborations, which have already been announced in connection with the fifth edition, will need to be examined when this matter is retried.

Languages:

German.



Identification: GER-2009-1-009

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 28.10.2008 / **e)** 1 BvR 462/06 / **f)** / **g)** / **h)** *Beck-Rechtsprechung* [legal database] 2009, 31527; *Die Öffentliche Verwaltung* 2009, 374; CODICES (German).

Keywords of the systematic thesaurus:

3.7 General Principles – **Relations between the State and bodies of a religious or ideological nature.**

4.6.8.1 Institutions – Executive bodies – Sectoral decentralisation – **Universities.**

5.4.21 Fundamental Rights – Economic, social and cultural rights – **Scientific freedom.**

Keywords of the alphabetical index:

Lecturer, institution, higher education, faculty, theology / Religious community, self-determination, right / Professor, theology, transfer, new subject / Professor, theology, renouncement, religion.

Headnotes:

For lecturers at institutions of higher education, the core of the freedom of scholarship is their right to be responsible for their subject in research and teaching. Where state measures that affect their position as lecturers in institutions of higher education with the status of civil servants relate to aspects of their work that are specifically relevant to scholarship, Article 5.3 of the Basic Law (freedom of scholarship) and not Article 33.5 of the Basic Law (traditional fundamental principles of the permanent civil service) is the standard of review.

The Basic Law permits theology faculties to be established at state institutions of higher education within the scope of the state's right and duty to organise education and scholarship at the state universities. In doing this, the state must take account of the right of self-determination of the religious community whose theology is the teaching subject.

The freedom of scholarship of university theology lecturers is limited by the right of self-determination of the religious community and by the right of the faculty, protected by Article 5.3 of the Basic Law, to preserve its identity as a Theology Faculty and to fulfil its duties in the training of theologians.

Decision on the right of lecturers at institutions of higher education to participate in academic training.

Summary:

I. The complainant has been a professor (with the status of a civil servant) in the theology faculty of a state university since 1983. He was originally engaged for the subject "New Testament" in teaching, research and further training. After he publicly renounced the Christian faith, he was required by an order of the university to be responsible for the subject "History and Literature of Early Christianity". The complainant's new subject is not taken account of in the study and examination regulations. The complainant's courses were announced in the university calendar with the added words "not part of the course of studies to train prospective theologians". The complainant initiated proceedings at the administrative courts against his transfer to the new subject. His action failed at all instances.

II. The First Panel of the Federal Constitutional Court rejected the constitutional complaint lodged against the Administrative-Court judgments and judged the order of the university to be unfounded. It held that the transfer encroached on the complainant's right under sentence 1 of Article 5.3 of the Basic Law, but that the encroachment was justified.

Sentence 1 of Article 5.3 of the Basic Law gives everyone who works in academia, research and teaching a fundamental right to free scholarly activity. For lecturers at institutions of higher education, the core of the freedom of scholarship is their right to be responsible for their subject in research and teaching. The freedom is also substantially influenced by the teaching position allocated to them. Consequently, where state measures that affect their position as lecturers in institutions of higher education with the status of civil servants relate to aspects of their work that are specifically relevant to scholarship, Article 5.3 of the Basic Law and not Article 33.5 of the Basic Law (which ensures the traditional fundamental principles of the permanent civil service to be taken into account) is the standard of review.

Therefore, a change of the subject for which a lecturer is responsible will necessarily affect the content of the freedom of scholarship. The complainant was allocated the subject "History and Literature of Early Christianity" instead of the subject "New Testament", and as a result he was no longer involved in the training of theologians related to a particular religious denomination. This was an encroachment on the freedom of scholarship. In addition, the freedom of scholarship is affected by the fact that the complainant was transferred from a core subject to a peripheral subject that is not relevant to training. He was thus given a position that is markedly diminished in its significance in the university's teaching and research context. This represents a reaction of the state to specifically academic pronouncements and positions and specifically creates the danger against which sentence 1 of Article 5.3 of the Basic Law provides protection.

However, the encroachment on the freedom of scholarship is justified with regard both to the church right to self-determination (Article 140 of the Basic Law in conjunction with Article 137.3 of the Weimar Constitution (*Weimarer Reichsverfassung*) and to the rights of the theology faculty, which in turn are protected by Article 5.3 of the Basic Law.

The freedom of scholarship of university theology lecturers finds its limits in the right of self-determination of the religious communities. The Basic Law permits theology to be taught as an academic discipline at state universities. If state theological

faculties have been established, the right of self-determination of the religious community whose theology is the teaching subject that is related to a particular religious denomination must be taken into account. The position of a lecturer at the theology faculty of an institution of higher education may therefore be designed to be related to a particular religious denomination. It cannot and may not be the concern of the state, which is neutral in religious and ideological matters, to make the decision as to whether theological teaching is appropriate to a religious denomination. Instead, this is a right of the religious community itself.

The complainant's freedom of scholarship is also limited by the right of the faculty, itself protected by Article 5.3 of the Basic Law, to preserve its identity as a theology faculty and to fulfil its duties in the training of theologians. The teaching and research duties of a theology faculty are essentially shaped by the need for the teaching to be appropriate to a religious denomination. This function is endangered if the lecturers publicly no longer maintain the beliefs of the church. The existence of a theology faculty would be endangered if the church no longer regarded the doctrine taught there, above all in a core subject such as "New Testament", as appropriate to a religious denomination and consequently no longer accepted its graduates as clergy and did not permit teachers of religious education trained in the faculty to teach religious education related to a particular religious denomination. In addition, in the case of Protestant faculties the church – unlike the Catholic Church, with its mandatory teaching authority – primarily leaves it to them to ensure that the teaching remains appropriate to a religious denomination.

The measure taken by the university, which is challenged, and the administrative-court decisions were ultimately correct when they weighed the freedom of scholarship of the complainant against the opposing constitutional concerns, and in doing so they observed the principle of proportionality.

The transfer of the complainant from the subject "New Testament", which is related to a particular religious denomination, to the subject "History and Literature of Early Christianity", which is not related to a particular religious denomination, and his removal from the training of prospective theologians, take account of the church's right of self-determination and promote the purpose of preserving the functioning of the faculty of theology. The complainant may reasonably be expected to accept the transfer to the new subject, for he retains his position as a lecturer at an institution of higher education and he has been given a subject which is largely similar to his original subject. He may continue without hindrance to offer courses, to

research and publish in an area determined by himself, and to impart the results of his research to the students. Nor do the consequences of the transfer for the complainant's position in teaching and examination make the measure unreasonable. Admittedly, the fact that the complainant's new subject is not part of the examination and study regulations of the theology faculty has a considerable adverse effect on his freedom of teaching. Lecturers at institutions of higher education have the right to participate in teaching students and in the encouragement of the next generation of academics, which give their position its character. But the non-constitutional courts proceeded without infringement of the Constitution on the basis that the complainant's new subject may still be integrated appropriately into the study and examination regulations, and that the enforcement of a petition to this effect is not a matter for the present proceedings, but for future negotiations.

Languages:

German, English (on the website of the Federal Constitutional Court).



Identification: GER-2009-1-010

a) Germany / b) Federal Constitutional Court / c) Second Chamber of the Second Panel / d) 09.12.2008 / e) 2 BvR 717/08 / f) / g) / h) *Deutsches Verwaltungsblatt* 2009, 238-241; *Europäische Grundrechte-Zeitschrift* 2009, 51-53; *Neue Juristische Wochenschrift* 2009, 1195-1197; *Zeitschrift für Tarifrecht* 106-108; CODICES (German).

Keywords of the systematic thesaurus:

3.7 General Principles – **Relations between the State and bodies of a religious or ideological nature.**

3.22 General Principles – **Prohibition of arbitrariness.**

4.6.9 Institutions – Executive bodies – **The civil service.**

5.3.20 Fundamental Rights – Civil and political rights – **Freedom of worship.**

Keywords of the alphabetical index:

Minister, retirement, compulsory provisional / Retirement, compulsory / Employment, ecclesiastical law, judicial treatment / Religion, ecclesiastical law, application by state court / Religion, church, sovereignty, ecclesiastical offices / Internal legal acts, church, review by state courts / Religious community, right of self-determination.

Headnotes:

Imposing compulsory provisional retirement or retirement on a minister, and questions related to the determination of the minister's retirement pension, are not acts of public authority in which the state may intervene through court decisions to take corrective action.

Summary:

I. Protestant ecclesiastical law provides that if there are circumstances that make it impossible for a minister to conduct the ministry successfully, the minister may be removed from office. If, within one year after the removal, the minister is not appointed to a new parish, the minister must be given provisional retirement. After three years in provisional retirement without the minister finding a new parish, the minister is subject to compulsory retirement. Provisional retirement and retirement both entail financial loss.

A Protestant minister in the Rhineland who was affected by measures of this kind filed a constitutional complaint against them. He submitted that the ecclesiastical law applied in his case by the church authorities and courts infringed constitutional law.

II. The Second Chamber of the Second Panel of the Federal Constitutional Court refused to admit the constitutional complaint for decision, on the grounds that it was not admissible. At the same time the court held that the constitutional complaint would also be unfounded on the merits.

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

1. The constitutional complaint is inadmissible because, under Article 90.1 of the Federal Constitutional Court Act, such a complaint may be made only to challenge infringements of fundamental rights by "public authority". However, within the meaning of this provision, only measures of the three state functions, which are legally obliged to respect fundamental rights, are acts of public authority. The

concept does not include purely internal church measures.

Under the ecclesiological system of the Basic Law, each religious society organises and administers its affairs independently within the limits of the statutes valid for all. It confers its offices without the participation of the state or of the civil local authority (sovereignty with regard to ecclesiastical offices, Article 140 of the Basic Law in conjunction with Article 137.1 and 137.3 of the Weimar Constitution). In this way, the state recognises the churches as institutions with the right to self-determination, which are in their essence independent of the state and do not derive their authority from the state. In consequence, the state may not interfere with their internal circumstances. The constitutional guarantee of the church right to self-determination creates a special situation within the state legal order, respecting the communal exercise of freedom. This is owed not only to the fundamental right of Article 4 of the Basic Law in the sense of communal freedom of faith and religion but also to the fact that it is an institutional protection of the freedom of the churches from state interference within the meaning of Article 137.3 of the Weimar Constitution.

The autonomy of churches is not called into question by their character as corporate bodies under public law. In view of the religious and denominational neutrality of the state under the Basic Law, this does not mean that they enjoy equal treatment with other public corporations, which are associations integrated into the state. Instead, this merely recognises a public status which gives the churches more importance than the religious societies under private law, but does not subject them to any special sovereignty of the state in church matters or to increased state monitoring. This public legal status and effectiveness of the churches, which they derive from their special mission and which distinguishes them fundamentally from other societal structures, mean that church power is not a form of public authority.

If state courts have to decide church matters on the merits, they share in the decisions on these matters. This even applies when they endeavour to respect church autonomy in their substantive decision. Experience shows that concrete consideration of the conflicting interests and rights in the individual case may lead to a gradual increase of thoroughness of judicial review. It therefore carries the danger that the religious legitimisation of church-law provisions goes unrecognised and in this way there is an infringement of the state's neutrality in religious matters. This is a problem in particular in the sensitive area of the church's sovereignty with regard to ecclesiastical offices.

The challenged orders of the consistory court (*Verwaltungskammer*) of the Protestant Church in the Rhineland (*Evangelische Kirche im Rheinland*) adjudicate on a dispute in the area of internal church matters. The compulsory retirement of a minister and also the determination of a pension relate to questions of internal church constitution and organisation. But the judicial treatment of the employment law and law of ecclesiastical offices of the Protestant Church is subject to the church right to self-determination and is – unless the Church itself subordinates it to state law – removed from state jurisdiction. No act of public authority has occurred against which a constitutional complaint might be directed by way of legal redress. The autonomy and independence of the church authority, which is recognised by the Constitution, would be decreased if the state gave its courts – including the Federal Constitutional Court – the right to review the compliance with the Basic Law of internal church measures, which have no direct legal effects in the area of state responsibility.

2. Irrespective of the inadmissibility, the constitutional complaint would also be unfounded on the merits.

The church-law provisions on compulsory provisional retirement and retirement and the associated financial consequences do not infringe Article 33.5 of the Basic Law. Under this provision, the law of the civil service is to be organised and developed taking into account the traditional principles of the permanent civil service. However, the requirements contained as regards content apply solely to the organisation of the civil service as part of the state administration. They do not apply, either directly or with the necessary modifications, to the public-law employment relationships of the churches. If they did so, this would be inconsistent with the church's autonomy with regard to ecclesiastical offices.

Nor has the prohibition of arbitrariness (Article 3.1 of the Basic Law) been infringed. The provisions of ecclesiastical law on compulsory provisional retirement and retirement, and the church regulations on the granting of inactive status pay and a retirement pension, are based on the law of the religious societies on the independent organisation and administration of their affairs within the limits of the statutes valid for all. This right of self-determination, and the guarantee of autonomy with regard to ecclesiastical offices, contain the right to determine what church offices to create, how these are to be filled and what requirements are to be made of the holders of office.

Ecclesiastical law provides for the removal from office of a minister if there are circumstances that make it impossible for the minister to conduct the ministry successfully; this is an expression of the church's sovereignty with regard to ecclesiastical offices. In legislating for such a ground of removal from office, which avoids a reference to elements of fault, the governing body of the church is in possession of an instrument of control with which it is possible to react effectively and promptly to a situation that has objectively arisen in a parish.

Nor is the concept of provisional retirement, which takes effect following the removal, an arbitrary provision of ecclesiastical law. Compulsory provisional retirement is imposed if the minister is not appointed to a new parish within one year after the date of the removal. It is therefore not automatic, but instead a reaction to the fact that the minister removed has not been reinstated within the period of one year. This is an appropriate provision.

Nor could there be any objection to the imposition of compulsory retirement after three years of provisional retirement during which the minister has still not found a new parish. For the minister in provisional retirement is given an opportunity to be reinstated. Only if this is not realised is compulsory retirement imposed. This puts the affected minister, in an appropriate manner, in an equivalent position from a financial point of view with other pensioners.

Languages:

German.



Identification: GER-2009-1-011

a) Germany / b) Federal Constitutional Court / c) Second Panel / d) 15.01.2009 / e) 2 BvC 4/04 / f) / g) / h)) *Beck-Rechtsprechung* [legal database] 2009, 30697; *Deutsches Verwaltungsblatt* 2009, 307-310; *Die Öffentliche Verwaltung* 2009, 295; *Leitsatzkartei des deutschen Rechts* 2009, 130381; *Neue Zeitschrift für Verwaltungsrecht – Rechtsprechungs-Report* 2009, 313-316; CODICES (German).

Keywords of the systematic thesaurus:

3.18 General Principles – **General interest.**

4.9 Institutions – **Elections and instruments of direct democracy.**

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

Keywords of the alphabetical index:

Election, law, examination after expiry of electoral period / Election, scrutiny, public interest, decision on merits.

Headnotes:

In proceedings for the scrutiny of an election, there may be a public interest in a decision of the Federal Constitutional Court on the constitutionality of valid electoral-law provisions and the application of valid electoral law even after the expiry of an electoral period to the extent that a possible election error is of fundamental importance beyond the individual case.

Summary:

I. In November 2002, the complainant lodged an objection with the German *Bundestag* against the election to the 15th German *Bundestag*. The German *Bundestag* rejected the objection against the election as patently unfounded. The complainant lodged a complaint against the rejection before the Federal Constitutional Court. On 21 July 2005, the Federal President dissolved the 15th German *Bundestag* at the suggestion of the Federal Chancellor. Meanwhile, the 16th German *Bundestag* has convened as a result of the election held on 18 September 2005. The complainant continues to pursue his complaint.

II. The Second Panel of the Federal Constitutional Court has decided that the complaint requesting the scrutiny of an election has been disposed of.

Admittedly, the Federal Constitutional Court retains, in principle, its competence to review the claims of unconstitutionality of electoral-law provisions which have been made in the context of an admissible complaint requesting the scrutiny of an election, and of important doubts under electoral law, even after the dissolution of a *Bundestag* or the regular expiry of an electoral period. For after the expiry of an electoral period, there may be a public interest in a decision of the Federal Constitutional Court on the constitutionality of electoral-law provisions and the application of valid electoral law to the extent that a possible election error is of fundamental importance beyond the individual case.

After the expiry of the electoral period, no public interest exists, however, in a decision on the merits to the extent that a complaint requesting the scrutiny of an election is inadmissible from the outset. Nor is there a public interest in a decision on the merits if the Federal Constitutional Court has already clarified in another context the constitutionality of the challenged provision or doubts under electoral law that have been raised by the complainant, and if the complainant has not submitted any aspects that might give rise to a different assessment. The same applies if the challenged defect has meanwhile been remedied by amending the provision or if there is a close factual context between the provision in question and provisions whose unconstitutionality has already been established by the Federal Constitutional Court. A public interest in a decision on the merits can also cease to exist if the German *Bundestag* has already in the objection procedure established a violation against an electoral-law provision which has been objected to by the complainant.

The public interest does not run counter to terminating the present proceedings without a decision on the merits. For the objections raised by the complainant are partly inadmissible already because they do not comply with the requirements placed on substantiation. To the extent that the complainant claims that the age limit to the right to vote is unconstitutional, alleges the possibility of an election error due to newspaper and magazine inserts and objects to opinion polls before the election as unconstitutional, his sweeping submissions do not meet the substantiation requirements. Apart from this, the complainant has not set out in a sufficiently substantiated manner that an election error has occurred on account of election advertising by the political party FDP which had been funded in an impermissible manner due to a violation of the party's accountability.

The complainant further complains that the equality of voting has been violated by the emergence of overhang mandates and by the fact that the second votes of voters in two Berlin constituencies have been taken into account who secured a mandate for the respective constituency candidate of the party PDS with their first vote but voted for a different *Land* (state) list with their second vote. In this respect, there is no longer a public interest in continuing the proceedings for the scrutiny of an election due to the Panel's decision on what is known as the negative voting weight. The Federal Constitutional Court instructed the legislature to amend the complex of regulations which can result in the emergence of what is known as the negative voting weight until 30 June 2011 at the latest so that in the future the German

Bundestag can be elected on the basis of a law which is in harmony with the constitution. Since the effect mentioned is inextricably linked with the overhang mandates and the possibility of combining lists, a new regulation can take as a starting point the emergence of overhang mandates or the offsetting of direct mandates against second-vote mandates or the possibility of creating combinations of lists. After the adoption of the new regulation, the issue of the unconstitutionality of overhang mandates which has been raised by the complainant will no longer arise in the same manner. Whether and to what extent the distribution of mandates in the German *Bundestag* is compatible with the Constitution can only be assessed taking into account the interplay of the different electoral-law provisions, and with a view to the electoral system chosen by the legislature.

To the extent that the complainant complains of an unlawful use of data by the party CDU, for election campaign purposes, there is no public interest in a decision on the merits. For the German *Bundestag* established already in the objection procedure that the transmission to the CDU of the data of all persons entitled to vote in the respective constituencies by the City of Cologne had been unlawful. The question of whether and to what extent the transmission of the data of all those entitled to vote might have constituted a considerable voting error in the past therefore does not need to be decided any longer.

The complainant's remaining complaints concern electoral-law provisions whose constitutionality has already been established by the Federal Constitutional Court and doubts under electoral law which have already been decided by the Federal Constitutional Court. In this regard, the complainant has not submitted any aspects which might give rise to a different assessment.

Supplementary information:

Schleswig-Holstein is the only German Federal *Land* which as yet does not have a *Land* Constitutional Court. The Federal Constitutional Court therefore takes the place of a *Land* Constitutional Court in such cases.

Cross-references:

The Panel's decision on what is known as the negative voting weight mentioned in the summary dates from 03.07.2008 (file no. 2 BvC 1/07, 2 BvC 7/07; *Bulletin* 2008/2, [GER-2008-2-013]).

Languages:

German.



Identification: GER-2009-1-012

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 03.03.2009 / **e)** 2 BvC 3/07, 2 BvC 4/07 / **f)** / **g)** *Beck-Rechtsprechung* [legal database] 2009, 31806; *Der Sachverständige* 2009, 150; *Deutsches Verwaltungsblatt* 2009, 511-516; *Die Öffentliche Verwaltung* 2009, 374; *Europäische Grundrechte-Zeitschrift* 2009, 129-143; *Gewerbe-Archiv* 2009, 222; *Hanseatische Gerichts-Zeitung* 2009, 131-146; *Kommunikation & Recht* 2009, 255-260; *Landes- und Kommunalverwaltung* 2009, 171; *MultiMedia und Recht* 2009, 316210/2009 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

4.9.9.6 Institutions – Elections and instruments of direct democracy – Voting procedures – **Casting of votes.**

Keywords of the alphabetical index:

Election, voting computer, use, admissibility / Election, parliament / Election, principle, public nature / Election, public examinability / Election, error, impact, elected people, representation.

Headnotes:

The principle of the public nature of elections emerging from Article 38 in conjunction with Article 20.1 and 20.2 of the Basic Law requires that all essential steps in the elections are subject to public examination unless other constitutional interests justify an exception.

When electronic voting machines are deployed, it must be possible for the citizen to check the essential steps in the election and in the ascertainment of the results reliably, without special expert knowledge.

Summary:

I. Two voters lodged complaints requesting the scrutiny of an election which were directed against the deployment of computer-controlled voting machines (“voting computers”) in the 2005 *Bundestag* election (16th German *Bundestag*) in different polling districts of the federal *Länder* (states) Brandenburg,

Hesse, North Rhine-Westphalia, Rhineland-Palatinate and Saxony-Anhalt.

The voting machines of the type used store the votes cast by the voters on a storage module, which is equipped with an electronic storage medium. At the end of the election day, they are counted electronically. The figures thus ascertained for the first and second votes are subsequently read out by the returning committee and entered into the election record. The figures can also be printed out on a printer, which is connected to the back of the voting machine.

The basis of the deployment of computer-controlled voting machines in elections to the German *Bundestag* are § 35 of the Federal Electoral Act (*Bundeswahlgesetz*) and the Federal Voting Machine Ordinance (*Bundeswahlgeräteverordnung*) which was enacted on its basis. Accordingly, computer-controlled voting machines may only be used if their type is authorised and their use was approved.

II. The Second Panel of the Federal Constitutional Court ruled that the Federal Voting Machine Ordinance is not compatible with Article 38 in conjunction with Article 20.1 and 20.2 of the Basic Law insofar as it does not ensure monitoring that complies with the constitutional principle of the public nature of elections. The use of the electronic voting machines of the type deployed in the elections to the 16th German *Bundestag* was not compatible with Article 38 in conjunction with Article 20.1 and 20.2 of the Basic Law.

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

The principle of the public nature of election results from the fundamental constitutional options for democracy, the republic and the rule of law. It requires that all essential steps in the election are subject to public examination unless other constitutional interests justify an exception. Particular significance is attached to the monitoring of the election and to the ascertainment of the election result.

The deployment of voting machines, which record the voters' votes in electronic form and ascertain the result of the election electronically, only meets the constitutional requirements if the essential steps in the election and in the ascertainment of the results can be checked reliably and without special expert knowledge. In classic elections with voting slips, manipulations or election falsifications are, under the conditions of the valid provisions, at any rate only possible with considerable effort and with a very high

risk of discovery. In contrast, with electronic voting machines it is not easily recognisable whether there have been programming errors in the software or targeted election falsifications through manipulation of the software. The major scope of the effect of possible errors in the voting machines or targeted election falsifications requires special precautions to be taken in order to comply with the principle of the public nature of elections.

The voter himself or herself must be able to verify even without a more detailed knowledge of computers whether his or her vote as cast is recorded truthfully as a basis for counting or at least as a basis for a subsequent re-count. If the election result is ascertained by computer-controlled processing of the votes stored in an electronic storage medium, it is not sufficient if only the result of the calculation process as implemented in the voting machine can be taken note of using a summary paper printout or an electronic display.

The legislature is not prevented from using electronic voting machines in the elections if the constitutionally required possibility of a reliable correctness check is ensured. Supplementary monitoring by the voter, the election bodies or the public is possible for example with electronic voting machines in which the votes are recorded elsewhere in addition to electronic storage.

Restrictions on the possibility for citizens to monitor the election procedure cannot be counter balanced by subjecting sample devices, in the context of the type approval procedure or the voting machines specifically used in the elections prior to their deployment, to verification by an official institution as to their compliance with certain security requirements and their proper technical performance. A comprehensive bundle of other technical and organisational security measures is also not suited to compensate, in itself, for a lack of controllability of the essential steps in the election procedure by the citizen. For the monitoring of the essential steps in the election promotes well-founded trust in the fairness of the election only if the citizen himself or herself can reliably verify the election event.

When deploying computer-controlled voting machines, no contrary constitutional principles are recognisable which are able to justify a broad restriction of the public nature of elections and hence the controllability of the election and the ascertainment of the results. Ruling out inadvertent incorrect markings on voting slips, unintentional counting errors or incorrect interpretations of the voters' intention when votes are counted does not justify by itself forgoing any type of verifiability of the election. Nor can the principle of the secrecy of

elections and the interest in rapidly clarifying the composition of the German *Bundestag* be used as a basis for a broad restriction of the controllability of the election and of the ascertainment of the results. There is no constitutional requirement for the election result to be available shortly after closing the polling stations. What is more, the past *Bundestag* elections have shown that the preliminary official final result of the elections can, as a rule, be submitted in a matter of hours, even without the deployment of voting machines.

Whilst the authorisation to hand down ordinances contained in § 35 of the Federal Electoral Act does not give rise to any profound constitutional objections, the Federal Voting Device Ordinance is unconstitutional on grounds of a violation of the principle of the public nature of elections. The Federal Voting Device Ordinance does not ensure that only those voting machines are approved and used which comply with the constitutional preconditions of the principle of the public nature of elections and of the reliable verifiability of the election result. This shortcoming cannot be remedied by means of an interpretation in conformity with the Constitution.

Also the deployment of the voting computers used in the election of the 16th German *Bundestag* in some federal *Länder* infringes the public nature of the election. The voting machines did not facilitate effective monitoring of the election. For due to the fact that the votes were exclusively recorded on an electronic storage medium, neither the voter nor the returning committees, nor the citizens present in the polling station, were able to check whether the votes cast were recorded by the voting machines without falsification. The essential steps in the ascertainment of the results by the voting machines also could not be verified by the public. It was not sufficient that the result of the computing process implemented in the voting machine could be taken note of using a summary paper printout or an electronic display.

The election errors that were ascertained do not lead to the repetition of the elections in the constituencies designated.

The election error does not lead to a partial declaration of invalidity of the elections to the 16th German *Bundestag* even if its relevance to mandates were to be assumed. The interest in the protection of the *status quo* of the people's representation composed in trust in the constitutionality of the Federal Voting Machine Ordinance outweighs the election error. For there are no indications that voting machines worked incorrectly or might have been manipulated. The possible impact on the composition of the 16th German *Bundestag* can therefore be

regarded as marginal at most. Also taking into account that the violation of the Constitution that was ascertained took place when the legal situation was still unclear, it does not make the continuation of the elected people's representation appear untenable.

Languages:

German, English (on the website of the Federal Constitutional Court).



Hungary Constitutional Court

Statistical data

1 January 2009 – 30 April 2009

Number of decisions:

- Decisions by the Plenary Court published in the Official Gazette: 36
- Decisions in chambers published in the Official Gazette: 9
- Other decisions by the Plenary Court: 48
- Other decisions in chambers: 13
- Number of other procedural orders: 64

Total number of decisions: 170

Important decisions

Identification: HUN-2009-1-001

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 27.03.2009 / **e)** 34/2009 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 2009/38 / **h)**.

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Publication, ban.

Headnotes:

Occasionally, freedom of the press may give rise to a crime, an incitement to commit a crime, or a violation of public morality or the personality rights of others. The ability of the Ministry of Culture to cancel the registration of periodicals in these circumstances runs counter to the freedom of the press clause in the Hungarian Constitution.

Summary:

An individual claimant and the Minister of Culture asked the Court to review the constitutionality of Article 14.1 of Act II of 1986 on the Press (hereinafter, the "Press Act"), as in certain specified circumstances and subject to judicial review the Ministry of Culture, the administrative agency responsible, could cancel the registration of periodicals. Such a restriction on free press was available in case of violation of Article 3.1 of the Press Act, which states: "The exercise of press freedom cannot constitute a crime or incitement to commit a crime, it cannot violate public morality, and it cannot cause a breach of other people's personality rights." Personality rights are defined by the Civil Code as including human dignity, the right to one's honour as well as personal data. In theory, therefore, both defamation and any conduct by the press that is defined as a crime by the Criminal Code such as libel, slander or incitement, may result in the banning of a newspaper.

The Constitutional Court held this restriction to be an unnecessary and disproportionate limit on free press as enshrined in Article 61.2 of the Constitution. The Court also pointed out the need for a complete revision of the Press Act, in order to bring it completely into line with the Constitution in force.

Languages:

Hungarian.

*Identification:* HUN-2009-1-002

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 21.04.2009 / **e)** 47/2009 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 2009/55 / **h)**.

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**.

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

Keywords of the alphabetical index:

Oath, religious importance.

Headnotes:

The written form of the oath taken by public servants must not contain data regarding their faith or beliefs; otherwise it would contravene the constitutional guarantees of protection of personal data and freedom of conscience.

Summary:

I.1. In a claim lodged with the Constitutional Court, a petitioner challenged Section 12 of a provision in the Act on Public Service. The petitioner argued that the final phrase "So help me, God", at the end of the oath and in the written version violated the right to freedom of thought, freedom of conscience and freedom of religion. It also discriminated between religious and atheist people.

2. Another petitioner filed a complaint with the Court on behalf of the Church of the Nazarene arguing that under the Act it is impossible to take an oath of public office with the word 'affirm' instead of 'swear'. The precept in the Bible "Swear not at all" is however universal. This makes it impossible for a Nazarene to serve as a public officer, and means that the Act differentiates in an unlawful way among religious people. The petitioner contended that there should be scope to swear an oath or affirm it, but this possibility is missing from the Act on Public Service.

3. The third petitioner requested a constitutional review of Section 12.3 of the Act, according to which the oath should have a written form. The petitioner suggested that this provision contradicts Article 60.2 of the Constitution, as it obliges public servants to express their beliefs in public.

4. Under Section 12.1 of the Act, public officials must take an oath when appointed (both verbally and in writing) and failure to do so could give rise to invalidity; he or she would not be inducted if they did not take the oath. The text of the oath is provided in Section 12.2 of Act XXIII of 1992: "I ... swear allegiance to my country, the Republic of Hungary. I shall abide by the Constitution and the constitutional statutory laws. I shall keep state and service secrets. I shall perform my official duties impartially, conscientiously, truly, solely in line with statutory laws, accurately, ethically, with respect to human dignity, according to the best of my knowledge in serving the interests of the nation (and the self-government of ...). In my work and private life I shall

behave in a manner commensurate with my position and I shall promote the development of the Republic of Hungary. (According to the candidate's belief:) "So help me God!"

II.1. Article 60.1 of the Constitution guarantees universal freedom of thought, freedom of conscience and freedom of religion. According to Article 60.2 this right includes the free choice or acceptance of a religion or belief, and the freedom to publicly or privately express or decline to express, exercise and teach such religions and beliefs by way of religious actions, rites or in any other way, either individually or in a group. In the Court's opinion, the text of the Act ensures that a person before officially assuming public office can take an oath of office in accordance with his or her faith. Section 12.2 does not require a public expression of belief. It merely enables the candidate to decide whether or not to express his or her belief in public. The clause under dispute (So help me God) is not an obligatory part of the oath. Therefore, nobody is under coercion to take an oath of office against their faith or even to express their beliefs in public.

The Court therefore held that the contested clause did not violate freedom of conscience ensured by Article 60 of the Constitution; neither did they differentiate between the people on the basis of their faith or belief.

2. The Court has considered the significant constitutionality issue raised by the petitioner that the Nazarenes are to request exemption from swearing in the oath of office on the basis of their conscience and religious conviction under Article 60.1 of the Constitution. Section 12 of the Act prescribes the general obligation to take on oath of office with the word of "swear" but the statute does not regulate exemptions.

Taking an oath of office as regulated in the Act has undoubtedly caused more serious problems for those who, like the Nazarenes, believe that swearing is against their conscience and strongly held religious beliefs. In constitutional democracies it is a frequently debated issue whether citizens may be exempted based on their conscience and religious beliefs from statutes that prescribe general obligations. Examples include the use of narcotics for religious ceremonies, wearing clothes required by their religion in the army, and the possibility of deviating from rules governing marriage and family ties, for example, from monogamy. When considering the proportionality of the right restriction in this type of regulation, the Court applies a different so-called "comparative test of burdens" for those whose conscience and religious freedoms are also affected by the regulations.

On the one hand, one should take into consideration the basic principle of a state under the rule of law which says that everybody has rights and obligations in the same legal system, and therefore statutes apply to all in such a way that the law treats everybody as equals (as individuals with equal dignity). On the other hand, one cannot ignore the fact that the fundamental values of a constitutional democracy include variety within the political community and the freedom and autonomy of individuals and their communities. Therefore, it may not be established as a general rule that freedom of conscience and religion should always be an exception to the laws of universal application, and likewise, the rule of law may not be declared fully applicable to the internal life of a religious community.

Due to various and sometimes contradictory constitutionality criteria, the constitutionality issue of whether an exception should be made from the general laws due to freedom of religion may only be decided case by case. The decision is largely influenced by questions such as whether the requested exception is closely related to a dogma or a religious ceremony and whether the exception violates the rights of those who do not belong to the religious community. Therefore, the concrete facts of the case must be studied to judge whether the persons affected should be granted exemption from the general rules and whether the State "should allow alternative rules of conduct within reasonable limits".

In the instant case the Court held that based upon Article 60 of the Constitution, the State must remain neutral in matters concerning the freedom of religion and other questions concerning conscience. However, the words 'oath' and 'swearing' in the Hungarian language do not have a religious meaning, they are secular notions. That is why some provisions of the Constitution include these expressions. Under 29/D of the Constitution, prior to entering office, the President of the Republic must take an oath before Parliament. According to Article 33.5 the Government is formed upon appointment of the Ministers. Subsequent to its formation, the Members of the Government shall take an oath before Parliament.

Based upon the guiding principle of the neutrality of the state, the constitutional provisions could not be interpreted in such a way as to only have a religious basis. The word 'oath' in the challenged provision is primarily secular in meaning. The Act also allows the oath to be taken with or without the clause 'So help me God'. It therefore does not differentiate in an unlawful way among religious people.

3. Finally, the Court held that there was no legitimate reason for registering those public servants who took an oath of office with the clause of 'So help me God'. The Court declared that the written form of the oath of public servants must not contain data concerning the public officers' faith or beliefs.

Justice Bragyova and Justice Balogh attached separate opinions to the judgment. Justice Trócsányi attached a concurring opinion.

Languages:

Hungarian.



Ireland

Supreme Court

Important decisions

Identification: IRL-2009-1-001

a) Ireland / **b)** High Court / **c)** / **d)** 28.01.2009 / **e)** HC 1031/08 / **f)** Director of Public Prosecutions v. McCrea / **g)** [2009] IESC 39 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

1.4.8.7 Constitutional Justice – Procedure – Preparation of the case for trial – **Evidence**.

3.15.1 General Principles – Publication of laws – **Ignorance of the law is no excuse**.

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

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:

Accused, rights.

Headnotes:

The right of access to a solicitor (lawyer) when detained by the police is a constitutional right (although it is not mentioned specifically in the Constitution). It is also established that, even where a person is detained lawfully, a breach of his/her constitutional rights during the detention will render the detention unlawful, and evidence obtained during unlawful detention will be inadmissible in criminal proceedings against the accused.

Summary:

In this decision it was confirmed by the High Court that, once an accused's detention by the police has become unlawful, that person is entitled to be released and leave the police station forthwith. It was held that the person who breaches the accused's constitutional rights need not be aware of the breach – what matters is that the breach actually occurs by virtue of their actions. It was also held that, regarding

the exclusion of evidence obtained by the police during the unlawful detention, it is not necessary that a causative link must exist between that evidence and the breach of a person's constitutional right to access to a lawyer.

In the present case the accused had been arrested on suspicion of driving while intoxicated. He was required by statute to provide a sample of his breath to a *Garda* (police officer) using an intoxilyser machine. At the police station the accused requested to speak with his solicitor (lawyer) prior to providing a sample of his breath into the intoxilyser machine. However, the *Garda* operating the machine, on the belief that she would be not permitted by law to obtain a second sample from the accused if the machine's operation was interrupted to allow him to contact his solicitor, informed him that he was obliged by law to provide the sample and that he would be able to talk to his solicitor afterwards. The accused refused to provide a breath sample, which constituted a criminal offence attracting a penalty more severe than that for a first offence of driving with a certain level of alcohol in his system.

When the case came before the District Court (a court of local and limited jurisdiction), the District Judge dismissed the charge, holding that the *Garda's* belief that she would not be entitled to make another request of the accused if she broke the operating cycle of the intoxilyser machine was based on a misunderstanding of the law, and that the *Garda* should have permitted the defendant to consult a solicitor. The Director of Public Prosecutions (DPP) disputed this decision and, at his request, a question of law was sent by the District Judge to the High Court (a superior court of full jurisdiction) as follows:

- i. "Should the defendant have been provided with access to a solicitor before the breath test procedure under the relevant statutory provisions was completed?"
- ii. If the answer to question 1 is "yes", was I correct in dismissing the prosecution on that basis?"

The High Court answered both questions in the affirmative. The Court cited previous (and binding) decisions of the Supreme Court, to the effect that:

- The right of access to a solicitor (lawyer), which is "such an important and fundamental standard of fairness in the administration of justice... must be deemed as constitutional in origin", rather than merely legal, in order to ensure that citizens' personal rights are afforded adequate protection;

- "The defence and vindication of the constitutional rights of the citizen is a duty superior to that of trying a citizen for a criminal offence"; and
- A "deliberate and conscious decision" to breach an accused's right to access to a solicitor would render his detention unlawful.

The prosecution and defence disputed the nature of the breach and the extent of unlawfulness of the accused's detention, based on differing interpretations of past case law of the Supreme Court. The High Court held that the correct interpretation of the current position in law is that an accused's detention, where he is detained in accordance with law, is lawful until the point where his constitutional rights are breached i.e. in the present case, the accused's detention became unlawful as soon as the *Garda* refused to accede to his request for access to a solicitor. Moreover, the High Court stated that once his detention became unlawful "the entire process became tainted with illegality", that the *Garda's* entitlement under law to demand a breath sample "evaporated" at the moment she refused the accused access to a solicitor, and that once the accused's detention became unlawful he was entitled to be released and to leave the police station forthwith.

In addition, the test of whether it was a "deliberate or conscious decision" to breach the accused's constitutional rights was not subjective but objective: if the breach actually occurred as a result of a conscious decision on the *Garda's* part, it was immaterial whether the *Garda* appreciated that his/her action constituted a breach of the accused's constitutional rights or not. The maxim *ignorantia juris haud excusat* (ignorance of the law is no excuse) applied. Therefore, in the instant case, despite the fact that the *Garda's* actions had been reasonable and *bona fide*, her refusal to facilitate the accused's access to a solicitor rendered his detention unlawful from the point of the refusal onward.

The High Court also indicated that the appropriate question when considering breach of the accused's constitutional right to a lawyer was not whether access to a lawyer would have made a difference but rather whether it could have made a difference. In the present case, the lawyer could have set out a number of options available to the accused under the law, each of which would have attracted a lesser criminal penalty than his refusal to provide a breath sample.

At present, the position in Irish law is that a strict rule exists whereby any evidence obtained during unlawful detention is inadmissible in court proceedings. The High Court held that the current

position in law, which had been disputed by the prosecution, is that there does not have to be any causative link between breach of the accused's constitutional rights and any evidence obtained during unlawful detention i.e. the evidence need not have been obtained as a result of the breach in order to be inadmissible (this question was considered in the context of the accused's refusal to provide evidence in the form of a breath sample).

The rationale for this strict exclusionary rule had been set out by the Supreme Court in a previous case, which the High Court quoted:

"To exclude only evidence obtained by a person who knows or ought reasonably to know that he is invading a constitutional right is to impose a negative deterrent. It is clearly effective to dissuade a policeman from acting in a manner which he knows is unconstitutional or from acting in a manner reckless as to whether his conduct is or is not unconstitutional.

To apply, on the other hand, the absolute protection rule of exclusion whilst providing also that negative deterrent, incorporates as well a positive encouragement to those in authority over the crime prevention and detection services of the State to consider in detail the personal rights of the citizens as set out in the Constitution, and the effect of their powers of arrest, detention, search and questioning in relation to such rights.

It seems to me to be an inescapable conclusion that a principle of exclusion which contains both negative and positive force is likely to protect constitutional rights in more instances than is a principle with negative consequences only."

It may be noted that the strictness of this exclusionary rule has been questioned in a High Court judgment from 2007, to which the High Court made reference in the instant case (please note that the High Court generally sits as a one-judge court and each of these cases were heard by different judges). The decision from 2007 has been appealed to the Supreme Court and should be heard during summer/autumn 2009.

Languages:

English.



Israel Supreme Court

Important decisions

Identification: ISR-2009-1-001

a) Israel / **b)** High Court of Justice (Supreme Court) / **c)** Panel / **d)** 25.01.2001 / **e)** H.C.J 5167/00 / **f)** Professor Hillel Weiss, Esq. et al. v. The Prime Minister of Israel et al. / **g)** *IsrSC* 55(2) 455; to be published in [2001] *IsrLR* as well / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.10 General Principles – **Certainty of the law.**
3.14 General Principles – **Nullum crimen, nulla poena sine lege.**
4.6.2 Institutions – Executive bodies – **Powers.**
4.6.4.3 Institutions – Executive bodies – Composition – **End of office of members.**

Keywords of the alphabetical index:

Government, term of office, end.

Headnotes:

The scope of the power of an outgoing government, and more specifically, its power to conduct political negotiations during the period of time that precedes the election of a new government is not limited during the "transitional" period, nor does an outgoing government enjoy a special status as to judicial review. The principles of reasonableness and proportionality are general legal principles, which apply to the actions of every government, including those of an outgoing government.

Summary:

I. The Prime Minister resigned and special elections for Prime Minister were set for 6 February 2001. It should be noted, that according to the provisions of Basic Law: The Government (described here as "the basic law"), the resignation of the Prime Minister is deemed to be the resignation of the Government. The Prime Minister and the Ministers of the outgoing

government would continue to fulfil their duties until the new government took office. In this framework the outgoing government continued to conduct political negotiations with the Palestinian Authority with the aim of reaching an agreement before the elections.

The High Court had to determine the scope of the authority and breadth of the discretion of the outgoing government, i.e. is it authorised to conduct political negotiations and sign agreements during the interim period which precedes the elections and the establishment of a new government.

II. The majority of the panel held that the basic law does not limit the formal authority of the resigning Prime Minister and the ministers to ongoing operations alone. The State of Israel's Constitutional Law also does not recognise a special doctrine which limits the authority of an outgoing government to such operations. Yet, the principles of reasonableness and proportionality are general legal principles, which apply to the actions of every government, including those of an outgoing government. The outgoing government must act while taking into consideration the purpose which lies at the heart of the principle of continuity of government, which is enshrined in the basic law. On the one hand, it must act with the restraint appropriate for the status of an outgoing government. On the other hand, it must ensure stability and continuity. Thus, when reviewing the reasonableness and proportionality of an action taken by the outgoing government, the relevant question is not whether the action under consideration is ongoing or exceptional, but rather whether in the overall balance there is a need for restraint or action.

The scope of the margin of reasonableness relating to a specific issue is dependent on the characteristic of the authority. In regard to specific issues, the margin of reasonableness of an outgoing government is narrower than the margin of reasonableness of a government which is operating normally. The margin of reasonableness changes as the date of the end of office of the elected Prime Minister approaches. Therefore, this margin becomes narrower and the need for restraint increases after the elections, and before the elected prime minister begins his term of office, all subject to the essential public needs.

Cross-references:

- HCJ 5/86 SHAS *Party Association of Sephardim Shomrei Torah in the Knesset v. Minister of Religions*, [1986] *IsrSC* 40(2)742;
- HCJ 6924/00 *Shtenger v. Prime Minister*, [2001] *IsrSC* 55(2) 485.

Languages:

Hebrew, English (translation by the Court).



Identification: ISR-2009-1-002

a) Israel / b) High Court of Justice (Supreme Court) / c) Panel / d) 13.02.2001 / e) H.C.J 2390/96 / f) Yehudit Karsik et al. v. State of Israel, Israel Lands Authority et al. / g) *IsrSC* 55(2) 625; to be published in [2001] *IsrLR* as well / h) CODICES (English).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Expropriation, purpose.

Headnotes:

The High Court established a new legal rule, according to which if the public purpose which served as the basis for expropriation of lands according to the Lands Ordinance (Purchase for Public Purposes), 1943, ceased to exist, as a rule, the expropriation is to be cancelled, and the owner of the expropriated lands is entitled to the return of the lands subject to exceptions and rules that are to be formulated.

Summary:

In the late 1950's the army needed a training area and for this purpose the authorities expropriated about 137 *dunam* of land in the region of Hadera in accordance with the Lands Ordinance (Purchase for Public Purposes) 1943. After a number of years, on 24 March 1966 under the authority granted to him in Section 19 of the Expropriations Ordinance, the Minister of Finance published a notice as to the granting of the land to the State and the land was registered in the land registration books in the name of the State. The petitioners are the heirs of the owners of lands in the area of the expropriation prior to the expropriations.

The expropriated land has served its designation as to the expropriation for about three decades (from the time the land was expropriated until 1996). In a meeting conducted on 31 August 1993, after finding that there was demand in the area for residential construction, the government decided to clear the army out of the area. After the government decision of 1993 the Ministry of Construction and Housing prepared a city zoning plan – HD/VM 944 – according to which an area of about 160 *dunam*, including the petitioners' lands, was designated for multi-storey building (592 residential units), for public structures, for a commercial area and for open public spaces.

The High Court established a new legal rule, according to which if the public purpose which served as the basis for expropriation of lands according to the Lands Ordinance (Purchase for Public Purposes), 1943, ceased to exist, the expropriation is to be cancelled, and the owner of the expropriated lands is entitled to the return of the lands subject to exceptions and rules that are to be formulated.

The justices' opinions varied in relation to the normative framework which lies at the basis of the above noted legal rule. Justice M. Cheshin was of the opinion that the normative basis for the new rule is found in the 'ongoing connection model', according to which the past owner maintains a legal connection – of some degree or another – to the land that was expropriated from his ownership; and that the act of expropriation does not disconnect the owner entirely from that land. This is so as regards to the original owner. Regarding the expropriating authority, the meaning of that legal connection is – in principle – that the authority has a continuing obligation to justify the act of expropriation.

Justice I. Zamir was of the opinion that the normative basis for the new rule established by the court is found in the 'purpose appended authority' approach, according to which the purpose of the power granted to the authority must exist not only at the time the power is exercised, but also after the exercise of the power. The exercise of the power changes the legal situation over time upon the condition that the purpose of the power exists for the entire time. When this condition ceases to exist, the legal situation that is created with the exercise of the power must change.

Justice T. Strasberg-Cohen saw the ownership acquired by the State by way of expropriation as a special legal institution of "public ownership" acquired by coercion, which is not expressed in the Land Law 5729-1969 and which is an outcome of the laws of expropriation. Hence, once the purpose of the expropriation has been exhausted, the duty of the

authority arises to return the land to the original owner from whom it was taken by the authority through coercion (or to pay compensation, depending on the circumstances). This duty reflects the protection of the property right of the original owner, which is enshrined as a constitutional right in the Basic Law: Human Dignity and Liberty.

President A. Barak based the new legal rule established in the judgment on the central status of the property right of the original owner (due to the legislation of Basic Law: Human Dignity and Liberty, which granted constitutional supra-statutory status to this right). According to President Barak, the constitutional status granted to the right to property has brought about a change in the balance between the property right of the original owner and the public needs.

Cross-references:

- HCJ 2739/95 *Mahol v. Minister of Finance*, *IsrSC* 50(1) 309;
- HCJ 5091/91 *Nuseiba v. Minister of Finance* (unreported);
- FHH CJ 4466/94 *Nuseiba v. Minister of Finance* *IsrSC* 59(4) 68.

Languages:

Hebrew, English (translation by the Court).



Identification: ISR-2009-1-003

a) Israel / **b)** High Court of Justice (Supreme Court) / **c)** Panel / **d)** 09.07.2001 / **e)** H.C.J 6924/98 / **f)** Association for Civil Rights in Israel v. State of Israel et al. / **g)** *IsrSC* 55(5) 15; to be published in [2001] *IsrLR* as well / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.21 General Principles – **Equality**.
 5.2.2.2 Fundamental Rights – Equality – Criteria of distinction – **Race**.
 5.2.3 Fundamental Rights – Equality – **Affirmative action**.

Keywords of the alphabetical index:

Affirmative action / Discrimination of nationals.

Headnotes:

The principle of equality imposes a duty on the State to allocate State resources, including civil service jobs, in an equal manner to Arabs and to Jews. The legal sources which require equal treatment of Arabs create a doctrine which requires granting appropriate representation to Arabs in the public service. Under this doctrine, when making a decision regarding an appointment to the public service, the authority is required to take into account the fact that the candidate is a member of the Arab minority as one of the relevant considerations and give it the appropriate weight. Furthermore, when making a decision regarding appointments to the public service, it is not sufficient to act with equality toward an Arab candidate, but it is also necessary to act with affirmative action towards him or her, in order to provide the Arab population with appropriate representation in the public service.

Summary:

The High Court had to determine whether there is a duty imposed on the state to grant appropriate representation to the Arab minority in the Israel Lands Council, which is the government agency responsible for the establishment of the land policy pertaining to most of the land in Israel.

The Israel Lands Council ("the Council") is the government agency responsible for the establishment of the land policy pertaining to most of the land in Israel. Since the establishment of the state of Israel, the Arab population was not given any representation in the council. Only in the year 2000, after the submission of the petition under consideration, the government appointed a member of the Arab minority as one of the representatives of the public in the council.

The petitioner, the Association for Civil Rights in Israel, asked the Court to direct the Government of Israel, the Minister of National Infrastructures, and the Minister of Finance to nullify the appointment of some of the representatives on behalf of the Government in the Council and to appoint in their stead, Arabs as members of the Council. The petitioner claimed that the Arab population has a right to appropriate representation in the council, which corresponds to its relative proportion in Israeli society. The petitioner further claimed that such representation is necessitated by the principle of equality.

The High Court had to determine whether there is a duty imposed upon the state to grant appropriate representation to the Arab minority in the Council.

The High Court held that discrimination against an Arab for being an Arab is a violation of the principle of equality in its narrow sense and is therefore considered a grave violation of equality. According to the principle of equality there is, *inter alia*, a duty to allocate State resources, including civil service jobs, in an equal manner to Arabs as to Jews.

The legal sources which require equal treatment of Arabs create a doctrine which requires granting appropriate representation to Arabs in the public service. The duty imposed based on the doctrine relates primarily to the discretion of the authority in power. According to the doctrine, the fact that a candidate belongs to the Arab population, is a relevant consideration, which the authority must take into account when making a decision regarding appointments to the public service. Furthermore, according to the doctrine, when making decisions concerning appointments to the public service it is not sufficient to act with equality toward an Arab candidate but it is also necessary to act with affirmative action toward him or her, in order to provide the Arab population with appropriate representation in the public service.

The required extent of representation is dependent on the context. The question of what constitutes appropriate representation in a specific entity is dependent, *inter alia*, on the substance of the entity, including the practical importance of the entity in terms of the group entitled to appropriate representation.

Cross-references:

- HCJ 453/94 *Israel Women's Network v. Government of Israel*, *IsrSC* 48(5) 501; [1992-4] *IsrLR* 425;
- HCJ 2671/98 *Israel Women's Network v. Minister of Labour and Social Affairs*, *IsrSC* 52(3) 630;
- HCJ 1113/99 *Adalah Legal Centre for Arab Minority Rights in Israel v. Minister of Religious Affairs* [2000] *IsrSC* 54(2) 164.

Languages:

Hebrew, English (translation by the Court).



Identification: ISR-2009-1-004

a) Israel / b) High Court of Justice (Supreme Court) / c) Panel / d) 29.05.2007 / e) H.C.J 8397/06 / f) Advocate Eduardo Wasser et al. v. Minister of Defence et al. / g) to be published in [2001] *IsrLR* as well / h).

Keywords of the systematic thesaurus:

3.17 General Principles – **Weighing of interests.**
 3.20 General Principles – **Reasonableness.**
 5.3.4 Fundamental Rights – Civil and political rights – **Right to physical and psychological integrity.**

Keywords of the alphabetical index:

Terrorism, fight / State, responsibility / Security, consideration / Judicial review, principle.

Headnotes:

The Court will intervene – albeit on rare occasions and with restraint – even in decisions concerning the professional discretion of the authority on the budgets allocated by it, if these decisions depart in an extreme manner from the margin of reasonableness given to the administrative authority. It will be self-evident that the Court will be called upon to intervene – to a greater degree where it is concerned with decisions that may affect human rights in general, and risks presented to human life in particular. The reasonableness of decisions of this kind will of course be examined, first and foremost, on the basis of the facts that were before the authority when it made the decision.

The state does not have an absolute duty to protect every citizen, or even every student, at any price against all personal security threats. Whenever the state is required to decide whether to allocate a certain sum of money in order to reduce one security threat or another, it should weigh up the likelihood that the security threat will be realised, the risk that can be anticipated to human life if that risk is realised, the financial cost involved in preventing or reducing that threat and other considerations that may be relevant in the specific circumstances of a particular case. The balance between the considerations should be made within the scope of the margin of reasonableness given to the administrative authority.

Summary:

The towns in the area near the Gaza Strip, including the town of Sederot, and the settlements within the jurisdiction of the Shaar HaNegev Regional Council, have suffered for years from attacks by 'Qassam'

rockets fired from the Gaza Strip. The two petitions before the Court concerned the question of whether the state has a duty to protect the educational institutions in the towns near the Gaza Strip.

In June 2006, following an incident in which a 'Qassam' rocket fell inside the grounds of a school in Sederot, the Minister of Defence decided that action should be taken to protect the schools in settlements near the Gaza Strip. On 2 July 2006, the government (in government Decision no. 219) adopted the protection plan prepared by the Home Front Command, according to which twenty-four schools in settlements near the Gaza Strip, which included sixteen primary schools and eight secondary schools, should be protected by means of the 'protected area' system. This system of protection is not based on the complete protection of all the classrooms in the various schools. Rather, under this system some of the classrooms are protected and others are not. The unprotected classrooms are close to protected areas – a proximity which enables the students in these classes to reach the protected area when they hear a warning that a 'Qassam' rocket has been fired.

The petitioners argued that the 'protected areas' method is not a reasonable protection method. The petitioners further claimed that the respondents' protection policy violates the right to life, the right to physical integrity, and the right to education of the students who study in classrooms that are not properly protected. Such violations are inconsistent with the duties of the state under the Compulsory Education Law, 5709-1949.

The Court had to determine whether the respondents' decision not to protect the main classrooms of students in grades 4-12 and the special classrooms fully, but rather to make do for this purpose with the 'protected areas' method is a decision that falls within the margin of reasonableness.

The petition was granted.

The Court held that the premise for examining the respondents' choice of basing the protection of certain classrooms in the schools near the Gaza Strip on the 'protected areas' method is that this choice reflects the professional position of the administrative authority, which has expertise in this matter, and therefore a court that scrutinises the discretion of that authority will not intervene in its professional decision lightly. Moreover, the fact that the choice between the various methods of protection has significant financial consequences, and that this choice reflects, *inter alia*, certain budgetary priorities concerning the manner of distributing the resources in society, affects the degree to which the Court will tend to intervene in that choice.

The Court will intervene – albeit on rare occasions and with restraint – even in decisions concerning the professional discretion of the authority or the budgets allocated by it, if these decisions depart in an extreme manner from the margin of reasonableness given to the administrative authority. It will be self-evident that the Court will be called upon to intervene – to a greater degree when it is concerned with decisions that may affect human rights in general, and risks presented to human life in particular. The reasonableness of decisions of this kind will of course be examined, first and foremost, on the basis of the facts that were before the authority when it made the decision.

The Court further held that the state does not have an absolute duty to protect every citizen, or even every student, at any price against all personal security threats. Whenever the state is required to decide whether to allocate a certain sum of money in order to reduce one security threat or another, it should weigh up the likelihood that the security threat will be realised, the risk that can be anticipated to human life if that risk is realised, the financial cost involved in preventing or reducing that threat and other considerations that may be relevant in the specific circumstances of a particular case. The balance between the considerations should be made within the scope of the margin of reasonableness given to the administrative authority.

The Court concluded that the respondents' decision was extremely unreasonable and should therefore be set aside. Even according to the respondents' experiments, only in 70-75% of cases did the students reach the 'protected area' within fifteen seconds, which the respondents determined to be the critical period of time for doing so. Moreover, in some cases when rockets were fired, no alarm was sounded. Although the cost of providing full protection for all the classrooms is considerable, and the Court does not lightly intervene in matters of budgetary considerations, in view of the extent of the threat, the likelihood it will be realised and the number of students exposed to it, the decision not to equip the classrooms with full protection is such an unreasonable decision that it justifies judicial intervention.

Cross-references:

- HCJ 82/02 *Caplan v. State of Israel, Ministry of Finance, Customs Department* [2004] *IsrSC* 58(5) 901;
- HCJ 3472/92 *Brand v. Minister of Communications* [1993] *IsrSC* 47(3) 143;

- HCJ 1113/99 *Adalah Legal Centre for Arab Minority Rights in Israel v. Minister of Religious Affairs* [2000] *IsrSC* 54(2) 164;
- HCJ 2599/00 *Yated, Children with Downs Syndrome Parents Society v. Ministry of Education* [2002] *IsrSC* 56(5) 834.

Languages:

Hebrew, English (translation by the Court).



Identification: ISR-2009-1-005

a) Israel / b) High Court of Justice (Supreme Court) / c) Panel / d) 27.02.2006 / e) H.C.J 11163/03 / f) Supreme Monitoring Committee for Arab Affairs in Israel et al. v. Prime Minister of Israel / g) [2006(1)] *IsrLR* / h) CODICES (English).

Keywords of the systematic thesaurus:

- 3.3 General Principles – **Democracy**.
- 3.4 General Principles – **Separation of powers**.
- 4.6.2 Institutions – Executive bodies – **Powers**.
- 4.10.1 Institutions – Public finances – **Principles**.
- 5.2.2.3 Fundamental Rights – Equality – Criteria of distinction – **Ethnic origin**.
- 5.4.2 Fundamental Rights – Economic, social and cultural rights – **Right to education**.

Keywords of the alphabetical index:

Fundamental right, essence / Equality, principle.

Headnotes:

The case dealt with the residual power of the government under Section 32 of the Basic Law. The determination of primary arrangements is the sole prerogative of the Israeli Parliament, the government only has power to determine secondary or executive arrangements.

Prohibited discrimination may occur without any discriminatory intention or motive on the part of those creating the discriminatory norm. Where discrimination is concerned, the discriminatory outcome is sufficient.

Summary:

The government adopted a decision to establish 'national priority areas' in outlying parts of the country. These areas were defined in a map that was attached to the government decision. The towns and residents of these areas were given benefits, including in the field of education. The petitioners, three organisations that are active in advancing the rights of the Arab sector in Israel, attacked the legality of the government decision. They argued that the method of classifying the towns for the national priority areas, which grants extensive benefits by virtue of government decisions, is improper because it does not rely on primary legislation. The petitioners further argued that that government decision is discriminatory and unlawful, since hardly any Arab towns were included in the national priority areas.

Thus, the Court had to determine whether the government was authorised, by virtue of the residual power given to it in the provisions of Section 32 of the Basic Law: the Government, 5761-2001, to establish national priority areas and whether the government's decision – insofar as it concerns the benefits in the field of education – should be set aside for discriminating against the Arab residents of the State of Israel.

The petition was granted.

The Court held that there was a defect in the government decision concerning the determination of the national priority areas in the field of education. This defect has two aspects: first, the above government decision is unlawful, since in a matter of this kind the government does not have the power to make an arrangement that is in essence and character a primary arrangement, which falls within the sole jurisdiction of the *Knesset* (Israeli parliament). Second, the government decision is unlawful since it discriminates in a prohibited manner between Jews and Arabs, and this discrimination violates the right to equality to a disproportionate degree. In view of the seriousness of the defects that tainted the government decision, the Court decided the decision, in so far as it relates to the determination of the national priority areas in education, should be declared void.

The Court held that determination of primary arrangements is the sole prerogative of the *Knesset*, whereas the government only has power to determine secondary or executive arrangements. The requirement that primary arrangements should be determined in a statute of the *Knesset* is necessitated by the system of government in Israel, which is a system of representative democracy. Since the

Knesset was elected by all the citizens of the state, it represents the citizens and acts as their spokesman. Thus, the *Knesset* alone has the power to decide the basic issues of the state, i.e. to determine primary arrangements for leading the state and its inhabitants. The residual power that the government acquired in the provisions of Section 32 of the Basic Law: the Government, 5761-2001, which is a small part of all the powers of the government, does not by its very nature contain the power to give the government authority to determine primary arrangements.

The Court further held that the government is not authorised, by virtue of its residual power under the provisions of Section 32, to violate the basic rights of the individual. These rights are an integral part of the law, and a limitation of them can be effected solely by means of a statute of the *Knesset*.

The principle of equality is one of the most basic principles of the State of Israel. It applies to all spheres of government activity. Notwithstanding, it is of special importance with regard to the duty of the government to treat the Jewish citizens of the state and non-Jewish citizens equally. This duty of equality for all the citizens of the State of Israel, whether Arab or Jewish, is one of the foundations that make the State of Israel a Jewish and democratic state.

A violation of equality is always serious. It is much more serious when it harms the right to education. The right to education is not limited to the right of the individual to choose the education that he wants. It sometimes also includes the obligation of the state to allow the individual – every individual – to receive basic education on an equal basis.

Prohibited discrimination may occur without any discriminatory intention or motive on the part of the persons creating the discriminatory norm. Where discrimination is concerned, the discriminatory outcome is sufficient.

Cross-references:

- HCJ 4541/94 *Miller v. Minister of Defence* [1995] *IsrSC* 49(4) 94; [1995- 6] *IsrLR* 178;
- HCJ 6698/95 *Kadan v. Israel Land Administration* [2000] *IsrSC* 54(1) 258;
- HCJ 2599/00 *Yated, Children with Downs Syndrome Parents Society v. Ministry of Education* [2002] *IsrSC* 56(5) 834;
- HCJ 721/94 *El-AI Israel Airlines Ltd. v. Danielowitz* [1994] *IsrSC* 48(5) 749;
- [1992-4] *IsrLR* 478.

Languages:

Hebrew, English (translation by the Court).

*Identification:* ISR-2009-1-006

a) Israel / **b)** High Court of Justice (Supreme Court) / **c)** Panel / **d)** 19.09.2007 / **e)** H.C.J 10843/04 / **f)** Hotline for Migrant Workers. et al. v. Government of Israel et al. / **g)** to be published in [2007] *IsrLR* / **h)** CODICES (English).

Keywords of the systematic thesaurus:

5.3.5 Fundamental Rights – Civil and political rights – **Individual liberty.**

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

Keywords of the alphabetical index:

Autonomy, personal, exercise / Employment, foreign worker, restriction.

Headnotes:

Restrictive employment arrangements are highly undesirable, and cause very great harm to foreign workers. Yet, an exceptional arrangement with special characteristics that justify the exclusion of the government decision under consideration in this petition from the rule that invalidates restrictive arrangements is acceptable.

Summary:

In 2002 an agreement was signed between Israel Military Industries Ltd (IMI) and the Turkish Ministry of Defence to upgrade 170 Turkish Army tanks, for a sum of approximately 700 million dollars. The agreement included an undertaking on the part of the State of Israel to make reciprocal purchases in an amount of approximately 200 million dollars over a period of ten years, i.e., approximately 20 million dollars per annum (hereinafter: the offset arrangement). Within the framework of this agreement, the State of Israel undertook that the Yilmazlar International Construction

Tourism & Textile Co. Ltd (hereafter: the Yilmazlar company), a company registered in Israel with Turkish owners, would be given permits by the Israeli authorities to employ Turkish workers in Israel in the construction industry. According to the terms of these permits, the Turkish workers were only permitted to be employed in Israel by the Yilmazlar company. The above agreement was enshrined in government decision no. 2222 of 11 July 2004 (hereafter: the government decision).

Following the decision of the Court in HCJ 4542/02 *Kav LaOved Worker's Hotline v. Government of Israel* (hereinafter: the *Kav LaOved* judgment), which set aside arrangements that restricted foreign workers in Israel to a specific employer as a violation of their human rights, the petitioners challenged the restrictive arrangement relating to the Turkish workers of the Yilmazlar company.

The petition was denied by the majority of the panel (Vice-President E. Rivlin and Justice E. Hayut), who reached the conclusion that the offset arrangement under consideration is an exceptional arrangement with special characteristics that justify the exclusion of the government decision under consideration from the rule that invalidates restrictive arrangements.

The majority of the panel emphasised that the conclusion of the Court in the *Kav LaOved* judgment was based to a large extent on the factual background. Yet, the arrangement concerning the Turkish workers of the Yilmazlar Company differs from the restrictive arrangements addressed in the *Kav LaOved* judgment. First, the Turkish workers are not required to pay huge amounts to middlemen or to manpower companies in order to come to Israel to work for Yilmazlar. The opposite is true: Yilmazlar pays the cost of bringing the workers to Israel, including the costs of medical checks, flights to Israel and medical insurance. In view of the aforesaid, and as the respondents justly pointed out in their replies, an employee of the Yilmazlar company who is not satisfied with his conditions of employment may terminate his work relationship with the company, return to his country of origin, and this too is at Yilmazlar's expense (except in exceptional cases where the worker is dismissed because of damage and loss that he deliberately and wilfully caused to the company), without the worker being encumbered by any significant debt. Indeed, a foreign worker who enters Israel within the framework of the offset arrangement does not have any acquired right to work in Israel; he certainly does not have an acquired right to work at any place of work that he wishes and for any employer that he chooses. Notwithstanding, a worker who has returned to Turkey can, if he so wishes, take the necessary steps in order to be

employed by another Israeli employer, like any foreign national who wishes to be employed in Israel.

Furthermore, the procedure of making a contract with Yilmazlar's workers is carried out under the auspices and supervision of the Turkish government; the employment agreement with the workers is drafted and prepared by the Turkish Ministry of Labour together with the Turkish Ministry of Defence; the agreement is written in Turkish, the mother-tongue of the workers, and a copy of it is kept in the file that is maintained by the central management of the Turkish employment office; the work agreement is signed in Turkey as a three-party agreement by the worker, the Yilmazlar company and also a representative of the Turkish Ministry of Labour; the agreement grants the Yilmazlar workers a right to sue Yilmazlar even in Turkey. In this respect their situation is also different from other foreign workers, since the deportation of the latter from Israel to their country of origin is likely to make it impossible for them to pursue their rights against their Israeli employer. With regard to the work conditions of the Yilmazlar company's workers, the employment of these workers requires compliance with very strict conditions that were determined by the Turkish authorities. The respondents declared that the workers enjoy good working conditions, which include receiving three meals a day, housing and medical insurance that are all paid for by Yilmazlar. The activity of the Yilmazlar company, in so far as it concerns the protection of the rights of the Turkish workers employed by it in Israel, is subject to institutional supervision and strict review by several bodies, both on the Turkish side and on the Israeli side.

Finally, the majority of the panel emphasised the fact that according to the government decision under review, it will not be possible in the future to make an additional arrangement to bring foreign workers to Israel or to employ them as a part of reciprocal purchase agreements, without the approval of the government. Thus, in view of the state's foreign affairs and security interests that are in the balance, the fact that the arrangement under consideration is supposed to continue only until the end of the year, and that the workers' terms of employment were dictated by the Turkish government, which has a sincere concern for the conditions in which its citizens are employed, the majority of the panel concluded that there are no grounds for granting relief to the workers, especially when it is questionable whether they want such relief.

In contrast, Justice E. E. Levy was of the opinion that the restrictive element in the government decision cannot stand, because it is inconsistent with the provisions of the prevailing law. In the *Kav LaOved* judgment, the High Court held that a procedure that

made the entitlement of a foreign worker to a residency and work licence in Israel conditional upon his remaining with the employer whose name is stipulated in the licence was void as an excessive violation of basic rights. It was held that the procedure blatantly conflicted with a major principle in labour law – the right of a person to stop working for an employer with whom he no longer wants to be associated, without this involving such a serious sanction that it makes the termination of the employment relations not worthwhile. By taking from the employee the natural protection inherent in the idea of the free market, the restrictive arrangement exposes him to violations of his rights. The fundamental case law ruling that the 'restrictive arrangement' is void remains valid, even if it has not been implemented in full. It created a new legal position, in which the law is no longer prepared to tolerate the making of arrangements of this kind. It binds all the organs of government, and in particular the government. The special characteristics of the Turkish transaction cannot undermine the basis of the claim that the restrictive arrangement seriously violates the rights of the workers. Even though the facts of the case are not entirely clear, it is sufficient that there is a real concern, which arises in this case, that the rights of the Yilmazlar workers are likely to be violated in various respects.

Cross-references:

- HCJ 4542/02 *Kav LaOved Worker's Hotline v. Government of Israel* [2006] (1) *IsrLR* 260;
- CrimA 11196/02 *Frudenthal v. State of Israel* [2003] *IsrSC* 57(6) 40;
- LCA 267/06 *Yilmazlar International v. Yagel* (unreported decision of 09.01.2006).

Languages:

Hebrew, English (translation by the Court).



Identification: ISR-2009-1-007

a) Israel / **b)** High Court of Justice (Supreme Court) / **c)** Panel / **d)** 10.10.2007 / **e)** H.C.J 5666/03 / **f)** *Kav LaOved et al. v. National Labour Court, Jerusalem et al.* / **g)** to be published in [2007] *IsrLR* / **h)** CODICES (English).

Keywords of the systematic thesaurus:

5.2.1.2 Fundamental Rights – Equality – Scope of application – **Employment.**

Keywords of the alphabetical index:

Laws, conflict / Relations, contractual.

Headnotes:

The accepted conflict of law test for the law of contracts is the consent of the parties, or in the absence thereof, the 'strongest ties' test, where the result of the test may be affected by wider policy considerations that serve general normative interests.

In the field of employment law, the ties based on the consent of the parties are likely to have less weight where the consent is inconsistent with the principles of employment law. Furthermore, where there is a lack of clarity or a *lacuna* in the contract with regard to the express or apparent intentions of the parties, the 'strongest ties' test should be influenced by the principle of equality – equal wages and employment conditions for the same or effectively the same work, whether the employees are men or women, parents or not parents, Jews or Moslems, Israelis or Palestinians.

Summary:

Several inhabitants of Judea and Samaria, who are not citizens of Israel, filed claims in the Regional Labour Courts against their Israeli employers. The High Court had to determine which law should apply to the employment relationships between the Palestinian workers who are inhabitants of the occupied territories and Israeli employers, when the place of work is in the 'Israeli enclaves' in the territories.

The High Court held that whereas public international law determines the local law – i.e., which law will apply, as a rule, in the geographic area of 'the territory of Judea and Samaria' – private international law determines which law will apply in a given case of a dispute in the field of private law. Thus, the decision regarding the law of contracts in the case presented to the Court will be made in accordance with the conflict of law rules accepted in private international law, as interpreted by the Court.

The accepted conflict of law test for the law of contracts is the consent of the parties, or in the absence thereof, the 'strongest ties' test, where the result of the test may be affected by wider policy considerations that serve general normative interests. In identifying a contract's

ties to a given law and determining their weight, there is no reason why the Court should not take into account general policy considerations of the legal system and the fundamental principles of the contractual sphere for which the choice of law is required. In the absence of concrete ties, the Court may resort to objective ties of the contract, namely the law that is applied to similar contracts, between similar parties and in similar circumstances.

The conflict of law rule that applies to employment relations is influenced by the two foundations on which this field stands – the contractual foundation and the binding legislative foundation. The application of the 'strongest ties' test is influenced by the basic principles of employment law and the fundamental principles of the legal system, both internally, by identifying the relevant ties and giving proper weight to the ties being considered, and externally, by virtue of the principle of public policy and a constitutional scrutiny of the rights of the parties.

The circumstances of the case presented to the Court lead to the conclusion that the employment relationships under consideration are more closely connected with Israeli law than with Jordanian law. This conclusion is also supported by the principles of substantive employment law, for which the choice of law is required. The principle of equality, which is a fundamental principle of employment law, demands that the same law govern both Israeli and Palestinian workers who work in the same place. Applying different sets of laws for Israeli workers and Palestinian workers necessarily results in discrimination. The conflict of law rules were not intended to legitimize such an outcome.

Cross-references:

- HCJ 393/82 *Jamait Askan Alalmoun Altaounia Almahdouda Almasaoulia Cooperative Society v. IDF Commander in Judaea and Samaria* [1983] *IsrSC* 37(4) 785;
- HCJ 2612/94 *Shaar v. IDF Commander in Judaea and Samaria* [1994] *IsrSC* 48(3) 675;
- CA 1432/03 *Yinon Food Products Manufacture and Marketing Ltd v. Kara'an* [2005] *IsrSC* 59(1) 345;
- CA 6601/96 *AES Systems Inc. v. Saar* [2000] *IsrSC* 54(3) 850.

Languages:

Hebrew, English (translation by the Court).



Identification: ISR-2009-1-008

a) Israel / **b)** High Court of Justice (Supreme Court) / **c)** Panel / **d)** 28.07.2008 / **e)** HCJ 3071/05 / **f)** Louzon et al. v. The Government of the State of Israel et al. / **g)** to be published in [2008] *IsrLR* / **h)**.

Keywords of the systematic thesaurus:

3.17 General Principles – **Weighing of interests.**
 3.20 General Principles – **Reasonableness.**
 4.10.1 Institutions – Public finances – **Principles.**
 4.10.2 Institutions – Public finances – **Budget.**
 5.4.19 Fundamental Rights – Economic, social and cultural rights – **Right to health.**

Keywords of the alphabetical index:

State, responsibility / Fundamental right, essence, regulation.

Headnotes:

Although the right to health and health care is acknowledged by different international conventions and in the constitutions of some of the world's states, the definition of its internal scope and the extent of its protection remain vague and are characterised by a cautious approach, which takes into consideration the budgetary capability of each country and the principle of the gradual realisation of the right.

From a wide social perspective and considering the limited public resources, it is doubtful that a requirement to publicly funded innovative experimental medications finds support in the hard core of the constitutional rights enshrined in the basic laws. Moreover, even according to an interpretative approach, which widens the constitutional scope of the right to human dignity beyond the minimal standard required in the realms of welfare and social security, it seems that only under rare circumstances will the state have a constitutional duty to fund one particular medication out of all the medications for which requests of public funding were submitted.

Summary:

The petitioners are patients suffering from colon cancer, who were in need of a medication named “Erbitux”, which was not included in the national list of

health services (“the Health Basket”), which is publicly funded under the provisions of the National Health Insurance Law, 5754 – 1994.

The Court had to determine whether the decision to exclude the medication “Erbitux” from the Health Basket constitutes an infringement of a constitutional or legal right of the petitioners.

The petition was denied.

The Court held that the right to health has indeed been acknowledged by different international conventions, and even included in the constitutions of some of the world's states. Yet, the definition of its internal scope and the extent of its protection remain vague and are characterised by a cautious approach, which takes into consideration the budgetary capability of each country and the principle of the gradual realisation of the right. Thus, the constitution of the World Health Organisation (WHO) of 1946 acknowledges a basic right to health, yet the scope of this right is defined as “the highest attainable standard of health”. As for the Universal Declaration of Human Rights of 1948, it establishes several social human rights, including the right to an adequate standard of living, which includes aspects of the right to health and health care. Yet, the introduction to the declaration states specifically that the said right will be assured by gradual means. One of the most central international documents concerning the right to health is the International Covenant on Economic, Social and Cultural Rights of 1966, which was ratified by the State of Israel in 1991. Article 12 of this Covenant sets out that the states party to the Covenant acknowledge the right of every person to enjoy the highest attainable standard of physical and mental health, and that they must take necessary steps to insure, *inter alia*, the creation of conditions which would assure medical service and medical attention to all in the event of sickness. Article 2 of the Covenant further stipulates that each state party to the Covenant undertake steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the Covenant by all appropriate means, including particularly the adoption of legislative measures. Thus, international conventions which acknowledge the right to health and health care take into consideration budgetary limitations and are cautious in determining the scope of the said right and the extent of the protection given to it.

As for the internal realm of the states, the constitutions of many states, including the United States and Canada, do not grant explicit constitutional status to the right to health. The law of these states only protects

limited aspects of the said right. In contrast, Article 27 of the Constitution of South Africa grants specific Constitutional status to the right of access to health care services. Yet, the Constitution further stipulates that the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights. It was also noted that the constitutions of the Netherlands and India explicitly establish the right to the advancement of public health, yet this right is not enforceable by the judicial authority and is a mere basic principle that should guide the executive authority's and legislative authority's conduct.

After examining the data presented to it, the Court concluded that the medication named "Erbitux" (and similar innovative experimental medications) is not included in the basic health care services, which are required for minimal human existence in society. From a wide social perspective and considering the limited public resources, it is doubtful that a requirement to publicly fund such innovative medications finds support in the hard core of the constitutional rights enshrined in the basic laws. Moreover, even according to an interpretative approach, which widens the constitutional scope of the right to human dignity beyond the minimal standard required in the realms of welfare and social security, it seems that only under rare circumstances will the state have a constitutional duty to fund one particular medication out of all the medications regarding which requests for public funding were submitted. In this context, it was noted that due to reticence about excessive intervention in national-economic priorities, courts around the world avoid ruling that a lack of public funding for a particular medical treatment constitutes an infringement of a patient's constitutional right. Taking all of this into consideration, the Court concluded that in the matter before it, no infringement of a constitutional right of supra-legal status has been proven.

The Court further held that the right to public health care services – whether it is a constitutional right or not – is still a right which is recognised by Israeli legislation and case law and is protected, *inter alia*, by the rules of Administrative Law. The Health Basket Committee (whose role it is to advise the relevant authorities on the matter of prioritising the different new medical technologies for the purpose of expanding the Health Basket) constitutes a part of the public administration and is bound in its actions to the rules of administrative law. As a rule, the Court will not intervene in the committee's discretion as long as its recommendations were reached by proper procedures and provided the committee has not substantially deviated from the relevant considerations it must consider or substantially

digressed from the proper balance of those considerations within the margin of reasonableness. Moreover, according to Israel's case law, a public authority is authorised and even obliged to consider budgetary limitations while exercising its judgment, as part of the fulfilment of its duties towards the public. The budgetary consideration is a legitimate consideration, which the Health Basket Committee is authorised to take into consideration when prioritising the new medical technologies. It cannot be said that the recommendation of the Committee in regard to the ranking of "Erbitux" is unreasonable to the extent that requires the intervention of the Court. Neither can it be said that the Committee's recommendation in regard to "Erbitux" constitutes discrimination of the petitioners in relation to other patients, whose medication was included in the health basket. Under the circumstances, in which the public resources are not sufficient for all needs and all the needy there is a necessity to allocate the resources by setting a list of priorities, which naturally creates distinctions between individuals and groups of people. These distinctions do not constitute discrimination as long as they are based on reasonable and relevant considerations. A different approach would mean ruling out any possibility of making distributive decisions for the purpose of allocating public resources, even under circumstances in which the decisions were made on the basis of legally permissible considerations.

Cross-references:

- LCA 4905/98 *Gamzou v. Yeshayahu* [1998] IsrSC 55 (3) 360;
- HCJ 494/03 *Physicians for Human Rights v. The Minister of Finance* [2003], IsrSC 59(3) 322;
- HCJ 5578/02 *Manor v. Minister of Finance* IsrSC 59(1) 729;
- HCJ 2557/05 *Majority Camp v. Israel Police* (not yet reported 12.12.2006);
- HCJ 4769/95 *Menahem v. Minister of Transportation* [2002], IsrSC 57(1)235.

Languages:

Hebrew, English (translation by the Court).



Latvia

Constitutional Court

Important decisions

Identification: LAT-2009-1-001

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 23.04.2009 / **e)** 2009-42-01 / **f)** On Compliance of the Words “One Hour Long” and “in the Presence of a Representative of an Investigation Prison Administration” of Section 13.6 of the Law “On Procedures for Keeping in Custody” with Article 96 of the Constitution of the Republic of Latvia / **g)** *Latvijas Vestnesis* (Official Gazette), no. 64(4050), 25.04.2008 / **h)** CODICES (Latvian, English).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Detainee, rights / Detainee, private visit, supervision.

Headnotes:

The notion of “private life” is often used in a broad sense, encompassing respect for family life, home and correspondences. The law recognises the difficulty in distinguishing between these rights, which overlap and supplement each other.

The right to private life comprises the rights to form and maintain relations with family members and other human beings. The State must not only refrain from intervening in private life, but must also protect this right.

There are numerous components to the right to private life. It protects physical and moral integrity, honour and reputation, the use of somebody’s name and identity, personal data and other aspects. Under the right to private life, individuals enjoy the right to their own homes, the right to live as they please, in

accordance with their own personalities, tolerating minimum interference from the state and others. This right comprises the right of an individual to be different and retain and develop virtues and abilities, which distinguish him or her from others, and make them into individuals.

The duty of the State to help a person maintain relations with those close to them during custody follows from the right to private and family life.

Summary:

The provision under dispute allows a detainee an hour-long visit with relatives or other persons only once per month and in the presence of a representative of the prison administration.

On 23 April 2009, the Constitutional Court of the Republic of Latvia ruled that the terms “one hour long” and “in the presence of a representative of the prison administration” from the contested provision do not comply with the right to inviolability of private life and right to family life.

The Court decided that these terms must be interpreted on a case-by-case basis, taking into account on each occasion the specific facts of an individual case. The Court also decided that these terms conflict with a person’s right to a private life, as outlined in Article 8 ECHR, in a disproportionate way, as the benefits that accrue to society through limiting detainee visitation rights do not outweigh a detainee’s individual right to visits.

Cross-references:

Previous decisions of the Constitutional Court in the following cases:

- Judgment no. 2004-17-01 of 26.01.2005; *Bulletin* 2005/1 [LAT-2005-1-002];
- Judgment no. 2006-42-01 of 16.05.2007;
- Judgment no. 2007-24-01 of 09.05.2008; *Bulletin* 2008/2 [LAT-2008-2-003].

European Court of Human Rights:

- *Berrahab v. The Netherlands*, Judgment of 21.06.1988, para 23;
- *Niemietz v. Germany*, Judgment of 16.12.1992, para 29;
- *Guerra and others v. Italy*, Judgment of 19.02.1998, para 58;
- *Olsson v. Sweden*, Judgment of 24.03.1998, para 59;

- *Aliev v. Ukraine*, Judgment of 29.04.2003, para 187;
- *Perry v. the United Kingdom*, Judgment of 17.07.2003, para 36;
- *Von Hannover v. Germany*, Judgment of 24.07.2004, para 57;
- *Ciorap v. Moldova*, Judgment of 19.06.2007, para 111, 117, 118;
- *Kucera v. Slovakia*, Judgment of 17.07.2007, para 127, 128;
- *Dickson v. the United Kingdom*, Judgment of 04.12.2007, para 81;
- *X v. Croatia*, Judgment of 17.07.2008, para 3;
- *Moiseyev v. Russia*, Judgment of 09.10.2008, para 246, 252- 256, 258;
- *Biriuk v. Lithuania*, Judgment of 25.11.2008, para 34, 35.

Languages:

Latvian, English (translation by the Court).



Liechtenstein State Council

Important decisions

Identification: LIE-2009-1-001

a) Liechtenstein / **b)** State Council / **c)** / **d)** 09.12.2008 / **e)** StGH 2008/42 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

1.4.8.2 Constitutional Justice – Procedure – Preparation of the case for trial – **Notifications and publication.**

1.4.10.6.2 Constitutional Justice – Procedure – Interlocutory proceedings – Challenging of a judge – **Challenge at the instance of a party.**

1.4.11.1 Constitutional Justice – Procedure – Hearing – **Composition of the bench.**

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.**

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

Keywords of the alphabetical index:

Court, bench, composition, disclosure.

Headnotes:

The Supreme Court's practice of disclosing only the list of titular and substitute judges likely to be sitting during a case, not the composition of the bench determining the case, infringes Article 59.1 of the Law on the Organisation of the Judiciary (hereinafter, "the Law"). Non-compliance with this procedural rule constitutes an inadmissible restriction on the right to a court deriving from Article 33.1 of the Constitution, and on the right to an effective remedy under Article 43 of the Constitution. Indeed, an application to challenge a Supreme Court judge, whose identity is not known beforehand, could not be brought by way of an ordinary appeal but only through a constitutional appeal to the State Council, whereas it should be possible for a petition of this kind to be lodged and heard in ordinary proceedings.

Summary:

In several of its decisions, the State Council has demonstrated that the Supreme Court's practice, at variance with that of other courts consisting of a bench of judges, not to give the parties advance notice of its composition, infringes former § 15.1 of the Law (now new Article 59.1), and the right of access to court and to an effective remedy.

As the partiality of a judge had been alleged in the instant case, the impugned Supreme Court decision had to be quashed for infringing the right of access to court and to an effective remedy.

Languages:

German.

*Identification:* LIE-2009-1-002

a) Liechtenstein / **b)** State Council / **c)** / **d)** 10.12.2008 / **e)** StGH 2008/38 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

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

3.16 General Principles – **Proportionality.**

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

3.18 General Principles – **General interest.**

3.19 General Principles – **Margin of appreciation.**

3.20 General Principles – **Reasonableness.**

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

5.4.6 Fundamental Rights – Economic, social and cultural rights – **Commercial and industrial freedom.**

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

Keywords of the alphabetical index:

Medical profession / Social security.

Headnotes:

It is not the exercise of freedom of trade and industry that must be objectively founded, but the limitation that may be placed on it.

In carrying out its duties, the legislator has a considerable margin of discretion in applying the criterion of expediency and the principle of proportionality. In the light of this principle, the legislator must ensure that its measures pursue an identifiable goal of public interest, are founded on objective reasons, and are adequate and necessary for achieving the aim sought.

The statutory and constitutional requirement of health protection justifies the imposition of proportionate limitations on freedom of trade and industry, by regulating in particular the practice of medicine.

Even though the exercise of the medical profession presupposes strict regulation, it is not clearly apparent that the prohibition of its exercise in the legal form of a corporation is expedient or appropriate in order to achieve the goals of health protection, promotion of public health, quality of care, protection of patients or any other purpose linked with health policy or with the law applicable to social insurance.

The legislature itself proceeds from the principle that medicine can be practiced not only as an independent profession but also in the framework of a relationship of employment with an approved public medical establishment, that is a corporation.

While tax-related interests may constitute public interests, in principle they do not suffice to justify limitations on the exercise of fundamental rights.

The general stipulation forbidding medical practices to operate in the legal form of a corporation, which follows from Article 37.4 in conjunction with Article 18.1 GesG (Health Act), interferes disproportionately with the principle of freedom of trade and industry.

Summary:

The repeal of a provision of the former law on public health by the State Council made it possible to grant authorisation for a medical activity to be pursued in the legal form of a corporation. Subsequently, the new law on public health prohibited the practice of medicine under this legal arrangement and ordered the lapse within one year of the authorisations already granted. In the absence of any other means of appeal, the State Council received an individual

petition lodged by the holder of one of the said authorisations, directly contesting the validity of this provision on the basis of Article 15.3 StGHG (State Council Law).

The State Council allowed this application, found a breach of the principle of freedom of trade and industry, and accordingly set aside the impugned provisions.

Languages:

German.



Lithuania Constitutional Court

Important decisions

Identification: LTU-2009-1-001

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 02.03.2009 / **e)** 28/08 / **f)** On the legality of founding the national investor / **g)** *Valstybės Žinios* (Official Gazette), 25-988, 05.03.2009 / **h)** CODICES (English, Lithuanian).

Keywords of the systematic thesaurus:

3.18 General Principles – **General interest**.
 3.25 General Principles – **Market economy**.
 4.10.8.1 Institutions – Public finances – Public assets – **Privatisation**.
 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 / Energy, sector / Monopoly / Nuclear power plant / Property, public, use / State property, investment / Economy, state regulation.

Headnotes:

The legislative establishment of the protection of the rights of electricity consumers, the creation of a national investor which will own the main part of electricity production, transmission, distribution, import and export, and investment of state property along with that of private entities are in line with the Constitution, but the implementation of the goal of the law, namely the creation of preconditions for construction of the new nuclear power plant, must be secured by a legal regulation.

Summary:

The *Seimas* (Parliament) asked the Constitutional Court to assess the following provisions of the Law on the Nuclear Power Plant.

1.1. "The national investor shall be an independent private legal entity registered in the Republic of Lithuania, operating under Lithuanian law, and established for an indefinite period of time. The aim of its activity shall be the gaining of benefits for itself and all its shareholders in a socially responsible manner" (Article 10.1 (wording of 1 February 2008)). The Parliament expressed concerns as to whether that the single aim of the national investor was indeed the gaining benefits for itself and its shareholders in a socially responsible manner and as to whether the protection of consumer rights was legislatively established. A question was raised over compliance with Article 46.5 of the Constitution.

1.2. "The national investor shall be the national power company managing through its subsidiaries the main part of the Lithuanian power system – the electricity transmission and distribution networks. To achieve the goal of its activity, the national investor shall participate, on the basis of private initiative, in the implementation of the project of construction of a new nuclear power plant, and the construction, according to the procedure established by the Law on Electricity and other legislation, connections between the power system of the Republic of Lithuania and those of the Republic of Poland and the Kingdom of Sweden" (Article 10.1 (wording of 1 February 2008)). Parliament expressed concern over the creation of a national investor which, as an owner, would concentrate in its hands most of the production, transmission, distribution, export and import of electricity and suggested a potential conflict with Article 46.3 and 46.4 of the Constitution.

1.3. "The Government of the Republic of Lithuania implementing the provisions of Article 10 of this Law shall have the right to: 1. negotiate with the shareholder of the controlling block of shares in the joint-stock company 'VST' on the establishment of the national investor and on the investment of all the shares owned by that shareholder in the joint-stock company 'VST', or part thereof amounting to more than 2/3 of the shares of the joint-stock company 'VST' carrying more than 2/3 of votes at the general shareholders' meeting, as well as on the acquisition of newly issued shares of the national investor (...)" (Article 11.1 (wording of 1 February 2008)). Parliament suggested a potential conflict with Articles 29.1 and 46.4 of the Constitution.

With regard to the compliance of the provision at 1.1 (above) of Article 10.1 of the Law on the Nuclear Power Plant with Article 46.5 of the Constitution, the Court noted the petitioner's assertion that the only aim of the activity of the national investor was gaining benefits for itself and all its shareholders in a socially responsible manner. In fact, this was not the only aim of the national investor.

The Constitutional Court noted that the protection of consumer rights and interests do not fall exclusively within the remit of regulation by the Law on the Nuclear Power Plant. It is also enshrined in the Law on Consumer Rights Protection, the Civil Code, and the Law on Electricity, and this legislation was not amended after the enactment of the Law on the Nuclear Power Plant.

The Constitutional Court noted that the provision "the State shall defend the interests of the consumer" entrenched in Article 46.5 of the Constitution implies that legal norms must establish various measures to protect consumer interests; the constitutional duty of the state to protect consumer interests must be implemented primarily by the legislator who establishes both general and specific measures (tailored to the economic activity which is being regulated) to protect and defend consumer rights which are correspondingly applicable in general to all areas of economic activity and of specific applicability to others, including electricity. The efficient protection and defence of consumer interests implies *inter alia* the fact that the legislator has a duty to establish an institutional system of protection of consumer rights and interests, i.e. the law must establish corresponding state institutions, clearly define their powers, and create the conditions to allow the institutions themselves to secure the realistic protection and defence of consumer rights in their respective areas of economic activity. It also implies a duty on the part of the legislator to establish such legal regulation which would enable every consumer to receive a safe and reliable supply of electricity under non-discriminatory conditions. The establishment of price limits is one way of protecting consumer interests.

The Court observed that the petitioner had not presented any arguments or reasons to support its contention that after Article 10.1 of the Law on the Nuclear Power Plant established the right of the national investor to gain benefits for itself and all its shareholders in a socially responsible manner, the electricity sector underwent such changes that it became necessary to establish additional protection of consumer rights, which should have been established precisely in the Law on the Nuclear Power Plant. It found that the provision in 1.1 overleaf of Article 10.1 of the Law on the Nuclear Power Plant in the aspect disputed by the petitioner was not in conflict with the Constitution.

The Constitutional Court proceeded to examine the compliance of the provision mentioned at 1.2 overleaf of Article 10.1 of the Law on the Nuclear Power Plant with Article 46.3 and 46.4 of the Constitution. The Law on the Nuclear Plant created the preconditions to

form a “prototype” for the national investor, whereby the national electricity company, a newly-founded entity based on state and private capital, comprises, together with existing companies, a group of companies of the national investor. This will be composed of the parent company – the national investor – and subsidiaries, which, as separate legal persons conduct separate activities of electricity generation, transmission, distribution, supply, the activity of the market operator, and other activities under procedure established by legal acts. This legal regulation created preconditions to consolidate the management of the group of companies of the national investor in the newly founded national electricity company (the national investor).

The Constitutional Court noted that Parliament, as the institution of legislative power and the Government as an institution of executive power enjoy very broad discretion to form and execute the economic policy of the state. If, in legislation, differentiated legal regulation was established for a certain sector of economy by comparison with the legal regulation of other economic sectors, or amendments were made to the legal regulation of a certain economic activity as a reaction to changes in the market and national and international economic circumstances, this cannot in itself cannot serve as a pretext to question the economic policy of the state, which is formed and executed by Parliament and the Government. The legal pre-conditions for differentiated legal regulation (when account is taken of the importance and nature of the regulations in question) originate from the Constitution itself (and in particular Article 46.2); the differentiated establishment of the legal situation of separate economic entities is to be related with the objectives raised by the state in a particular economic sector and attempts to organise the country’s economy in a corresponding manner.

The Constitutional Court stated that the legal regulation established in the Law on the Nuclear Power Plant did not create any legal preconditions for reducing or increasing the number of economic entities which conducted or were able to conduct the activities of electricity transmission and distribution, or for reducing or increasing the segment of the market which falls or has the potential to fall within the remit of the said economic entities. Thus, a new monopoly was not created in the electricity sector. Moreover, there is no provision within the Law on the Nuclear Power Plant for the national investor to conduct the activities of its subsidiaries. The law provides that the separate activities of electricity generation, transmission, and distribution are conducted by the subsidiaries of the national investor. When the legislation established a new electricity company – the national investor – with the central purpose of

acting as parent company to the national investor group of enterprises, it did not create any legal preconditions to change the electricity market in essence from the aspect of monopolisation.

The Constitutional Court held that the provision outlined in 1.2 above of Article 10.1 of the Law on the Nuclear Power Plant was not in conflict with the Constitution.

The Court then examined the compliance of the above-mentioned item of Article 11.1 of the Law on the Nuclear Power Plant with the Constitution. It first clarified the constitutionality of the method of investment the state had chosen here, whereby in the course of founding the national investor, state property is invested jointly with one private person, as indicated in the legislation. The court ruling noted that one of the aims of the national investor is to fund all or part of the project of new nuclear plants, or to secure funding for this purpose. Another aim is participation in the implementation of the project of building a new nuclear power plant in Lithuania and in establishing connections between the power system of the Republic of Lithuania with those of the Republic of Poland and the Kingdom of Sweden. Another aim is the integration, in a complex manner, of the electricity system of the Republic of Lithuania into the electricity transmission systems and internal electricity markets of the member states of the European Union. The national investor also has to implement in an efficient manner the main task of the national electricity system supplying Lithuanian electricity customers with electricity of the Republic of Lithuania for an indefinite period, safely and independently. Thus, when the state set up the institution of the national investor, and state property was invested jointly with that of a private entity, care had to be taken to select a private entity that would ensure the implementation of these aims.

The Constitutional Court noted the various methods at the legislator’s disposal for the investment of state property; there is no problem, from a constitutional perspective, with establishing an investment vehicle whereby state property is invested together with that of others (including private entities). When deciding how to invest state property, however, the state must look after the vital constitutionally grounded needs and interests of society. An investment would be constitutionally unjustifiable, if it would clearly result in harm to society or a breach of the rights of other parties.

The Constitutional Court held that Article 11.1 of the Law on the Nuclear Power Plant was not in conflict with the Constitution.

Article 8.1 of the Law on the Nuclear Power Plant deals with the implementation of the rights attaching to the shares the state holds in the national investor company. Under this provision, the manager of the state's shares, or persons authorised by the manager, shall exercise the property and non-property rights of the state as a shareholder in accordance with the procedure established by the Government. The Constitutional Court noted that this paragraph does not establish the principles by which the manager or those he appoints should be guided, in securing efficient representation of the state as a shareholder in order to create financial preconditions for constructing the new nuclear power plant. Nor does it establish how the management of the property and non-property rights of shareholders in the national investor should be managed, with a view to accruing monetary funds for the construction of the nuclear power plant. The Constitutional Court held that, to the extent that it did not establish any legal regulation to secure the implementation of the goal of the law, the creation of preconditions for the building of the new nuclear plant, Article 8.1 of the Law on the Nuclear Power Plant ran counter to Article 46.3 of the Constitution.

Languages:

Lithuanian, English (translation by the Court).



Identification: LTU-2009-1-002

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 10.04.2009 / **e)** 27/08-29/08-33/08 / **f)** On not returning a vehicle that has been towed away / **g)** *Valstybės Žinios* (Official Gazette), 42-1624, 16.04.2009 / **h)** CODICES (English, Lithuanian).

Keywords of the systematic thesaurus:

3.9 General Principles – **Rule of law**.
3.16 General Principles – **Proportionality**.
5.3.39.3 Fundamental Rights – Civil and political rights – Right to property – **Other limitations**.

Keywords of the alphabetical index:

Road traffic, offence / Offence, administrative / Penalty, administrative / Sanction, administrative / Measure, coercive, non-punitive, criteria / Measure,

other than punishment / Measure, administrative, validity / Car, private / Ownership, right, restriction / Property, right, restriction.

Headnotes:

The provision in the Code of Administrative Violations of Law under which retrieval of a vehicle that has been towed away is only possible upon payment of a fine or service of a period of administrative detention was found to be in conflict with the Constitution and with the constitutional principle of a state under the rule of law.

Summary:

The Supreme Administrative Court of Lithuania lodged a petition with the Constitutional Court, questioning the compatibility of Article 269.7 (wordings of 13 December 2007 and 3 July 2008) of the Code of Administrative Violations of Law (“the CAVL”) with Article 109.1 of the Constitution and with the constitutional principles of a state under the rule of law and proportionality, to the extent that it only allows for the retrieval of a vehicle that has been towed away (except where it has been confiscated) upon payment of a fine or after service of the period of administrative arrest.

The Supreme Administrative Court contended that because the vehicle could only be retrieved upon payment of a fine or service of a period of administrative arrest, the rights of the person are limited more than is necessary to protect public interests; there is not a reasonable and adequate balance between this measure and the objectives it seeks to achieve. The measure was accordingly disproportionate.

The Constitutional Court held that the disputed provision “It is permitted to retrieve a towed-away vehicle (save the cases when the vehicle is confiscated) only after paying the imposed fine or serving the time of the administrative arrest” of Article 269.7 (wordings of 13 December 2007 and 3 July 2008) of the CAVL is designed to cover the securing of the execution of the imposed administrative penalty – payment of a fine or service of a period of administrative arrest.

The Constitutional Court noted that it is implicit within the constitutional principles of justice and a state under the rule of law that any measures the state introduces with regard to violations of law must be in proportion to the violation, and must comply with the lawful and socially significant objectives sought. The measures should not impose a more stringent

restriction on the person concerned than is necessary in order to reach these objectives; there must be a fair balance (proportionality) between the objective of punishing those who break the law, and that of deterrence from breaking it, and the measures chosen for reaching this objective. In the course of legislative establishment of liability and its implementation, a fair balance is needed between individual rights and those of society as a whole, so as to evade unreasonable restriction of the rights of the person. On the basis of this principle, the rights of a person may be restricted by laws only to the extent necessary for the protection of public interests, and there must be a reasonable correlation between the measures adopted and the legitimate objective.

The Supreme Administrative Court of Lithuania expressed concerns over the compliance with the Constitution of Article 269.7 (wording of 13 December 2007) of the CAVL in that once the vehicle has been towed away, it can only be recovered upon payment of a fine or service of a period of administrative arrest. In the petitioner's view, this restricts the rights of the owner to use the vehicle.

The Constitutional Court noted that, under the Constitution, the right of ownership is not absolute. Certain restrictions are possible, in connection with the nature of the property, transgressions against the law or a particular social need which is constitutionally justified. However, ownership rights can only be restricted by law, and they must be necessary in a democratic society in order to protect the rights and freedoms of others, important constitutional objectives or values. Any restrictions must comply with the proportionality principle, and be in line with the objectives sought which are necessary to society and constitutionally justified.

The owner or rightful possessor of the vehicle that has been towed away will only be able to enjoy free use of it at his or her discretion when the fine has been paid or a period of administrative arrest served, although the objective of impounding the vehicle is not the avoidance of obstruction by the vehicle or pedestrian traffic, to remove negative consequences caused by the violation of law or to prevent such consequences appearing (*inter alia* to avoid the damage or loss of property). It should also be noted that the owner of the vehicle and the person who committed the administrative violation of law that caused the vehicle to be towed away can be different persons and indeed the person who caused it to be taken away might even have taken unlawful possession of the vehicle.

The Constitutional Court found Article 269.7 (wordings of 13 December 2007 and 3 July 2008) of the CAVL, to the extent that it only allowed for the retrieval of a

vehicle that had been towed away upon payment of a fine or service of a period of administrative arrest, to be in conflict with Article 23.1 and 23.2 of the Constitution and with the constitutional principle of a state under the rule of law.

In its ruling, the Constitutional Court noted that in situations where the rationale behind towing a vehicle away is to avoid obstruction to vehicle and pedestrian traffic, to remove the negative consequences caused by the violation of law and to prevent such negative consequences from appearing (*inter alia* to avoid damage of or loss to property), the measure of removing the vehicle should be assessed as proportionate and adequate to the objectives sought.

The Constitutional Court also noted that a consolidation of measures surrounding the confiscation of a vehicle would be helpful, when the legislator is establishing administrative penalties, in accordance with the relevant norms and principles of the Constitution. For example, the legislator could introduce provision for temporary return of the vehicle pending consideration of the administrative proceedings.

Languages:

Lithuanian, English (translation by the Court).



Identification: LTU-2009-1-003

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 29.04.2009 / **e)** 23/05-18/07 / **f)** On licences to engage in natural gas transmission, distribution and storage activity and on regulation of prices of natural gas supply / **g)** *Valstybės Žinios* (Official Gazette), 49-1993, 30.04.2009 / **h)** CODICES (English, Lithuanian).

Keywords of the systematic thesaurus:

2.2.2 Sources – Hierarchy – **Hierarchy as between national sources.**
 3.4 General Principles – **Separation of powers.**
 3.9 General Principles – **Rule of law.**
 3.25 General Principles – **Market economy.**
 4.6.2 Institutions – Executive bodies – **Powers.**
 5.1.4 Fundamental Rights – General questions – **Limits and restrictions.**

5.4.6 Fundamental Rights – Economic, social and cultural rights – **Commercial and industrial freedom.**

Keywords of the alphabetical index:

Energy, sector, regulation / Licence, granting, requirement / Energy, pricing, regulation / Price, gas, supply.

Headnotes:

The requirement for enterprises seeking licences for the transmission, distribution or storage of gas to have gas systems within their ownership rights or to use them in any other legal is in conflict with the Constitution.

When enacting sub-statutory legal acts, the Government must take care not to establish a legal regulation which would compete with existing legislation. It is important that the Government should enact laws without exceeding its powers and that these laws are not in conflict with the Constitution and other laws.

Summary:

The Supreme Administrative Court of Lithuania and the Vilnius Regional Court requested an assessment of the compliance of Article 5.2 (wording of 10 October 2000) of the Natural Gas Law and Item 10 (wording of 19 June 2001) of the Regulations on Licensing the Transmission, Distribution, Storage and Supply of Natural Gas (referred to as the Regulations) as approved by Government Resolution no. 743 of 19 June 2001 with the Constitution. They also sought a review of the compliance of Item 37 (wording of 23 December 2002) of these regulations with the Constitution and with the provisions of the Law on Energy, the Natural Gas Law, the Law on Competition and the Civil Code.

The Supreme Administrative Court expressed concerns over the requirement for enterprises seeking to obtain licences for the transmission, distribution or storage of gas to have gas systems within their ownership right or to use them by any other legal means in the disputed provision of the Natural Gas Law, which was repeated in Item 10 of the Regulations. The Supreme Administrative Court observed that this created disproportionately large obstacles in the way of obtaining such licences. It artificially restricted freedom of economic activity and competition in the gas market and could potentially give rise to a monopolistic gas market, which would breach consumers' rights. A situation could also arise whereby the acquired gas systems could remain unused, impeding the rational exploitation of land and

harming the natural environment. The petitioner suggested that such legal regulation might contravene Articles 46 and 54 of the Constitution.

Referring to its former rulings, the Constitutional Court emphasised that the freedom of economic activity is not absolute; it is hedged around by certain obligatory requirements and limitations. Under the Constitution, the state is entitled to establish legal regulation of economic activity, *inter alia* the conditions of economic activity, limitations and prohibitions, and regulation of procedures by legal acts. When imposing limitations, the state must take care not to impinge upon vital provisions of the freedom of economic activity such as equality of rights of economic entities and fair competition. When regulating economic activity, the state must follow the principle of a balance between the interests of an individual and those of society as a whole and must protect the interests of an individual person (or economic entity) and those of society.

The Constitutional Court held that the legal regulation under dispute has not replaced the system previously in force of licences to engage in energy activity. The requirement for economic entities to have gas systems within their ownership rights or to use them in other legal ways within the challenged provision applied to all businesses seeking to obtain these licences in a particular area, and therefore did not deny the equal rights of economic entities. The established legal regulation was a natural development, and necessary for the licensed activities of transmission, distribution and storage of gas which would be completely impossible without these systems. The Constitutional Court also pointed out that the mere fact of establishment of certain conditions in order to engage in economic activity should not automatically be assessed as the creation of preconditions for the monopolisation of the market. The rationale behind the legal regulation was the proper implementation of transmission, distribution and storage of natural gas, the safety, reliability and continuity of supply of natural gas to consumers and the protection of consumer interests. Therefore, according to the Constitutional Court, this regulation was not in conflict with the Constitutional Court.

In its petition, the Vilnius Regional Administrative Court expressed concern over the Government's imposition, in Item 37.9 of the Regulations of a duty for enterprises engaged in natural gas transmission, distribution and storage activity to establish a price of gas supply for eligible customers which would not exceed the price cap on gas supply established by the National Control Commission for Prices and Energy. The Vilnius Regional Administrative Court suggested that this provision unlawfully restricted the right of natural gas enterprises to freely establish the

price of gas supply for eligible customers and supplemented the finite list of prices within the natural gas sector regulated by the state which is established in the Natural Gas Law. In so doing, it created a legal norm of a new kind, and also restricted the natural gas suppliers' right to property, freedom and initiative of economic activity. It did not ensure freedom of fair competition.

The Constitutional Court established that Item 37.9 of the Regulations competed with the legal regulation to be found in Article 14.1 of the Natural Gas Law, which established that one could only regulate the prices of natural gas transmission, distribution and storage and the prices of gas for regulated consumers. Other prices, including the price of natural gas supply for eligible customers, were contractual (could not be regulated). Therefore, the disputed provision provided for something that had not been provided for in the law. The Constitutional Court noted that under the Constitution, when passing legislation, the Government must follow the effective laws and while implementing some laws, it may not violate others. Legal acts by the Government – sub-statutory legal acts – should not establish a legal regulation which clashes with legislation already in force. The Government must adopt its legal acts without exceeding its powers and these legal acts should not be in conflict with the Constitution and laws.

The Constitutional Court held that if the Government establishes a legal regulation in its resolutions that competes with legislation already in force or which is not grounded on laws, this does not only violate the constitutional principle of a state under the rule of law and Article 94.2 of the Constitution, but also Article 5.2 of the Constitution, which establishes that the scope of power shall be limited by the Constitution, and the constitutional principle of the separation of powers. In view of the above, the Constitutional Court recognised the disputed provision of Item 37 of the Regulations to be in conflict with the above constitutional provisions and with the constitutional principle of a state under the rule of law. The provision also ran counter of Article 14.1 (wording of 10 October 2000) of the Natural Gas Law.

Languages:

Lithuanian, English (translation by the Court).



Mexico Supreme Court

Important decisions

Identification: MEX-2009-1-001

a) Mexico / **b)** Supreme Court / **c)** First Chamber / **d)** 06.02.1929 / **e)** 7 / **f)** Direct Judicial review 4306/28 / **g)** *Semanario Judicial de la Federación*, Tome XXV, 554; IUS 315, 447; *Relevant Decisions of the Mexican Supreme Court*, 21-22 / **h)**.

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Crime, qualification / Proceedings, criminal / Death penalty.

Headnotes:

The absence of a ballot box during the composition of a jury does not prevent the creation of an impartial jury. Questioning the accused as to whether a crime was committed during a quarrel is irrelevant for determining premeditation.

Summary:

The First Chamber of the Supreme Court decided on direct relief proceedings no. 4306/28 filed by the lawyers of José de León Toral against the resolution of the Seventh Chamber of the Federal District Superior Court confirming the death sentence passed by the Trial Judge of the Judicial District of Tacubaya for the murder of General Álvaro Obregón.

The indictment stated that when the juries were selected by ballot, various legal formalities were omitted; one of them being that the ballot box required by law had not been used. Another was the fact that that no question was posed during the

interrogations as to whether the homicide had taken place in the context of a quarrel. Also, the death penalty was alleged to have been passed without bringing together the three conditions required under the Federal Constitution in cases of homicide; namely premeditation, treachery and advantage. Furthermore, the death penalty was considered applicable although the crime was of a political nature, and despite the fact that its main purpose was not to cause Obregon's death but to derogate or reform the laws governing cults. The plaintiff argued that all these matters had been violated, breaching the guarantees in Articles 14, 16 and 22 of the Federal Constitution.

Having analysed the offences, the Chamber decided to deny relief.

Firstly, the fact that the ballot box had not been used, as established under Article 279 of the Penal Proceedings Code then in force, was not seen as detrimental to the plaintiff, but served, rather, to confirm the purpose of the law. The idea was to ensure that the jury selection process was conducive to the creation of an impartial jury.

Furthermore, the fact that during the interrogations no questions were posed to establish whether the crime had been committed during a quarrel by no means represented a violation. Such a question was irrelevant to the issue of premeditation, and had greater bearing on the applicable penalty. Moreover, this situation did not violate the essential formalities of the proceedings given that it was possible to argue that the interrogations were incomplete.

The Chamber also established that Article 561 of the Penal Code in force at that time, requiring that all three conditions be met: premeditation, treachery or advantage, as requirements to qualify for the offence of homicide, could not be derogated from by Article 22 of the Federal Constitution, which demands that all three conditions be met.

With regard to the affirmation that the crime had been of an essentially political nature, the Chamber determined that there was no rational or scientific basis to qualify the homicide as a political crime given that at the time of the offence, General Obregón did not hold a public position and was, instead, living the life of an ordinary citizen who had participated in the 1 July 1928, elections to renew the Federal Executive. In the current case, the crime was deemed to have been motivated by religious passion and was not a political crime.

Languages:

Spanish.



Identification: MEX-2009-1-002

a) Mexico / **b)** Supreme Court / **c)** First Chamber / **d)** 20.02.1933 / **e)** 9 / **f)** Judicial Review 4220/31 / **g)** *Semanario Judicial de la Federación*, Tome XXXVII, 943; IUS 336, 807; *Relevant Decisions of the Mexican Supreme Court*, 27-28 / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Abuse of power / Media, newspaper, distribution / Press, freedom, protection, scope / Social justice.

Headnotes:

Impeding the circulation of a newspaper violates the freedom of the press.

Summary:

When deciding on relief proceedings under review no. 4220/31, the Second Chamber of the Supreme Court set an important precedent in terms of the freedom of the press in Mexico.

One of the offences involved an order given by the Governor of the State of Yucatán to the responsible municipal mayors and public employees and officers to the effect that the circulation of the newspaper *El Diario de Yucatán* was to be impeded. Law enforcement officers were to seize copies of the newspaper and spokespersons or agents of circulation were to be arrested. This resulted in the suspension of the publication of the newspaper.

The Second Chamber determined that the first of these actions contravened the guarantees enshrined in Articles 4, 6, 7 and 16 of the Federal Constitution in that any act aimed at obstructing the free manifestation of ideas should be deemed contrary to the ideals proclaimed by the revolutionary movement that struggled to implement a system of social justice in the country.

The Chamber indicated that despite potential for misuse, the freedom of the press should not be repressed given that the struggle against its action is unjustifiable if its accompanying source of energy is eliminated, and greater evils result from the stifling of ideas, which is the origin of all abuse of power. Moreover, the freedom to write and publish granted under Article 7 of the Federal Constitution, goes hand in hand with the right of free expression of ideas contemplated under Section 6. This represents a highly significant triumph for the Mexican people in their political evolution.

The Chamber also indicated that, although it is accepted that the acts interfering with the freedom of the press were the work of individuals and specifically members of a political party, the violation of guarantees by the responsible authorities should be viewed against the background of the obligation of the national authorities to put a stop to breaches of this nature in the light of their legal obligation to abide by the Political Constitution, and to ensure its compliance. Violation may not result directly from acts of the authorities, but can nevertheless be attributable to acts of omission.

Moreover, the Court considered that constitutional protection could not be extended to some of the alleged acts, such as the seizure of copies of the newspaper and the arrest of the plaintiffs, as the damage done was irreparable.

Languages:

Spanish.



Identification: MEX-2009-1-003

a) Mexico / **b)** Supreme Court / **c)** Second Chamber / **d)** 19.02.1943 / **e)** 19 / **f)** Judicial review 8756/41 / **g)** *Semanario Judicial de la Federación*, Tome LXXV, 4364 and 4365; IUS 351, 409; 325, 300; *Relevant Decisions of the Mexican Supreme Court*, 59-62 / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Expropriation, purpose / Public utility, determination, competence.

Headnotes:

The exercise of a constitutional action is dependent on the alleged act being definitive, and administrative acts are definitive whenever the law does not concede an appeal, hearing, or other means of legal defence against them.

The executive does not have the sovereign authority to appreciate the existence of a public utility cause not previously decreed by the Legislature.

Summary:

Various expropriations took place during the government of Lázaro Cárdenas, which led the private sector to legally defend its interests. On 20 February 1939, the expropriatory decree of 18 February 1939, issued by Lázaro Cárdenas and countersigned by the Minister of National Economy and the Minister of Finance and Public Credit, was published in the Official Gazette, declaring the expropriation of the property belonging to *Compañía Azucarera del Mante, S.A.*

In the decree, the Executive indicated that because the Company had been incorporated with funds obtained from Banco de Mexico through operations performed on the basis of the political influence of its founders, a public benefit cause existed to justify the expropriation of the property so acquired. The company expropriated would then become an economic social benefit source operated directly by employees and farm workers serving the company.

The Company requested a revocation of the expropriation decree before the competent authorities, but the request was denied by the Executive on

11 March 1939. On 29 June of the same year, the Company filed relief proceedings before the Second Federal District Administrative Judge.

The judge determined that the expropriation decree was unconstitutional given that the Federal Executive had based it on causes that the Legislature did not qualify as affected by a public purpose. He also rejected the argument put forward by the responsible authorities in the sense that the effectiveness of the decree ceased instantly when replaced by a resolution which denied its revocation. This resolution had in fact reaffirmed the decree. Consequently, the judge granted relief requested from the legalisation, publication, and execution of the expropriation decree and the resolution denying its revocation, and also from the application of the Expropriation Law and the Additional Tax on Sugar.

The decision was contested by the President, the Minister of the Interior, the Minister of National Economy and the Minister of Finance and Public Credit, along with the board of directors of the common land holders co-operative and the sugar mill workers of Mante. *Inter alia*, the President and the Minister of the Interior argued that the judge had not applied the Court's jurisprudence requiring the dismissal of relief proceedings whenever acts carried out irreparably are contested, as in the case of the publication of the expropriation decree and the resolution denying its revocation.

The Ministry of Economy alleged that:

- the expropriation decree was not a definitive act for the purposes of relief proceedings given that a suit of revocation against it had been admitted;
- substituting the decree with the resolution denying its revocation had nullified its effects, thus updating the grounds for inadmissibility contemplated under Section XVI of Article 73 of the Amparo Law;
- the acts claimed in the relief proceedings were the object of a diverse guarantees lawsuit; and
- the application of the Expropriation Law and Additional Tax on Sugar in the expropriation decree and revocation denial did not qualify as acts claimed, but as concepts of violation.

The Ministry of Finance and Public Credit stated that the District Judge should have discontinued the proceedings relating to the approval of the expropriatory agreement and the resolution denying its revocation, given that such approval was in no way detrimental to the plaintiff and because the act in question had caused irreparable damage.

Finally, the Common Land Owners and Sugar Mill Workers Union of Mante argued that the processing of the lawsuit in the first instance had been irregular given that the co-operative was not cited as an aggrieved third party. In this respect, the Court resolved that the plaintiff could not be qualified as such, given that none of the alleged acts had been processed or dictated in its favour.

Consequently, the Second Chamber of the Supreme Court determined that, in accordance with that established in constitutional Articles 107.IX and 73.XV of the Amparo Law, the exercise of the constitutional action is dependent on the alleged act being definitive, and administrative acts are definitive whenever the law does not concede an appeal, hearing, or other means of legal defence against them. It is then impossible for a decree of expropriation to be qualified as definitive given that it can be modified through a request for its revocation.

It was deemed inappropriate to dismiss the case relating to the approval of the resolution denying the revocation of the expropriation decree and its publication as such approval was necessary to constitutionally validate the act in question. Moreover, the legal interests of the plaintiff had been affected by the approval and publication of the decree and the acts had not been irreparably consummated, as constitutional redress would consist of the approval and its publication no longer having the desired legal effect.

Moreover, the Federal Executive was not considered competent to order the expropriation of the plaintiff's property given that federal jurisdiction for expropriation purposes was limited by the powers conferred by the Constitution to the Federation. Matters pertaining to the sugar industry did not come under the federal jurisdiction. The Federal Executive accordingly lacked the sovereign authority to consider the existence of a public utility cause not previously decreed by the Legislature. The application of Section IX of Article 1 of the Expropriation Law had also been imprecise, given that the federation could not favour the creation of a cooperative operated to the detriment of established industries. The rationale here is that a collective derives no benefit from the expropriation of property belonging to a company only to then hand it over to another company comprised of different persons.

It was therefore concluded that the resolution dated 11 March 1939 contravened Articles 14, 16, 27, 49, 73 and 124 of the Federal Constitution by denying the revocation of the expropriation agreement without motivating or serving as a basis for the legal proceedings.

Languages:

Spanish.

*Identification:* MEX-2009-1-004

a) Mexico / **b)** Supreme Court / **c)** Plenary / **d)** 19.07.1951 / **e)** 29 / **f)** Competence 113/48 Between Criminal Judges acting in the capacity of Civil Judges in Celaya, Guanajuato and in Querétaro, State of Querétaro / **g)** *Semanario Judicial de la Federación*, Tome CIX, 522; IUS 278, 335; *Relevant Decisions of the Mexican Supreme Court*, 87-88 / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Alimony, amount / Family, separation / Jurisdiction, dispute / Law, applicable.

Headnotes:

A wife separated from a husband against her will may request that the local judge oblige her former partner to provide alimony during the separation and compensation for any omissions since the time of separation.

Where the laws of states whose judges are in dispute share the same provisions in relation to a point of controversy, any conflict of competence is to be decided on the basis of such provisions.

Summary:

On the basis of Articles 40, 42, 73 and others relating to the now extinct Family Relations Act then in force in Guanajuato, María Teresa Figueroa de Bustamante filed a plenary suit against her husband, David Bustamante, requesting authorisation to live separately and to receive alimony to cover her basic living expenses and those of their younger son. The plaintiff stated that she and her husband had married

on 8 September 1946, in the city of Celaya, and had subsequently moved to Querétaro. The couple lived together until the defendant physically assaulted Figueroa and threw her out of the home. The plaintiff had insulted her husband after discovering that he was having an extra-marital affair with a lady from Irapuato.

David Bustamante denied the claim and refused to recognise the authority of the Judge. The defendant presented a request to have the suit heard by the First Instance Civil Judge of Querétaro.

He based his request on the fact that a suit had been filed against him in connection with his marriage, and that the family home was in Querétaro, as recognised by the plaintiff. The judge in Querétaro considered himself competent to hear the case and issued a writ of prohibition to the First Instance Civil Judge of Celaya, who duly referred the case to a Criminal Judge of the same category. As the latter authority maintained his own jurisdiction to try the case, he passed the files to the Supreme Court to resolve the conflict.

Sitting *en banc*, the Supreme Court decided that, when María Teresa Figueroa de Bustamante filed a plenary suit against her husband requesting authorisation to live separately and demanding alimony for her younger son and herself, she in fact filed both a civil and a personal suit. However the judge whose jurisdiction covered the defendant's address (the Civil Judge of Querétaro) should not have declared himself competent to hear the case, as established under Article 30.IV of the State of Guanajuato Code of Civil Procedures, as well as under Article 185 of the respective State of Querétaro Code. The latter Article specifies that the judge with jurisdiction over the defendant's address is competent to hear civil or personal suits, except in cases where alimony is claimed by a wife from her husband. A special provision adopted by the states of Guanajuato and Querétaro on 21 June 1918 and 23 August 1911, respectively, and covering the Federal Districts and Territories was in place for such purposes, as contemplated under Article 73 of the Family Relations Law issued on 9 April 1917.

The Court explained that under the provisions of the Family Relations Act, a wife obliged to live independently from her husband, through no fault of her own, was entitled to resort to the First Instance Judge with jurisdiction over her place of residence and to request that her husband support her during their separation and provide compensation for any omissions since their separation. In this context, Figueroa de Bustamante had claimed to be residing in Celaya, Guanajuato – a fact tacitly acknowledged

by her husband at the time of the request to have the case heard by the Judge of Querétaro. Consequently, the Court en Banc, decided that legal authority to hear the suit in question rested with the Criminal Judge of Celaya, acting in a civil capacity, as established in the above legal provisions, and under Article 32 of the Code of Civil Procedures.

Languages:

Spanish.



Identification: MEX-2009-1-005

a) Mexico / b) Supreme Court / c) Plenary / d) 08.08.1961 / e) 52 / f) Docket Number 236/61 / g) *Semanario Judicial de la Federación*, First part, L; 125; IUS 806, 136; *Relevant Decisions of the Mexican Supreme Court*, 157-159 / h).

Keywords of the systematic thesaurus:

1.3.1 Constitutional Justice – Jurisdiction – **Scope of review**.
 3.4 General Principles – Separation of powers.
 4.7.1 Institutions – Judicial bodies – Jurisdiction.
 5.2.1.4 Fundamental Rights – Equality – Scope of application – **Elections**.

Keywords of the alphabetical index:

Election, campaign / Judicial review.

Headnotes:

The Supreme Court may only investigate a possible violation of the right to vote on a discretionary basis.

Summary:

I. Aquiles Elorduy presented his candidacy for deputy at the 1961 federal elections in representation of the First District in Aguascalientes without the support of any particular party. After the elections, Mr Elorduy requested that the Supreme Court exercise its powers of investigation under Article 97.3 of the Federal Constitution alleging that the right to vote had been violated for his name, had not been inscribed in

the ballot slips for potential selection by voters as had the names of the other candidates. Mr Elorduy was forced to provide his followers with stickers bearing his name, but supposedly authorised personnel confiscated them from the voters, thus denying Mr Elorduy's followers the right to vote.

II. Prior to a decision carefully put together and considered by Justice Alfonso Francisco Ramírez, the Supreme Court, noted that under Article 97.3 of the Federal Constitution, the Court was empowered to appoint one of its members or a District Judge or Circuit Magistrate, or one or several special commissioners to investigate, *inter alia*, the violation of the right to vote upon request by the Federal Executive, one of the Chambers of the Congress of the Union, or the Governor of a State or, when necessary, by the Court itself. However, no such request had been made by any of the above entities in these proceedings.

The Supreme Court did not consider it expedient to proceed to investigate the alleged violations of the right to vote, as its investigative powers are to be exercised whenever judicial intervention is in the national interest in view of the severity of circumstances at a particular time. Everyday and constant participation by the judicial state power in electoral matters would undermine the essential function of the agency, transforming it into an overtly political entity. Furthermore, individuals are not entitled to demand the exercise of investigative power. If an individual does make such a request, the Constitution allows the Court discretionary use of its powers. It is not obliged to exercise this authority in the event of an alleged violation of the right to vote. Were the Supreme Court to proceed with the inquiry simply at the request of an individual without evaluating the importance and public interest inherent in such a request, it would be called upon to pass judgment on all types of elections to the detriment of the country, and could cause unrest. The Court also took the view that the events considered by the plaintiff to represent violations of the right to vote were unimportant and lacked the transcendence and characteristics necessary to warrant the exceptional intervention of the Supreme Court. Lastly, the private plaintiffs could not legitimately claim defencelessness because other entities were fully operational in electoral processes under the law, with the precise purpose of providing redress in the event of violations of the right to vote.

A basic principle of the constitutional regime is that the sovereignty of the people is divided into three powers with their own clearly defined authority. Such authority is clear cut and should never be overlooked.

The object is to rule out any possibility of impinging upon the authority of the other two powers. In terms of federal elections, each Chamber definitively qualifies the election of its members, without appeal. Consequently, it is not the responsibility of the Court to review or become involved in the resolutions taken by electoral colleges as part of their spheres of competence and in use of their full sovereignty.

The provision contained in Article 97.3 of the Federal Constitution is so generic and vague that it needs to be co-ordinated with the general constitutional system and with the nature and functions of the Judiciary. The 1917 Constituent Assembly granted absolute discretion to the Courts to investigate possible violations of the right to vote whenever these are reported by the various persons belonging to government entities indicated in the Article.

It must also be noted that although such an investigation will necessarily seek to prosecute and punish violators of the right to vote, it should never decide on the validity or invalidity of any type of election because, under Article 97.3 of the Federal Constitution, the Supreme Court is only empowered to give instructions to have an investigation opened.

The Supreme Court therefore declined to conduct the investigation requested by Mr Elorduy in order to avoid becoming a political electoral entity. This would have undermined its important constitutional functions.

Languages:

Spanish.



Moldova Constitutional Court

Important decisions

Identification: MDA-2009-1-001

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 17.03.2009 / **e)** 5 / **f)** Constitutionality review of Article 326.1 of the Procedure Code / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, Russian).

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.**

3.13 General Principles – **Legality.**

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.**

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

5.3.13.25 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to be informed about the charges.**

Keywords of the alphabetical index:

Criminal proceedings, charges, aggravation, defendant / Prosecutor, charges, obligation to bring.

Headnotes:

The principle of legality obliges prosecutors to bring aggravated charges when new incriminatory circumstances come to light, after the original indictment. Not doing so would violate the rights of victims.

Summary:

I. An appeal by Member of Parliament Gheorghe Susarenco served as grounds for an examination of the dossier. He had asked for a constitutional assessment of the provisions of Article 326.1 of the Criminal Procedure Code (CPC).

It was suggested in the appeal that the provisions of Article 326.1 jeopardise the rights to defence of indicted persons, as they run counter to Article 325.2 of the CPC. This provision only allows for amendments to the indictment in court if this does not have a negative impact on the defendant's situation and if the changes do not violate the defendant's right to defence. The point was also made that the provisions are unconstitutional as the defendant is effectively denied access to two levels of jurisdiction where the prosecutor amends the indictment at appellate stage, given that at this stage, the re-examination of circumstances is not possible. Reference was also made to the lack of conformity of these provisions with Article 2 Protocol 7 ECHR.

II. The Moldovan Criminal Procedure Code allows a prosecutor participating in the examination on the merits of criminal cases at first instance and at appeal to amend, by ordinance, the charges brought against the accused. These can be made more serious from the perspective of the accused, if the evidence examined in court proves beyond reasonable doubt that he or she has committed a crime more serious than that on the original indictment. The new charges must be communicated to the defendant, his attorney and, if applicable, his legal representative. The court, at the request of the defendant and his attorney, will then suggest a time span for the preparation of the defence in the light of the fresh charges, and the examination of the case will proceed. In the Appeal Court, the prosecutor may only alter the indictment so that the charges are more serious in cases of declared appeal.

The concept of judicial and legal reform in the Republic of Moldova foresees that "the legislation of criminal procedure shall exclude such processes as transmission of dossiers to the judiciary for re-examination". The procedure was duly excluded from the Criminal Procedure Code. Approval of a new concept on the purposes of penal pursuit finally led to amendments to criminal legislation and prosecutors acquiring the right to modify charges against indicted persons (in the sense of more serious charges) in criminal proceedings at first instance and upon appeal.

In the decision the Court made reference to its previous positions with regard to the goals pursued by the criminal trial. Hence, on the one side, the criminal prosecution is unleashed in order to protect the public,

society and the state against offences. This goal is ingrained throughout the process. As a counter-balance another equally important facet of the criminal trial is to protect the public and society as a whole from unlawful actions by those occupying positions in which they deal with the investigation of presumed or committed offences so that anybody who has committed an offence will be punished in accordance with his or her guilt, while somebody who is not guilty will not be held criminally responsible and convicted. In national and international legal and judicial practice this goal has generated the tendency to apply all necessary measures for the maximum protection of the rights of the defendant in criminal trials.

The Court considered the practice of bringing about unfounded grounds of accusation in the process of criminal trial inadmissible. It also noted that it would be equally inadmissible for a representative of state prosecution who discovers new incriminatory circumstances during the trial not to apply judicial measures aimed at the correct and equitable qualifying of actions committed by the person indicted. This could result in infringement by the prosecutor of the rights of the victim of the alleged crime and society as a whole.

The Court went on to assess whether the provisions of Article 326.1 of the CPC violate the rights of indicted persons to defence and fair trial. In so doing, it examined whether these provisions harmed the exceptional principle of restriction to some rights enshrined in Article 54 of the Constitution.

If the provisions of Article 326.1 are only enforced on condition that the evidence examined in court session proves beyond reasonable doubt that the defendant has committed a more serious crime than the one for which he or she was originally indicted, this denotes that this restriction is necessary in the interest of public order aimed at prevention of offences, the protection of rights, liberties and dignity of others and impartiality of justice. The Court therefore held that Article 326.1 satisfies the conditions imposed by Article 54.2 of the Constitution. Moreover, the above provisions conform to the principle of presumption of innocence because they are applied in the process of the administration of justice. The new charges framed by the prosecutor are meant to be examined by the first instance of the court before the verdict is given. In this way, Article 326.1 of the CPC also complies with Article 54.3 of the Constitution which prohibits restraint of this principle. The Court concluded that the contested provisions tally with the principle of proportionality under Article 54.4 of the Constitution. The restriction provided for by Article 326.1 of the CPC is applied where the evidence examined in court session proves beyond doubt that the defendant has committed a more serious crime than the one for which he was indicted.

The Court stressed the crucial role of the principle of legality in all procedural actions. In conformity with this principle, those administering criminal prosecution and judicial procedure must conduct any procedural action in strict conformity with the provisions of the CPC. Thus, Article 326.1 of the CPC sets out in considerable detail the procedure which should be followed not only by the prosecutor and the court, but also the defendant and his or her lawyer. They may request a new time span in order to prepare their defence in the light of the new charges.

With regard to the issue of an inadmissible number of ordinances altering the indictment which may be exercised by the prosecutor in criminal trials at first instance and at appellate stages, the Court observed that this was an issue of opportunity rather than constitutionality. The Court found that there had been no breach of the right to access of a double level of jurisdiction, as decreed in Article 119 of the Constitution. As the norm was being interpreted through the European Convention on Human Rights and was under its jurisdiction, each judicial act is subject to appeal and checking by at least one hierarchically superior judicial instance.

The Court declared constitutional the provisions of Article 326.1 of the CPC.

Languages:

Romanian, Russian.



Identification: MDA-2009-1-002

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 28.04.2009 / **e)** 8 / **f)** Constitutionality review of Governmental Decision no. 1284 of 2 October 2002 on approval of the Regulation on the method of organising competitions for obtaining licences for trading with remnants and scraps of ferrous and non-ferrous metals, used accumulator batteries including processed ones by economic agents located on the territory of the Republic of Moldova and those with no fiscal relationship with its budgetary system as well as their export, together with amendments and subsequent additions / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, Russian).

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.**

3.25 General Principles – **Market economy.**

4.6.3.2 Institutions – Executive bodies – Application of laws – **Delegated rule-making powers.**

5.2 Fundamental Rights – **Equality.**

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

Keywords of the alphabetical index:

Competition, economic, protection / Entrepreneur, equal status / Law, as a source of executive authority / Legal person, equality / Monopoly, business / Property, disposal, limitation / State, duty to protect.

Headnotes:

It is possible within the framework of a market economy for the state to undertake measures that derogate from the general rules in certain sectors considered to be matters of national importance. The creation of measures which the state considers necessary for the achievement of such goals is the sovereign duty of the lawmaker under the Constitution.

Capitalisation and training in the field of secondary material resources constitute an important branch of state economy, implying the need for a sensible use of natural resources, and observance of industrial safety requirements. The ensuring of rigorous control and setting up certain conditions regarding licensing are accordingly justifiable.

Summary:

I. A Member of Parliament lodged a complaint seeking a constitutional review of Governmental Decision no. 1284 of 2 October 2002, on approval of the regulation by licence of the method of organising competitions for the obtaining of licences for trading with and exporting remnants and scraps of ferrous and non-ferrous metals, used accumulator batteries (including processed ones) by economic agents located on the territory of the Republic of Moldova and those with no fiscal relationship with its budgetary system, together with amendments and subsequent additions.

The above Regulation deals with the *modus operandi* and conditions for the organization of competitions for licences to carry out the activities outlined above.

It was noted in the complaint that the Government passed Decision no. 1284 in order to carry into effect legislation on secondary material resources which was subsequently repealed. As a consequence, the Regulation approved by Decision no. 1284 became a source of legal norms that are not based upon law, a state of affairs that runs counter to Article 102.2 of the Constitution. The complainant argued that by establishing norms of primary character through the Regulation, something which falls within the exclusive competence of Parliament, the executive power assumed improper duties violating Article 6 of the Constitution. The provisions of this particular Regulation limit the right to property, freedom of commerce and entrepreneurial activity. They also breach the principle of fair competition and due to the economic, financial and legal barriers they create in the business environment they considerably diminish the achievement of major national interests in external economic activity.

II. Under the Constitution, the economy of the Republic of Moldova is a market economy and the state must ensure the freedom of commerce and entrepreneurial activity, the protection of loyal competition and the creation of a framework favourable to the development of all factors of production.

The Constitution states that the Government is to adopt decisions relating to law enforcement. Article 8.1.a.21 of Law no. 451-XV of 30 July on the regulation by licence of business activity provides that the collection, keeping, processing, trading and export of remnants and scraps of ferrous and non-ferrous metals and used accumulator batteries (including processed ones) require licensing by the Chamber of Licensing.

Special conditions for the issue of licences for the export of the items described above and their trading to economic agents located on the territory of the Republic of Moldova and those with no fiscal relationship with its budgetary system are established in accordance with the legislation on the regulation by licensing of entrepreneurial activity. Licenses for this type of activity are issued on the basis of competition, and the organisation of competitions to obtain licences will be established by government-approved regulation.

The Court noted that Decision no. 1284 was taken by the Government during 2002 with a view to enforcing Law no. 787-XIII of 26 March 1996 on secondary material resources and Law no. 451-XV of 30 July 2001 on "the licensing of certain types of activity" with subsequent amendments and additions.

On 14 December 2007 the Parliament repealed Law no. 787-XIII of 26 March 1996 on secondary material resources and so on 6 June 2008 the Government excluded references to this law from Decision no. 669 "Regarding approval of modifications operated in Governmental Decision no. 1284 of 2 October 2002".

On 2 December 2008 by Law no. 313-XVI "Regarding completion of certain legislative acts" Parliament made some changes to Article 8 of Law no. 451-XV on the regulation by licence of entrepreneurial activity, introducing paragraph 2, which stipulated that licences for trading in and exporting remnants and scraps of ferrous and non-ferrous metals, used accumulator batteries including processed ones by economic agents located on the territory of the Republic of Moldova and those with no fiscal relationship with its budgetary system are to be issued on a competitive basis, pursuant to government regulation.

On 10 April 2009 the Government by Decision no. 276 modified the preamble to Decision no. 1284 of 2 October 2002 and item 1 of the Regulation replacing the wording "Law no. 451-XV of 30 July 2001 on the licensing of certain types of activity" with the wording "Article 8.2¹ of Law no. 451-XV of 30 July 2001 on the regulation by licensing of entrepreneurial activity".

The Court therefore concluded that the Government did not exceed the limits of its competence and did not assume improper duties, Decision no. 1284 having been adopted within the framework of legal provisions with the observance of the norms of Article 102.2 of the Constitution.

The obtaining of ferrous and non-ferrous fusions and alloys that are products resulting from the processing of scraps are attributed by law to the category of dangerous industrial objects.

The conditions surrounding the issue of licences for the activities outlined in these proceedings are established in conformity with Article 8.2¹ of Law no. 451-XV of 30 July 2001. Licenses in these circumstances are issued on a competitive basis and the method of organising the competition is established by governmental regulation. The legislator for these reasons entrusted the Government with the adoption and approval of regulations governing the organisation of competitions in these circumstances.

The Court took the view that the imposition by normative acts of certain standards on economic agents trading in and exporting remnants and scraps of ferrous and non-ferrous metals and used accumulator batteries is in line with the provisions of

Articles 9.3 and 126.1 of the Constitution according to which the basic factors of the economy of the Republic of Moldova are market, free economic initiative and fair competition.

The provisions of the Regulation do not create a monopoly of economic agents over the trading activities and export of secondary materials, neither do they limit competition. They simply set out the modus operandi and conditions for the organisation of competitions for obtaining licences in accordance with the activity in question and industrial safety interests. They do not create impediments in exercising the right to the disposal of collected waste matter, but merely set out a minimum ceiling of statutory capital and the responsibility to possess certain technical and material resources. This is justifiable taking into account the kind of activity for which a licence is being issued.

The Court held that the provisions of the Regulation approved by Governmental Decision no. 1284 with a view to enforcing Law no. 451-XV on the regulation by licence of entrepreneurial activity have a subsidiary character, they do not run counter to the constitutional provisions, neither do they infringe upon the rights of economic agents to trade and export ferrous and non-ferrous scrap metal.

Dissenting opinion:

During the examination of this issue one judge expressed a dissenting opinion to the effect that essential conditions for licensing these types of activity are regulated exclusively by law. Governmental Decision no. 1284 by its form and regulatory method impinges in the domain of law and, therefore, contravenes Article 102.2 of the Constitution.

Through its exaggerated demands, Decision no. 1284 renders it impossible for small firms to take part in competitions, which means that the Decision violates the principle of universality guaranteed by Article 15 of the Constitution as well as the constitutional principles of fair competition, freedom of commerce and entrepreneurial activity set out by Articles 9 and 126 of the Constitution.

Languages:

Romanian, Russian.



Netherlands Council of State

Important decisions

Identification: NED-2009-1-001

a) Netherlands / b) Council of State / c) Third Chamber (sole and last instance) / d) 22.04.2009 / e) 200809196/1 / f) The Provincial Executive of Noord-Holland and others v. the Crown / g) *Jurisprudentie Bestuursrecht* (JB) 2009, 144 / h) CODICES (Dutch).

Keywords of the systematic thesaurus:

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

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

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

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

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

Keywords of the alphabetical index:

Decree, royal.

Headnotes:

Provincial and municipal administrative orders to commence collection proceedings against the Icelandic bank Landsbanki should not have been annulled by the Crown on the basis of the reasons given for the reversal; the justification requirements set for this type of Royal Decree had not been met.

Summary:

I. The Administrative Jurisdiction Division of the Council of State quashed the Royal Decree of the Dutch Crown that barred the Province of North Holland, a number of municipalities and some other public bodies from recouping their outstanding deposits worth € 145 million in the Icelandic bank Landsbanki through the Dutch courts. The Administrative Jurisdiction Division of the Council of State gave judgment as a court of sole and last instance.

II. Under Article 134.1 of the Constitution, decisions by administrative organs of provinces and municipalities may be annulled only by Royal Decree and on the grounds that they conflict with the law or the public interest. The Crown had annulled all administrative procedural orders that imposed pre-judgment garnishment on the Landsbanki bank's foreign funds on the grounds that these orders conflicted with the public interest, as these attempts to recover money amounted to a direct infringement of confidential and diplomatic consultations with the Icelandic State, and jeopardised savers' interests. The public authorities concerned argued in appeal *inter alia* that the Royal Decree hampered their access to the civil law courts.

III. The Administrative Jurisdiction Division of the Council of State first held that 'unprompted annulment' is an administrative instrument for central government in order to safeguard the constitutional division of tasks between the various tiers of government. If a Royal Decree is based on the public interest and is subject to parliamentary review, the court must exhibit deference. However, the court does have a legal duty to give judgment on the merits of the case. Unprompted annulment is a measure of last resort and of a drastic nature. Therefore, the justification given by the Crown must be comprehensive and understandable. The Administrative Jurisdiction Division of the Council of State held that it did not follow from the reasons given by the Crown in the present Royal Decree, how the public authorities' interests in terms of legal certainty (access to the civil law courts) had been taken into account in the decision-making process preceding the Royal Decree. This was a very serious matter, as legal certainty is essential to a democratic state under the Rule of Law. Besides, the Crown had not properly explained how the administrative procedural orders concerned endangered the state's financial stability and foreign relations and how the state's interests had been weighed.

Languages:

Dutch.



Identification: NED-2009-1-002

a) Netherlands / b) Council of State / c) Third Chamber (sole and last instance) / d) 22.07.2009 / e) 200808232/1/H3 / f) X (a citizen) v. Mayor of Breda / g) *Landelijk jurisprudentienummer* (LJN), BJ3402 / h) CODICES (Dutch).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Licence, refusal to grant.

Headnotes:

A municipal maximum scheme for the licensing of drinking establishments is binding even if in breach of freedom of choice of work or the right to the peaceful enjoyment of one's possessions.

Summary:

I. The Mayor of Breda rejected an application for an operating permit for a drinking establishment. The applicant (referred to as X) contested the decision, but the Mayor dismissed his objections. X then launched proceedings in an administrative law court. The District Court upheld the Mayor's decision, refusing *inter alia* to hold local law non-binding. X then appealed to the Administrative Jurisdiction Division of the Council of State, arguing that the maximum scheme provided for by municipal law amounted to a violation of both Article 19.3 of the Constitution (freedom of choice of work) and Article 1 Protocol 1 ECHR (right to the peaceful enjoyment of one's possessions).

II. The General Municipal Ordinance ('*Algemene Plaatselijke Verordening*', referred to here as 'APV') gives the Mayor and Aldermen the power to designate areas in which a maximum scheme applies. This means that in the areas concerned a maximum number of drinking establishments is allowed for. X had applied for a license in a zone in which zero drinking establishments were allowed.

The Administrative Jurisdiction Division of the Council of State held that the maximum scheme was binding even if in breach of Article 19.3 of the Constitution. The Council of State recalled that, according to the relevant pages in the parliamentary documents of the 1983 revision of the Constitution, there was meant to be a difference between freedom of choice of work on the one hand and the requirement for quality of choice of work on the other hand. Rules that set out to regulate professional practice in order to stimulate good professional conduct, without any intention to limit the numbers of professionals, are usually not considered to be restrictions of the freedom of choice of work. Parliamentary documents specify that the power of local authorities to regulate professional practice for the benefit of public order, morality and health remains unimpaired. Primary legislation as a legal basis for regulatory measures therefore, is not required, unless the regulatory rules amount to a disproportional limitation of the freedom of choice of work. In this case regulation served the residential climate. Since X could still establish his business outside the zone concerned, the Administrative Jurisdiction Division of the Council of State held that there had not been a disproportionate restriction on his ability to practice his profession.

The Administrative Jurisdiction Division of the Council of State also rejected the claim based on Article 1 Protocol 1 ECHR, that provides that no one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. X had claimed that the notion of 'law' in the sense of Article 1 Protocol 1 ECHR required a basis in an Act of Parliament. However, according to settled case-law of the European Court of Human Rights, the notion of 'law' does not refer to primary legislation, but requires the existence of and compliance with adequately accessible and sufficiently precise domestic legal provisions. The Administrative Jurisdiction Division of the Council of State held that, having regard to the relevant provisions of the APV, the law applicable to this case was accessible and sufficiently precise.

Cross-references:

- *X (a citizen) v. the Mayor of Uden*, *Bulletin* 2007/1 [NED-2007-1-003].

Languages:

Dutch.



Portugal Constitutional Court

Statistical data

1 January 2009 – 30 April 2009

Total: 211 judgments, of which:

- Prior review: 1 judgment
- Abstract *ex post facto* review: 12 judgments
- Appeals: 145 judgments
- Complaints: 39 judgments
- Declarations of inheritance and income: 5 judgments
- Political parties' accounts: 9 judgments

Important decisions

Identification: POR-2009-1-001

a) Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 03.03.2009 / **e)** 101/09 / **f)** / **g)** *Diário da República* (Official Gazette), 64 (Series II), 01.04.2009, 12452 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Procreation, medically assisted.

Headnotes:

If a group of citizens takes the first steps towards the holding of a referendum this does not in itself constitute the existence of a draft referendum. Their initiative requires consideration by the Assembly of the Republic. If the Assembly accepts their initiative, it can only go ahead by decision of the President of the Republic. There is thus no requirement to suspend an

ongoing legislative process with the same subject matter as the initiative – a suspension that only occurs in the event that a draft referendum is presented by the Assembly of the Republic or the Government.

Summary:

Formal questions were raised about the non-suspension of the ongoing legislative process and an alleged lack of compliance with the Rules of Procedure of the Assembly of the Republic. Concerns were also raised in relation to potential material defects in the law. These involved:

1. The acceptability of the use of MAP techniques in cases involving a risk of transmission of diseases with non-genetic or non-infectious origins.
2. The absence of any provision for a maximum age limit for recipients of MAP treatment.
3. The use of MAP to treat serious illness in a third party.
4. The use of embryos in research.
5. The acceptability of heterologous procreation.
6. The question of knowing donor identity.
7. The rules governing filiation in heterologous reproduction.
8. The requirement not to create excess embryos, and general prevention of multiple pregnancies.
9. Pre-implantation Genetic Diagnosis (PGD).
10. The alleged lack of provision in the legislation for punishment of reproductive cloning in certain circumstances, and the acceptability of transferring a nucleus without reproductive cloning.
11. The lack of criminal sanctions for surrogate maternity without payment, despite this being considered unlawful.

The Court considered that in all these cases, there was no infringement of material constitutional limits that would make the solutions adopted by the Law unconstitutional. The essential content of the principle of respect for the dignity of the human person is not transgressed in any way. Sufficient heed had been paid to the other constitutional rights and values which the applicants alleged had been undermined – particularly the rights to physical and moral integrity, to personal identity, to genetic identity, to the development of personality, to the protection of the privacy of personal and family life, to form a family, and to health.

The Court felt that sufficient heed had been paid to the principle of precaution to safeguard the essential content of any rights that might have been violated. Although analysis of comparative law shows that the options the ordinary legislative authorities adopted when they weighed up the various rights at stake

differed from solutions adopted in other jurisdictions, these options presented no difficulties from a legal and constitutional perspective.

The Court examined the question of the acceptability of the use of MAP techniques in cases involving a risk of transmission of diseases that are not of genetic or infectious origin, the absence of any maximum limit on the age of those receiving treatment, the use of the technique to treat a serious illness in a third party, and the use of embryos for research purposes. It could find no effective risk in the legal system under consideration that medically assisted procreation techniques might be used for purposes which could be criticised from an ethical perspective, and noted that the legislative authorities had taken care to create mechanisms to ensure the preservation of the rights at stake, especially adequate protection for embryos.

On the question of heterologous procreation – i.e. the use of the medically assisted procreation technique that implies resorting to donor gametes and to a donation of embryos that raises the issue of the right to genetic identity – the Court felt that the latter right is not affected, as it makes particular reference to the intangibility of the genome and the unique character of each person's genomic makeup. In essence, it is aimed at the prevention of the genetic manipulation of the human being and cloning, rather than the prevention of heterologous procreation.

The Court turned to the question of filiation in heterologous reproduction and the applicants' allegation that the law impedes the right to know one's parentage and for parentage to be acknowledged. As the law admits single-parent births and does not impose any sanctions for failing to comply with the rule that every child has two parents, both of which would be unconstitutional, the Court felt that inasmuch as it permits medically assisted procreation, and assuming that MAP does not in itself breach the right to personal identity, it would make no sense to contest the legal paternity criterion derived from the provisions of the law. "[I]n heterologous assisted procreation, it is not reasonable to insist on the biological criterion... The bond of filiation must be... formed in relation to the beneficiary of the MAP who did not contribute his reproductive cells to the process, on condition that he gave his valid consent to the formation of the bond. This is all the more true in that he played a key causal role in the birth. It was his decision that began the process of procreation". The Court also said that the filiation rules match the principles which the Council of Europe's Ad Hoc Committee of experts on progress in the biomedical sciences set out in relation to this issue in 1989.

With regard to the need to avoid the creation of excess embryos, the Court said that the rules before it (which are set out in the chapter on in vitro fertilisation) do not breach any constitutional limits. The Court accepted that “embryos can only be created” by “inseminating oocytes, and that it is only permitted to inseminate the number of oocytes (and thus create embryos) that are needed for the success of the medically assisted procreation process, in the light of good medical practice and the couple’s clinical situation.

The ordinary legislative authorities consequently based themselves on a principle of need, which must be assessed in accordance with a medical criterion and from the perspective of minimum intervention based on a calculation of probabilities. This renders impossible any interpretation of the law that would permit the arbitrary creation of embryos, given that it is not possible to be unaware that the fertilisation process is linked to the goal of procreation. The Court also noted that, as the National Council of Ethics for the Life Sciences (CNECV) acknowledges, in principle it is not possible to guarantee an absolute match between the number of embryos created and the number of embryos transferred to the uterus.

Turning to the general prevention of multiple pregnancies, and the alleged violation of the right to the protection of health on the grounds that the law permits the implantation of more than one embryo in the mother’s uterus, with the ensuing risk of multiple pregnancies and situations in which foetuses are deformed, the Court noted that even though the law does not place a maximum limit on the number of embryos that can be transferred, it only allows “the creation of the number of embryos deemed necessary to the success of the process, in the light of good clinical practice”, and also subjects the insemination of oocytes in each case to “the couple’s clinical situation” and the need to ensure the “prevention of multiple pregnancies”.

The applicants also argued that the legal rules governing pre-implantation genetic diagnosis (PGD) are unconstitutional. They alleged that this diagnosis is intended to produce human beings who are selected in accordance with predetermined qualities, thus resulting in a manipulation that is contrary to the dignity, integrity and unique and unrepeatable identity of the human being. The Court ruled that the use of PGD as a diagnostic investigation technique “is not in breach of fundamental ethical principles”, and can offer positive value from an ethical perspective: “when it is possible to avoid the development of a human being who has a high probability of being born with, or developing, a serious illness that will lead to premature death and prolonged and irreversible

suffering”; or “when, following medical assessment, it is shown that at least one of the progenitors carries a hereditary genetic alteration that causes serious illness”; and also, in the light of the principle of solidarity, when “PGD is used to select embryos that will donate stem cells in order to treat a fatal disease in a family member”.

In relation to the alleged absence of criminal punishment for reproductive cloning and the acceptability of the technique of transferring nuclei without reproductive cloning, the Court noted that there was nothing in the legislation to allow the conclusion that it does not criminalise reproductive cloning.

The literal text of the rule in question indicates that a nucleus can only be transferred for the purpose of making PGD techniques viable, and then only when the PGD techniques in question are themselves authorised by the law; the law does not say that nucleus transfers can be autonomously used as a PGD technique in their own right.

On the issue of the absence of any criminal punishment for unpaid surrogate maternity, the law does criminalise both being a party to, and promoting, paid surrogate maternity contracts, but does not provide for penal sanctions for unpaid surrogate mothers. The legislative authorities opted to differentiate between the legal effects in these two situations, depending on whether the arrangement is remunerated or not: in both cases there is a civil law effect (the nullity of the arrangement), but in the second of the two there are also criminal sanctions.

The Court considered that while the legislative authorities are not necessarily obliged to criminalise a given form of conduct, whenever they consider that there is a legal asset or right which deserves the protection of the law they do possess a degree of freedom to consider their choice of the most appropriate means of guaranteeing that asset or right, while simultaneously respecting the other values and interests which the Constitution protects in the light of the key principle of the dignity of the human person. The Court therefore considered that there was no unconstitutionality in that omission.

Supplementary information:

Two concurring opinions and two partially dissenting opinions were attached to this Ruling. The former are in agreement with the overall decision, although they partially differ from the majority on the grounds for it.

The first partially dissenting opinion raises some important underlying issues – particularly in relation to the concept of life to which the author of the opinion felt the Ruling subscribed. She said that this concept determines the frontier that separates life from non-life by the different location – intra-uterine or extra-uterine – of the embryo, and only qualifies the former situation as life. While the author recognised the value scale on which “potential life” and “actual life” occupy different positions, she disagreed with the majority understanding because she considered that ultimately the Court’s definition of the constitutional concept of life limits the possibilities that Bioethical Law, which is thus deprived of the support of Constitutional Law, has to shape legislation. The author of the opinion also raised questions about the content of the principle that the dignity of the human person must be safeguarded, and others concerning the acceptability of research that uses embryos. The author said that inasmuch as the law has not adopted the criterion of a numeric limit on the number of embryos that can be created during the in vitro fertilisation process, but rather that which results from the general clause on “good clinical practice”, and while she accepted that projects involving experimentation on embryos should be permitted on condition that it is reasonable to expect that they will result in a benefit for humanity, the law does not give embryos adequate (and constitutionally required) protection against an instrumentalisation for experimental purposes. She said that this instrumentalisation is not justified by the goal of the freedom to engage in scientific research, or that of implementing the right to health.

The author of the second opinion subscribed to the arguments put forward in the first dissenting opinion, and also raised the question of the principle of the donor’s anonymity and the extent of the exceptions thereto. He considered that a correct balance between the different constitutional rights involved would have led to a system based on the principle that donors should not be anonymous.

It should also be noted that the Ruling makes various references to comparative law.

Languages:

Portuguese.



Identification: POR-2009-1-002

a) Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 18.03.2009 / **e)** 135/09 / **f)** / **g)** *Diário da República* (Official Gazette), 85 (Series II), 04.05.2009, 2512 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Traffic offence, fine / Defence, right.

Headnotes:

The constitutional provision that enshrines citizens’ rights and duties in relation to the Public Administration guarantees private individuals the possibility of recourse to the courts to challenge any concrete, singular acts on the part of the Administration that have external legal effects and thus have the potential to infringe human rights. Therefore any legal rule which excludes that possibility in relation to certain acts or certain categories of administrative act, or which restricts the possible grounds for such a challenge to the kind of problems that can result in these acts being null and void, must be considered unconstitutional.

Summary:

The representative of the Public Prosecutors’ Office (PPO) at the Constitutional Court asked the Court to consider the constitutionality of a Highway Code rule. Under this rule, during the period of time when an administrative decision that has applied the accessory sanction of a driving ban can be challenged before the courts, an accused person who has voluntarily paid the fine for a highway infraction is not allowed to raise in court the issue as to whether that infraction actually occurred. This rule had already been held unconstitutional in at least three Constitutional Court decisions, which means that the conditions needed for it to be declared unconstitutional with generally binding force were met. The PPO asked the Court for such a declaration.

In Ruling no. 45/2008 (sent to the Venice Commission as part of the selection for the first four months of 2008), the Court noted that the rule prevents the accused from raising the issue as to whether the infraction actually took place and only allows discussion of the severity of the infraction

(which has a bearing on the duration of the ban). It held that the normative criterion under which voluntary payment of the fine inexorably implies the imposition of the accessory sanction of a driving ban is constitutionally inadmissible.

The Court examined the question again in Ruling no. 135/2009. An assessment was required of whether the normative criterion under which voluntary payment of a fine for a road traffic administrative offence makes it impossible for the accused to raise in court the actual occurrence of the infraction complies with the constitutional requirements of access to the courts for the effective protection of rights and interests that are recognised by the law, by means of a fair process, as part of a judicial process of challenging an administrative decision that carries sanctions.

The Court said that the answer to this question is no, whether one considers such an interpretation of the law to be based on the establishment of an inescapable presumption, or on the attribution of absolute probatory value to the confession which the accused is said to implicitly make by opting to pay the fine voluntarily, or on a renunciation of either the ability to challenge the administrative act or the ability to argue a particular grounds for such a challenge.

Virtually all road traffic infractions and contraventions are now classified as administrative offences, whereas they fall within the remit of criminal law. Nonetheless, the controversy over the nature of measure of the driving ban (security measure or “accessory” sanction, or the effect of such a sanction) “does not negate the fact that it clearly represents the elimination of an area of civic liberty that can only be ordered by a judge after a trial hearing”.

The Court also noted the right of the legislative authorities to establish presumptions in the field of sanctions (including criminal ones) and therefore the legality of the legislative decision that voluntary payment of the fine leads to the presumption that the infraction actually occurred. However, there are grave constitutional problems with the inescapable nature of that presumption, when it prevents the accused from proving in court that the infraction did not in fact take place.

It is not reasonable to impose the “disadvantage” of not being able to discuss whether the “facts” actually occurred, in return for the “advantage” the accused obtains by deciding to voluntarily pay the fine – i.e. the fact that this means he pays the minimum amount on a varying scale. The accused is sufficiently penalised by the disadvantage with which he comes before the court, in that the latter will normally

associate such a payment with an acknowledgement that he has committed the infraction. Thus any challenge to the “presumption” of guilt will bear a special burden of proof.

The Court noted that it is not quite so crucial to ensure the guarantees of the defence in cases involving administrative offences as it is in criminal cases. However, the former cannot be relegated to such an extent that the efficacy of the protection of the courts and the requirements of fair process are denied.

Even if one does not transpose the strict rules with which the Code of Criminal Procedure surrounds the importance attached to an accused’s confession in criminal proceedings to proceedings arising from administrative offences, one must still consider that the voluntary payment of a fine cannot constitute a confession that the infraction has been committed, in such a way as to completely eliminate any possibility of retraction. This is particularly true when such payments are made at the moment when the official record of the offence is issued. The accused is not usually in a position to seek legal advice at that moment and may not have realised the consequences of his or her choice.

The Court thus declared with generally binding force that the Highway Code rule in question is unconstitutional, when interpreted in such a way that voluntary payment of a fine during the period of time for which an administrative decision imposing the accessory sanction of a driving ban is open to challenge in court prevents the accused from being able to raise in court the issue as to whether the infraction actually occurred. The Court based this decision on the grounds that this interpretation violates the constitutional right of access to the law and to effective judicial protection of the rights and guarantees that the Constitution affords to citizens in their relations with the Public Administration.

Supplementary information:

The Ruling is accompanied by two concurring opinions and two dissenting ones. The authors of the concurring opinions agree with the finding of unconstitutionality, but differ from the majority in terms of the grounds for that decision. The author of the first concurring opinion felt that when the law allows the accused to renounce in advance his or her right to discuss the predetermined assumption that a “fact” which leads to the imposition of a sanction in an administrative offence case actually existed, it is not in breach of either the guarantee of court protection against damaging administrative acts, or the guarantee of effective protection by the courts.

However, for this to be so, this normative effect must be linked to a free and informed act of will on the part of the accused. Given that on the one hand the Highway Code does not currently require either the police or the administrative authorities to warn interested parties about the consequences of voluntary payment of fines, and that on the other this rule has been interpreted in such a way as to preclude the accused from even demonstrating the existence of defects in his or her own will to accept the existence of the infraction, which is deduced from voluntary payment of the fine, the author of the opinion agreed with the overall finding of unconstitutionality.

The author of the second concurring opinion differed from the majority in relation to the grounds for the decision. He felt that the rule in question was in breach of the principle of freedom of trial included in the guarantee of effective protection by the courts.

The authors of the two dissenting opinions took the view that the Constitution of the Portuguese Republic does not prevent the legislative authorities from equating the voluntary payment of the fine with confirmation that the infraction took place. It was of decisive importance to this understanding that the payment is voluntary and its object is a fine. The dissenters felt that in a case involving sanctions of the type imposed for an administrative offence, confirmation of the existence of the infraction is an effect of the manifestation of the accused's will, and that voluntary payment of the fine once proceedings have commenced is equivalent to a confession that he or she has committed the transgression and thus to the definitive establishment of the facts that are relevant for the purpose of conviction.

Languages:

Portuguese.



Identification: POR-2009-1-003

a) Portugal / **b)** Constitutional Court / **c)** Second Chamber / **d)** 25.03.2009 / **e)** 161/09 / **f)** / **g)** *Diário da República* (Official Gazette), 80 (Series II), 24.04.2009, 16747 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

5.4.14 Fundamental Rights – Economic, social and cultural rights – **Right to social security.**

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

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

Keywords of the alphabetical index:

Pension, disability / Occupational injury, compensation.

Headnotes:

The law does not expressly lay down any specific prescriptive deadline for an application to review a disability, counting from the point at which a change therein becomes known. What it does establish are temporal conditions for the exercise of that right, by fixing a preclusive deadline of ten years from the date on which the pension is set, and by limiting the frequency with which review requests can be made: once every six months in the first two years, and once a year thereafter.

Summary:

Following an accident at work that led to a permanent partial (32%) disability, in May 1972 the victim and an insurance company entered into a homologated agreement. Almost twenty-three years later, the victim asked the insurance company to defray the costs of surgical intervention, to include the installation of an intra-ocular lens that might restore sight in his left eye. The insurer pointed out that the ten-year deadline that had been set for requests to review disability had passed – something which would have eliminated the grounds for the victim's request. However, it was decided that the situation did not entail a revision of the victim's disability or pension, but rather one which was included within the framework of the right to monetary reparation provided for by another rule, and which was not subject to any prescriptive deadline. The insurer eventually fulfilled the victim's request with resort to its own medical services, "with the proviso that subsequently, and depending on the results of the surgery, it might request a review of the pension". Two surgical interventions took place.

In March 2008 the victim requested a review examination due to a worsening of his clinical situation. The insurer opposed this request on the grounds that more than ten years had passed since the pension was set. The Court ruled that under the applicable legislation, a review examination could only be

requested within ten years of the date on which the pension is set, but that the impossibility of revising the pension prevents a victim from concretely receiving fair reparation in the event that he can show his clinical situation has deteriorated. The Court considered that this breached the victim's right to fair reparation, and therefore held the rule unconstitutional.

The appeal that led to the present Constitutional Court ruling was brought against that Court decision, and was lodged by the representative of the Public Prosecutors' Office (PPO) at the Oporto Labour Court. The PPO argued that in a case where, on the grounds of an alleged supervening worsening in his injuries, the victim of a work-related accident requests the revision of a pension he is receiving due to that accident, and there has been no update of the degree of his disability in the period of more than twenty years that has elapsed since the pension was originally set, the fact that the law establishes a preclusive deadline of ten years for the revision of a pension payable to the victim of an accident at work does not breach the principle of equality or the victim's right to fair reparation.

The Constitutional Court considered that the issue in this appeal was not the constitutionality of the overall rules governing deadlines for the exercise of rights arising from accidents at work, but solely the imposition of time limits on the exercise of the right to the review of a disability and an ensuing revision of the pension that was awarded for that condition.

The law does not expressly lay down any specific prescriptive deadline for an application to review a disability, counting from the point at which a change therein becomes known. What it does establish are temporal conditions for the exercise of that right, by fixing a preclusive deadline of ten years from the date on which the pension is set, and by limiting the frequency with which review requests can be made: once every six months in the first two years, and once a year thereafter.

The Court recognised special characteristics in the situation before it in the present case, differentiating it from others it had considered in the past.

In the present case, with the agreement of the parties, a court had already acknowledged in the past that despite the fact that more than a decade had gone by since the pension was set, there was a legal requirement for the insurer to pay for a surgical intervention designed to repair the damages incurred by the victim – an intervention which had become possible because medical techniques that had not existed at the time of the accident had since been developed.

The appearance of this new surgical intervention and the Court's decision to order it naturally negated the "presumption" that the clinical situation had stabilised – a presumption which, in previous decisions, the Constitutional Court had linked to the absence of any review of a disability after the ten-year period. This means that the argument that the rule is not unconstitutional (because after ten years it would be normal for the victim's clinical situation to have stabilised), and on the grounds of the need to protect the security of the legal position of the entity with the responsibility to make reparation for the damages derived from a work-related accident – is unsustainable.

A singular occurrence in the victim's clinical situation undeniably negated the presumption that that situation had stabilised.

When the insurer agreed to pay for the surgical intervention, it immediately emphasised that it reserved the right that "subsequently, and depending on the results of the surgery, it might request a review of the pension". The insurer's reservation is undoubtedly a valid one, given the hypothesis that if the intervention was successful the victim might completely recover his sight, and that this might lead not just to a reduction in the pension, but to the very extinction of the right to it. However, it would have to be considered equally valid in the event the complications caused by the failure of a second intervention caused a deterioration in the situation; the degree of disability should be revised even though the initial ten-year period had ended.

At the point where the decision was made to provide new surgery, the situation became unstable, which in turn negates the *raison d'être* of the argument that the legal solution in question is a reasonable one and accordingly not unconstitutional. The new situation is closer to situations that become unstable due to pension revisions caused by acknowledged changes in the extent of the victim's disability.

Supplementary information:

The decision was unanimous.

Languages:

Portuguese.



Identification: POR-2009-1-004

a) Portugal / b) Constitutional Court / c) Plenary / d) 02.04.2009 / e) 173/09 / f) / g) *Diário da República* (Official Gazette), 85 (Series II), 04.05.2009, 2518 / h) CODICES (Portuguese).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Company, board, members / Insolvency.

Headnotes:

The justification for measures that restrict a person's civil capacity is the need to protect that person, if he/she has been rendered incapable for natural reasons.

Restrictions on civil capacity should be limited to those needed to safeguard other constitutionally protected rights or interests.

Summary:

Under the Constitution, at the request of any of its own Justices or the Public Prosecutors' Office (PPO), the Constitutional Court must consider whether any rule that it has already found unconstitutional or illegal in three concrete cases is indeed unconstitutional or illegal. This constitutes a new review process in its own right, and leads to a new decision. If the Court again finds the rule unconstitutional or illegal, it must then declare it so with generally binding force.

In the present case the PPO representative at the Constitutional Court asked the Court to consider the CIRE rule under which, when a court sentence includes a finding of the culpable insolvency of a commercial company, the Court must also order the disqualification of the latter's directors.

This rule had already been held unconstitutional in more than three concrete cases, and the PPO representative therefore asked the Court to declare it unconstitutional with generally binding force.

In Ruling no. 173-09 the Court summarised the grounds for a number of earlier decisions, and then re-examined the issue. It noted that under the Constitution, civil capacity must be recognised on the basis of legal personality and embraces both the

capacity to enjoy rights and the capacity to exercise them or to act.

In constitutional terms deprivation of citizenship and restrictions on civil capacity can only be imposed in the cases and under the conditions laid down by law. While there is a sliding scale for both the capacity to enjoy, and the capacity to exercise, rights, in the case of adult legal subjects deprivation or restriction of such rights is an exceptional measure which, at least to begin with, can only be justified by the need to protect the incapacitated person's own legal personality.

In particular, such a restriction cannot serve as a punishment, or be the effect of a punishment.

With regard to the CIRE rule that was before the Court in this case, the disqualification was not the result of a situation involving a person's natural incapacity, which rendered him unable to manage his property independently, but an objective state involving the impossibility of fulfilling overdue obligations that can be attributed to culpable behaviour (qualified guilt) on the part of the debtor or its directors. However, the latter form of behaviour is not in itself indicative of any incapacitating personal characteristic.

Moreover, if one were to consider that the object of the protection was the person affected by the disqualification measure, it would not make sense for its subjective scope to be limited to the directors who least deserved that protection, given that they were accused of highly reprehensible conduct as managers, while directors who acted without blame or with only a slight degree of culpability were excluded.

If these were to be the grounds for the disqualification, one would also have to explain why the general preconditions for the measure are not those laid down by the Civil Code. In the present case, the imposition of a measure that restricts capacity is a necessary accessory effect of a situation of culpable insolvency, without their need to resort to the applicable procedural means to prove a lack of natural capacity.

Nor is this a case of defending the creditors' interests, inasmuch as the disqualification does nothing to help achieve the goal of the insolvency process. The latter includes a suitable mechanism for this purpose, which seeks to preserve any property with a lien on it by transferring the directors' powers to the administrator of the insolvency process and deciding the fate of the insolvent company's assets.

The scope of the disqualification provided for by this rule can only be a punitive one, which is reflected in a real punishment for the illegal, culpable behaviour on the part of those who have been disqualified.

The duration of the measure can be anywhere between a minimum and a maximum – a feature of criminal penalties. Nor do the criteria for determining its exact length greatly differ from those used in the criminal field (particularly as regards the degree of blame and the seriousness of the damaging consequences).

If one accepts the constitutional legitimacy of placing restrictions on civil capacity for reasons other than the protection of the subject who is the object of the measure, then it is necessary to determine whether the disqualification serves any other interests – particularly the defence of the general interests of legal commerce. We can see that the measure does not safeguard the position of any future creditors of the disqualified person, given that under the rules on disqualification, they would not possess the legitimacy to argue the invalidity of any acts that the disqualified person were to undertake without the trustee's consent.

This leaves the question of whether such a punitive measure is supported by reasons related to the need to prevent forms of behaviour that are culpably damaging to the security of legal commerce in general.

However, the latter goal continues to be served by the measure that entails the prohibition of engaging in commerce and of acting as a director or officer of a commercial or civil body corporate, association or private foundation engaging in economic activities, or state-owned or cooperative company – a sanction that is applied in addition to, and not instead of, disqualification.

Bearing in mind the obligatory nature of the disqualification order – a measure that could only be justified in the light of these general interests and everything affected by it – it is possible to conclude that the more serious sanction of disqualification is not indispensable to the safeguarding of those interests. As such, the measure is in breach of the criterion of necessity stipulated by the principle of proportionality.

Even if one were to argue that disqualification is more effective in preventive terms, one would always have to say that the combination and simultaneous imposition of both restrictions would run counter to the principle of the prohibition of excess.

Therefore, irrespective of the view one takes of the purpose of the rule in question and the teleology of disqualification as a whole, the CIRE rule violates the principle of proportionality.

The Court thus declared with generally binding force that the Corporate Insolvency and Recovery Code

rule which requires the Court to order the disqualification of the directors of a commercial company in respect of which it has made a finding of culpable insolvency to be unconstitutional.

Supplementary information:

A number of opinions are attached to this Ruling. The first is that of the rapporteur, who emphasised that the object of the finding of unconstitutionality was just one aspect of the CIRE rule, as required by the principle that the Court's decision can only address the issues raised in the application or appeal. He did say, however, that the PPO's application could have been wider in range, and could have covered both the debtor and all its legally appointed or de facto directors, inasmuch as the PPO already had enough Court decisions at its disposal to do so. The rapporteur considered that the Constitution requires the purpose of a measure which restricts civil capacity – even the capacity to engage in business dealings – to be that of protecting the incapacitated person. This was not the rationale of the rule before the Court.

The second opinion concurred with the decision, but differs as to the grounds for it. Its author felt that in the absence of any statement by the director of the company that had been declared insolvent that he was not able to manage its assets in an appropriate manner, the imposition of the disqualification measure – which limits his legal capacity – was not proportionate, and is thus unacceptable under the article of the Constitution governing restrictions on constitutional rights, freedoms and guarantees.

There was also a dissenting opinion. Its author argued that removal of capacity is only a restriction on the fundamental right to civil capacity, which, because it is a restriction on a fundamental right, must comply with the requirements laid down by the Constitution – namely the principle of proportionality. At the same time it is not a legal instrument that serves solely to protect the interests of the incapacitated person. The dissenting Justice felt that the option adopted by the ordinary legislative authorities cannot be criticised; it has to be recognised that they possess a prerogative that enables them to gauge permissible restrictions on the fundamental right to civil capacity.

Languages:

Portuguese.



Russia

Constitutional Court

Important decisions

Identification: RUS-2009-1-001

a) Russia / **b)** Constitutional Court / **c)** / **d)** 27.02.2009 / **e)** 4 / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 18.03.2009 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

3.6 General Principles – **Clarity and precision of legal provisions**

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

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

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

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

Keywords of the alphabetical index:

Mental disturbance, degree / Hospital, psychiatric, confinement.

Headnotes:

The following provisions of the Code of Civil Procedure are unconstitutional:

- those allowing a court to give a decision on incapacity based solely on a psychiatric report without ever giving the person concerned the opportunity to state his/her position;
- those depriving the person concerned, who did not take part in the hearing, of his/her right to appeal to the higher courts to challenge the decision on incapacity;
- those allowing forced hospitalisation of the person lacking capacity in a special institution without a judicial decision.

Summary:

The applicants had been declared legally incapable by judicial decisions given following an application by their parents. None of them had been called to the hearing. It was by chance that they learnt of the judicial declaration of incapacity. One of them had been subjected to forced hospitalisation.

The applications lodged by the applicants with the higher courts were dismissed because when the decision at first instance becomes final, the person concerned loses *ipso facto* the right to defend his/her own claims. Under the legislation in force, the protection of the rights of a person lacking capacity must then be sought by his/her guardian. In the instant case, this was the applicants' parents.

The applicants argued that the provisions in question were incompatible with Article 123.3 of the Constitution, under which “judicial proceedings shall be conducted on an adversarial and equal basis”, and with Article 19, which provides that “all shall be equal before the law and the courts”. They alleged that the impugned provisions had deprived them of access to justice and had violated Article 46 of the Constitution, under which “everyone shall be guaranteed protection of his or her rights and liberties in a court of law”.

According to one of the applicants, the Law on psychiatric assistance violates Article 22 of the Constitution, which provides, on the one hand, that “everyone shall have the right to freedom and personal inviolability”, and on the other, that “arrest, detention and keeping in custody shall be allowed only by an order of a court of law”.

The Constitutional Court ruled that discrimination against persons suffering from a mental disturbance was inadmissible. Furthermore, once a person had been declared legally incapable, he/she lost most of his/her fundamental rights and freedoms and became completely dependent on his/her guardian. Such persons would accordingly require special protection.

Persons lacking legal capacity were entitled to defend their rights in the courts. This proved impossible if they were not physically present. Depriving them of any possibility of defending their position therefore violated the principles of fairness of justice, adversarial proceedings and equality of arms.

The Constitutional Court stated that the impugned Law did not answer the question of whether a judge seized of an application for a person to be declared legally incapable is obliged to inform the person concerned and give him/her the opportunity to defend his/her rights, in particular by appointing a lawyer for that purpose.

In addition, the impugned Law is insufficiently clear and precise regarding the degree of mental deficiency which is necessary for a person to be declared legally incapable.

Under these circumstances, a court cannot simply take formal note of the psychiatric report's findings. The judge has a duty to give his/her decision on the basis of personal convictions regarding the person's mental state. In case of doubt as to the sincerity or authenticity of the psychiatric report, the judge must order a new report.

The Constitutional Court held that a person lacking capacity must have the opportunity to challenge the judicial decision declaring him/her legally incapable. The Court recognised that forced hospitalisation constitutes a deprivation of liberty which, under the Constitution, is possible only after a judicial decision.

Forced hospitalisation at the guardian's request is inadmissible, *a fortiori* where the guardian and the person lacking capacity are in conflict. Where there is any risk of restriction of freedom, the person concerned must have the opportunity to exercise his/her right to judicial protection. The principles of dignity, freedom and personal inviolability might otherwise be violated.

Languages:

Russian.



Identification: RUS-2009-1-002

a) Russia / **b)** Constitutional Court / **c)** / **d)** 24.03.2009 / **e)** 6 / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 03.04.2009 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

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

3.22 General Principles – **Prohibition of arbitrariness.**

4.7.4.1.2 Institutions – Judicial bodies – Organisation – Members – **Appointment.**

5.2.1.2.2 Fundamental Rights – Equality – Scope of application – Employment – **In public law.**

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, independence.

Headnotes:

A refusal to recommend a candidate for a post of judge must be based on objective circumstances. The appointments board must give reasons for its refusal.

Summary:

The Constitutional Court reviewed the constitutionality of the laws on judicial bodies and on the status of judges.

The applicant, a former judge, had been appointed judge at the Court of Arbitration of the Republic of Komi. After three years in office, he applied to the appointments board of the Republic of Komi for a renewal of his appointment. The appointments board rejected his application, stating that the judge had “not obtained the necessary votes”, although he was “a competent, scrupulous judge” and there had been no complaints about him.

The applicant challenged this decision, first in the Supreme Court of the Republic of Komi, then in the Russian Supreme Court. Both courts deemed the refusal to appoint him well-founded in that the laws on judicial bodies and the status of judges did not require the appointments board to give reasons for its refusal.

The applicant considered that the impugned laws violated the constitutional principles of fairness and equality of citizens in access to public office. He argued that certain relevant provisions failed to meet the criteria of precision and clarity of legal rules and were likely to give rise to arbitrary application by making it possible for a citizen to be excluded from the magistracy without any reason being given.

He further argued that the impugned provisions violated his right to legal protection by depriving him of any possibility of challenging the board's decision on the merits. Legal protection must be equitable, full and effective. In this case, the courts merely took formal note of the results of votes by the appointments board and did not review the matter on the merits.

Judges in Russia are independent, irremovable and inviolable. Under international standards and domestic legislation, candidates must satisfy specific requirements such as impartiality, honesty, competence and integrity. The system in place was designed to ensure that the best candidates were chosen. This was the task of the appointments boards. Their decisions were presumed legal, fair and well-founded. Their independence and unaccountability did not mean that their decisions were arbitrary.

The Constitutional Court stated that a refusal to recommend a candidate for a post of judge must be based on objective circumstances. The appointments board must give reasons for its refusal. The right to challenge this decision in the courts has a basis in law. The reasons for the appointments board's decision must therefore be clearly stated. An unsubstantiated refusal would deprive the court seized of the matter of the possibility of reviewing the decision on the merits and would thus make the constitutional right to legal protection a mere formality.

The impugned provisions were declared constitutional. However, the Constitutional Court ruled that its interpretation of these provisions should henceforth exclude all other interpretations.

Languages:

Russian.



Slovakia

Constitutional Court

Statistical data

1 January 2009 – 30 April 2009

Total number of motions: 715

Number of decisions taken:

- Decisions on the merits by the plenum of the Court: 5
- Decisions on the merits by the Court panels: 176
- Number of other decisions by the plenum: 3
- Number of other decisions by the panels: 463



Slovenia

Constitutional Court

Statistical data

1 January 2009 – 30 April 2009

The Constitutional Court held 24 sessions over this period (14 were plenary and 10 were in chambers: 4 were in civil chambers, 3 in penal chambers and 3 in administrative chambers). There were 281 unresolved cases in the field of the protection of constitutionality and legality (denoted U- in the Constitutional Court Register) and 675 unresolved cases in the field of human rights protection (denoted Up- in the Constitutional Court Register) from the previous year at the start of the period (1 January 2009). The Constitutional Court accepted 116 new U- and 486 Up- new cases in the period covered by this report.

In the same period, the Constitutional Court decided:

- 180 cases (U-) in the field of the protection of constitutionality and legality, in which the Plenary Court made:
 - 50 decisions and
 - 130 rulings;
- 6 cases (U-) were joined to the above-mentioned cases for common treatment and adjudication.

Accordingly, the total number of U- cases resolved was 186.

In the same period, the Constitutional Court resolved 405 (Up-) cases in the field of the protection of human rights and fundamental freedoms (18 decisions issued by the Plenary Court, 387 decisions issued by a Chamber of three judges).

Decisions are published in the Official Gazette of the Republic of Slovenia. However, the rulings of the Constitutional Court are not generally published in an official bulletin, but are handed over to the participants in the proceedings.

The decisions and rulings are published and submitted to users:

- In an official annual collection (Slovenian full text versions, including dissenting/concurring opinions, and English abstracts);

- In the *Pravna Praksa* (Legal Practice Journal) (Slovenian abstracts, with the full-text version of the dissenting/concurring opinions);
- Since August 1995 on the Internet, full text in Slovenian as well as in English <http://www.us-rs.si>;
- Since 2000 in the JUS-INFO legal information system on the Internet, full text in Slovenian, available through <http://www.ius-software.si>;
- Since 1991 bilingual (Slovenian, English) version in the CODICES database of the Venice Commission.

Important decisions

Identification: SLO-2009-1-001

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 05.02.2009 / **e)** Up-2940/07 / **f)** / **g)** *Uradni list RS* (Official Gazette), 17/09 / **h)** *Pravna praksa*, Ljubljana, Slovenia (abstract); CODICES (Slovenian, English).

Keywords of the systematic thesaurus:

- 5.1.4 Fundamental Rights – General questions – **Limits and restrictions.**
- 5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression.**
- 5.3.24 Fundamental Rights – Civil and political rights – **Right to information.**
- 5.3.31 Fundamental Rights – Civil and political rights – **Right to respect for one's honour and reputation.**
- 5.3.32 Fundamental Rights – Civil and political rights – **Right to private life.**

Keywords of the alphabetical index:

Medias, journalist, freedom of expression, limits / Medias, press, written, freedom.

Headnotes:

In cases concerning limitation on the freedom of expression in the context of journalistic reporting, a particularly careful examination is needed, as to the existence of constitutionally admissible reasons for such limitation. In the case at issue, two circumstances were essential for the court's decision which strongly tipped the scales in favour of the right to

freedom of expression when weighing the constitutional rights which were in collision, namely:

1. it concerned an instance of journalistic reporting on a subject of great importance to the public;
2. the defendant held public office and therefore his conduct was subject to greater scrutiny in the press and in the public arena.

The standpoint of the court that a violation of the right to privacy exists directly as soon as the public is informed of facts and circumstances from a person's life and the person is described in such a way that he or she is recognisable in his or her environment is, in the assessment of the Constitutional Court, not acceptable from the viewpoint of the right to freedom of expression and the right to be informed.

In handing down the challenged decision, the courts excessively protected the defendant's right to the protection of personality rights and privacy, and accorded insufficient weight to the complainant's right to freedom of expression.

Summary:

The principal allegation of the complainant with regard to the challenged judicial decision is that the court excessively interfered with the constitutionally guaranteed right to freedom of expression contained in Article 39 of the Constitution. The complainant alleges that the court gave absolute priority to the right to privacy contained in Article 35 of the Constitution and overlooked the fact that in this particular case there existed circumstances which justified the interference with the plaintiff's privacy.

The case at issue concerns a conflict between the human rights of the plaintiff and the complainant. There is scope in such circumstances for a limited exercise of rights, to the extent that this does not excessively interfere with those of another. Therefore, the Court must reduce the scope of the exercise of every right that is in conflict to the extent this is necessary in order to ensure that the human rights of others are exercised. In order to assess whether the exercise of one right already constitutes an excessive limitation on the rights of another, it is necessary to weigh up the significance of both rights and the extent of the interference, in the light of all the circumstances of the individual case.

The Constitutional Court reviewed whether, in arriving at the decision in point, the courts had, as the complainant suggested, accorded excessive protection to the plaintiff's rights (to the protection of personality and privacy), whilst paying insufficient regard to the complainant's right (to freedom of expression).

Article 39.1 of the Constitution guarantees freedom of expression of thought, freedom of speech and public appearance, and freedom of the press and other forms of public communication and expression. Everyone may freely collect, receive, and disseminate information and opinions. The significance and the role of the freedom of expression are complex. There is an active aspect to its function (the protection of the freedom to disseminate information and opinions) and a passive aspect, namely the freedom to receive this material and thus the right to be informed. Within the framework of the right to freedom of expression, freedom of the press has a particularly important role.

As is the case with other human rights, the right to freedom of expression is not unlimited. In accordance with Article 15.3 of the Constitution, human rights and fundamental freedoms are limited only by the rights of others. The right to freedom of expression contained in Article 39 of the Constitution frequently clashes with rights in the field of the protection of personality rights and privacy contained in Article 35 of the Constitution. The right to the protection of honour and reputation fits within this category. Journalists must undoubtedly be particularly responsible when implementing the right of the public to be informed, with reference to which they act as representatives of the public. They must ensure that information is true, clear, and unambiguous, and they may not and cannot make the excuse that they are simply giving the public what it wants.

A finding as to the special significance of freedom of expression in cases of journalistic reporting means that when weighing interests and benefits in a conflict between human rights, freedom of expression must be given greater weight and the above-mentioned circumstances must be considered as strongly leaning in favour of freedom of expression. Therefore, in cases on the limitation of freedom of expression regarding journalistic reporting, a very careful examination is needed as to the existence of constitutionally acceptable reasons for the limitation. The Constitutional Court duly proceeded to review whether the court stated such reasons in order to limit the complainant's right to freedom of expression.

In the case at issue, the complainant was ordered to pay compensation for the non-pecuniary damage which the plaintiff allegedly sustained due to the interference with his right to honour and reputation by the publication of articles entitled: "Did a Bribeable Police Commander Help Prostitutes?" and "Bribeable Police Commander – Losing a Job, not Retiring?" The courts held that by writing "the police commander" the journalists went beyond the information obtained at the press conference and characterised the plaintiff in the articles so that he could clearly be

recognised as a person who is or is allegedly engaging in criminal activities. The courts held that thereby they inadmissibly (i.e. unlawfully) interfered with the plaintiff's personality and dignity.

The Constitutional Court held that in the case at issue two circumstances are essential for the court's decision, which when weighing the relevant opposing human rights strongly leaned in favour of the right to freedom of expression, namely:

1. it was a case of journalistic reporting that was of great public concern: the articles dealt with the suspicion that police officers (including the plaintiff) had committed criminal offences in the performance of their duties and therefore the public had the right to be informed about it;
2. the plaintiff held a public office – a supervisory position in the police hierarchy – and therefore his conduct was subject to greater scrutiny in the public and in the press.

The Court of First Instance held that a police commander in his capacity as a leader is expected to have a higher than normal tolerance threshold to the reactions of the public. As a result, the protection of his privacy with reference to carrying out such work is lower than in matters of a private nature. Regardless of the exposure of the plaintiff due to his official position, the court of first instance held that his honour and reputation must be respected during reporting. The Higher Court upheld this decision, basing its own decision on the standpoint that when the public is informed of facts and circumstances from a person's life and somebody is described in such a way that they are recognisable in their surroundings, this entails a violation of privacy.

The Constitutional Court took the view that such a stance is not acceptable from the perspective of the right to freedom of expression and the right to be informed. When the public is informed of certain events, it is impossible to rule out the possibility that a certain circle of people may, by making a smaller or greater effort, be able to recognise the individuals involved, even by substantially curtailing or omitting the personal data necessary for somebody to be recognisable. If the case stems from the reporting of events in a small town, which is the case here, it is even harder to avoid the persons involved being recognised. The Constitutional Court noted the factual findings of the court, to the effect that the journalist published the challenged articles on the basis of information obtained from the Murska Sobota Police Station and that at the press conference the initials of the names and surnames of the police officers involved were, *inter alia*, also stated. In the Constitutional Court's view, this sufficed to allow a

conclusion that the journalist had a sufficiently correct and reliable factual basis for the written information.

The Constitutional Court ruled that the courts had accorded excessive protection to the plaintiff's right to the protection of personality rights and privacy, and had paid insufficient heed to the complainant's right to freedom of expression or to the right of the public to be informed. Therefore, the Constitutional Court decided to overturn the challenged judgments in the part referring to the complainant (in civil proceedings the second defendant) and to refer that part of the case to the Court of First Instance for a retrial.

Supplementary information:

Legal norms referred to:

- Articles 35 and 39 of the Constitution [URS];
- Article 59.1 of the Constitutional Court Act [ZUstS].
- Decision of the Constitutional Court no. Up-422/02 of 10.03.2005, Official Gazette RS no. 29/05 and Official Court Digest OdiUS XIV, 36;
- Decision of the Constitutional Court no. Up-636/07 of 17.01.2008, Official Gazette RS no. 28/08 and Official Court Digest OdiUS XVII, 22;
- Decision of the Constitutional Court no. U-I-172/94 of 09.11.1994, Official Gazette RS no. 73/94 and Official Court Digest OdiUS III, 123;
- Decision of the Constitutional Court no. Up-462/02 of 13.10.2004, Official Gazette RS no. 120/04 and Official Court Digest OdiUS XIII, 86;
- Judgment of the European Court of Human Rights *Dyundin v. Russia* (no. 37406/03, Judgment of 14.10.2008).

Languages:

Slovenian, English (translation by the Court).



South Africa Constitutional Court

Important decisions

Identification: RSA-2009-1-001

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 12.03.2009 / **e)** CCT 03/09 and CCT 09/09; [2009] ZACC 3 / **f)** Richter v. Minister for Home Affairs and Others (Democratic Alliance and Others Intervening; Afriforum and Another as *Amici Curiae*); Richter v. Minister for Home Affairs and Others / **g)** <http://41.208.61.234/uhtbin/cgiisirs/20090506115130/SIRSI/0/520/J-CCT03-09A> / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.3 General Principles – **Democracy.**

4.9.9.6 Institutions – Elections and instruments of direct democracy – Voting procedures – **Casting of votes.**

5.1.1.1.1 Fundamental Rights – General questions – Entitlement to rights – Nationals – **Nationals living abroad.**

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

Keywords of the alphabetical index:

Election, citizen, residing abroad, vote, right.

Headnotes:

Permitting only certain classes of registered voters absent from the country to vote in the country's general elections unjustifiably violates the right to vote.

Summary:

I. The applicant, a South African citizen, was denied the right to vote in the 2009 elections because Section 33.1 of the Electoral Act 73 of 1998 (the Electoral Act) restricted certain classes of people absent from the country on polling day from voting via the 'special vote' procedure. This procedure was limited to those absent from the country due to government service, and those temporarily absent for the "purposes of a holiday, a business trip, attendance of a tertiary institution or an educational visit or participation in an international sports event."

The High Court declared the relevant sections of the Electoral Act inconsistent with the Constitution and therefore invalid. The matter was thus referred to the Constitutional Court (the Court) for confirmation. Various political parties intervened in the litigation as either friends of the court, or interested parties.

II. Writing for a unanimous Court, O'Regan J considered the ambit and purpose of the right to vote. She emphasised the symbolic value of the right to vote as representing the worth of each and every citizen, a particularly significant value in the context of a history in which the majority of citizens were denied the right to vote. In this light, O'Regan J held that the right to vote was infringed if a registered voter is willing to take reasonable steps to exercise his or her right to vote, but is nevertheless prevented from doing so by a statutory provision.

On this basis, O'Regan J declared that the words "for purposes of a holiday, a business trip, attendance of a tertiary institution or an educational visit or participation in an international sports event" of the Electoral Act and the related provisions of the Electoral Regulations constituted an unjustifiable limitation of Section 19 of the Constitution. The Court consequently made an order extending the period within which those who expected to be abroad on polling day may notify the Chief Electoral Officer of their intention to vote while abroad.

An intervening party, the Democratic Alliance, argued that the Court's order should be extended to allow citizens abroad to also vote in the provincial elections. Given the urgency of the matter and the lack of evidence relating to the logistical capacities of the Independent Electoral Commission, the Court declined to grant such relief.

Supplementary information:

Legal norms referred to:

- Sections 3.2,a, 9.1, 10 and 19.3.a of the Constitution of the Republic of South Africa, 1996;
- Section 33 of the Electoral Act 73 of 1998;
- Regulations 6.b, 6.e, 9, 11 and 12 of the Election Regulations, 2004.

Cross-references:

- *New National Party of South Africa v. Government of the Republic of South Africa and Others, Bulletin* 1999/1 [RSA-1999-1-004];
- *African Christian Democratic Party v. Electoral Commission and Others, Bulletin* 2005/3 [RSA-2005-3-016];

- *Minister of Home Affairs v. National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) and Others, Bulletin 2004/1 [RSA-2004-1-002];*
- *August and Another v. Electoral Commission and Others, Bulletin 1999/3 [RSA-1999-3-008].*

Languages:

English.



Identification: RSA-2009-1-002

a) South Africa / b) Constitutional Court / c) / d) 12.03.2009 / e) CCT 06/09; 10/09; [2009] ZACC 4 / f) The AParty and Another v. Minister for Home Affairs and Others; Kwame Onkgopotse Moloko and Others v. Minister for Home Affairs and Another / g) www.constitutionalcourt.org.za/Arcimages/13360.pdf / h) CODICES (English).

Keywords of the systematic thesaurus:

1.4.2 Constitutional Justice – Procedure – **Summary procedure.**

4.9.9.6 Institutions – Elections and instruments of direct democracy – Voting procedures – **Casting of votes.**

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

Keywords of the alphabetical index:

Election, citizen, residing abroad, vote, right.

Headnotes:

It would be undesirable to address an important matter like the right to vote of citizens living abroad on an urgent basis. Direct access to the Constitutional Court on an urgent basis will generally be refused if that urgency is self-created.

Summary:

I. The Court heard two applications for direct access which challenged provisions of the Electoral Act 73 of 1998 and the Regulations made in terms of that Act.

One application was brought by the AParty, a registered political party. The other application was brought by Mr and Mrs Moloko, South Africans working in Vancouver, as well as ten other applicants in similar working and living circumstances.

The applications concerned, in the main, South African citizens who were not registered as voters. The applicants challenged certain sections of the Electoral Act, as well as the regulations giving effect thereto, arguing that they limited the right of South Africans abroad to exercise their right to vote in that registration was permitted only within South Africa. The applicants also challenged the limited classes of registered voters permitted to vote outside South Africa. This question was dealt with in a separate judgment, *Richter v. Minister of Home Affairs and Others* [RSA-2009-1-001].

The Applicants submitted that the restriction on the right to register unjustifiably limited the constitutional right to vote of South African citizens living abroad, and that the sections were unconstitutional and therefore invalid.

The Minister for Home Affairs opposed the granting of direct access to the applicants, maintaining that it was not in the interests of justice that a constitutional attack directed at the electoral system be brought before the Court on an urgent basis, and that the provisions in question formed part of an electoral scheme designed by Parliament in order to regulate the right to vote. The Independent Electoral Commission opposed the contention that citizens should be entitled to register outside of the country for the 2009 elections, based on the difficulties that this would cause.

II. The Constitutional Court emphasised that it would be undesirable for the Court to address matters of such importance on an urgent basis. The Court found that the urgency in this case was self-created: the applicants could have brought the applications as early as 2003 when the legislation was introduced and there was no sufficient reason proffered for their failure to do so. The High Court had not been given an opportunity to decide on the provisions in question and the Constitutional Court would thus be acting as a court of first and last instance if the matter was decided. While every citizen has a right to vote, the Court held that such right requires each citizen to act reasonably.

In the result, the applicants were not granted direct access.

Supplementary information:

Legal norms referred to:

- Sections 1.d, 3, 9, 10 and 19 of the Constitution of the Republic of South Africa, 1996;
- Sections 7, 8, 9, 17, 33 and 60 of the Electoral Act 73 of 1998.

Cross-references:

- *New National Party of South Africa v. Government of the Republic of South Africa and Others*, *Bulletin* 1999/1 [RSA-1999-1-003];
- *Bruce and Another v. Fleecytext Johannesburg CC and Others* 1998 (2) *South African Law Reports* 1143; 1998 (4) *Butterworths Constitutional Law Reports* 415;
- *Richter v. Minister for Home Affairs and Others (Democratic Alliance and Others Intervening; Afriforum and Another as Amici Curiae)* [2009] ZACC 3 [RSA-2009-1-001].

Languages:

English.

*Identification:* RSA-2009-1-003

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 17.03.2009 / **e)** CCT 08/08; [2009] ZACC 5 / **f)** Johncom Media Investments Limited v. M and Others with the Media Monitoring Project as *amicus curiae* / **g)** www.saflii.org.za/za/cases/ZACC/2009/5.pdf / **h)** CODICES (English).

Keywords of the systematic thesaurus:

5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression**.
 5.3.22 Fundamental Rights – Civil and political rights – **Freedom of the written press**.
 5.3.32.1 Fundamental Rights – Civil and political rights – Right to private life – **Protection of personal data**.

Keywords of the alphabetical index:

Media, divorce proceedings, information, publication / Divorce, proceedings, information, publication / Freedom of expression, censorship, preventive / Privacy, right.

Headnotes:

The prohibition of the publication of information that comes to light during a divorce action and related proceedings (Section 12 of the Divorce Act) infringes the right to freedom of expression enshrined in Section 16 of the Constitution. Such limitation is not justifiable under Section 36 of the Constitution.

Summary:

I. Mr D and Ms M were married on 22 March 1975. During their marriage, they had two children. One of the children, PD, was the second respondent in this matter. In 1995 the marriage was dissolved by means of a divorce. The parties signed a settlement agreement. In 2001, Mr D instituted action in the High Court against Ms M and PD for damages in the amount of R 1 009 847,51; a restoration of certain benefits paid to Ms M in accordance with the settlement agreement; a partial rescission of the divorce order to the extent that it referred to PD as his biological son; and an order declaring that PD was not his biological son. Mr D's action was founded on the claim that Ms M had wrongfully misrepresented to him that PD was his biological son when she knew it to be false.

A national newspaper became aware of the case and sought to publish a story based on the untested factual allegations in the pleadings. Before publication, the newspaper sought comments from the affected parties. This request precipitated an urgent application for an interdict against publication. An interim interdict was granted on the basis of Section 12 of the Divorce Act 70 of 1979 (the Divorce Act) – a section which prohibited the publication of information which came to light during divorce proceedings. Following a counter-application by the applicant, the High Court declared Section 12 to be invalid on the basis that it was inconsistent with the right to freedom of expression enshrined in Section 16 of the Constitution. The applicant then applied to the Constitutional Court for confirmation of this order.

II. In the Constitutional Court, Jafta AJ explained that, subject to certain limited exceptions, the prohibition in Section 12 of the Divorce Act prevents the publication of information that comes to light during divorce proceedings, including information which emerges during proceedings related to the enforcement or variation of such orders. Section 16 of the Constitution

defines the bounds of the right to freedom of expression, and, in Section 16.2, specifically excludes certain expression from its ambit. The prohibition in Section 12 of the Divorce Act is not covered by the exclusions in Section 16.2 of the Constitution; it thus constituted a limitation on the media's right to impart information.

Applying the limitations test under Section 36 of the Constitution, Jafta AJ held that the purpose of the limitation was to protect the privacy and dignity of people involved in divorce proceedings. However, in serving this purpose the prohibition affects not only the rights of the media but also the right of members of the public to receive information. Jafta AJ held that this same purpose could be achieved by less restrictive means than those envisaged by Section 12 of the Divorce Act, namely a prohibition on the publication of only the identities of the parties in divorce proceedings and any information that tends to reveal such identities. The limitation was, therefore, not justified and consequently Section 12 was unconstitutional.

As a result, the decision of the High Court was confirmed. The Court further ordered that, unless authorised by a court in exceptional circumstances, the publication of the identity of or any information that may reveal the identity of any party or child involved in any divorce proceedings is prohibited.

Supplementary information:

Legal norms referred to:

- Sections 16, 36 and 172.1 of the Constitution of the Republic of South Africa, 1996;
- Section 12 of the Divorce Act 70 of 1979.

Cross-references:

- *National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others*, *Bulletin* 1998/3 [RSA-1998-3-009];
- *Islamic Unity Convention v. Independent Broadcasting Authority and Others* [2002] ZACC 3; 2002 (4) *South African Law Reports* 294 (CC); 2002 (5) *Butterworths Constitutional Law Reports* 433 (CC).

Languages:

English.



Identification: RSA-2009-1-004

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 01.04.2009 / **e)** CCT 36/08; [2009] ZACC 8 / **f)** Director of Public Prosecutions, Transvaal v. the Minister of Justice and Constitutional Development and Others (the Centre for Child Law; Childline South Africa, Resources aimed at the Prevention of Child Abuse and Neglect, Operation Bobbi Bear, Children First, People Opposing Women Abuse and The Cape Mental Health Society as *amici curiae*) / **g)** <http://41.208.61.234/uhtbin/cgiirsi/20090504200420/SIRSI/0/520/J-CCT36-08A> / **h)** CODICES (English).

Keywords of the systematic thesaurus:

- 1.2.3 Constitutional Justice – Types of claim – **Referral by a court.**
- 3.4 General Principles – **Separation of powers.**
- 4.7.2 Institutions – Judicial bodies – **Procedure.**
- 5.3.44 Fundamental Rights – Civil and political rights – **Rights of the child.**

Keywords of the alphabetical index:

Child, best interests / Child, sexual abuse / Discretionary power, scope / Child, rape proceedings, in camera / Rape, child, cross-examination / Witness, cross examination.

Headnotes:

It is appropriate for a High Court to raise, on its own initiative, the constitutional validity of legislative provisions, provided that such enquiries arise from the facts of the case before it.

Provisions dealing with the testimony of child victims and child witnesses in sexual offence cases in the Criminal Procedure Act (CPA) are not unconstitutional to the extent that they afford a judicial officer a discretion to determine whether a child witness or complainant requires assistance. Such provisions are to be interpreted in the light of the Constitution, which requires that the best interests of the child be of paramount importance in the exercise of that discretion.

Summary:

I. The central issue in this case was whether the provisions of the Criminal Procedure Act (CPA) concerning the protection to be given to child complainants in criminal proceedings involving sexual offences provided protection consistent with the best interests of the child principle.

The two accused were each charged with the rape of a child. The High Court Judge, of his own accord, raised the constitutional validity of the CPA provisions relating to child witnesses. He called upon the accused, the state (including government ministers) and various non-governmental organisations that are concerned with children, to submit written argument on the constitutionality of these provisions. The Judge found that the provisions fell short of the standard of protection required by the Constitution. He thus declared them to be invalid. The High Court also issued declaratory and supervisory orders concerning the rights of child complainants and child witnesses. The matter was then referred to the Constitutional Court (the Court) for confirmation.

II. The Court (in a majority judgment of Ngcobo J), held that a court may not ordinarily raise and decide a constitutional issue that does not arise from the facts of the case before it. A court may, of its own accord, raise and decide a constitutional issue where:

- a. the constitutional question arises on the facts; and
- b. a decision on the constitutional question is necessary for a proper determination of the case before it; or it is in the interests of justice to do so.

In this case, the only issue that the High Court could have properly raised on the facts related to the constitutional validity of the procedure for appointing intermediaries to assist child witnesses. However, the Court held that it was in the interests of justice to consider the constitutional validity of all the provisions that the High Court had declared to be invalid to avoid potential uncertainty.

The Court held that, when properly interpreted, the invalidated provisions were not inconsistent with the Constitution. The proper interpretation of these sections requires trial courts to have due regard to the principle that a child's best interests are always of paramount importance. It followed therefore, that when a prosecutor does not raise the matter, a judicial officer must, of his or her own accord, raise the need for an intermediary to be appointed to assist child complainants in sexual offences cases.

The Court also considered whether it was appropriate for the High Court to have made certain declaratory and supervisory orders. The Court set aside these orders as they were an impermissible intrusion into the domain of the executive.

For these reasons, all the orders made by the High Court were set aside. However, the Court ordered that information relating to the availability of

intermediaries and other facilities for child complainants be provided to the Court.

Supplementary information:

Legal norms referred to:

- Sections 1.d; 28.2, 36.1, 38; 165, 172.1.b of the Constitution of the Republic of South Africa, 1996;
- Sections 153.3, 153.5, 158.5, 164.1, 170A.1, 170A.7, 342A of the Criminal Procedure Act 51 of 1977;
- Section 52 of the Sexual Offences and Related Matters Amendment Act 32 of 2007;
- Section 52 of the Criminal Law Amendment Act 105 of 1997.

Cross-references:

- *Potgieter v. Die Lid van die Uitvoerende Road: Gesondheid Provinsiale Regering Gauteng en Andere*, Bulletin 2001/3 [RSA-2001-3-017];
- *Doctors for Life v. Speaker of the National Assembly and Others*, Bulletin 2006/2 [RSA-2006-2-008];
- *Carmichele v. Minister of Safety and Security*, Bulletin 2001/2 [RSA-2001-2-101];
- *Daniels v. Campbell and Others*, Bulletin 2004/1 [RSA-2004-1-003];
- *President of the Republic of South Africa and Others v. South African Rugby Football Union and Others*, Bulletin 1999/3 [RSA-1999-3-008];
- *Khosa and others v. Minister of Social Development and Others; Mahlaule and Others v. Minister of Social Development and Others*, Bulletin 2004/1 [RSA-2004-1-002];
- *Zondi v. MEC for Traditional and Local Government Affairs and Others*, Bulletin 2004/3 [RSA-2004-3-013];
- *S v. M*, Bulletin 2007/3 [RSA-2007-3-011];
- Investigating Directorate: *Serious Economic Offences and Others v. Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v. Smit NO and Others*, Bulletin 2000/2 [RSA-2000-2-011];
- *S v. Dlamini; S v. Dladla and Others; S v. Joubert; S v. Schietekat*, Bulletin 1999/2 [RSA-1999-2-007];
- *Shinga v. the State; O'Connell and Others v. The State*, Bulletin 2007/1 [RSA-2007-1-002].

Languages:

English.



Spain

Constitutional Court

Important decisions

Identification: ESP-2009-1-001

a) Spain / b) Constitutional Court / c) Plenary / d) 11.09.2008 / e) 103/2008 / f) Consulta popular en el País Vasco / g) no. 245, 10.10.2008 / h) CODICES (Spanish).

Keywords of the systematic thesaurus:

3.1 General Principles – **Sovereignty**.
 3.3.2 General Principles – Democracy – **Direct democracy**.
 4.5.6 Institutions – Legislative bodies – **Law-making procedure**.
 4.8.4.1 Institutions – Federalism, regionalism and local self-government – Basic principles – **Autonomy**.
 4.9.2 Institutions – Elections and instruments of direct democracy – **Referenda and other instruments of direct democracy**.

Keywords of the alphabetical index:

Authority, abuse.

Headnotes:

A law enacted by the autonomous parliament of the Basque Country, calling upon Basque citizens to answer several questions of a plainly political nature, actually constitutes an indirect referendum infringing the Constitution because this is an area of reserved State power.

The Spanish Constitution provides for the existence of a representative democracy coupled with certain instruments of direct democracy such as a referendum. These instruments are intended to strengthen, not weaken or supplant, representative democracy.

In order to abide by the Constitution, it is imperative that institutional reform bills take the course laid down for that purpose by the Constitution itself, particularly when they involve the identity of the single, exclusive entity in which national sovereignty is vested and which is none other than the Spanish people.

Defects that vitiate legislative procedure infringe the Constitution if they substantively pervert the expression of the position obtained in the houses of parliament.

Summary:

I. In this judgment, the Constitutional Court determined an appeal on grounds of unconstitutionality lodged by the President of the Spanish Government against an act of the Basque Country's parliament with the object of questioning the citizens of that Autonomous Community about "initiating a process of negotiation to promote political harmony and normalisation".

The President of the Spanish Government stated the following grounds for his appeal:

- a. encroachment on the State's sole authority to authorise the organisation of consultations of the people by referendum;
- b. substantive unconstitutionality of recognising a new sovereign entity besides the Spanish people, without any prior constitutive decision; and
- c. procedural unconstitutionality based on contestation of the legislative procedure followed in the passage of the act.

II. In the unanimously adopted judgment detailed below, the Constitutional Court examined these three questions in succession:

Concerning the first question, the Constitutional Court began by reminding the parties that the act of parliament must be found unconstitutional if it should prove to have the object of organising a referendum. In order to ascertain the nature of this act, it was essential to determine who it was directed at, and the procedural guarantees. The consultation settled by the act constituted a referendum on an issue of a plainly political nature since it was referred to the electorate of the Basque Country and carried safeguards characteristic of electoral processes. In establishing whether it was a referendum, the legally non-binding nature of the outcome was immaterial. In the instant case, the consultation of the people had been organised with no claim to empowerment whatsoever, as it was not expressly prescribed by positive law including the autonomy statutes of Spain's Communities and the Constitution. Besides, under the Spanish constitutional system, governed solely by the general principle of representative democracy, no implicit power was prescribed in the matter. The Constitutional Court's inference from this in its judgment was therefore that the impugned act infringed Article 149.1.32 of the Constitution.

As to the second question, the Constitutional Court stated in its judgment that the identification of an institutional entity, as it happened the Basque people, purportedly vested with a “right to decide” equivalent to that of the Spanish people, was impossible without a prior reform of the current Constitution by way of Article 168 of the Constitution. That would require the twofold participation of the *Cortes generales* (Article 66 of the Constitution) and of the entity vested with sovereignty, through a mandatory referendum of ratification (Article 168.3 of the Constitution). The Spanish people alone are vested with national sovereignty, the foundation of the Constitution and the source of all political power (Articles 1.2 and 2 of the Constitution).

The Constitutional Court concluded that the act examined concerned issues which the standing orders of the Basque parliament expressly excluded from the single reading procedure, under which no amendment could be moved. Passage of the act according to that procedure substantively perverted the process of articulating the position of the house of parliament: the procedure imposed in fact greatly limited the possibilities of participation by minorities in the formulation of the provision, and moreover was pursuant to a decision of the Basque Government, not a unanimous decision by the Bureau of the parliament.

The appeal alleging unconstitutionality was lodged on 15 July 2008. The Constitutional Court sat during August so as not to interrupt the proceedings. The full bench finally delivered its judgment on 11 September, two months after the appeal had been brought.

Supplementary information:

The act of the Basque parliament, no. 9/2008 of 27 June 2008, on the organisation and regulation of a popular consultation to ask the citizens of the Autonomous Community of the Basque Country about initiating a process of negotiation to promote political harmony and normalisation, was published in the “*Boletín Oficial del País Vasco*” on 15 July 2008.

Languages:

Spanish.



Identification: ESP-2009-1-002

a) Spain / **b)** Constitutional Court / **c)** Second Chamber / **d)** 17.11.2008 / **e)** 152/2008 / **f)** Fedeca / **g)** no. 299, 12.12.2008 / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

4.6.9.5 Institutions – Executive bodies – The civil service – **Trade union status.**

5.4.11 Fundamental Rights – Economic, social and cultural rights – **Freedom of trade unions.**

Keywords of the alphabetical index:

Election, association / Election, administration / Civil servant.

Headnotes:

A federation of civil servants' associations enjoys the right to avail itself of the freedom to form and join trade unions or federations thereof (Article 28.1 of the Constitution).

The rejection of the candidatures presented by a federation of civil servants' associations for trade union elections run within the administration infringes the right to organise (Article 28.1 of the Constitution).

Summary:

The Federation of Associations of Senior Staff of the State Civil Administration (FEDECA) had put up candidates for the election of staff representatives before the administration. The associations in question had been formed during the transition to democracy, in accordance with Law no. 19/1977 repealed in 1985 by the Organic Law on the right to organise, currently in force.

This federation's candidatures had been set aside by an arbitration award at a first stage, and subsequently by judicial ruling on the ground that the FEDECA was not a true trade union, merely a professional association of a corporative nature.

In its Judgment no. 152/2008, the Constitutional Court explained that trade unions were a class of association within the constitutional meaning of the term, whose formation and functioning were the outcome of exercising the right of association (Article 22 of the Constitution) and the right to form or join trade unions (Article 28.1 of the Constitution), whose specific purpose was to ensure the

advancement and defence of workers' economic and social interests, using specific means of action to achieve that end.

In its judgment, the Constitutional Court further asserted that Article 28.1 of the Constitution in no way excluded or limited the right to organise for public servants, including members of the upper echelons of the administration, who also enjoyed the right to form federations, confederations and international organisations with the aim of improving the outcomes of industrial action and of using every means of industrial action.

For these reasons, the Constitutional Court found that the Federation's right to organise had been infringed in that the denial of its status as a trade union had been founded on an interpretation contrary to that right.

Supplementary information:

Law no. 19/1977 of 1 April 1977 on the right to form a trade union (published in the State Official Gazette of 4 April 1977, no. 80), approved during the transition to democracy, was replaced by Organic Law no. 11/1985 of 2 August 1985 on freedom to form and join trade unions (published in the State Official Gazette – *Boletín Oficial del Estado* – of 8 August 1985, no. 189).

Cross-references:

- Constitutional Court Judgment no. 18/1984 of 07.02.1984.

Languages:

Spanish.



Identification: ESP-2009-1-003

a) Spain / **b)** Constitutional Court / **c)** Second Chamber / **d)** 15.12.2008 / **e)** 170/2008 / **f)** Colectivo de Trabajadores-Mossos d'Esquadra / **g)** no. 8, 09.01.2009 / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

- 3.3 General Principles – **Democracy.**
- 4.9.8 Institutions – Elections and instruments of direct democracy – **Electoral campaign and campaign material.**
- 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.**
- 5.3.29 Fundamental Rights – Civil and political rights – **Right to participate in public affairs.**

Keywords of the alphabetical index:

Freedom of expression, collective.

Headnotes:

Demonstrations organised at election time by persons other than political parties or candidates may not be prohibited according to the electoral law, unless there is reason to believe that such demonstrations are intended to gain votes.

In the electoral sphere, only in certain borderline cases can it be accepted that a message may be capable of bending the voters' will, having regard to the personal nature of their decision and to the available legal means of securing electoral freedom.

Public opinion is a necessary vehicle for the exercise of the rights inherent in the functioning of the democratic system, including the rights of political participation secured to the citizens.

Summary:

The collective *Trabajadores Mossos d'Esquadra* (officers of the Catalan regional police force, CAT-ME for short) had called a public demonstration in order to protest against its working conditions and demand the humanisation of the public services. The demonstration was concurrent with the campaign for elections to the Parliament of Catalonia. Pursuant to the Organic Law on the general rules of elections, the administration banned the demonstration on the ground that it might influence the electoral process, given the imminence of the regional elections.

In its judgment, the Constitutional Court granted constitutional protection to the applicants and set aside the prohibition of the demonstration in accordance with its practice regarding the right of assembly and its limitations (Article 21 of the

Constitution). The Constitutional Court held that, to justify modulation or denial of the right of assembly, it did not suffice to invoke a mere suspicion or a simple possibility of interference with the rights protected by the Constitution.

The opinions arising from the interchange or opposition of ideas, the defence of interests or the airing of demands might indeed have some influence over the citizens, but such influence could not be seen as any more than a suspicion or possibility. Consequently, a demonstration of this kind could not be banned unless there were valid reasons to believe that it was an electoral type of demonstration aimed at gaining votes. Otherwise, it would be an utterly absurd state of affairs to prohibit all demonstrations during election campaigns.

Given the lack of evidence in the instant case that the demonstration may have had an influence on the voters' decisions, it was expedient to give the right of assembly precedence over other rights, particularly the rights of political participation. This was not only because the right of assembly was a right essential to the formation of public opinion, but also because its prior exercise was crucial to the existence of free, firm opinion.

Supplementary information:

According to the precedent established by Judgment no. 170/2008, the Constitutional Court in several subsequent judgments again upheld the right of assembly when exercised at election time and where not intended to gain votes: Judgment no. 37/2009 of 9 February 2009, in favour of a demonstration called by the non-governmental organisation "SOS Racism Catalunya" to agitate for migrants' right to vote, and Judgment no. 38/2009 of 9 February 2009 in favour of a demonstration called by the association "Sindicat D'Estudiants de Catalunya" to demand quality state education.

Languages:

Spanish.



Identification: ESP-2009-1-004

a) Spain / **b)** Constitutional Court / **c)** First Chamber / **d)** 22.12.2008 / **e)** 176/2008 / **f)** Alex P.V. / **g)** no. 21, 24.01.2009 / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

3.17 General Principles – **Weighing of interests.**
 5.2.2.11 Fundamental Rights – Equality – Criteria of distinction – **Sexual orientation.**
 5.3.33.1 Fundamental Rights – Civil and political rights – Right to family life – **Descent.**
 5.3.44 Fundamental Rights – Civil and political rights – **Rights of the child.**

Keywords of the alphabetical index:

Orientation, sexual / Child, visiting right.

Headnotes:

Although transsexualism is not explicitly mentioned in the Constitution as a specific case where all discriminatory treatment is forbidden, this situation follows from the clause "any other personal or social condition or circumstance" (Article 14), carrying a prohibition of all discrimination.

The effect of a parent's sexual orientation or sex change on his paternal relations can in no circumstances constitute an objective, reasonable justification for any discriminatory treatment whatsoever of the person concerned.

The right to communicate and visit enjoyed by a parent who does not have custody of an underage child is a right of both parent and child, in so far as it is a sign of the filial bond that unites them and fosters affective personality development for them both.

Where the exercise of any of the parents' rights may have a negative repercussion on the development of an underage child's personality, the child's interest overrides that of the parents.

Summary:

After the separation of a couple in April 2002, the civil courts had assigned joint custody of the child to both parents, the child being required to spend every second weekend and half the holidays with the father. Because the father had begun having sex-change treatment early in 2004, the courts gave the mother full custody of the child (then aged six years), on her express application. The courts moreover restricted

the father's visiting rights and placed him under a supervised arrangement involving meetings with his child for three hours every fortnight in a specialised centre with a professional person and the child's mother in attendance. The possibility of relaxing these new visiting rules in future had nevertheless been contemplated in the light of two-monthly reports by the psychologists of the specialised centre.

In Judgment no. 176/2008, in line with the case-law of the European Court of Human Rights and its own earlier judgments, the Constitutional Court held that the maxim which should guide the judicial ruling was necessarily the child's overriding interest, possibly weighed with the interest of the parents. The judicial ruling should expressly include the judgment weighing the respective interests, as well as specifying the right at issue, so that the expediency and proportionality of the measure adopted might be assessed. Furthermore, if the child's mental well-being was imperilled, the existence of any kind of interference with it need not be proven in order to restrict the parent's right; it would suffice in that case to substantiate the presence of a high likelihood of the interference occurring.

To predicate a likelihood of personality disturbance in the child, it was not constitutionally probative to invoke just the sexual orientation of one parent. Any judicial ruling ordering the rights of a transsexual parent in respect of his or her underage children to be withdrawn or curtailed must contain a justification of the restrictive measures ordered. Review of the ruling should disclose that the parent's sexual orientation or sex change had not prompted the ruling adopted.

In its judgment, the Constitutional Court found that in the instant case the cause of the restriction on the visiting arrangements made was not the father's transsexuality, but the state of emotional instability in which he found himself during his sex change. That was the conclusion of the psychological examination ordered by the judicial bodies, indicating that there was a high likelihood of real disturbance to the child's emotional well-being and personality development, considering its age (six years at the time of the judicial inquiry) and the developmental stage reached.

The Constitutional Court held that the civil courts had justified the expediency and proportionality of their decision to place provisional restrictions on the visiting arrangements for the father on the basis of a reasoned and cogent assessment of the tests conducted in the course of the proceedings, and specifically the psychological expert's examination. The courts had ascertained the existence of a definite likelihood of disturbance to the child's mental well-

being or personality development if the original visiting arrangements were maintained, owing to the father's passing emotional problems.

Languages:

Spanish.



Identification: ESP-2009-1-005

a) Spain / **b)** Constitutional Court / **c)** First Chamber / **d)** 22.12.2008 / **e)** 183/2008 / **f)** Menor B.E / **g)** no. 21, 24.01.2009 / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

5.1.1.3 Fundamental Rights – General questions – Entitlement to rights – **Foreigners**.

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

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:

Foreign, minor, expulsion.

Headnotes:

Any judicial ruling which negates the capacity of alien minors to contest before the justice authorities an expulsion to their state of origin infringes their right of access to justice in so far as such a ruling prevents them from obtaining a judicial review of an administrative decision directly concerning them.

The fact that the minor has reached the age of majority when the appeal on grounds of unconstitutionality is examined in no way nullifies the object of proceedings.

Summary:

In 2003 the Guardianship Board of the Autonomous Community of Madrid took into care a Moroccan minor born in 1989, after he was declared to be in distressed circumstances with no adult able to provide for him. At the same time, the Guardianship Board asked the central administration to initiate a repatriation procedure to return the child to his family, a decision eventually taken by the government representative to the Autonomous Community of Madrid in 2006. The child contested his expulsion through the agency of a lawyer appointed by the Guardianship Board. The Court held that there was a conflict of interest between the Guardianship Board and the child, and accordingly appointed a lawyer to take charge of the child's defence. The Court then overturned the expulsion. The Court of appeal subsequently ruled that it could take no decision in connection with these proceedings, on the ground that the plaintiff was a minor lacking capacity to plead in court and could not appeal to the justice authorities except through the agency of his guardian, the administration of the Autonomous Community of Madrid as it happened. The Court of appeal moreover ruled that the Court below did not have jurisdiction to remedy the child's incapacity by appointing legal counsel since that was an exclusive function of civil and not administrative courts.

In Judgment no. 183/2008, the Constitutional Court considered it proven that the child, aged 17 years at the material time, had contested the decision in court through the agency of his lawyer and confirmed at law his desire to be represented by that lawyer and to contest the repatriation order. By refusing to acknowledge his capacity to appeal to justice, the justice system had not allowed him to remedy this defect by appointing counsel, thereby preventing the child from securing the judicial review of an administrative decision that nevertheless directly affected his life and personal sphere, which was an infringement of his right of access to justice in order to defend his personal interests fettered by decisions of the public administration (Articles 24.1 and 106.1 of the Constitution).

At the time when the Constitutional Court delivered its decision (in 2008), the child had reached the age of majority. It was therefore appropriate to raise the question of the real effectiveness of the appeal, given that the impugned administrative decision was no longer enforceable. Here, the Constitutional Court recalled that constitutional proceedings became without object only where the judicial bodies themselves directly redressed the breach of the Constitution, or if the act or procedure giving rise to the action for constitutional protection lapsed, without prejudice to the general interest which the case might disclose.

Supplementary information:

Right of minors to be heard in judicial proceedings:

- Article 12.1 of the United Nations Convention on the Rights of the Child of 20.11.1989;
- Article 24.1 of the Charter of Fundamental Rights of the European Union (OJEU of 14.12.2007).

Cross-references:

- Procedural decision of the Constitutional Court no. 372/2007 of 17.09.2007 recalling that repatriation is one of the instances where there is encroachment on the personal and family sphere of a child.

Languages:

Spanish.



Switzerland

Federal Court

Important decisions

Identification: SUI-2009-1-001

a) Switzerland / **b)** Federal Court / **c)** Second Public Law Chamber / **d)** 02.04.2008 / **e)** 2C_5/2008 / **f)** X. v. Department of Health and Social Action and Administrative Court of the Canton of Vaud / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 134 II 235 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

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

3.16 General Principles – **Proportionality.**

5.3.4.1 Fundamental Rights – Civil and political rights – Right to physical and psychological integrity – **Scientific and medical treatment and experiments.**

5.3.5 Fundamental Rights – Civil and political rights – **Individual liberty.**

Keywords of the alphabetical index:

Fine, disciplinary / Minor, understanding, capacity / Patient, agreement / Patient, informed consent / Patient, right / Medical profession / Medical treatment, refusal.

Headnotes:

Disciplinary fine; patient's informed consent.

Generally speaking, minors' opinions must be taken into consideration, if they are capable of understanding (recital 4.1).

In this case, the young female patient, aged thirteen years and two months, clearly objected to her treatment, but the practitioner did not take this into account and relied on the consent of the mother, who was present when the events took place (recital 4.2).

Notion of capacity for understanding, within the terms of Article 16 of the Swiss Civil Code; case of a young person who, despite her condition, was fully able to

understand the cause of the injury from which she was suffering, and the nature of the treatment proposed (recital 4.3).

Justification for the administrative fine imposed on the practitioner (recital 4.4).

Summary:

A. was born in 1992 and in 2005 visited a medical centre with her mother because of pain she was experiencing after falling on her coccyx during a gymnastics class. The doctor examined A. in her mother's presence and diagnosed a lesion of the coccyx. She proposed two alternative therapies to the patient and her mother: no treatment or rectal manipulation to reposition the coccyx. She said that she would not carry out this procedure herself and recommended X., an osteopath practising this method.

In accordance with the mother's wishes, X. was called in and on the same day carried out an endorectal reduction to correct the position of A.'s coccyx, in the presence of her mother, even though the patient had expressed her clear objections. He carried out an initial manipulation and then a second, after establishing by x-ray that the first had not had the desired effect.

A few days later, the patient's mother complained to the *Société Vaudoise de Médecine* (Vaud medical association) about the medical care that her daughter had received. The Head of the Department of Health and Social Action (hereafter Head of Department) opened an administrative inquiry into the events. The Health Council found that, having regard to the particular nature of the procedure carried out on a juvenile, X. should have taken the patient's opinion into account. It appeared from the case notes that the patient had screamed uninterruptedly, had not co-operated at any moment and had begged the practitioner to stop. The Head of Department had therefore fined X. 1 500 Swiss francs (CHF). Following an appeal from X., the Administrative Court of the Canton of Vaud confirmed the Head of Department's decision.

X. then lodged a public law appeal requesting the Federal Court to set aside the disciplinary fine. He argued that the patient's state prevented her from giving valid consent to the treatment, which meant that her mother could decide in her place. The Federal Court dismissed the appeal in so far as it was admissible.

The requirement for patients' informed consent, to justify the infringement of physical integrity arising from medical treatment, is a judicial principle based

on the right to personal freedom and physical integrity. The courts acknowledge that minors can only consent to medical treatment if they are capable of understanding. Minors who are capable of such understanding are entitled to exercise strictly personal rights by themselves (see Article 19.2 of the Swiss Civil Code). The trend towards taking minors' opinion into account is confirmed in international conventions, such as the Convention of 20 November 1989 on the Rights of the Child (Article 12.1) and the Convention of 4 April 1997 on Human Rights and Biomedicine (Article 6). The cantonal law applicable in this case is based on these principles.

The case notes show that the patient was clearly and adequately informed of the treatment proposed by the osteopath, thus satisfying the conditions for her to give her informed consent. It is also clear that the girl expressly objected to this treatment on several occasions. However, the practitioner did not take this into account and carried out two successive manipulations, which the mother accepted.

Any decision on whether the osteopath could disregard the minor's refusal on the grounds that the mother had agreed to the treatment therefore depended exclusively on whether or not, at the time of these events, the girl was capable of understanding.

Under Article 16 of the Civil Code, persons who are capable of acting reasonably have the capacity for understanding. Capacity for understanding is a relative concept. It must not be assessed in the abstract but practically, in relation to a particular event and in accordance with its nature and importance. The required abilities must exist when the event occurred. The Swiss Civil Code does not specify a particular age at which young persons are deemed to be reasonable. Both case-law and legal theory stress the need to assess young patients' capacity for understanding in practical terms, in accordance with their ability to understand their condition and the probable consequences of a decision, and to communicate their preference in full knowledge of the facts.

Since it may be difficult to provide evidence of capacity for understanding, the practice is to consider that it must, in principle, be presumed, on the basis of general experience of life. It can be presumed that small children lack the necessary capacity for understanding to choose a form of medical treatment. In this case it can be asked whether the capacity for understanding of the patient – aged 13 years and two months at the time – can be presumed. However, it is unnecessary to take this any further for the following reasons.

The patient had suffered a lesion of the coccyx. First the doctor and then the osteopath had proposed rectal treatment to correct the position of the coccyx. This treatment was not essential, since the alternative was simply to let time do its work. In such circumstances, it has to be acknowledged that, given her age, the patient was able to understand the information supplied successively by the two practitioners, grasp the nature of her injury, assess the implications of the treatment suggested and its alternative, and communicate her preference in full knowledge of the facts. Since the treatment was clearly not essential and did not have to be imposed or performed as a matter of urgency, there was no therapeutic justification for continuing the treatment without the patient's agreement and collaboration. The osteopath should therefore have respected the will of the young person.

In the light of the foregoing, the cantonal authorities were entitled to find that the appellant's conduct towards his patient constituted negligence in the exercise of his profession. In view of all the circumstances, the fine of CHF 1 500 imposed on him was not unreasonable or manifestly disproportionate. Nor was this decision arbitrary in its effect.

Languages:

French.



Identification: SUI-2009-1-002

a) Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 24.10.2008 / **e)** 2C_149/2008 / **f)** X. and Y. v. the School Council of the City of Schaffhausen and the Public Education Council of the Canton of Schaffhausen / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 135 I 79 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

3.13 General Principles – **Legality**.
 3.16 General Principles – **Proportionality**.
 3.17 General Principles – **Weighing of interests**.
 5.3.18 Fundamental Rights – Civil and political rights – **Freedom of conscience**.

Keywords of the alphabetical index:

Lessons, swimming, exemption / Education, primary / Islam, Muslim population, integration / Religion, religious conviction / Religion, religious feeling, respect.

Headnotes:

Article 15 of the Federal Constitution (freedom of conscience and belief) and Article 9 ECHR; exemption from mixed swimming lessons on religious grounds.

According to the Islamic precept relied on, believers must not see the largely uncovered bodies of persons of the opposite sex (recital 4.2).

Beliefs on which a form of conduct derived from religious convictions are based or which underlie certain dress practices should not, in principle, be examined (recital 4.4).

The core principle of religious freedom is not affected by the precept under consideration (recital 5).

The obligation to take part in mixed swimming lessons has an adequate legal basis, namely the lower tier of compulsory state education in the Canton of Schaffhausen (recital 6).

In weighing up the interests, account must be taken of the various aspirations for integration of the Muslim population (recital 7.2).

If accompanied by other measures, the obligation in question does not constitute an inadmissible infringement of Muslim children's religious freedom (recital 7.3).

Summary:

For religious reasons, A., a Tunisian national, asked the school authorities of the City of Schaffhausen to exempt his two sons, X (born in 1995) and Y. (born in 1997), from the compulsory mixed swimming lessons in their primary school. The school authorities rejected the application and the Schaffhausen Cantonal Court dismissed the appeal lodged by X. and Y., who then lodged a public law appeal requesting the Federal Court to set aside the cantonal court's decision. The Federal Court dismissed the appeal.

Freedom of conscience and belief include the internal freedom to believe, not to believe and to change one's own religious convictions at any time and in any

way, as well as the external freedom to express, practice and communicate within certain limits one's religious convictions or vision of the world. Safeguards for the exercise of religion include not only confessions and religious beliefs, but also other expressions of religion that manifest themselves in everyday life. For example, the appellants can refer to the rule in the Koran that forbids believers from looking at the uncovered bodies of persons of the opposite sex and ask them to avert their gaze when they encounter persons whose part of the body between the navel and the knees is not covered. For the appellants therefore the obligation to take part in mixed swimming lessons represented interference in their freedom of conscience and belief.

Under federal law, sport is a compulsory subject in school. What is specifically included is a cantonal responsibility. It is clear from the school curricula of the Canton of Schaffhausen that swimming lessons are part of the compulsory sports syllabus. It is also clear that basic education is in mixed classes. Boys and girls are entitled to the same educational opportunities and the same basic education. There is therefore an adequate legal basis for mixed swimming lessons.

The compulsory mixed swimming lessons must therefore be weighed against the appellants' wish to follow the rules of their religion. As a general principle, basic compulsory education is intended to promote equal opportunities for all children and equality between boys and girls in education. It also makes an important contribution to integrating children from different countries, customs and religions. With the growth in the foreign-born population, the integration aspect has become increasingly important in recent years. It is explicitly referred to in the new federal aliens legislation. Schools that provide this basic education, including sport and swimming, have a part to play in the integration process. This includes familiarising children of foreign origin with Swiss the life style and living conditions and helping them to participate in the institutions of their country of residence, to ensure a minimum level of homogeneity in society, based on respect for and tolerance of others. Foreign nationals are therefore asked to make certain adjustments to the customs and habits of the chosen country. Against this background, compulsory basic education, including sport and swimming, are of critical importance. The schools can thus make it a requirement for all children to attend these classes and are not obliged to make exceptions. This applies equally to mixed swimming lessons. The mixing of boys and girls in the swimming pool, which the appellants see as a form of interference, does not affect the very essence of freedom of conscience and

belief. It is not just in swimming lessons, but very often in everyday life that the appellants are confronted with women and girls who, reflecting current styles of dress, do not cover all the parts of the body that should be covered according to these precepts. The school authorities have not, therefore, infringed freedom of conscience and belief by refusing to exempt the appellants from mixed swimming lessons.

Languages:

German.



"The former Yugoslav Republic of Macedonia" Constitutional Court

Important decisions

Identification: MKD-2009-1-001

a) "The former Yugoslav Republic of Macedonia" / b) Constitutional Court / c) / d) 11.02.2009 / e) U.br.200/2007 / f) / g) *Sluzben vesnik na Republika Makedonija* (Official Gazette), 23/2009, 19.02.2009 / h) CODICES (Macedonian, English).

Keywords of the systematic thesaurus:

- 3.3 General Principles – **Democracy.**
- 3.11 General Principles – **Vested and/or acquired rights.**
- 3.12 General Principles – **Clarity and precision of legal provisions.**
- 3.14 General Principles – ***Nullum crimen, nulla poena sine lege.***
- 3.18 General Principles – **General interest.**
- 3.19 General Principles – **Margin of appreciation.**
- 5.3.39.1 Fundamental Rights – Civil and political rights – Right to property – **Expropriation.**

Keywords of the alphabetical index:

Expropriation, purpose / Land, construction.

Headnotes:

The case concerned provisions of the legislation on expropriation, which allow expropriation to be carried out for the needs of natural and legal persons to construct housing, business and economic facilities for the purposes of acquiring a priority right of construction. It was suggested that they violated the right to property, as they allow certain property to be taken away at all times and under any circumstances, ostensibly in the public interest and for the benefit of economically powerful users, resulting in a diminution of the interest of the owner's property rights.

It was held that the legislator's discretionary right to define public interest is not unlimited and must not be exercised without reasonable grounds. It is not enough to enumerate the types of facilities for the construction of which expropriation is made; definition is needed as to where the public interest is to be realised, what it consists of and the reasonable grounds giving rise to the necessity of interference in the private sphere through expropriation.

Summary:

The petitioners asked the Court to assess the constitutionality of Article 3.1.3 of the Law on expropriation (“Official Gazette of the Republic of Macedonia”, nos. 33/1995, 20/1998, 40/1999 and 31/2003) and Articles 1 and 2 of the Law on Supplementing the Law on Expropriation (“Official Gazette of the Republic of Macedonia”, no. 46/2005).

They argued that allowing expropriation for the purpose of constructing housing or buildings for business and economic facilities for natural and legal persons, and justifying it by stating that it is in the public interest, violates the principles of the rule of law and property rights, as it in fact only served the private interests and enrichment of individuals.

The disputed provision of the Law on expropriation allows expropriation to be carried out, *inter alia*, for the needs of legal and natural persons in order to build facilities and perform other matters in the public interest. A controversial amendment to the legislation provided that public interest represents, *inter alia*, construction of housing or buildings for business and economic facilities stipulated for construction in detailed urban plans, in order to gain priority rights of construction over construction land.

The Court took account of the provisions of Article 8.1.6.7.10 and Articles 30, 51 and 56 of the Constitution, as well as relevant provisions of the Law on property and other real rights (“Official Gazette of the Republic of Macedonia”, no. 18/2001) Law on construction land (“Official Gazette of the Republic of Macedonia”, no. 82/2008) Law on spatial and urban planning (“Official Gazette of the Republic of Macedonia”, no. 51/2005) and noted that the right to property and other real rights are exercised on the basis of free disposition with required restrictions envisaged in the Constitution and laws. Under the Law on construction land, ownership of construction land creates rights and obligations and serves the wellbeing of the owner and of the community; land may be expropriated in a manner and under conditions defined by the regulations for expropriation.

The Court noted that the legislator has a discretionary right to define the public interest, but this only extends to a certain degree and must not be exercised without reasonable ground. A note in the Law on expropriation that there is public interest and that enumerates the types of facilities for the construction of which expropriation is made will not suffice. A definition is needed as to where the public interest is to be realised, what it consists of and the reasonable grounds giving rise to the necessity of interference in the private sphere through expropriation. The Court further noted that failure to observe these strictures would result in expropriation losing its sense, as a final, necessary and useful measure will lose its sense.

According to the Court, detailed enumeration of the types of facilities for the construction of which Article 2 of the Law defines public interest was sufficient in the conditions of transformation of ownership. Now, however, under conditions where other legal instruments are available, such as purchase of construction land, concession or long-term lease, expropriation should be the legal instrument “of last resort” for the restriction of the right to property. Otherwise, public interest as a constitutional restriction of property will be replaced by the commercial interest of the holders of the right to construction, that is the needs of natural and legal persons for the construction of housing and business facilities will be elevated to the level of public interest.

With regard to the priority right of construction, the Court took note of the difference between the right of priority purchase as an obligation right and the right of priority construction, which derives from the ownership of the land. Deprivation of property owed to the priority right of construction, that is, depriving someone who owns a piece of land and awarding that land to another person with reference to housing, business or economic facilities rather than the public interest element of these facilities, casts doubt over that right. This is due to the fact that an individual owner who does not have sufficient economic power to build, is exploited by someone who requests expropriation and acquires the priority right over his or her land.

The Court was of the view that all instruments of contractual law should be exhausted before expropriation is deployed; this is a measure of last resort. Restriction of the right of property, for the purposes of gaining a priority right of construction, is not a reasonable and proportionate measure for the realisation of public interest goals.

As a consequence, the Court found the disputed articles of the Expropriation Law to be in conflict with the Constitution.

Languages:

Macedonian.

*Identification:* MKD-2009-1-002

a) "The former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 18.03.2009 / **e)** U.br.199/2008 / **f)** / **g)** *Sluzben vesnik na Republika Makedonija* (Official Gazette), 45/2009, 03.04.2009 / **h)** CODICES (Macedonian, English).

Keywords of the systematic thesaurus:

3.5 General Principles – **Social State**.

3.8.1 General principles – Territorial principles – **Indivisibility of the territory**.

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

5.2.2.5 Fundamental Rights – Equality – Criteria of distinction – **Social origin**.

5.4.14 Fundamental Rights – Economic, social and cultural rights – **Right to social security**.

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

Keywords of the alphabetical index:

Childcare, allowance / Maternity, protection / Child, welfare / Social security.

Headnotes:

The exercise of the right to a special allowance for a newborn child should not depend on the mother's place of residence. Granting this right only to mothers who live in municipalities where the birth rate is below 2.1 live births per woman, violates the principle of equality.

Summary:

The petitioner asked the Court to assess the constitutionality of that part of Article 24-a that reads "who has a place of residence in the municipalities in which the rise in birth rate is under 2.1 live births per woman, and according to the data of the State Bureau of Statistics of the Republic of Macedonia, published for the preceding year" of the Law on

Health Insurance ("Official Gazette of the Republic of Macedonia", nos. 25/2000, 34/2000, 96/2000, 50/2001, 11/2002, 31/2003, 84/2005, 37/2006, 18/2007, 36/2007, 82/2008 and 44/2008).

He argued that this provision introduces territorial division of the state and puts the citizens in an unequal position in the exercise of their social security rights depending on the territory where they live.

The Court took account of the provisions of Articles 1.1, 8.1, 9.2, 34, 35, 39, 41 and 42.1 of the Constitution, and the relevant provisions of the Law on Health Insurance, including the contested provision of Article 24-a of the Law by virtue of which only mothers giving birth to live children who reside in the municipalities in which the rise in birth rate is below 2.1 live births per woman, according to the data of the State Bureau of Statistics of the Republic of Macedonia, published for the preceding year, will receive a special allowance. The allowance referred to in paragraph 1 of this Article is received by the mother of a living child and paid for a period of nine months continuously. If she gives birth to several children at once (twins, three children or more), she will receive an allowance for one year from the date of their birth in the amount of 30% of the average net salary paid per worker in the Republic of Macedonia announced for the current month.

The Court noted that the care of the state for social security and social justice of citizens, in addition to the normative function for the exercise of the right, also covers the provision of material and financial means. Without this component, rights would be a mere declaration with no value whatsoever; this is what makes the state a social state. It further noted that the essence of the principle of equality of citizens is its anti-discriminatory character which prohibits any privilege and form of advantage, *inter alia*, on grounds of the social status of the citizens. This right does not allow the establishment of grounds for any differences whatsoever between people when they exercise certain rights.

The Court held that the disputed Article of the Law does not in fact provide for the equal treatment of women in the exercise of the right to child allowance, as this right is only available to mothers of living children resident in the municipalities in which the rise in birth rate is below 2.1 live births per woman, and which is defined according to the data of the State Bureau of Statistics of the Republic of Macedonia, published for the preceding year.

The Court noted as undisputed the fact that the legislator has a right to legally prescribe certain conditions, the manner and means for the exercise of the rights of health insurance and social care, and within these frameworks to determine strategies, for example the case of the rise in the birth rate envisaged in Article 24-a of the Law, all with a view to the state conducting a humane population policy. However, it reiterated the legislator's obligation in this field to prescribe equal rights for citizens irrespective of the municipality they live in, excluding any differences and discriminations whatsoever among the people when they exercise their rights, thereby paying regard to humanity, social justice and solidarity.

The Court also found the above provision to be unconstitutional in that it violates and restricts the exercise of the right of health insurance by mothers living in municipalities outside its scope, which violates the principles of equality of the citizens before the Constitution and laws, social justice, equal protection of mothers and children, as well as the constitutional determination of humanity, social justice and solidarity as fundamental values of the constitutional order of the Republic of Macedonia. It therefore ordered the repeal of the challenged part of Article 24-a.

Languages:

Macedonian.



Identification: MKD-2009-1-003

a) “The former Yugoslav Republic of Macedonia” / b) Constitutional Court / c) / d) 08.04.2009 / e) U.br.179/2008 / f) / g) *Sluzben vesnik na Republika Makedonija* (Official Gazette), 48/2009, 13.04.2009 / h) CODICES (Macedonian, English).

Keywords of the systematic thesaurus:

3.3 General Principles – **Democracy**.
 3.10 General Principles – **Certainty of the law**.
 3.14 General Principles – **Nullum crimen, nulla poena sine lege**.
 5.3.32 Fundamental Rights – Civil and political rights – **Right to private life**.
 5.4.7 Fundamental Rights – Economic, social and cultural rights – **Consumer protection**.

Keywords of the alphabetical index:

Fine, determination / Licence, alcohol, sale / Alcohol, sale.

Headnotes:

The case concerned the sentencing of natural persons for buying alcoholic beverages contrary to the prescribed regime for their sale. This was found not to fall within the category of a legally justified rational measure with the purpose of controlling the sale of alcohol, which is a legitimate aim of the state. The measure was found to contravene the principle of the rule of law and to represent unfounded interference in and violation of the dignity and repute of the citizen and his or her moral integrity.

Summary:

The petitioner asked the Court to assess the constitutionality of Articles 24-a.3 and 57-a of the Law on Trade (“Official Gazette of the Republic of Macedonia”, nos. 16/2004, 128/2006, 63/2007 and 88/2008). Article 24-a introduced a ban on buying alcoholic beverages between 7:00 p.m. and 06:00 a.m. the following day. Article 57-a of the same Law prescribed a sentence for minor offences (misdemeanour, violation) – a fine in the amount of 200 euros on individuals buying alcoholic beverages between 7:00 p.m. and 06:00 a.m. the following day.

The petitioner claimed that these provisions violated the constitutional principle of the rule of law and citizens' human rights and freedoms, as only the sale of alcoholic beverages contrary to the prescribed regime may represent a violation attracting a corresponding fine. According to the petitioner, the purchase of alcoholic beverages under the same conditions could not be a violation, i.e. the violation could not be made by both the vendor and the purchaser at the same time.

The Court took account of the provisions of Articles 8.1.1.3, 11.1, 25 and 51 of the Constitution, as well as the relevant provisions of the Law on Trade governing the sale and purchase of alcohol. It observed that the legislator has the legitimate right to regulate the regime of the sale of alcoholic beverages, in a manner that will prohibit the sale of alcoholic beverages in certain sales outlets and at certain times of the day, for the purpose of controlling and protection against the excessive use of alcohol during the evening, especially by young persons. In the opinion of the Court, the legislator also has the legitimate right to determine sanctions for vendors (both legal and natural persons) who flout this ban.

However, the Court noted that the imposition of sanctions for natural persons (purchasers of alcoholic beverages in the said period) exceeds the sense and justification of a measure that is necessary for the prevention of alcohol misuse. The Court took the view that the introduction of a requirement for a retailer selling alcoholic beverages to possess a license to do so, and by prescribing the conditions and procedure for granting the license, the legislator has provided normative preconditions for tradesmen selling alcoholic beverages to adhere to the prescribed regime for sale. If they do not adhere to it, their licenses will be confiscated and their business activity curtailed.

The prescribed regime for the sale of alcoholic beverages concerns the retail trade in sales outlets where the goods for sale are on public display and immediately available to the consumer. It follows, logically, that the purchaser may buy any item that is on public display and available in the sales outlet. It also follows that if certain goods are sold to him or her, and he or she pays the price for them, he or she has a legitimate expectation that this transaction is permissible and that his or her conduct in buying the goods is not unlawful. Therefore, the seller is the only person who can be called to account if he or she offers for sale and sells goods the turnover of which is prohibited, and the prescription of a sanction for his or her conduct is the only justified and necessary measure the purpose of which is the control of the sale of alcohol as a legitimate aim.

The punishment of natural persons – purchasers of such goods – cannot be accepted as a legally justified rational measure. Such a measure is, in the Court's opinion, contrary to the principle of the rule of law, as a fundamental value of the constitutional order of the Republic of Macedonia and represents unfounded interference in and violation of the dignity and repute of the citizen and his or her moral integrity.

Languages:

Macedonian.



Identification: MKD-2009-1-004

a) "The former Yugoslav Republic of Macedonia" / b) Constitutional Court / c) / d) 15.04.2009 / e) U.br.202/2008 / f) / g) *Sluzben vesnik na Republika Makedonija* (Official Gazette), 53/2009, 15.04.2009 / h) CODICES (Macedonian, English).

Keywords of the systematic thesaurus:

3.1 General Principles – **Sovereignty**.
 3.7 General Principles – **Relations between the State and bodies of a religious or ideological nature**.
 5.2.2.6 Fundamental Rights – Equality – Criteria of distinction – **Religion**.
 5.3.18 Fundamental Rights – Civil and political rights – **Freedom of conscience**.
 5.4.2 Fundamental Rights – Economic, social and cultural rights – **Right to education**.

Keywords of the alphabetical index:

Education, religious.

Headnotes:

Freedom of confession by its nature implies that everyone is free, without interference, to determine his or her religious belief, to accept whether or not to accept a certain religion or to embrace another, or not to accept any religion at all. It also implies the freedom to profess one's religion and to decide whether or not to take part in religious sermons etc. Under the principle of secularism, the state must maintain its neutrality and must not interfere in religious matters (and therefore religious communities and groups), or promote a particular religion or religion in general. Nor should it obstruct the expression of religion, impose religious conformism or request implementation of religious activities as socially desirable conduct.

Issues over religious education (religious instruction, religious teaching) should be left to be the subject of decision and sphere of concern of religious communities and groups, within the frameworks of the freedoms to establish religious schools for these purposes. Any form of religious education that exceeds the academic and neutral character of the teaching, which is otherwise the characteristic of the public, state education and involves the state in the organisation of such religious teaching, violates the principle of secularism.

Summary:

The Liberal Democratic Party of the Republic of Macedonia asked the Court to review the constitutionality of Article 26 of the Law on Primary Education (“Official Gazette of the Republic of Macedonia”, no. 103/2008) which introduced the possibility of religious education in elementary school as an elective subject.

The petitioner claimed that the disputed provision was contrary to Article 19 and Amendment VII of the Constitution, which determined the secular character of the state, and as a result religious education was only permissible on a voluntary basis and outside state (public) schools.

The Court took account of the provisions of Articles 9, 16.1, 19.1.2, 20, 44, 45 and Amendment VII of the Constitution, as well as relevant provisions of the Law on Primary Education and the Law on the Legal Position of a Church, Religious Community and Group (“Official Gazette of the Republic of Macedonia, no. 113/2007). It observed that:

- the citizens of the Republic of Macedonia are equal in their freedoms and rights;
- the free expression of religious confession is guaranteed to everyone;
- religious communities and groups are separate from the state and equal before the law;
- they are free to establish religious schools and other social and charitable institutions;
- the right to belong to a certain religion also implies the right not to belong to any religion and not to profess its teaching;
- there is no state religion that would be privileged and no privileges of any religion on any ground are recognised;
- citizens enjoy freedom of association to exercise their convictions on the basis of programmes and actions that are not directed, *inter alia*, at religious hatred and intolerance.

The Court went on to observe that Article 19 and Amendment VII of the Constitution promote the freedom of confession, but at the same time establish the principle of separation of the state and the religious communities, that is, the principle of secularity. Freedom of confession by its nature implies that everyone is free, without interference, to determine his or her religious belief, to accept whether or not to accept a certain religion or to embrace another, or not to accept any religion at all. It also implies the freedom to profess one’s religion and to decide whether or not to take part in religious sermons etc. Under the principle of secularism, the state must maintain its neutrality and must not

interfere in religious matters (and therefore religious communities and groups), or promote a particular religion or religion in general. Nor should it obstruct the expression of religion, impose religious conformism or request implementation of religious activities as socially desirable conduct.

Issues over religious education (religious instruction, religious teaching) should be left to be the subject of decision and sphere of concern of religious communities and groups, within the frameworks of the freedoms to establish religious schools for these purposes. Any form of religious education which exceeds the academic and neutral character of the teaching, which is otherwise the characteristic of the public, state education and involves the state in the organisation of such religious teaching, violates the principle of secularism.

The Court found that Article 26 of the Law provides an opportunity to introduce a subject in primary education in which certain a religion is studied, allowing an introduction, in the form of religious teaching, religious lessons or religious instruction, into the rules by which members of a certain religious confession should abide. The Court took into account the fact that the manner of implementation of the contested provision coincides with this conclusion in all respects. Such form of religious education deriving as a possibility from the law, exceeds the academic and neutral character of teaching, which is otherwise the characteristic of public state education and involves the state in the organisation of such religious teaching, *vis-à-vis* the noted principle of separation of the state and the church, and in this context the freedom of the religious communities to establish religious schools. Hence, the Court found that the contested provision of the Law is be in contravention of Article 19 and Amendment VII of the Constitution.

Languages:

Macedonian.



Turkey

Constitutional Court

Important decisions

Identification: TUR-2009-1-001

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 17.01.2008 / **e)** E.2002/71, K.2008/44 / **f)** Concrete Review of Law no. 2822 (The Law on Collective Bargaining, Strike and Lockout) / **g)** *Resmi Gazete* (Official Gazette), 03.04.2008, 27189 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

5.4.10 Fundamental Rights – Economic, social and cultural rights – **Right to strike**.

Keywords of the alphabetical index:

Strike, political / Strike, prohibition / Collective bargaining.

Headnotes:

If all workers taking part in strike action are subjected to the same criminal sanctions without considering different possible motives, this violates their right to strike and is contrary to the Constitution.

Summary:

I. Bandırma Criminal Court asked the Constitutional Court to assess the compliance with the Constitution of Article 73 of Law no. 2822 (The Law on Collective Bargaining, Strike and Lockout). Article 73 of Law no. 2822 prohibits strikes aimed at preventing the making, altering or revocation of a decision and strikes in protest against decisions by legislative, executive or judicial organs or central or local authorities. The third paragraph of the article imposes criminal sanctions on those who take part in such unlawful strikes. Article 54 of the Constitution regulates the right to strike and lockout, stipulating that workers are entitled to strike if a dispute arises during the collective bargaining process. The Constitution prohibits “politically motivated strikes and lockouts, solidarity strikes and lockouts, occupation of work premises, labour go-slows and other forms of obstruction” in Article 54.7.

II. The Constitutional Court ruled that the Constitution recognises the right of workers to strike during the collective bargaining process, in order to protect their interests and to provide better conditions in collective agreement. A legislative act may jeopardise their rights in the collective agreement; they are entitled to defend their rights against such legislative acts. Subjecting all workers participating in a strike protesting against a law on social security to criminal sanctions without considering the various possible motives violates the right to strike and is contrary to the Constitution. The Court accordingly decided unanimously that Article 73.3 of the Law on Collective Bargaining, Strike and Lockout contravened Articles 2, 5 and 54 of the Constitution and directed its repeal. Five members of the Court namely, President Mr Kılıç, Judge Mr Erten, Judge Mr Özler, Judge Mr Özgüldür and Judge Mr Apalak agreed with this result for different reasons and put forward concurring opinions.

Languages:

Turkish.



Identification: TUR-2009-1-002

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 20.11.2008 / **e)** E.2008/42, K.2008/167 / **f)** Concrete Review of Law no. 2820 (Law on Political Parties) / **g)** *Resmi Gazete* (Official Gazette), 18.03.2009, 27173 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
4.5.10.2 Institutions – Legislative bodies – Political parties – **Financing**.
5.2.1.4 Fundamental Rights – Equality – Scope of application – **Elections**.

Keywords of the alphabetical index:

Political party, public funding, campaign, access / Political party, registration.

Headnotes:

A 7 % vote threshold for political parties to determine their eligibility for state funding is not contrary to the Constitution. It is necessary to prevent party inflation. It is proportionate and does not contravene the principle of equality.

Summary:

The Liberal Democratic Party (LDP) which received 89.000 votes (less than 1 %) in the 2002 general elections applied to the Ministry of Finance for public funding. The Ministry rejected the LDP's claim on the ground that it was not eligible for public funding under the Law on Political Parties. The LDP brought an action for annulment of the decision of the Ministry of Finance before Ankara 5th Administrative Court and claimed that Supplementary Article 1 of the Law on Political Parties is contrary to the Constitution. Ankara 5th Administrative Court asked the Constitutional Court to assess the compliance of Supplementary Article 1 of the Law on Political Parties with the Constitution. Supplementary Article 1 of the Law no. 2820 (The Law on Political Parties) stipulates that political parties which completed the administrative procedures in order to participate in elections and received at least 7 % of the votes cast in the last general elections are eligible for state funding. The last paragraph of Article 68 of the Constitution stipulates that "the state shall provide the political parties with adequate financial means in an equitable manner".

The Constitutional Court noted the vital role political parties play in a democratic pluralist system. They mediate interaction between citizens and the political system by bringing social demands to the political system. They contribute to political pluralism by organizing different political opinions; they identify individuals with political competence, educate them on political issues and prepares them for statecraft. Moreover, they contribute to the emergence of national will through participation in elections and help to realise national sovereignty. Because of these functions, political parties are noted in the Constitution as indispensable elements of democratic political life.

The Court stated in its decision that in order to accomplish these functions, political parties may obtain financial resources through revenues from their members and deputies as well as the funds provided by the state. Under Article 68 of the Constitution, financial means shall be provided "adequately" and "in an equitable manner". Such an "adequate amount" should beyond doubt be embodied by legislative power according to the

economic, political and social conditions of the country. On the other hand, the term "equitable manner" is the basic criterion by which political parties receive financial resources from the State. This term should be interpreted in such a way that those political parties with a definite organization within the country and those receiving a certain percentage of the vote at the general elections are entitled to state funding.

The Court also stated that the main goal of political parties is to play an intermediary role in the establishment of the national will through participating in elections and to come to power by receiving public support. Those parties which fail to satisfy the requirements for participating in elections or which fail to attract sufficient public support clearly do not make the same contribution to the establishment of the national will as other parties. The disputed provision regulates the conditions for obtaining public funds and takes into account the extent of the contribution of political parties to democratic political life as a criterion. Such a criterion cannot be described as unreasonable, disproportionate or lacking in objectivity. The Court accordingly ruled that the provision did not breach the Constitution, and rejected the claim. Five members of the Court, namely, President Mr Kılıç, Vice-President Mr Paksüt, Judge Mr Adalı, Judge Mrs Kantarcıoğlu and Judge Mrs Perктаş put forward dissenting opinions.

Languages:

Turkish.

*Identification:* TUR-2009-1-003

a) Turkey / b) Constitutional Court / c) / d) 25.12.2008 / e) E.2006/140, K.2008/185 / f) Annulment of Law no. 5548 (Law on Public Auditor (Ombudsman) / g) *Resmi Gazete* (Official Gazette), 04.04.2009, 27190 / h) CODICES (Turkish).

Keywords of the systematic thesaurus:

3.4 General Principles – **Separation of powers.**
 4.12 Institutions – **Ombudsman.**
 4.12.1 Institutions – Ombudsman – **Appointment.**
 4.12.3 Institutions – Ombudsman – **Powers.**

4.12.6 Institutions – Ombudsman – **Relations with the legislature.**

4.12.7 Institutions – Ombudsman – **Relations with the executive.**

Keywords of the alphabetical index:

Ombudsman, powers / Ombudsman, law, *locus standi*, challenging.

Headnotes:

The creation of an office of public auditor (ombudsman) which is subordinate to and elected by the Parliament and which has competence to audit administrative bodies contravenes the constitutional principles of separation of powers, integrity of administration and the principle that all public power emanates from the Constitution.

Summary:

I. The Law on Public Auditor (Ombudsman) was enacted and published in the Official Gazette in 2006. The President and 125 members of the Parliament filed annulment actions before the Constitutional Court on a separate basis. Both applicants asked the Constitutional Court to assess the compliance of the Law as a whole with the Constitution. The Constitutional Court consolidated the two actions and suspended application of the Law as an interim measure until it reached a decision.

The Law on Public Auditor established an Institution of Public Auditorship with its own public legal personality and a special budget. Under the Law, the Institution is composed of a chief public auditor and ten public auditors. The Institution is subordinate to the Parliament and members of the Institution are to be elected by Parliament. The auditors' term of office is five years. The jurisdiction of the Institution is to assess all acts and actions of the administration in terms of compatibility with human rights, the law and equity and to make suggestions to the administration. The acts of the President, legislative and judicial acts and pure military actions are not within the competence of the Institution.

II. The Constitutional Court ruled that audit of administration (executive) by an institution subsidiary to the Parliament is contrary to the principle of separation of powers and principle of integrity of administration. It also ruled that the powers of the Parliament are regulated in Article 87 of the Constitution and there is no power to elect public auditors in the Constitution. Article 6 of the Constitution stipulates that "No person or agency

shall exercise any state authority which does not emanate from the Constitution". Therefore, the Court decided that the Law as a whole ran counter to Articles 6, 87 and 123 of the Constitution and repealed it in its entirety.

Languages:

Turkish.



Ukraine

Constitutional Court

Important decisions

Identification: UKR-2009-1-001

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 13.01.2009 / **e)** 1-rp/2009 / **f)** Concerning official interpretation of provisions of Article 20.1.1.13 of the Law on the Cabinet of Ministers, Articles 52.2, 53.3 and 54.2 of the Budget Code in the light of the provisions of Articles 93.1, 96.2, 116.6 of the Constitution (case on the right to legislative initiative over amendments to the Law On State Budget) / **g)** *Ophitsiynyi Visnyk Ukrainy* (Official Gazette), 7/2009 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

4.5.6.1 Institutions – Legislative bodies – Law-making procedure – **Right to initiate legislation.**

Keywords of the alphabetical index:

Budget Act, right to legislative initiative.

Headnotes:

The right to submit draft laws introducing amendments to the State Budget to Parliament (*Verkhovna Rada*) belongs to all subjects of the right of legislative initiative mentioned in Article 93.1 of the Constitution, not only the Cabinet of Ministers.

Summary:

Fifty-four People's Deputies sought an official interpretation from the Constitutional Court of certain provisions of Article 20.1.1.13 of the Law on the Cabinet of Ministers (hereinafter, the "Law"), Articles 52.2, 53.3 and 54.2 of the Budget Code (hereinafter the "Code") against the background of Articles 93.1, 96.2 and 116.6 of the Constitution.

Under Article 93.1 of the Constitution, the right of legislative initiative in Parliament (*Verkhovna Rada*) belongs to the President, People's Deputies and the Cabinet of Ministers. The above constitutional provision draws no distinction between the President,

Deputies and cabinet, in terms of the content and scope of this right. However, other norms of the Constitution contain an exhaustive list of draft laws that may only be submitted to Parliament by specific subjects of the right of legislative initiative under Article 93.1 of the Constitution. For instance, draft legislation on the State Budget for the following year is to be submitted by the Cabinet of Ministers (Article 96.2 of the Constitution), whilst draft legislation on introducing constitutional amendments may be submitted by the President or by no fewer than one third or two-thirds of the constitutional composition of Parliament (Articles 154 and 156.1 of the Constitution).

The Constitution provides for general provisions of the budget process and determines its participants at specific stages of this process.

The Cabinet of Ministers drafts legislation on the State Budget for the following year and submits it to Parliament, ensures implementation of the State Budget approved by Parliament and submits a report on its implementation to Parliament (Articles 96.2, 97.2 and 116.6 of the Constitution).

Parliament approves the State Budget and introduces amendments to it, controls its implementation and adopts decisions on the report as to its implementation (Articles 85.1.4 and 96.1 of the Constitution).

The fundamental principles of the budget process and regulation of its stages are also provided for in the Code:

- Chapter 6 "Elaboration of the Draft State Budget" regulates activities of the Cabinet of Ministers related to the exercise of its constitutional authorities at this stage of the budget process;
- Chapter 7 "Consideration and Adoption of the State Budget" regulates activities of Parliament related to the exercise of its constitutional powers at this stage of the budget process;
- Chapter 8 "Implementation of the State Budget" regulates activities of the Cabinet of Ministers related to the exercise of its constitutional obligation to ensure implementation of the State Budget;
- Chapter 9 "Introducing Amendments to the Law on the State Budget" regulates this procedure as an individual independent stage of the budget process related to correction of components of the State Budget in the process of its implementation.

Each of these stages has a constitutional basis (Articles 85.1.4, 96, 97 and 116.6 of the Constitution).

Article 93.1 of the Constitution enumerates the subjects of the right of legislative initiative at the initial stage of the legislative process; initiation of a draft law by submitting it for consideration to Parliament.

Elaboration of a draft law is a specific type of activity that precedes the stage of submission (tabling) of the draft law and is thus not immediately related to the subjects mentioned in Article 93.1 of the Constitution.

On that assumption, the Constitutional Court took the view that elaboration of draft legislation on the State Budget (Article 116.6 of the Constitution, Article 32.1 of the Code) and its submission to Parliament (Article 96.2 of the Constitution, Article 37.2 of the Code) are independent stages of the budget process.

Therefore, there are grounds to conclude that the provisions of Article 20.1.1.13 of the Law may not be the subject of official interpretation in terms of Article 116.6 of the Constitution since they determine the stage of elaboration of draft laws in the State Budget and introducing amendments to the State Budget, rather than the stage of their submission to Parliament.

The provisions of Chapter 9 of the Code determine the powers of the Cabinet of Ministers at stages of the budget process such as introducing amendments to the Law on the State Budget, namely: “the Cabinet of Ministers carries out a quarterly assessment of compliance of expected macro-indicators of economic and social development with the indicators that were taken into consideration when approving the State Budget for a relevant budget period” (third sentence of Article 52.1); the Cabinet of Ministers within two weeks from the day of announcement of conclusions on over-fulfilment of the income part of the State Budget is to submit to Parliament a draft Law on introducing amendments to the legislation governing the State Budget (Article 53.3); the Cabinet of Ministers, should revenues of the general fund of the State Budget be in deficit for more than 15 per cent of the sum envisaged in the calculation of the state budget for a quarter, upon a motion of the Ministry of Finance is to elaborate and submit to Parliament a draft Law on introducing amendments the law on the State Budget (Article 54.2).

However, a systematic analysis of provisions of Articles 52, 53 and 54 of the Code confirms that these norms do not envisage an exclusive right of legislative initiative for the Cabinet of Ministers with regard to the introduction of amendments to legislation on the State Budget. The above-mentioned

powers of the Cabinet of Ministers do not restrict the rights of other subjects provided for in Article 93 of the Constitution to submit draft legislation introducing amendments to the Law on the State Budget to Parliament.

Judges V. Bryntsev, I. Dombrovskiy, V. Kampo and M. Markush expressed their dissenting opinions.

Languages:

Ukrainian.



Identification: UKR-2009-1-002

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 15.01.2009 / **e)** 2-rp/2009 / **f)** Concerning conformity with the Constitution of the Decree of the President on certain issues of state foreign policy administration / **g)** *Ophitsiynyi Visnyk Ukrainy* (Official Gazette), 5/2009 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

4.4.3.2 Institutions – Head of State – Powers – **Relations with the executive powers.**
4.4.3.5 Institutions – Head of State – Powers – **International relations.**

Keywords of the alphabetical index:

Head of State, foreign policy, powers / Foreign policy, powers.

Headnotes:

Preliminary approval by the President of candidates for positions in the Ministry of Foreign Affairs does not prevent the Cabinet of Ministers from exercising its powers in the area of ensuring the implementation of the foreign policy of the state, direction and co-ordination of ministries' activities provided for in Articles 116.1 and 116.9 of the Constitution and appointment of first deputy ministers and deputy ministers – nominated by ministers as provided for in Article 22 of the Law on the Cabinet of Ministers. Such approval does not interfere with the powers of the Government.

Summary:

Fifty-three People's Deputies asked the Constitutional Court to consider the conformity with the Constitution of the decree of the President on certain issues relating to the administration of foreign political activities of the State (no. 513 of 4 June 2008). This covers candidates seeking appointment as First Deputy and Deputy Minister of Foreign Affairs, Head of Division, Consul General, Minister-Counsellor, counsellor of a diplomatic mission in a foreign state, an international organisation, President, First Vice President and Vice President of the Diplomatic Academy of the Ministry of Foreign Affairs. Any such candidates are subject to preliminary approval by the President pursuant to the established procedure. Material relating to candidates for the positions of First Deputy and Deputy Minister of Foreign Affairs shall be submitted to the President by the Minister of Foreign Affairs prior to submission to the Cabinet of Ministers for the appointment of the candidates (Articles 1 and 2).

Pursuant to Article 18 of the Constitution, foreign political activity is aimed at ensuring national interests and security by maintaining peaceful and mutually beneficial co-operation with members of the international community according to generally acknowledged principles and norms of international law.

Foreign policy is an important area of the state's activities and its efficiency requires the stability of foreign political affairs and the co-ordination and coherence of actions of public authorities.

Parliament (*Verkhovna Rada*) exclusively by laws determines the fundamental principles of foreign policy of the state and foreign relations, hears annual reports and special addresses of the President concerning Ukraine's domestic and foreign situation, consents to or rejects the binding nature of international treaties within the term established by law (Articles 85.1.5, 85.1.8, 85.1.32 and 92.1.9 of the Constitution).

The President, in accordance with the status determined in the Constitution, is the head of state and acts on its behalf. He or she is the guarantor of national sovereignty, territorial indivisibility, respect for the Constitution, human and citizen's rights and freedoms (Article 102). Pursuant to Article 106 of the Constitution, in the sphere of foreign policy, the President guarantees the state's independence, national security and legal succession, represents the state in international relations, administers the state's foreign political activities, negotiates and concludes international treaties, makes decisions on recognising

foreign states, appoints and dismisses heads of diplomatic missions to other states and to international organisations, accepts credentials and letters of recall of diplomatic representatives of foreign states, submits to Parliament nominations for the Minister of Foreign Affairs, confers the highest diplomatic ranks (Article 106.1.1, 106.1.3-106.1.5, 106.1.10, 106.1.24).

The Cabinet of Ministers ensures the implementation of the state's foreign policy and directs and co-ordinates the work of the ministries and other executive bodies (Article 116.1, 116.9 of the Constitution).

Parliament, President and Cabinet of Ministers have separate constitutional powers in the sphere of foreign political activities, but only the President, being Head of State, is entitled to administer these activities. The constitutional provisions covering the above-mentioned powers of the President and other subjects of state foreign policy are norms of direct effect (Article 8.3). This means that the Head of State not only exercises the overall direction of the foreign political course of the state in accordance with the fundamental principles of the foreign policy determined by Parliament, but also uses appropriate means to influence the activities of the subjects of foreign political activity so as to safeguard national interests and security.

Implementation of the fundamental principles of foreign political activities determined by Parliament and carried out under the auspices of the President and ensured by the Cabinet of Ministers and the Ministry of Foreign Affairs requires a degree of co-ordination by the Head of State, including personnel issues. In dealing with the administration of state foreign policy, the President influences the activities of the Cabinet of Ministers and the Ministry of Foreign Affairs through relevant decrees and orders.

The purpose of the Decree providing for preliminary approval of candidates for appointments to positions in the Ministry of Foreign Affairs and the Ministry's Diplomatic Academy is, as mentioned in its Preamble, to ensure the implementation of Article 106.1.3 of the Constitution. This provides *inter alia* for the authority of the President to carry out the administration of state foreign policy. The exercise of this constitutional authority stipulates the participation of Head of State in the selection of personnel, including participation through preliminary approval of candidates for appointment to positions in the Ministry of Foreign Affairs and the Ministry's Diplomatic Academy, which offers training, re-training and capacity development courses for diplomatic and consulate personnel.

Hence, the procedure for preliminary approval of candidacies for positions as provided for in the Decree should be seen as a method of the exercise by the President of his constitutional authority to administer state foreign policy activity.

The Constitution, namely Articles 85.1.25 and 106.1.11 of the Constitution, provides for approval by Parliament of the President's appointment of candidates for certain positions, and Article 136.3 of the Constitution – for the President's approval of candidates seeking appointment as Chair of the Council of Ministers of the Autonomous Republic of Crimea. In the resolution of problems arising from state administration, such approval serves to co-ordinate actions by public authorities and represents a form of the exercise of their authorities.

The Decree's aim, as follows from its contents, is to further improve the implementation of the state's foreign policy and to develop the co-ordination in this area, including professional training and the selection of personnel for the Ministry of Foreign Affairs, which ensures and directly implements foreign policy.

The phrase "preliminary approval" as used in the Decree means that the procedure for approving candidates for positions in the Ministry of Foreign Affairs takes place at the stage of personnel selection before an authorised official or body makes the decision to appoint. Simultaneously, it shows who should give such an approval. The President's approval is received by the Minister of Foreign Affairs who either submits candidacies for respective positions to the Cabinet of Ministers or appoints the candidates himself.

Preliminary approval of candidates seeking positions in the Ministry of Foreign Affairs under the Decree is a procedure for co-ordination of actions by the Minister of Foreign Affairs with those of the President, in terms of the appointment of respective officials. This procedure does not replace decision-making on appointment of such candidates as an act of volition by those officials or entities entitled to make such decisions and may not be considered as a mandatory component of this decision.

Preliminary approval by the President of candidates for the positions discussed above does not prevent the Cabinet of Ministers from exercising its powers in the area of ensuring the implementation of the foreign policy of the state, direction and co-ordination of ministries' activities provided for in Article 116.1 and 116.9 of the Constitution and appointment of first deputy ministers and deputy ministers – nominated by ministers as provided for in Article 22 of the Law on the Cabinet of Ministers. In issuing the decree, the President did not interfere with the authorities of the highest executive body.

The procedure for preliminary approval by the President of candidates for positions in the Ministry of Foreign Affairs, as provided for in the Decree, relates to the resolution by the President of a specific aspect of foreign policy rather than the general organisation and operational procedures of the Ministry. The Constitutional Court accordingly did not see the necessity to connect the provisions of the decree mentioned in the constitutional petition with the organisation and activities of executive bodies (namely the Cabinet of Ministers), the regulation of fundamental principles of the civil or diplomatic service or the identification of fundamental principles of foreign policy that belong to the sphere of legislative regulation.

Judges I. Dombrovskiy and V. Kampo expressed their dissenting opinion.

Languages:

Ukrainian.



Identification: UKR-2009-1-003

a) Ukraine / b) Constitutional Court / c) / d) 03.02.2009 / e) 3-rp/2009 / f) Concerning conformity with the Constitution of a provision of Article 211.2 of the Family Code (case on age difference between an adoptive parent and a child) / g) *Ophitsiynyi Visnyk Ukrainy* (Official Gazette), 11/2009 / h) CODICES (Ukrainian).

Keywords of the systematic thesaurus:

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

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

3.19 General Principles – **Margin of appreciation.**

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

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

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

Keywords of the alphabetical index:

Adoption, age limit / Adoption, age difference between adoptive parent and child.

Headnotes:

The establishment of a requirement concerning the age difference between an adoptive parent and an adopted child belongs to the legislative powers of Parliament.

Summary:

I. The Authorised Human Rights Representative of Parliament (*Verkhovna Rada*) asked the Constitutional Court to declare the provisions of Article 211.2 of the Family Code to be unconstitutional, as they breached Articles 21, 22, 24 and 51 of the Constitution. The petitioner had particular difficulties with the appending of Article 211.2.1 of the Code with the second sentence reading that the age difference between an adoptive parent and a child may not exceed forty-five years pursuant to the Law on Introducing Amendments to Certain Legislative Acts Concerning Adoption of 10 April 2008 (hereinafter, the "Law"), and suggested that it infringed the constitutional rights of Ukrainian citizens.

The Authorised Human Rights Representative of Parliament argued that this amendment constituted a legal provision discriminatory on the grounds of age, restricting citizens' right to adopt a selected child and the child's right to be adopted. It also violated the constitutional principle of equality of human rights, according to which the needs of all persons without exception are equally important and everyone has equal opportunities.

II. When considering the issue of conformity with the Constitution of Article 211.2 of the Code, the Constitutional Court proceeded from the following:

In Ukraine, childhood is protected by the state (Article 51.3 of the Constitution). The state must provide adequate conditions for education, physical, mental, social, spiritual and intellectual development of children, their social and psychological adaptation and their vital activities, growing up in a family environment in an atmosphere of peace, dignity, mutual respect, freedom and equality (see Article 4 of the Law on Protection of Childhood). The priority for legal regulation of family relationships is to provide family education and opportunities for spiritual and physical development for each child (Article 1.2 of the Code).

The creation of conditions for each child to enjoy the right to family education, facilitating child adoption, establishing a system of incentives and support for adoptive parents, falls within the fundamental principles of state policy on social protection of orphaned children and children deprived of parental care (Article 3 of the Law on Ensuring Organisation and Legal Conditions for Social Protection of Orphaned Children and Children Deprived of Parental Care).

The state is obliged to take care of orphaned children and children deprived of parental care, including support and upbringing (Article 52.3 of the Constitution). The state's duty to ensure protection and care of a child necessary for his/her wellbeing is in line with the provisions of international legal acts recognised by Ukraine, namely Article 10.3 of the 1966 International Covenant on Economic, Social and Cultural Rights and Article 3 of the Convention on the Rights of the Child of 1989.

Legal relations pertaining to adoption are not subject to direct constitutional regulation. However, in order to ensure implementation of provisions of Articles 51 and 52 of the Constitution and international legal acts the state, in taking care of orphaned children and children deprived of parental care, determines the procedure for adoption. It controls this procedure by adopting norms that regulate the above social relations. According to the provisions of Principle 2 of the 1959 Declaration of the Rights of the Child, when adopting laws in this regard, the best interests of the child shall be of paramount consideration. The European Court of Human Rights also gives special consideration to the priority of the principle of the child's interests when deciding on adoption cases (Judgment in the case of *Pini and Bertani & Manera and Atripaldi v. Romania* dated 22 June 2004, *Reports of Judgments and Decisions* 2004-V).

The fundamental principles of the protection of childhood are determined exclusively by law (Article 92.1.6 of the Constitution). Provisions concerning adoption, including procedure and the legal status of the adopting parent and the adopted child, are provided for in Article 18 of the Code. Analysis of the relevant provisions would indicate that the person's intention to adopt a child means a possibility to adopt. The implementation of such an intention depends on the decision of the authorised body (the court), taking into consideration conditions established by the state and requirements for persons willing to adopt a child when ruling on adoption.

When evincing the arguments for the unconstitutionality of Article 211 of the Code, the petitioner was primarily proceeding from the interests of those seeking to adopt a child without taking heed of the priority of the interests of adopted children and the legal consequences of adoption. Adoption both bestows rights on adoptive parents and imposes responsibility on them, within the same framework as those of parents over their children (Article 232.4 of the Code). It also bestows both rights and responsibilities on adopted children within the same scope as those of children with regard to their parents (Articles 172, 202.1 and 232.5 of the Code). The establishment of a requirement concerning the age difference between an adoptive parent and an adopted child belongs to the legislative powers of Parliament. It is explained by the state's responsibility for the fate of orphaned children and children deprived of parental care according to the principles of relations between parents and children as provided for in the Constitution (Articles 51 and 52 of the Constitution).

The requirement determined in the Law with regard to the age difference between an adoptive parent and an adopted child is equally binding upon everyone willing to adopt a child and actually refers to a possibility to adopt a child of a certain age. As such, it does not violate the principle of equality of citizens before the law as provided for in Article 24 of the Constitution.

Judges V. Kampo, M. Markush and Yu. Nikitin expressed their dissenting opinion.

Languages:

Ukrainian.



Identification: UKR-2009-1-004

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 03.02.2009 / **e)** 4-rp/2009 / **f)** Concerning conformity with the Constitution (constitutionality) item 13.2.b, items 1, 4, 8, 10, 14 and 17 of Chapter I of the Law "On Introducing Amendments to Legislative Acts concerning Exercise of State Architectural and Construction Control and Facilitation of Investment Activities in Construction" / **g)** *Ophitsiynyi Visnyk Ukrainy* (Official Gazette), 11/2009 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

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

4.8.8.1 Institutions – Federalism, regionalism and local self-government – Distribution of powers – **Principles and methods.**

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

Keywords of the alphabetical index:

Local self-government, duties / Delegation of powers.

Headnotes:

The delegation of powers means transferring powers from one body to another. This should not be regarded as a complete cession of powers; they remain the powers of the body from which they have been transferred. The Constitution contains no limitations on changes to delegated powers or their return by law to the bodies of executive power; such activities fall within state discretion.

Summary:

I. The Constitutional Court recognised various provisions of legislation amended by the Law on Introducing Amendments to Legislative Acts Concerning Exercise of State Architectural and Construction Control and Facilitation of Investment Activities in Construction as being in conformity with the Constitution.

The complainant lodged a petition with the Constitutional Court, contending that the Law introducing Amendments to Legislative Acts concerning Exercise of State Architectural and Construction Control and Facilitation of Investment Activities in Construction no. 1026-V dated 16 May 2007 restricts the authorities of the Autonomous Republic of Crimea (hereinafter the "ARC") by transferring the powers of inspectorates of state architectural and construction control of the ARC to the territorial body of the State Architectural and Construction Inspectorate. The provisions in point were alleged to be out of line with Articles 19.2, 132, 134, 136.4 and 137.1.4 of the Constitution.

Under Article 10.2 of the Law on Architectural Activities, state architectural and construction control in the ARC is exercised by the Architectural and Construction Control Inspectorate, inspectorates of state architectural and construction control, oblasts,

districts, cities of Kyiv and Sevastopol and cities of oblast subordination. The inspectorate of state architectural and construction control in the ARC was part of and subordinate to the ARC Ministry of Construction Policy and Architecture. Inspectorates of state architectural and construction control in oblasts, cities of Kyiv and Sevastopol, districts and cities of oblast subordination operated within the framework of local authority administration and executive committees of city councils.

The Resolution of the Cabinet of Ministers no. 1182 dated 26 September 2007 introduced amendments to the system of the exercise of state architectural and construction control. The new system included the State Architectural and Construction Inspectorate and its territorial bodies in the ARC, oblasts and cities of Kyiv and Sevastopol.

Following these amendments, Parliament (*Verkhovna Rada*) adopted the Law on Introducing Amendments to Legislative Acts concerning Exercise of State Architectural and Construction Control, and Facilitation of Investment Activities in Construction no. 1026-V, 16 May 2007 (hereinafter, the "Law").

II. The Constitutional Court acknowledged the establishment of the ARC as an administrative-territorial unit and the conferring of powers to it as a form of decentralisation of state power in a unitary state. The delegation of powers to ARC through legislation stems from the fundamental constitutional principles of the exercise of public power. The powers of the ARC delegated by law define the necessary balance of state administration and the region's participation in the resolution of specific issues of state internal policy at a certain stage of its socio-economical development.

The delegation of powers means transferring powers from one body to another. The Constitutional Court pointed out that this should not be regarded as a complete cession of powers; they remain the powers of the body from which they have been transferred. The Constitution contains no limitations on changes to delegated powers or their return by law to the bodies of executive power; such activities fall within state discretion.

Accordingly, the delegation to the ARC of powers other than those provided for by the Constitution or their alteration by legislation does not run counter to the constitutional principle of combining centralisation and decentralisation in the exercise of state power (Article 132 of the Constitution).

Under Article 137 of the Constitution and Article 9.1.4 of the Law on the Parliament of the Autonomous Republic of Crimea, the Parliament of the ARC exercises the normative regulation of urban development and housing management. This, however, must be exercised within the limits defined by law. The Constitution and laws do not confer upon the ARC the powers of normative regulation of state control in urban development.

Unlike the normative regulation of state control, its exercise in urban development should be regarded as a state executive function which may be delegated to the ARC under Articles 138 and 35.3 of the Constitution. Indeed, Article 10 of the Law on Principles of Urban Development provides for the right of the ARC to exercise state control in urban development.

The legislation under dispute delegated powers to the body of the ARC and returned them to the bodies of executive power (the State Architectural and Construction Inspectorate and its territorial bodies). It does not, therefore, contradict Articles 134 and 136.4 of the Constitution.

The Constitutional Court interpreted Article 1 of the Law on Principles of Urban Development and Articles 1 and 10 of the Law on Architectural Activities as signifying that state architectural and construction control is a "detached" form of state urban development control. The Constitutional Court concluded that while the powers to exercise state control in urban development over architecture and construction are conferred upon the State Architectural and Construction Inspectorate and its territorial body in the ARC, the other powers concerning exercising state control over urban development delegated by law to the ARC remain within its competence.

Languages:

Ukrainian.



Identification: UKR-2009-1-005

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 25.02.2009 / **e)** 5-rp/2009 / **f)** Concerning conformity with the Constitution of the Presidential Decree on certain issues of administration in the spheres of national security and defence / **g)** *Ophitsiynyi Visnyk Ukrainy* (Official Gazette), 17/2009 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

4.4.3.6 Institutions – Head of State – Powers – **Powers with respect to the armed forces.**

4.11.1 Institutions – Armed forces, police forces and secret services – **Armed forces.**

Keywords of the alphabetical index:

National security, protection / Armed forces, control, competence.

Headnotes:

The Parliament, the President and the Cabinet of Ministers have separate constitutional powers in respect of national security and defence of the realm, but only the President has the constitutional powers to exercise administration in these spheres. In so doing, the President directs the activities of those charged with safeguarding national security and defence of the state, including the Armed Forces, Security Services, Foreign Intelligence Service, State Border Service and other military establishments created pursuant to laws to implement the basic system set out in Article 92.1.17 of the Constitution and Law on Fundamentals of National Security.

Summary:

Forty-nine People's Deputies asked the Constitutional Court to rule upon the compliance with the Constitution of the Presidential Decree on certain administrative issues in the spheres of national security and defence.

The preamble to the decree states that, in order to ensure the implementation of single state policy in the spheres of national security and defence and to improve co-ordination in these areas and pursuant to Article 106.1.1 and 106.1.17 of the Constitution and Articles 2, 5 and 13 of the Law on Democratic Civil Control over the Military Organisation and Law Enforcement Bodies of the State, the President resolved to approve the List of positions of heads of military establishments and law enforcement bodies (hereinafter, the "List"), candidates for which are to be approved by the President (Article 1).

Article 2 of the Law reads:

- materials required for approval of candidates for the positions of First Deputy Minister and Deputy Minister of Defence shall be submitted to the President by the Minister of Defence before their submission to the Cabinet of Ministers for appointment to respective positions (second paragraph);
- Security Service, Ministry of Defence and other central executive bodies that exercise management of military establishments shall submit, if necessary, to the President by May 1 proposals concerning changes in the overall structure or numerical strength of the Security Service, the Armed Forces and other military establishments, respectively, for the following calendar year (third paragraph);
- plans and timetables of manoeuvres or training exercises involving large military formations, military units of the Armed Forces and other military establishments (except manoeuvres or training exercises involving the armed forces of other states) are subject to the President's approval (fourth paragraph).

Under the Constitution, protection of sovereignty and territorial indivisibility and the safeguarding of its economic and informational security are the most important functions of the state and a matter of concern for all. The defence and protection of sovereignty, territorial indivisibility and inviolability are entrusted to the Armed Forces; guarantees of state security and protection of state borders are entrusted to the relevant military authorities and the national law enforcement agencies; their organisation and operational procedure are determined by law (Article 17.1, 17.2 and 17.3).

National security is a vital part of a state's activity, fulfilling a vital role for individuals, citizens, the state and society as a whole, with the aim of sustainable social development, the timely detection, prevention and neutralisation of real and potential threats against national interests (Article 1.2 of the Law on Fundamental Principles of National Security). Defence plays a pivotal role too, as a system of political, economic, social, military, scientific, research-and-development, informational, legal, organisational and other measures taken by the state in order to prepare for military protection or its own protection in case of the armed aggression or armed conflict (Article 1.2 of the Law on Defence). The efficiency of national security and defence requires co-ordination and concurrence by state authorities.

The Parliament (*Verkhovna Rada*), upon submission by the President, declares war and concludes peace, approves presidential decisions on the use of the Armed Forces and other military formations in the event of armed aggression against Ukraine. It determines the fundamental elements of national security, the organisation of the Armed Forces and undertakes the safeguarding of public order, exclusively by legislation. It also determines the procedure for deploying units of the Armed Forces to other states, the procedure for admitting and the terms for stationing units of the armed forces of other states on the territory. See Articles 85.1.9, 92.1.17 and 92.2.2 of the Constitution.

The President as the Head of State and the guarantor of state sovereignty and territorial indivisibility in accordance with his constitutional and legal status ensures state independence and national security of the state. He is Commander-in-Chief of the Armed Forces; appoints to and dismisses from office the high command of the Armed Forces and other military establishments, and conducts administration in the spheres of national security and defence of the state. He is head of Council of National Security and Defence (Article 106.1.1, 106.1.17 and 106.1.18 of the Constitution).

The Cabinet of Ministers takes measures to ensure defence capability, national security, and public order and to combat crime (Article 116.7 of the Constitution).

The List approved by the Decree provides for the necessity of the president's approval of candidates for the First Deputy Minister and Deputy Minister of Defence and the heads of certain structural units in the Ministry of Defence, the Armed Forces, military establishments, law enforcement bodies, in other words those charged with safeguarding national security and defence as set out in Article 17 of the Constitution who carry out activities in the areas which fall within the President's administrative remit, as provided for in Article 106.1.17 of the Fundamental Law.

Approval of those seeking to become First Deputy Minister and Deputy Minister of Defence under Article 2.2 of the Decree is done before the Minister of Defence submits their respective candidatures to the Cabinet of Ministers. It constitutes the procedure for co-ordinating the actions of the Minister of Defence with the President for appointment to these positions where the law does not provide otherwise. This process is not a substitute for the cabinet of Minister's decision on the appointment of candidates for these positions; neither should it be perceived as a mandatory component of this decision. As such, it does not violate the right provided for in Article 22.9.3

of the Law on the Cabinet of Ministers. In line with the principle of strict delimitation of powers and interaction of state authorities in ensuring national security (Article 5.1.6 of the Law on Fundamentals of National Security), the Cabinet of Ministers makes independent decisions on these appointments.

Approval of candidacies for all other positions, except for the First Deputy Minister and Deputy Minister of Defence, falls within the individual remit of the President in the spheres of national security and defence and does not concern the organisation and activities of executive bodies, namely the Cabinet of Ministers as is stated by the subject of the right to constitutional petition. The President who has the constitutional power to administrate in these spheres may approve a List of positions, the candidates for which are subject to his approval.

Approval of the overall structure, numerical strength and definition of functions of the Security Service, the Armed Forces and other military establishments created in accordance with Ukrainian laws as well as the Ministry of Interior, pursuant to Article 85.1.22 of the Constitution, falls within the remit of the Parliament.

Proposals in this regard are submitted to the Parliament pursuant to Article 13.1.2 of the Law on Democratic Civil Control of the Military Organisation and Law Enforcement Bodies of the State by the President. The Constitutional Court therefore took the view that the President has the right to determine the period within which the above bodies, if necessary, are to submit respective proposals.

In the exercise of his constitutional powers of administration with regard to national security and defence, the President has to take steps to increase the combat and mobilisation efficiency and capability of the Armed Forces and other military establishments and their readiness to protect Ukraine, defend its sovereignty, territorial indivisibility and integrity. This includes participation in and control over manoeuvres and training exercises as mentioned in Article 2.4 of the Decree. The Constitutional Court accordingly concluded that the approval of plans and timelines for manoeuvres and training exercises by the President as Commander-in-Chief of the Armed Forces as provided for in the Decree is within the scope of his powers and in line with the Constitution.

Judge M. Markush expressed her dissenting opinion.

Languages:

Ukrainian.



Identification: UKR-2009-1-006

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 26.02.2009 / **e)** 6-rp/2009 / **f)** Concerning official interpretation of Article 85.1.18 of the Constitution / **g)** *Ophitsiynyi Visnyk Ukrainy* (Official Gazette), 16/2009 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

4.4.3.1 Institutions – Head of State – Powers – **Relations with legislative bodies.**
4.5.2 Institutions – Legislative bodies – **Powers.**

Keywords of the alphabetical index:

National Bank, head, dismissal / National bank, head, appointment.

Headnotes:

The Parliament (*Verkhovna Rada*) only has the power to dismiss the Head of the National Bank from office when an appropriate request has been made by the President.

Summary:

The President asked the Constitutional Court for an official interpretation of Article 85.1.18 of the Constitution, arguing that this was needed due to the adoption by the Parliament (*Verkhovna Rada*) of a Resolution “On Activities of the National Bank in the Period of Financial Crisis and the Status of Implementation of Decisions of the Parliament Thereon” dated 26 January 2009. Paragraph 5 of the Resolution cancels the Resolution of the Parliament “On Appointing V.S. Stelmakh to the Office of the Head of the National Bank” dated 16 December 2004.

The Constitution defines the legal status of the National Bank as the central bank of the State, the principal function of which is to ensure stability of the monetary unit (Article 99). The specific characteristic of the legal status of the National Bank is that, on the one hand, it has the public legal status of a special central public administration body independent and autonomous in its activities with state bodies (Articles 6, 7, 24, 25 and 53 of the Law on the National Bank dated 20 May 1999 (hereinafter, the “Law”)), and on the other – the civil legal status of a

legal entity having separate property that is an object of state property and is completely under its economic management; the Bank also may enter into certain civil legal transactions with commercial banks and the State (Articles 4, 29, 31 and 42 of the Law). In order to ensure independence while implementing single loan and monetary policy, the Law precludes interference by the legislative and executive bodies or their officials with the exercise of functions and powers of the National Bank in other ways than those provided for by Law (Article 53). Pursuant to Article 51 of the Law, the National Bank is accountable to the President and the Parliament according to their constitutional powers.

The Head of the National Bank presides over the Board of the central bank of the State, manages its activities and is personally accountable to the Parliament and the President for these activities (Articles 16 and 19 of the Law).

One of the constitutional legal guarantees of the activities of the National Bank for ensuring the stability of the monetary unit is the special procedure for appointment and dismissal of the Head of the National Bank by the Parliament upon submission of the President as provided for in Article 85.1.18 of the Constitution.

The Constitution defines a different procedure for the dismissal of officials appointed to their respective positions upon joint approval by the President and the Parliament. The Constitutional Court concluded that a systematic comparison of the provisions of Article 85.1.12¹, 85.1.18 and 85.1.21 as stated in the Decision of the Constitutional Court no. 12-rp/2007 dated 11 December 2007 (the case on the procedure for termination of powers of members of the Cabinet of Ministers) shows that a request made by the President is not necessary for the Parliament to exercise its constitutional power to dismiss the Prime Minister, Minister of Defence, Minister of Foreign Affairs or make decisions on their resignation. Article 85.1.12¹, 85.1.18 and 85.1.21 of the Constitution clearly determine the powers of the Parliament over appointment and dismissal – at the President’s submission – of Head of the Security Service, Head of the National Bank, members of the Central Election Commission (paragraph 4.5 of the motivation part of this Decision).

Thus the constitutional provisions on appointments to and dismissal from certain positions by the Parliament upon submission by the President presuppose the conclusion of an agreement between the President and the Parliament on the resolution of personnel matters (see paragraph 4.4 of the

motivation part of Decision of the Constitutional Court no. 7-rp/2000 dated 27 April 2000 (the case on temporary fulfilment of duties of officials)).

The Parliament is a body of legislative power (Article 75 of the Fundamental Law). Appointment and dismissal of the Head of the National Bank from office belongs to the constitutional powers of the Parliament (Article 85.1.18 of the Constitution).

Under Articles 6.2 and 19.2 of the Constitution, the Parliament as a body of state power is obliged to act only on the grounds, within the limits of power and in the manner envisaged by the Constitution and laws. The Constitution established an imperative procedure for appointment and dismissal of the Head of the National Bank by the Parliament only upon submission of the President, under Article 85.1.18; there is no other provision for terminating his or her office within the Fundamental Law.

The Constitutional Court therefore affirmed the contents of Article 85.1.18; namely that the Parliament has the authority to make decisions over the dismissal of the Head of the National Bank only upon a request made by the President, i.e. according to the procedure set out in the Constitution.

Judges V. Bryntsev and I. Dombrovskiyi expressed dissenting opinions.

Languages:

Ukrainian.



Identification: UKR-2009-1-007

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 16.04.2009 / **e)** 7-rp/2009 / **f)** Concerning official interpretation of provisions of Articles 19.2, 144 of the Constitution, Articles 25, 46.14, 59.1, 59.10 of the Law "On Local Self-Government" (case on repeal of acts of bodies of local self-government) / **g)** *Ophitsiynyi Visnyk Ukrainy* (Official Gazette), 32/2009 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

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

4.8.8.1 Institutions – Federalism, regionalism and local self-government – Distribution of powers – **Principles and methods.**

Keywords of the alphabetical index:

Local authority, law-making power.

Headnotes:

Certain provisions of the Constitution and the Law on the rights of local authorities to repeal their decisions should be understood as meaning that local authorities are entitled to adopt, alter and repeal their own decisions, on the grounds, within the limits of their powers and in the manner envisaged by the Constitution and laws.

The decision was also made to terminate constitutional proceedings in the case concerning the official interpretation of provisions of the Law on local self-government as the constitutional petition did not satisfy the requirements set out by the Constitution or the legislation.

Summary:

The Kharkiv City Council lodged a petition with the Constitutional Court seeking an official interpretation of Articles 19.2, 144 of the Constitution, Articles 25, 46.14, 59.1, 59.10 of the Law on Local Self-Government no.280/97-VR dated 21 May 1997 regarding the right of a local government authority to alter and to repeal its decisions with regard to any issue within its field of competence.

The Constitution allows for local-self government – the right of a territorial community (residents of a village or a voluntary association of residents of several villages, residents of a settlement or a city) to resolve local issues within the limits of the Constitution and laws – to be carried out by the people, either directly or through local authorities such as village, settlements and city councils (Articles 5.2, 140.1).

Local authorities adopt decisions which are mandatory throughout the territory in question (Article 144 of the Constitution). Under Articles 19, 140, 143, 144 and 146 of the Fundamental Law, when they take these decisions they must do so on the grounds, within the limits of their powers and in the manner envisaged by the Constitution and laws.

In accordance with Article 59 of the Law, normative and other acts are adopted by councils in the form of decisions. Having analysed the functions and competences of local authorities, the Constitutional Court concluded that councils adopt both normative and non-normative acts. While normative acts are of local and repeated application to an unlimited number of persons, establishing, amending or repealing legal norms, non-normative acts contain stipulations which apply on a "one off" basis to one particular legal or physical person. They lose their regulative effect afterwards.

The norms of Article 144 of the Constitution and Article 59 of the Law set out the procedure for the adoption and control of decisions by local authorities. For instance, a decision by a respective council may be subject to review by the same council (Articles 25 and 59.4 of the Law) and decisions of the executive committee of a council may be repealed by a respective council (Articles 26.1.15, 59.9 of the Law).

Other provisions of the Law provide for the right of a council to repeal its decisions or introduce amendments to them. An example is the right to revoke permissions for the special use of natural resources of local character (Article 26.1.36 of the Law) and to introduce amendments to a local budget (Article 26.1.23).

Under Articles 144.2 and 59 of the Law, decisions by local authorities may be pronounced unlawful by a court of general jurisdiction due to lack of compliance with the Constitution or other legislation at the request of the persons concerned. Nonetheless, in the opinion of the Court, this does not mean that local authorities cannot amend or repeal their own acts (also for reasons of non-compliance with the Constitution and other legislation), either upon their own initiative or at the request of persons affected.

The Constitutional Court stressed the principle enshrined in the Constitution whereby human rights, freedoms and their guarantees determine the essence and orientation of the activities of the state which is responsible to individuals for its activities (Article 3). Likewise, local authorities are answerable to legal and physical persons for their activities (Article 74 of the Law). In this context, local authorities are not at liberty to repeal their decisions and make changes to them if legal relations connected with the realisation of subjective rights and interests protected by law occurred on the basis of these decisions, and the subjects of these legal relations object to such changes or repeal. This is "a guarantee of stability of social relations" between local authorities and citizens, and citizens require assurance that future decisions will not have a

detrimental impact on their present state. It corresponds with a legal position stipulated in paragraph 2.5 of the motivation part of the Decision of the Constitutional Court no. 1-zp dated 13 May 1997 (a case on incompatibility of the deputy mandate).

Non-normative acts by local authorities are acts of single application; they lapse once executed, so they cannot be repealed or amended by local authorities after their execution.

Judge V. Kampo expressed a dissenting opinion.

Languages:

Ukrainian.



Identification: UKR-2009-1-008

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 28.04.2009 / **e)** 8-rp/2009 / **f)** Concerning official interpretation of a provision of Article 83.8 of the Constitution in a systematic link with provisions of Articles 83.6, 83.7, 106.1.9, 114.3 and 114.4 of the Constitution / **g)** *Ophitsiynyi Visnyk Ukrainy* (Official Gazette), 34/2009 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

4.4.3.1 Institutions – Head of State – Powers – **Relations with legislative bodies.**
4.6.4.1 Institutions – Executive bodies – Composition – **Appointment of members.**

Keywords of the alphabetical index:

Parliamentary group / Prime Minister, candidate, proposal / Cabinet of Ministers / Government, head, appointment, method.

Headnotes:

The submission to the President of proposals concerning a candidate for the office of the Prime Minister and candidates for the membership of the Cabinet of Ministers falls within the exclusive ambit of the coalition of deputy (parliamentary) factions in the Parliament (*Verkhovna Rada*) formed in accordance with the Constitution.

Summary:

Under Article 5.1 and 5.2 of the Constitution, Ukraine is a republic where the people are the bearers of sovereignty and the only source of power exercising it directly and through the bodies of state power. The formation of these bodies (in particular, election or appointment for fixed periods) as envisaged by the Constitution is highly significant for a democratic state and its foundations as a republic.

After introducing amendments by Law no. 2222-IV dated 8 December 2004, the Constitution established a new procedure for the appointment of the Prime Minister and formation of the Cabinet of Ministers. The procedure prescribed by Articles 114.2 – 4 of the Constitution is as follows:

The Prime Minister is appointed by the Parliament (*Verkhovna Rada*). The President will submit proposals concerning a candidate for the office of the Prime Minister to the Parliament upon the proposal of the coalition of deputy (parliamentary) factions in the Parliament formed in accordance with Article 83 of the Constitution or a deputy (parliamentary) faction which includes the majority of People's Deputies from the constitutional composition of the Parliament. The Minister of Defence and the Minister of Foreign Affairs are appointed by the Parliament upon the submission of the President. Other members of the Cabinet of Ministers are appointed by the Parliament upon the submission of the Prime Minister. The coalition of deputy (parliamentary) factions submits proposals concerning candidates for the membership of the Cabinet of Ministers.

Hence, according to the Constitution, the coalition of deputy (parliamentary) factions in the Parliament is an independent participant in the formation of the Cabinet of Ministers with its own powers.

Article 83.6 of the Constitution states that in the Parliament, the coalition of deputy parliamentary factions (to include the majority of People's Deputies from the constitutional composition of the Parliament) shall be formed according to election results and on the grounds of agreement on political positions.

In its Decision no. 16-rp dated 17 September 2008 (paragraph 2 item 3.2 of the motivation part), a case on coalition of deputy (parliamentary) factions in the Parliament, the Constitutional Court pointed out that the definition of the phrase "coalition of deputy (parliamentary) factions in the Parliament" shall be based on the Constitution, combining the political and legal aspects of the formation of a coalition of deputy factions, and the organisation and termination of its activities. It will also take into consideration its

primary purpose enshrined in Articles 83.8, 106.1.9 and 114.3 of the Constitution, i.e. to form the Government.

Pursuant to Article 83.7 of the Constitution, the coalition of deputy (parliamentary) factions is formed in a newly-elected Parliament, and in a subsequent coalition, in the event that the coalition's activities were terminated during the activities of the Parliament. A systematic analysis of Articles 83.6, 83.7, 106.1.9, 114.3 of the Constitution suggests that the notion "coalition of deputy (parliamentary) factions formed in accordance with Article 83 of the Constitution" means not only the coalition of deputy (parliamentary) factions formed in a newly-elected Parliament, but the coalition of deputy (parliamentary) factions formed in the event that the activities of a preceding coalition of deputy (parliamentary) factions are terminated as well.

Thus, the Fundamental Law provides for the participation of the coalition of deputy (parliamentary) factions in the Parliament formed in the event that the activities of a preceding coalition of deputy (parliamentary) factions in the Parliament have been terminated in the formation of the Cabinet of Ministers under the auspices of the powers set out in Article 83.8 of the Constitution. By that means the primary purpose of the coalition of deputy (parliamentary) factions in the Parliament – the formation of the Government – is realised, and the political and legal connection of the existing coalition of deputy (parliamentary) factions in the Parliament with the Cabinet of Ministers is maintained.

Judges I. Dombrovskyi and V. Kampo expressed dissenting opinions.

Languages:

Ukrainian.



Identification: UKR-2009-1-009

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 28.04.2009 / **e)** 9-rp/2009 / **f)** Concerning conformity with the Constitution of item 4.13 Chapter I of the Law "On Introducing Amendments to Laws concerning Alleviation of Impact of World Financial Crisis on

Employment Sphere”(case on unemployment allowance for employees dismissed by consent of the parties) / **g**) *Ophitsiynyi Visnyk Ukrainy* (Official Gazette), 35/2009 / **h**) CODICES (Ukrainian).

Keywords of the systematic thesaurus:

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

5.4.3 Fundamental Rights – Economic, social and cultural rights – **Right to work**.

5.4.14 Fundamental Rights – Economic, social and cultural rights – **Right to social security**.

Keywords of the alphabetical index:

Unemployment, benefit, right / Security, social / Contract, employment, termination.

Headnotes:

Amendments to Ukrainian legislation on general mandatory state social insurance against unemployment resulted in changes to the point at which claims could be made by employees who had lost their jobs. The changes meant that they could not effectively claim any allowance for ninety days. This was held to be unconstitutional.

Summary:

The President lodged a petition with the Constitutional Court, in which he challenged the constitutional compliance of provisions of Article 23.3 of the Law on General Mandatory State Social Insurance against Unemployment no. 1533-III dd. 2 March 2000 (hereinafter, the “Law”) as amended by the Law on Introducing Amendments to Laws concerning Alleviation of Impact of World Financial Crisis on Employment Sphere no. 799-VI dd. 25 December 2008 (hereinafter, “Law no. 799-VI”).

Ukraine is a sovereign, independent, democratic, social and law-based state whose main duty is to affirm and ensure human rights and freedoms (Articles 1, 3.2 of the Constitution). Under Article 46.1 of the Constitution, citizens have the right to social protection, i.e. provision in cases of 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. Therefore, according to this constitutional norm, the list of cases to obtain social provision is not exhaustive.

Social protection is connected with loss of ability to earn income, loss of income or insufficient wherewithal for a citizen to look after disabled members of his or her family due to unemployment as a socio-economic phenomenon.

Article 1.9 of the Law enumerated the grounds for loss of employment due to circumstances beyond the control of employees. These included the ground provided by Article 36.1 of the Labour Code (hereinafter, the “Code”) – termination of a contract of employment by consent of the parties.

Paragraph 7 item 4.1 of Chapter I of Law no. 799-VI amended Article 1.9 of the Law. The amended Article 1.9 of the Law does not include Article 36.1 of the Code among grounds for the loss of a job due to circumstances beyond control of employees.

Article 22 of the Law determines conditions and terms for the payment of unemployment allowance. As a general rule, employees dismissed for valid reasons have the right to receive unemployment allowance starting from the eighth day after registration in the State Employment Service under the established procedure. However, under Article 23.3 of the Law, employees dismissed for non-valid reasons are only entitled to receive unemployment allowance starting from the ninety-first day.

Before the amendments to the Law were introduced, employees dismissed under Article 36.1 of the Code were entitled to receive unemployment allowance under the general rule provided by Article 22 of the Law. Following the amendments to Articles 1.9 and 23.3 of the Law, employees dismissed under Article 36.1 of the Code were included in the category of employees dismissed for non-valid reasons. They accordingly lost the right to receive unemployment allowance starting from the eighth day after registration in the State Employment Service under the established procedure; instead they were only entitled to receive it with effect from the ninety-first day.

The Constitutional Court concluded that the changes made to Articles 1.9 and 23.3 of the Law resulted in the loss by employees dismissed under Article 36.1 of the Code of the right to receive unemployment allowance starting from the eighth day after registration with the State Employment Service under the established procedure, and consequently the right to receive unemployment allowance for ninety calendar days after dismissal. The Constitution, however, does not allow reduction in the content and scope of existing rights and freedoms by adoption of new laws or introducing amendments to the laws that are in force (Article 22.3).

The Constitutional Court has repeatedly underlined in its case-law that benefits, compensations and guarantees are a type of social provision and an essential component of the constitutional right to sufficient standard of living. Reducing the content and scope of this right by the adoption of new laws or introducing amendments to those already in force shall be considered unacceptable in view of Article 22 of the Constitution (Decisions no. 8-rp dd. 6 July 1999, no. 5-rp dd. 20 March 2002, no. 7-rp dd. 17 March 2004, no. 20-rp dd. 1 December 2003, no. 8-rp dd. 11 October 2005, no. 4-rp dd. 18 June 2007).

The provisions of Article 23.3 of the Law as amended by Law no. 799-VI run counter to the Constitution. Since the provision of Article 1.9 of the Law as amended by the Law no. 799-V is in a systematic link with provisions of Article 23.3 of the Law it will be recognised as unconstitutional on the grounds of Article 61.3 of the Law on the Constitutional Court.

Judge V. Shyshkin expressed his dissenting opinion.

Languages:

Ukrainian.



United Kingdom House of Lords

Important decisions

Identification: GBR-2009-1-001

a) United Kingdom / **b)** House of Lords / **c)** / **d)** 21.01.2009 / **e)** / **f)** R (Black) v. Secretary of State for Justice / **g)** [2009] UKHL 1 / **h)** [2009] 2 *Weekly Law Reports* 282; CODICES (English).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Prisoner, sentence, periodic review / Prison sentence, determinate / Prison sentence, indeterminate.

Headnotes:

A distinction is drawn between the approach taken under Article 5.4 of the European Convention on Human Rights (ECHR) between determinate prison sentences, the lawfulness of which was determined by the original sentencing procedures and indeterminate prison sentences, the lawfulness of which was determined by matters unknown at the time the sentence was handed down and by way of periodic review. The fact that the Secretary of State for Justice had a power, subject to judicial review, to refuse or to authorise release on licence a prisoner serving a determinate sentence did not infringe Article 5.4 ECHR. The lawfulness of a determinate sentence was not affected by the fact that the Parole Board was required to consider whether a prisoner should be released on licence and make recommendations accordingly.

Summary:

I. Mr Black had a long history of criminal activity in the UK and Denmark, Switzerland and Portugal. In 1995 he was sentenced to 20 years' imprisonment for offences of false imprisonment, kidnapping, conspiracy

to kidnap and robbery. In 1996, he was sentenced to a consecutive term of four years for the offence of escaping from custody and assault. He was therefore sentenced to a total of 24 years' imprisonment. He became eligible for parole in June 2006. The Parole Board recommended, in May 2006, he be released on licence. That recommendation was rejected by the Secretary of State for Justice. Mr Black brought judicial review proceedings in respect of the Secretary of State's decision. He did so on the ground that it breached his rights under Article 5.4 ECHR.

II. Lord Brown gave the lead judgment, with which the other Lords agreed, apart from Lord Phillips.

The Secretary of State, the appellant on the appeal, submitted that in all cases where a determinate sentence was handed down its lawfulness, for the purposes of Article 5.4 ECHR was determined at that time. It could only be challenged at a later time if new arises arose. Mr Black, who was the respondent on the appeal, submitted that where legislation provides for a prisoner subject to a determinate sentence to be eligible for parole further detention is thereafter unlawful unless an independent body with the characteristics of a court concludes that there remains an unacceptable risk that the prisoner will reoffend. Only in those circumstances can continued detention remain lawful.

Lord Brown noted that the Strasbourg Court had held, in respect of indeterminate sentences, that the entirety of such sentences i.e., the fixed punitive tariff and the post-tariff period the length of which depended on the threat the prisoner posed of reoffending, had to be decided judicially: *Thynne, Wilson and Gunnell* (1990) 13 *European Human Rights Reports* 666 and A190-A; *Hussain v. UK* (1996) 22 *European Human Rights Reports* 1996-I; *Bulletin* 1996/1 [ECH-1996-1-004]; and *Stafford v. UK* (2002) 35 *European Human Rights Reports* 1121, *Reports of Judgments and Decisions* 2002-IV. Fixing the punitive tariff engaged Article 6 ECHR as it formed part of the sentencing decision. Fixing the post-tariff period engaged Article 5.4 ECHR and had to be conducted by a body with the characteristics of a court. The Strasbourg Court had however treated determinate sentences differently: see *Stafford* at paragraph [87]; and *Mansell v. UK* (application no. 32072/96), unreported, 02.07.1997.

He went on to hold that if the Court were to hold that Article 5.4 ECHR was to be applied to determine sentences it would widen its scope beyond its proper limits. Permitting the Secretary of State to overrule the Parole Board did not introduce a risk of arbitrariness into the parole system as any such decision was susceptible to judicial review. There was nothing insofar as the European Convention of Human Rights was concerned which rendered it intrinsically objectionable

for the Executive to take parole decisions where such decisions were reviewable by the courts. It might be indefensibly anomalous to permit this to occur, but it is not contrary to Article 5.4 ECHR.

Lord Phillips in his dissenting judgment noted that the Strasbourg Court had not as yet extended its approach to indeterminate sentences to determinate sentences. He went on however to state that there was 'no great leap of reasoning' to apply the same approach as taken to the former to the latter. He went on to state that it was not the case that a determinate sentence rendered detention lawful for the full period of that sentence. It provided the legal foundation for detention during the sentence's term providing other conditions were satisfied. It was the case that the law provided for circumstances when a person subject to such a sentence was entitled to release. Article 5.4 ECHR was, insofar as he understood, properly engaged at that point in order to enable the prisoner to seek a determination of whether the release conditions had been satisfied. In support of this he referred to *Gebura v. Poland* (Application no. 63131/00, unreported, 06.03.2007).

Languages:

English.



Identification: GBR-2009-1-002

a) United Kingdom / **b)** House of Lords / **c)** / **d)** 18.02.2009 / **e)** / **f)** RB (Algeria) v. Secretary of State for the Home Department & Others / **g)** [2009] UKHL 10 / **h)** [2009] 2 *Weekly Law Reports* 521; CODICES (English).

Keywords of the systematic thesaurus:

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

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

5.3.5 Fundamental Rights – Civil and political rights – **Individual liberty.**

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

Keywords of the alphabetical index:

Prisoner, deportation, legality / Deportation, torture, risk / Deportation, receiving state, assurances.

Headnotes:

A number of issues arose in respect of Articles 3, 5 and 6 ECHR in three conjoined appeals. Insofar as Article 3 ECHR was concerned, there was no principle of law that required a state to be satisfied that there was no risk of torture if an individual was deported to another state. It was a question of fact whether assurances from the receiving state could be relied on to provide a sufficient guarantee that a deportee would not be at risk of treatment that would breach Article 3 ECHR. 50 days detention once deported would not constitute a breach of Article 5 ECHR so as to require an individual not to be deported to the state where he was likely to be detained. Finally, for deportation proceedings to violate Article 6 ECHR there had to be substantial grounds for believing that there was a real risk that once deported there would be a fundamental breach of the Article 6 right in the state to which the individual was to be deported.

Summary:

I. The deportation of three individuals was sought by the Secretary of State for the Home Department. Deportation was sought on the grounds that they each posed a threat to the United Kingdom's national security. Each of the three individuals challenged the deportation on the basis that to deport them would breach their European Convention on Human Rights. Two of the three individuals argued that their deportation to Algeria would breach their Article 3 ECHR right. The third individual argued that if returned to Jordan he would be subject to treatment that would breach his Articles 3, 5 and 6 ECHR.

II. Lord Phillips gave the lead judgment, with which the other Lords agreed. He dealt with the three issues as follows:

Article 3 ECHR: *Chahal v. UK* 23 *European Human Rights Reports* 413, *Reports of Judgments and Decisions* 1996-V; *Bulletin* 1996/3 [ECH-1996-3-015], was the starting point for an assessment of this issue. The Strasbourg Court identified in that decision that the relevant test was one which required there to be substantial grounds for believing that if deported an individual would face a real risk of treatment that would breach Article 3 ECHR. The UK Government in that case relied on guarantees that there was no risk of such treatment. The issue was whether those assurances could be relied on. The Strasbourg Court had not

specified what level of assurance could be relied on. It was noted that the Court had in *Saadi v. Italy* BHRC 123, *Bulletin* 2008/2 [ECH-2008-2-003] noted that the deporting government had to dispel any doubts regarding future treatment. Lord Phillips did not consider however that the Strasbourg Court had gone so far as to require that assurances had to be given which would eliminate all risk of inhuman treatment. A state had however to demonstrate that there was a good reason to rely on assurances from the receiving state such that they could amount to a reliable guarantee that the deportee would not be subject to inhuman treatment. These assurances formed part of all the circumstances the state had to take account of in assessing whether there were substantial grounds for believing there was a real risk of such treatment.

Article 5 ECHR: Again it was necessary to demonstrate that there were substantial grounds for believing that if an individual were to be deported there would be a real risk that he would be subject to treatment that breach his Article 5 ECHR right. It was also necessary to demonstrate that the treatment, of which there was a real risk, was such as would, as per *R (Ullah) v. Special Adjudicator* [2004] UKHL 26, [2004] AC 323, amount to a flagrant breach of Article 5 ECHR. A flagrant breach was one, the consequences of which were so severe that they overrode the state's right to expel a foreign national from its territory.

Article 6 ECHR: The flagrant breach test applied to questions of breaches of Article 6 ECHR as it did to Article 5. There was no guidance however from the Strasbourg Court how to apply that test in the context of Article 6 ECHR as a procedural rather than substantive right. For there to be a flagrant breach there had to be a deficiency or deficiencies in the trial process in the receiving state that the fairness of a prospective trial would be fundamentally destroyed. The assessment however must not simply focus on the nature of the trial process. It had to also take account of the potential consequences of the trial process. The extent of any potential breach of an individual's substantive human rights from a breach of the fair trial right had to be taken account of in that assessment. There must therefore be substantial grounds for believing that there is a real risk of a fundamental breach of the Article 6 right and that that would lead to a flagrant violation of fundamental, substantive rights.

Languages:

English.



United States of America Supreme Court

Important decisions

Identification: USA-2009-1-001

a) United States of America / **b)** Supreme Court / **c)** / **d)** 31.03.2009 / **e)** 07-9995 / **f)** Rivera v. Illinois / **g)** 129 *Supreme Court Reporter* 1446 (2009) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

5.3.13.10 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Trial by jury**.

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:

Jury, challenge, peremptory / Due Process, fundamental elements / Jury, impartial, challenge / Procedure, meticulous observance of constitutional issue.

Headnotes:

Parties are constitutionally prohibited from exercising peremptory challenges to exclude jurors on the basis of race, ethnicity, or sex.

There is no freestanding constitutional right to peremptory challenges (challenges made as a matter of right, without a requirement to show any cause) to the composition of a jury.

The constitutional requirement of due process requires jurisdictions to adhere to the fundamental elements of fairness in criminal trials, but does not safeguard the meticulous observance of a jurisdiction's procedural law requirements.

Unless a member of the jury as finally composed was removable for cause, there is no violation of the constitutional right to a fair trial before an impartial jury.

Summary:

I. Michael Rivera was charged with the crime of murder. During selection of the jury in his trial in the State of Illinois, his counsel sought to use a peremptory challenge (a challenge made as a matter of right, without a requirement to show any cause) to excuse a member of the jury pool, Delores Gomez, from the jury. The trial court judge, concerned that the challenge was based on constitutionally impermissible grounds, rejected it. Under a 1986 U.S. Supreme Court decision, *Batson v. Kentucky*, as well as subsequent decisions building on it, parties in a judicial proceeding are constitutionally prohibited from exercising peremptory challenges to exclude jurors on the basis of race, ethnicity, or sex. At trial, with Gomez as its foreperson, the jury found Rivera guilty of first-degree murder.

On appeal, the Illinois Supreme Court concluded that the trial court erroneously rejected the peremptory challenge. Nevertheless, the Illinois Supreme Court ruled that this error did not require reversal of Rivera's conviction.

II. The U.S. Supreme Court unanimously affirmed the Illinois Supreme Court's decision that the trial court's error did not require reversal of the conviction. In so doing, the Court denied Rivera's claim that because of the erroneous denial of the peremptory challenge, the Due Process clause of the Fourteenth Amendment to the U.S. Constitution required reversal. The Due Process Clause states in relevant part that no State shall "deprive any person of life, liberty, or property, without due process of law."

According to the Court, there is no freestanding constitutional right to the making of a peremptory challenge. Unless so provided in a State's constitution, the availability of a peremptory challenge is a matter of a State's statutory law, and a State may decline to offer such an opportunity at all. Thus, the loss of a peremptory challenge due to a state court's good-faith error is not a matter of federal constitutional concern, but is a matter solely for the State to address under its own laws. In this regard, the Court noted that the Due Process Clause requires States to adhere to the fundamental elements of fairness in a criminal trial, but does not safeguard the meticulous observance of State procedural law requirements.

The Court also ruled that the trial court's refusal to excuse a juror did not deprive Rivera of his constitutional right under the Sixth Amendment to the U.S. Constitution to a fair trial before an impartial jury. The Sixth Amendment states in relevant part that: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed..." It is applicable to the States through the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. In denying Rivera's Sixth Amendment claim, the Court cited its case law that holds that, unless a member of the jury as finally composed was removable for cause, there is no violation of the Sixth Amendment right to an impartial jury.

Cross-references:

- *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L. Ed. 2d 69 (1986).

Languages:

English.



Identification: USA-2009-1-002

a) United States of America / b) Supreme Court / c) / d) 21.04.2009 / e) 07-542 / f) Arizona v. Gant / g) 173 L. Ed. 2d 485 (2009); 2009 U.S. LEXIS 3120 (2009) / h) CODICES (English).

Keywords of the systematic thesaurus:

1.6.3.1 Constitutional Justice – Effects – Effect *erga omnes* – **Stare decisis**.

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

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

Keywords of the alphabetical index:

Car, privacy, interest / Criminal procedure, evidence, admissibility / Privacy, interest / Search, incident to arrest / Search, in car, evidence, admissibility.

Headnotes:

A search conducted without a warrant issued by a judicial officer generally is unreasonable under the constitutional prohibition against unreasonable searches and seizures; however, a search incident to a lawful arrest is an exception, grounded in interests in officer safety and evidence preservation, to this warrant requirement.

The search-incident-to-arrest exception to the constitutional prohibition against warrantless searches may be exercised only in the space within the arrestee's immediate control: that is, the area in which an arrestee is able to gain possession of a weapon or destructible evidence.

The search-incident-to-arrest exception to the warrant requirement in the prohibition against unreasonable searches and seizures authorises the police to search a motor vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.

The doctrine of *stare decisis*, or binding precedent, does not require the court to adhere to long-standing interpretation of a judicial decision when continued adherence to a faulty assumption underlying that decision would authorise ongoing constitutional practices.

Summary:

I. In the State of Arizona, the police arrested Rodney Gant for driving an automobile even though his driver's license had been suspended. After the police placed handcuffs on him and locked him in a patrol car, they conducted a search of his automobile and found a plastic bag of cocaine in a jacket pocket.

Mr Gant was prosecuted in the Arizona courts for two offenses: possession of a narcotic drug for sale and possession of drug paraphernalia (the bag in which the cocaine was found). He filed a motion at the trial court seeking to have the evidence suppressed on the ground that the search of his automobile, conducted without a search warrant, violated the Fourth Amendment to the U.S. Constitution. The Fourth Amendment states in full that "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." It

is applicable to the States through the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.

The trial court rejected the State's contention that the officers had probable cause to search Mr Gant's automobile for contraband when the search began. However, it denied the motion to suppress, reasoning that the search was permissible as a search related to arrest. The jury found Mr Gant guilty on both drug counts and he was sentenced to a three-year prison term.

The Arizona Supreme Court, holding that the search of Mr Gant's automobile was unreasonable under the Fourth Amendment, reversed the trial court's decision on the motion to suppress evidence. The Supreme Court did so after examining two U.S. Supreme Court decisions: *Chimel v. California* (1969) and *New York v. Belton* (1981). In the *Belton* decision, the U.S. Supreme Court ruled that the police may search the passenger compartment of a vehicle, and any containers located within, as a contemporaneous incident of an arrest of the vehicle's recent occupant. The Arizona Supreme Court determined, however, that *Belton* did not address the threshold question of whether the police may conduct a search incident to arrest at all once the scene is secure. In this regard, the Arizona Supreme Court turned to the *Chimel* decision, in which the U.S. Supreme Court articulated what is termed the "reaching distance" rule. According to that rule, the search-incident-to-arrest exception to the Fourth Amendment's warrant requirement is limited to the space within an arrestee's "immediate control": that is, the area from within which the arrestee might gain possession of a weapon or destructible evidence. Thus, in *Chimel* the Court recognised that police officer safety and evidence preservation interests justify the exception to the warrant requirement. Noting that in Mr. Gant's case these justifications no longer existed because Mr Gant was handcuffed, secured in the back of a patrol car, and under the supervision of a police officer, the Arizona Supreme Court ruled that the warrantless search of the automobile could not be justified and as a result was unreasonable.

II. The U.S. Supreme Court affirmed the decision of the Arizona Supreme Court. In so doing, it used the occasion to re-visit the *Belton* decision and its subsequent interpretation and application. In *Belton*, applying the *Chimel* reaching distance rule, the Court assumed that articles inside the passenger compartment of an automobile generally are within the area into which an arrestee might reach, and upheld the constitutionality of a warrantless search.

In the instant case, the Court determined that subsequent lower court decisions construed *Belton* to allow a vehicle search incident to the arrest of a recent occupant even when there is no possibility that the arrestee could have gained access to the vehicle at the time of the search. Therefore, according to the Court, it was necessary to clarify the *Belton* decision, which it did by stating that the *Chimel* reaching distance rule defines and limits the scope of *Belton*'s effect: in other words, a warrantless automobile search must observe the reaching distance rule and will be unconstitutional unless the facts justify concerns about officer safety or preservation of evidence. Under this standard, the search of Mr Gant's automobile violated the Fourth Amendment.

The Court also discussed its decision within the context of the doctrine of *stare decisis*, or binding judicial precedent. This doctrine, the Court stated, does not require adherence to a broad reading of *Belton*. According to the Court, the experience of the 28 years since *Belton* has shown that the generalisation underpinning a broad reading of that decision is unfounded, and blind adherence to its faulty assumption would authorise myriad unconstitutional searches.

Supplementary information:

Four of the Court's nine Justices dissented from the Court's decision. The *Gant* ruling is expected to have a significant impact on the activity of law enforcement officers, due to the number of warrantless searches conducted since 1981 pursuant to the broadly-accepted interpretation of *Belton*'s treatment of the search-incident-to-arrest exception.

Cross-references:

- *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L. Ed. 2d 685 (1969);
- *New York v. Belton*, 453 U.S. 454, 101 S.Ct., 69 L. Ed. 2d 768 (1981).

Languages:

English.



Identification: USA-2009-1-003

a) United States of America / **b)** Supreme Court / **c)** / **d)** 29.04.2009 / **e)** 07-1356 / **f)** Kansas v. Ventris / **g)** 2009 U.S. Lexis 3299 (2009) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

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

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

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

Keywords of the alphabetical index:

Criminal procedure, evidence, admissibility / Evidence, illegally obtained / Evidence, admissibility / Evidence, exclusionary rule / Testimony, challenge, evidence, admissibility.

Headnotes:

Whether evidence obtained in violation of constitution guarantees, while otherwise inadmissible at trial, can be admitted for purposes of impeachment of a witness's testimony depends upon the nature of the constitutional guarantee that is violated.

When the constitutional guarantee against compelled self-incrimination is violated, it may not be admitted at trial for any purpose, including impeachment of witness testimony.

When the constitutional guarantee against unreasonable searches and seizures is violated, the admissibility of the evidence thereby obtained for purposes of impeachment of witness testimony is a question to be decided by a balancing of the competing interests, rather than an automatic exclusion.

Evidence obtained in violation of the constitutional right to counsel is not automatically inadmissible for all purposes; while inadmissible for purposes of affirmatively proving guilt, it may be admitted for purposes of witness impeachment because the need to prevent perjury and to assure the integrity of the trial process outweigh the perceived deterrent effect on police officers.

Summary:

I. Donnie Ray Ventris and Rhonda Theel were prosecuted for murder and other crimes in the courts of the State of Kansas. While Ventris was awaiting trial, the police placed an undercover informant in his jail cell. According to the informant, Ventris admitted while speaking in the cell that he had shot and robbed the victim. At trial, Mr Ventris testified that Rhonda Theel committed the crimes. The prosecutor then sought to call the informant as a witness in order to impeach (to cast doubt on, or challenge, the credibility of the testimony of a witness) Mr Ventris's testimony. Mr Ventris objected to the introduction of the informant's testimony, arguing that admission of this evidence would violate his right to counsel guaranteed under the Sixth Amendment to the U.S. Constitution. The Sixth Amendment states, in relevant part, that in all criminal prosecutions "the accused shall enjoy the right...to have the Assistance of Counsel for his defence." It is applicable to the States through the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. While conceding that Mr Ventris's right to counsel probably had been violated, the prosecutor argued that the informant's testimony was admissible for purposes of impeaching Mr Ventris's testimony.

The trial court ruled that the informant's testimony was admissible for impeachment purposes. In its verdict, the jury found Mr Ventris guilty of aggravated burglary and aggravated robbery. On appeal, the Kansas Supreme Court reversed the trial court's decision, ruling that the informant's statements were categorically inadmissible, even for impeachment purposes.

II. The U.S. Supreme Court reversed the decision of the Kansas Supreme Court. The Court ruled that the application of the exclusionary rule, which in certain circumstances mandates the suppression of evidence in a criminal proceeding when the acquisition of the evidence was in violation of constitutional guarantees, depends on the nature of those guarantees when the evidence is offered for impeachment purposes only. Thus, any evidence obtained in violation of the right not to be compelled to give evidence against oneself (the Fifth Amendment to the U.S. Constitution) is inadmissible for any purpose. On the other hand, if the guarantee against unreasonable searches and seizures (the Fourth Amendment to the U.S. Constitution) is violated, the application of the exclusionary rule acts as a deterrent sanction against police misconduct, rather than categorical protection of the substantive right. In such cases, according to the Court, the inadmissibility of evidence is not automatic, but is instead determined by a balancing of the competing interests.

In the case of the Sixth Amendment right to counsel, the Court concluded that a balancing test is to be applied when evidence obtained in violation of that right is offered for impeachment purposes only. In this regard, the interests of preventing witness perjury and assuring the integrity of the trial process outweigh the perceived deterrent effect on police officers.

The Court determined that police officers would have strong incentives to comply with constitutional requirements, since statements lawfully obtained can be used at trial not only for impeachment, but also for the direct purpose of proving the defendant's guilt.

Two of the Court's nine Justices dissented from the Court's decision. Their views were set forth in a dissenting opinion authored by Justice Stevens.

Languages:

English.



Inter-American Court of Human Rights

Important decisions

Identification: IAC-2009-1-001

a) Organisation of American States / **b)** Inter-American Court of Human Rights / **c)** / **d)** 26.11.2008 / **e)** Series C 190 / **f)** Tiu Tojin v. Guatemala / **g)** / **h)** CODICES (English, Spanish).

Keywords of the systematic thesaurus:

- 1.6.1 Constitutional Justice – Effects – **Scope.**
- 4.7.11 Institutions – Judicial bodies – **Military courts.**
- 5.1.3 Fundamental Rights – General questions – **Positive obligation of the state.**
- 5.3.2 Fundamental Rights – Civil and political rights – **Right to life.**
- 5.3.3 Fundamental Rights – Civil and political rights – **Prohibition of torture and inhuman and degrading treatment.**
- 5.3.4 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.**
- 5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts.**
- 5.3.13.13 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Trial/decision within reasonable time.**
- 5.3.38.1 Fundamental Rights – Civil and political rights – Non-retrospective effect of law – **Criminal law.**
- 5.3.44 Fundamental Rights – Civil and political rights – **Rights of the child.**
- 5.3.45 Fundamental Rights – Civil and political rights – **Protection of minorities and persons belonging to minorities.**
- 5.5.5 Fundamental Rights – Collective rights – **Rights of aboriginal peoples, ancestral rights.**

Keywords of the alphabetical index:

Access to justice, meaning / Forced disappearance, investigation, obligation / Human rights violation, state, tolerance / Impunity / Indigenous community access to justice / Human rights case, transfer from military to civilian court.

Headnotes:

Since the forced disappearance of persons is a crime of a continuous or permanent nature, if its author persists in his or her criminal behaviour at the time that the crime of forced disappearance of persons is typified under domestic criminal law, the new legislation will be applicable with respect to that offence.

Given their special vulnerability, access to justice requires that victims of human rights violations who are members of indigenous communities can understand and make themselves understood in legal proceedings, and that they do not have to make excessive or exaggerated efforts in order to access centres for the administration of justice.

Summary:

I. On 29 August 1990, María Tiu Tojín and her month-old child, Josefa, were forcibly disappeared by members of the Guatemalan Army and Civil Self-Defence Patrols, which arrived at the "Community of Population in Resistance" known as "La Sierra," and captured 86 of its residents. This community was made up of groups of families that had been displaced and had sought refuge in the mountains in order to resist the strategies of the Guatemalan Army against the population displaced during the armed conflict. The 86 detainees were transferred to the military base in Santa María Nebaj, where María Tiu Tojín and her daughter were seen for the last time. At the time of her detainment, María Tiu Tojín was linked to the Council of Ethnic Communities Runujel Junam (CERJ) and to the National Committee of Widows of Guatemala, organisations that advocated resistance to participation in Civil Self-Defence Patrols during the internal armed conflict in Guatemala. In October and November 1990, three petitions for habeas corpus were filed on their behalf. Of these, two were dismissed and one was forwarded to the military justice system. There, criminal proceedings remained at their preliminary stage for more than 16 years, without significant progress in investigations. During the proceedings before the Inter-American Court, the case was transferred back to the ordinary criminal court system at the request of the Human Rights Section of the Public Prosecutors' Office of the City of Guatemala.

On 28 July 2007, The Inter-American Commission on Human Rights (hereinafter, the "Commission") filed an application against the State of Guatemala in order to determine its responsibility for the alleged violation of Article 4 ACHR (Right to Life), 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 (Obligation to Respect Rights) and Article I of the Inter-American Convention on Forced Disappearances of People (hereinafter "Inter-American Convention on Forced Disappearances"), to the detriment of María and Josefa Tiu Tojín; Article 19 ACHR (Rights of the Child), to the detriment of Josefa Tiu Tojín; and Article 5 ACHR (Right to Humane Treatment), Article 8 ACHR (Right to a Fair Trial), and Article 25 ACHR (Right to Judicial Protection), to the detriment of their next of kin. The Commission stated that it valued that the State's efforts in seeking to repair, at least in part, the violations it incurred. However, it highlighted that impunity persists in this case, and that it is a duty of the Guatemalan State to provide an adequate judicial response, establish the identity of those responsible, and locate the remains of the victims in order to adequately repair their next of kin. The representatives of the victims agreed with the Commission and requested that the Court order the State to comply with all of the measures of reparation it had offered the victims in a settlement accorded while the case was in proceedings before the Commission.

II. Taking into account its acknowledgment of international responsibility, the Court held that the State violated the rights to life, humane treatment, personal liberty, fair trial, and judicial guarantees and protection enshrined in Articles 4, 5, 7, 8 and 25 ACHR, in relation to Article 1.1 ACHR and that the State tolerated the practice of forced disappearances prohibited by Article I of the Inter-American Convention on Forced Disappearances, to the detriment of María and Josefa Tiu Tojín. The Court also held the State responsible for the violation of Article 19 ACHR, to the detriment of the child Josefa Tiu Tojín, and the violation of Article 5 ACHR to the detriment of Victoria Tiu Tojín, sister and aunt of the victims. Additionally, the Court found the State in violation of Articles 8 and 25 ACHR with respect to María and Josefa Tiu Tojín's next of kin.

The Court found that the damages accorded in the State's settlement with the victims were adequate in light of its jurisprudence on reparations. However, the Court ordered that the State take all measures necessary to guarantee, within a reasonable time, effective compliance with its duty to investigate, prosecute, and, if applicable, punish those

responsible for the facts of this case, and that it ensure the victims' right to a fair trial. The Court also ordered that the State provide access to all the documentation, information, and resources, including logistic and scientific resources, necessary to do so, and that the result of the proceedings be made public so that Guatemalan society may know the truth. Additionally, the Court held that even though the crime of forced disappearance had not been typified at the time Tiu Tojín and her daughter were last seen alive, because their whereabouts were still unknown when that typification came into force, the facts of this case must be investigated and prosecuted as a forced disappearance, and not merely as a kidnapping.

The Court also held that in order to guarantee access to justice, the State must ensure that the victims, members of the Maya indigenous community, can understand and make themselves understood in legal proceedings through the use of interpreters or other effective means. Additionally, the State was ordered to ensure that the victims did not have to make excessive or exaggerated efforts in order to access centres for the administration of justice, and was required to pay an amount for the expenses that will be incurred during proceedings in the ordinary courts. The State must also proceed immediately in search of the remains of María and Josefa Tiu Tojín, and, if they are found, must cover the costs of burial. Furthermore, the Court ordered that parts of its Judgment be published in the nation's Official Gazette and another national newspaper of widespread circulation, and that they be disseminated through a radio station with broad coverage in the Department of Quiché on at least four Sundays in both Spanish and the native language Maya K'iché.

Finally, as a guarantee of non-repetition, the State was ordered to transfer all judicial case files whose subject matter was not directly related to the duties of the armed forces, particularly those that entailed the prosecution of human rights violations, from military to regular criminal jurisdiction, in accordance with its domestic legislation.

Judge *ad hoc* Álvaro Castellanos Howell wrote a concurring opinion.

Languages:

Spanish.



Identification: IAC-2009-1-002

a) Organisation of American States / b) Inter-American Court of Human Rights / c) / d) 27.11.2008 / e) Series C 191 / f) Ticona Estrada *et al.* v. Bolivia / g) / h) CODICES (English, Spanish).

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.**
- 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.**
- 5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts.**
- 5.3.13.13 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Trial/decision within reasonable time.**
- 5.3.38.1 Fundamental Rights – Civil and political rights – Non-retrospective effect of law – **Criminal law.**

Keywords of the alphabetical index:

Forced disappearance, continuous nature / Human rights violation, state, tolerance / Impunity / Forced disappearance, investigation, obligation / Forced disappearance, crime, elements / State, responsibility, international / Treatment or punishment, cruel and unusual.

Headnotes:

Since the forced disappearance of persons is a crime of a continuous or permanent nature, if its author persists in his or her criminal behaviour at the time that a new treaty enters into force, its provisions directly related to the elements of that crime may be applicable against the State.

The elements of the crime of forced disappearance include the deprivation of liberty against the will of the person, the involvement of governmental officials, directly or by acquiescence, and the refusal to disclose the fate and whereabouts of the person concerned. The violation of a State's duty to hold detainees in an officially recognised place of detention is not an essential element of the crime of forced disappearance of persons. Thus, it cannot be considered a violation of a continuous nature.

Summary:

I. In 1980, a *coup d'état* led by General Luis García Meza established a repressive regime in which military forces and paramilitary groups committed serious violations of human rights with impunity. On 22 July 1980, Renato Ticona Estrada and his brother Hugo were detained by an army patrol near the control post of Cala-Cala in Oruro, Bolivia, but were not informed of the charges against them or brought before judicial authorities. State agents stripped them of their belongings and tortured them, beating them for several hours, and later transferred them to a military post in Vinto. From there, the Ticona brothers were taken to the offices of the Special Security Service (hereinafter, "SES"), also known as the Division of Public Order (hereinafter, "DOP"), and handed over to the chief of that unit. That was the last time that Hugo Ticona knew of Renato Ticona's whereabouts. When Hugo and Renato Ticona's parents heard about their detention, they turned to State authorities and institutions in order to learn of their sons' whereabouts, to no avail. Finally, thanks to the information provided by a social worker, the parents learned that Hugo Ticona was badly injured and had been taken first to a clinic, and later to the military hospital of COSSMIL in the city of La Paz, where he was held incommunicado for two weeks. He was then transferred to the DOP of La Paz later imprisoned at Puerto Cavinás until 4 November 1980, date on which he was released. In 1983, criminal proceedings were opened in relation to the facts of the case, but these were archived in 1986 despite that the preliminary phase of the proceedings had not yet concluded. On 15 April 2004, Luis García Meza acknowledged in an interview that the personnel under his command were responsible for the detention of Hugo and Renato Ticona and the subsequent disappearance of the latter. Criminal proceedings on this case were reopened in 2005, and a default judgment was rendered against several state agents. Appointed defence counsel appealed this judgment, but it was upheld. A writ of cassation filed against this last ruling was still pending at the time of the Judgment of the Inter-American Court. More than 28 years have passed since Renato Ticona was disappeared, and his whereabouts or the location of his earthly remains are still unknown.

On 8 August 2007, the Inter-American Commission on Human Rights (hereinafter, the "Commission") filed an application against the State of Bolivia in order to determine its responsibility for the alleged violation of Article 3 ACHR (Right to Juridical Personality), Article 4 ACHR (Right to Life), 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 (Obligation to Respect Rights) and Articles I, III and XI of the Inter-American Convention on Forced Disappearances of People (hereinafter "IACFDP"), to the detriment of Renato Ticona Estrada, and Article 5 ACHR (Right to Humane Treatment), Article 8 ACHR (Right to a Fair Trial) and Article 25 ACHR (Right to Judicial Protection) to the detriment of his next of kin. The Commission also alleged that the State violated Article 2 ACHR (Domestic Legal Effects), in relation to Articles I and III IACFDP. Finally, the Commission requested the Court to order certain measures of reparation. The representatives of the victims agreed with the legal arguments of the Commission.

II. Taking into account the State's acknowledgment of international responsibility, and that the forced disappearance of persons is a crime of a permanent nature, the Court held that the State violated the rights to life, humane treatment, personal liberty, fair trial, judicial guarantees, and judicial protection enshrined in Articles 4, 5, 7, 8 and 25 ACHR, in relation to Article 1.1 ACHR, to the detriment of Renato Ticona Estrada. It also found that the State violated Articles 8 and 25 ACHR with respect to his next of kin, since no final judgment has been rendered in the criminal proceedings initiated over 25 years ago, and since the State has not carried out the steps necessary to locate Ricardo Ticona or his earthly remains. Additionally, because Renato Ticona's whereabouts were still unknown at the time the IACFDP came into force, the State violated Article I of that treaty, which obligates the State not to practice, permit, or tolerate the forced disappearance of persons and to effectively punish those responsible for forced disappearances within a reasonable time. Finally, taking into account the existence of a close family bond and the family's fruitless efforts to find Renato Ticona, the Court held that the State violated Article 5 ACHR, to the detriment of Ticona's next of kin, through its lack of response and failure to investigate the crimes committed against him. Additionally, although the State recognised the Court's competence in 1993, because the State became aware of Hugo Estrada's torture during the proceedings initiated in 2005 in relation to his brother's forced disappearance, it was obligated to investigate those facts. Because it did not, the State failed to guarantee Hugo Estrada access to justice, in violation of Articles 8 and 25 ACHR.

However, despite the State's acknowledgement of responsibility, the Court found that it did not violate Article 3 ACHR because the right to juridical personality has its own juridical content and its violation does not constitute an element of the crime of forced disappearance of persons. Additionally, the Court found that the State did not violate Article XI

IACFDP, since the duty to hold detainees in an officially recognised place of detention and to maintain official and updated registries of their detainees came into force at the ratification of the IACFDP in 1999. The Court also found that the State did not violate Article 2 ACHR, since it did not have the specific obligation of typifying the crime of forced disappearance of persons at the time criminal proceedings were initiated in 1983, and since other criminal norms existed at the time that could guarantee the rights to life, personal integrity, and personal liberty enshrined in the American Convention on Human Rights. The Court noted that the State incurred the obligation of typifying the crime of forced disappearance when it ratified the IACFDP in 1999, and did not do so until 2006. Nevertheless, the failure to comply with Articles I.d and III IACFDP had been cured by the time the case came before the Court.

The Court ordered the payment of pecuniary and non-pecuniary damages, as well as costs and expenses. It also ordered that the State continue the criminal proceedings initiated in relation to the forced disappearance of Renato Ticona and investigate the acts committed against Hugo Ticona in order to identify, prosecute, and, if applicable, punish the responsible within a reasonable time. Additionally, the Court ordered the State to publish parts of the Judgment in its Official Gazette and in another national newspaper of widespread circulation, to provide medical and psychological care to the victims, and to provide the Inter-Institutional Council for the Clarification of Forced Disappearance the human and material resources necessary to carry out its functions.

Judges Diego García Sayán and Sergio García Ramírez wrote a concurring opinion.

Languages:

Spanish.



Identification: IAC-2009-1-003

a) Organisation of American States / **b)** Inter-American Court of Human Rights / **c)** / **d)** 27.11.2008 / **e)** Series C 192 / **f)** Valle Jaramillo *et al.* v. Colombia / **g)** / **h)** CODICES (English, Spanish).

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.**

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

5.3.6 Fundamental Rights – Civil and political rights – **Freedom of movement.**

Keywords of the alphabetical index:

Human rights defender, protection / Human rights violation, state, tolerance / Impunity / Human rights violation, investigation, obligation.

Headnotes:

The State has the obligation to adopt all reasonable measures necessary to guarantee the rights to life, personal liberty, and personal integrity of those who denounce human rights violations and are in a situation of special vulnerability. This obligation is conditioned upon the State being aware of a real and immediate danger to human rights defenders and upon the existence of a real possibility of preventing or avoiding this danger.

The right to freedom of movement and residence contemplates the right of all persons lawfully within a State to move freely within that State, to choose their place of residence within it, and to enter, remain in, or leave the State's territory without unlawful interference.

The right to freedom of movement and residence may be affected when a person is the victim of threats or harassment, and the State does not provide the guarantees necessary to allow him or her to move freely and reside in the territory in question, even when those threats and harassments are carried out by non-State actors.

Summary:

On 27 February 1998, three armed individuals entered Jesús María Valle Jaramillo's office in Medellín, where Carlos Fernando Jaramillo Correa and Nelly Valle Jaramillo were also present, and proceeded to tie all three hostages up. Jesús María Valle, a well-known human rights defender who actively denounced crimes perpetrated by paramilitary groups with the collaboration and acquiescence of members of the Colombian military and who had been repeatedly threatened due to these activities, was executed with two shots to the head. The perpetrators dragged Nelly

Valle Jaramillo and Carlos Fernando Jaramillo Correa to the lobby and threatened to shoot them as well, but then left the office. Various criminal proceedings were opened in relation to the facts of the case. Jaramillo Correa cooperated with investigations, but was later forced into exile with his family due to the continued threats he received. As of the date of the Inter-American Court's Judgment, some criminal proceedings remained open. Disciplinary proceedings were also opened in order to investigate the conduct of judicial officials involved with the case, and the State reached a settlement with some of the victims through administrative proceedings.

On 13 February 2007, the Inter-American Commission on Human Rights submitted an application to the Court against the Republic of Colombia in order to determine whether the State was responsible for the violation of the rights recognised in Article 4 ACHR (Right to Life), Article 5 ACHR (Right to Humane Treatment) and Article 7 ACHR (Right to Personal Liberty), in relation to Article 1.1 ACHR (Obligation to Respect Rights), to the detriment of Jesús María Valle. The Commission also alleged the State's responsibility for the violation of Articles 5 and 7 ACHR, to the detriment of Nelly Valle Jaramillo and Carlos Fernando Jaramillo Correa, as well as Article 22 ACHR (Freedom of Movement and Residence), to the detriment of Jaramillo Correa and his next of kin. The Commission further requested a determination on the alleged violation of Article 8.1 ACHR (Right to Fair Trial) and Article 25 ACHR (Right to Judicial Protection), to the detriment of Nelly Valle Jaramillo, Carlos Fernando Jaramillo Correa, and Jesús María Valle Jaramillo's next of kin. Last, the Commission asked that the State be required to adopt measures of reparation. The representatives alleged additional violations of Article 11 ACHR (Right to Privacy), Article 13 ACHR (Freedom of Thought and Expression), Article 16 ACHR (Freedom of Association) and Article 17 ACHR (Rights of the Family).

On 9 July 2007, the State filed a brief partially acknowledging its international responsibility for the violation of specific articles of the Convention. It denied its responsibility with respect to other alleged violations and indicated that the State had not fostered an environment of harassment or persecution against human rights defenders.

II. In its Judgment of 27 November 2008, the Court found that the danger created by the State through its establishment of "self-defence" groups aggravated the situation of vulnerability of human rights defenders who, like Valle Jaramillo, denounced the violations committed by paramilitary groups and the armed forces. Likewise, the Court found that the protection and recognition of the importance of the

role of human rights defenders, whose work is essential for the strengthening of democracy and the rule of law, is intrinsically tied to its obligation of creating the conditions necessary for the effective exercise of the rights established in the Convention. Because the State did not adopt reasonable measures necessary to prevent the violation of Valle Jaramillo's right to life, humane treatment, and personal liberty, despite that it was aware of the danger that he faced, and because it did not carry out a complete and effective investigation into the facts of the case, the State violated Articles 4.1, 5.1 and 7.1 ACHR, to the detriment of Jesús María Valle Jaramillo; Articles 7.1 and 5.1 ACHR, to the detriment of Nelly Valle Jaramillo and Carlos Fernando Jaramillo Correa; and Article 5.1 ACHR to the detriment of their next of kin, all in relation to Article 1.1 ACHR.

The Court found, also, that because disciplinary proceedings are intended to protect the administrative function and to correct and control public officials, they serve a complementary role in guaranteeing the rights in the Convention, but cannot substitute criminal investigations in cases of human rights violations. Likewise, the Court acknowledged the role of administrative proceedings in providing reparations to victims, but stressed that they cannot be regarded adequate and effective remedies for the integral reparation of human rights violations. With respect to the criminal proceedings initiated, the Court held that partial impunity subsisted in this case because the whole truth regarding the facts had not been established and no arrest warrants had been issued for members of paramilitary groups tried and convicted *in absentia*. Thus, the State violated the right to judicial guarantees and to judicial protection recognised in Articles 8.1 and 25.1 ACHR, in relation to Article 1.1 ACHR, to the detriment of Nelly Valle Jaramillo, Carlos Fernando Jaramillo Correa, and their next of kin. The Court also found a violation of Article 22.1 ACHR, since Jaramillo Correa and his immediate family found themselves in a vulnerable situation that prevented them from freely exercising their right to freedom of movement and residence, in part because the State did not offer them the guarantees that would enable them to exercise that right in Colombian territory.

With respect to a criminal complaint that had been filed by a private party against Jesús María Valle for libel or slander due to the accusations he had made, the Court found no violation of Articles 11 or 13 ACHR. The Court held that the State's review of the complaint was not in itself unlawful harm to the honour or dignity of the individual or an infringement on the right to freedom of thought and expression. The Court also found that no arguments had been set

forth with respect to the alleged violation of Article 17 ACHR, and so found no violation thereof. It also found no violation of Articles 13 and 16 ACHR with respect to the rights of human rights defenders in general, stating that alleged victims must be specifically identified in the application submitted to the Tribunal.

Finally, the Court ordered several of the measures of reparation that the State had offered to undertake, including a public act acknowledging its international responsibility, the placement of a plaque at the Courthouse of the Department of Antioquia, medical and psychological care for the victims, the establishment of a scholarship for Nelly Valle Jaramillo and Carlos Fernando Jaramillo Correa, and the payment of pecuniary and non-pecuniary damages. The State also agreed to guarantee the safety of Jaramillo Correa should he decide to return to Colombia. Additionally, the Court ordered that the State publish parts of the Judgment in its official gazette and in another national newspaper of widespread circulation, and that it investigate the facts that gave rise to the violation, ensuring access at all stages of the investigation to the victims and their next of kin.

Judge Sergio García Ramírez wrote a concurring opinion.

Languages:

Spanish.



Court of Justice of the European Communities and Court of First Instance

Important decisions

Identification: ECJ-2009-1-001

a) European Union / **b)** Court of First Instance / **c)** First Chamber / **d)** 17.01.2007 / **e)** T-231/04 / **f)** Hellenic Republic v. Commission of the European Communities / **g)** *European Court Reports* II-63 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

2.1.1.4.10 Sources – Categories – Written rules – International instruments – **Vienna Convention on the Law of Treaties of 1969.**

2.1.2.2 Sources – Categories – Unwritten rules – **General principles of law.**

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

Keywords of the alphabetical index:

European Union, co-operation between Commission and Member States / European Union, common foreign and security policy, agreement / Public international law, principles / Good faith, principle / Legitimate expectations, protection.

Headnotes:

1. Under the EU Treaty, in the version arising from the Treaty of Amsterdam, the powers of the Court of Justice are exhaustively listed in Article 46 EU. That Article makes no provision for any jurisdiction of the Court in respect of the provisions of Title V of the EU Treaty.

However, where the Commission proceeds to recover by offsetting amounts which have arisen in the context of an arrangement between the Commission and the Member States resulting from cooperation within the scope of Title V, by means of an act adopted pursuant to Regulation no. 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities and Regulation

no. 2342/2002 laying down detailed rules for the implementation of the Financial Regulation, that act of offsetting is covered by Community law and is open to challenge by way of an action for annulment under Article 230 EC (see paragraphs 73-74).

2. The appraisal of the obligations of a Member State which is a participating partner in a joint project between the Commission and certain Member States undertaken in the context of cooperation coming within the Union's common foreign and security policy cannot be based solely on the memoranda recording the agreements entered into by the partners, but must also take into account the expectations which that Member State's conduct led its partners to entertain. In fact, as a signatory of those memoranda, each partner is required to act in good faith as regards the other partners.

The principle of good faith is a rule of customary international law, the existence of which has been recognised by the Permanent Court of International Justice established by the League of Nations, and subsequently by the International Court of Justice and which has been codified by Article 18 of the Vienna Convention of 23 May 1969 on the Law of Treaties. Consequently, it is binding on the Community and on its partners in the framework of those agreements (see paragraphs 84-87, 97).

Summary:

After the capital of Nigeria was transferred from Lagos to Abuja, some member states including Greece decided to build an office complex in Abuja to house their diplomatic missions and the local delegation of the Commission. For this purpose, on 18 April 1994, the Commission and the member states signed a memorandum of understanding based on Article 20 of the EU Treaty, empowering the Commission to act on behalf of the member states to choose architects and building firms, negotiate the corresponding contracts, cover the costs involved and make essential arrangements with the Nigerian government. The member states had agreed to reimburse the corresponding costs to the Commission. A permanent steering committee comprising representatives of all the member states had also been set up to co-ordinate and supervise the project. It was agreed that the parties would ultimately negotiate a second memorandum once the final arrangements for the project had been made. This additional memorandum was to set out each partner's rights over the finished premises, the detailed plans of the buildings and the way in which costs would be shared between the parties. Greece signed and ratified the initial memorandum; it also signed the additional memorandum but never ratified it. Despite

this, it took an active part in all the stages and aspects of the Abuja project until it withdrew in September 2000.

On the basis of the memorandums, the Commission made repeated requests to Greece to reimburse the sums owed as a result of its participation in the project. Greece never paid the sums due, so the Commission recovered them by offsetting them against the amount payable to Greece under the Regional Operational Programme for mainland Greece. This procedure is provided for by the Financial Regulation applicable to the budget of the European Communities and its implementing rules.

It was against this offsetting process that Greece brought an action for annulment before the Court of First Instance. One of Greece's main arguments was that no financial obligation could arise from the additional memorandum as it had not ratified it.

As a preliminary point, the Court gave a ruling on its own jurisdiction. It held that memorandums fell within the remit of Title V of the Treaty on European Union, on the Union's common foreign and security policy. Yet the Treaties did not grant any jurisdiction to the Community courts in this sphere. The Court noted, however, that the Commission had carried out the offsetting procedure by means of an act adopted on the basis of a financial regulation and its implementing rules, and found therefore that the action brought against this act was admissible.

However, the action for annulment was dismissed on the ground that Greece was bound by the obligations set out in the initial memorandum of understanding, which it had signed and ratified, and by the additional memorandum, which it had signed. In so doing, the Court relied on the international legal principle of good faith and its corollary in Community law, the principle of the protection of legitimate expectations.

Supplementary information:

An appeal was lodged against the judgment: ECJ, 06.11.2008, *Greece v. Commission*, C-203/07 P, not yet published in the Official Journal. The judgment on the appeal upheld the Court's ruling but referred directly to the international principle of good faith without introducing the Community principle of legitimate expectations.

Cross-references:

- TPI, 22.01.1997, *Opel Austria GmbH v. Council of the European Union*, T-115/94, Rec. II-0039, *Bulletin* 1997/1 [ECJ-1997-1-001].

Languages:

Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovakian, Slovenian, Spanish, Swedish.

*Identification:* ECJ-2009-1-002

a) European Union / **b)** Court of Justice of the European Communities / **c)** First Chamber / **d)** 18.01.2007 / **e)** C-229/05 P / **f)** Osman Ocalan, on behalf of the Kurdistan Workers' Party (PKK) and Serif Vanly, on behalf of the Kurdistan National Congress (KNK) v. Council of the European Union / **g)** *European Court Reports* I-00439 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

2.3.4 Sources – Techniques of review – **Interpretation by analogy.**
5.3.13.2 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Effective remedy.**

Keywords of the alphabetical index:

Terrorism, fight / Protective measure / Judicial review.

Headnotes:

1. Fundamental rights form an integral part of the general principles of law the observance of which the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories. The European Convention on Human Rights has special significance in that respect. The case-law of the European Court of Human Rights, as it currently stands, appears to indicate that an organisation which does not appear on the list of persons, groups and entities subject to the restrictive measures laid down by Regulation no. 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating

terrorism would not be able to establish that it has the status of a victim within the meaning of Article 34 ECHR and therefore would not be able to bring an action before that court.

Consequently, where the Community judicature concludes that such an organisation is not individually concerned within the meaning of Article 230.4 EC, as interpreted by the case-law, and its action for annulment is therefore inadmissible, there is no conflict between the European Convention on Human Rights and Article 230.4 EC (see paragraphs 74, 76, 82-83).

2. The European Community is a community based on the rule of law in which its institutions are subject to judicial review of the compatibility of their acts with the Treaty and with the general principles of law which include fundamental rights. Individuals are therefore entitled to effective judicial protection of the rights they derive from the Community legal order, and the right to such protection is one of the general principles of law stemming from the constitutional traditions common to the Member States. That right has also been enshrined in Articles 6 and 13 ECHR.

In that respect, as regards Regulation no. 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, it is particularly important for that judicial protection to be effective because the restrictive measures laid down by Regulation no. 2580/2001 have serious consequences. Not only are all financial transactions and financial services thereby prevented in the case of a person, group or entity covered by the regulation, but also their reputation and political activity are damaged by the fact that they are classified as terrorists.

Under Article 2.3 of Regulation no. 2580/2001, read in conjunction with Article 1.4 to 1.6 of Common Position no. 2001/931, a person, group or entity can be included in the list of persons, groups and entities to which that regulation applies only if there is certain reliable information, and the persons, groups or entities covered must be precisely identified. In addition, it is made clear that the names of persons, groups or entities can be kept on the list only if the Council reviews their situation periodically. All these matters must be open to judicial review.

It follows that, where the Community legislature takes the view that an entity retains an existence sufficient for it to be subject to the restrictive measures laid down by Regulation no. 2580/2001, it must be accepted, on grounds of consistency and justice, that that entity continues to have an existence sufficient to contest those measures. The effect of any other

conclusion would be that an organisation could be included in the list of persons, groups and entities to which that regulation applies without being able to bring an action challenging its inclusion (see paragraphs 109-112).

3. The provisions of the Statute of the Court of Justice, in particular Article 21, the Rules of Procedure of the Court of Justice, in particular Article 38, and the Rules of Procedure of the Court of First Instance, in particular Article 44, were not devised with a view to the commencement of actions by organisations lacking legal personality. In that exceptional situation, the procedural rules governing the admissibility of an action for annulment must be applied by adapting them, to the extent necessary, to the circumstances of the case. It is a question of avoiding excessive formalism which would amount to the denial of any possibility of applying for annulment even though the entity in question has been the object of restrictive Community measures (see paragraph 114).

Summary:

The question of the admissibility of actions for annulment brought by natural or legal persons comes up frequently in EU case-law. The current case was a significant example of this even though the facts were admittedly very specific.

As part of the anti-terrorism measures following the attacks of 11 September 2001, the Council of the European Union adopted a series of measures, which included the inclusion of the Kurdistan Workers' Party (PKK) on a list of terrorist organisations, resulting in the freezing of its funds.

An action against that decision was brought before the Court of First Instance by Mr Osman Ocalan on behalf of the PKK and by Mr Serif Vanly on behalf of the Kurdistan National Congress (KNK), which is an association set up to promote Kurdish interests. By order of 15 February 2005, the Court of First Instance dismissed the action as inadmissible on the grounds that the KNK was not individually concerned within the meaning of Article 230.4 by the PKK's inclusion on the list of terrorist organisations, and that Mr Ocalan had failed to prove that he really represented the PKK, whose very existence was uncertain at the time of the facts.

Both applicants then lodged an appeal with the Court of Justice to have the order of the Court of First Instance set aside and their action declared admissible.

In support of its appeal, the KNK argued that the criteria for the admissibility of actions for annulment set by Article 230.4 were too restrictive and deprived the applicants of their right to an effective judicial remedy within the meaning of Article 13 ECHR. The Court rejected this argument, relying precisely on the case-law of the European Court of Human Rights with regard to Article 34 ECHR. It found that the KNK could not be considered a victim of a violation of the Convention within the meaning of the Article referred to and could not therefore reasonably lodge an application with the Strasbourg Court. The Court therefore considered that the dismissal of the KNK's action for inadmissibility under Article 230.4 was compatible with the case-law of the European Court of Human Rights.

The PKK argued that the Court of First Instance had been wrong to find, in the light of the evidence brought before it, that the organisation had ceased all activity in 2002 and therefore that Mr Ocalan could not validly represent it. The Court set aside the judgment of the Court of First Instance on this matter and held that the inclusion of the PKK on the list of terrorist organisations proved that this organisation retained a sufficient existence and that it could therefore dispute the impugned decision by means of an action for annulment. The Court also stated that in exceptional circumstances such as these, namely where a Council decision was disputed by an organisation without legal personality, the procedural rules on actions for annulment needed to be adjusted.

Cross-references:

- TPI, 03.05.2002, *Jégo-Quéré v. Commission*, T-177/01, *Rec.* 2002, p. II-2365;
- TPI, 12.07.2006, *Ayadi v. Council*, T-253/02, *Rec.* 2006, p. II-2139.

Languages:

Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovakian, Slovenian, Spanish, Swedish.



Identification: ECJ-2009-1-003

a) European Union / **b)** Court of Justice of the European Communities / **c)** Grand Chamber / **d)** 25.01.2007 / **e)** C-407/04 P / **f)** Dalmine SpA v. Commission of the European Communities / **g)** *European Court Reports* I-00829 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

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

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

5.3.13.23.1 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to remain silent – **Right not to incriminate oneself.**

Keywords of the alphabetical index:

Competition, procedure, rights of the defence / Competition, procedure, access to the file / Competition, procedure, means of proof.

Headnotes:

1. In the exercise of the powers conferred on it to ensure compliance with the Community competition rules, the Commission is entitled, if necessary by adopting a decision, to compel an undertaking to provide all necessary information concerning such facts as may be known to it but may not compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove.

However, since the questions it was required to answer did not imply acknowledgement of an infringement, an undertaking cannot effectively rely on its right not to be compelled by the Commission to admit having participated in an infringement (see paragraphs 34-35).

2. In competition law, respect for the rights of the defence requires that the undertaking concerned must have been afforded the opportunity, during the administrative procedure, to make known its views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim that there has been an infringement.

However, the interpretation that the rights of the defence were not respected owing to the very fact that the origin of the documents was unknown and that their reliability had not been demonstrated by the Commission could compromise the evaluation of evidence where it is necessary to establish the existence of an infringement of Community competition law.

In effect, the evaluation of evidence in Community competition law cases is characterised by the fact that the documents examined often contain business secrets or other information that cannot be disclosed, or the disclosure of which is subject to significant restrictions.

In those circumstances, the rights of the defence cannot be compromised in the sense that documents containing incriminating evidence must automatically be excluded as evidence when certain information must remain confidential. That confidentiality may also attach to the identity of the authors of the documents and also to the persons who transmitted them to the Commission (see paragraphs 44, 46-48).

3. In administrative proceedings in competition law, it is precisely the notification of the statement of objections, on the one hand, and access to the file enabling the addressee of the statement of objections to peruse the evidence in the Commission's file, on the other, that ensure the rights of the defence and the right to a fair legal process for the undertaking in question.

It is by the statement of objections that the undertaking concerned is informed of all the essential evidence on which the Commission relies at that stage of the procedure. Consequently, it is only after notification of the statement of objections that the undertaking is able to rely in full on the rights of the defence.

If the rights in question were extended to the period preceding the notification of the statement of objections, the effectiveness of the Commission's investigation would be prejudiced, since the undertaking would already be able, at the first stage of the Commission's investigation, to identify the information known to the Commission and therefore the information that could still be concealed from it.

Thus, since there is no indication that the fact that the Commission did not inform the undertaking in question during the investigation stage that it was in possession of minutes of certain examinations conducted in national investigations might have an impact on its subsequent possibilities of defending itself during the administrative procedure initiated by

the notification of the statement of objections, no infringement of the rights of the defence or the right to a fair legal process on the basis of Article 6.1 ECHR can be found (see paragraphs 54, 58-61).

4. The lawfulness of the transmission to the Commission by a national prosecutor or the authorities competent in competition matters of information obtained in application of national criminal law is a question governed by national law and the Community judicature has no jurisdiction to rule on the lawfulness, as a matter of national law, of a measure adopted by a national authority.

Since the principle which prevails in Community law is that of the unfettered evaluation of evidence and the only relevant criterion for the purpose of assessing the evidence adduced relates to its credibility, where the transmission of minutes to the Commission has not been declared unlawful by a national court, those documents cannot be considered to have been inadmissible evidence which ought to be removed from the file (see paragraphs 62-63).

Summary:

The case of the seamless steel tubes, which are materials used in the oil and gas industry, originated in a decision by the Commission on 8 December 1999 imposing fines on eight companies which produced these tubes and had organised a cartel that was incompatible with Article 81 of the EC Treaty. More specifically, they had negotiated an agreement in which they undertook to restrict themselves to domestic markets for the sale of certain types of steel tube. Seven of the eight companies, including Dalmine SpA, brought an action against this decision. In a judgment of 8 July 2004 (T-50/00, *Rec. II-2395*), the Court of First Instance upheld the substance of the Commission's decision but reduced the fines because of lack of evidence concerning the duration of the infringement. Dalmine then lodged an appeal with the Court in which it sought to have set aside the judgment of the Court of First Instance insofar as it concerned Dalmine. Several arguments were advanced concerning the administrative procedure and respect for the rights of the defence.

Dalmine's first ground of appeal was the right not to incriminate oneself. According to Dalmine, the Commission had put a number of questions to it in the course of the investigation which it had been impossible to answer without recognising that it had committed an offence. The Court found, however, that Dalmine had not been compelled to answer these questions, so it could not effectively rely on its right not to be forced to admit that it had participated in an infringement.

Dalmine's second plea was that some of the evidence used against it was inadmissible, particularly an incriminating document submitted by an unknown third party. The Court's response to this was that in Community competition law, a typical feature of the evaluation of evidence was that the documents examined contained business secrets or other confidential information. These documents could not therefore be automatically excluded as evidence.

Thirdly, Dalmine complained that the Court of First Instance had regarded the minutes of examinations of some of its former directors carried out during investigations in Italy as admissible evidence. More specifically, Dalmine argued that the Commission should have informed it, before notification of the statement of objections, that it was in possession of these minutes. The Court confirmed, in this connection, that the Commission had no obligation to inform Dalmine on this point. According to a consistent body of case-law, it was only after notification of the statement of objections that the company could rely on the rights of the defence. The Court also pointed out that the overriding principle in Community law was the unfettered evaluation of evidence, and that the only relevant criterion by which evidence could be assessed was its credibility. Consequently, the lawfulness of the transmission to the Commission by the national authorities of information obtained in accordance with national criminal law is a matter for national law, not one that falls within the jurisdiction of the Community courts. In this case, the national courts had not declared the transmission of the documents to the Commission unlawful, so the Community courts could not regard them as inadmissible evidence.

Since none of the arguments raised by Dalmine could be upheld, the Court dismissed its appeal.

Languages:

Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovakian, Slovenian, Spanish, Swedish.



Identification: ECJ-2009-1-004

a) European Union / **b)** Court of Justice of the European Communities / **c)** Grand Chamber / **d)** 27.02.2007 / **e)** C-354/04 P / **f)** Gestoras Pro Amnistía e.a. v. Council / **g)** Reports I-1579 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

2.3.4 Sources – Techniques of review – **Interpretation by analogy.**

4.17.1.2 Institutions – European Union – Institutional structure – **Council.**

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

Keywords of the alphabetical index:

European Union, police and judicial co-operation in criminal matters, effective judicial protection, right.

Headnotes:

1. It follows from Article 46 EU that the provisions of the EC and EAEC Treaties concerning the powers of the Court of Justice are applicable to Title VI of the EU Treaty only under the conditions provided for by Article 35 EU. In contrast, Article 35 EU confers no jurisdiction on the Court of Justice to entertain any action for damages whatsoever. In addition, Article 41.1 EU does not include, among the articles of the EC Treaty establishing the European Community applicable to the areas referred to in Title VI of the EU Treaty, Article 288.2 EC, according to which the Community must, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties, or Article 235 EC, under which the Court has jurisdiction in disputes relating to compensation for damage provided for in Article 288.2 EC.

It follows that no action for damages is provided for under Title VI of the EU Treaty. A Council declaration concerning the right to compensation, annexed to the minutes at the time of the adoption of an action of the European Union, is insufficient to create a legal remedy not provided for by the applicable texts and therefore could not suffice to confer jurisdiction on the Court in this respect (see paragraphs 44, 46-48, 60-61).

2. As regards the Union, the treaties have established a system of legal remedies in which, by virtue of Article 35 EU, the jurisdiction of the Court is less extensive under Title VI of the Treaty on European

Union than it is under the EC Treaty. While a system of legal remedies, in particular a body of rules governing non-contractual liability, other than that established by the treaties can indeed be envisaged, it is for the Member States, should the case arise, to reform the system currently in force in accordance with Article 48 EU.

Applicants wishing to challenge before the courts the lawfulness of a common position adopted on the basis of Article 34 EU, are not, however, deprived of all judicial protection. Article 35.1 EU, in that it does not enable national courts to refer a question to the Court for a preliminary ruling on a common position but only a question concerning the acts listed in that provision, treats as acts capable of being the subject of such a reference for a preliminary ruling all measures adopted by the Council and intended to produce legal effects in relation to third parties. Given that the procedure enabling the Court to give preliminary rulings is designed to guarantee observance of the law in the interpretation and application of the Treaty, it would run counter to that objective to interpret Article 35.1 EU narrowly. The right to make a reference to the Court for a preliminary ruling must therefore exist in respect of all measures adopted by the Council, whatever their nature or form, which are intended to have legal effects in relation to third parties. As a result, it has to be possible to make subject to review by the Court a common position which, because of its content, has a scope going beyond that assigned by the EU Treaty to that kind of act. So, a national court hearing a dispute which, in an incidental plea, raises the issue of the validity or interpretation of a common position adopted on the basis of Article 34 EU, and which raises serious doubt whether that common position is really intended to produce legal effects in relation to third parties, would be able, subject to the conditions fixed by Article 35 EU, to ask the Court to give a preliminary ruling. It would then fall to the Court to find, where appropriate, that the common position is intended to produce legal effects in relation to third parties, to accord it its true classification and to give a preliminary ruling.

The Court would also have jurisdiction to review the lawfulness of such acts when an action has been brought by a Member State or the Commission on the conditions fixed by Article 35.6 EU.

Finally, it is for the Member States and, in particular, their courts and tribunals, to interpret and apply national procedural rules governing the exercise of rights of action in a way that enables natural and legal persons to challenge before the courts the lawfulness of any decision or other national measure relating to the drafting or the application to them of an act of the European Union and to seek compensation for the loss suffered, where appropriate (see paragraphs 50-51, 53-56).

3. A Council declaration, annexed to the minutes at the time of adoption of an action of the European Union, cannot therefore be given any legal significance or be used in the interpretation of law emanating from the EU Treaty where no reference is made to the content of the declaration in the wording of the provision in question (see paragraph 60).

Summary:

This case was an opportunity for the Court to clarify its case-law with regard to the powers of the Community courts on matters belonging to the EU's third pillar, namely police and judicial co-operation in criminal matters (Title VI of the EU Treaty).

In this case, two Basque organisations and their spokespersons had been included, by means of Council Common Position 2001/963 of 27 December 2001 and its successive revisions, on the list of persons, groups or entities involved in acts of terrorism. After an unsuccessful application to the European Court of Human Rights, the applicants turned to the Court of First Instance with a view to obtaining reparation for the damage suffered as a result of their inclusion on this list. The Court of First Instance held that it clearly had no jurisdiction, in the legal system of the European Union, to hear such a case.

The applicants therefore lodged an appeal with the Court of Justice against the judgment of the Court of First Instance.

In support of their appeal, the appellants relied on their right to an effective remedy and a Council declaration on the right to compensation. According to the appellants, this declaration, which had been appended to the minutes when Common Position 2001/963 was adopted, established an additional remedy in relation to Title VI of the EU Treaty.

The Court pointed out that no action for damages was provided for under Title VI of the EU Treaty. The powers of the Court were listed exhaustively in this area and the only remedies provided for were the reference for a preliminary ruling, the action for annulment and the procedure for settling disputes between member states. The Court added that a Council declaration was insufficient to create a legal remedy not provided for by the applicable texts and that it could not therefore be given any legal significance where, as in this case, no reference was made to the content of the declaration in the wording of the provision in question.

The appellants were not, however, deprived of judicial protection, as common positions which produced legal effects in relation to third parties could be referred for a preliminary ruling. The Court dismissed

the appeal on the ground that since this legal remedy existed there had been no infringement of the right to an effective judicial remedy.

Cross-references:

- CJCE, 27.02.2007, *Segi e.a. v. Council of the European Union*, C-355/04 P, Rec. 2007, p. I-1579;
- CJCE, 19.03.1996, *Commission v. Council*, C-25/94, Rec. 1996, p. I-1469, *Bulletin* 1996/1 [ECJ-1996-1-003].

Languages:

Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovakian, Slovenian, Spanish, Swedish.



Identification: ECJ-2009-1-005

a) European Union / b) Court of Justice of the European Communities / c) Fifth Chamber / d) 08.03.2007 / e) C-45/06 / f) Campina GmbH & Co., formerly TUFFI Campina emzett GmbH v. Hauptzollamt Frankfurt (Oder) / g) *European Court Reports* I-2089 / h) CODICES (English, French).

Keywords of the systematic thesaurus:

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

5.3.16 Fundamental Rights – Civil and political rights – **Principle of the application of the more lenient law.**

Keywords of the alphabetical index:

Community law, principles / Law, national, application.

Headnotes:

The principle of retroactive application of the more lenient penalty must be respected by national courts when they have to penalise practices which do not comply with rules laid down by Community legislation (see paragraph 40, operative part).

Summary:

Community regulations on milk require all purchasers in the Community to communicate to the competent national authority a summary of the statements drawn up for each milk producer. To deal with cases of non-compliance with the time-limits for communicating this information, a system of penalties was set up by Commission Regulation (EEC) no. 536/93 of 9 March 1993, laying down detailed rules on the application of the additional levy on milk and milk products. The system was subsequently amended to apply less severe penalties.

Following a three-day delay in the communication of the statements of quantities of milk delivered by producers over the 1998-1999 financial year, the German authorities imposed a penalty on the undertaking Meierei-Zentrale GmbH ('MZ') on the basis of Article 3.2.2 of Regulation no. 536/93 as it stood at the time.

Campina, which was the universal successor to MZ, brought an action for annulment of that decision. In connection with that dispute, the German courts referred a question to the Court for a preliminary ruling on the proportionality of the system of penalties in cases where there had been only a slight overrun of the deadline for the communication of production statements. The Court looked at the question from another angle, shifting the focus of the debate to the principle of the application of the new, more lenient system of penalties to facts predating its entry into force.

The Court pointed out that the principle of the retroactive application of the more lenient penalty formed part of the constitutional traditions common to the member states and should therefore be regarded as one of the general principles of Community law.

Cross-references:

- CJCE, 03.05.2005, *Berlusconi e.a., others* C-387/02, C-391/02 and C-403/02, *Rec.*, p. I-3565, *Bulletin* 2008/2 [ECJ-2008-2-009].

Languages:

Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovakian, Slovenian, Spanish, Swedish.



European Court of Human Rights

Important decisions

Identification: ECH-2009-1-001

a) Council of Europe / b) European Court of Human Rights / c) Grand Chamber / d) 19.09.2008 / e) 9174/02 / f) *Korbely v. Hungary* / g) *Reports of Judgments and Decisions of the Court* / h) CODICES (English, French).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Crime against humanity, elements / Geneva Convention of 1949 / Law, quality, foreseeable consequences.

Headnotes:

In order for an act to entail a foreseeable conviction for crime against humanity in the meaning of Article 7 ECHR it is required that the crime in question should not be an isolated or sporadic act but should form part of "State action or policy" or of a widespread and systematic attack on the civilian population.

Summary:

I. The applicant was a retired military officer. In 1994 he was indicted for his participation in the quelling of a riot in Tata during the 1956 revolution. He was charged with having commanded, as captain, a 15-strong squad in an assignment to regain control of a police department building which had been taken over by insurgents, and with having shot, and ordered his men to shoot, at civilians. Several people died or were injured in the incident, which according to the findings of the domestic courts, was triggered when one of the insurgents removed a pistol from a coat pocket after being told to hand over the weapon. The trial court initially discontinued the criminal proceedings on the grounds that the offences with which the applicant was charged constituted homicide and incitement to homicide, rather than crimes

against humanity, so that their prosecution was statute-barred. Ultimately, however, the applicant was convicted under Article 3.1 of the Geneva Conventions of 1949 of a crime against humanity through multiple homicide and sentenced to five years' imprisonment.

In his application to the Court, the applicant claimed that he had been convicted for an action which did not constitute any crime at the time when it had been committed. He relied on Article 7 ECHR.

II. The Court had to determine whether, at the time of its commission, the applicant's act constituted an offence defined with sufficient accessibility and foreseeability by domestic or international law. The applicant was convicted of multiple homicide, which the Hungarian courts regarded as a crime against humanity punishable under the Geneva Conventions. The conviction was thus based exclusively on international law. Since the Geneva Conventions satisfied the accessibility test, the Court turned to the issue of foreseeability. In deciding that issue, it examined, firstly, whether the applicant's act was capable of amounting to a crime against humanity as that concept was understood in 1956 and, secondly, whether it could reasonably be said that the victim of the alleged offence was "taking no active part in the hostilities".

Whether the applicant's act was capable of amounting to a crime against humanity: Although murder within the meaning of common Article 3 could have provided a basis for a conviction for crimes against humanity committed in 1956, other elements also needed to be present. These derived not from common Article 3 but from the international law elements inherent in the notion of crime against humanity at the time. Certain of these appeared relevant, notably the requirement that the crime in question should not be an isolated or sporadic act but should form part of "State action or policy" or of a widespread and systematic attack on the civilian population. The domestic courts, however, had confined their examination to the question whether the insurgents came under the protection of common Article 3 and did not examine the further question whether the killing had met the additional criteria necessary to constitute a crime against humanity, in particular, whether it was to be seen as forming part of a widespread and systematic attack on the civilian population. Although the Supreme Court had found that the central authorities had effectively waged war on the civil population, it had not addressed the question whether the applicant's act was to be regarded as forming part of that State policy. It was thus open to question whether the constituent elements of a crime against humanity had been satisfied in the applicant's case.

Whether the victim could reasonably be said to have taken no active part in the hostilities: The applicant's conviction was based on the finding that one of the victims was a non-combatant for the purposes of common Article 3. That provision extended protection to persons taking no active part in hostilities, including members of armed forces who had laid down their arms. The deceased had clearly taken an active part in the hostilities as he was the leader of an armed group of insurgents who had engaged in acts of violence, taken control of the police building and seized the officers' weapons. The question was, therefore, whether he had laid down his arms. The domestic courts found as a fact that he had secretly been carrying a handgun and had not clearly and unequivocally signalled an intention to surrender. Instead, he had embarked on an animated quarrel with the applicant before drawing his gun with unknown intentions. It was precisely in the course of that act that he had been shot. In the light of the commonly accepted international law standards applicable at the time, the Court was not satisfied that the deceased could be said to have laid down his arms within the meaning of common Article 3 or that he fell within any of the other categories of non-combatant. Accordingly, it had not been shown that it was foreseeable that the applicant's acts constituted a crime against humanity under international law.

Cross-references:

- *S.W. v. the United Kingdom*, Judgment of 22.11.1995, Series A, no. 335-B;
- *C.R. v. the United Kingdom*, Judgment of 22.11.1995, Series A, no. 335-C;
- *Waite and Kennedy v. Germany* [GC], no. 26083/94, *Reports of Judgments and Decisions* 1999-I;
- *Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96, 35532/97 and 44801/98, *Reports of Judgments and Decisions* 2001-II;
- *Behrami and Behrami v. France and Saramati v. France, Germany and Norway (dec.)* [GC], nos. 71412/01 and 78166/01, 02.05.2007;
- *Jorgic v. Germany*, no. 74613/01, 12.07.2007.

Languages:

English, French.



Identification: ECH-2009-1-002

a) Council of Europe / b) European Court of Human Rights / c) Grand Chamber / d) 27.11.2008 / e) 36391/02 / f) *Salduz v. Turkey* / g) *Reports of Judgments and Decisions of the Court* / h) CODICES (English, French).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Police custody, lawyer, access, restriction / Confession, lawyer, absence, validity / Minor, lawyer, assistance / Lawyer, access, restriction, compelling reasons.

Headnotes:

As a rule, a detained suspect must have access to a lawyer from the first police interview, unless there are compelling reasons to restrict that right. Even when such compelling reasons exist, the restriction should not unduly prejudice the rights of the defence; in particular, which incriminating statements made during a police interview without access to a lawyer should not be used as a basis for a conviction.

Access to a lawyer is of fundamental importance where the person in custody is a minor.

Summary:

I. At the material time, Turkish law afforded suspected offenders a right of access to a lawyer from the moment they were taken into custody, unless they were accused of an offence falling within the jurisdiction of the State Security Courts. The applicant, a minor, was arrested on suspicion of aiding and abetting an illegal organisation, an offence triable by the State Security Courts. Without a lawyer being present, he gave a statement to the police admitting that he had taken part in an unlawful demonstration and written a slogan on a banner. Subsequently, on being brought before the prosecutor and the investigating judge, he sought to retract that statement, alleging it had been extracted under duress. The investigating judge remanded him in custody, at which

point he was allowed to see a lawyer. He continued to deny his statement at trial, but the State Security Court found that his confession to the police was authentic and convicted him as charged. He was given a thirty month prison sentence.

In his application to the Court, the applicant claimed, *inter alia*, that he had been denied access to a lawyer while in police custody. He invoked Article 6.3.c ECHR.

II. The Court considered that in order for the right to a fair trial under Article 6.3.c ECHR to remain sufficiently practical and effective, access to a lawyer had to be provided, as a rule, from the first police interview of a suspect, unless it could be demonstrated that in the particular circumstances there were compelling reasons to restrict that right. Even where such compelling reasons did exist, the restriction should not unduly prejudice the rights of the defence, which would be the case where incriminating statements made during a police interview without access to a lawyer were used as a basis for a conviction. In the instant case, the justification given for denying the applicant access to a lawyer – namely that such access was by law systematically denied for offences falling within the jurisdiction of the State Security Courts – fell short of the requirements of Article 6 ECHR. Moreover, the State Security Court had used the applicant's statement to the police as the main evidence on which to convict him, despite the fact that he denied its accuracy. Neither the assistance subsequently provided by a lawyer nor the adversarial nature of the ensuing proceedings could cure the defects which had occurred during police custody. The applicant's age was also a material factor. As the significant number of relevant international law materials on the subject showed, access to a lawyer was of fundamental importance where the person in police custody was a minor. In sum, even though the applicant had had the opportunity to challenge the evidence against him at his trial and subsequently on appeal, the absence of a lawyer during his period in police custody had irretrievably affected his defence rights. There had therefore been a violation of Article 6.3.c ECHR.

Cross-references:

- *Colozza v. Italy*, 12.02.1985, Series A, no. 89;
- *Can v. Austria*, no. 9300/81, Commission report of 12.07.1984, Series A, no. 96;
- *Imbrioscia v. Switzerland*, 24.11.1993, Series A, no. 275;
- *Poitrimol v. France*, 23.11.1993, Series A, no. 277-A;

- *John Murray v. the United Kingdom*, 08.02.1996, *Reports of Judgments and Decisions* 1996-I;
- *Magee v. the United Kingdom*, no. 28135/95, *Reports of Judgments and Decisions* 2000-VI;
- *Kwiatkowska v. Italy* (dec.), no. 52868/99, 30.11.2000;
- *Brennan v. the United Kingdom*, no. 39846/98, *Reports of Judgments and Decisions* 2001-X;
- *Kolu v. Turkey*, no. 35811/97, 02.08.2005;
- *Sejdovic v. Italy* [GC], no. 56581/00, *Reports of Judgments and Decisions* 2006-II;
- *Jalloh v. Germany* [GC], no. 54810/00, *Reports of Judgments and Decisions* 2006-IX;
- *Demebukov v. Bulgaria*, no. 68020/01, 28.02.2008.

Languages:

English, French.



Identification: ECH-2009-1-003

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 04.12.2008 / **e)** 30562/04 and 30566/04 / **f)** *S. and Marper v. the United Kingdom* / **g)** *Reports of Judgments and Decisions of the Court* / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
 3.19 General Principles – **Margin of appreciation**.
 5.1.1.4.1 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Minors**.
 5.3.32.1 Fundamental Rights – Civil and political rights – Right to private life – **Protection of personal data**.

Keywords of the alphabetical index:

Fingerprints, retention, after acquittal / DNA, analysis, retention after acquittal / Data, personal, retention, blanket and indiscriminate nature.

Headnotes:

The retention of cellular samples, DNA profiles and fingerprints amounts to an interference with the right to respect for private life. While the retention of such information pursues the legitimate aim of prevention of crime, a blanket and indiscriminate power of retention, without regard to the nature or gravity of the offence or of the age of the suspect, unlimited in time, with only limited possibilities to have the data removed and without provision for independent review constitutes a disproportionate interference when the person concerned has been acquitted or the proceedings against him have been discontinued.

Summary:

I. Under Section 64 of the Police and Criminal Evidence Act 1984, fingerprints and DNA samples taken from a person suspected of a criminal offence may be retained without limit of time, even if the subsequent criminal proceedings end in that person's acquittal or discharge. The applicants had been charged with criminal offences but not convicted. The first applicant, an eleven year old minor, had been acquitted of attempted robbery while in a separate case proceedings against the second applicant for the alleged harassment of his partner had been formally discontinued after the couple reconciled. In view of the fact that they had not been convicted, the applicants asked for their fingerprints and cellular samples to be destroyed, but in both cases the police refused. Their applications for judicial review of that refusal were rejected in a decision that was upheld on appeal.

In their applications to the Court, the applicants claimed, that the authorities had retained their fingerprints and cellular samples and DNA profiles after the criminal proceedings against them had ended with acquittal or had been discontinued. They invoked Article 8 ECHR.

II. The Court held that given the nature and the amount of personal information contained in cellular samples, including a unique genetic code of great relevance to both the individual concerned and his or her relatives, and the capacity of DNA profiles to provide a means of identifying genetic relationships between individuals or of drawing inferences about their ethnic origin, the retention of both cellular samples and DNA profiles in itself amounted to an interference with the applicants' right to respect for their private lives. While the retention of fingerprints had less of an impact on private life than the retention of cellular samples and DNA profiles, the unique information fingerprints contained about the individual concerned and their retention without his or her

consent could not be regarded as neutral or insignificant and also constituted an interference with the right to respect for private life.

It was accepted that the retention of the information pursued the legitimate purpose of the prevention of crime by assisting in the identification of future offenders. As to the scope of the Court's examination, the question was not whether the retention of fingerprints, cellular samples and DNA profiles could in general be regarded as justified under the Convention but whether their retention in the cases of the applicants, as persons who had been suspected, but not convicted, of certain criminal offences, was so justified. The core principles of the relevant instruments of the Council of Europe and the law and practice of the other Contracting States required retention of data to be proportionate in relation to the purpose of collection and limited in time, particularly in the police sector. The protection afforded by Article 8 ECHR would be unacceptably weakened if the use of modern scientific techniques in the criminal justice system were allowed at any cost and without carefully balancing their potential benefits against important private life interests. Any State claiming a pioneer role in the development of new technologies bore special responsibility for striking the right balance. In that respect, the blanket and indiscriminate nature of the power of retention in England and Wales was particularly striking, since it allowed data to be retained irrespective of the nature or gravity of the offence or of the age of the suspect. Likewise, retention was not limited in time and there existed only limited possibilities for an acquitted individual to have the data removed from the nationwide database or to have the materials destroyed. Nor was there any provision for independent review of the justification for the retention according to defined criteria. The risk of stigmatisation was of particular concern, with persons who had not been convicted of any offence and were entitled to the presumption of innocence finding themselves treated in the same way as convicted persons. Retention could be especially harmful in the case of minors such as the first applicant, given their special situation and the importance of their development and integration in society. In conclusion, the blanket and indiscriminate nature of the powers of retention, as applied in the applicants' case, had failed to strike a fair balance between the competing public and private interests, and the respondent State had overstepped any acceptable margin of appreciation in that regard. Accordingly, the retention constituted a disproportionate interference with the applicants' right to respect for private life and could not be regarded as necessary in a democratic society. There had therefore been a violation of Article 8 ECHR.

Cross-references:

- *McVeigh, O'Neill and Evans*, nos. 8022/77, 8025/77 and 8027/77, Report of the Commission of 18.03.1981, *Decisions and Reports* 25;
- *Malone v. the United Kingdom*, 02.08.1984, Series A, no. 82;
- *Leander v. Sweden*, 26.03.1987, Series A, no. 116;
- *Kruslin v. France*, 24.04.1990, Series A, no. 176-A;
- *Burghartz v. Switzerland*, 22.02.1994, Series A, no. 280-B, Opinion of the Commission;
- *Friedl v. Austria*, Judgment of 31.01.1995, Series A, no. 305-B, Opinion of the Commission;
- *Kinnunen v. Finland*, no. 24950/94, Commission decision of 15.05.1996;
- *Z. v. Finland*, 25.02.1997, *Reports of Judgments and Decisions* 1997-I;
- *T. v. the United Kingdom* [GC], no. 24724/94, 16.12.1999;
- *Amann v. Switzerland* [GC], no. 27798/95, *Reports of Judgments and Decisions* 2000-II;
- *Asan Rushiti v. Austria*, no. 28389/95, 21.03.2000;
- *Rotaru v. Romania* [GC], no. 28341/95, *Reports of Judgments and Decisions* 2000-V;
- *Hasan and Chaush v. Bulgaria* [GC], no. 30985/96, *Reports of Judgments and Decisions* 2000-XI;
- *Coster v. the United Kingdom* [GC], no. 24876/94, 18.01.2001;
- *Bensaid v. the United Kingdom*, no. 44599/98, *Reports of Judgments and Decisions* 2001-I;
- *P.G. and J.H. v. the United Kingdom*, no. 44787/98, *Reports of Judgments and Decisions* 2001-IX;
- *Mikulić v. Croatia*, no. 53176/99, *Reports of Judgments and Decisions* 2002-I;
- *Pretty v. the United Kingdom*, no. 2346/02, *Reports of Judgments and Decisions* 2002-III;
- *Peck v. the United Kingdom*, no. 44647/98, *Reports of Judgments and Decisions* 2003-I;
- *Y.F. v. Turkey*, no. 24209/94, *Reports of Judgments and Decisions* 2003-IX;
- *Connors v. the United Kingdom*, no. 66746/01, 27.05.2004;
- *Ünal Tekeli v. Turkey*, no. 29865/96, *Reports of Judgments and Decisions* 2004-X;
- *Sciacca v. Italy*, no. 50774/99, *Reports of Judgments and Decisions* 2005-I;
- *Weber and Saravia v. Germany* (dec.), no. 54934/00, *Reports of Judgments and Decisions* 2006-XI;
- *Van der Velden v. the Netherlands* (dec.), no. 29514/05, *Reports of Judgments and Decisions* 2006-XV;

- *Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria*, no. 62540/00, 28.06.2007;
- *Evans v. the United Kingdom* [GC], no. 6339/05, *Reports of Judgments and Decisions* 2007-IV;
- *Dickson v. the United Kingdom* [GC], no. 44362/04, *Reports of Judgments and Decisions* 2007-XIII;
- *Liberty and Others v. the United Kingdom*, no. 58243/00, 01.07.2008.

Languages:

English, French.



Systematic thesaurus (V20) *

* Page numbers of the systematic thesaurus refer to the page showing the identification of the decision rather than the keyword itself.

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1.1 Constitutional jurisdiction²

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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.

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¹¹ (Deputy) Registrars, Secretaries General, legal advisers, assistants, researchers, etc.

¹² Including questions on the interim exercise of the functions of the Head of State.

¹³ Referrals of preliminary questions in particular.

¹⁴ Enactment required by law to be reviewed by the Court.

¹⁵ Review *ultra petita*.

¹⁶ Horizontal distribution of powers.

¹⁷ Vertical distribution of powers, particularly in respect of states of a federal or regionalised nature.

¹⁸ Decentralised authorities (municipalities, provinces, etc.).

¹⁹ For questions other than jurisdiction, see 4.9.

²⁰ Including other consultations. For questions other than jurisdiction, see 4.9.

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²¹ Examination of procedural and formal aspects of laws and regulations, particularly in respect of the composition of parliaments, the validity of votes, the competence of law-making authorities, etc. (questions relating to the distribution of powers as between the State and federal or regional entities are the subject of another keyword 1.3.4.3).

²² As understood in private international law.

²³ Including constitutional laws.

²⁴ For example, organic laws.

²⁵ Local authorities, municipalities, provinces, departments, etc.

²⁶ Or: functional decentralisation (public bodies exercising delegated powers).

²⁷ Political questions.

²⁸ Unconstitutionality by omission.

²⁹ Including language issues relating to procedure, deliberations, decisions, etc.

³⁰ For the withdrawal of proceedings, see also 1.4.10.4.

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³¹ Pleadings, final submissions, notes, etc.

³² May be used in combination with Chapter 1.2. Types of claim.

³³ For the withdrawal of the originating document, see also 1.4.5.

³⁴ Comprises court fees, postage costs, advance of expenses and lawyers' fees.

-
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³⁶ Only for issues concerning applicability and not simple application.

³⁷ This keyword allows for the inclusion of enactments and principles arising from a separate constitutional chapter elaborated with reference to the original Constitution (declarations of rights, basic charters, etc.).

³⁸ Including its Protocols.

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³⁹ Presumption of constitutionality, double construction rule.

⁴⁰ Including the principle of a multi-party system.

⁴¹ Includes the principle of social justice.

⁴² See also 4.8.

⁴³ Separation of Church and State, State subsidisation and recognition of churches, secular nature, etc.

⁴⁴ Including maintaining confidence and legitimate expectations.

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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 (for example, between state authorities, municipalities, etc.).

⁴⁹ Including questions of treason/high crimes.

⁵⁰ Including prohibition on monopolies.

⁵¹ For the principle of primacy of Community law, see 2.2.1.6.

⁵² Including the body responsible for revising or amending the Constitution.

-
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⁵³ For example, presidential messages, requests for further debating of a law, right of legislative veto, dissolution.

⁵⁴ For example, nomination of members of the government, chairing of Cabinet sessions, countersigning.

⁵⁵ For example, the granting of pardons.

⁵⁶ For regional and local authorities, see chapter 4.8.

⁵⁷ Bicameral, monocameral, special competence of each assembly, etc.

⁵⁸ Including specialised powers of each legislative body and reserved powers of the legislature.

⁵⁹ In particular, commissions of enquiry.

⁶⁰ For delegation of powers to an executive body, see keyword 4.6.3.2.

⁶¹ Obligation on the legislative body to use the full scope of its powers.

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⁶² Representative/imperative mandates.

⁶³ Presidency, bureau, sections, committees, etc.

⁶⁴ Including the convening, duration, publicity and agenda of sessions.

⁶⁵ Including their creation, composition and terms of reference.

⁶⁶ State budgetary contribution, other sources, etc.

⁶⁷ For the publication of laws, see 3.15.

⁶⁸ For example, incompatibilities arising during the term of office, parliamentary immunity, exemption from prosecution and others. For questions of eligibility, see 4.9.5.

⁶⁹ For local authorities, see 4.8.

⁷⁰ Derived directly from the constitution.

⁷¹ See also 4.8.

⁷² The vesting of administrative competence in public law bodies having their own independent organisational structure, independent of public authorities, but controlled by them. For other administrative bodies, see also 4.6.7 and 4.13.

⁷³ Civil servants, administrators, etc.

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⁷⁴ Practice aiming at removing from civil service persons formerly involved with a totalitarian regime.

⁷⁵ Other than the body delivering the decision summarised here.

⁷⁶ Positive and negative conflicts.

⁷⁷ Notwithstanding the question to which to branch of state power the prosecutor belongs.

⁷⁸ For example, Judicial Service Commission, *Haut Conseil de la Justice*, etc.

⁷⁹ Comprises the Court of Auditors in so far as it exercises judicial power.

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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.

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Proportional, majority, preferential, single-member constituencies, etc.

87

For example, *Panachage*, voting for whole list or part of list, blank votes.

88

For aspects related to fundamental rights, see 5.3.41.2.

89

For the creation of political parties, see 4.5.10.1.

90

For example, names of parties, order of presentation, logo, emblem or question in a referendum.

91

Tracts, letters, press, radio and television, posters, nominations, etc.

92

Impartiality of electoral authorities, incidents, disturbances.

93

For example, signatures on electoral rolls, stamps, crossing out of names on list.

94

For example, in person, proxy vote, postal vote, electronic vote.

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.

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⁹⁸ Parliamentary Commissioner, Public Defender, Human Rights Commission, etc.

⁹⁹ For example, Court of Auditors.

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.

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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.

¹⁰⁸ Taxes and other duties towards the state.

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.

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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.

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.

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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.

¹²³ Aspects of the use of names are included either here or under "Right to private life".

¹²⁴ Including compensation issues.

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This keyword also covers "Freedom of work".

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Includes rights of the individual with respect to trade unions, rights of trade unions and the right to conclude collective labour agreements.

Keywords of the alphabetical index *

* The précis presented in this Bulletin are indexed primarily according to the Systematic Thesaurus of constitutional law, which has been compiled by the Venice Commission and the liaison officers. Indexing according to the keywords in the alphabetical index is supplementary only and generally covers factual issues rather than the constitutional questions at stake.

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