

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 2010 – 30 April 2010 for the following country:

Bosnia and Herzegovina.

Précis of important decisions of the reference period 1 January 2010 – 30 April 2010 will be published in the next edition, *Bulletin* 2010/2, for the following countries:

Denmark, Latvia, Morocco, Switzerland, United States of America.

Algeria

Constitutional Council

Important decisions

Identification: ALG-2010-1-001

a) Algeria / **b)** Constitutional Council / **c)** / **d)** 13.06.1998 / **e)** 04/A.L/CC/98 / **f)** Allowances and pension system for members of parliament / **g)** *Journal officiel de la République algérienne démocratique et populaire*, 07.08.1998 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
 3.20 General Principles – **Reasonableness**.
 4.5.2 Institutions – Legislative bodies – **Powers**.
 4.5.7 Institutions – Legislative bodies – **Relations with the executive bodies**.
 4.5.11 Institutions – Legislative bodies – **Status of members of legislative bodies**.
 4.6.2 Institutions – Executive bodies – **Powers**.
 5.2.1 Fundamental Rights – Equality – **Scope of application**.

Keywords of the alphabetical index:

Parliament, member, principal monthly allowance, calculation / Parliament, member, representation allowance / Parliament, member, mandate / Parliament, member, secretariat / Parliament, member, attendance allowance / Parliament, member, interest-free loan / Parliament, member, pension scheme.

Headnotes:

The legislator infringed the principle of equality by prescribing a method of calculation for the net principal monthly allowance paid to a member of parliament conflicting with the method prescribed by the provisions of current laws and regulations on salaries and wages.

Summary:

Request by the President of the Republic for a ruling on the constitutionality of certain provisions of the

Law establishing the system of allowances and pensions for Members of Parliament.

As to the provision establishing a principal monthly allowance payable to Members of Parliament, calculated according to indexing point 3680 as a net amount after all statutory deductions, the Constitutional Council held that, owing to this method of calculation, should there be an increase in the rates of taxation on wages and/or of social security contributions, the net principal monthly allowance of a Member of Parliament would be unaffected by the increase and would remain constant. However, if the value of the indexing point increased it would also increase, unlike the wages and salaries of state civil servants to which it was aligned.

As to the establishment of two allowances, one awarded to Members of Parliament representing the Algerian expatriate community, equal to the salary of a head of diplomatic mission, the Constitutional Council held that although the principle of equality raised no objection to this, since it was appropriate to take account of the specific circumstances of certain parliamentarians whose situations differed, establishing these two principal allowances each calculated on a different basis created disproportion between the situations of parliamentarians as they were founded on non-objective, non-rational criteria.

As to the supplementary monthly allowance for representation, discharge of mandate and secretarial services, intended to cover the expenses incurred in the performance of the member's electoral obligations, the Constitutional Council held that by linking this allowance with the performance of parliamentary electoral obligations, the legislator had prescribed unequal treatment between elected and appointed Members of Parliament.

As to the provision establishing an attendance allowance for Members of Parliament present at the plenary sittings of Parliament and at committee proceedings, the Constitutional Council held that as well as being in contradiction with the performance of Parliament's constitutional functions, it was not founded on objective, rational criteria.

As to the provisions the application of which was delegated by way of instructions to the bureaus of the two houses of Parliament, the Constitutional Council held that enforcement of the laws came within the regulatory purview of the head of Government.

As to the provision enabling Members of Parliament to receive an interest-free loan refundable over a period of ten years to purchase a private car, the Council held that the legislator had provided for a matter not within the ambit of the law.

Lastly, the Constitutional Council held that the provisions on the pension scheme for Members of Parliament included in the Law which was the object of the referral had no constitutional foundation, considering the stipulation of the Constitution that only the allowances of Members of Parliament shall be determined by law.

Languages:

Arabic.



Andorra Constitutional Court

Important decisions

Identification: AND-2010-1-001

a) Andorra / **b)** Constitutional Court / **c)** / **d)** 01.02.2010 / **e)** 2009-18-RE / **f)** / **g)** BOPA (Official Gazette), 8/2010 / **h)** CODICES (Catalan).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
 5.3.13 Fundamental Rights – Civil and political rights – **Procedural safeguards, rights of the defence and fair trial**.
 5.3.13.18 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Reasoning**.
 5.3.33 Fundamental Rights – Civil and political rights – **Right to family life**.
 5.4.3 Fundamental Rights – Economic, social and cultural rights – **Right to work**.

Keywords of the alphabetical index:

Extradition / Criminal procedure.

Headnotes:

With respect to the right to fair proceedings, the role of the Constitutional Court is not to take the place of the trial court in making an objective assessment of the evidence, including, where appropriate, expert evidence, but to verify that the manner in which evidence submitted by the parties was dismissed does not constitute an infringement of the right to a fair trial.

Summary:

The applicant, a French national, had been sentenced to one year's imprisonment for various offences. The Minister of Justice and the Interior ordered his expulsion for two years on the ground that his presence in the Principality posed a serious risk to public safety and order. After exhausting the ordinary remedies, the applicant lodged an *empara* appeal with the Constitutional Court. He alleged a

violation of the right to a fair trial, his right to lead a normal family life and his right to work.

After dismissing, on procedural grounds, the arguments based on an alleged infringement of the right to family life and the right to work, the Constitutional Court said that the trial court had held, in accordance with established case-law, that the lawfulness of an expulsion decision must be assessed on the date on which the decision is taken. In such cases, the trial court is required to verify, on the one hand, that the legal conditions for expulsion are fulfilled and, on the other, that the substance of the decision, for example, the length of expulsion, is proportional to the facts of the case and the situation of the individual concerned. Account must then be taken of all the circumstances which might influence the length of expulsion, in particular the conduct of the person concerned or his family ties. The Court must give a detailed reply to any applications to produce evidence, including expert evidence, as this may have an influence on the assessment of proportionality.

It is not possible to tell clearly from the wording of paragraph 4 of the High Court's judgment whether it rejected the application to produce evidence because of the lack of any chronological link with the expulsion decision or, as the wording implies ("no effect on the substance of the decision"), because of a prior assumption which would preclude the actual assessment of proportionality.

The applicant is therefore justified in seeking the benefit of constitutional protection and the referral of the case back to the High Court of Justice.

Languages:

Catalan.



Armenia Constitutional Court

Statistical data

1 January 2010 – 30 April 2010

- 79 applications have been filed, including:
 - 9 applications, filed by the President
 - 2 applications, filed by ordinary courts
 - 2 applications, filed by the Defender of Human Rights
 - 41 applications, filed by individuals
 - 1 application, filed by a candidate for the office of Deputy of the National Assembly
- 32 cases have been admitted for review, including:
 - 3 applications, concerning the compliance of obligations stipulated in international treaties with the Constitution (including applications filed before the relevant period)
 - 2 applications, filed by ordinary courts
 - 2 applications, filed by the Defender of Human Rights
 - 14 individual complaints, concerning the constitutionality of certain provisions of laws
 - 1 application, filed by a candidate for the office of Deputy of the National Assembly
- 32 cases heard and 31 decisions delivered (including decisions on applications filed before the relevant period), including:
 - 8 decisions on individual complaints (including decisions on applications filed before the relevant period)
 - 1 decision on 2 applications, filed by ordinary courts
 - 1 decision on application, filed by the Defender of Human Rights (the application has been filed before the relevant period)
 - 21 decisions concerning the compliance of obligations stipulated in international treaties with the Constitution (including decisions on applications filed before the relevant period)

- 1 decision on the application, filed by a candidate for the office of Deputy of the National Assembly

Important decisions

Identification: ARM-2010-1-001

a) Armenia / **b)** Constitutional Court / **c)** / **d)** 12.09.2009 / **e)** DCC-827 / **f)** On the conformity with the Constitution of Article 285.2.2 of the Code of Criminal Procedure / **g)** *Tegekagir* (Official Gazette) / **h)**.

Keywords of the systematic thesaurus:

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

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

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

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

Keywords of the alphabetical index:

Arrest and detention, safeguard.

Headnotes:

The realisation of the right to be brought before a tribunal and for one's case to be heard is directly and inextricably linked with actually keeping somebody in custody i.e. isolating them physically from society. The obligation of the state to guarantee the implementation of this right arises at the point where somebody is deprived of their liberty and physically isolated from society. The safeguards built into Article 16 of the Constitution, as well as Article 5 ECHR, only begin to operate when the state actually deprives someone of their liberty. A person subject to search procedures is not deprived of his or her liberty, and does not therefore benefit from the safeguards mentioned above, or the right to be heard in court when the possibility of detention as a restriction comes up in a case in his or her absence.

Summary:

The Constitutional Court was asked by an individual to assess the constitutionality of Article 285 of the Criminal Procedure Code. The applicant suggested that because this Article prescribes the possibility of detention for someone subject to a search procedure, it is in breach of Article 16 of the Constitution, which states that only arrested persons may be detained.

The Constitutional Court reviewed the constitutional legal contents of Article 16 of the Constitution and, having considered the subject and aim of the legal regulation of Article 16.3, found that it does not define the order of implementation of the institutes of arrest and detention. Neither do they make clear the succession of the requisite decisions on arrest and detention made by the competent bodies. Arrest is not considered as a binding prerequisite for detention; and so the fact that an arrest has not taken place does not rule out the possibility of detention. The Constitutional Court also emphasised that when those drafting the Constitution set out in Article 16.1 the cases where someone would be deprived of their liberty, the legislator was left with the discretion to choose the forms of deprivation of liberty and the goals and grounds of the measure. No stipulation was made as to the kind of procedural measures that can be undertaken in each concrete case or in order to achieve a concrete goal. The Code of Criminal Procedure, in line with Article 16.1, has determined arrest and detention as procedural measures for achieving separate legitimate goals, and at the same time defines the function, aim, and grounds of each. The Constitutional Court stated that the possibility of the binding succession of the implementation of the institutions of arrest and detention is also excluded in the context of the essence, goals, and grounds of implementation of these institutions.

The Constitutional Court also highlighted the issue of safeguarding the right to be heard before a court prescribed by Article 5.3 ECHR when a decision is taken to detain someone who is being searched. Because the realisation of the right to be brought before a tribunal and to be heard is directly and inextricably linked with actually keeping someone in custody (isolating them physically from society), the Constitutional Court found that the state's duty to guarantee the implementation of this right arises from the point where the person is actually deprived of his or her liberty and cordoned off from society. In other words, all guarantees prescribed by Article 16 of the Constitution, as well as Article 5 ECHR, only start functioning at the point where someone is actually deprived of liberty by the state. A person subject to search procedures is not actually deprived of his or her liberty and so does not enjoy these safeguards, or

the right to be heard by a court when the issue of detention as a restrictive measure arises during his or her absence. Therefore, if a decision is taken to choose detention as a measure of restriction during someone's absence, this does not result in a violation of rights guaranteed by Article 16 of the Constitution and Article 5 ECHR.

Languages:

Armenian.



Austria

Constitutional Court

Important decisions

Identification: AUT-2010-1-001

a) Austria / b) Constitutional Court / c) / d) 16.12.2009 / e) B 516/09 / f) / g) / h) www.icl-journal.com; CODICES (German).

Keywords of the systematic thesaurus:

3.7 General Principles – **Relations between the State and bodies of a religious or ideological nature.**

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

5.2.1.2.2 Fundamental Rights – Equality – Scope of application – Employment – **In public law.**

5.3.20 Fundamental Rights – Civil and political rights – **Freedom of worship.**

Keywords of the alphabetical index:

Religion, state / Religion, religious community.

Headnotes:

The case concerned the legal requirement that at least 2% of the Austrian population be members of a certain religious community, if that community was to be fully legally recognised as a church and in order to secure its continued existence, ability to perform its duties and financial independence.

Summary:

The Federal Minister for Education, Arts and Culture dismissed a request by the Church of Seventh-day Adventists for full legal recognition as a religious community, under Section 11.1 of the Religious Communities Act (hereinafter, the "BekGG"). The Church of Seventh-day Adventists had existed in Austria for twenty years and had achieved the status of a registered religious community under Austrian law in 1998. Full legal recognition, however, was refused as the legal requirements for successful application as set out in Section 11.1 BekGG were not met: under Section 11.1, at least 2% of the Austrian population (equating to approximately

20 000 persons) must belong to the religious association in question. The most recent census showed that the Church of Seventh-day Adventists had only 5.770 members in Austria.

The Church of Seventh-day Adventists lodged a complaint against this decision with the Constitutional Court, alleging a violation of its constitutionally guaranteed right to equal treatment. In particular, the applicant argued that several fully legally recognised churches in Austria, such as the Methodist Church, had under 20.000 members. The decision would result in unequal treatment of the applicant. The applicant also suggested that the limit of 2 % under Section 11.1 BekGG had been defined arbitrarily. This criterion should be substituted by the fact that the applicant already existed for twenty years in Austria.

The Minister stated that there was an objective differentiation with regard to the legal status of the Methodist Church. For instance, in the field of religious education, a central element of legal recognition, the Church of Methodists had signed an agreement with the Evangelical Church giving Methodist children the opportunity to participate in evangelical religious classes. The argument that the Methodist Church had less than 20 000 members was irrelevant, as the BekGG was enacted in 1998, forty-seven years after the legal recognition of the Methodist Church. Consequently, there was a difference as regards the legal situation before and after the enactment of the BekGG. The Minister also referred to Constitutional Court case-law, which demonstrated that the mere existence of a hardship case did not violate the constitutionally guaranteed right to equal treatment (cf. *VfGH VfSlg* 3568/1959, 9908/1983, 10.276/1984, 10.455/1985, 11.616/1988).

The Minister also argued against the contention that the 2% limit was defined arbitrarily, on the basis that the right to religious freedom as a collective right was supplemented by the basic principle of co-operation between the State and churches in Austria. The grant of legal personality was partly associated with benefits accorded by the State for certain activities. This originates from the idea that it is more cost effective for the State to support churches in the provision of private schools or care for the elderly and sick than to offer these facilities itself. In terms of the public budget, this cost-benefit analysis is one of the reasons for the public interest in the long-term existence of a religious community legally validated on the basis of the number of its members. With regard to the number of members required to achieve full legal recognition, the Minister referred to data provided by the Court of Audit, according to which it

would scarcely be worthwhile for the Seventh-day Adventists to organise religious education unless each age group contained at least two hundred and fifty children. Assuming a life expectancy of around eighty years, the total sum would be around twenty thousand persons. Lastly, the Minister argued that the definition of an easily managed limit and a simple investigative procedure was in the interest of the applicant as well as that of an economically effective, purposeful and economically prudent administration.

The Church of Seventh-day Adventists also relied on *Religionsgemeinschaft der Zeugen Jehovas and others v. Austria* (ECHR, 31.07.2008, Appl. 40.825/98). The European Court of Human Rights pointed out in this case that the legal status of a registered church or religious community must be generally accessible in a fair process based on objective facts.

The Constitutional Court held that the requirement for at least two per cent of the Austrian population to be members of a particular church in order for it to achieve full legal recognition was constitutionally compliant, giving the following reasons for its ruling:

1. By full legal recognition as a church or a religious community, a religious association achieves the status of a corporation under public law. The community then acquires certain rights as well as an obligation to participate in public and social life. Recognised churches and religious communities, for example, are entitled and obliged to organise and supervise religious education in public schools. They decide on the content of the teaching with regard to compulsory school subjects and also have the power to select their own religious education teachers.

2. Records of the parliamentary deliberations on the relevant government bill show that the requirement under Section 1.1 BekGG that at least two per cent of the Austrian population must belong to a church or religious community in order for it to achieve full legal recognition (the two percent rule) came about because the number of members was not only significant for the existence of a religious community, but also in terms of its performance of its duties as a legally recognised church or religious community. In view of the legal consequences of achieving the status of a corporation under public law, the Constitutional Court accepted the possibility of linking legal recognition with a prognosis on the community's medium term existence. This would enable communities to carry out their duties without public support. These aspects are closely connected with the need for adequate financial resources in order to provide church service, pastoral care and a regular religious education as laid down in Sections 5 and 6.6 of the Recognition Act (*AnerkennungsG*).

3. The Constitutional Court discussed perceptions of this problem in Germany, where comparable legislation regulates the relationship between church and state. According to Article 140 of the German Basic Law in conjunction with Article 137 of the Weimar Constitution, recognition under public law also requires that the religious community demonstrates its constancy by means of the number of its members. The quantity of members enables a prognosis to be made of its future existence (cf. *BVerfGE* 102, 370).

The Constitutional Court found that the two per cent rule was justified in view of the factual aim of easy handling of the legal provision and a relatively stable demographic development. It therefore held the requirement of a minimum quantity of members as a precondition for full legal recognition as a religious community was objective, and that Section 11.1 BekGG did not violate the right to equal treatment as guaranteed under Article 7 of the Federal Constitution (B-VG).

4. In general terms, the Constitutional Court conceded a margin of appreciation to the legislator when deciding on a minimum quantity of members for full legal recognition (as regards the margin of appreciation of states in view of public recognition of religious communities compare *Religionsgemeinschaft der Zeugen Jehovas and others v. Austria* (ECHR, 31.07.2008, Appl. 40.825/98); *Koppi* (ECHR, 10.12.2009, Appl. 33.001/03, Z33). However, this margin of appreciation is not unlimited and the definition of the number of members to be achieved by the religious community must be seen in the light of the aims mentioned above (permanent existence, ability to carry out duties and financial autonomy). In enacting the two percent rule, the legislator did not exceed the permissible margin of appreciation. Finally, because the Austrian system provides for the legal personality of religious communities simply by registration according to Section 2.1 BekGG (without the need to attain a certain number of members), the Constitutional Court found that a breach had not occurred of the constitutionally guaranteed right to freedom of religion under Article 9 ECHR (cf. dissenting opinion of Justice Steiner, *Religionsgemeinschaft der Zeugen Jehovas and others v. Austria* (ECHR, 31.07.2008, Appl. 40.825/98).

Languages:

German.



Belarus Constitutional Court

Important decisions

Identification: BLR-2010-1-001

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 23.03.2010 / **e)** D-432/2010 / **f)** On equal guarantees of the citizens' right to unemployment protection / **g)** *Vesnik Kanstytucyjnaha Suda Respubliki* (Official Digest), no. 1/2010 / **h)** CODICES (English, Belarusian, Russian).

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**.

5.4.15 Fundamental Rights - Economic, social and cultural rights - **Right to unemployment benefits**.

Keywords of the alphabetical index:

Unemployment, benefit, equality / Benefit, right, abolition, restriction / Legislative omission, partial.

Headnotes:

The determination of the rate of educational maintenance allowance is dependent on the circumstances of the termination of the contract of employment, as well as instances where certain persons are refused unemployment benefit.

Summary:

Under Article 10 of the Law of Employment of the Population of 15 June 2009, with regard to employment assistance, the state is to guarantee to the unemployed free vocational training and retraining in accordance with their social needs, individual aptitudes, abilities and skills and their psychological and physical profiles. It should also guarantee unemployment benefits and educational maintenance allowance when training has been recommended by labour, employment and social security authorities.

In order to safeguard these guarantees, provision has been made in Article 23 of the Law on Employment of the Population that individual educational maintenance allowance is to be granted at the rate of 50% to 75% of the applicant's most recent salary, depending on whether there are any children under the age of fourteen or disabled children below the age of eighteen. This allowance should not fall below one and a half times the minimum unemployment benefits for this unemployed person and should not exceed the three-fold nominal unit.

Article 23.3 determines that citizens, who have terminated their permanent contracts of employment of their own free will, or by agreement, or whose contracts of employment have been terminated on the grounds specified in Articles 42.4, 42.5, 42.7-42.9, 44.5 and 47 of the Labour Code, and those who have been recognised as unemployed under established procedure, are to be granted educational maintenance allowance at the rate of a nominal unit.

The Constitutional Court noted that certain citizens, who have terminated employment contracts of their own volition, have done so due to circumstances which eliminate or impede their work (on health grounds, for instance). They would fall within the remit of Article 23 of the Law on Employment of the Population. It also noted instances where employers have violated labour legislation, collective contracts or agreements, or contracts of employment (Article 40.4 of the Labour Code). Citizens then have valid reasons to terminate their employment contracts.

As generally provided in Article 24 of the Law on Employment of the Population unemployment benefits are granted by labour, employment and social security authorities and are payable to citizens as soon as they register as unemployed. Also set out in this Article are the procedures and conditions for the payment of benefits and payment patterns pertaining to certain categories of the unemployed. Unemployment benefits may be refused in instances where a citizen has terminated his or her contract of employment of his or her own volition or this has been agreed between the parties or on the grounds specified in Articles 42.4, 42.5, 42.7-42.9, 44.5 and 47 of the Labour Code, or in the event of expulsion for military (classroom) misconduct or loss of sources of income through unlawful acts.

The Constitutional Court observed that in the furtherance of the social objective of unemployment benefits and the state guarantees aimed at the appropriate safeguarding of the constitutional right to unemployment protection, those citizens who had permanent contracts of employment which they

terminated of their own volition for valid reasons (Article 40.4 of the Labour Code) should not be refused unemployment benefits.

The basis of the legislative provision on the refusal of unemployment benefits to individuals who are not covered by Article 47.1¹ of the Labour Code casts a degree of doubt over those individuals who have not been dismissed through any fault of their own. They cannot be regarded as falling within the remit of Article 24.2.2 of the Law on Employment of the Population and within the category of those whose contracts of employment have been terminated and unemployment benefits refused.

The principle of equality before the law is characteristic of the legal status of citizens in all fields of public life including the social aspect. Any differentiation of legal regulation must be constitutionally founded; for instance it should aim to establish legal diversity, advantages and preferences to specific categories of citizens, such as minors and the disabled, provided that the legal remedies applied are reasonable and commensurate to protected values and goals.

The Constitutional Court held that clarification was needed of the legal regulation on the establishment of grounds for termination of employment contracts which affects the rate of educational maintenance allowance and the opportunity to be granted unemployment benefits. Under the present regime, individuals of the same category (who have not been dismissed through their own fault and have been recognised as unemployed) are not provided with equal unemployment protection. This is inconsistent with the principles of equality and equity.

The Constitutional Court highlighted the need to for alterations and addenda to the Law on the Employment of the Population in order to clarify the list of grounds whereby somebody whose contract of employment has been terminated will receive a lower rate of educational maintenance allowance and the list of the grounds whereby the termination of a contract of employment can result in the refusal of unemployment benefits. The Council of Ministers was presented with a proposal to enact appropriate draft legislation and to submit it, under the established procedure, to the House of Representatives of the National Assembly.

Languages:

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



Identification: BLR-2010-1-002

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 27.04.2010 / **e)** D-433/2010 / **f)** On the conformity of the Law “On Making Alterations and Addenda to the Law “On Environmental Protection” to the Constitution / **g)** *Vesnik Kanstytucyjnaha Suda Respubliki Belarus* (Official Digest), no. 2/2010 / **h)** CODICES (English, Belarusian, Russian).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Environment, protection, powers, distribution.

Headnotes:

Under Article 46 of the Constitution, everybody is entitled to a healthy environment and to compensation for loss or damage caused by the violation of this right. The State is to supervise the rational use of natural resources to protect and improve living conditions, and to preserve and restore the environment.

Summary:

A number of provisions of the Law on Making Alterations and Addenda to the Law on Environmental Protection provide for expansion and strengthening of the environmental protection requirements pertaining to “biospheric refugia”. The requirements are related to the location, building design, construction, operation, conservation and decommissioning of military and defence facilities, weapons and military equipment as well as the operation of agricultural facilities, land reclamation and reclamation projects and the operation, location, construction and reconstruction of settlements, and the disposal of ionising radiation sources (points 15, 26-32 and others of Article 1). The Law is aimed at further development of the individual constitutional right to a healthy environment and at putting in place the mechanisms needed for the implementation of Part one of Article 46 of the Constitution.

The rules of the Law (points 8-11 and others of Article 1), which vest in the President, the Council of Ministers, the Ministry of Natural Resources and Environmental Protection and regional executive and regulatory bodies supplementary powers over the establishment of state control over the rational use of natural resources while creating a national ecology network and the activation and inactivation of “biospheric refugia” were found to be in line with the constitutional provisions on state control over the rational use of natural resources (Article 46.2) and to serve as a genuine safeguard of the individual constitutional right to a healthy environment.

A number of provisions of the Law contain legal instructions on the creation and functioning of the national ecology network and its elements, on “biospheric refugia” and their structure, which are subject to international treaties to which the Republic of Belarus is a signatory. These include the Convention on Biological Diversity, the Convention on Conservation of Migratory Species of Wild Animals, and the Pan-European Biological and Landscape Diversity Strategy. In particular, in order to preserve natural ecological systems and biological and landscape diversity the legislator sets out duties and restrictions applying to natural areas of preferential protection, natural areas subject to special protection and “biospheric refugia”.

The analysis of the content of the Law shows that it is clear and unambiguous, and also shows certainty of the legal rules applied and specific terms. The Law aims at further improving the legal regulation of social relations in the field of environmental protection that comply with the supremacy of the law (Article 7 of the Constitution) and its derived principle of legal certainty.

The Law was adopted within the powers of the National Assembly. The House of Representatives can now consider draft legislation on environmental protection and the rational use of natural resources (Article 97.1.2 of the Constitution). This will be approved or rejected by the Council of the Republic (Article 98.1.1 of the Constitution).

The analysis of the articles of the Law, the format of the Act and the procedure for its adoption were shown to be in line with the Constitution.

The Constitutional Court recognised the Law on Making Alterations and Addenda to the Law on Environmental Protection to be in conformity with the Constitution.

Languages:

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

*Identification:* BLR-2010-1-003

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 29.04.2010 / **e)** D-445/2010 / **f)** On the conformity of the Law “On Making Alterations and Addenda to the Criminal Procedure Code” to the Constitution / **g)** *Vesnik Kanstytucyjnaha Suda Respubliki Belarus* (Official Digest), no. 2/2010 / **h)** CODICES (English, Belarusian, Russian).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Criminal procedure, guarantees / Criminal procedure, preparatory phase, guarantee / Suspect, fundamental rights.

Headnotes:

The effect of the removal of a suspected person from office is beyond the scope of criminal procedure. Essentially, it restricts individual constitutional rights and freedoms such as the right to work, honour, dignity and personal business standing.

Summary:

In accordance with the alterations to the Criminal Procedure Code (hereinafter, the “CPC”) the inquiry agency head has the right to confirm the order on removal of a suspected person from office (Article 38.5), and the public prosecutor shall sign this criminal procedure sanction (Article 34.5.13). Similar

powers to remove a suspected person from office are vested in the Minister of Internal Affairs, the Chairman of the Committee for State Security, Deputy Chairman of the State Supervisory Committee and the Director of Financial Investigation Department (Article 38.5).

Pursuant to Article 60.1 of the Constitution everyone’s protection of their rights and liberties shall be guaranteed by a competent, independent and impartial court of law within the time span specified by law.

Article 8 of the Universal Declaration of Human Rights provides that everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him or her by the Constitution or by law. By virtue of Article 2.3.a of the International Covenant on Civil and Political Rights, each State Party undertakes to ensure that any person whose rights or freedoms as recognised herein are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.

In view of the constitutional provisions and the instruments of international law mentioned above, the Constitutional Court took the view that following the imposition of the criminal procedure sanction of a suspect’s removal from office, this person is entitled to appeal to the court in order to protect his or her rights.

Criminal procedure exists in order to protect the person, individual rights and freedoms, the interests of society and the state by way of fast and full-scale investigation of offences and socially dangerous acts by mentally incompetent persons, and by the exposure and criminal prosecution of guilty persons. The criminal procedure should also provide for adequate law enforcement in order to bring offenders to justice and to prevent those who are not guilty from being held criminally liable and condemned (Article 7.1 of the CPC).

To this end, various alterations have been made to the CPC. For example, prior to the initiation of a criminal case, it is permissible to obtain specimens for comparative study and to remove a dead body from its place of burial (Article 173.2 of the CPC). If an accused is on the “wanted list”, a criminal case agency is entitled to carry out various procedures without having to notify the accused of the relevant order (Article 227.4 of the CPC).

The above provisions of the Law have imposed certain restrictions on the rights and legitimate interests of parties to criminal proceedings. However, in accordance with Article 23.1 of the Constitution, restriction of personal rights and liberties is only

permitted in the instances specified by law, in the interest of national security, public order, the protection of the morals and health of the population and the rights and freedoms of others.

The alterations made to the CPC are not contrary to the Constitution; their aim is to protect social law and order. The Constitutional Court reminded law enforcement bodies of the need to observe the fact that in carrying out their criminal procedure duties, they must observe the rules of the Constitution on the exercise of personal constitutional rights and freedoms as an individual and as a citizen.

The Law also makes changes to several articles of Chapter 47 of the CPC on fast track criminal proceedings. In order to ensure the rights and legitimate interests of parties to criminal proceedings, the provisions of the Law set out the criteria under which a fast track investigation will proceed (Articles 456 and 457).

In fast track criminal proceedings the law allows exceptions to the general rules of pre-trial proceedings, which presuppose the necessity to ensure adequate guarantees to prevent the violation of constitutional rights and freedoms of individuals and citizens. The Constitutional Court noted that law enforcement practice should adhere to the rule of part two of Article 59 of the Constitution, according to which State bodies, officials and others who have been entrusted to exercise state functions shall take necessary measures to implement and safeguard the rights and liberties of the individual, in co-ordination with the provisions of Article 10.1 of the CPC, which bind the prosecuting agency to ensure the protection of the rights and freedoms of parties to criminal proceedings. Otherwise, the procedural and constitutional rights of parties to criminal proceedings could be breached.

The procedure for the adoption of the Law conforms to the rules of the Constitution under which draft legislation is considered by the House of Representatives and submitted for adoption by the Council of the Republic of the National Assembly (Articles 97.1.2 and 98.1.1 of the Constitution). The chambers of the National Assembly therefore acted within their competence as set out by Articles 97-100 of the Constitution.

In the Constitutional Court's opinion, in terms of the content of the rules, the form of the act and the procedure for its enactment, the Law is not contrary to the Constitution.

The Constitutional Court recognised the Law on Making Alterations and Addenda to the Criminal

Procedure Code to be in conformity with the Constitution.

Languages:

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



Belgium

Constitutional Court

Important decisions

Identification: BEL-2010-1-001

a) Belgium / **b)** Constitutional Court / **c)** / **d)** 04.02.2010 / **e)** 9/2010 / **f)** / **g)** *Moniteur belge* (Official Gazette), 11.03.2010 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
 5.2 Fundamental Rights – **Equality**.
 5.3.13.4 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Double degree of jurisdiction**.
 5.3.13.6 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to a hearing**.
 5.3.44 Fundamental Rights – Civil and political rights – **Rights of the child**.

Keywords of the alphabetical index:

Child, right to be heard, double degree of jurisdiction / Child, capable of understanding, equal access to the courts, right to be heard / Equality, comparison / Compatible interpretation.

Headnotes:

By introducing Article 931.3 3 to 931.7 in the Judicial Code, Parliament applied Article 12 of the Convention on the Rights of the Child, guaranteeing children who are deemed capable of understanding the right to be heard in any judicial or administrative proceedings concerning them.

Parliament cannot in a discriminatory manner interfere with this right conferred on juveniles who are capable of understanding.

Summary:

The Ghent Court of Appeal questioned the Constitutional Court about the compatibility of Articles 10 and 11 of the Constitution and Article 931.4

of the Judicial Code, in so far as no remedy was available against a judicial decision whereby a request to be heard lodged by a juvenile deemed capable of understanding was refused on a ground other than the lack of this capacity, with the result that the child would never have the possibility of being heard.

Before the Constitutional Court the Council of Ministers contended that the preliminary question was inadmissible since it failed to specify another category of persons in comparison with whom juveniles were allegedly discriminated against. The Constitutional Court dismissed this argument. It considered that the preliminary question could be understood to mean that juveniles who, in the case under consideration, were deprived by parliament of the right to appeal against a judicial decision must be compared with other categories of justice system users to whom parliament had granted the right of appeal.

The Constitutional Court reiterated its established precedent whereby, except in criminal matters, there was no general principle guaranteeing the right to a double degree of jurisdiction. However, where parliament provided for a right of appeal, it could not deprive a given category of justice system users of that right without having a reasonable ground for doing so. The Court also stipulated that the right of equal access to second-tier courts applied only in the same procedural context. A difference of treatment between categories of users resulting from the application of different rules of procedure in different circumstances was not in itself discriminatory. Discrimination could exist only where the difference in treatment ensuing from the application of these rules of procedure resulted in a disproportionate restriction of the rights of the parties concerned.

The Court then examined whether the difference in treatment under consideration disproportionately infringed the rights of juveniles whose requests to be heard were dismissed. The sole ground on which a request to be heard could be rejected was that the juvenile was not capable of understanding.

The lack of this capacity must be assessed by the court, if necessary after obtaining an expert opinion on the subject, and particular grounds must be cited for its assessment.

The Constitutional Court deemed that it was for parliament to determine whether the assessment of a juvenile's capacity to understand should be confined to a single tier of court or whether it should be open to appeal. In this connection, parliament could take account of concerns not to render proceedings unnecessarily cumbersome and protracted, especially in matters of divorce. The Court nonetheless ruled that

if the provision was interpreted to mean that no appeal lay against a decision whereby a court dismissed a juvenile's request to be heard on a ground other than incapacity this constituted discriminatory interference with the right of a juvenile capable of understanding to be heard in any proceedings concerning him or her, as guaranteed by Article 12 of the Convention on the Rights of the Child.

The Court then went on to stipulate that the legislative provision at issue could be interpreted in a manner compatible with the rules of equality and non-discrimination taken in conjunction with Article 12 of the above Convention. Under this interpretation juveniles retained the possibility to appeal against a decision whereby their request to be heard was dismissed on a ground other than their lack of capacity to understand.

The operative provisions of the judgment set out the two possible interpretations along with the findings that they did or did not constitute a violation.

Languages:

French, Dutch, German.



Identification: BEL-2010-1-002

a) Belgium / **b)** Constitutional Court / **c)** / **d)** 18.03.2010 / **e)** 29/2010 / **f)** / **g)** *Moniteur belge* (Official Gazette) / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

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

1.2.2.2 Constitutional Justice – Types of claim – Claim by a private body or individual – **Non-profit-making corporate body.**

1.3 Constitutional Justice – **Jurisdiction.**

1.4.9.2 Constitutional Justice – Procedure – Parties – **Interest.**

1.4.9.4 Constitutional Justice – Procedure – Parties – **Persons or entities authorised to intervene in proceedings.**

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

5.2 Fundamental Rights – **Equality.**

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

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

Keywords of the alphabetical index:

Appeal, interest, linked to scope of legislation / Appeal, interest, several appellants / Appeal, intervening party / Privacy, data base / Privacy, medical data / Competition.

Headnotes:

The right to respect for one's private and family life, guaranteed under Article 22 of the Constitution and Article 8 ECHR, is not absolute.

The above articles require that any infringement by the authorities of the right to respect for one's private and family life must be provided for by legislation that is sufficiently precise and be necessary to the pursuit of a legitimate aim, which entails in particular that there must be a reasonable balance between the measure's consequences for the person concerned and the interests of society.

In establishing an "eHealth platform" for the secure exchange of health related data among all operators in the health care field, parliament does not act in breach of these provisions or of a number of related European legal standards.

Summary:

A law of 21 August 2008 established an "eHealth platform" for the secure exchange of health related data among all operators in the health care field.

A local medical association established as a non-profit organisation (ASBL) (the "*Chambre Syndicale des Médecins*"), a private individual acting in her capacity as a patient and the non-profit organisation "*Ligue des Droits de l'Homme*", as an intervening party, sought the annulment of this law, which in their opinion interfered with privacy.

The first four grounds of appeal were based on a violation of the right to privacy, as guaranteed by Article 22 of the Constitution in conjunction with Article 8 ECHR, with certain provisions of Directive 95/46/EC of the European Parliament and of

the Council, of 24 October 1995, on the protection of individuals with regard to the processing of personal data and on the free movement of such data, with a provision of Council of Europe Convention no. 108 of 28 January 1981 for the protection of individuals with regard to automatic processing of personal data, with certain provisions of the law of 8 December 1992 on the protection of privacy with regard to processing of personal data, with a provision of the Royal Decree of 13 February 2001 implementing the law of 8 December 1992 and possibly with the principle of equality and non-discrimination established in Articles 10 and 11 of the Constitution.

The Council of Ministers, which defended the law in the proceedings before the Court, argued in the first place that the first appellant (a medical association) had failed to show how medical secrecy would be affected by the impugned law and accordingly had no interest in lodging the appeal. The Court replied that, where an appellant's interest depended on the scope of impugned legislation, it was examined together with the merits of the case. Since the Court would be examining the merits, it did not have to consider the objection of a lack of interest in bringing proceedings in respect of other appellants in the same case.

The Council of Ministers contended that the Court was not competent to rule whether the impugned law was compatible with provisions of international law and with other laws cited in the grounds of appeal.

The Court responded that:

- it was not a matter of reviewing laws with regard to other laws having the same legal force since parliament could derogate from another provision of the same nature;
- it was competent to rule on compliance with international obligations (Directive 95/46/EC and Convention no. 108) which were inextricably linked to protection of privacy, as guaranteed by Article 22 of the Constitution;
- it was not competent directly to verify respect for "freedom of trade and industry", which was guaranteed by law but not by the Constitution;
- it was competent to consider whether freedom of trade and industry was restricted in a discriminatory manner, in that this freedom was also relied on in conjunction with the principle of equality and non-discrimination (Articles 10 and 11 of the Constitution);
- where a violation of the principle of equality and non-discrimination (Articles 10 and 11 of the Constitution) in conjunction with the right to fair competition (Articles 87 and 88 of the Treaty establishing the European Community, now Articles 107 and 108 of the Treaty on the

Functioning of the European Union (TFEU)) was alleged, the Court must examine whether this guarantee was not breached in a discriminatory manner.

With regard to the merits of the case, the Court clarified the scope of the right to privacy (Article 22 of the Constitution and Article 8 ECHR) and considered that these provisions had not been violated in the instant case.

The Court considered, *inter alia*, that the objectives and functions of the "eHealth platform" were determined with sufficient precision by the law itself, since there was no derogation from the law of 8 December 1992 on the protection of privacy with regard to processing of personal data, which contained detailed rules on the processing of personal data relating to health and provided for a secure environment for exchanging existing data between institutions, all authorised to access personal data.

The appellants maintained, *inter alia*, that the funding of the eHealth platform constituted a form of concealed aid that breached Articles 107 and 108 of the TFEU in a discriminatory manner. The Court replied that where, for reasons of respect for privacy, a public institution was entrusted with an activity in the public interest, the institution's funding could not be interpreted as a measure that breached the ban on state aid laid down by the provisions of European law mentioned in the ground of appeal.

The Court also declared a number of other grounds to be unfounded and dismissed the appeal.

Languages:

French, Dutch, German.



Identification: BEL-2010-1-003

a) Belgium / **b)** Constitutional Court / **c)** / **d)** 30.03.2010 / **e)** 32/2010 / **f)** / **g)** *Moniteur belge* (Official Gazette), 14.05.2010 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

2.1.1.4.5 Sources – Categories – Written rules – International instruments – **Geneva Convention on the Status of Refugees of 1951**.

5.2 Fundamental Rights – **Equality**.

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

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

Keywords of the alphabetical index:

Nuclear power, operator, contribution / Equality, comparability / Marginal control / Taxation, principle of lawfulness / Constitution and treaty, similar provisions / Ownership right, interference, taxation.

Headnotes:

Requiring nuclear power producers to pay a distribution contribution of 250 million euros for 2008, to finance the country's energy policy and government measures in this sector, does not amount to discrimination or breach their property rights.

Summary:

Article 65 of the Programme-Act of 22 December 2008 required nuclear power producers to pay a single "distribution contribution" of 250 million euros for 2008. The aim of this contribution was to "finance the country's energy policy and government measures to cover expenditure on promoting investments in electrical power generation, to meet expenses and investments relating to nuclear power, to reinforce security of supply, to combat energy price rises and, lastly, to enhance competition in the power market in the interests of consumers and industry."

The company Electrabel SA, asserting that it had to pay 89 % of the total contribution and that this tax represented about one quarter of its total net profit, sought the annulment (*inter alia*) of this legislation. Other companies required to contribute also lodged appeals seeking the Programme-Act's annulment.

After dismissing a number of objections on grounds of inadmissibility, the Court firstly examined whether there was discrimination (Articles 10 and 11 of the Constitution) between, on one hand, nuclear power operators and other companies having a share in power generation through fission of nuclear fuel, who were required to pay this contribution, and, on the other hand, non-nuclear power producers and "other Belgian electricity market operators" such as importers, transporters, distributors and suppliers of

electricity and other intermediaries in the Belgian power market, who were not required to pay the contribution.

The Court cited at length the preparatory documents justifying this measure.

It considered that when, in such matters, the legislature decided to impose a contribution on certain categories of entities, this approach was part and parcel of its overall economic, tax and energy policy and the Court could censure differences in treatment resulting from such decisions only if there was clearly no reasonable justification for them.

The Court concluded that Parliament could consider that nuclear power operators and other companies having a share in power generation through fission of nuclear fuel were in a situation different from that of the entities with which the appellants compared themselves.

The Court then ruled on a limb of the ground of appeal complaining that "small nuclear power producers" which were required to pay the distribution contribution and the "dominant nuclear power operator" were treated in the same way.

It replied that the situations of the nuclear power operator and of the other two companies having a share in power generation through fission of nuclear fuel, who were affected by the two grounds of appeal in question, were not fundamentally different from the standpoint of the challenged legislation, since these three taxpayers had in common the fact that they controlled part of the nuclear power generation industry.

The parties also complained of discrimination between the entities concerned by this legislation and all other taxpayers liable for corporate income tax.

In this connection, the Court recalled the scope of the constitutional principle of equality and non-discrimination: "Articles 10 and 11 of the Constitution do not rule out a difference in treatment between categories of entities in so far as it is based on an objective criterion and there is a reasonable justification for it. The existence of such a justification must be assessed taking account of the aim and the effects of the impugned measure and the nature of the principles at issue: the principle of equality is breached where it can be shown that there is no reasonable proportion between the means utilised and the aim being pursued."

In the light of the aim laid down in the impugned legislation, the Court considered that "ordinary"

taxpayers liable for corporate income tax were not in a comparable situation from the standpoint of a measure of this kind.

The Court also rejected the arguments concerning the principle of lawfulness in tax matters, the non-retrospective effect of legislation and the right of ownership and dismissed the appeal.

Concerning the right of ownership, the Court observed that Article 1 Protocol 1 ECHR was similar in scope to Article 16 of the Constitution and that the safeguards laid down therein were indistinguishable from those secured by the constitutional provision.

The Court also pointed out that a tax in principle constituted an interference with the right to peaceful enjoyment of one's property: "The interference is compatible with this right only if it is reasonably proportionate to the aim pursued, that is to say it does not upset the fair balance between the demands of the general interest and the requirements of the protection of this right. Even though the authors of tax legislation enjoy a broad margin of discretion, a tax accordingly breaches this right if it imposes an excessive burden on the taxpayer or fundamentally jeopardises his or her financial position (ECHR, 31 January 2006, *Dukmedjian v. France*, §§ 52-54; ECHR, decision, 15 December 2009, *Tardieu de Maleissye and others v. France*)."

The Court referred to the aim of the contribution and held that, in the light of the profits engendered by nuclear power generation on account of the accelerated depreciation of nuclear power plants (the decision to close these plants having been revised), parliament could consider that this contribution was not "exorbitant" and that the fair balance between the demands of the general interest and the requirements of the right to peaceful enjoyment of one's property was not upset.

Languages:

French, Dutch, German.



Identification: BEL-2010-1-004

a) Belgium / b) Constitutional Court / c) / d) 22.04.2010 / e) 37/2010 / f) / g) *Moniteur belge* (Official Gazette) / h) CODICES (French, Dutch, German).

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.***

Keywords of the alphabetical index:

Criminal matter, legality, principle / Criminal matter, legality, delegation of power to the King / Criminal matter, legality, European regulation.

Headnotes:

The principle of legality in criminal matters does not go so far as to oblige parliament itself to regulate all aspects of the application of an offence. A delegation of power to the King does not breach this principle provided that the authorisation is established with sufficient precision and concerns the implementation of measures of which the essential details have been determined beforehand by parliament.

Summary:

The Veurne Criminal Court questioned the Constitutional Court as to whether Articles 1 and 2 of the Law of 18 February 1969 on the measures implementing the international treaties and instruments concerning sea, road, rail and inland water transport were compatible with the principle of legality in criminal matters established by Articles 12.2 and 14 of the Constitution. Article 1 of the law provides: "The King may, by a royal decree deliberated on in the Council of Ministers, take all measures necessary in the sphere of sea, road, rail and inland water transport to ensure the fulfilment of the obligations resulting from international treaties and the ensuing international instruments, which may include the repeal or amendment of legal provisions. ...". Article 2.1 of the law provides: "Breaches of the decrees issued pursuant to Article 1 shall be punishable by a prison sentence of eight days to six months and a fine of fifty to ten thousand euros, or by only one of these penalties, without prejudice to any damages that may be payable. ...".

The Court asked the Constitutional Court whether the authorisation conferred on the King and the

criminalisation of breaches of the decrees issued pursuant thereto were incompatible with the principle of legality in criminal matters since parliament had not specified what interpretation should be given to “all measures necessary” nor which “international treaties” and “international instruments” were concerned.

The Court first reiterated its established precedents in this matter: Articles 12.2 and 14 of the Constitution guaranteed all citizens that no conduct would be punishable and no penalty would be imposed other than on the basis of rules adopted by a democratically elected deliberative assembly.

The principle of legality in criminal matters did not go so far as to oblige parliament itself to regulate all aspects of the application of an offence. A delegation of power to the King did not breach this principle provided that the authorisation was established with sufficient precision and concerned the implementation of measures of which the essential details had been determined beforehand by parliament.

In the light of the case brought before the requesting court, the Court then confined its examination of this question to cases where the authorisation conferred on the King related to obligations deriving from European regulations. It specified that such regulations were general in scope, fully compulsory and directly applicable in all member states and had legal effect only if they had been published in the Official Journal of the European Union.

The Court cited Articles 13, 15.7 and 19.1 of Regulation (EEC) no. 3821/85. It then stipulated that it was for parliament to take the measures necessary to implement a regulation or to authorise the King to do so. Where parliament penalised breaches of legislation, the principle of legality established by Article 12.2 of the Constitution required that an authorisation conferred on the King should be established with sufficient precision and concern the implementation of measures of which the essential details had been determined beforehand by parliament.

The Court recognised that these essential details could be laid down in a European regulation directly applicable in the Belgian legal system. The rules concerning which parliament had penalised breaches were accordingly precisely laid down. The criminalisation of breaches of the regulation ensued expressly from the law determining the minimum and maximum penalties applicable.

In such a legal context parliament could, without infringing the principle of legality in criminal matters,

delegate to the King full authority for the implementation of regulations in a given sphere, in the instant case sea, road, rail and inland water transport, without having to confirm this separately for each regulation and without having to specify the implementing measures the King could take.

The Court accordingly held that there was no violation of Articles 12.2 and 14 of the Constitution.

Languages:

French, Dutch, German.



Identification: BEL-2010-1-005

a) Belgium / **b)** Constitutional Court / **c)** / **d)** 29.04.2010 / **e)** 48/2010 / **f)** / **g)** *Moniteur belge* (Official Gazette) / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

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

5.2 Fundamental Rights – **Equality.**

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

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

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

Keywords of the alphabetical index:

Family allowance, conditions, lawful residence / Family allowance, child, EU citizen / Equality, European citizens / Constitutional Court, summary proceedings.

Headnotes:

Where a legislative provision concerning guaranteed family benefits has been deemed incompatible with Articles 10 and 11 of the Constitution in so far as it applies to a recipient having a dependent child of Belgian nationality, it must also be deemed incompatible with Articles 10 and 11 of the Constitution, taken in conjunction with Articles 18 and

20 of the Treaty on the Functioning of the European Union, in so far as it applies to a recipient having a dependent child holding EU citizenship.

Summary:

Under the Belgian social security scheme, “family benefits” are awarded in the form of “family allowances” (a monthly amount per child up to the age of 18 or until the end of the child’s studies), a “childbirth allowance” (a single payment at the time of birth) or an adoption grant. The scheme is funded by means of contributions paid by employers, employed persons and self-employed persons.

In addition to the “obligatory” family benefits scheme (compulsory contributions paid by employers, employed persons and self-employed persons) there is a “guaranteed family benefits” scheme for persons who do not contribute to the obligatory scheme (unemployed persons, pensioners, invalids and so on). Recognised refugees are entitled to family benefits, but asylum seekers are not.

Both the child (hereinafter, the “beneficiary”) and the parent (hereinafter, the “recipient”) must meet certain conditions showing that they have sufficiently close ties with Belgium: the child must be effectively and lawfully resident in Belgium and the parent must have lived lawfully and continuously in Belgium for at least the last five years at the time when the claim for family benefits is lodged.

Proceedings have taken place before the Constitutional Court concerning the latter condition.

In a Judgment of 28 June 2006 (no. 110/2006), the Court held that parliament could make the payment of benefits under the safety-net scheme conditional on lawful residence in Belgium.

In Judgment no. 62/2009 of 25 March 2009, the Court held that, in cases where the child was of Belgian nationality, the supplementary requirement that the recipient should have been resident for at least five years, which was additional to the requirement that the child should effectively be resident, seemed disproportionate in the light of the aim of broadening entitlement to benefits under the safety-net scheme while requiring that those entitled should have sufficiently close ties with Belgium.

In view of the latter judgment, the requesting court raised a preliminary question concerning a comparable situation, that of a Rwandan mother who claimed guaranteed family benefits for her child of Spanish nationality.

The Court answered this question by a so-called “immediate response” decision delivered under an expedited procedure. In proceedings of this kind, the two reporting judges from the outset submit “conclusions” in which they state their case that the matter can apparently be settled on the basis of existing case-law by following identical or similar reasoning. After offering the parties an opportunity to submit written arguments, the Court gives a ruling without any public hearing being held.

In the present case the reporting judges considered that, in the light of Articles 12 and 17 of the EU Treaty (now Articles 18 and 20 of the Treaty on the Functioning of the European Union (TFEU)) the reasoning followed in Judgment no. 62/2009 could be applied to a child of Spanish nationality who was lawfully resident in Belgium.

In Judgment no. 48/2010 the Court concurred with the reporting judges: “Since the provision at issue was deemed incompatible with Articles 10 and 11 of the Constitution in so far as it applied to a recipient having a dependent child of Belgian nationality, it must also be deemed incompatible with Articles 10 and 11 of the Constitution, taken in conjunction with Articles 18 and 20 of the Treaty on the Functioning of the European Union, in so far as it applies to a recipient having a dependent child with EU citizenship.”

Supplementary information:

Subsequent to Judgment no. 62/2009 of 25 March 2009, parliament passed a Miscellaneous Provisions Act of 30 December 2009, Section 34 of which introduced, with effect from 1 March 2009, an exemption from the five-year residence requirement for a parent who claimed benefit on behalf of a child of Belgian nationality or a child assimilated to a child of Belgian nationality under the relevant international law (more precisely Regulation (EEC) no. 1408/71 of the Council of the European Communities of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community or nationals of states having ratified the European Social Charter).

Languages:

French, Dutch, German.



Brazil

Federal Supreme Court

Important decisions

Identification: BRA-2010-1-001

a) Brazil / **b)** Federal Supreme Court / **c)** Plenary / **d)** 10.11.1994 / **e)** 71.373 / **f)** *Habeas Corpus* / **g)** *Diário da Justiça* (Justice Gazette), 22.11.1996 / **h)**.

Keywords of the systematic thesaurus:

3.17 General Principles – **Weighing of interests.**
 5.3.1 Fundamental Rights – Civil and political rights – **Right to dignity.**
 5.3.4 Fundamental Rights – Civil and political rights – **Right to physical and psychological integrity.**
 5.3.44 Fundamental Rights – Civil and political rights – **Rights of the child.**

Keywords of the alphabetical index:

Paternity, investigation / Paternity, recognition / Paternity, right to know / DNA, analysis / Right to private life, interference.

Headnotes:

Forcing an individual to take a paternity test violates the principles of human dignity, physical integrity, inviolability of the human body and legality. The refusal of the defendant must be resolved legally, not through physical coercion.

Summary:

A writ of *habeas corpus* was filed against a decision directing that the appellant would be forced to have a DNA paternity test, having refused to be tested voluntarily.

The Supreme Federal Court, by a majority vote, granted the order on the basis that a person cannot be forced to have material extracted from his or her body; this could result in violation of the principles of human dignity and inviolability of the human body. It was also stated that the principle of legality had been infringed, as no specific law exists on the matter.

It was held that there is a highly personal and patrimonial aspect to the right to acknowledgment of paternity. That right cannot predominate over the right of the accused to physical integrity and privacy.

Finally, it was noted that under the Brazilian legal system, there are legal consequences to the refusal of physical coercion. In civil proceedings, non-appearance of a party at trial, when they have been summoned, gives rise to the presumption of the veracity of the facts alleged against him or her (Article 343.2 of the Code of Civil Procedure).

Dissenting opinions were put forward, to the effect that the scientific certainty of the DNA test provides an important element in the consolidation of truth which is compatible with the right of knowledge of the origin and identity of a child and/or adolescent. This means that the legal truth is no longer based on presumptions but on scientific truth. It was also noted that the refusal of the person who is being investigated implies non-compliance with the procedural obligation to cooperate with the judiciary, as provided for in Article 339 of the Code of Civil Procedure. Finally, it was argued that the private right to the inviolability of the body would not be absolute, since a child's right to know his or her identity would prevail; this is characterised as clear public interest.

Supplementary information:

- Articles 339 and 343.2 of the Code of Civil Procedure.

Languages:

Portuguese, English (translation by the Court).



Identification: BRA-2010-1-002

a) Brazil / **b)** Federal Supreme Court / **c)** First Panel / **d)** 10.08.2004 / **e)** 82.354 / **f)** *Habeas Corpus* / **g)** *Diário da Justiça* (Justice Gazette), 24.09.2004 / **h)**.

Keywords of the systematic thesaurus:

5.3.13.8 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right of access to the file.**

5.3.13.25 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:

Police, investigation, continuing / Secret investigation / Lawyer / Fundamental right, protection, administrative proceedings.

Headnotes:

A lawyer is entitled to access to the file of the police investigation in respect of which his or her client has to testify, even though the procedure is being carried out “under seal”. However, this right is limited by the interests of the proper conduct of the police investigation. Thus, research regarding investigations that are already complete must be separated from those that are ongoing. The lawyer is entitled to access to the information already attached to the file of the police investigation, not to those still under way.

Summary:

A writ of *habeas corpus* was filed against a decision of the Superior Court of Justice. The plaintiff requested access to and copies of the police investigation before the date scheduled for the hearing of the accused, on the basis that denial of such a request would violate the rights and guarantees of the accused, and would constitute an infringement of the free exercise of the profession of a lawyer.

The First Panel of the Supreme Federal Court, by unanimous vote, granted the order to allow lawyers to consult the police investigation and obtain copies, ahead of the date set for the hearing of the accused.

The Panel began by discussing a preliminary question regarding the possibility of filing a petition for *habeas corpus* in order to have access to the police investigation, as the aim of the action was to protect the right to come and go. It was decided that the violation of the free professional exercise of an attorney, embodied in the prohibition of access to the police investigation, constitutes a restraint of defense, which may jeopardise, albeit indirectly, the freedom of movement of the accused.

In the merits, it was stated that police investigation is an administrative procedure that may eventually pave the way for criminal prosecution. It is not a judicial lawsuit, neither is it an administrative procedure, as there is no decision of the police authority arising from the investigation. Therefore, the adversarial system and full defence, established in Article 5.55 of the Federal Constitution and guaranteed in administrative proceedings and in judicial lawsuits, do not apply to the investigation stage.

It was, however, noted that accused persons have fundamental rights that must also be observed during the course of the investigation, including the right to counsel, the right against self-incrimination, and the right to remain silent. If such guarantees are to remain effective, the right to the free professional exercise of an attorney must be fully observed. For this reason, Law no. 8.906/1994, by virtue of Article 7.14, gave these professionals access to the file of the police investigation, despite the fact that the procedure is being carried out under seal, in contrast to what has been established in other cases, where the law expressly restricted such access in other administrative proceedings under seal.

Article 5.63 of the Constitution was also discussed. This enshrines the right for prisoners to receive assistance from family and lawyers. The same rights are guaranteed to the accused, even if he or she is released. This constitutional guarantee (technical assistance from an attorney) cannot exist if there is no access to the police investigation file in respect of which the accused has to testify.

The importance of the interests of the proper conduct of the investigation was emphasised. Documentation on research which is already complete must be separated from those that are still ongoing (call interception is an example), the implementation of which could be extended to other measures. The person under investigation is entitled, through his or her legal team, to access to information that is already incorporated into the police investigation file. The police authority is competent to evaluate the proper time to hear the accused so that prior knowledge of the information attached to the file does not obstruct the success of the investigation.

The reasoning consolidated in this decision, in conjunction with other precedents, led the Supreme Federal Court to issue its “Mandatory Precedent with binding effect 14”. This states:

“It is the right of the defender, in furtherance of the right to defence of the person he or she is representing, to have broad access to evidence

already documented in proceedings conducted by an organ with the competence of the judicial police.”

Supplementary information:

- Article 5.33, 5.54 and 5.55 of the Federal Constitution;
- Mandatory Precedent with binding effect 14;
- Law no. 8906/1994, article 7.14.

Languages:

Portuguese, English (translation by the Court).



Identification: BRA-2010-1-003

a) Brazil / **b)** Federal Supreme Court / **c)** Plenary / **d)** 07.05.2008 / **e)** 434.059 / **f)** / **g)** *Diário da Justiça* (Justice Gazette), 172, 12.09.2008 / **h)**.

Keywords of the systematic thesaurus:

4.7.15.1 Institutions – Judicial bodies – Legal assistance and representation of parties – **The Bar**.
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:

Lawyer / Defence, right / Administrative proceedings.

Headnotes:

The absence of a technical defence submitted by a legally assigned lawyer does not, *per se*, imply the nullity of the disciplinary administrative proceedings.

Summary:

The Federal Government and the National Institute of Social Security filed an appeal to the Supreme Federal Court against a ruling by the Superior Court of Justice (SCJ), which reinstated the appellant to the position she formerly occupied and declared void the disciplinary administrative proceedings as a result of which she had been dismissed. The

contested ruling stated that the nullity arose from restraint of defence due to the absence of an assigned lawyer in the administrative disciplinary proceedings. The appellants, however, contended that the appellant was granted the opportunity for a full defence, and there was no need for the submission of a technical defence by a lawyer in order to secure the right to the adversarial system and full defense in administrative proceedings (or judicial suits), established in Article 5.55 of the Federal Constitution.

The Court, by unanimous vote, granted the request on the basis that the absence of a technical defence submitted by a legally assigned lawyer does not, *per se*, imply the nullity of the disciplinary administrative proceedings. The guarantee established in the constitutional article cited previously contains the various rights, including the right to information (parties must be kept informed of steps taken in the case); to manifestation, (whereby parties can express themselves orally or in writing about the factual and juridical elements of the proceedings); and the right to consideration of their arguments (this requires a reasoned and impartial approach from the judge in order to analyse the reasoning put forward).

The Court was of the view that these rights were observed in this particular case, and therefore the right to full defence was fully exercised. It was also observed that in certain lawsuits, such as *habeas corpus*, in criminal review appeals, in Labour Court and in Small Claims Court cases, it is already settled law that the facility parties enjoy to launch court proceedings or to defend themselves against them is a constitutional one. The Supreme Court resolved to issue its “Mandatory Precedent with Binding Effect 5”, which contradicts Precedent 343 of SCJ that provides for the mandatory presence of a lawyer in all stages of disciplinary administrative proceedings, as follows:

“The absence of a technical defence drafted by a lawyer in disciplinary administrative proceedings does not run counter to the Constitution.”

Languages:

Portuguese.



Identification: BRA-2010-1-004

a) Brazil / **b)** Federal Supreme Court / **c)** Plenary / **d)** 07.08.2008 / **e)** 91.952 / **f)** *Habeas Corpus* / **g)** *Diário da Justiça* (Justice Gazette), 241, 19.12.2008 / **h)**.

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Jury trial / Prisoner, treatment.

Headnotes:

The use of handcuffs during a trial constitutes an exceptional measure which is only permissible where there is reason to fear aggression or escape by the prisoner.

Summary:

A writ of *habeas corpus* was filed, seeking a declaration of nullity in respect of a jury verdict, as the defendants were kept in handcuffs throughout the trial. The petitioners argued that the use of handcuffs constituted unlawful restraint, as it was not a situation of peril. They also observed that the reasons for protective custody of the defendant should not be confused with the requirements for the use of handcuffs.

The Supreme Federal Court, by a majority vote, granted the order to determine that another trial would be carried out where the defendants would not be handcuffed.

The Court noted that the use of handcuffs during a trial constitutes an exceptional measure which is only permissible when there is effective fear of escape or aggression on the part of the prisoner. This understanding aims to preserve the dignity and the physical and moral integrity of the defendant. It also aims to avoid a perception by the jury (often comprised of non-professional people) that somebody in handcuffs is actually a criminal. The Court stated that the unnecessary use of handcuffs is an illegal act which can be construed either as abuse of authority or as a crime of torture.

The Supreme Court emphasised that this standpoint is in accordance with the United Nations Standard Minimum Rules for the Treatment of Prisoners, which establish *inter alia* that handcuffs are never to be used as a method of punishment.

The reasoning consolidated in this decision, in conjunction with other precedents, led the Supreme Federal Court to issue its Mandatory Precedent with binding effect 11, which states:

“The use of handcuffs is only lawful in cases of resistance or where there is a justified concern that the prisoner might abscond or the prisoner or a third party might pose a danger to the physical integrity of another. This exception must be justified in writing under penalty of disciplinary, civil and penal responsibility of the agent or the authority and nullity of prison or procedural act, without prejudice of the civil responsibility of the State”.

Languages:

Portuguese, English (translation by the Court).

*Identification:* BRA-2010-1-005

a) Brazil / **b)** Federal Supreme Court / **c)** Plenary / **d)** 01.10.2008 / **e)** 568.596 / **f)** Appeal to the Supreme Federal Court / **g)** *Diário da Justiça* (Justice Gazette), 222, 21.11.2008 / **h)**.

Keywords of the systematic thesaurus:

4.9.5 Institutions – Elections and instruments of direct democracy – **Eligibility.**

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

Keywords of the alphabetical index:

Election, ineligibility / Election, sham / Election, candidacy, restriction.

Headnotes:

Former spouses of holders of senior positions of the executive branch are not eligible for election within the territory of jurisdiction of the holder of such position if the dissolution of conjugal partnership has occurred in the course of the elective mandate.

Summary:

An appeal was made to the Supreme Federal Court against a decision stating that the dissolution of a conjugal partnership during the period of elective mandate does not remove the ineligibility established in Article 14.7 of the Federal Constitution, according to which spouses of the head of the executive branch are not eligible for election within the territory of jurisdiction of the holder of such position.

The Supreme Federal Court, by a majority vote, rejected the request on the basis that the ineligibility of spouses also affects former spouses, if the dissolution of conjugal partnership occurs in the course of an elective mandate.

The Court explained that the rationale behind the above rule is to prevent the continuity of relatives of the head of the executive branch, ahead of the establishment of the new government, which would effectively give them a monopoly of the ownership of power. It also prevents the use of administrative machinery in favour of occupants of elective positions, in accordance with the principle of morality. The extension of this barrier to former spouses, whose separation has occurred in the course of the mandate, serves the same purpose as the original rule preventing partners' election, in view of the possibility of couples staging fraudulent separations to enable eligibility.

In the dissenting opinion, the point was made that fraud could not be presumed; it would have to be proved on a case-by-case basis. It was also argued that a broad interpretation cannot include more situations of ineligibility, beyond those expressly established in the Constitution, since a limitation on the exercise of citizenship is at stake.

The reasoning consolidated in this decision, in conjunction with other precedents, led the Supreme Federal Court to issue its Mandatory Precedent with binding effect 18, which states:

"The dissolution of marriage or of marital bond, in the course of the mandate, does not remove the ineligibility established in Article 14.7 of the Federal Constitution."

Supplementary information:

- Mandatory Precedent with binding effect 18;
- Article 14.7 of the Federal Constitution.

Languages:

Portuguese.

*Identification: BRA-2010-1-006*

a) Brazil / **b)** Federal Supreme Court / **c)** Plenary / **d)** 19.02.2009 / **e)** 96.099 / **f)** *Habeas Corpus* / **g)** *Diário da Justiça* (Justice Gazette), 104, 5/6/2009 / **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.**

Keywords of the alphabetical index:

Criminal law / Sentencing, increase / Firearm.

Headnotes:

There is no need to confiscate a firearm and examine its functioning, in order to determine whether increased punishment might be appropriate when its use can be proved by other means.

Summary:

A writ of *habeas corpus* was filed against a decision that deemed unnecessary the seizure and the examination of the functioning of a firearm, in order to determine whether there is a case for increased punishment for the crime of robbery, when the use of the gun can be demonstrated by other means. The defendant argued that increased punishment was not applicable, as the weapon was not seized and therefore a demonstration of its harmfulness by experts was not allowed.

The Supreme Federal Court, by majority of votes, denied the order of *habeas corpus* on the basis that the seizure and examination of the expertise of a firearm are not necessary in terms of proving its harmfulness; this quality is part of the nature of the weapon. The Court stated that the burden of proving the absence of harmfulness of the gun rests on the accused and noted that even if the gun cannot shoot projectiles, it could still be deployed as an instrument capable of producing serious injury. It was also decided that the requirement of expertise to prove harmfulness would encourage criminals to get rid of their weapons, avoiding the application of the argument for increased punishment.

A dissenting opinion was put forward, to the effect that intimidation, violence and serious threats are already part of the crime of robbery, and so, apart from the use to which the weapon can be put, effective harmfulness must be established. It was also argued that in criminal matters, presumption cannot be used in order to prejudice the defendant.

Supplementary information:

- Article 157.2.1 of the Criminal Code.

Languages:

Portuguese, English (translation by the Court).



Identification: BRA-2010-1-007

a) Brazil / **b)** Federal Supreme Court / **c)** Plenary / **d)** 26.03.2009 / **e)** 90.279 / **f)** *Habeas Corpus* / **g)** *Diário da Justiça* (Justice Gazette), 157, 21.08.2009 / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Prison, sentence, execution / Appeal, right.

Headnotes:

It is not possible to require the appearance of the defendant at prison, in order for an appeal to be admitted.

Summary:

A writ of *habeas corpus* was filed against a decision rejecting the request of the defendant to appeal against a judgment that considered him convicted. The argument was put forward that this benefit cannot be granted when there are one or more hypotheses to authorise preventive custody.

The Supreme Federal Court, by a majority of votes, granted the order so that the appeal would have a consequence, irrespective of the decree of preventive custody or the defendant's committal to prison. The Court observed that the requirement for the defendant to appear in prison before appealing constitutes an anticipated implementation of penalty which violates the presumption of innocence. The Supreme Court also stated that Article 594 of the Code of Criminal Procedure, which established this requirement, was not received by the Federal Constitution of 1988. It had also been revoked by Law no. 11.719/2008.

In dissenting votes, the writ of *habeas corpus* was partially granted to declare the impossibility of the requirement of appearance of the defendant at prison before appealing, but, at the same time, to maintain the decree of preventive custody.

Supplementary information:

- Article 594 of the Code of Criminal Procedure (revoked by Law no. 11.719/2008).

Languages:

Portuguese.



Identification: BRA-2010-1-008

a) Brazil / **b)** Federal Supreme Court / **c)** Plenary / **d)** 26.08.2009 / **e)** 591.874 / **f)** / **g)** *Diário da Justiça Eletrônico* 64 (Justice Gazette), 237, 18.12.2009 / **h)**.

Keywords of the systematic thesaurus:

4.6.10.1.2 Institutions – Executive bodies – Liability – Legal liability – **Civil liability**.

Keywords of the alphabetical index:

Public service / Transport, passengers, public / Civil liability / Liability, strict.

Headnotes:

The strict liability of the State and of private companies providing a public service for damages to third parties during the performance of the service affects both users and non-users.

Summary:

An appeal was lodged with the Supreme Federal Court against a decision whereby a private company which held a concession for collective transportation (a public service) was found to be strictly liable for injury caused by one of its buses to a cyclist. The applicant alleged that the doctrine of strict liability did not apply to the case, as the cyclist was not a user of the service.

The Supreme Federal Court, by a majority vote, rejected the appeal on the basis that the State, and the legal private entity, has strict liability for harm caused to others, whether or not they were using the service, as the injuries occurred during the performance of the service. Public service is of a general nature and extends to all citizens, whether they derive direct or indirect benefit from it. However, Article 37.6 of the Federal Constitution, which provides for this responsibility, does not distinguish between user and non user, and those interpreting the law cannot make a distinction where none has been made by the legislator.

Finally, it was held that strict liability can only be ruled out in cases where there are reasons beyond the service-provider's control, or where the fault lies solely with the victim. It was explained that, on this hypothesis, it was not possible to prove the victim was solely at fault, but the clear existence of the causal nexus between the public service and the harm generated would suffice to establish strict liability.

In a dissenting opinion, it was argued that as it was impossible to prove whether the victim was solely to blame for the accident, there was no scope for a broader interpretation of strict liability in these proceedings, since doubt in connection with the hypothesis would exclude this liability.

Supplementary information:

- Article 37.6 of the Federal Constitution.

Languages:

Portuguese, English (translation by the Court)



Bulgaria

Constitutional Court

Statistical data

1 January 2010 – 30 April 2010

Number of decisions: 6

Important decisions

Identification: BUL-2010-1-001

a) Bulgaria / **b)** Constitutional Court / **c)** / **d)** 31.03.2010 / **e)** 01/10 / **f)** / **g)** *Darzhaven vestnik* (Official Gazette), 27, 09.04.2010 / **h)**.

Keywords of the systematic thesaurus:

3.4 General Principles – **Separation of powers**.
 4.5.2 Institutions – Legislative bodies – **Powers**.
 4.6.2 Institutions – Executive bodies – **Powers**.
 4.10.2 Institutions – Public finances – **Budget**.

Keywords of the alphabetical index:

Power, horizontal apportionment, independence / Budget, law, amendment.

Headnotes:

The execution of the state budget is entrusted to the Council of Ministers. In exercising this power it must act in accordance with the Law on the state budget enacted by Parliament, which it has no right to amend. A legislative provision assigning the Council of Ministers powers vested in Parliament by the Constitution is unconstitutional.

Summary:

The Constitutional Court had before it an application by 59 deputies to certify the unconstitutionality of some provisions of the Law on the 2010 state budget of the Republic of Bulgaria.

Section 17 of the impugned Law enabled the Council of Ministers to reduce the current expenditure and transfers referred to in Section 1.2 of the same Law to below the prescribed amount. But normally the annual budget is approved by Parliament with the passage of a law for this purpose which Parliament can subsequently modify and amplify. Thus the Law delimits the statutory framework of the conditions under which the Council of Ministers must ensure its execution. The procedure for adopting the annual state budget, defined by the Constitution, guarantees Parliament's ascendancy over the government; the latter must act in accordance with the State Budget Law which it may not amend. By authorising the Council of Ministers to reduce current expenditure and transfers subject to certain conditions, the provision at issue granted it power to amend the 2010 Budget Law which Parliament had enacted. In being authorised to determine the propriety of the figures set out in the budget and to alter these quite freely without the participation of Parliament, but availing itself of the power which Parliament had assigned to it, the government acted in defiance of Article 84.2 of the Constitution.

Parliament is the sole legislative organ. Its powers cannot be delegated nor yielded to any other state organ. The State Budget Law is absolutely binding on the Council of Ministers. Parliament cannot grant the government prior authorisation, during the process of adopting the budget, to modify of its own motion the parameters specified in the Law on the budget.

Parliamentary oversight of the government's activity is of a political nature and has the dual purpose of ascertaining whether the government's activity is carried out according to the scheme of the financial policy laid down by Parliament, and of safeguarding the citizens' interests by taking care that public spending is managed cost-effectively and thriftily. The responsibility of the government and its dependence on the confidence of Parliament illustrate the rights and duties of these two constitutional organs. By transferring to the Council of Ministers certain powers to modify the parameters of the 2010 State Budget Law, Parliament had in practice divested itself of its political responsibility and transferred it to the government. Thus, Section 17 of the impugned Law was contrary to Article 62.1 of the Constitution.

The separation of powers presupposes independence and interaction between the organs of the three powers within the limits set by the Constitution. Co-operation and deterrence between the powers prevent the organs of one power from encroaching on the exclusive functions assigned to the organs of another by the Constitution. The basic law had entrusted Parliament with the adoption of the state

budget and of the report on its execution, and the government with preparing the draft Law on the annual budget and with its execution. So, in authorising the government to modify fundamental parameters of the budget, Section 17 of the Law before the Court interfered with a constitutional power of Parliament. It was found contrary to Article 8 of the Constitution.

The Constitution is placed at the apex of the hierarchy of sources of law. The organs of the legislature and the executive are bound to the Constitution, and their activity must conform to the constitutional provisions. Under the terms of Section 17, Parliament transferred to the government powers which it ought not to be assigned in principle. Consequently, this provision was declared unconstitutional.

The Constitutional Court found that Section 17 of the Law before it was contrary to the principle of the rule of law whereby the executive's subordination derives from the stipulation of guaranteeing the predictability of its activities, to be performed under conditions of publicity and transparency. However, Section 17 granted the Council of Ministers power to amend the annual budget of its own motion and did not provide for the organisation of a public debate in the National Assembly, as normally prescribed in the event of rectification of the budget, and thus infringed Article 4.1 of the Constitution.

The procedure for adopting the annual state budget, laid down by the Constitution, guarantees the ascendancy of Parliament over the government. The fact that each year the government is compelled to ask Parliament to approve the financial resources which it needs to implement its programme bears witness to its dependence on the legislature. The Court held that the Section 17 at issue was contrary to Article 1.1 of the Constitution because it vested the government with power to amend the annual budget after its adoption by Parliament.

Section 2.5 of the 2010 State Budget Law reads, "Non-recovery of the receipts deriving from the activity of the judiciary detracts from the liquid assets generated by the accounts of the previous years. Where there is a shortage of liquid assets, non-recovery shall be offset by an additional subsidy levied on the central budget and allocated even where it may cause impairment of the budgetary surplus prescribed by Section 1.3." The legislative text does not identify Parliament as the subject having the right, by means of an amending statute, to rectify the budgetary surplus established by Section of the 2010 State Budget Law. In fact the body able to act upon the stipulations in the impugned Law is the Council of Ministers. But the

power to alter the budgetary surplus under the terms of Section 2.5, the Court found, was an encroachment on a power expressly assigned to Parliament, that of amending the Law according to the prescribed procedures. The phrase in Section 2.5 of the impugned Law, "allocated even where it may cause impairment of the budgetary surplus prescribed by Section 1.3" was contrary to Article 84.2 of the Constitution and consequently to Articles 62.1, 8, 5.1 and 1.1.

The provision in Section 26 of the Law before the Court is replicated by Section 1.5 of the Law on the Budget of the National Sickness Insurance Fund for 2010. The activities prescribed therein shall be carried out by the National Sickness Insurance Fund's board of management and not by the Council of Ministers which is responsible for executing the state budget; consequently the aforementioned Section 26 was not deemed unconstitutional.

Section 27.2 is similar in its substance to Section 2.5 of the 2010 State Budget Law in which the second part of Section 2.2 authorises the Council of Ministers to approve the release of an additional transfer to the social security budget "even in cases where this additional transfer may cause impairment of the budgetary surplus prescribed by Section 1.3". In performing its functions relating to the execution of the annual budget, however, the Council of Ministers may not modify its parameters. For that reason, the second part of Section 27 was found contrary to Article 84.2 of the Constitution, hence contrary to Articles 62.1, 8, 5.1, 4.1 and 1.1.

Languages:

Bulgarian.



Canada

Supreme Court

Important decisions

Identification: CAN-2010-1-001

a) Canada / **b)** Supreme Court / **c)** / **d)** 29.01.2010 / **e)** 33289 / **f)** Canada (Prime Minister) v. Khadr / **g)** *Canada Supreme Court Reports* (Official Digest), [2010] 1 S.C.R. 44 / **h)** Internet: <http://scc.lexum.umontreal.ca/en/index.html>; [2010] S.C.J. no. 3 (*Quicklaw*); CODICES (English, French).

Keywords of the systematic thesaurus:

- 1.6.2 Constitutional Justice – Effects – **Determination of effects by the court.**
- 3.19 General Principles – **Margin of appreciation.**
- 4.6.2 Institutions – Executive bodies – **Powers.**
- 4.16 Institutions – **International relations.**
- 5.1.3 Fundamental Rights – General questions – **Positive obligation of the state.**
- 5.3.3 Fundamental Rights – Civil and political rights – **Prohibition of torture and inhuman and degrading treatment.**
- 5.3.5.1 Fundamental Rights – Civil and political rights – Individual liberty – **Deprivation of liberty.**
- 5.3.12 Fundamental Rights – Civil and political rights – **Security of the person.**

Keywords of the alphabetical index:

Foreign relations, execution power / Foreign relations, constitutional review / Fundamental right, national detained abroad, violation by national authorities / Repatriation, request, refusal / Remedy, appropriate.

Headnotes:

Canada actively participated in a process contrary to its international human rights obligations when its agents interrogated abroad a Canadian youth detained without access to counsel to elicit statements about serious criminal charges, while knowing that the youth had been subjected to sleep deprivation and while knowing that the fruits of the interrogations would be shared with the prosecutors. Canada contributed to the youth's ongoing detention in a way which deprived him of his right to liberty and security of the person

guaranteed by Section 7 of the Canadian Charter of Rights and Freedoms and which was not in accordance with the principles of fundamental justice. The appropriate remedy was to declare that Canada violated the youth's Charter rights and to leave the matter to the government to decide how best to respond in light of current information, its responsibility over foreign affairs, and the Charter.

Summary:

I. K, a Canadian, has been detained by the U.S. military at Guantanamo Bay, Cuba, since 2002, when he was a minor. In 2004, he was charged with war crimes, but the U.S. trial is still pending. In 2003, agents from two Canadian intelligence services questioned K on matters connected to the charges pending against him, and shared the product of these interviews with U.S. authorities. In 2004, an official interviewed K again, with knowledge that he had been subjected by U.S. authorities to a sleep deprivation technique, known as the "frequent flyer program", to make him less resistant to interrogation.

In 2008, in *Khadr v. Canada*, [2008] 2 S.C.R. 125 (hereinafter, "*Khadr* 2008"), the Supreme Court of Canada held that the regime in place at Guantanamo Bay constituted a clear violation of Canada's international human rights obligations, and, under Section 7 of the Canadian Charter of Rights and Freedoms, ordered the Canadian government to disclose to K the transcripts of the interviews he had given to its officials, which it did. After repeated requests by K that the Canadian government seek his repatriation, the Prime Minister announced his decision not to do so. K then applied to the Federal Court for judicial review, alleging that the decision violated his rights under Section 7 of the Charter. The Federal Court held that under the special circumstances of this case, Canada had a duty to protect K under Section 7 of the Charter and ordered the government to request his repatriation. The Federal Court of Appeal upheld the order, but stated that the Section 7 breach arose from the interrogation conducted in 2004 with the knowledge that K had been subjected to the "frequent flyer program".

II. In a unanimous decision, the Supreme Court of Canada allowed the appeal in part but declared that the government had violated K's rights.

Canada actively participated in a process contrary to its international human rights obligations and contributed to K's ongoing detention so as to deprive him of his right to liberty and security of the person, guaranteed by Section 7 of the Charter, not in accordance with the principles of fundamental justice. Though the process to which K is subject has

changed, his claim is based upon the same underlying series of events considered in *Khadr* 2008. As held in that case, the Charter applies to the participation of Canadian officials in a regime later found to be in violation of fundamental rights protected by international law. There is a sufficient connection between the government's participation in the illegal process and the deprivation of K's liberty and security of the person. While the U.S. is the primary source of the deprivation, it is reasonable to infer from the uncontradicted evidence before the Court that the statements taken by Canadian officials are contributing to K's continued detention. The deprivation of K's right to liberty and security of the person is not in accordance with the principles of fundamental justice. The interrogation of a youth detained without access to counsel, to elicit statements about serious criminal charges, while knowing that the youth had been subjected to sleep deprivation and while knowing that the fruits of the interrogations would be shared with the prosecutors, offends the most basic Canadian standards about the treatment of detained youth suspects.

K is entitled to a remedy under Subsection 24.1 of the Charter. The remedy sought by K – an order that Canada request his repatriation – is sufficiently connected to the Charter breach that occurred in 2003 and 2004 because of the continuing effect of this breach into the present and its possible effect on K's ultimate trial. While the government must have flexibility in deciding how its duties under the royal prerogative over foreign relations are discharged, the executive is not exempt from constitutional scrutiny. Courts have the jurisdiction and the duty to determine whether a prerogative power asserted by the Crown exists; if so, whether its exercise infringes the Charter or other constitutional norms; and, where necessary, to give specific direction to the executive branch of the government. Here, the trial judge misdirected himself in ordering the government to request K's repatriation, given the constitutional responsibility of the executive to make decisions on matters of foreign affairs and the inconclusive state of the record. The appropriate remedy in this case is to declare that K's Charter rights were violated, leaving it to the government to decide how best to respond in light of current information, its responsibility over foreign affairs, and the Charter.

Supplementary information:

Following the decision, the Federal Justice Minister sent a diplomatic note to the United States asking that the evidence gathered by Canadian officials not be used in any American legal proceeding against K.

Languages:

English, French (translation by the Court).



Croatia

Constitutional Court

Important decisions

Identification: CRO-2010-1-001

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 22.12.2009 / **e)** U-I-2643/2007 / **f)** / **g)** *Narodne novine* (Official Gazette), 4/10 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

3.18 General Principles – **General interest.**

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

4.8.4.2 Institutions – Federalism, regionalism and local self-government – Basic principles – **Subsidiarity.**

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

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

Keywords of the alphabetical index:

Company, pharmaceutical, right / Entrepreneur, market, equal position / Local self-government, property / Medication, supply / Ownership right, restriction / Pharmacy, ownership / Pharmacy, transfer / Property, transfer / Public health, protection.

Headnotes:

The legal prohibition of the transfer of founders' rights over pharmacies established by the county, as a unit of local or regional government, to other legal or natural persons safeguards the existence of a network of "county pharmacies" and therefore the implementation of the counties' duty in terms of health care activities (in this case accessibility and the supply of the population with necessary medication). It also achieves the necessary balance between the "public" and the "private" sector in the field of pharmaceutical activities.

The disputed legal measure could be included in the limitation of the ownership or property rights of counties within the meaning of Article 50.2 of the Constitution and it is acceptable in constitutional law since it has a legitimate aim, namely the protection of citizens' health in accordance with Article 50.2. Furthermore, in this case an excessive burden has not been imposed on counties, particularly in the light of their constitutional duty to deal, in their respective territories, with the public service element of pharmacy.

Because of the special nature of pharmaceutical activities, and the special constitutional position and importance of counties as units of local government and as legal persons in public law, it is not acceptable in constitutional law to identify counties with private entrepreneurs and to associate with them the guarantee of entrepreneurial and market freedoms.

Summary:

The Constitutional Court refused the request of a county for the initiation of proceedings for the constitutional review of Article 9a of the Pharmacy Act, which prohibits the transfer of founders' rights over pharmacies founded by the county to other legal or natural persons.

The applicant was a local government authority and had set up several pharmacies in its area. It contended that the disputed provision placed unconstitutional limits on its entrepreneurial freedoms and ownership rights. It also argued that the provision was out of line with certain constitutional provisions, namely Article 48.1 of the Constitution (guarantee of the right to ownership) and Article 50.2 of the Constitution (restriction of the entrepreneurial and ownership rights) and that they ran counter to other constitutional provisions regulating local and regional self-government, together with the internationally recognised principles of local self-government.

Starting from the premise that counties are public-law entities and subjects of public law, the Constitutional Court noted that founders' rights, the transfer of which is prohibited, represent property belonging to the counties with a special purpose in public law. Where there are potential breaches of ownership rights which are of a specific public-law nature and connected to a specific public-law owner, account must be taken of various factors that do not exist in cases of the protection of the constitutionally guaranteed ownership of private persons under private law. For instance, account must be taken of the state's powers to pass economic and social policy measures aimed at creating conditions for and harmonising activities and developments in all

fields of health so as to ensure the health care of the population. The state also realises its rights, obligations, duties and goals in the health care field by planning health care, determining the strategy for it and providing the legislative basis for achieving these goals. The state enjoys a degree of freedom of judgment in applying the measures it undertakes, as it does when applying measures in other fields related to national social, financial or economic policy.

The Constitutional Court found that the disputed legal measure could be included in the limitation of ownership rights of counties within the meaning of Article 50.2 of the Constitution and that it is acceptable in constitutional law since it has a legitimate aim: the protection of citizens' health in accordance with Article 50.2 of the Constitution.

When the Act came into force, there were more "private pharmacies" in the state. The Constitutional Court was of the opinion that there were grounds for the Government's statement – as the proponent of the Act – that any further transfer of the founders' rights of counties over the pharmacies they had set up to legal and natural persons could result in disarray in the public service sector of the pharmaceutical service, the primary goal of which is to give the population access to and supplies of the medication necessary to treat all illnesses. The network of county pharmacies founded by regional government authorities as public-law persons and subjects of public law prevent this type of disorder. The Constitutional Court accordingly found that the disputed legal measure is proportional with the legitimate aim that it is intended to achieve. This prohibition, on the one hand, secures the existence of the network of "county pharmacies" and enables the counties to carry out their health care obligations, and on the other hand achieves the necessary balance between the "public" and the "private" sector in the field of pharmaceutical activities.

The Constitutional Court reiterated that counties, as units of local and regional government, and under the remit of Article 134.2 of the Constitution, deal with health care matters, including pharmaceutical matters. The restriction the legislator has imposed on their founders' rights in pharmacies, which stops them transferring them to other legal or natural persons, cannot be considered as constituting a "burden" which would be the case for private persons and the property that they own, which is not intended to secure the functioning of a public service in the national interest.

The Constitutional Court stated that in this case, an excessive burden has not been imposed on counties, in particular because of the duty of each county regarding matters that relate to the pharmacy as a

public service. The legal ban on transferring founders' rights over pharmacies is difficult to perceive as being a restriction on their ownership rights in the usual sense of Article 50.2 of the Constitution.

Finally, due to the special nature of pharmaceutical activities, and the special constitutional position and importance of counties as units of local and regional government and legal persons in public law, the Constitutional Court noted that it was inappropriate in constitutional law to identify counties with private entrepreneurs and to associate with them the guarantee of entrepreneurial and market freedoms that are at the root of the economic organisation of the State, within the meaning of Article 49 of the Constitution.

Languages:

Croatian, English.



Identification: CRO-2010-1-002

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 17.03.2010 / **e)** U-I-988/1998 and Others / **f)** / **g)** *Narodne novine* (Official Gazette), 40/10 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

3.11 General Principles – **Vested and/or acquired rights.**
 3.12 General Principles – **Clarity and precision of legal provisions.**
 5.3.27 Fundamental Rights – Civil and political rights – **Freedom of association.**
 5.4.16 Fundamental Rights – Economic, social and cultural rights – **Right to a pension.**

Keywords of the alphabetical index:

Freedom of association, scope / Law, quality / Pension, fund / Pension, principle of insurance / Pension, principle of solidarity / Pension, scheme / Pension, social security / Right, essence, guarantee / Social security, board / Social security, right, contribution.

Headnotes:

The right to a pension (i.e. the right to obtain a social benefit from the pension insurance sub-scheme based on generational solidarity) is a pecuniary right enshrined in the Constitution, which is of a strictly personal nature. It is not subject to a limitation period, it cannot be transferred or inherited and is acquired under statutory conditions.

Pensions and other social benefits from pension insurance based on generational solidarity cannot be subsumed under the right of ownership in the meaning of private law, because these are benefits of a public-law nature that follow from a compulsory contributory scheme made for a special public-law purpose. Thus, it is constitutionally permissible to change, and even to revoke, certain types of pension benefits from that scheme, until the point is reached which calls into question the very essence of the right to a pension.

Legal provisions that are unclear, or which have uncertain or unpredictable effects, run counter to the principle of the rule of law, which must be fulfilled if a legal norm is to be considered a law.

The existence of a single Croatian Pension Insurance Bureau, as a legally-based public institution which implements compulsory and “pay-as-you-go” pension insurance within the first pillar of pension insurance, cannot be perceived or reviewed from the perspective of freedom of association in the meaning of Article 43 of the Constitution or of the prohibition of abuse of the monopoly position defined by the law in the meaning of the second sentence of Article 49.2 of the Constitution.

Summary:

The Constitutional Court did not accept a proposal from the Croatian Bar Association, one natural person, the Federation of Independent Trade Unions of Croatia, the Croatian Peoples' Party and several natural persons belonging to the Group of Disabled Workers Entitled to Part-time Employment from Split (the applicants) for the constitutional review of Articles 2.3, 5.3 and 6 of the Pension Insurance Act (hereinafter, the “Act”). However, under the authority contained in Article 38.2 of the Constitutional Act on the Constitutional Court, the Constitutional Court decided to institute proceedings on its own initiative for the constitutional review of Article 5.3 and 5.5 of the Act. It directed their repeal.

Article 2.3 of the Act stipulates that insured persons under the age of 40 are included in compulsory pension insurance for old age based on individual

capitalised savings, and that the contribution rate for this insurance may not be less than 5% of the base for payment of contributions to pension insurance based on generational solidarity.

The applicants challenged the constitutionality (Articles 3 and 14.1 of the Constitution) of the age element in the compulsory pension insurance scheme based on individual capitalised savings brought in by Article 2.3 of the Act, because their individual capitalised savings were completely ignored, although they were recognised for those under 40.

The Constitutional Court noted that pension insurance is an intrinsic part of “social security and social insurance” within the meaning of Article 56.1 of the Constitution. It found that the legislator has the constitutional obligation to regulate the rights of employees and their family members within the pension insurance framework, as the central link in the chain of social security. The Constitution does not contain a single provision defining the national pension insurance scheme (i.e. determining how to regulate eligibility for pension insurance). This was left to the legislator, who prescribed in Article 1 of the Act the tripartite structure of the pension scheme. Unlike the first pillar of the pension scheme, based on generational solidarity and managed by public law subjects, the second and third pillars of the individual capitalised savings are managed by private law subjects. As the first pillar of the pension scheme (the sub-scheme of generational solidarity) is a defined benefit pension scheme, and the sub-schemes of compulsory (second pillar) and voluntary (third pillar) insurance based on capitalised savings are defined contribution pension schemes, there are fundamental differences between the rules that govern the amount of the pensions. These rules start from a different basic approach and have a different social and economic function.

The Constitutional Court noted that the Pension Insurance Act regulates only one of the three pillars mentioned in the Act (the compulsory pension insurance based on generational solidarity). The applicants disputed the compliance with the Constitution of compulsory pension insurance grounded on individual capitalised savings, which is the second pillar of the national pension insurance scheme. However, Article 2.2 of the Act clearly shows that the second and third pillars of the pension insurance system are regulated by separate legislation and not by the Act.

Moreover, the Constitutional Court found that compulsory pension insurance grounded on individual capitalised savings is not regulated in this Act, and therefore not subject to these constitutional court proceedings.

Article 5.3 of the Act stipulates that acquired pension insurance rights, specified by law, may be revoked only in cases specified by this Act.

The applicants suggested that this provision was unconstitutional, as it contravened Article 3 of the Constitution (the principle of social justice) and Article 16 of the Constitution (principle of proportionality in limiting rights and obligations) by regulating by statute that acquired rights from pension insurance specified by law may be revoked.

The Constitutional Court found that the right to pension insurance is one of the inherent rights of employees and of their family members to social security and social insurance within the meaning of Article 56.1 of the Constitution. It is enshrined in the Constitution and under the protection of the Constitutional Court.

The Constitutional Court also found that the right to a pension (the right to obtain social benefit from the pension insurance sub-scheme based on generational solidarity) is a pecuniary right enshrined in the Constitution, which is of a strictly personal nature, not subject to a limitation period, it cannot be transferred or inherited, and is acquired under statutory conditions. Pensions and other social benefits from pension insurance based on generational solidarity cannot be subsumed under the right of ownership in the meaning of private law, because these are benefits of a public-law nature that follow from a compulsory contributory scheme made for a special public-law purpose. It is therefore constitutionally permissible to change, and even to revoke, certain types of pension benefits from that scheme, up to the point where the very essence of the right to a pension comes into question.

The Constitutional Court did not accept the reasoning given by the applicants as grounds for initiating a constitutional review of Article 5.3 of the Act.

However, the Constitutional Court noted that the applicants' petition revealed a particular breach of the Constitution by Article 5.3 and 5.5 of the Act (they stipulate that acquired pension insurance rights specified by law may be revoked only in cases specified by this Act) when viewed in the light of the principle of the rule of law, the highest value of the constitutional order of the Republic of Croatia stipulated in Article 3 of the Constitution.

The Constitutional Court pointed out that the legal restriction in Article 5.3 and 5.5 of the Act fails to respect the basic legal principles of *lex specialis derogat legi generali* and *lex posterior derogat legi priori*. The Act is a general law dealing with matters

arising from a pension insurance system grounded on a scheme based on generational solidarity. Its general rules may be overridden by a special law. Equally, subsequent legislation that regulates the same material as the Act in a different way has priority. These are general legal principles of universal meaning which may not, and cannot, be derogated from, which is what has been attempted in the disputed provisions of the Act.

The Constitutional Court therefore directed the repeal of the disputed provisions, although their repeal does not and cannot have any practical legal consequences because they are "non-viable" legal norms. This has been confirmed by legislative and legal practice in the wider sense on several occasions.

Finally, the Constitutional Court noted that the disputed provisions of the Act highlight the necessity to enhance the quality of the national laws, especially the technique of writing them, and the need for standardisation of legal rules in cases where one law derogates from the provisions of another.

The Constitutional Court noted that Article 5.3 of the Act contains two concepts that are in practice interpreted in different and even opposite, ways. These are the concept of "acquired rights" in pension insurance based on generational solidarity and the concept of revocation of these rights, which some of the earlier legislation had already recognised for beneficiaries.

Much of the confusion over pension insurance rights based on generational solidarity has arisen from these two concepts, which are the backbone of the statutory rule in Article 5.2 of the Act ("acquired pension insurance rights specified by law may be revoked..."). This is very apparent from the proposal to institute proceedings to review the conformity of this legal provision with the Constitution.

The Constitutional Court therefore pointed out that it is unacceptable to formulate legal provisions that are unclear, or which have uncertain or unpredictable effects. Such formulations do not comply with the demands of the principle of the rule of law, which must be fulfilled if a legal norm is to be considered a "law".

Article 6 of the Act stipulates that the Croatian Pension Insurance Bureau, a public institution, was set up in order to realise the rights of workers, farmers, self-employed persons and other insured persons specified by this Act.

The applicants argued that the Bureau is a monopoly in an area in which there is freedom of association, and that the disputed provision of the Act is in breach of Article 43 and the second sentence of Article 49.2 of the Constitution.

The Constitutional Court noted that the Bureau was founded by law to carry out work connected to the first pillar (the pension insurance sub-scheme regulated in the Act). The Bureau is therefore only the insurance sponsor of that part of the pension scheme created in order to ensure a basic level of social insurance. To this end the Bureau is the institutionalised expression of the State's constitutional obligation to safeguard the rights of employees and their families to social security and social insurance under Article 56.1 of the Constitution.

However, the pension insurance scheme overall comprises two further pillars (sub-schemes) that are based on the principles of capitalised savings.

In view of the structure of the pension insurance scheme, and of the legal characteristics of the first pillar that is based on the principle of generational solidarity, the position of the Croatian Pension Insurance Bureau within the first pillar cannot be viewed in the light of the second sentence of Article 49.2 of the Constitution (prohibition of abuse of a dominant position as defined in law).

The Constitutional Court also noted the existence of the Bureau as a public institution established by law, which implements compulsory and pay-as-you-go pension insurance within the first pillar of pension insurance. It cannot reasonably be connected with the freedom of association in the meaning of Article 43 of the Constitution.

The constitutional guarantee of the freedom of association includes the freedom to set up trade unions and associations, and the freedom of every individual to join or leave them. The freedom of association has a negative aspect (the freedom not to be a member), which is also protected under the Constitution. Trade unions and association may freely address issues connected to pension insurance and pension rights in the Republic of Croatia. This does not, however, mean that they may perform the work of the Pension Insurance Bureau.

In the same way that the Bureau's activities do not fall under the constitutional field of the freedom of association, the freedom of association to realise objectives connected to pension and disability insurance is not restricted or threatened by the activities of the Bureau.

In view of the above, the Constitutional Court held that the alleged non-conformity of Article 6 of the Act could not be reviewed or examined from perspective of Article 43 and the second sentence of Article 49.2 of the Constitution.

Languages:

Croatian, English.



Identification: CRO-2010-1-003

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 17.03.2010 / **e)** U-I-2771/2008 / **f)** / **g)** *Narodne novine* (Official Gazette), 40/10 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Craft industry, organisation, property, protection / Entrepreneur, status, equal.

Headnotes:

A provision of the Crafts Act stated that a craftsman is liable for obligations incurred in performing the craft to the extent of all of the registered property necessary for running the craft business, rather than to the extent of all his or her property (by contrast to Article 9.2 of the Companies Act in the case of a sole trader). In this way, the legislator introduced different legal regimes for the liability of debtors for obligations incurred in business operations. This led to an exception to the principle of the inseparability of property and the principle of liability over the entire property. These are universal principles, which are applicable to all categories of economic subjects, including craftsmen.

The State's obligation to guarantee all entrepreneurs an equal legal status in the market, enshrined within the first sentence of Article 49.2 of the Constitution, requires that entrepreneurs are equal in terms of their obligations as well as their rights.

Summary:

On the basis of its powers under Article 38.2 of the Constitutional Act on the Constitutional Court, the Constitutional Court decided to institute proceedings to review the conformity of Article 20.1 of the Crafts Act. It directed its repeal.

Under Article 20.1, craftsmen are liable for obligations arising from their craft businesses to the extent of all the registered property necessary for running a craft business.

Under company and commercial law, each business owner is liable for the business obligations of his or her enterprise to the extent of all his or her property. However, decisions of the Constitutional Court (including cases nos. U-III-783/2005 and U-III-4649/2004) highlighted the concept of "registered property necessary for running a crafts business", under Article 20.1 of the Act, as an unclear and indefinite category. They also highlighted problems with the manner in which the liabilities of craftsmen are regulated in this provision in terms of guaranteeing the equality of everyone before the law, and in terms of guaranteeing entrepreneurs an equal legal status within the market. The State is obliged to ensure this protection is in place.

The Constitutional Court also reviewed the legal regulation of liability for the obligations of craftsmen, sole traders and corporations, these being the three basic statutory organisational formats for economic subjects in legal operations. A craftsman is a natural person who performs his or her economic activities on the grounds of regulations governing crafts and is liable to the extent of all the registered property necessary for running a crafts business. A sole trader is also a natural person performing economic activities on the grounds of regulations about crafts, but he or she is liable for obligations to the extent of his or her entire property. A company is also a legal person and likewise liable for its obligations to the extent of its entire property.

During its review of the constitutionality of Article 20.1 of the Act, the Constitutional Court examined whether the differences in the extent of the liabilities of craftsmen, sole traders and companies were constitutionally justified or whether they violated the constitutional principle of equality (Article 14 of the Constitution) and bestowed an unfair advantage on

craftsmen, which would mean that the State was in dereliction of its duty to ensure all entrepreneurs an equal legal status in the market (Article 49.2 of the Constitution). The Constitutional Court had to determine whether craftsmen and sole traders enjoyed the same legal position, whether the Crafts Act regulated these situations in different ways, and whether the legislator had an objective and reasonable justification for doing so.

The Constitutional Court found that when the legislature stipulated in Article 20.1 of the Act that craftsmen were liable for obligations incurred in the performance of their craft to the extent of "all of the registered property necessary for running a crafts business", rather than "with all his assets" (which is the regime applied by Article 9.2 of the Companies Act to sole traders), it introduced different legal regimes for the liability of debtors for obligations incurred in business operations. This led to derogations from the principle of the inseparability of property and the principle of liability to the full extent of one's property which are universal principles and applicable to all forms of economic subjects, including craftsmen.

The Constitutional Court held that the State's obligation to guarantee all entrepreneurs an equal legal status on the market, under the first sentence of Article 49.2 of the Constitution, entails equality for entrepreneurs in terms of their obligations and not only their rights. Sole traders are, in accordance with the principle of the inseparability of property, liable for obligations to the full extent of their property, whether this is invested in their business or whether it is private. However, under Article 20.1 of the Crafts Act, the private property of craftsmen, which falls outside the category of "registered property necessary for running a crafts business" is exempt from liability. Since it is not possible to differentiate between these two kinds of property in the case of craftsmen and in terms of the principle of the inseparability of property this differentiation is not permitted, Article 20.1 has cast doubts over the equal legal status on the market of sole traders and craftsmen. It therefore also contravenes the first sentence of Article 49.2 of the Constitution.

The non compliance of the disputed provision with Article 49.2 of the Constitution also stems from the fact that craftsmen, like companies, are economic subjects, carrying out entrepreneurial activities within the market, despite the fact that craftsmen are natural persons and companies are legal persons, and that they do not perform their activities under the same regulations.

Starting from the principle of the inseparability of property, as the basis of the system of liability for business obligations created on the market, there is also no reason based on constitutional law for companies to be liable to the extent of their entire property whilst craftsmen are only liable to a certain extent of it.

Recognising the need for coherent economic practice, the Constitutional Court determined, under Article 55.2 of the Constitutional Act on the Constitutional Court, that this decision would enter into force on 15 July 2010.

Languages:

Croatian, English.



Identification: CRO-2010-1-004

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 17.03.2010 / **e)** U-II-38101/2009 / **f)** / **g)** *Narodne novine* (Official Gazette), 36/10 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Local self-government, competence / Local self-government, legislative power.

Headnotes:

The Local and Regional Self-Government Act failed to establish a competent body to appoint and dismiss members, representatives or management bodies to the management committees of public institutions, companies or other legal entities founded, owned or co-owned by local authority institutions. The Act leaves this function to local government legislation; thus the legislator has left the issue within the remit of local government.

The right to local self-government is realised through the local representative body under the Constitution. The legislator provided the municipal council, city council and county assembly, and the City Assembly of the City of Zagreb with the right to stipulate in their statutes the body competent to elect and dismiss the representative of this unit in the management committees or assemblies of the above legal entities. Each representative body decides whether this function is to be exercised under its statute by the representative body itself or the mayor or municipal or county prefect. A statutory stipulation that one of these bodies is authorised to carry out these activities is not disputable from the perspective of lawfulness or constitutionality.

Summary:

The Constitutional Court rejected a proposal lodged by a natural person for the review of the constitutionality and legality of Articles 18.2 and 49.9.3 of the City of Beli Manastir Statute (hereinafter, the "Statute").

Article 18.2 of the Statute stipulates that the City Council shall, within its jurisdiction, appoint and dismiss members of management boards and councils of public institutions, companies and other legal persons in Paragraph 1 of the Article, as well as their management committees, if this is not otherwise provided in a separate decision.

Article 49.9.3 of the Statute stipulates that the City Council shall elect, appoint and dismiss the City's representative to the assemblies of companies co-owned by the City and to the management boards of institutions founded by the City.

The applicant argued that the Statute does not give the unit of local government the power to regulate the jurisdiction of this body regarding elections or appointments to the management committees of the institutions it has set up or to the boards of companies of which the local government unit is a founder and member, neither can the Statute regulate the authority of the representative body to perform these functions.

In the applicant's view, under Article 9, in connection with Article 42.1 of the Local and Regional Self-Government Act (hereinafter, the "Act") the city mayor represents the city at company meetings and so the provision of the Statute to the effect that the City Council shall designate its representatives at meetings of companies the city council co-owns or has set up has no legal basis. In the legal sense, participation in a company assembly in fact means representing the founder. Since the executive body of

the local self-government unit – the city mayor – is elected in direct elections by the citizens to manage city property and represent the city, the representative body has no right to deprive him or her of his or her legally defined authority.

The Constitutional Court found various constitutional articles of significance in the constitutional review of these provisions, namely Articles 5.1, 132.1 and 132.2, 134 and 135. In terms of their lawfulness, Articles 8.2, 35.1.1, 35.1.2, 35.1.3, 35.1.5, 44, 48.1, 48.2, 48.4 and 48.6 of the Act were relevant.

Article 132 of the Constitution guarantees citizens the right to local and regional self-government, as a fundamental constitutional right. Contained within this right is the right to decide on citizens' needs and interests at a local level. This is realised through local respective regional representative bodies elected by the citizens at free elections by secret ballot.

The fundamental general legal act of a unit of local self-government is its statute. The details of local government jurisdiction are set out in Article 134 of the Constitution; further detail is contained in the law. Article 135 of the Constitution directly recognises the right of units of local self-government to arrange their internal organisation and jurisdiction in their statutes within legally-defined limits.

The law allows local authority bodies to regulate by statute all issues of importance for realising the rights of citizens which are necessary for rational and efficient local government.

In reviewing the constitutionality and lawfulness of the disputed provisions of the Statute, the Constitutional Court considered whether the representative body of the City of Beli Manastir in allowing itself by its Statute to elect, appoint and dismiss members of management committees of institutions, companies and other legal persons, or representatives to the boards of companies the City co-owned or which it had set up, had exceeded its jurisdiction as set out in the Act and thus deprived the executive body (the mayor) of his or her jurisdiction under the Act.

Under Article 35 of the Act, the jurisdiction of the representative body also includes adopting the statute of the unit of local and regional self-government, setting up working bodies of the councils and assemblies and electing members for them, appointing and relieving other persons as defined in legislation or other regulation or statute, and establishing public institutions and other legal entities to perform economic, social, utility and other activities of significance for local and regional government. However, a municipal prefect performs executive

business in a municipality, whilst a mayor exercises this function in a city and a county prefect at county level (see Article 44 of the Act).

In the Constitutional Court's opinion, the jurisdiction of the representative body of the unit of local self-government regulated in the Constitution and by law indicates its authority to elect, appoint or dismiss "other persons" outside the circle of members of working bodies of the councils or assembly. Thus the Act provides explicit authorisation for the representative body to designate in its Statute the body competent to elect, appoint or dismiss certain persons. The Constitutional Court brought the stated authority into correlation with the failure to establish a body competent to appoint and dismiss members, representatives or management bodies to the management committees of public institutions, companies or other legal entities founded, owned or co-owned by the unit of local self-government, and with the authority of the representative body to set up public institutions, companies or other legal entities. It found beyond doubt that the representative body of the unit of local self-government is entitled to stipulate in the Statute its powers to appoint or dismiss members and representatives to the management boards of public institutions, companies or other legal entities, which it has itself set up or which it owns or co-owns.

Article 42 of the Act stipulates that the mayor and the municipal and county prefects represent the municipality, city and county respectively. However, within the meaning of Article 42, the authority to represent does not include the authority to appoint members and representatives of the local government to the boards and assemblies of institutions and companies which the local government authority has itself set up. A local authority's right to represent relates to their legal representation "towards the outside" (e.g. at court, towards third persons, other state and public bodies).

The right to local self-government is realised through the local representative body (Article 132 of the Constitution). The legislator provided the municipal council, city council and county assembly, and the City Assembly of the City of Zagreb, with the right to stipulate in their statutes the body competent to elect and dismiss representatives of this unit to management boards and assemblies. Each individual representative body will decide whether the representative body itself will carry out this function or whether this should be done by the mayor or the municipal or county prefect. The statutory stipulation that one of these bodies shall be authorised to carry out these activities cannot be disputed from the aspect of lawfulness or constitutionality (Article 136 of the Constitution).

The Constitutional Court found that the proposal for the review of the constitutionality and lawfulness of the disputed provisions of the Statute was not well founded.

Languages:

Croatian, English.



Identification: CRO-2010-1-005

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 07.04.2010 / **e)** U-I-1029/2007 and U-I-1030/2007 / **f)** / **g)** *Narodne novine* (Official Gazette), 47/10 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

1.2.2.2 Constitutional Justice – Types of claim – Claim by a private body or individual – **Non-profit-making corporate body.**

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

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

Keywords of the alphabetical index:

Constitutional law, quality / Law, organic, quality.

Headnotes:

Under a provision of the Constitutional Act on the Rights of National Minorities, the legislator gave the political institutions representing national minorities the right to lodge a constitutional complaint, thereby extending the circle of persons entitled to lodge a constitutional complaint beyond the circle of persons stipulated in the Constitutional Act on the Constitutional Court.

The title of the Constitutional Act on the Rights of National Minorities does not change its legal nature and does not make it legally different from what it really is according to the Constitution and its content – i.e. an organic law.

Summary:

The Constitutional Court was asked to review the constitutionality of Article 38.3 of the Constitutional Act on the Rights of National Minorities. It did not accept the applicant's proposal to delete the word "constitutional" from the title and text of the Act.

Under the disputed provision of the Constitutional Act on the Rights of National Minorities, local or regional national minority councils, or representatives of national minorities and the Council of National Minorities have the right, in accordance with the provisions of the Constitutional Act on the Constitutional Court, to lodge a constitutional complaint with the Constitutional Court, if they assess on their own initiative or that of the members of a national minority that the rights and freedoms of members of national minorities, stipulated by the provisions of this Constitutional Act and special acts, have been violated.

The applicant contended that this provision broadened the jurisdiction of the Constitutional Court beyond that determined by the Constitution, and should not therefore be implemented. He suggested that the word "constitutional" should be removed, as the Act is an organic law and not a constitutional one.

In reviewing the disputed provision of the Constitutional Act on the Rights of National Minorities the Constitutional Court noted the following points:

By virtue of Article 131.2 of the Constitution, the Constitutional Act on the Constitutional Court is a regulation with the force of the Constitution (having been passed and amended by the procedure used for passing and amending the Constitution). The Constitutional Act on the Rights of National Minorities is, by the force of the Constitution (Article 15.2), an organic law passed by a two-thirds majority vote of all the representatives (Article 82.1). Therefore, despite being called "constitutional", the Constitutional Act on the Rights of National Minorities does not have the power of the Constitution and the Constitutional Act on the Constitutional Court, not having been passed by the same procedure as applies to the passing and amending of the Constitution.

In accordance with the above, and having in mind Article 5 of the Constitution, the Constitutional Act on the Rights of National Minorities must comply with the Constitution as well as the relevant provisions of the Constitutional Act on the Constitutional Court.

A constitutional complaint is a separate remedy in constitutional law for the protection of constitutional rights in individual cases. Every natural person (Croatian citizens as well as foreigners) may lodge a

constitutional complaint, and this also applies to all legal persons (whether domestic or foreign) and groups of individuals who enjoy the legal status of a party to the proceedings. The requirement for lodging a constitutional complaint is that the applicant of the constitutional complaint holds a constitutional right which has, in his or her view, been breached by a decision of a public or government authority.

The Constitutional Court referred to Article 128.4 of the Constitution and Article 62.1 of the Constitutional Act on the Constitutional Court and observed that the disputed provision did not broaden the jurisdiction of the Constitutional Court. However, the legislator had given the political institutions of national minorities the right to lodge a constitutional complaint and in that way broadened the circle of persons with the right to lodge a constitutional complaint beyond the circle of persons stipulated in the Constitutional Act on the Constitutional Court.

It went on to find that the disputed provision does not comply with the Constitution and the Constitutional Act on the Constitutional Court. The Constitutional Court also noted that Article 62.1 of the Constitutional Act on the Constitutional Court safeguards the universal protection of human rights and fundamental freedoms regulated in the Constitution. This includes everybody, including members of national minorities, but under the requirements stipulated therein.

Under Article 131.2 of the Constitution only the Constitutional Act on the Constitutional Court is a regulation that enjoys the legal force of the Constitution. The Constitutional Act on the Rights of National Minorities is, pursuant to Article 82.1 of the Constitution, an organic law passed by a two-thirds majority vote of all representatives. Therefore, the Constitutional Court found that in this case the title of the act itself does not change its legal nature and does not alter its fundamental legal "make-up" which is, under the Constitution and its content, an organic law.

Cross-references:

The earlier decision where the Constitutional Court held that the Constitutional Act on the Rights of National Minorities is, by its legal nature, an organic law, decision no. U-I-774/2000 of 20.12.2000, *Bulletin* 2000/3 [CRO-2000-3-018].

Languages:

Croatian, English.



Identification: CRO-2010-1-006

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 07.04.2010 / **e)** U-I-1267/2006 and Others / **f)** / **g)** *Narodne novine* (Official Gazette), 47/10 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Flat, privatisation / Flat, purchase, sale / Property, private and municipal.

Headnotes:

The sale of janitors' flats to their occupants under the Sale of Flats Intended for Janitors of Residential Buildings Act is a constitutionally permitted restriction of the joint ownership rights of flat owners to the janitor's flat as a common part of the building. It has a legitimate aim and is proportionate to the purpose it was intended to achieve, this being the completion of the "transformation" process of socially-owned flats by recognising the rights of persons who have been using janitors' flats on valid legal grounds to buy them under certain conditions. The earlier flat owners received the right to compensation at market value in proportion to their jointly-owned share of the janitor's flat.

The fact that persons who, on valid legal grounds, used the flat intended for the janitor of the residential building cannot buy these flats under the same conditions as the specially protected tenants under the Protected Tenancies (Sale to Occupier) Act is the consequence of their different legal position and does not represent a violation of the constitutional provisions of equality. This is so because the disputed Sale of Janitor Flats Act provided for equal conditions and ways of buying janitors' flats for all those who complied with the conditions. Thus it did not establish differences among subjects in the same position, i.e. within the same group.

Summary:

The Constitutional Court did not accept the proposals of several natural persons for the review of the constitutionality of Articles 1, 2, 3, 6, 7, 8, 10, 11, 12 and 18 of the Sale of Flats Intended for Janitors of Residential Buildings Act (the Act), and of the Act as a whole.

The Act regulates the conditions and the manner of the sale of flats intended for the janitor of a residential building together with the common parts and facilities of the building and the appertaining land, the manner of determining the price of the flats, and the manner of selling flats that were created by converting the common premises in a building.

The applicants disputed the constitutional ground for passing the Act. By separate claims they also challenged Article 1 (the subject of the Act), Articles 2 and 3 (the defined circle of persons authorised to submit requests to purchase flats), Article 6 (which stipulates that the vendor of the janitor flat is the municipality, city or the City of Zagreb, and the proceeds of sale of the flat also belong to them), and Article 7 (paragraphs 1 and 2 of which stipulate that if the previous flat owners and the local authority are co-owners of the janitor flat, the previous owners are entitled to compensation equal to the market value of their co-owned share, if they submit a request within fifteen days from the day when the purchase contract was made, and that the local authority shall pay the compensation from the proceeds of sale of the flat. Under paragraph 4, the former flat owner, within the meaning of the Act, is the person who became a flat owner in accordance with the provisions that were in force until 1 January 1997, apart from persons who bought a flat under the Specially Protected Tenancies (Sale to Occupier) Act. Also under challenge were Article 8 (this provides that the municipality, city and the City of Zagreb shall be vendors of a flat, that the proceeds of sale belong to the owners of the building in which the flat is situated, and that owners can request the funds to be paid into the common reserve account and used to cover the expenses of maintaining and improving the building), Articles 10, 11 and 12. These stipulate the manner of calculating the price of the flat – in a contract depending on the calculation of the value of the flat – in full, or in instalments – in accordance with the buyer's choice. They had an issue too over Article 18 (whereby persons who do not buy a flat under the provisions of the Act shall acquire the legal status of leaseholder).

The Constitutional Court found various constitutional provisions of direct relevance to the constitutional review of the provisions of the Sale of Janitor Flats Act. These were Article 3 (inviolability of ownership, and the

rule of law as the highest values of the constitutional order), Article 5.1 (the principle of constitutionality), Article 14 (prohibition of discrimination and equality of all before the law), Article 16 (restriction of liberties and rights and the principle of proportionality), Article 48.1 (guarantee of ownership rights), Article 50.1 (restriction or expropriation of property in the national interest upon payment of compensation equal to its market value).

Flats intended for janitors were not included in the Specially Protected Tenancies (Sale to Occupier) Act of 1991. These flats were given for use during the period of performing the functions of a janitor; and those performing this function did not enjoy the status of specially protected tenants. Thus, the legal position of those using janitors' flats had, from the time when they had acquired these rights, differed from the legal position of specially protected tenants in socially owned flats. Regarding the challenge to the constitutional ground for passing the Act, the Constitutional Court held that this Act belongs within the category of "transitional" legislation, which finalises the "transformation" of ownership in housing. It therefore held that the Act has the legitimate aim of solving the housing status of persons who were, on valid legal grounds, using flats intended for the janitor of a residential building.

Some of the applicants had claimed that the sale of the janitors' flats to their occupants restricted the rights of the flat owners (as owners of the privately-owned separate parts of the condominium) to joint ownership over janitor flats, as jointly-owned parts of the condominium (Articles 6 and 7 of the Act). The Constitutional Court found that in this case it was constitutionally permitted to restrict the (joint) ownership rights of flat owners to the janitor's flat as a common part of the building, as provided for by law. The restriction has a legitimate aim and is proportional to that aim (completing the "transformation" process of socially-owned flats by recognising the right of persons who have been using the janitor flat on valid legal grounds to buy it under certain conditions), and previous flat owners were entitled to compensation at market value in proportion to their jointly-owned share of the janitor flat.

Some applicants had argued that through the establishment of the municipality and city as the exclusive vendors of the janitor's flat, the flat owners' right to dispose of their jointly-owned share consisting of the janitor's flat was restricted (Article 8.1 of the Act). The Constitutional Court noted that had a different person been authorised to enter into the contract to sell the flat, this would not have changed the flat-owners' obligation to make the contract. The flat owners are obliged to make a contract to sell the flat to persons authorised to buy janitors' flats, if they

so request (otherwise, somebody authorised to submit a request to buy such a flat may realise his or her right through a court judgment that replaces a purchase contract for the flat). The Constitutional Court therefore found that the disputed provision does not constitute a substantial restriction of the joint owners' right and that the transfer of powers to the municipality, city or the City of Zagreb to sell the janitors' flats in the name and benefit of all the owners does not contravene Articles 48 and 50 of the Constitution.

Other applicants had suggested that when the legislator introduced the term "previous flat owner" (Article 7.4 of the Act), it drew a distinction between the two categories of flat owners. In this particular case, this meant that one category of flat owners (who had bought their flats under the Sale to Occupier Act, which allowed specially protected tenants to buy the flats they were living in) lost the right to compensation equal to the market value. The Constitutional Court found that the term "previous flat owner" was introduced for the needs of the Act and is restricted to its implementation, and that the distinction between those earlier flat owners (who bought their flat according to its market value, which also included the value of the janitor flat) and persons who bought their flat under the Specially Protected Tenancies (Sale to Occupier) Act (who did not buy the flat according to its market value or for a price that included the value of the janitor flat) is just and in accordance with the aim which the law intended to achieve. The Constitutional Court noted that (earlier) specially protected tenants did not pay the market value of their flat when they bought it under the Specially Protected Tenancies (Sale to Occupier) Act. Starting from the fact that socially-owned flats were sold during the transition period, the transformation of social ownership and the reform of the entire political, economic and social organisation of the state, they paid the price that the legislator assessed corresponded with their social potentials and they received the stimulation of more favourable conditions as to the amount they paid for the flats and the way they did this. Therefore, the constitutionally guaranteed right of ownership of the persons who bought their flat under the Specially Protected Tenancies (Sale to Occupier) Act were not violated (Article 48.1 of the Constitution).

The suggestion was also made that, with regard to the amount paid for the flats and how they were paid for (Articles 10, 11 and 12 of the Act), the applicants were placed in an unequal position in comparison with persons who bought flats under the Specially Protected Tenancies (Sale to Occupier) Act. The Constitutional Court found that comparison or equalisation of these categories of persons is not

possible. The grounds for the use of socially-owned flats by specially protected tenants and for the use of janitors' flats in residential buildings are different. The fact that persons who, on valid legal grounds, used flats meant for the janitor of a residential building cannot buy these flats under the same conditions as specially protected tenants under the Specially Protected Tenancies (Sale to Occupier) Act is the consequence of their different legal position and does not represent a violation of the constitutional provisions of equality. This is so because the disputed Act provided for equal conditions and ways of buying janitors' flats for all persons who comply with the conditions. It did not, therefore, establish differences among subjects in the same position, i.e. within the same group.

Consequently, the Constitutional Court did not accept the applicants' claims about the unconstitutionality of the Sale of Janitor Flats Act as a whole, or the disputed provisions.

Cross-references:

Previous decision providing interpretation of the three constitutional rules on the ownership rights guarantee, Decision no. U-III B-1373/2009 of 07.07.2009, *Bulletin* 2009/2 [CRO-2009-2-010].

Previous decision expressing the Court's opinion on the establishment of differences among subjects in the same position, Decision no. U-I-697/95 *et al* of 29.01.1997, *Bulletin* 1997/1 [CRO-1997-1-002].

Languages:

Croatian, English.



Cyprus

Supreme Court

Important decisions

Identification: CYP-2010-1-001

a) Cyprus / **b)** Supreme Court / **c) / d)** 08.10.2009 / **e)** / **f)** Criminal Appeal 56/2009 / **g) / h).**

Keywords of the systematic thesaurus:

4.7.1 Institutions – Judicial bodies – **Jurisdiction.**
 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.**
 5.3.13.5 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Suspensive effect of appeal.**

Keywords of the alphabetical index:

Challenging, judge.

Headnotes:

The right to criticise judgments is undeniable. However, its exercise while criminal liability is under judicial deliberation is prejudicial and encroaches on the rights of parties to a fair trial. It also tends to undermine the judiciary as the constitutional guardian of the rights of the individual. Dismissal of judicial proceedings because of press reports or adverse comments jeopardises individual rights guaranteed in the Constitution under Article 30.2. The rights of the accused safeguarded by Article 30.3 are interwoven with the exercise of the judicial proceedings and not with their suspension.

Summary:

Police officers were accused of assaulting and humiliating two students. An indictment with 96 charges was drawn up and the defendants were brought to trial before the Assize Court which eventually acquitted them on the ground that the defendants' guilt had not been established beyond reasonable doubt.

Halfway through the delivery of the judgment, the Attorney General entered the court room and requested that the reading of the verdict be stopped. The presiding judge denied his request and the Attorney General left the court. Then the Attorney General openly questioned the court's judgment, casting doubt on its correctness. His attack on the decision led to various public demonstrations against the decision and the writing of many articles criticising its correctness.

An appeal was filed by the Attorney General against the judgment. Upon the respondents' application, an order was sought based on two grounds and objectives. Firstly, the appeal should be suspended on the grounds that a fair trial could not be conducted due to the extreme publicity and the demonstrations following the issuing of the acquittal. It was argued that the image of the administration of justice system had been severely distorted in the eyes of the ordinary man in the street. Thus, if the appeal were to lead to the police officers being convicted, they might well draw the inference that the Court had arrived at that decision due to the tremendous pressure of the publicity.

Secondly, the trial should be stayed in view of the inappropriate remarks made by the Attorney General immediately after the delivery of the judgment by the trial Court and the day before filing the appeal. Following the case of *Constantinides v. Vimama Ltd* (1983) 1 CLR 348 they argued the process should be suspended until the Attorney General withdrew his comments and declarations, thereby restoring the dignity, honour and jurisdiction of the Court.

With regard to the first ground of the application, the justices noted that the right to criticise judgments is undeniable, but that its exercise while criminal liability is under judicial deliberation is prejudicial and encroaches on the rights of parties to a fair trial. It tends to undermine the judiciary as the constitutional guardian of the rights of the individual. However, a decision to dismiss judicial proceedings because of press reports or adverse comments would certainly jeopardise individual rights guaranteed in the Constitution under Article 30.2. The opinion of an ordinary member of the public in the street could not constitute a rational criterion for allowing the application and for the Court to refuse to exercise its appellate jurisdiction. They pointed out the dangers of such a state of affairs. The whole judicial function would be rendered ineffective as it would culminate in the denial of the right of the individual to a fair trial and the determination of criminal culpability would be left in the hands of the media. The principle enshrined in Article 30.2 requires the sole arbiters of the criminal responsibility and the rights and obligations of parties to be the national courts of law. The rights of the accused safeguarded by Article 30.3

are interwoven with the exercise of the judicial proceedings and not with their suspension. The administration of justice cannot be subordinated to or be interrupted by any reason extraneous to the purposes it is designed to serve. Therefore the first ground of the application was dismissed. The justices proceeded to examine the second ground and whether the dictum in *Constantinides* case was to be followed and the proceedings stayed.

In *Constantinides* the appellant was the chief editor of the newspaper and after the dismissal of his claim for libel and whilst intending to appeal he published various texts attacking the reasoning of the judicial decision to dismiss his action for libel. An application was filed by the respondents to prevent the appellant being heard before withdrawing the statements. The Supreme Court justices were unanimously of the opinion that the exercise by the appellant of his statutory right of appeal, while questioning the impartiality of the judiciary in the manner outlined above, amounted to a gross abuse of the process of the Court. Therefore, unless the appellant first restored the authority of the Court, it would have been an abuse on his part to invoke its powers to obtain justice in the case. The litigant had attempted to vindicate his proclaimed rights through the press, by destroying the premises upon which justice is administered, that is, the impartiality of the judiciary.

On behalf of the Attorney General, the argument was evinced that the distinguishing feature between the case in point and *Constantinides* is that in the former the impartiality and integrity of the Court had not been questioned and that the statements of the Attorney General in the interview broadcast the day before the appeal was filed may have been severe and harsh, but they were critical of a court decision and were expressing disagreement with its correctness and the decided acquittals.

Although in the case under examination it was to be expected that the Attorney General would have withdrawn his statements, the majority of the members of the Court pointed out that the process was not punitive in nature. It was not a question (and this was in any case beyond their jurisdiction) of taking measures in the form of a penalty for what was said. The issue as put to them was whether the Attorney General manifestly abused the judicial process by seeking to exercise the appeal and requesting the intervention of the Supreme Court.

Distinguishing the case from *Constantinides*, they noted the declaration of the Counsellor on behalf of the Attorney General that the latter never doubted the honesty, impartiality of the Assize Court and of the Supreme Court whose jurisdiction he addressed,

having full confidence in the current justice system as structured and institutionalised under the Constitution and Laws. The statements of the Attorney General might have been severe and harsh but they were made in the context of criticism which was merited in the public interest.

The President and another member of the Supreme Court did not concur with the above approach to the second ground of the application. They distinguished their opinion from that of the majority. In their opinion, the Attorney-General's statements could not be seen as mere criticism and disagreement with the correctness of the decision, and had certainly not only undermined the trial court's authority, but also the justice system and its administration in general.

They concluded that the statements of the Attorney General fell within the scope of the decision in the case of *Constantinides*. The rationale for the decision of *Constantinides* warranted scope for the Court, when its validity to administer justice is under challenge by a litigant in any derogatory sense, to order a stay of the proceedings when its continuation would be an abuse of the process of the Court. However the Attorney General was not strictly speaking, 'a party' to the proceedings and his statements were not made in such a capacity.

Languages:

Greek.



Identification: CYP-2010-1-002

a) Cyprus / **b)** Supreme Court / **c)** / **d)** 08.12.2009 / **e)** 1/2009 / **f)** President of the Republic and the House of Representatives / **g)** / **h)**.

Keywords of the systematic thesaurus:

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

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

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

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

4.5.6.1 Institutions – Legislative bodies – Law-making procedure – **Right to initiate legislation.**

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

Keywords of the alphabetical index:

Constitution, interpretation.

Headnotes:

The provisions of Article 80.2 of the Constitution are clear and unambiguous. It can only be interpreted as imposing an express limitation upon the power of the House of Representatives in the context of a Bill relating solely to an increase of budgetary expenditure. The Court cannot change words in legislation to cover cases for which no provision has been made (*Casus omissus*). That would result in an amendment of the law, not an interpretation of it. The spirit and tenor of the Constitution do not encompass a conceptual context disassociated from the explicit provisions of the Constitution. They are depicted by reference to those explicit provisions and to the rules of construction that emerge from them.

Summary:

The President of the Republic asked the Supreme Court for its opinion as to whether the Law on Value Added Tax (Amendment) (no.2) Act 2009 was incompatible or inconsistent with the provisions of Articles 61, 80.2 and 179 of the Constitution and the principle of separation of powers. The above Amendment Act was introduced as a Bill by a number of members of the House of Representatives and related to a reduction in VAT for catering and for foods, excluding drinks, beer and wine, from 8% to 5%.

Article 61 of the Constitution assigns the legislative power of the Republic in all matters other than matters expressly reserved for the Communal Chambers to the House of Representatives.

Article 179 provides that, subject to the provisions of Article 1A, the supreme law of the Republic is the Constitution and no law or act or decision may be in any way contrary or inconsistent with any of its provisions.

Finally, Article 80.2 provides that no Bill relating to an increase in budgetary expenditure can be introduced by a Representative.

On behalf of the President of the Republic, the Attorney General argued that the amending Act violated the principle of separation of powers that earmarks the authority of state powers under the

Constitution. He alleged that the impugned law was enacted in violation of Article 80.2 of the Constitution.

In his opinion, Article 80.2 of the Constitution covers increases as well as decreases in budgetary expenditure. He made reference to the provisions of Article 40 of the French Constitution and to a similar provision in the Greek Constitution (Article 73.3), and suggested that members of the judiciary should follow the meaning and the purpose of the above constitutional provisions in their interpretation of Article 80.2 of the Cypriot Constitution. Finally, he invited the Court to interpret the above Article in a broad sense since a reduction in income in essence equates to an increase in costs. He therefore concluded that the impugned law introduced by a Bill of Law contravened Article 80.2.

Advocates of the House of Representatives, however, argued that the meaning of Article 80.2 is clear and unambiguous and not open to a different construction or interpretation. The members of the Supreme Court, having regard to the words used in this constitutional provision, all contended that there was no scope for any other interpretation. It is a “canon rule” that law cannot be widely construed and it is not permissible to deliberately broaden its interpretation so as to insert a provision where it is abundantly clear that such a provision has not been included.

There is no precedent for empowering the Court to change the wording of legislation or to cover cases for which no provision had been made (*casus omissus*). That would result in an amendment of the law rather than an interpretation of it. Regarding the proposition that Article 80.2 should be interpreted in accordance with the spirit of the Constitution, the Court emphasised that the spirit and tenor of the Constitution do not encompass a conceptual context disassociated from the explicit provisions of the Constitution. They are depicted by reference to those explicit provisions and to the rules of construction that emerge from them.

The relevant provisions of the French and Greek Constitutions that explicitly provide for and prohibit the reduction of income have no impact on the provisions within the Cypriot Constitution. Had the legislator intended to include such a provision, he would have done so explicitly.

It was therefore unanimously held that the provisions of Article 80.2 of the Constitution are clear and unambiguous and the only interpretation possible was that to assume that it imposes an express limitation upon the power of the House of Representatives over a Bill relating solely to an increase of budgetary expenditure.

They therefore found the Act on Value Added Tax was not passed in contravention of Article 80.2 and in breach of the principle of separation of powers.

Languages:

Greek.



Czech Republic Constitutional Court

Statistical data

1 January 2010 – 30 April 2010

- Judgments of the Plenary Court: 7
- Judgments of panels: 78
- Other decisions of the Plenary Court: 11
- Other decisions of panels: 1 095
- Other procedural decisions: 52
- Total: 1 243

Important decisions

Identification: CZE-2010-1-001

a) Czech Republic / **b)** Constitutional Court / **c)** Fourth Chamber / **d)** 19.01.2010 / **e)** Pl. ÚS 16/09 / **f)** On the principle of equality of parties in proceedings on a preliminary injunction / **g)** *Sbírka zákonů* (Official Gazette), no. 48/2010; *Sbírka nálezů a usnesení* (Collection of decisions and judgments of the Constitutional Court); <http://nalus.usoud.cz> / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Injunction, preliminary, protection, effective.

Headnotes:

In preliminary injunction proceedings, a real opportunity must exist for the affected party to protect his or her rights in relation to the order of the injunction. The purpose of a preliminary injunction as

well as the speed and efficiency of the proceedings must also be reflected.

Summary:

In a judgment of 19 January 2010 the plenum of the Constitutional Court repealed § 220.3 of the Civil Procedure Code with effect from 1 April 2011 because the section of the legislation that allows a decision to be amended, when a first-instance court has dismissed or denied a petition to issue a preliminary injunction or suspended proceedings on such a petition, is inconsistent with the principle of equality of parties to proceedings under Article 37.3 of the Charter of Fundamental Rights and Freedoms and Article 6.1 ECHR. The Constitutional Court also decided that, as long as this provision was in effect, it did not apply to a decision by the first-instance court to reject or deny a petition to issue a preliminary injunction or suspended proceedings on such a petition. In the same proceedings the plenum of the Constitutional Court rejected a petition seeking the repeal of § 76g of the Civil Procedure Code.

In a constitutional complaint on a related matter (file no. II. ÚS 2100/08), the Constitutional Court reviewed a situation where the plaintiffs sought a preliminary injunction order against the applicant, the defendant. The Municipal Court in Prague denied the application for the order of preliminary injunction, and in accordance with § 76g of the Civil Procedure Code the decision was delivered only to the plaintiff's attorney. He subsequently filed an appeal against the decision, which the appellate court granted in the contested decision and in accordance with § 220.3 of the Civil Procedure Code amended the Municipal Court's original decision to deny the application. The applicant argued that as she had been excluded from review of the matter by the court of second appeal (i.e. in the appeal proceedings), she was not given an opportunity to defend herself in the matter of the application for a preliminary injunction against the plaintiffs' claims and the court's decision.

In its judgment the Constitutional Court stated that the principle of equality of parties to proceedings is a key principle of a fair trial; it guarantees parties to the proceedings an equal status as regards the rights that the legal order grants them in specific types of proceedings. The principle of equality of parties to proceedings also applies in relation to an application to order a preliminary injunction, notably because of the potential to impose an obligation that has a significant impact on the legal position of the defendant. However, one cannot conclude from the principle of equality of parties to the proceedings that all parties must, at all times during the case, simultaneously have particular procedural means at

their disposal. Some procedural methods, by their nature and purpose, can only be exercised by one party. This applies to an application for a preliminary injunction because it serves, among other things, to ensure that the judicial protection that may be provided is effective. The legislator, in allowing a plaintiff in a case to which § 76g of the Civil Procedure Code applies, to exercise a remedy against a decision by the first instance court, can justify its action by the interest in the effective protection of the plaintiff's subjective rights. If the first-instance court's decision were to be delivered to the defendant, this could alert him or her to the plaintiff's procedural actions and allow the defence team to take actions that could defeat the effectiveness of any preliminary injunction subsequently issued. Therefore, non-delivery of the decision to the defendant, which basically ensures the point of the plaintiff's appeal, cannot be said to violate the principle of equality of parties to proceedings.

However, § 220.3 of the Civil Procedure Code is inconsistent with the principle of equality, because it interferes with the possibility of effective protection of a party's subjective rights before a court. Modification of procedures pursuant to § 210.1 of the Civil Procedure Code (delivery of an appeal to the defendant) and § 214.2.c of the Civil Procedure Code (ordering a hearing) cannot be used to protect the rights of a party to proceedings against whom an application for a preliminary injunction is directed. Such a practice would hinder the effective protection of rights by means of a preliminary injunction as the defendant could take steps to make it impossible to achieve its aim. Such actions would also be inconsistent with the requirements of speed, surprise and effectiveness.

The Constitutional Court noted that it was the legislator's prerogative to decide upon the legal framework to adopt for decision-making in preliminary injunction matters in order to remove the constitutional flaw set out in the judgment. It emphasised that this had arisen in the context of the entire legal framework for preliminary injunctions in the Civil Procedure Code and had manifested itself in this particular case in the complete absence of the right to be heard and the complete absence of opportunities for legal protection by the defendant against the preliminary injunction where it was the court of second instance that imposed the obligation on that party, in contrast to the petition and in contrast to the situation that would arise had the preliminary injunction been ordered by the court of first instance. The Constitutional Court therefore repealed § 220.3 of the Civil Procedure Code due to inconsistency with the principle of equality of parties to proceedings.

The Judge-Rapporteur in the matter was Pavel Rychetský. A dissenting opinion to Verdicts I to III, together with the reasoning of the judgment, was filed by Judge Ivana Janů.

Languages:

Czech.



Identification: CZE-2010-1-002

a) Czech Republic / **b)** Constitutional Court / **c)** First Chamber / **d)** 18.02.2010 / **e)** I. ÚS 1849/08 / **f)** On the prohibition of self-incrimination in administrative proceedings / **g)** *Sbírka nálezů a usnesení* (Collection of decisions and judgments of the Constitutional Court); <http://nalus.usoud.cz> / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

3.3 General Principles – **Democracy.**

5.3.13.23.1 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to remain silent – **Right not to incriminate oneself.**

5.3.28 Fundamental Rights – Civil and political rights – **Freedom of assembly.**

Keywords of the alphabetical index:

Fine, disciplinary, court, review / Sanction, administrative.

Headnotes:

Imposing a disciplinary fine simply on the grounds of failure to appear to provide an explanation is not permitted in the field of administrative sanctions, due to the necessity for the strict observation of the prohibition of self-incrimination (*nemo tenetur se ipsum accusare*), which follows from the interpretation of Article 6.1 ECHR.

Summary:

Upon the applicant's petition, Panel I of the Constitutional Court, by judgment of 18 February 2010, overturned the decision of the Supreme

Administrative Court of 5 June 2008, because it violated the applicant's fundamental rights under Articles 11.1 and 2.3 of the Charter of Fundamental Rights and Freedoms and Article 6.1 ECHR.

The applicant had received a disciplinary fine for failing to comply with a summons from an administrative body and for failing to appear to provide an explanation as to the conduct which the administrative body found to be in breach of transportation and road administration regulations. The breach the applicant was alleged to have committed was the following: as the organiser of a duly-announced gathering, he placed two loudspeakers on a road without having first sought authorisation from the relevant administrative office. Thus, he was alleged to have used the road for a purpose other than that for which it is intended. The appellate body upheld the decision to impose a fine, and the applicant's administrative complaint and cassation complaint were denied. The applicant contested the decision of the Supreme Administrative Court. In the *obiter dicta* of its decision, the Court agreed with the applicant that since the action in question was not a breach, the administrative body was not authorised to require an explanation from him. However, it concluded that if the applicant did not obey the summons, the decision to impose a disciplinary fine was in line with the law.

The Constitutional Court referred to its earlier case law concerning the exercise of state authority, which may not, in a substantive law-based state, be without content or purpose. The state authority must exercise the powers and competences to which an individual is fundamentally subject within the material scope of their function and must observe the requirements arising from the principle of proportionality. In the matter at hand, the Constitutional Court concluded that both administrative bodies exercised their formal authority, seen from a substantive point of view, *ultra vires*.

It should have been quite clear to the administrative body that the applicant's conduct did not satisfy the legal elements of an infraction, because placing loudspeakers on a road is part of the exercise of the right of assembly. Imposing a disciplinary fine only on grounds of failure to appear to provide an explanation is not permitted in administrative law, because it is necessary to strictly observe the prohibition on self-incrimination that arises from the case law of the European Court of Human Rights, or from the interpretation of Article 6.1 ECHR.

Insofar as the administrative bodies and the administrative court did not recognise the function of the fundamental right of assembly, or of the right to a

fair trial (in the aspect of the prohibition of self-incrimination), their actions towards the applicant were excessive.

The Supreme Administrative Court also failed to observe the constitutional imperative contained in Article 4.4 of the Charter and consequently confirmed the violation of the applicant's property rights. The decisions of the administrative bodies, resulting from their unconstitutional conduct, imposed a fine on the applicant, which naturally entails an unconstitutional reduction of the applicant's property. It also violated the applicant's right to free and autonomous will, as well as the right to a fair trial as to the aspects guaranteed by Article 6.1 ECHR.

Consequently, the Constitutional Court overturned the contested decision of the Supreme Administrative Court.

The judge rapporteur was Eliška Wagnerová. No dissenting opinions were filed.

Languages:

Czech.



Identification: CZE-2010-1-003

a) Czech Republic / **b)** Constitutional Court / **c)** First Chamber / **d)** 02.03.2010 / **e)** Pl. ÚS 13/08 / **f)** On financially securing judicial independence (freezing judges' salaries) / **g)** *Sbírka zákonů* (Official Gazette), no. 104/2010; *Sbírka nálezů a usnesení* (Collection of decisions and judgments of the Constitutional Court); <http://nalus.usoud.cz> / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

3.9 General Principles – **Rule of law**.
 4.5.8 Institutions – Legislative bodies – **Relations with judicial bodies**.
 4.7.4.6 Institutions – Judicial bodies – Organisation – **Budget**.
 4.7.8 Institutions – Judicial bodies – **Ordinary courts**.

Keywords of the alphabetical index:

Judge, salary, judicial independence.

Headnotes:

A temporary, justified freeze of judges' gross salaries cannot be considered an interference in their independence. However, a measure passed by the legislator which would halt the rate of growth of judges' salaries and potentially reduce the level of material security they already attained (even if this was only in part) would not be consistent with the principle of a democratic, law-based state, especially if the salary restrictions only applied to judges, and not to other state employees.

Summary:

The plenum of the Constitutional Court, in a judgment of 2 March 2010, rejected a petition from the Municipal Court in Brno, seeking the repeal of part of the Act on Stabilisation of Public Budgets concerning an extraordinary measure applicable to the determination of the level of salaries and reimbursement of certain expenses for state representatives and certain state bodies and judges in the years 2008 to 2010. It applied to judges of district, regional and high courts, the Supreme Court and the Supreme Administrative Court.

The Municipal Court pointed out that there were proceedings before it on a complaint in which a judge of the Municipal Court in Brno sought payment of CZK 3,900 on the grounds of entitlement to supplemental salary and compensation of expenses, because he had not received his full salary and full compensation of expenses to which he would have been entitled for January 2008. Under the provisions which the Municipal Court sought to strike out, judges' salaries in the period from 1 January 2008 to 31 December 2010 are calculated using the salary basis attained as of 31 December 2007. Thus, with effect from 1 January 2008 judges' salaries will not increase, although they should have increased in view of the Act on the Salaries of State Representatives.

According to the applicant, the contested statutory provisions are a disproportionate limitation on judges' salaries and inconsistent with Article 1.1 of the Constitution under which the Czech Republic is a sovereign, unitary and democratic state governed by the rule of law, founded on respect for the rights and freedoms of man and of citizens, in conjunction with Article 82.1 of the Constitution, which states that judges are to be independent in the performance of their duties and nobody may threaten their impartiality.

The Constitutional Court began by referring to its judgment in the matter Pl. ÚS 55/05 and stated that after the adoption of the new framework for calculating the salary basis for state representatives, and in view of current developments in setting the salary basis, a judge's gross annual salary calculated from the salary basis of 2007 did not increase in 2008. However, it did not decrease either. The current three-year freeze in judges' gross salaries cannot be considered constitutionally impermissible.

The Constitutional Court stated that in terms of the principle of division of powers and the requirement of their balance, the safeguards and guarantees set out in the Act on the Salaries of State Representatives were preserved. The extraordinary measure contested by the petitioner cannot be evaluated in isolation; rather it is essential to review its actual effect on the income situation of judges. The effect was not that of a permanent decrease in a judges' material security. An interference in the material security of judges, guaranteed by law, must be evaluated in the context protected by the principle of judicial independence. Although the independence of judges is conditioned by their moral integrity and level of expertise, it is also tied to appropriate material security; the ban on arbitrary restrictions of their salaries serves to prevent various types of pressure on their decision-making. The Constitutional Court took the view that in this particular case, a temporary freeze on the guaranteed increases of judges' pay did not have an impact on the levels of material security they had already attained that would give rise to an inference that this was an arbitrary action by the legislator aimed at limiting or removing judicial independence.

In the Constitutional Court's opinion, the reviewed legal framework did not represent a constitutionally impermissible removal of judges' salaries; a distinction has to be drawn between removal and a mere temporary freeze. It also pointed out that if the legislator had, even partly, removed the levels of material security judges had already attained, it could have hardly approved such a measure in terms of the principles of a democratic, law-based state.

Supplementary information:

The judge rapporteur in the matter was Miloslav Výborný. Dissenting opinions to the verdict and the reasoning of the judgment were filed by judges Vlasta Formánková, Eliška Wagnerová and Vladimír Kůrka. A dissenting opinion to the verdict of the judgment was filed by judge Pavel Holländer.

Summary of dissenting opinion of Constitutional Court Judge Pavel Holländer

The requirement for an independent judiciary stems from two sources: the neutrality of judges, as a guarantee of fair, impartial, and objective court proceedings, and from the securing of individual rights and freedoms by judges who are separate from political powers. Judicial independence is safeguarded by the guarantees of a special legal status, organisational and functional independence from bodies that represent the legislative and executive powers and the separation of the judiciary from the legislative and executive powers. In terms of its content, judicial independence is secured by the fact that judges are bound only by the law.

The independence of judges is primarily conditioned by their moral integrity and the level of their expertise, but it is also tied to their appropriate material security. Professional judges are entitled to a salary set at a level which should protect them from pressure over their decision-making, or influence over their conduct when determining the law, which could endanger their independence and impartiality. The reason for prohibiting arbitrary interference in the material security of judges (by salary restrictions) is to prevent the possibility of pressure by the legislative or executive power on judges' decision-making.

Summary of dissenting opinion of Constitutional Court Judge Vlasta Formánková

Denying the contested provision's unconstitutionality led to arbitrary interference by the legislator in the area of material security of judges and thus also in the principle of their independence. The Act on the Salaries and other Remuneration Connected with the Office of State Representatives, certain State Bodies, Judges, and European Parliament Deputies came into force on 26 October 1995. Since 1997, there has been a quite regular interference with judges' salaries, which resulted in the loss of guarantees in the stability of the levels of remuneration. Since judges' salaries were also repeatedly frozen in the past, judges began to meet the principle of economic solidarity at the time when the salaries of public sector employees grew. Thus, a professional group, whose opportunity to earn income other than salary is quite markedly limited by law, has been contributing for some time to the reduction of budget deficits.

Interference in the material security of judges guaranteed by law must, given the principle of proportionality, be justified by exceptional circumstances and may not create grounds for an inference that the limitation affects the dignity of judges or that it is an expression of constitutionally

impermissible pressure by the legislative and executive powers on the judicial power.

Summary of dissenting opinion of Constitutional Court Judge Eliška Wagnerová

The contested legal framework violated the equality of judges' legitimate expectation of non-frozen salaries in the years 2008 to 2010 in comparison with the salaries in effect for other state employees or employees paid from the state budget. The non-accessory principle of equality was also violated. When assessing the material security of judges, note must always be taken of the absolute prohibition on judges conducting business activity or conducting any activities other than those permitted by law (non-remunerated ones), and the fact that the material security of a judge is a safeguard for his or her independence.

Summary of dissenting opinion of Constitutional Court Judge Vladimír Kůrka

The appropriate material security of judges is an important condition for the independence and the constitutional position of judges on the one hand and the representatives of the legislative and executive power (especially state administration) on the other. These are different in view of the principles of division of powers and judicial independence. This also results in the limited scope for legislative discretion in the area of remuneration of judges. Interference in the material security of judges may not be an expression of arbitrariness by the legislator, but must be based on the principle of proportionality and justified by exceptional circumstances, such as the state experiencing tough economic times. If this condition is met, the difference in function between judges and representatives of the legislative and executive branches, particularly state administration, must be taken into account.

Languages:

Czech.



Identification: CZE-2010-1-004

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 30.03.2010 / **e)** Pl. ÚS 2/10 / **f)** On freedom of access to information / **g)** *Sbírka zákonů* (Official Gazette), no. 123/2010; *Sbírka nálezů a usnesení* (Collection of decisions and judgments of the Constitutional Court); <http://nalus.usoud.cz> / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
5.3.13.11 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Public judgments**.
5.3.24 Fundamental Rights – Civil and political rights – **Right to information**.

Keywords of the alphabetical index:

Judgment, publication / Judicial independence.

Headnotes:

A legal framework limiting the right to information, which does not allow for a review in every case as to whether the condition of necessity for the limitation has been met, is inconsistent with the right to information under the Charter. From this viewpoint, § 11.4.b of the Act on Freedom of Information was unconstitutional, as it prevented in a blanket manner the provision of court decisions that were still to come into force.

Summary:

In a judgment dated 30 March 2010, the plenum of the Constitutional Court repealed, with effect from the date of promulgation of the judgment, § 11.4.b of Act no. 106/1999 Coll., on Freedom of Information (hereinafter, the “Information Act”) due to a conflict with Articles 17.1, 17.2, 17.3, 17.4, and 17.5, and Article 4.4 of the Charter, and with Article 10.1 and 10.2 ECHR.

The Constitutional Court was asked to review a situation where the Supreme Administrative Court had resolved to approve a legal framework under which § 11.4.b of the Information Act prevents subjects from providing information in the form of court decisions that are not yet in force. The applicant observed that decisions resulting from the courts' decision-making activity – apart from certain narrowly-defined exceptions – are public. This is all the more relevant if information on them is requested from a public authority which, in the proceedings that

led to the decisions, was acting in a dispute over state property. In the applicant's opinion, the question of the legal force of a decision was not a criterion that could meet the substantive conditions for limiting the right to information under Article 17.4 of the Charter.

In connection with Article 17.4 of the Charter and Article 10.2 ECHR, the Constitutional Court reviewed whether the limitation established in the contested provision encroached on the right to receive information, whether it pursues one or more legitimate aims and whether it was "necessary in a democratic society" in order to achieve those aims. In this regard, the Constitutional Court concluded that the norm in question did not meet the condition of necessity for limitation of an individual's fundamental right or freedom in a democratic society.

In the Constitutional Court's opinion, the contested norm does not permit review of the existence of "urgent social need" for limitation of a fundamental right in each particular case. The contested norm indicates that given the existence of a statute and a legitimate aim for limitation of the fundamental right to information, the limitation will always be given priority over the individual's fundamental right to information.

In the Constitutional Court's opinion, publication of court decisions that are not in effect does not *a priori* violate protection of the impartiality and independence of the judicial power. Individual cases must be assessed in view of their specific circumstances; thus, in some cases an "urgent social need" may exist for limiting the fundamental right in question and information will not be provided. In contrast, in some cases public discussion of a decision that is not in effect may contribute to improving the quality of court proceedings.

The Constitutional Court concluded that the obligation to provide a decision that is not in effect applies to a state body even if it is acting in the court proceedings as a party to a private law dispute, because the addressee of the fundamental right to information under Article 17 of the Charter is the state (the bearer of state authority), not a court or other state body. Thus, if the right to be provided with information and the corresponding obligation of the state to provide the information exists, then in terms of the significance and purpose of that right it is not decisive which state body provides the information.

The Constitutional Court concluded that the contested provision should be repealed, as it did not satisfy the conditions of being essential and necessary. It was also out of line with Article 4.4 of the Charter, which requires that in the application of provisions on the limits of fundamental rights and freedoms are applied,

their essence and significance must be preserved. The Information Act already contains sufficient instruments enabling information to be withheld in justified cases.

The judge rapporteur was Vojen Güttler. Dissenting opinions to the verdict of the judgment were filed by judges Pavel Rychetský, Pavel Holländer, Vlasta Formánková, Jiří Mucha, Jiří Nykodým, and Michaela Židlická. A concurring opinion to the reasoning of the judgment was filed by Dagmar Lastovecká.

Languages:

Czech.



Estonia

Supreme Court

Important decisions

Identification: EST-2010-1-001

a) Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 30.09.2009 / **e)** 3-4-1-9-09 / **f)** Request of the Koigi rural municipality council for the second sentence of Articles 20.3 and 34.2 of the Earth's Crust Act to be declared unconstitutional and repealed / **g)** *Riigi Teataja III* (Official Gazette), 2009, 41, 306 / **h)** www.riigikohus.ee; CODICES (Estonian, English).

Keywords of the systematic thesaurus:

3.18 General Principles – **General interest.**

4.8.4.2 Institutions – Federalism, regionalism and local self-government – Basic principles – **Subsidiarity.**

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

4.14 Institutions – **Activities and duties assigned to the State by the Constitution.**

5.1.1.5.2 Fundamental Rights – General questions – Entitlement to rights – Legal persons – **Public law.**

5.3.13.1.5 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Non-litigious administrative proceedings.**

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

Keywords of the alphabetical index:

Natural resources, exploitation.

Headnotes:

Final decision-making on the exploration and extraction of mineral resources is not a local issue. Planning the economical use of mineral resources must be based on the interests of the state.

Decisions over the exploration and extraction of mineral resources have a prejudicial impact on the

independent resolution of local issues. However, this encroachment is appropriate, necessary and reasonable to ensure that the state can take final decisions in the use of national resources.

Nonetheless, a local authority must be able to contest the consent of the Government in order to effectively assert its rights at the earliest stage possible in the process of issuing permits.

Summary:

I. By an order of 22 September 2008, the Järvamaa environmental service issued Hetkinvest OÜ with a permit for geological exploration in the Koigi mineral deposit. The Koigi rural municipality council filed an action with the administrative court seeking the annulment of the order and the explorations permit. The Council also asked the Supreme Court to declare the second sentence of Articles 20.3 and 34.2 of the Earth's Crust Act unconstitutional and invalid, on the basis that they infringed the right to self-management. Local authorities could no longer decide on consent to the issue of explorations permits and to mining as a local issue; their consent could now be substituted by the consent of the Government.

II. The Constitutional Review Chamber began by analysing whether the object of the contested regulation constituted a local issue to which the right to self-regulation of a local authority is extended. The Chamber found that the taking of final decisions on the exploration and extraction of mineral resources is not a local issue. Under Article 5 of the Constitution, Estonia's natural wealth and resources, including its mineral resources, are national assets which are to be deployed economically. Planning for the economical use of mineral resources is not something that can be achieved within the parameters of local government, but must instead be based on the interests of the state and on the need to guarantee the economical use of mineral resources throughout the state. Because decision-making on the use of mineral resources is a national issue under the Constitution, the Chamber could not conduct a review as to whether it might constitute a local issue.

Although it is a national issue, decisions on the exploration and extraction of mineral resources still have an impact on the independent resolution of local issues. The contested provisions infringe the local authority's right of self-management in the area of spatial planning. This part of the municipality's request was admissible, irrespective of the possibility of contesting the constitutionality of the Earth's Crust Act in the pending administrative court proceedings. The Chamber assessed the constitutionality of such an infringement.

In terms of Article 5 of the Constitution, the rationale behind the encroachment on local government's right to self-regulation under dispute here is the need to safeguard the state's ability to take final decisions in issues concerning the exploration and extraction of mineral resources, i.e. the use of national wealth. The solution adopted in the contested provisions is suitable because it rules out the possibility of a permit being refused simply due to opposition from local government.

The measure is also necessary because by curtailing the potential for local authorities to veto the issue of permits, it precludes the transferal of the right to take final decisions from a state institution to a local authority. No other effective means exist to achieve this aim; a local authority's duty to set out the reasons for refusal to grant its consent cannot be considered as an effective but less burdensome means of achieving this aim.

With regard to reasonableness, the Chamber did not find the restriction of the right of self-regulation under the provisions in dispute to be especially intensive. Firstly, the consent of the Government of the Republic does not determine whether a permit will in fact be issued or which requirements will be established in it. Secondly, a local authority can submit its environmental and social considerations to the authority issuing the permits either during the administrative proceedings for the issue of permits or in proceedings to assess the environmental impact.

The Chamber stressed the importance of the possibility to challenge the issuance of a permit by the Government for the exploration and extraction of mineral resources independently of final administrative legislation. Local authorities must be able to assert their rights in an effective fashion at the earliest possible stage in the process of issuing permits. This will allow the state to maintain the right of final decision in issues concerning exploration and extraction of mineral resources, whilst affording stronger protection of local government's rights to self-regulation.

The request of the Koigi rural municipality council was accordingly dismissed.

Cross-references:

- Decision no. 3-2-1-73-04 of 22.02.2005 of the Supreme Court *en banc*;
- Decision no. 3-4-1-9-06 of 16.01.2007 of the Constitutional Review Chamber, *Bulletin* 2007/1 [EST-2007-1-001];
- Decision no. 3-3-1-86-06 of 28.02.2007 of the Administrative Law Chamber;

- Decision no. 3-4-1-4-07 of 08.06.2007 of the Constitutional Review Chamber, *Bulletin* 2007/2 [EST-2007-2-003].

Languages:

Estonian, English.



Identification: EST-2010-1-002

a) Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 20.10.2009 / **e)** 3-4-1-14-09 / **f)** Constitutional review of articles of the Maritime Safety Act, the Merchant Shipping Code and regulations based on the Merchant Shipping Code / **g)** *Riigi Teataja III* (Official Gazette), 2009, 46, 342 / **h)** www.riigikohus.ee; CODICES (Estonian, English).

Keywords of the systematic thesaurus:

- 4.6.3.2 Institutions – Executive bodies – Application of laws – **Delegated rule-making powers**.
- 5.3.38.4 Fundamental Rights – Civil and political rights – Non-retrospective effect of law – **Taxation law**.
- 5.3.42 Fundamental Rights – Civil and political rights – **Rights in respect of taxation**.

Keywords of the alphabetical index:

Tax law, amendments.

Headnotes:

The legislator may delegate the right to establish obligations in public law to the executive, if this is prompted by the nature of the financial obligations and the legislator determines the extent of discretion. Further delegation, without imposing any restrictions on the executive, is in conflict with the Constitution.

The fact that the procedure for the implementation of a substantive obligation has not been supplemented by a procedure allowing for somebody to be coerced into fulfilling the obligation does not give rise to a breach of the right to good administration.

Summary:

I. The case dealt with the issue of the constitutional compliance of lighthouse, ice-breaking and navigation duties and the procedure for their collection.

Lighthouse and ice breaking duties were established by the Ministry of Transport and Communications regulation no. 113 of 12 December 2001 on the basis of an authority-delegating norm arising from Clause 13 of Government regulation no. 1 of 7 January 1997, issued on the basis of Article 6.1.13 of the Merchant Shipping Code (hereinafter, the "MSC").

On 25 April 2004 certain amendments to the Maritime Safety Act (hereinafter, the "MSA") came into force under which Article 6.1.13 of the MSC was repealed. Chapter 111 of the MSA defined lighthouse duties and navigation duties and established the procedure for calculation of the duties and submission of payment notices, rates, payment methods and sanctions for failure to pay.

On 16 November 2008, the amendments to the MSA entered into force, amending the provisions of Chapter 111 and establishing Article 952. This entitled the Maritime Administration to submit a payment notice to a ship owner or ship's agent who had failed to pay invoices seeking payment of the duties established in the repealed Article 6.1.13 of the MSC or in the valid Chapter 111 of the MSA.

In payment notice no. 1 of 13 January 2009, the Marine Administration required the AS Tallink Grupp to pay lighthouse and ice-breaking duties. AS Tallink Grupp had failed to settle earlier invoices the Marine Administration had submitted before 24 April 2004. By payment notice no. 2 of 13 January 2003 the Marine Administration required the AS Tallink Grupp to pay lighthouse duties and a fine for late payment, on the basis of invoices it had submitted after 24 April 2004. Using similar reasoning, the Marine Administration submitted payment notices nos. 7 and 8 to the AS Hansatee Cargo.

These companies asked the Tallinn Administrative Court to annul the payment notices, on the basis that the legal provisions under which they were issued were unconstitutional.

The Tallinn Administrative Court upheld the actions and initiated constitutional review proceedings. They concurred with the applicants' contention that the establishment of lighthouse and ice-breaking duties by regulation was in conflict with Article 113 of the Constitution, pursuant to which state taxes, duties, fees, fines and compulsory insurance payments

must be provided by law. Moreover, Article 952 of the MSA, which was aimed at a retrospective legitimisation of the obligation to pay duties in public law, was in conflict with the principle of protection of confidence, arising from Article 10 of the Constitution.

II. The Constitutional Review Chamber analysed the constitutionality of the norms which required payment of the duties and allowed for compulsory execution, firstly in regard to the period before 24 April 2004 (the legal basis for payment notices nos. 1 and 7), and secondly in regard to the subsequent period (legal basis for payment notices nos. 2 and 8).

The lawfulness of payment notices nos. 1 and 7 depends on whether the legislation in force when the invoices were submitted (i.e. before 24 April 2004) was in conformity with the Constitution. Article 113 of the Constitution requires state taxes, duties, fees, fines and compulsory insurance payments to be provided by law. Under Article 3.1 of the Constitution the powers of state shall be exercised solely pursuant to the Constitution and laws in conformity with it.

Article 6.1.13 of the MSC delegated the establishment of lighthouse and ice-breaking duties to the Government, which, in turn, was entitled to delegate authority to the Minister of Transport and Communications, which issued the regulation requiring the payment of light-house and ice-breaking duties. Thus, Article 6.1.13 infringed the general fundamental tax right, established in Article 113 of the Constitution.

In principle, the legislator may delegate the right to establish obligations in public law to the executive, if this is prompted by the nature of the financial obligations and provided that the legislator determines the extent of discretion. However, in these proceedings, the right to establish duties was further delegated to the Ministry of Transport and Communications and the law did not impose any restrictions on the executive. The regulations based on an unconstitutional norm delegating authority were in formal conflict with Articles 3.1, 113 and 94.2 of the Constitution.

As the regulations issued under Article 6.1.13 of the MSC were unconstitutional, the retroactive establishment of their compulsory execution in Article 952 of the MSA was unconstitutional, and the Chamber declared this part of the first sentence of Article 952 invalid. Consequently, Article 6.1.13 of the MSC in the wording in force until 24 April 2004, clause 13 of the Government regulation and Ministry of Transport and Communications regulation no. 113 were declared to be in conflict with the Constitution.

Regarding payment notices nos. 2 and 8 (invoices that the complainants had failed to pay under Chapter 111 of the MSA, which established lighthouse and ice-breaking duties by law and came into force on 25 April 2004), the Supreme Court observed that a distinction should be drawn between the procedure for implementation of substantive provisions that establish an obligation and the procedure for the application of coercive measures in cases where a substantive obligation is not fulfilled.

The fact that the possibility of compulsory execution was not initially provided in Articles 501-507 in Chapter 111 of the MSA, for the enforcement of the financial public law obligation established therein, did not infringe the right to good administration. The procedure for the implementation of the substantive obligation was guaranteed. It was possible to discern who should pay lighthouse duties and in which situations, the amount and calculation method of the duties and where they must be accrued.

The retroactive establishment of the possibility of compulsory execution infringed the principles of protection of confidence and legitimate expectation. Nonetheless, this infringement was not disproportionate in this particular case. The public interest in the retroactive establishment of compulsory execution consists in the fiscal interest of the state to enforce constitutionally-enacted financial obligations in public law and to collect duties. It is important to treat equally those business operators who observed the obligation to observe the law, and paid the lawfully established duties, and those who violated the obligation. Consequently, Article 952 of the MSA, insofar as it concerned payment notices nos. 2 and 8, was not unconstitutional.

Cross-references:

- Decision no. 3-4-1-10-00 of 22.12.2000 of the Supreme Court *en banc*, *Bulletin* 2000/3 [EST-2000-3-009];
- Decision no. 3-4-1-1-03 of 17.02.2003 of the Constitutional Review Chamber, *Bulletin* 2003/2 [EST-2003-2-002];
- Decision no. 3-4-1-5-05 of 13.06.2005 of the Constitutional Review Chamber;
- Decision no. 3-4-1-18-07 of 26.11.2007 of the Constitutional Review Chamber.

Languages:

Estonian, English.



Identification: EST-2010-1-003

a) Estonia / **b)** Supreme Court / **c)** Supreme Court (*En banc*) / **d)** 20.11.2009 / **e)** 3-3-1-41-09 / **f)** Application by A. Kõlm for Lõuna Police Prefecture directive no. 462p of 15 July 2008, to be declared unlawful and for compensation to be ordered / **g)** *Riigi Teataja III* (Official Gazette), 2009, 54, 401 / **h)** www.riigikohus.ee; CODICES (Estonian, English).

Keywords of the systematic thesaurus:

3.17 General Principles – **Weighing of interests**.
 4.6.9.3 Institutions – Executive bodies – The civil service – **Remuneration**.
 5.2.1.2.2 Fundamental Rights – Equality – Scope of application – Employment – **In public law**.
 5.2.1.3 Fundamental Rights – Equality – Scope of application – **Social security**.
 5.2.2.1 Fundamental Rights – Equality – Criteria of distinction – **Gender**.
 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:

Pension, retirement / Pension, occupational / Police, officer, social guarantee.

Headnotes:

The provision of an old age pension to women does not justify interference in their freedom to choose a sphere of activity and depriving them (in a way that it is different to the treatment men receive) of the potential to earn a greater income through work than that which would be guaranteed by pension.

Summary:

I. By a Lõuna Police Prefecture directive A. Kõlm was released from police service under Article 49 of the Police Service Act (hereinafter, the “PoISA”) as she had reached the specified age limit. A. Kõlm launched proceedings before the administrative court, requesting that the directive be declared unlawful. Her action was dismissed. The circuit court dismissed her subsequent appeal and upheld the administrative court judgment. In her appeal in cassation, A. Kõlm

applied for a declaration that the directive was unlawful and an order reinstating her to the police service. She also sought an order for payment during her time of enforced absence. In the alternative, she sought an order for compensation.

The Administrative Law Chamber of the Supreme Court referred the case to the Supreme Court *en banc* for a constitutional review of Article 49.3 of the PoISA, with regard to its differing treatment of men and women born in 1948, particularly its conformity with the second sentence of Article 12.1 of the Constitution.

II. The Supreme Court *en banc* first ascertained that it had grounds to commence constitutional review proceedings. It established that the Police Prefecture directive was sufficiently clear to be subject to judicial review, but that there was no scope for discretion in the applicable law as to the release of police officers who have reached pension age. Men and women were released from police service at different ages: Article 7.1.1 applied to men, and, with regard to women, Article 7.2 of the State Pension Insurance Act was applicable. The satisfaction of the action directly depended on the constitutional compliance of Article 49.3 and 49.4 of the PoISA. The Court went on to examine whether the Act which regulated the release was in conformity with the prohibition on sexual discrimination.

The Court did not examine the constitutionality of a gradual equalising of men and women's pension ages, neither did it examine the establishment of an age limit for police officers for holding office. The Court only reviewed the constitutionality of Article 49.3 and 49.4 of the PoISA in terms of the differing treatment of men and women born in 1948.

In the Court's opinion, different pension ages for men and women could not guarantee an optimal compromise between two opposing interests, such as a police officer's interest in continuing to be in service and the interest of the state in attracting younger recruits to the police force. An equal age limit for men and women would have afforded better protection of the public interest.

Provision of an old age pension to women does not justify interference in their freedom to choose a sphere of activity and depriving them (in a way that it is different to the treatment men receive) of the potential to earn a greater income through work than that which would be guaranteed by pension.

There was no reasonable basis to release a female police officer from police service earlier than a male police officer. The Court accordingly declared

unconstitutional and directed the repeal of Article 49.3 and 49.4 of the PoISA to the extent that they allowed for women born in 1948 to be released from police service at an earlier age than men born in the same year.

The Supreme Court upheld the appeal in cassation of A. Külm, overturned the judgments of the circuit court and the administrative court and handed down a new judgment. Since A. Külm only requested reinstatement to her position for the first time at the cassation stage, the Court did not find such an amendment of the appeal possible. The Court declared the contested directive of the Lõuna Police Prefecture unlawful and directed the Police Prefecture to pay A. Külm her six months' salary.

Languages:

Estonian, English.



Identification: EST-2010-1-004

a) Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 15.12.2009 / **e)** 3-4-1-25-09 / **f)** Request by the Tallinn Circuit Court to declare unconstitutional Articles 131.2 and 131.3 of the Code of Civil Procedure in conjunction with the provision of Annex 1 to the State Fees Act, prescribing the obligation to pay a state fee of 75 000 kroons in civil matters with a value of up to 1 000 000 kroons / **g)** *Riigi Teataja III* (Official Gazette), 2009, 60, 440 / **h)** www.riigikohus.ee; CODICES (Estonian, English).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
 4.10.1 Institutions – Public finances – **Principles**.
 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:

Proceedings, fee.

Headnotes:

The economy of proceedings, arising from Chapter XIII of the Constitution, is a legal value of constitutional ranking, and can justify the infringement of the right to an effective legal protection. However, if the amount of the state fee prevents somebody from exercising his or her rights in court, the state fee is disproportionate and, therefore, unconstitutional. The possibility of challenging the resolutions of a legal person must be real and not simply illusory.

Summary:

I. The Tallinn Circuit Court initiated constitutional review proceedings, based on an appeal against a ruling of the Harju County Court. A question had arisen as to whether the plaintiffs were obliged to pay the state fee of 75 000 kroons to file an action seeking a declaration that a resolution of the general meeting of a building association was null and void. The Circuit Court was of the opinion that Article 131.2 and 131.3 of the Code of Civil Procedure (hereinafter, the "CCP") in conjunction with the provision of Annex 1 to the State Fees Act (hereinafter, the "SFA"), which sets out the requirement to pay a state fee of 75 000 kroons in a civil matter with a value of up to 1 000 000 kroons, must be declared to be in conflict with the Constitution.

II. The Constitutional Review Chamber began by assessing the relevance of the contested provisions. The obligation to pay the state fee of 75 000 kroons arises from the action seeking a declaration that a resolution by a general meeting of another legal person specified in Article 131.2 of the CCP (in this case a building association) is null and void. In such a case, the value of the action is one tenth of the net assets of the legal person (2 230 800 kroons in the current case). The value of the action cannot exceed 1 000 000 kroons according to Article 131.3 of the CCP. The state fee in the latter case would be 75 000 kroons according to Annex of the SFA.

The regulations mentioned above were significant because, if they were unconstitutional, the state fee of 75 000 kroons should not have been paid. Article 131.3 of the CCP was only relevant in the part which referred to Article 131.2 of the CCP.

According to the Court, the provisions encroached on the fundamental right to effective legal protection under Article 15.1 of the Constitution. No gaps are permissible in this protection. The requirement to pay a state fee in the amount under dispute had a detrimental impact on the fundamental right to effective legal protection and encroached on the area of protection of the right.

The Chamber went on to examine the constitutionality of the provisions under dispute. As they were passed by a parliamentary majority, the procedural requirements arising from Article 104.2.14 of the Constitution were fulfilled.

Finally, the Chamber analysed the substantive constitutionality of the provisions.

The substantive constitutionality of an infringement of the general fundamental right to effective legal protection depends on whether there was a legitimate purpose behind the infringement and whether the infringement itself is proportionate. As Article 15.1 of the Constitution is a fundamental right not subject to reservation by law, the right can only legitimately be restricted in order to protect another fundamental right or legal value of constitutional ranking. The court observed that the economy of proceedings, arising from Chapter XIII of the Constitution, is a legal value of constitutional ranking, and can justify the infringement of the right to effective legal protection.

The Chamber considered whether charging a state fee of 75 000 kroons on the filing of an action is proportionate to the objective of the economy of proceedings. It held that this fee is an appropriate and necessary measure for this purpose.

However, the increase of state fees upon recourse to a court poses a serious threat to the availability of legal protection. The higher the state fee, the more onerous the restriction the state fee imposes on the general fundamental right to effective legal protection. If the amount of the state fee prevents somebody from exercising his or her rights in court, the state fee is disproportionate and, therefore, unconstitutional.

In the case in point, the plaintiffs were seeking a declaration that a resolution of the general meeting of a building association was null and void. A building association is a commercial association, which in turn is a company, the purpose of which is to support and promote the economic interests of its members through joint economic activity. At the same time, the essential character of a building association does not correspond to a traditional company, whose main objective is to earn income from economic activity. The economic activities of members of a building association include the ownership and administration of immovable property or buildings forming a part thereof. Members of the building association do not receive dividends or other payments from net profit. Net profit may only be used to achieve the objectives of the association.

The Chamber noted that the possibility of challenging the resolutions of a body of a legal person must be real, not merely illusory. The possibility of filing an action is aimed at ensuring the lawfulness of the resolutions and to protect the interests of members of the association. The state fee of 75 000 kroons which the plaintiffs were asked to pay in these proceedings amounted to around six average Estonian wages and seventeen minimum wages. If the court upheld the action, it would not bring about changes in the value of the plaintiffs' property. The Chamber accordingly held that it is disproportionate to pay the state fee of 75 000 kroons on an action which does not have as its objective the obtaining of traditional proprietary benefit.

The Chamber upheld the Tallinn Circuit Court's request and declared Article 131.2 and 131.3 of the CCP (to the extent that Subsection 3 refers to Subsection 2) and Annex 1 to the SFA unconstitutional and invalid to the extent that they established a requirement to pay the state fee of 75 000 kroons on an action seeking a declaration of the nullity of a resolution of the general meeting of a building association.

Cross-references:

- Decision no. 3-4-1-10-00 of 22.12.2000 of the Supreme Court *en banc*, *Bulletin* 2000/3 [EST-2000-3-009];
- Decision no. 3-4-1-5-02 of 28.10.2002 of the Supreme Court *en banc*, *Bulletin* 2002/3 [EST-2002-3-007];
- Decision no. 3-1-3-10-02 of 17.03.2003 of the Supreme Court *en banc*, *Bulletin* 2003/2 (EST-2003-2-003);
- Decision no. 3-4-1-5-05 of 13.06.2005 of the Constitutional Review Chamber;
- Decision no. 3-4-1-4-06 of 09.05.2006 of the Constitutional Review Chamber;
- Decision no. 3-4-1-3-08 of 03.04.2008 of the Constitutional Review Chamber.

European Court of Human Rights:

- *Mehmet and Suna Yigit v. Turkey*, decision of 17.07.2007.

Languages:

Estonian, English.



Identification: EST-2010-1-005

a) Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 22.12.2009 / **e)** 3-4-1-16-09 / **f)** Review of constitutionality of Article 8.1 and 8.4 of the Local Government Council Election Act / **g)** *Riigi Teataja III* (Official Gazette), 2010, 2, 11 / **h)** www.riigikohus.ee; CODICES (Estonian, English).

Keywords of the systematic thesaurus:

3.3.1 General Principles – Democracy – **Representative democracy**.
 3.6.1 General Principles – Structure of the State – **Unitary State**.
 4.8.4.1 Institutions – Federalism, regionalism and local self-government – Basic principles – **Autonomy**.
 4.9.4 Institutions – Elections and instruments of direct democracy – **Constituencies**.
 5.3.41.1 Fundamental Rights – Civil and political rights – Electoral rights – **Right to vote**.
 5.3.41.2 Fundamental Rights – Civil and political rights – Electoral rights – **Right to stand for election**.

Keywords of the alphabetical index:

Constituency / Local self-government, right.

Headnotes:

The provision of the bases for the formation of electoral districts is not a local issue and is not therefore included in the area of protection. It cannot infringe the local government's right to self-regulation.

A request concerning a regulation which allegedly violates the principle of uniformity of elections can be submitted by an individual in administrative court proceedings or in electoral complaint proceedings, or by the Chancellor of Justice in an abstract review. It cannot be submitted by a local council.

Summary:

I. On 16 April 2009, the Estonian Parliament enacted legislation to amend the Local Government Council Election Act (RT I 2009, 23, 144). On 18 June 2009, the Tallinn City Council asked the Supreme Court to declare invalid the second sentence of Article 8.1, 8.4 and the first sentence of Article 8.41 of this Law as they conflicted with the Constitution. The City Council suggested that the special procedure for the formation of electoral districts in Tallinn in conjunction with the special procedure for the distribution of mandates (which applies to Tallinn as a local

authority with several electoral districts), violated the local authority's right to self-regulation, the principle of democracy and active and passive voting rights due to the conflict with the principle of uniformity of elections.

II. The Constitutional Review Chamber pointed out that the above provisions concerned the bases for the formation of electoral districts in the city of Tallinn. The Tallinn City Council had submitted a similar request on 5 February 2009. The Constitutional Review Chamber found then in case no. 3 4 1 2 09 of 9 June 2009 that the provision of the bases for the formation of electoral districts was not a local issue and was therefore not included in the area of protection. It cannot infringe a local authority's right to self-regulation. The Chamber reaffirmed this statement and found the request inadmissible in terms of the contested provisions.

The Chamber emphasised that a local authority may only request a declaration that legislation is invalid if it conflicts with the right of local government to self-regulation under Article 154.1 of the Constitution; i.e. only if the local authority has the right to establish such regulation itself.

Although the conduct of local government council elections is a local issue, it derives from the principle of the unitary state that the state must establish a uniform national regulatory framework as a basis for these elections. Therefore, the provisions regulating the formation of electoral districts could not infringe the right of a local authority to make independent decisions and organise all local issues. The Chamber noted that the possible over-representation of the interests of one city district by comparison with another in the council does not render the members of the council dependent on the state authority for decision-making.

The Chamber also held that although the provisions which influence a council's degree of representation may infringe the rights of persons entitled to vote and run as candidates in the local government, this possible infringement cannot be challenged by a local authority. Such a request, over a regulation which allegedly violates the principle of uniformity of elections, may be submitted by an individual in administrative court proceedings or in electoral complaint proceedings, or by the Chancellor of Justice in an abstract review.

The Chamber concluded that the contested Articles of the LGCEA could not infringe the constitutional guarantees of a local authority and rejected the Tallinn City Council's request as inadmissible.

Cross-references:

- Decision no. 3-1-3-10-02 of 17.03.2003 of the Supreme Court *en banc*, *Bulletin* 2003/2 [EST-2003-2-003];
- Decision no. 3-4-1-1-05 of 19.04.2005 of the Supreme Court *en banc*, *Bulletin* 2005/3 [EST-2005-3-001];
- Decision no. 3-4-1-2-09 of 09.06.2009 of the Constitutional Review Chamber, *Bulletin* 2009/2 [EST-2009-2-006].

Languages:

Estonian, English.



Identification: EST-2010-1-006

a) Estonia / **b)** Supreme Court / **c)** Supreme Court (*En banc*) / **d)** 16.03.2010 / **e)** 3-4-1-8-09 / **f)** Request by the Tallinn City Council to declare unconstitutional and invalid Articles 16, 17.1, 19.2, 19.3, 20.3 and 20.4 of the 2009 Supplementary Budget Act and related acts / **g)** *Riigi Teataja III* (Official Gazette), 2010, 13, 97 / **h)** www.riigikohus.ee; CODICES (Estonian, English).

Keywords of the systematic thesaurus:

- 2.1.1.4.14 Sources – Categories – Written rules – International instruments – **European Charter of Local Self-Government of 1985.**
- 2.3 Sources – **Techniques of review.**
- 3.12 General Principles – **Clarity and precision of legal provisions.**
- 4.8.3 Institutions – Federalism, regionalism and local self-government – **Municipalities.**
- 4.8.4.1 Institutions – Federalism, regionalism and local self-government – Basic principles – **Autonomy.**
- 4.8.7.1 Institutions – Federalism, regionalism and local self-government – Budgetary and financial aspects – **Finance.**
- 4.8.7.2 Institutions – Federalism, regionalism and local self-government – Budgetary and financial aspects – **Arrangements for distributing the financial resources of the State.**

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

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

4.10.1 Institutions – Public finances – **Principles.**

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

Keywords of the alphabetical index:

Local self-government, right / Local government, finances.

Headnotes:

Financial safeguards for local authorities include the right to assume debt obligations, the right to levy taxes and impose duties, the right to sufficient funds to perform local government functions, the right to the stability of the funding system for local government functions, and the right to full and complete funding from the state budget of national duties imposed by law.

Summary:

I. On 20 February 2009, the Parliament passed the 2009 Supplementary Budget Act and Related Acts Amendment Act. A local authority submitted a petition suggesting that various amendments to six different acts were at odds with the constitutional safeguards for local government.

II. Article 7 of the Constitutional Review Court Procedure Act allows a local council to submit a request to the Supreme Court to declare an Act, a regulation or one if its provisions unlawful if it is in conflict with the constitutional guarantees of local government. The Court ascertained that if the provision of the Constitution relied on in the petition is not a constitutional guarantee of local government, the petition will be inadmissible. The potential for encroachment on the constitutional safeguards of local government is not a prerequisite for the admissibility of the petition – identification of the impossibility of encroachment requires specification as to the scope of protection of the relevant constitutional guarantee and explanation as to the potential within the contested legislation or provision for a negative impact on the scope of protection.

According to the Court, the right and obligation to independently decide and organise all local issues based on law arising from Subsection 154.1 of the Constitution includes decision-making as to the use of funds allocated for resolution of local issues. Local

authorities can only organise and make decisions about local issues if they have sufficient money. Indeed, adequate financing of local government functions arising from legislation (as well as those that are not provided for in the law) must be guaranteed in accordance with the right arising from Subsection 154.1 of the Constitution. The Court stated that such an interpretation is supported by Article 9 of the European Charter of Local Self-Government.

According to the Court, the state is under a duty to establish a funding system that provides local authorities with enough money to carry out their functions. The legislator must decide on the sources of this funding.

With regard to the scope of protection of financial guarantees, the Court explained that the right to municipal self-administration includes the right to assume debt obligations and to sufficient funds for performance of local government functions. The right to assume debt obligations may be limited under the same conditions as the right to municipal self-administration. The state is required to adopt legislation to guarantee a minimum amount to allow for the performance of local functions to the minimum extent required. Local authorities must also have access to funding to exercise their right to self-regulation so as to decide upon and to arrange important local issues not regulated by law.

The funding of local government functions as a whole should not be disproportionately dependent on one-off allocations by the state. Rather, it should adequately mirror the overall economic situation. Local authority funding should take into account regional differences in social, demographic, geographic and economic situations.

Local authorities must be given sufficient money to perform all their essential functions. Essential local functions cannot be listed exhaustively – they may differ from one local authority to another – and, over time, requirements will also differ as to their extent and quality of their performance depending on the overall socio-economic situation and the level of welfare of society. The state cannot allow a situation to develop where the availability of primary public services depends largely on the economic capacity of the local authority where an individual or business happens to be registered.

The right to sufficient funding does not prohibit the state from cutting back on local authority funding. The prerequisite is that after the cuts, the local authority is still able to carry out a basic level of local public service. A provision will not be found to be in breach

of the right to sufficient funding for local government functions simply because it makes the performance of some local function compulsory or otherwise increases the costs of carrying out local government functions. It is irrelevant whether the burden of the additional costs is specifically targeted at local authorities or a broader circle of addressees. The right to sufficient funding is not violated by legislation that forces local authorities to increase costs, but rather by legislation regulating the funding of local government functions. The state must establish a system for funding local authority functions that allows the adequacy of the funding to be evaluated on a case-by-case basis. A right has actual substance only if a violation of the right can be identified. In order to enforce the right to sufficient funding in court, a local authority must be given a reasonable opportunity to prove that the funding system does not allow it to provide a basic level of service. The Constitution requires a clear distinction between funds earmarked for the performance of local government functions and those earmarked for national functions. In order to distinguish between the two, and to evaluate the amount of money required for performance, a clear understanding is needed of the national duties imposed on local authorities by law and the extent of “essentially local government functions”.

Under Subsection 154.2 of the Constitution, duties may only be imposed on a local authority by law or by agreement with the local authority; expenditure related to the duties of the state imposed on local authorities by law shall be funded from the state budget. It must be possible to discern whether the state has respected the right to the full funding of national duties from the state budget. However, the local authority cannot contest the national duty as such. Legislation imposing duties on local authorities must stipulate whether these duties are local or national. The state budget must specify in a clear and transparent way how the money is allocated to carry out one or more national duties imposed on local authorities.

According to the Court, the right to the stability of the funding of local authority functions also arises from the principle of the rule of law and the right to municipal self-regulation. It establishes the principle of legitimate expectation in financial relationships between local authorities and the state. The right to the stability of the system cannot be prejudiced where the revenue of local authorities decreases without any interference from the state. The right to the stability of the system may be limited on the same terms and conditions as the right to municipal self-government. In the event of major amendments to the funding

system, local authorities must be granted the right to be heard.

Cross-references:

- Decision no. 3-4-1-1-00 of 17.03.2000 of the Supreme Court *en banc*;
- Decision no. 3-4-1-7-03 of 21.01.2004 of the Constitutional Review Chamber, *Bulletin* 2004/1 [EST-2004-1-006];
- Decision no. 3-3-1-46-03 of 19.04.2004 of the Supreme Court *en banc*;
- Decision no. 3-4-1-9-06 of 16.01.2007 of the Constitutional Review Chamber, *Bulletin* 2007/1 [EST-2007-1-001];
- Decision no. 3-3-1-46-06 of 03.12.2007 of the Supreme Court *en banc*;
- Decision no. 3-4-1-2-09 of 09.06.2009 of the Constitutional Review Chamber, *Bulletin* 2009/2 [EST-2009-2-006];
- Decision no. 3-4-1-13-09 of 19.01.2010 of the Constitutional Review Chamber.

Languages:

Estonian, English (translation by the Court).



Germany

Federal Constitutional Court

Important decisions

Identification: GER-2010-1-001

a) Germany / **b)** Federal Constitutional Court / **c)** Second Chamber of the Second Panel / **d)** 16.01.2010 / **e)** 2 BvR 2299/09 / **f)** Extradition ban / **g)** / **h)** *Strafverteidiger Forum* 2010, 63-65; CODICES (German).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
 5.3.1 Fundamental Rights – Civil and political rights – **Right to dignity**.
 5.3.3 Fundamental Rights – Civil and political rights – **Prohibition of torture and inhuman and degrading treatment**.
 5.3.5.1 Fundamental Rights – Civil and political rights – Individual liberty – **Deprivation of liberty**.

Keywords of the alphabetical index:

Extradition, proceedings / Extradition, preconditions / Prison, sentence, life, harsh / Prison, sentence, without any prospect of regaining freedom / Punishment, unbearable kind / Detention, humane / Public international law, minimum standards.

Headnotes:

In extradition proceedings, German courts are bound by the Constitution to examine whether extradition and the act underlying it are in conformity with the minimum standards under public international law and with the indispensable principles of the German public order (*“ordre public”*).

The indispensable constitutional principles include the core of the proportionality principle. Accordingly, the organs of the Federal Republic of Germany are not permitted to extradite a sought after criminal if he or she faces punishment of an unbearable kind, which consequently appears unreasonable from any conceivable point of view. Similarly, a cruel, inhumane or degrading punishment stands in

contradiction to the indispensable principles of the German constitutional order.

A life prison sentence without the possibility for the sentence to be suspended and the prisoner granted probation, does not as such amount to unbearably hard or inhumane punishment which would prevent extradition. However, one of the prerequisites for humane detention is the retention in principle by the convicted person of the chance of regaining his or her freedom.

All that counts in extradition matters with a requesting state is that under its legal system the convicted person actually has a chance of regaining his or her freedom.

If, however, the enforcement of the punishment continues until death without any actual, adequate prospect of the convicted person regaining his or her freedom, then the punishment is cruel and degrading even taking into account the respect that must be paid to foreign legal systems in international dealings.

Summary:

I. The applicant is a Turkish national. He is accused, in his role as a regional leader of the Kurdistan Workers' Party (PKK), of planning and ordering a bomb attack against a provincial governor. The Turkish government seeks his extradition on the basis of an arrest warrant issued by a Turkish court comprised of professional and lay judges. The applicant has been in detention for the purpose of extradition since 2 April 2009. In Turkey, he faces what is known as a “harsh” life prison sentence should he be convicted. The suspension of the enforcement of this sentence and a grant of parole are not possible. A pardon is also only possible in cases of permanent illness, disability or for reasons of age. The competent Higher Regional Court (*Oberlandesgericht*) declared the extradition permissible.

II. The Second Chamber of the Second Panel of the Federal Constitutional Court allowed the constitutional complaint directed against such decision and reversed the Higher Regional Court's order. In light of the punishment faced by him, the cooperation of the German authorities in the extradition of the applicant is incompatible with Article 1.1 of the Basic Law (guarantee of human dignity) and Article 2.1 of the Basic Law (right to freely develop one's personality). This is not yet a final decision on the extradition. Instead the competent authorities are called upon to make a new decision.

According to the case-law of the Federal Constitutional Court one of the indispensable principles of the German constitutional order is that threatened or imposed punishments may not be cruel, inhumane or degrading. Above all, the possible destructive psychological effects of imprisonment are of great significance and they must be countered by humane detention. In this connection, hope for a possible early release eases the psychological strain connected with imprisonment. However, especially in extradition matters, the Federal Constitutional Court takes into account that the Basic Law assumes that the Federal Republic of Germany is integrated in the international legal order of the community of states. This includes respecting the structures and content of foreign legal systems and views even when they do not conform with German domestic views in an individual case. This leads to the following in relation to the question of whether a possible impediment to extradition exists: the protection afforded a core area that is governed by respect for human dignity and the principles of the rule of law cannot be identical in international dealings with that afforded under domestic legal views. Indispensable principles are not violated simply because the punishment to be enforced has to be regarded as extraordinarily harsh and, if measured strictly by German constitutional-law standards, could no longer be regarded as reasonable.

All that is relevant for the assessment of the “harsh” life prison sentence in the present case is that the continued enforcement of the sentence until death can only be dispensed with where the prisoner is extremely infirm or suffering from a life-threatening illness. This in any case violates the indispensable principles of the German constitutional order in those situations where – like here – even if such circumstances exist, regaining freedom remains uncertain because the prisoner can only hope that he or she will be pardoned. The punishment to be expected deprives a convicted person of any hope he or she may have of leading an independent life in freedom. It is this, however, that makes the enforcement of a life sentence even bearable in the first place according to the understanding of human dignity. The Higher Regional Court should therefore not have limited itself to examining whether the applicant had a theoretical chance of regaining his freedom. Instead what matters in each individual case is an overall assessment of how the relevant detention is implemented. This overall assessment may not fail to acknowledge that a “harsh” life prison sentence must allow the convicted person to hope at best to die free.

Languages:

German.



Identification: GER-2010-1-002

a) Germany / **b)** Federal Constitutional Court / **c)** First Chamber of the First Panel / **d)** 04.02.2010 / **e)** 1 BvR 369/04, 1 BvR 370/04, 1 BvR 371/04 / **f)** / **g)** / **h)** *Archiv für Presserecht* 2010, 142-145; CODICES (German).

Keywords of the systematic thesaurus:

3.17 General Principles – **Weighing of interests.**
 5.3.1 Fundamental Rights – Civil and political rights – **Right to dignity.**
 5.3.19 Fundamental Rights – Civil and political rights – **Freedom of opinion.**
 5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression.**

Keywords of the alphabetical index:

Opinion, extreme right-wing / Fundamental right, communication, control exercised by the Federal Constitutional Court / Hatred, incitement against segments of the population, judgment, criminal law / Opinion, expression, legal assessment.

Headnotes:

Irrespective of their motivation, their intrinsic value and correctness, opinions are protected by freedom of expression. Within the confines of Article 5.2 of the Basic Law, therefore, extreme right-wing opinions are also protected.

In their legal assessment of an expression of opinion, the non-constitutional courts have to determine its objective meaning, taking into account the circumstances of the individual case from the perspective of an unbiased and reasonable average audience.

Furthermore, in principle it is necessary to balance the freedom of expression against the legal interest impaired in its exercise. If the opinion expressed encroaches upon another person's human dignity, freedom of expression is always secondary in rank.

Errors in the interpretation of a statement and of the non-constitutional law in criminal proceedings can have serious consequences. At least in the area of fundamental rights of communication, therefore, more stringent control by the Federal Constitutional Court is unavoidable. In order to prevent the freedom to make such statements from being affected in its substance, particularly effective controls under constitutional law are required.

Summary:

I. In their capacity as members of the association "Augsburger Bündnis – Nationale Opposition", for a campaign week, the applicants had designed and prepared large-format posters bearing the following slogan:

Campaign
Repatriation of foreigners
Campaign weeks 3 June – 17 June 2002
For a German Augsburg that is pleasant to live in
Augsburger Bündnis – Nationale Opposition.

The applicants were thereupon sentenced to fines by the Local Court (*Amtsgericht*) Augsburg pursuant to § 130.2.1.b of the Criminal Code (*Strafgesetzbuch*), for inciting hatred against segments of the population. It was held that they had publicly displayed writings which attacked the human dignity of other persons by insulting and maliciously maligning segments of the population, namely foreigners living here.

§ 130.2.1.b of the Criminal Code reads:

"(2) Whoever:

1. with respect to writings ... which incite hatred against segments of the population or a national, racial or religious group, or one characterised by its folk customs, which call for violent or arbitrary measures against them, or which assault the human dignity of others by insulting, maliciously maligning or defaming segments of the population or a previously indicated group:

- a) ...;
- b) publicly displays, posts, presents, or otherwise makes them accessible;
- c) ...;
- d) ...;

2. ..., shall be punished with imprisonment for not more than three years or a fine."

The legal remedies lodged by the applicants against the judgments before the Regional Court (*Landgericht*) and the Bavarian Highest Regional Court (*Bayerisches Oberstes Landesgericht*) remained unsuccessful.

II. The First Chamber of the First Panel of the Federal Constitutional Court set aside the judgments handed down under criminal law for inciting hatred against segments of the population pursuant to § 130.2.1.b of the Criminal Code (*Strafgesetzbuch*), and remitted the case to the original court.

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

The criminal sentences violate the freedom of expression (sentence 1 of Article 5.1 of the Basic Law).

The criminal courts have to accurately capture the meaning of an expression that is to be evaluated. In their interpretation, they also have to balance freedom of expression against the legal interest impaired by that freedom. Admittedly, the fundamental right of freedom of expression is always secondary in rank to human dignity. However, insofar as it is assumed that the exercise of a fundamental right impairs human dignity, the grounds must be stated with particular clarity. There is only an attack on human dignity if the person under attack is denied his or her right to live as an equal within the public community and if he or she is treated as an inferior being. In line with this view, the criminal courts only assume an attack on human dignity where the slogan "foreigners out" is accompanied by other circumstances.

The judgments handed down under criminal law do not meet these requirements.

The judgment of the Local Court neither meets the requirements for the interpretation of expressions of opinion nor those for the interpretation of the provision which limit the freedom of expression (§ 130.2.1.b of the Criminal Code) because, in its legal assessment, the Local Court failed to address the fundamental right of freedom of expression.

The judgment of the Regional Court does not meet the requirements of constitutional law either. The Regional Court attributed a meaning to the message on the poster which the poster as such did not have. This meaning is not substantiated elsewhere in a plausible manner under the aspect of constitutional

law by the other findings of the Regional Court. The poster designed by the applicants does not, e.g. through the sweeping attribution of socially unacceptable conduct or characteristics, state that foreigners are inferior. Nor is such an attribution implied in the word “foreigners” in the phrase “repatriation of foreigners” that is placed vis-à-vis the phrases “German Augsburg” and “pleasant to live.” The words “campaign for repatriation of foreigners” do not contain such an attribution either. The poster makes it completely clear that the applicants’ initiative intends to “repatriate” foreigners. However, the scope of the advocated repatriation and the means by which the applicants want it to be effected, e.g. whether by incentives or by force, are not indicated. It is therefore not possible to deduce from the poster that foreigners are to be or are to be considered disenfranchised or as objects. In order to arrive at such an interpretation of the poster, the Regional Court would have had to indicate specific accompanying circumstances which sufficiently justified this as the sole reasonable interpretation in that context. Such accompanying circumstances do not appear in the findings of the Regional Court.

The Regional Court did not balance the conflicting interests against one another nor did it state the grounds for this omission. The judgment, so far, rests on the mere statement that the text of the poster amounted to more than a statement expressing merely emotional rejection. It is also based on the assumption that the attack was not only directed against certain aspects of the right of personality, but was so undifferentiated that it related to all foreigners living in Augsburg. These findings do not support the classification of the poster text as a violation of human dignity. The assumption of a violation of human dignity has to be examined with particular care. Therefore, the sweeping nature of a verbal attack does not automatically justify the assumption of a disparagement which denies those concerned their recognition as persons.

The judgment of the Bavarian Highest Regional Court, which merely confirmed the judgment of the Regional Court, does not satisfy the requirements of Article 5.1 of the Basic Law either, because it is confined to the finding, in one single sentence, that there was an attack on human dignity. More detailed grounds are lacking.

Languages:

German.



Identification: GER-2010-1-003

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 09.02.2010 / **e)** 1 BvL 1/09, 1 BvL 3/09, 1 BvL 4/09 / **f)** Hartz IV / **g)** / **h)** *Neue Juristische Wochenschrift* 2010, 505-518; *Deutsches Verwaltungsblatt* 2010, 314-321; *Gewerbemiete und Teileigentum* 2010, 18-22; *Zeitschrift für das gesamte Familienrecht* 2010, 429-441; *ZFSH/SGB Sozialrecht in Deutschland und Europa* 2010, 152-178; *Die Sozialgerichtsbarkeit* 2010, 227-240; *Europäische Grundrechte-Zeitschrift* 2010, 121-145; *Kommunaljurist* 2010, 137-153; *Sozialrecht und Praxis* 2010, 233-249; *Sozialrecht aktuell* 2010, 69-80; CODICES (German).

Keywords of the systematic thesaurus:

3.5 General Principles – **Social State**.
 5.1.3 Fundamental Rights – General questions – **Positive obligation of the state**.
 5.3.1 Fundamental Rights – Civil and political rights – **Right to dignity**.
 5.4.18 Fundamental Rights – Economic, social and cultural rights – **Right to a sufficient standard of living**.

Keywords of the alphabetical index:

Income, minimum, in line with human dignity, fundamental right to guarantee / Income, minimum, coverage, benefits, claim, ascertainment / Life, social, cultural and political, participation.

Headnotes:

1. The fundamental right to a guarantee of a subsistence minimum that is in line with human dignity derived from Article 1.1 of the Basic Law in conjunction with the principle of the social welfare state contained in Article 20.1 of the Basic Law ensures that each person in need of assistance obtains assistance, the material prerequisites of which are indispensable for his or her physical existence and for a minimum participation in social, cultural and political life.

2. As a guaranteed right, this fundamental right in Article 1.1 of the Basic Law, takes on an autonomous significance, taken together with Article 20.1 of the Basic Law, in addition to the right from Article 1.1 of

the Basic Law to respect for the dignity of each individual, which has an absolute effect. The legislator may not alter it and it must be honoured; it must however be lent concrete shape, and be regularly updated by the legislator, who has to direct the benefits to be paid towards the respective stage of development of the polity and towards the existing conditions of life. The legislator has latitude in bringing about this state of affairs.

3. In order to ascertain the extent of the claim, the legislator has to realistically and comprehensibly assess all expenditure that is necessary for one's existence in a transparent, expedient procedure on the basis of reliable figures and plausible methods of calculation.

4. The legislator may cover the typical needs to ensure a subsistence minimum (i.e. living wage) that is in line with human dignity by means of a fixed monthly amount, but must grant an additional benefit for securing a special need beyond this which is irrefutable, recurrent and not merely a single instance.

Summary:

I. The Second Book of the Code of Social Law (*Sozialgesetzbuch Zweites Buch*, hereinafter "the Act") establishes a means-tested basic provision for employable persons and the persons living with them in a joint household (*Bedarfsgemeinschaft*). The basic provision is essentially made up of the standard benefit paid to secure one's livelihood, which is determined in §§ 20 and 28 of the Act, and benefits for accommodation and heating. Upon its entry into force, the Act fixed the standard benefit for singles at 345 euros. The other members of a joint household receive percentage shares of this amount: spouses, civil partners and live-in partners receive an amount of 311 euros (90 %), children before completing the age of 14 an amount of 207 euros (60 %) and children from the beginning of their 15th year of age an amount of 276 euros (80 %).

An increase for everyday needs is ruled out. Single-instance assistance is only paid in exceptional cases for a special need.

The basis of the assessment of the standard rates is a special evaluation of the sample survey on income and expenditure, which is conducted every five years by the Federal Statistical Office. What is relevant to the determination of the standard rate is the expenditure, compiled in the different divisions of the sample survey, of the lowest 20 % of the single-person households stratified according to their net income (lowest quintile) after taking out the recipients

of social assistance. However, only certain percentage shares of this expenditure are considered for the assessment of the standard rate.

The Standard Rate Ordinance (*Regelsatzverordnung*), in force since 1 January 2005, is based on the 1998 sample survey on income and expenditure. When determining the expenditure that is relevant to the standard rate, the division Education was not taken into account. Further reductions were made inter alia in the division Clothing and Shoes e.g. for furs, in the division Housing etc. with the expenditure item "Electricity", in the division Transport due to the costs of motor vehicles and in the division Leisure, Entertainment and Culture e.g. for gliders. The amount calculated for 1998 was projected to 1 January 2005 according to the development of the current pension value in the statutory pensions insurance scheme. When fixing the standard benefit for children, the legislator created two age groups: 0 to 14 years and 14 to 18 years.

The Higher Social Court of Hesse (*Hessisches Landessozialgericht*) and the Federal Social Court (*Bundessozialgericht*) submitted to the Federal Constitutional Court the question of whether the amount of the standard benefit to ensure the livelihood of adults and children until they have completed the age of 14 in the period between 1 January 2005 and 30 June 2005 according to § 20.1 to 20.3 and according to sentence 3, no. 1, alternative 1 of § 28.1 of the Act is compatible with the Basic Law.

II. The provisions of the Act which concern the standard benefit for adults and children, do not comply with the constitutional claim based on Article 1.1 of the Basic Law in conjunction with Article 20.1 of the Basic Law, to guarantee a subsistence minimum (i.e. living wage) in line with human dignity.

This claim to benefits not only extends to the means which are absolutely necessary to maintain an existence that is in line with human dignity, but also guarantees the entire subsistence minimum. The claim comprises a human being's physical existence while securing the possibility of cultivating human relations and securing a minimum participation in social, cultural and political life. This claim to benefits must be structured in such a way that it always covers the need which is necessary for the existence of every individual holder of fundamental rights.

The extent of this claim cannot be directly inferred from the Constitution. Instead, it depends on the views held in society about what is necessary for an existence that is in line with human dignity, on the

specific situation of the person in need of assistance and on the respective economic and technical circumstances. When determining the extent of the benefits paid to secure the subsistence minimum, the legislator has latitude, which comprises the assessment of the actual circumstances as well as an evaluating appraisal of the need.

In doing so, the legislator has to consistently assess all expenditure that is necessary for one's existence in a transparent and expedient procedure according to the actual need. No specific method is prescribed to the legislator for that. Deviations from the chosen method must, however, be objectively justified. The result achieved must be continually reviewed and further developed, especially if fixed rates are provided.

As regards the result, substantive review by the Federal Constitutional Court is restricted to ascertaining whether the benefits are evidently insufficient.

The fundamental right to the guarantee of a subsistence minimum that is in line with human dignity requires a review of the bases and the method of benefit assessment with regard to the objective of the fundamental right. The protection provided by the fundamental right therefore extends to the procedure for ascertaining the subsistence minimum. In order to ensure that the amount of the statutory assistance benefits is comprehensible and can be reviewed by the courts, the determination of the benefits must be viably justifiable on the basis of reliable figures and plausible methods of calculation.

The Federal Constitutional Court therefore examines whether the legislator has appropriately taken up and described the objective pursued by the fundamental right, whether it has chosen a fundamentally suitable method of calculation, whether it has, in essence, completely and correctly ascertained the necessary facts, and finally, whether it has kept within the boundaries of what is justifiable in all stages of calculation. For that, the legislator is obliged to comprehensibly disclose the methods and stages of calculation employed for determining the subsistence minimum.

The system of benefits to secure one's livelihood as a component of the basic provision for jobseekers is intended to take into account all situations of need which must be covered for securing an existence that is in line with human dignity. According to its definition, it (fundamentally) meets the requirements of Article 1.1 of the Basic Law in conjunction with Article 20.1 of the Basic Law. Moreover, it is in principle unobjectionable that a single-instance need,

which only arises at irregular intervals, be covered by increasing the monthly standard benefits.

The standard benefits of 345, 311 and 207 euros are sufficient to secure a subsistence minimum in line with human dignity.

The method of calculation chosen for determining the standard benefit is (fundamentally) suitable for realistically assessing the benefits necessary to secure a subsistence minimum in line with human dignity.

The relevant statistical model is also a justifiable method for realistically assessing the subsistence minimum for a single person. In particular, it is based on suitable empirical data.

It is constitutionally unobjectionable that only a certain percentage of the expenditure of the lowest quintile compiled in the different divisions of the sample survey on income and expenditure is considered for assessing the standard benefit. The respective reduction must, however, be objectively justified, also as regards its amount, and it requires an empirical basis. Estimates conducted "at random" run counter to a procedure which involves a realistic assessment and therefore infringe Article 1.1 of the Basic Law in conjunction with Article 20.1 of the Basic Law.

The legislator must comprehensibly substantiate its evaluations and decisions especially if it deviates from the method it has chosen. When ascertaining the standard benefit of 345 euros, the legislator deviated from the structural principles of the statistical model it has chosen without providing a factual justification, and hence in an unconstitutional manner. For instance, in several divisions of the sample survey on income and expenditure 1998, the legislator made percentage reductions for goods and services that are not relevant to the standard benefit. Whether the lowest quintile of the single-person households had incurred such expenditure at all was, however, uncertain. Thus the legislator estimated, without a sufficient factual basis, a share of the expenditure that allegedly does not serve to secure the subsistence minimum. There is no empirical evidence with regard to the amount of reductions made in other divisions.

Finally, it would have required special substantiation to explain why the expenditure compiled in the division Education and the expenditure covered by the item "Extracurricular instruction in sports and fine arts subjects" in the division Leisure, Entertainment and Culture were completely left out of the account.

The fact that the expenditure relevant to the standard benefit was projected to the figure of 1 July 2003 according to the increase of the current pension value in the period from 1 July 1999 to 1 July 2003 was another unjustified deviation from the structural principles of the statistical method of ascertainment. Due to the fact that the pensions had not been adapted on 1 July 2004, the standard rate was not increased for the period starting on 1 January 2005.

The insufficient ascertainment of the standard benefit also has an effect on the derived benefits for partners living in a joint household and for children, so that these amounts now also do not meet the constitutional requirements.

Moreover, the assessment of the social allowance for children before they complete the age of 14, at 60 % of the standard benefit for a single person, is not based on any justifiable method of determining the subsistence minimum of such a child. In spite of the special child-specific and age-specific need, which arises particularly with school-age children, the legislator did not ascertain the subsistence minimum of an underage child living with his or her parents. The creation of a uniform age group of children up to 14 years of age would have required particular justification, as the need of a schoolchild at puberty is obviously different from that of an infant or a small child.

The fact that the Act does not provide for a claim to benefits for securing a special need, which is irrefutable, recurrent and not merely a single occurrence to cover the subsistence minimum that is in line with human dignity is incompatible with Article 1.1 of the Basic Law in conjunction with Article 20.1 of the Basic Law. In this regard, the legislator is to provide for a hardship arrangement in the shape of a claim to assistance benefits. It is in principle permissible to grant a standard benefit as a fixed rate, because with regard to legislation on mass phenomena, the legislator may pass generalising provisions that are based on typical cases. However, the subsistence minimum must be secured in every individual case. The provisions of the Act are, as a general rule, but not without exception, able to cover an individual special need. They neither cover all need situations nor a special need which is irrefutable, recurrent and not merely a single instance, which is taken into account as regards its nature, but only to an average amount.

The provisions submitted are to be declared incompatible with the Basic Law. Due to the life-determining significance of the provisions for a very large number of people, a new provision is to be enacted by 31 December 2010. There is no obligation to retroactively enact a new provision.

With a view to the requirement of a hardship arrangement to secure a special need, which is irrefutable, recurrent and not merely a single occurrence to cover the subsistence minimum that is in line with human dignity, a violation of Article 1.1 of the Basic Law in conjunction with Article 20.1 of the Basic Law must be prevented in the transitional period.

Languages:

German, English (on the Court's website).



Identification: GER-2010-1-004

a) Germany / **b)** Federal Constitutional Court / **c)** First Chamber of the First Panel / **d)** 18.02.2010 / **e)** 1 BvR 2477/08 / **f)** / **g)** / **h)** *Archiv für Presserecht* 2010, 145-147; *Deutsches Verwaltungsblatt* 2010, 643-645; CODICES (German).

Keywords of the systematic thesaurus:

3.17 General Principles – **Weighing of interests.**
 5.1.2 Fundamental Rights – General questions – **Horizontal effects.**
 5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression.**
 5.3.31 Fundamental Rights – Civil and political rights – **Right to respect for one's honour and reputation.**

Keywords of the alphabetical index:

Personality, right, general / Cease and desist order, civil-law / True facts, publication.

Headnotes:

The protection conferred by Article 5.1 of the Basic Law (freedom of expression of opinion) extends to factual claims provided they can contribute to the formation of opinions.

Provisions constituting a civil-law right to forbearance on account of a violation of the general right of personality can be considered to be legal provisions limiting fundamental rights within the meaning of Article 5.2 of the Basic Law. However, when

interpreting and applying such provisions the courts must give sufficient consideration to the value of the limited fundamental right.

Summary:

I. The applicant operates a website on which he publishes an online newspaper. He intended to publish an article by the author R. on that site. The article dealt with a lawsuit in which R. was the party claimed against for forbearance of the publishing of a book. Because of that, the applicant wrote a letter to the associate of the lawyer H., who was representing the plaintiff in the lawsuit, to enquire whether he could use a photograph taken from his law firm's homepage for the publication. The tone of the enquiry was in part unfriendly, in part ironic. The associate (hereinafter, the "plaintiff") explicitly refused to allow pictures of himself and his associate H. to be used and threatened to take legal steps against the applicant. When R.'s article was subsequently published in the online newspaper, it was accompanied by comments on both the legal representative H.'s demeanour and his appearance. The editors also noted that, following an enquiry, the applicant "had not wished to permit an impressive homepage photo of his law firm to accompany R.'s commentary". In addition, the content of the plaintiff's email and another email in which H. had explicitly refused to allow his photo to be used were quoted *verbatim*.

The plaintiff thereupon filed an action against the applicant before the Berlin Regional Court (*Landgericht Berlin*) to compel him to refrain from quoting *verbatim* from the lawyer's letter. In the judgment being challenged by the constitutional complaint the Regional Court confirmed the existence of a right to forbearance according to the provisions set out in § 823.1 and § 823.2 in conjunction with sentence 2 of § 1004.1 of the Civil Code (*Bürgerliches Gesetzbuch – BGB*). The Court held that by having his harshly worded refusal reproduced on the applicant's website, the plaintiff was publicly made to look like someone who reacted to a simple request by issuing a strongly worded threat, and that the resulting encroachment of the plaintiff's right of personality weighed more heavily than the public's interest in this information. The applicant's appeal was rejected as unfounded.

II. The First Chamber of the First Panel of the Federal Constitutional Court overturned the courts' decisions and referred the case back for a decision upon rehearing. The issuing of a cease and desist order to prevent the plaintiff's lawyer's letter being quoted *verbatim* violated the applicant's fundamental right to free expression of opinions (Article 5 of the Basic Law). The protection conferred by Article 5.1 of the Basic Law

extends to factual claims provided they can contribute – as in the present case – to the formation of opinions. § 823.1 and § 1004 of the Civil Code can be considered to be legal provisions limiting fundamental rights within the meaning of Article 5.2 of the Basic Law. However, when interpreting and applying such provisions, the courts must give sufficient consideration to the value-conferring importance of the limited fundamental right.

The courts' assumption that publishing the quotation constituted an encroachment of the plaintiff's right of personality already raises considerable constitutional concerns. Insofar as the courts were guided by the case group involving the so-called "pillory effect" which has been developed in the civil-law's case-law, then no reasonable grounds have been provided. In particular, the statement of grounds for the decision does not indicate that the conduct of the plaintiff, which has been reported by including the quotation, could result in any serious condemnation by the general public or large parts of it. However, this is the requirement for the assumption of denunciation. Rather, it already appears doubtful whether the information that someone strongly protests against the publication of his own photograph can in fact damage his honour or his reputation.

The appellate court's supplementary consideration, namely that the statement in general gave the wrong impression by presenting the plaintiff as someone who reacts to a simple enquiry with a strongly worded threat, also proves untenable. The editorial note does not explicitly refer to the wording or the nature of the enquiry, but only informs readers that the plaintiff had not wished to permit his photo to be used. The Court, in particular, did not sufficiently take account of the context in which the statements were made in the text. In this respect it has not met the constitutional requirements in regard to the interpretation of statements to which the protection conferred by Article 5.1 of the Basic Law extends.

Objections must also be raised in regard to the courts' weighing of the plaintiff's general right of personality, which in their opinion had been affected, against the applicant's freedom of expression of opinion. The courts were essentially guided by the idea that there was little public interest in the information the statement in issue contained. However, the freedom of expression of opinion is not only protected with the proviso that there is a public interest, but also primarily guarantees the self-determination of each individual holder of fundamental rights in regard to the development of his or her personality in his or her communication with others. The importance of the freedom of expression is already based on this, and must be weighed against the general right of personality. This can only be increased by the public's

possible interest in the information and, since this is the case, it represents a constitutionally objectionable reduction for the courts to thus have accorded the plaintiff a right to forbearance merely because his general right of personality outweighed the public's interest in certain information.

Languages:

German.



Identification: GER-2010-1-005

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 02.03.2010 / **e)** 1 BvR 256/08, 1 BvR 263/08, 1 BvR 586/08 / **f)** Data retention / **g)** / **h)** *Neue Juristische Wochenschrift* 2010, 833-856; *Wertpapier-Mitteilungen* 2010, 569-586; *Europäische Grundrechte-Zeitschrift* 2010, 85-121; *Deutsches Verwaltungsblatt* 2010, 503-509; *Kommunikation und Recht* 2010, 248-254; CODICES (German).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Data, retention / Media, data, telecommunications traffic, storage / Media, data, telecommunications, retrieval and use / Media, telecommunication service, providers, storage, duty / Media, data, telecommunications traffic, security.

Headnotes:

1. Storage of telecommunications traffic data without cause for six months by way of precaution by private service providers as set out in Directive 2006/24/EC of the European Parliament and the Council of 15 March 2006 (OJ L 105 of 13 April 2006, p. 54) is not in itself incompatible with Article 10 of the Basic Law; any potential priority of the Directive is therefore not relevant to the decision.

2. The principle of proportionality requires the formulation of the legislation on such storage to take appropriate account of the particular weight of the encroachment upon fundamental rights constituted by the storage. Sufficiently sophisticated and well-defined provisions are required with regard to data security, to the use of the data, to transparency and to legal protection.

3. Guaranteeing data security and the restriction of the possible use of data, in well-defined provisions, are inseparable elements of legislation that create a duty of data storage, the responsibility of the Federal legislature, under Article 73.1.7 of the Basic Law. In contrast, the responsibility for creating the retrieval provisions themselves and for drafting the provisions on transparency and legal protection depends on the legislative competence for the respective subject-matter.

4. With regard to data security, there is a need for statutory provisions which lay down a particularly high security standard in a well-defined and legally binding manner. It must be ensured by statute, at all events fundamentally, that this standard is oriented to the state of development of the discussion between specialists, constantly absorbs new knowledge and insights and is not subject to a free weighing of interests against general business considerations.

5. The retrieval and the direct use of data are only proportionate if they serve overridingly important tasks of the protection of legal interests. In the area of the prosecution of criminal offences, this requires the suspicion of a serious criminal offence based on specific facts. For warding off danger and for performing the duties of the intelligence services, they may only be permitted if there is actual evidence of a concrete danger to the life, limb or freedom of a person, to the existence or the security of the Federation or of a *Land* or to ward off a danger to public safety.

6. A merely indirect use of data by the telecommunications service providers to issue information with regard to the owners of Internet Protocol addresses is permissible, even independent of restrictive lists of legal interests or criminal offences, for the prosecution of criminal offences, for warding off danger and for carrying out intelligence-services duties. For the prosecution of regulatory offences, such information can only be allowed to be given in cases of particular weight expressly named by the legislature.

Summary:

The constitutional complaints challenge §§ 113a, 113b of the Telecommunications Act (*Telekommunikationsgesetz*, hereinafter, “the Act”) and § 100g of the Code of Criminal Procedure (*Strafprozessordnung*) to the extent that the latter permits the collection of data stored pursuant to § 113a of the Act.

According to § 113a of the Act, the providers of publicly accessible telecommunications services have a duty to store virtually all traffic data of telephone services, email services and Internet services without cause, by way of precaution. The duty of storage essentially extends to all information that is necessary in order to reconstruct who communicated or attempted to communicate when, how long, to whom, and from where. The contents of the communication, and consequently the details of what Internet pages are visited by users, are not to be stored. At the end of the six months in which the duty of storage exists, the data are to be deleted within one month.

§ 113b of the Act governs the purposes for which these data may be used. This provision broadly designates intended uses that are possible in general; these are to be put in concrete terms by provisions passed by the Federal Government and the *Länder* (states). In the first half-sentence of the first sentence of § 113b, the possible purposes of the direct use of the data are listed: the prosecution of criminal offences, the warding off of substantial dangers to public security and the performance of intelligence tasks. The second half-sentence permits the indirect use of the data for information under § 113 of the Act in the form of a claim to information from the service providers in order to identify IP addresses. This provides that if authorities know an IP address, they may demand information as to the user to whom this address was allocated. The legislature permits this for the purposes of the prosecution of criminal offences and regulatory offences and the warding off of danger independently of more specific definitions. There is neither a requirement of judicial authority nor a duty of notification.

§ 100g of the Code of Criminal Procedure putting the first half-sentence of the first sentence of § 113b of the Act into specific terms, governs the direct use for criminal prosecution of the data stored by way of precaution. The provision governs all access to telecommunication traffic data. It also permits access to connection data that are stored by the service providers for other reasons (for example in order to carry out business transactions). The legislature does not differentiate

in this respect between the use of the data stored by way of precaution under § 113a of the Act and other traffic data. It permits even the retained data to be used independently of an exhaustive list of criminal offences for the prosecution of criminal offences of substantial weight. Pursuant to an examination of proportionality based on the individual case, the data may be used generally to prosecute criminal offences that are committed via telecommunications. There must be a prior judge’s decision. The Code of Criminal Procedure also provides for duties of notification and subsequent judicial relief in this connection.

The challenged provisions implement Directive 2006/24/EC of the European Parliament and the Council on the retention of data of the year 2006. This Directive provides that the providers of telecommunications services must be put under an obligation to store the data described in § 113a of the Act for a minimum of six months and a maximum of two years and to keep them available for the prosecution of serious criminal offences. The Directive contains no more detailed provision on the use of the data. The data protection measures are also largely left to the Member States.

II. The provisions of the Act and of the Code of Criminal Procedure on data retention are not compatible with Article 10.1 of the Basic Law (protection of the secrecy of telecommunications).

The challenged provisions do not satisfy the requirements set out in the Headnotes of the decision. The reason why § 113a of the Act is unconstitutional is not simply that the scope of the duty of storage would have to be regarded as disproportionate from the outset. But the provisions on data security, on the purposes and the transparency of the use of data and on legal protection do not meet the constitutional requirements. In consequence, the whole legislation lacks a structure complying with the principle of proportionality.

Even the necessary guarantee of a particularly high standard of data security is missing. The Act essentially refers only to the care generally needed in the field of telecommunications. Putting the measures in more specific terms is left to the individual telecommunications service providers. The persons with a duty of storage are neither required in a manner that can be enforced to use instruments to guarantee data security, nor is a comparable level of security otherwise guaranteed. There is also no balanced system of sanctions that attributes more weight to violations of data security than to violations of the duties of storage themselves.

The provisions on the use of data for criminal prosecution are also incompatible with the standards developed from the principle of proportionality. Alternative 1 of sentence 1 of § 100g.1 of the Code of Criminal Procedure does not ensure that, in general and in individual cases, only serious criminal offences may be the cause for collecting the relevant data.

Nor does § 100g of the Code of Criminal Procedure comply with the constitutional requirements, in that it permits data retrieval not merely for individual cases to be confirmed by a judge, but as a general rule even without the knowledge of the person affected.

The very structure of alternatives nos. 2 and 3 of sentence 1 of § 113b of the Act does not satisfy the requirements of sufficient limitation of the purposes of use. The Federal legislature contents itself with sketching, in a general manner, the fields of duty for which data retrieval in accordance with later legislation, in particular legislation of the *Länder*, is possible. In this way it does not satisfy its responsibility for the constitutionally required limitation of the purposes of use.

The formulation of the use of the data stored under § 113a of the Act is also disproportionate in that no protection of confidential relations is provided for the transmission. At least for a narrowly defined group of telecommunication connections, which rely on particular confidentiality, such a protection is a fundamental requirement.

Half-sentence 2 of sentence 1 of § 113b of the Act does not satisfy the constitutional requirements insofar as it makes the information on data possible for the general prosecution of regulatory offences, without further limitation, and as it does not provide duties of notification following the provision of such information.

The violation of the fundamental right to protection of the secrecy of telecommunications under Article 10.1 of the Basic Law makes §§ 113a and 113b of the Act void, as it does the first sentence of § 100g.1 of the Code of Criminal Procedure insofar as traffic data under § 113a of the Act may be collected under this provision. The challenged norms are therefore to be declared void, their violation of fundamental rights having been established.

With regard to the assessment of §§ 113a and 113b of the Act as unconstitutional, the decision was passed by seven votes to one as regards its result, and with regard to further questions of substantive law it was passed by six votes to two, to the extent shown in the two dissenting opinions.

The Senate decided by four votes to four that the provisions are to be declared void, and not merely incompatible with the Basic Law.

Languages:

German, English (on the Court's website).



Hungary

Constitutional Court

Statistical data

1 January 2010 – 30 April 2010

Total number of decisions: 190

- Decisions by the Plenary Court published in the Official Gazette: 41
- Decisions in chambers published in the Official Gazette: 9
- Other decisions by the Plenary Court: 47
- Other decisions in chambers: 19
- Number of other procedural orders: 74

Important decisions

Identification: HUN-2010-1-001

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 28.01.2010 / **e)** 8/2010 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 2010/10 / **h)**.

Keywords of the systematic thesaurus:

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

4.10.7.1 Institutions – Public finances – Taxation – **Principles.**

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

Keywords of the alphabetical index:

Tax, property / Property, real / Tax authority, powers.

Headnotes:

A wealth tax was to provide the tax authority with a nearly unlimited right of appraisal and exemptions were to be solely based on the value of property, not taking into account the number of its owners.

Summary:

I. Several petitioners, including the Parliamentary Commissioner for Civil Rights contested a wealth tax to be introduced in 2010 before the Constitutional Court. The legislation would have introduced a bracketed tax on wealth from the start of 2010.

The petitioners argued, *inter alia*, that Act no. LXXVIII of 2009 on the taxation of high-value property (the Act) guarantees the tax authority a practically unlimited right of appraisal. Therefore, any uncertainty in deciding the tax base is a serious encroachment on the demands of legal certainty. The tax also discriminates against large families. The exemption is solely based on the value of the property and does not take into account the number of its owners.

Under the Act, the tax rate would have been 0.25% up to 30 million HUF, 0.35% 30-50 million HUF, and 0.5% on above 50 million HUF. Homes valued at up to 30 million HUF which were occupied by their owners would have been exempt. There would be a 15 million HUF exemption on the value of a second property.

II. In its decision, the Court did not find the principle of property tax unconstitutional as such. However, it identified problems with the calculation of the value of homes subject to the tax. And the time at which this was done. The market price of real property as defined by the Act was uncertain, and therefore taxpayers would be unable to comply with the requirement to assess the market value of the properties they own.

The Court also held that the Act gave the tax authority broad powers to impose penalties, and so the responsibility of assessing the market value rested entirely with the taxpayers.

The Court also noted that the Act failed to take into account the income of taxpayers subject to the tax. This could put some of them into an impossible situation.

It accordingly ruled that the provisions of the Act relating to residential property created legal uncertainty and were unconstitutional. However, the provisions of the Act pertaining to high-performance passenger cars, boats and aircraft would remain in force.

Languages:

Hungarian.



Identification: HUN-2010-1-002

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 04.03.2010 / **e)** 23/2010 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 2010/31 / **h)**.

Keywords of the systematic thesaurus:

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

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

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:

Advertising, ban.

Headnotes:

The freedom of expression guaranteed by the Constitution does not exclude limitations on business advertising activity. Tobacco corporations are not citizens; they do not have ideas of their own and are not therefore given the fundamental right to free speech in the same way as real people. Consequently, the state can impose limits on tobacco advertising.

Summary:

I. Several petitions were lodged, seeking the constitutional review of Act LVIII of 1997 on Business Advertising Activity (hereinafter, the “Act1”) and Act XLVIII of 2008 on Essential Conditions of and Certain Limitations to Business Advertising Activity (hereinafter, the “Act2”).

Act1 introduced a comprehensive ban on tobacco advertising, which was to cover print media and outdoor advertising, including posters, billboards and other forms of advertisements. Act1 only allowed exhibitions of tobacco products and their prices at points of sale, advertising in industry publications and, on request, at global motor sport events, such as the Hungarian Formula 1 race.

Act2 introduced a total ban on tobacco advertising. Act2 only allowed exhibitions of tobacco products and their prices at the point of sale and advertising in industry publications.

Various petitioners, including tobacco industry representatives, challenged Act1 and Act2 in the Constitutional Court, alleging a violation of commercial freedom of speech.

II. The Court rejected the petitions requesting the removal of the ban on tobacco advertising in Act1, on the basis that freedom of expression, as enshrined in Article 61.1 of the Constitution, does not exclude statutory limitations on commercial speech. Corporations (in this case the tobacco industry) do not have their own view based upon their private autonomy, and by advertising tobacco products they do not create a political debate. The advertisements in question are exclusively for commercial purposes, for making money, and the ads do not provide further information on tobacco products. The Court also took note of the fact that the advertisements promote tobacco products, which seriously damage the health of the consumer.

Nonetheless, it held Section 27 of the Act2 unconstitutional. This provision enables an authority or court to prohibit the publication of advertising that has yet to be published, if it has been established that the advertising, if published, would infringe provisions relating to business advertising activity. The Court held that a provision containing such a ban was “over-inclusive”. The wording of Section 27 was not specific enough. It enabled an authority or a court to ban the publication of an advertisement even in cases of minor violations of Act2. Such a ban could delay the publication of a newspaper and lead to prior restraint. Section 27 of Act2 was therefore declared unconstitutionally vague.

Justice András Bragyova attached a concurring opinion to the decision, emphasising that the provision at issue was unconstitutional, but only because it allowed an authority or court to prohibit publication of the newspaper containing the advertisement in breach of the Act2.

Justice Barnabás Lenkovics attached a dissenting opinion to the decision; Justice Elemér Balogh joined him in doing so. In their view, Section 27 is in line with the Constitution, as it only allows bans on advertising in breach of Act2. Courts and authorities do not have the power to impose fines, only to prohibit publication of the specific advertisement. This statutory limitation of free expression is the most effective way to protect public order, public morals and public health.

Cross-references:

- Decision no. 1270/B/1997, *Bulletin* 2000/2 [HUN-2000-2-003];
- Decision no. 37/2000, *Bulletin* 2000/3 [HUN-2000-3-006].

Languages:

Hungarian.

*Identification:* HUN-2010-1-003

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 25.03.2010 / **e)** 32/2010 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

5.2 Fundamental Rights – **Equality**.

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

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

5.3.43 Fundamental Rights – Civil and political rights – **Right to self fulfilment**.

Keywords of the alphabetical index:

Marriage / Homosexuality, couple, same-sex.

Headnotes:

The Registered Partnership Act, under which the institution of registered partnership is only available to same sex couples, is not contrary to the Constitution.

Summary:

I. In December 2008, the Constitutional Court in its Decision no. 154/2008, annulled the Registered Partnership Act before it entered into force. The Court held that the establishment of the institution of registered partnership for same sex couples is not unconstitutional. Nonetheless, it annulled the Act, on the basis that for different sex couples, the registered partnership was a doubling-up of marriage, which resulted in the devaluation of the institution of marriage.

In line with the Court's decision, the Parliament adopted a new Registered Partnership Act (hereinafter, the "Act"). This restricted registered partnerships to same sex couples. Almost all the rules of marriage applied, apart from the right to take a common surname, the right to adopt and to participate in assisted reproduction.

Several petitions were lodged, seeking a constitutional review of the Act. The arguments were diverse. Some argued that the new legal institution undermines the institution of marriage, others that excluding different sex couples is discriminatory. There were legal arguments against the technique of codification (a general clause equating registered partnership with marriage for most purposes), but also religious arguments that homosexuality is disorderly and immoral.

II. However, the Court, reaffirming its previous decision, rejected the above claims, on the basis that the right of same sex couples to legal recognition and protection can be derived from the fundamental right to human dignity and that the introduction of an institution similar to marriage for same sex couples is a duty of the state imposed by the Constitution.

The Court added that the Act could play a positive role in promoting the social acceptance of same sex couples and help gays and lesbians to come out.

The Court noted that not all differences between marriage and registered partnership are necessarily discriminatory, holding, for example, the current differences (no right to take the partner's name, to adopt children, and to participate in assisted reproduction) constitutional.

Under the Act, registered partnership is a family law institution that is established by joint declaration in front of a registrar. There could be no constitutional reason for the registrar to reject the request of the same sex couple to establish a registered partnership. When, in spite of that, the registrar refuses to register the partnership, the couple and the witnesses can later testify and based on this the partnership can be established by another registrar.

Justice András Barygyova attached a concurring opinion to the judgment. He noted that it would have been enough for the Court to say that registered partnership is not a marriage; therefore the Act concerning the registered partnership could not violate Article 15 of the Constitution (protection of marriage).

Justice László Kiss attached a concurring opinion, in which he stressed that the registrar (based upon conscience reasons) can refuse to establish the registered partnership, because not her/him, but the state is obliged to register the same sex couple.

Justice Elemér Balogh, Justice Péter Kovács and Justice László Kiss attached dissenting opinions to the decision. According to them, the Court should have annulled the whole Registered Partnership Act.

Languages:

Hungarian.



Identification: HUN-2010-1-004

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 31.03.2010 / **e)** 33/2010 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 2010/47 / **h)**.

Keywords of the systematic thesaurus:

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

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

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

4.6.3.1 Institutions – Executive bodies – Application of laws – **Autonomous rule-making powers.**

4.10 Institutions – **Public finances.**

Keywords of the alphabetical index:

Decree, legislative, review, constitutional.

Headnotes:

Granting legislative powers to the President of the Hungarian Financial Supervisory Authority would have required constitutional amendment.

Summary:

At its session of 23 November 2009, Parliament passed an Act on the Amendment of several acts concerning the legislative power of the President of the Hungarian Financial Supervisory Authority (or HFSA).

The President of the Republic did not sign the Amendment because he had concerns over its constitutionality. Exercising the power vested in him by Article 26.4 of the Constitution, he initiated a constitutional review of the Amendment.

The President observed that only the Constitution can grant legislative power. Without amending the Constitution, the President of the HFSA had no right to issue decrees.

The amendment under dispute changed the Acts on capital market, insurance, reinsurance and investment business, granting the President of the HFSA authority to issue decrees pertaining to these sectors.

The Constitutional Court noted that under the Constitution only the Parliament has legislative power (Article 19.3). The Government (Article 35.2), members of the Government (Article 37.2), the President of the Hungarian National Bank (Article 32/D.4) and local representative bodies (Article 44/A.2) are allowed to issue decrees. During a national crisis, the National Defence Council may issue decrees, as may the President of the Republic during a state of emergency (Article 19/B, 19/C).

The Constitution grants the above institutions exclusive power to enact statutes and to issue decrees. Therefore any statute granting legislative power to state institutions other than those listed in the Constitution is unconstitutional.

Consequently, the Constitutional Court declared the HFSA head's legislative rights unconstitutional.

Justice Péter Kovács attached a concurring opinion to the decision, in which he emphasised that EU law also forms part of the Hungarian legal system under Article 2/A of the Constitution.

Languages:

Hungarian.



Identification: HUN-2010-1-005

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 28.04.2010 / **e)** 51/2010 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 2010/63 / **h)**.

Keywords of the systematic thesaurus:

1.3.2.1 Constitutional Justice – Jurisdiction – Type of review – **Preliminary / ex post facto review**.
3.10 General Principles – **Certainty of the law**.

Keywords of the alphabetical index:

Law, entry into force.

Headnotes:

The first two books of the new Civil Code did not come into force on 1 May 2010, after the Constitutional Court declared the Act on the entry into force unconstitutional. The reason for this was that the sixty-day deadline by which the authorities and all interested parties should have examined the new provisions that were to take effect in the first stage was “excessively tight”. Moreover, the Court held that the new Civil Code’s “two-stage entry into force” would have required the relevant authorities to accommodate a multitude of legislative changes twice within a short period of time. This would have run counter to the principle of legal certainty.

Summary:

The petitioners, including the director of the parliamentary group representing the winning party, asked the Court to direct the repeal of the new Civil Code on the basis that the time span for its enactment was too short.

The first two books of the new Civil Code were to have entered into force on 1 May 2010, and the other five books were to have become effective as of 1 January 2011.

The new Civil Code was meant to introduce several new legal institutions into Hungarian civil law and to amend several existing regulations. The first book contained the general provisions; the second book contained the law relating to the individual. These provisions include reforms relevant to persons with disabilities. The legal status of people under full guardianship would have been transformed into a joint decision-making arrangement between them and their guardian. The second book of the new Civil Code would also have introduced significant changes

to the basic regulations and the right to damages for infringement of personal rights.

During the proceedings, the Constitutional Court did not examine the actual content of the new provisions which regulate fundamental areas of life. The Constitutional Court simply pronounced the Act on the entry into force unconstitutional. According to the Court sixty days was too short a time span to allow those responsible for implementing the new Civil Code to be properly trained, which seriously endangered legal certainty (there were sixty days between the publication of the Act on entry into force and the Civil Code’s entry into effect). Secondly, the new and old Civil Codes would have applied simultaneously for eight months, which would have caused confusion.

Consequently, the Court ruled that the new Civil Code could not enter into force on 1 May 2010.

Justice László Kiss attached a concurring opinion to the judgment. He agreed that the simultaneous application of the new and the old Civil Codes would have caused confusion in practice, but held that the Court should have counted the days available for formulating the application of the new Code from the day of the new Code’s publication (20 November 2009), and not from the day of the publication of the Act on the entry into force.

Justice András Bragyova attached a dissenting opinion to the decision. In his opinion, the prohibition of immediate entry into force is a formal requirement. Deciding on the given Act’s entry into force is within the competence and responsibility of the legislature. The Court can overrule this decision only in case of obvious misinterpretation. This was not the case with the new Code Civil. The Code was enacted following years of intense debate and the Hungarian legal community was involved in drafting the reforms.

Languages:

Hungarian.



Ireland

Supreme Court

Important decisions

Identification: IRL-2010-1-001

a) Ireland / **b)** Supreme Court / **c)** / **d)** 21.01.2010 / **e)** SC 419/03 / **f)** Meadows v. Minister for Justice, Equality and Law Reform / **g)** [2010] IESC 3 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

2.1.1.4.5 Sources – Categories – Written rules – International instruments – **Geneva Convention on the Status of Refugees of 1951.**

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

3.16 General Principles – **Proportionality.**

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

3.20 General Principles – **Reasonableness.**

5.1.1.3.1 Fundamental Rights – General questions – Entitlement to rights – Foreigners – **Refugees and applicants for refugee status.**

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

Keywords of the alphabetical index:

Judicial review, standards / Proportionality, burden of proof / Refugee, expulsion.

Headnotes:

A proportionality test should be applied in reviewing whether administrative decisions which affect fundamental rights are reasonable.

Summary:

I.1. The Supreme Court is the final court of appeal in civil and constitutional matters. It hears appeals from the High Court, which is a superior court of full original jurisdiction in all matters, including civil and constitutional matters. The decision of the Supreme Court summarised here arose from a point of law of exceptional public importance referred by the High Court to the Supreme Court. The question was whether, in determining the reasonableness of an administrative decision, which affects the

constitutional or fundamental rights of an individual, it was correct to apply the existing standards of review under established case-law.

2. The appellant was a Nigerian national who had applied for refugee status upon her arrival in Ireland in 1999, at the age of 17. Her application was primarily based on the grounds that a former business partner of her father's would harm her as revenge for the death of his son in a tribal war between the Hausa and Yoruba tribes, and also that, if returned to Nigeria, she would be forced into a marriage arranged by her father and subjected to female genital mutilation (FGM). She was informed in September 2001 that her application for refugee status had been refused and that the Minister for Justice proposed to make a deportation order against her. She was also informed that, before the making of a deportation order, she was entitled to make representations to the Minister setting out any reasons why she should be allowed to remain temporarily in Ireland.

In October 2001, the appellant made written submissions to the Minister requesting leave to remain in Ireland on humanitarian grounds, namely, that she would be subjected to female genital mutilation (FGM) if returned to Nigeria. It was argued that this would constitute a violation of her fundamental right to "life, liberty and security of the person" under both national and international law and thus breach the prohibition of *refoulement* in Section 5 of the Refugee Act 1996, which gives effect to the prohibition of *refoulement* in Article 33 of the Geneva Convention of 1951 relating to the Status of Refugees.

In July 2002, the appellant was informed by letter that the Minister for Justice had decided to issue a deportation order against her. The reasons for the Minister's decision were provided as follows:

"In reaching this decision the Minister has satisfied himself that the provisions of Section 5 (Prohibition of Refoulement) of the Refugee Act 1996 are complied with in your case.

The reasons for the Minister's decision are that you are a person whose refugee status has been refused and, having had regard to the [factors in Section 3.6 of the Immigration Act, 1999 upon which the Minister could consider granting the appellant leave to remain in Ireland on humanitarian grounds], including the representations received on your behalf, the Minister is satisfied that the interests of public policy and the common good in maintaining the integrity of the asylum and immigration systems outweigh such

features of your case as might tend to support your being granted leave to remain in this State.”

3. The issue before the Supreme Court was the ambit of the criteria which the courts should apply when reviewing the validity of administrative decisions. It is established in the case-law of the Supreme Court that judicial review of administrative acts is not an appeal and that the court in reviewing a decision is not to substitute its own views for those of the decision-maker. The existing test for review, according to established case-law, is that of ‘reasonableness’: a court cannot interfere with an administrative decision unless it is ‘unreasonable’ i.e. where it “plainly and unambiguously flies in the face of fundamental reason and common sense”.

Counsel for the appellant had submitted that the Supreme Court should apply a stricter test for review of administrative decisions in the appellant’s case i.e. the “anxious scrutiny” test used by the English courts in cases concerning administrative decisions affecting important fundamental rights, particularly in asylum and immigration cases. That test allows for a “sliding scale” of review, with the intensity of review depending on the subject matter under consideration, the importance of the human right affected and the extent of the encroachment upon that right.

II. In considering the question of the appropriate standard of review, the Supreme Court referred to previous case-law, which stated that where rights are recognised under the Constitution, a remedy to enforce these rights must also be available, and that it is the task of the courts to ensure that where rights are wrongfully violated that an effective remedy is available.

However, the Supreme Court eschewed adoption of the “anxious scrutiny” test, preferring to resolve the matter on the basis of existing Irish case-law, by reference to the principle of proportionality.

The Court noted that it had, in previous cases concerning the compatibility of a legislative provision with the Constitution, subjected the legislation to a proportionality test. Denham J. set out the proportionality test in Irish law, which is that formulated by the Supreme Court of Canada and adopted by the Irish courts in a previous decision: the measure which restricts a fundamental right must

“a. be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;
b. impair the right as little as possible; and
c. be such that their effects on rights are proportional to the objective.”

The Supreme Court clarified that, in examining whether a decision is ‘reasonable’, i.e. “whether the decision properly flows from the premises on which it is based and whether it might be considered at variance with reason and common sense”, the Court could legitimately apply a proportionality test in determining that question. In other words, application of the proportionality test is a means of examining whether a decision meets the test of ‘reasonableness’.

The Chief Justice stated that it is inherent in the principle of proportionality that where an administrative decision entails grave or serious limitations on an individual’s fundamental rights, the countervailing reasons justifying the decision must be correspondingly more substantial.

The Chief Justice held that where material has been presented to the Minister for Justice to suggest that a deportation order would cause the life or freedom of the deportee to be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion, contrary to the prohibition of *refoulement* in Section 5 of the Refugee Act 1996, the Minister must specifically address that issue and form an opinion. Under the 1996 Act, a threat to a person’s freedom includes the risk of a “serious assault” and the appellant had asserted that she would be subjected to female genital mutilation (FGM) if returned to Nigeria, which the Supreme Court held could be considered a “serious assault” within the meaning of the Act.

In the instant case, the Minister for Justice had not provided any reasons to explain his decision to issue a deportation order. The letter sent to the appellant informing her of the Minister’s decision to deport her simply stated: “In reaching this decision the Minister has satisfied himself that the provisions of Section 5 (Prohibition of *Refoulement*) of the Refugee Act 1996 are complied with in your case.”

The Supreme Court held that an administrative decision affecting the rights and obligations of persons should at least disclose the essential rationale on foot of which the decision is taken. The Chief Justice stated that the rationale provided should be patent from the terms of the decision or capable of being inferred from its terms and context. Without such a requirement, the constitutional right of access to the courts to have the legality of an administrative decision judicially reviewed could be rendered either pointless or so circumscribed as to be unacceptably ineffective.

The Chief Justice held that the Minister’s decision in the instant case was expressed in terms so vague

and opaque that its underlying rationale could not be properly or reasonably deduced. There was therefore a fundamental defect in the Minister's decision and the Supreme Court allowed the appellant to institute proceedings before the High Court to have the Minister's decision judicially reviewed on this point.

It may be noted that, in applying the proportionality test, the Chief Justice held that a "margin of appreciation" should be accorded to the decision-maker in his choice of an effective means of fulfilling any legitimate policy objectives. Fennelly J. expressly stated that his judgment was not intended to express or imply any view as to how the Minister should make his decision; the decision remained within the Minister's discretion, in striking a balance between the rights of the individual and other policy considerations.

The Supreme Court also held that, where the principle of proportionality is relevant, the onus rests on an applicant to establish that an administrative decision is disproportionate.

III. This case was heard by a panel of five judges. The Supreme Court judgment summarised above was by a majority of three judges. Two Judges dissented from the majority judgment. Hardiman J., with whom Kearns P. fully agreed, objected to the approach of the majority on the basis that it violated the constitutional principle of the separation of powers by failing to accord due deference to the Minister as a member of the executive branch of government. In Hardiman J.'s view, the majority approach, in looking for explanation and justification from the Minister for his decision, required the courts to examine the merits and demerits of the Minister's decision and shifted the onus of proof to the Minister, contrary to the general principle of judicial review that the onus remains on the appellant at all times to establish that the decision made was unreasonable. To shift the onus, he said:

"...would, in my view, be very significantly to interfere with the separation of powers and to hamper or obstruct the Minister in taking a decision which is clearly within his scope. The courts would naturally and properly baulk at any suggestion of a ministerial interference in matter properly within their jurisdiction: the corollary of this is that the courts must respect the Minister's jurisdiction and interfere only upon proper proof by the applicant that the Minister's decision is flawed."

He viewed the majority's approach as a "revolution in the law of judicial review", comparable to the adoption of the "anxious scrutiny" standard of review in English law.

Languages:

English.



Israel

Supreme Court

Important decisions

Identification: ISR-2010-1-001

a) Israel / **b)** Supreme Court (Court of Appeal) / **c)** Panel / **d)** 11.02.2010 / **e)** CrimApp 8823/07 / **f)** John Doe v. The State of Israel / **g)** / **h)**.

Keywords of the systematic thesaurus:

- 3.16 General Principles – **Proportionality.**
- 3.17 General Principles – **Weighing of interests.**
- 3.18 General Principles – **General interest.**
- 5.1.1.4.3 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Detainees.**
- 5.3.1 Fundamental Rights – Civil and political rights – **Right to dignity.**
- 5.3.5.1.3 Fundamental Rights – Civil and political rights – Individual liberty – Deprivation of liberty – **Detention pending trial.**
- 5.3.13.1.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Criminal proceedings.**

Keywords of the alphabetical index:

Detainee, rights / Detention pending trial, hearing, accused, presence / Terrorism, fight, means, choice.

Headnotes:

The right of a detainee to be present at his or her own remand hearing is part of the right to due process and as such is a fundamental constitutional guarantee.

The provision, which enables a court to hold a remand hearing of detainees suspected of committing a security offence *in absentia* violates the detainee's right to due process to an unproportional degree.

Summary:

Section 5 of the Criminal Procedure Law (detainee suspected of a security offence), Temporary order – 2006, enables the Court (in limited circumstances) to hold a remand hearing of a detainee suspected of committing a security offence *in absentia*. The

Supreme Court (in an extended panel of nine judges) considered whether this provision is unconstitutional and therefore ought to be rendered null and void.

The majority of the panel held that a defendant's right to be present at trial is a fundamental constitutional one. The Court had already acknowledged the right to due process as a protected constitutional guarantee (with respect to specific aspects of that right). Indeed, the right to due process is an inherent precondition of protecting the right to freedom, which is also a basic constitutional right. Furthermore, the right to due process is linked to dignity, since a violation of the right to due process might "damage the defendant's self esteem and create within him a feeling of contempt and helplessness as if he were a pawn in the hands of others, in a manner that constitutes a violation of his constitutional right to dignity under Sections 2 and 4 of Basic Law: Human Dignity and Liberty (hereinafter the "Basic Law"). Based on the foregoing, it follows that, to the extent that the right to due process inherently relates to the protection of freedom and dignity, it is a protected constitutional right. The right of a defendant to be present at his or her own trial is a core element of the right to due process, and therefore it is also a constitutional right protected by the Basic Law. Indeed, the right to due process is an overarching right which includes derivative rights, *inter alia*, the right of a defendant to be present at his or her own trial.

The right of a defendant to be present at his or her own trial is not just the right of an individual. It also represents a significant public interest that the criminal judicial system will determine a person's fate by conducting a fair process, in which a defendant will be granted a full opportunity to present his or her own defence. Indeed, granting a defendant the right to be present at trial promotes transparency and ensures a more accurate determination of fact finding.

A suspect or a detainee also has a constitutional right to be present at his or her own remand hearing, as part of the right to due process. As a rule, the right to due process pertains to all aspects and stages of the criminal justice process – whether during police investigation or at trial. This is particularly the case in relation to the remand procedure, which is "the gravest form of violation of personal freedom". The remand procedure severely impacts on the rights of the suspect and/or of the defendant. Effective judicial review is an inseparable part of a constitutionally approved remand procedure. Accordingly, maintaining a fair remand procedure is a basic constitutional principle, which is required in order to protect the right to freedom and dignity.

Yet, the right to due process, including the right of a suspect to be present at his or her own remand hearing, is not an absolute one. It is possible to violate this right by virtue of a law, which meets the limitation clause conditions established in Section 8 of the Basic Law. In this case, the central question concerns the proportionality condition. The primary purpose of the law under consideration (including that of Section 5 of the Law) is to enhance the ability of law enforcement officers to perform effective investigations of security offences, given the particularities of such offences, namely, the difficulty in collecting information and the need to act expeditiously in order to prevent terrorist attacks. Whilst this purpose is an appropriate one, the question remains whether the means chosen by the legislator to achieve such goals are proportionate. On the basis of the limitation clause, a law is unconstitutional to the extent that it disproportionately interferes with a defendant's right to due process.

After reviewing the material presented, the Supreme Court was not convinced that the means chosen by the legislator within the framework of Section 5 of the Law are those least harmful to the defendant. Further, the provision could not be held to maintain the appropriate balance between interference with the right to due process – in the sense of denying the defendant's presence at his remand hearing – and fulfilling the purpose of an investigation.

Section 5 of the Law, especially when combined with other existing provisions (and in particular the one that might prevent detainees suspected of committing security offences from meeting with their lawyers – under certain circumstances) has the potential to cause grave harm to the judicial process, its effectiveness, transparency and fairness. The Supreme Court was not convinced that the purpose of Section 5 could not be achieved by other means, which would be less harmful to the detainee's rights.

Based on the forgoing analysis, the Court concluded that Section 5 is inconsistent with the fundamental constitutional principles enshrined in the Basic Law, and therefore must be rendered null and void.

Languages:

Hebrew.



Identification: ISR-2010-1-002

a) Israel / **b)** Supreme Court (Court of Appeal) / **c)** Panel / **d)** 25.03.2010 / **e)** LCA 4447/07 / **f)** Rami Mor v. Barak E.T.C the Company for Bezeq International Services Ltd. / **g)** / **h)**.

Keywords of the systematic thesaurus:

- 5.3.1 Fundamental Rights – Civil and political rights – **Right to dignity.**
- 5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts.**
- 5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression.**
- 5.3.23 Fundamental Rights – Civil and political rights – **Rights in respect of the audiovisual media and other means of mass communication.**
- 5.3.31 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:

Civil proceedings, against "X", procedure, absence / Internet, anonymity, right / Anonymity, right / Legislation, judicial.

Headnotes:

The right to anonymity on the Internet is derived from two important rights: the freedom of expression and privacy. It also supports the realisation of those rights. Nevertheless, the right to one's anonymity has a price. In this case, the value of anonymity is traded against the posting of defamatory publications without potential to file a lawsuit under the Prohibition of Defamation Law, 1965. Exercising the right to anonymity may provide shelter to defamatory conduct, thereby causing grave harm to one's right to good character and reputation – a right of considerable weight to a constitutional regime respecting human dignity.

Summary:

I. Several readers' comments ("TalkBacks") regarding the appellant – a practitioner of alternative medicine – were posted on a website. The appellant considered these comments defamatory and therefore sought to file a lawsuit against those responsible for posting them under the Prohibition of Defamation Law, 1965. Since the comments were anonymous, the appellant requested that the Court order the Internet Service

Provider to disclose information that would enable him to reveal the identity of the Internet users, posting the comments. This could be accomplished through the Internet Protocol address, which accompanies every comment posted by an Internet user.

II. The appeal was denied.

The Supreme Court (by a majority of two out of a Panel of three Judges) held that in the realm of Constitutional Law – when a person seeks to maintain his or her right to anonymity on the internet, he or she enjoys two basic significant rights – the right to freedom of expression and the right to privacy. Indeed, a person's right to express himself or herself anonymously is an incident of freedom of expression and serves important purposes. Anonymity is, at times, a prerequisite for the potential and capacity to express oneself freely, while at other times, it is part of the message contained in the expression. Anonymity is also a part of the right to privacy – which is considered one of the most important fundamental rights. It is protected by the Protection of Privacy Law, 1981 and is considered a constitutional right by force of Basic Law: Human Dignity and Liberty. Indeed, it is not easy to establish the boundaries of the right to privacy. Yet, there is no doubt that anonymity must be considered an important part of the right to privacy since it enables a person "to be left alone" and to avoid personal exposure and the disclosure of information he or she does not wish to disclose.

The significance of the right to anonymity is even greater online. The Internet has brought about great changes in many aspects of our lives, including the realm of gathering information, exposure to information, communication between people and free expression. The internet is accessible, immediate, free of geographical boundaries and often free of filtering and editing. And yes – it is also anonymous. The mere fact that some comments may be considered to be of poor taste or poor wording does not exclude them from the protection of the constitutional right to freedom of expression.

The importance of anonymity on the Internet is also apparent in the context of the right to privacy. When a person uses the Internet, information concerning him or her is created whether s/he wants it or not. The Internet enables, by direct as well as indirect ways, access to a person's mindset. Shattering the "illusion of anonymity" in a virtual world that otherwise, affords internet users an impression of privacy, might create associations of "big brother". This kind of encroachment on the right to privacy must be minimised. Within appropriate boundaries, the shelter of anonymity must be maintained as part of the

Internet surfing culture. It can be said that, to a great extent, anonymity makes the Internet what it is, and without it the freedom in the virtual sphere would be diminished in a way that will lead to substantial changes in the behaviour of Internet users.

Indeed, Internet anonymity relies on important rights and also supports the realisation of those rights. Yet, anonymity has a price. In this case, the value of anonymity is traded against the posting of defamatory publications without the potential to file a lawsuit under the Prohibition of Defamation Law. Exercising the right to anonymity may provide shelter to defamatory conduct, thereby causing grave harm to one's right to good character and reputation – a right which is of considerable weight to a constitutional regime respecting human dignity. A person's good standing – the reputation he or she has built over the course of his or her lifetime, and often acquired through hard work – is a part of his or her property. It is thus an important expression of human dignity – dignity in the sense of honour, i.e. the appreciation and recognition derived from a person's standing in the society to which he or she belongs, as well as dignity in the sense of a person's inherent personal value. A person's good name enables him or her to belong to a community, and in turn, self-actualise and develop his or her personality as he so chooses. Indeed, the right to a good character is not diminished in the virtual sphere.

In this case, the appellant is seeking relief at the preliminary stage of collecting information needed for a potential lawsuit. This type of request is very rare. As a rule, the Court does not intervene until a lawsuit has been filed. The rarity of the request includes the attempt to compel a third party in a preliminary legal proceeding to disclose information in his or her possession. Notably, this third party is not claimed to be involved in the commission of the civil tort himself. Accordingly, constitutional concerns about a potential violation of the right to anonymous Internet usage, also encompass the interests of a third party – a person or a private body – called to disclose information he or she possesses about the identity of clients, expecting to remain anonymous on the Internet.

Finally, the Court concluded that at the present time, there is no established procedural framework to enable the granting of a judicial order, which could expose the identity of an anonymous Internet user, and that the Court should not "invent" one through "judicial legislation". Israel's procedural laws do not consider the possibility of filing a lawsuit against a "generic" defendant – who we will name "John Doe", and who replaces the real defendant whose identity is unknown. Further, Section 9 of the Civil Procedure

Regulations stipulates that a Statement of Claim must include, *inter alia*, the defendant's name. According to Section 9 it is not possible to file a Statement of Claim against an unknown defendant. Rather, Section 9 requires that the defendant be fully identifiable in the Statement of Claim and if that is not the case, then there is no lawsuit. Acknowledging a "John Doe" defendant may enable a plaintiff to conduct a civil procedure, which could not otherwise exist. Thus, this possibility may advocate the enforcement of the essential rights claimed by the plaintiff and also promotes values concerning judicial access and fact-finding. Nevertheless, an acknowledgment of the possibility of filing an "incomplete" lawsuit, one with no defendant, is by no means obvious, and the creation of the procedural rules for filing and conducting such a lawsuit by way of "judicial legislation" raises great difficulties. As noted above, Section 9 of the Civil Procedure Regulations requires the name of the defendant to be included in the Statement of Claim and this requirement stands against the proposition of a virtual "John Doe" defendant. The information and details included in a Statement of Claim are of fundamental importance and are supposed to express the existence of a cause of action for the plaintiff against the defendant. The wording and form of any Statement of Claim must meet the standards of procedural fairness, a proper description of the controversy, transparency and effectiveness. Accurately identifying the defendant is a crucial element in the realisation of these purposes. It must be emphasised that a "John Doe" defendant is a fictitious defendant. He or she has a nickname, yet has no real existence as long as the real defendant has not been identified. Therefore, a lawsuit against a "John Doe" defendant, at least in its beginning is an "*ex parte*" lawsuit. Accordingly, it is not possible to acknowledge such a lawsuit without creating rules that would safeguard the rights of the nameless defendant and guarantee the procedural fairness as well as the effectiveness of this legal procedure.

It might be possible to think of different ways of granting (some) protection to the rights of the defendant of a "John Doe" lawsuit. This would entail the creation of an elaborate, detailed and multi-phased procedural framework. Creating such a framework by way of "judicial legislation" raises great difficulties and is, in fact, a dramatic judicial transformation of the Civil Procedure Regulations insofar as it adds new chapter to address "a lawsuit against a John Doe defendant". If such a revision is needed, it must be done by a legislative act.

This does not mean that the appellant has no way to disclose the identity of the defensors on an Internet website. Firstly, when a tort committed on the Internet

is also considered to be a criminal offence, the affected person may file a complaint with the police. Secondly, it may be assumed and hoped that ultimately a law will be passed, which will regulate this matter in a clear and detailed manner, and thereby create the proper procedural framework to resolve the relevant considerations and balancing of rights.

Languages:

Hebrew.



Japan

Supreme Court

Important decisions

The precis below from Bulletin 2009/3 is being reprinted due to the use of an ambiguous term in the summary.

Identification: JPN-2009-3-001

a) Japan / **b)** Supreme Court / **c)** Grand Bench / **d)** 30.09.2009 / **e)** / **f)** (Gyo-Tsu), 209/2008 / **g)** *Minshu*, 63-7 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Seats, allocation / Vote, relative weight / Constituency, disparities.

Headnotes:

The Constitution requires equality in the value of votes but, at the same time, the Constitution leaves it to the Diet's discretion to decide the mechanism of an election system.

The Diet also has discretion to decide how to reflect the population variation in the mechanism of an election system. However, where there has been extreme inequality in the value of votes due to population variation, and this has remained the case for some considerable time, and the Diet has failed to take any measures to correct such inequality, this failure is judged to be beyond the bounds of its discretionary power, the provision on the apportionment of seats therefore becomes unconstitutional.

Summary:

In these proceedings, the validity of the election of members of the House of Councillors held on 29 July 2007 was challenged. The appellants, voters in the

Tokyo Constituency, alleged that the provisions of the Public Offices Election Act (hereinafter, the "Election Act") on the apportionment of seats were in violation of Article 14.1 of the Constitution and invalid.

Under the Election Act, a proportion of the membership of the House of Councillors was to be elected in prefecture-based constituencies, according to the demarcation of constituencies and the number of members to be elected in each constituency prescribed in the appended table of the Act. The Election Act apportioned an even number of seats, amounting to not less than two, to each constituency in proportion to the population. When this system was introduced, the maximum disparity between constituencies in terms of the population per member was 1:2.62; thereafter, it gradually expanded. Several revisions were made to the Election Act, but the maximum disparity was 1:5.06 at the time of the election held on 29 July 2001. The Grand Bench of the Supreme Court held, in its judgment of 14 January 2004, that the provision on the apportionment of seats cannot be deemed to have been unconstitutional. However, six Justices expressed dissenting opinions. Another four Justices pointed out that there would be room for acknowledging unconstitutionality if the current situation was left to stand with no steps taken to rectify it.

An expert committee was then established and various suggested corrective measures were discussed, following the policy of maintaining the existing mechanism of the election system. Based on one of these proposals, the Act for Partial Revision of the Election Act was enacted on 1 June 2006. As a result, at the time of the Election, the maximum disparity was 1:4.86.

The report of the expert committee pointed out that, as far as the existing mechanism was maintained, it would be difficult to hold the disparity below the level of 1:4.

The Constitution requires equality in the substance of the right to vote, or in other words, equality in the influence of votes in electing Diet members or equality in the value of votes. However, the Constitution, at the same time, leaves it to the Diet's discretion to decide the type of electoral system that should be introduced to reflect the people's interests and opinions fairly and effectively in the political process. In view of this, equality in the value of votes is not the sole and absolute criterion for deciding the mechanism of an election system, but it must be realised in harmony with other policy purposes and grounds that the Diet is authorised to consider, such as the unique characteristics of the House of Councillors. Consequently, as long as specific

decisions made by the Diet can be reasonably approved as ones within the scope of exercise of its discretion, such decisions cannot be judged to be unconstitutional even though they might give rise to a need for a degree of compromise regarding equality in the value of votes.

The mechanism of the election system is reasonable to a considerable degree, in view of the fact that:

- i. the Constitution adopts a bi-cameral system in order to invest the House of Councillors with specific features in terms of its substance and function,
- ii. a prefecture can be defined as a unit with its own historical, political, economic, and social significance and substance, as well as being a political entity, and
- iii. Article 46 of the Constitution requires elections to take place for half the members of the House of Councillors every three years.

Therefore, the said mechanism cannot be described as being beyond the scope of reasonable exercise of the Diet's discretionary power.

Furthermore, in view of constant population variation in times of dramatic social and economic changes, the issue of how to reflect such variation in the mechanism of an electoral system requires complicated and sophisticated policy considerations and judgments. Decisions on this issue are in principle left to the discretion of the Diet. However, where there has been extreme inequality in the value of votes due to population variation and this has remained the case for some considerable time, but the Diet has failed to take any measures to correct such inequality and such failure of the Diet is judged to be beyond the bounds of its discretionary power, the provision on the apportionment of seats becomes unconstitutional.

Following the 2004 judgment, the Election Act was revised. As a result, the maximum disparity was 1:4.86 at the time of the Election. After the Election, an expert committee in charge of the electoral system was set up, demonstrating the Diet's intention to continue studying the issue of the disparity. However, a considerable period of time would be needed for sweeping reforms of the existing mechanism of the electoral system, and it was extremely difficult to make such reforms prior to the Election.

In view of the circumstances mentioned above, the Diet's failure to make any additional revisions of the provision on the apportionment of seats by the time of the Election could not be deemed to be beyond the bounds of its discretionary power. It could not

therefore be concluded that the provision was unconstitutional at the time of the Election.

However, a disparity still exists that has not been eliminated, even by the Act for Partial Revision. This demonstrates the existence of extreme inequality in the value of votes between constituencies, and efforts are needed to correct it. The Diet should therefore commence, as soon as possible, an appropriate study on this issue, taking full account of the importance of equality in the value of votes.

Five justices expressed dissenting opinions and four justices expressed concurring opinions.

Languages:

Japanese, English (translation by the Court).



Kazakhstan

Constitutional Council

Important decisions

Identification: KAZ-2010-1-001

a) Kazakhstan / **b)** Constitutional Council / **c)** / **d)** 23.02.2007 / **e)** 3 / **f)** / **g)** *Kazakhstanskaya pravda* (Official Gazette), 03.03.2007 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Language, official, used by the state authorities.

Headnotes:

As Kazakh has been designated in the Constitution as a state language, it follows that the Kazakh language is one of the determining factors of the statehood of Kazakhstan. It symbolises its sovereignty and is an element of the legal status of the Republic, expressing the unity of the people of Kazakhstan.

The constitutional norm whereby Kazakh and Russian are both used equally at national and local government level does not mean that Russian has been invested with the status of the second state language.

Summary:

On 15 January 2007 a group of deputies of Parliament lodged a petition with the Constitutional Council, seeking an interpretation of the Constitutional Council's decision dated 8 May 1997 no. 10/2, concerning the Law on Languages in the Republic of Kazakhstan.

The following questions were raised:

- Does a state language have priority over the official language of the context of non-state organisations and on national and important social occasions such as receptions, assemblies, congresses, conferences and round table sessions?

- Does the meaning “on the same level”, used in Article 7.2 of the Constitution relate to this kind of activity?

The Constitutional Council made the following decision:

Under the Constitution, the Kazakh language is the state language of the Republic of Kazakhstan. In national government organisations and at local authority level, Kazakh is used equally with Russian. Under Article 7 of the Constitution, the state arranges for the creation of conditions for the study and development of the languages of the people of Kazakhstan.

In its decision of 8 May 1997 no. 10/2, the Constitutional Council explained that under Article 7.2 of the Constitution, Kazakh is used equally with Russian both at national and local government level. It is to be understood unequivocally that the two languages are used equally and identically at this level, under all circumstances.

Legislation covering public relations, in connection with the application of the powers of national and local government authorities, should enable everybody to exercise their constitutional right to use either language. They must provide physical and legal persons with the opportunity to address national and local government authorities and to receive information from them on an equal basis in the Kazakh and Russian languages, irrespective of the language in which the official work has been done.

Equality in the use of the Kazakh and Russian languages also means equal legal importance being accorded to laws in both languages.

The supreme political-legal status of a state language is demonstrated by its designation in the Constitution and the opportunity to enact laws regarding its exclusive use or priority in the public and legal spheres. Examples include the obligatory free possession of a state language by the President of the Republic and the Chairmen of Chambers of Parliament; the use of the Kazakh language in state symbols; state bodies being named in Kazakh in seals and stamps and in borders and customs, priority to the Kazakh language in laws and other official documents at a state and local government level both on paper and in other forms, use of Kazakh in statements by officials of local and national government and in official forms, use of Kazakh in the national currency and other state securities; in documents verifying someone's identity as a citizen of the Republic and in other documents issued on behalf of the state.

The Constitution does not regulate the functioning of the state language, the language officially used and other languages in everyday life (such as inter-personal dialogue). The concept "on the same level", used in Article 7.2 of the Constitution, does not relate to household and inter-personal dialogue, or the actions specified in the reference under consideration.

The Constitution gives everyone the right to choose their language of dialogue at their own discretion.

The state is obliged to protect any language functioning within a society, and to warn against discrimination on the basis of language.

Languages:

Kazakh, Russian



Identification: KAZ-2010-1-002

a) Kazakhstan / **b)** Constitutional Council / **c)** / **d)** 27.02.2008 / **e)** 2 / **f)** Review of the constitutionality of Article 361.1 and 361.4 of the Criminal Code of the Republic of Kazakhstan upon application by the court of the town of Kapchagay in the oblast of Almaty / **g)** *Kazakhstanskaya pravda* (Official Gazette), 2008, 49, *Juridical Newspaper*, 2008, 35; *Official Newspaper*, 2008, 1 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

5.1.1.4.3 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Detainees**.
5.1.4 Fundamental Rights – General questions – **Limits and restrictions**.
5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression**.

Keywords of the alphabetical index:

Freedom of expression, collective / Prisoner / Integrity, physical, interference / Imprisonment.

Headnotes:

According to Article 1.1 of the Constitution, the Republic of Kazakhstan proclaims itself a democratic, secular, legal and social State, whose highest values are mankind, his or her life, his or her rights and freedoms, as evidenced by the supremacy of human values. Everyone is entitled to have free control of his or her own life and his or her own health, on condition that that does not constitute a breach of his or her obligations as established by law and does not violate the rights and freedoms of other persons, the constitutional system or public morals (Articles 12.5, 34.1 and 36 of the Constitution). Prisoners in Kazakhstan enjoy the rights and freedoms guaranteed by the Constitution and the international treaties ratified by the Republic. Inevitable restrictions of those rights and freedoms are possible during life in isolation, which is consistent with international standards on human rights.

Article 20.1.2 of the Constitution proclaims and guarantees freedom of speech, which also covers the right to express one's opinion.

Summary:

On 26 March 2007, the legislature adopted the Law amending Article 361 of the Criminal Code. The new version of that Article made deliberate mutilation of prisoners, with the aim of destabilising the activity of the prison establishment, a criminal offence.

In the course of examining a case connected with that question, the court of the town of Kapchagay, in the oblast of Almaty, had referred to the Constitutional Council an action brought by individuals challenging the constitutionality of those rules. The applicants maintained that acts of mutilation are a means whereby prisoners defend their rights and freedoms in protest against the illegal conduct of the prison administration, thus exercising their freedom of expression.

The Constitutional Council observed that deliberate mutilation may be a form of expression of opinion and can thus be examined as a means whereby prisoners defend their rights. In that case, a criminal prosecution for mutilation may be examined as a restriction of freedom of expression and freedom of opinion, which constitute one of the bases of freedom of speech, as guaranteed by Article 20 of the Constitution.

Thus the restriction which the Law places on the possibility for prisoners to defend their rights and freedoms, by making acts of mutilation a criminal offence, is permissible only on condition that it is consistent with the requirements of Article 39.1 of the Constitution, which provides that human rights and freedoms can be restricted by law only to the extent necessary for the protection of the constitutional regime, public order, the rights and freedoms of others, health and public morality.

Thus, on the basis of the arguments set out above, the Constitutional Council recognised that the norms of the Criminal Code, which made deliberate mutilation a criminal offence, were unconstitutional.

Languages:

Kazakh, Russian.



Identification: KAZ-2010-1-003

a) Kazakhstan / **b)** Constitutional Council / **c)** / **d)** 23.04.2008 / **e)** 4 / **f)** / **g)** *Kazakhstanskaya pravda* (Official Gazette), 26.04.2008 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Register, land.

Headnotes:

The deadline for the submission of documents for registration with the state means that citizens must heed those time limits, and the state, for its part, must provide a procedure to recognise and acknowledge changes to and termination of rights over real estate. Persons owning and using real estate on a lawful basis must register the property and are entitled to demand from the relevant records body that state registration be completed.

Summary:

On 26 July 2007, the Law on the State Registration of the Rights to Real Estate was adopted.

It placed purchasers of real estate under an obligation to register with judicial bodies. They would have to apply for state registration no later than six months from the legal event triggering the commencement of the right (a notarised contract, the coming into force of a court decision or the delivery of other relevant documents). If this deadline was missed, an application would have to be made to the Court for the restoration of the term, and if there were valid reasons for the deadline having been missed, the Court would direct restoration.

The Constitutional Council received an appeal from Court 2, City Kostanay of Oblast Kostanajskaya on 1 April 2008, seeking a declaration that these norms were unconstitutional. The basis of the appeal was that the judicial authorities had refused two citizens, Mr Derr and Mr Borlis registration of their rights over certain real estate as they had missed the deadline under the law. They sought redress from Court no. 2.

The Constitutional Council noted that state registration is a compulsory procedure whereby the state recognises and acknowledges changes in and termination of the rights over real estate.

The binding character of state registration means that regardless of the expiration of any term of the rights over lawfully-acquired property, the property must be registered with the relevant organisation when the time for this falls due.

The binding character of state registration also means that if the deadline of the term established by law for the submission of documents is missed, this may result in those responsible being called to account. However, it should not result in the refusal to register the documents or to recognise the rights.

The above-mentioned norms of the Law on the State Registration of the Rights to Real Estate were accordingly pronounced unconstitutional.

Languages:

Kazakh, Russian.

Identification: KAZ-2010-1-004

a) Kazakhstan / **b)** Constitutional Council / **c)** / **d)** 11.02.2009 / **e)** 1 / **f)** Review of the constitutionality of the Law of the Republic of Kazakhstan “On the insertion of amendments in certain legislative acts of the Republic of Kazakhstan on questions of freedom of conscience and religious communities” / **g)** *Kazakhstanskaya pravda* (Official Gazette), 2009, 68-69; *Juridical Newspaper*, 2009, 80;1 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

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

3.7 General Principles – **Relations between the State and bodies of a religious or ideological nature.**

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

4.4.3.1 Institutions – Head of State – Powers – **Relations with legislative bodies.**

5.3.20 Fundamental Rights – Civil and political rights – **Freedom of worship.**

5.3.28 Fundamental Rights – Civil and political rights – **Freedom of assembly.**

Keywords of the alphabetical index:

Religion, church and State, peaceful co-existence / Community, religious / Religion, religious worship, protection.

Headnotes:

The secular nature of the State, established by Article 1.1 of the Constitution, assumes the separation of Church and State, and also the equality of all religious communities before the law. According to the law of the Republic of Kazakhstan, freedom to meet for the purpose of satisfying religious needs and freedom to disseminate religious convictions are not absolute and may be limited by the law in accordance with the Constitution. Such a concept is in keeping with international human rights standards and in particular with Article 18 of the International Covenant on Civil and Political Rights, which has been ratified by the Republic of Kazakhstan and which provides that “freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals”.

Summary:

On 26 November 2008, the Parliament of the Republic of Kazakhstan adopted the Law “on the insertion of changes and amendments into certain legislative acts of the Republic of Kazakhstan on questions of freedom of conscience of religious communities” and had submitted it to the President for his signature.

The President had then requested the Constitutional Council to review the constitutionality of that Law. After examining the application, the Constitutional Council adopted the following decision: the Law “on the insertion of changes and amendments into certain legislative acts of the Republic of Kazakhstan on questions of freedom of conscience of religious communities” sought to strengthen the rules on freedom of conscience and the activities of religious communities and groups. The Constitutional Council noted that, in that Law, the legislator unlawfully restricted the circle of persons enjoying privileges and also the circle of persons whose legitimate interests must be protected by the competent organ, insofar as it excluded from the number of such persons aliens and individuals without citizenship who were lawfully on the territory of Kazakhstan. That contradicted the constitutional principle that all persons are equal before the law. Section 1.3.4 of the Law under review, with respect to the possibility of a restriction of “freedom of conscience”, was not consistent with Article 39.3 of the Constitution. In the course of its review of Section 1.2.1 of the Law, the Constitutional Council had noted a semantic error in the text of the Russian and Kazakh versions, which distorted the content of the legal rule and made a single interpretation impossible. Thus, on the basis of Article 7.2 of the Constitution, it was impossible to apply that rule in practice. The Constitutional Council noted that the wording of certain of the provisions of the contested Law failed to comply with the rules on legal technique, which rendered their application impossible.

The legal and technical flaws in the contested Law were apt to give rise to different understandings of its provisions, which might in practice lead to a free interpretation, an inadequate application of the measure in question and ultimately an arbitrary restriction of human and civil rights and freedoms.

For the reasons set out above, the contested Law was deemed unconstitutional and, in consequence, was not signed by the President.

Languages:

Kazakh, Russian.



Identification: KAZ-2010-1-005

a) Kazakhstan / **b)** Constitutional Council / **c)** / **d)** 05.11.2009 / **e)** 6 / **f)** Official interpretation of the norms of Article 4 of the Constitution in accordance with the order of enforcement of decisions of international organisations and their organs / **g)** *Kazakhstanskaya pravda* (Official Gazette), 2009, 283; *Juridical Newspaper*, 2009, 197 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

1.2.1.3 Constitutional Justice – Types of claim – Claim by a public body – **Executive bodies.**
 2.2.1.1 Sources – Hierarchy – Hierarchy as between national and non-national sources – **Treaties and constitutions.**
 3.1 General Principles – **Sovereignty.**
 3.2 General Principles – **Republic/Monarchy.**
 3.6.1 General Principles – Structure of the State – **Unitary State.**
 4.16.1 Institutions – International relations – **Transfer of powers to international institutions.**

Keywords of the alphabetical index:

International agreement, direct applicability.

Headnotes:

The Republic of Kazakhstan is an independent State and a primary subject of international relations. It pursues a policy of co-operation and good neighbourly relations with other States on the basis of the Constitution and in accordance with international treaties and the law. According to Article 4 of the Basic Law, the Constitution, organic laws, laws, international treaties and other international obligations, decisions of the Constitutional Council and of the Supreme Court constitute the law in force in the Republic. Article 4.3 of the Constitution provides that international treaties, duly ratified by the Republic, have higher authority than that of laws and apply directly, except where that application requires the adoption of a law.

Summary:

On 7 October 2009, the Prime Minister made an application to the Constitutional Council concerning the interpretation to be given to Article 4 of the

Constitution, on the priority of international treaties over laws and the direct application of those treaties. The question was whether that priority extended to decisions of international organisations and their organs, established on the basis of duly ratified international treaties. It was the Government's intention, in that regard, that Article 7 of the Treaty of 6 October 2007 establishing the Commission of the Customs Union between Russia, Belarus and Kazakhstan, which provides that the Commission's decisions are binding on the Parties, should be observed. That Commission is an organ to which, on the basis of the principles of the voluntary gradual transfer of part of the powers of the State, the power to ensure the functioning and development of the Customs Union is to be transferred.

After examining the above application, the Constitutional Council adopted the following decision. The Constitution does not establish a special rule providing for the possibility of transferring certain powers of the State organs to international organisations and their organs. Furthermore, the Republic of Kazakhstan's status as a sovereign State enables it to take such decisions while observing the principles and rules established by the Constitution. Article 4.3 of the Constitution provides that "international treaties, duly ratified by the Republic, have higher authority than that of laws and apply directly, except where that application requires the adoption of a law". Where those provisions are applied to the acts of international organisations, established in accordance with the international treaties duly ratified by the Republic, that means that where the text of the Treaty indicates that such acts are binding, the States Parties and their organs must take all measures necessary to comply with that requirement, including bringing national legislation into line with those acts. Thus, if the act of the Commission, which, according to the Treaty, is binding, proves to be contrary to a law of the Republic, then, in accordance with the general principles, the legal norm adopted by the Commission is applied.

Furthermore, the Constitutional Council observed that it is not permissible to recognise as binding decisions of international organisations and their organs which are adopted in breach of the positions of Article 91.2 of the Constitution. That Article provides that the sovereignty of the Republic extends to its entire territory and that it is prohibited to impair its territorial integrity, the unitary regime of the State and the republican form of government. In addition, decisions of the Commission which harm constitutional human and civil rights and freedoms cannot take priority over the laws of Kazakhstan.

Thus, Article 4.3 of the Constitution, on the priority of international treaties over laws, also extends to decisions of international organisations and their organs established on the basis of a convention. But, in accordance with Article 4.2 of the Constitution, decisions of international organisations and their organs cannot run counter to the Constitution of the Republic.

Decisions of international organisations and their organs may have direct effect in the domestic legal order of Kazakhstan, where the treaties establishing them provide that those decisions are to be mandatory.

In the event of a conflict between such a decision and a provision laid down in the domestic law of the Republic, the decision is to be applied until the conflict is exhausted.

Decisions of international organisations and their organs which harm constitutional human and civil rights and freedoms cannot be directly applied or take priority over the laws of Kazakhstan.

Languages:

Kazakh, Russian.



Korea Constitutional Court

Important decisions

Identification: KOR-2010-1-001

a) Korea / **b)** Constitutional Court / **c)** / **d)** 28.06.2007 / **e)** 2004Hun-Ma644, 2005Hun-Ma 360 (consolidated) / **f)** Right to vote for nationals residing abroad / **g)** 19-1 KCCR *Korean Constitutional Court Report* (Official Digest), 859 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

5.1.1.1.1 Fundamental Rights – General questions – Entitlement to rights – Nationals – **Nationals living abroad.**

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

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

Keywords of the alphabetical index:

Election, ineligibility / Residence, registration / Election, universal suffrage.

Headnotes:

In order to be eligible to file a complaint with the Constitutional Court, the applicant must have suffered harm.

Article 37.1 of Public Official Election Act (POEA) deprives Korean nationals living abroad who cannot register as residents, of the right to be enlisted in the electoral register. Article 38.1 of the POEA adds the requirement of domestic residence to the requirements for exercising the right to vote, thereby making it impossible for those residing overseas to vote. Therefore, Article 38.1, in conjunction with Article 37.1, denies Korean nationals living abroad their right to vote.

Exercising the right to vote, a political right to realise the principle of popular sovereignty, functions both as an important mirror of people's wishes on matters of State and as a means of control over State power via periodical elections.

Any legislation that restricts the right to vote can only be justified by the existence of unavoidable and defined reasons. Reasons such as an obscure and intangible risk, technical problems or obstacles which can be overcome through the effort of government are not valid reasons for the imposition of restrictions on the right to vote.

Summary:

I. The applicants, Korean nationals holding Japanese or United States or Canadian green cards asked the Constitutional Court to assess the constitutionality of provisions of the Public Official Election and Prevention of Election Irregularities Act (POEA) and the National Referendum Act (the Provisions). They expressed concern that these provisions prevented people from voting (themselves included) if they lived outside Korea and were not able to register on the electoral roll. Under the provisions, those wishing to exercise their rights to vote in the presidential elections, parliamentary elections, local elections and national referendums as well as their rights to stand for election must be registered as residents. Voting *in absentia* is only permissible for those who reside in Korea.

II. The Constitutional Court, in a unanimous decision, found the provisions to be in breach of the Constitution.

In regard to justiciability, the Court ruled that, taking into account the characteristics of elections along with the objectives of the applications, the complaint can be viewed as contesting in advance applicants' infringements of fundamental rights that the applicants will suffer through their inability to participate in future elections (that is to say, infringements of basic rights that are certain to occur in the future). In this case, the issue of the timely filing of complaints, which applies to cases stemming from events that have already taken place, does not arise.

The Court found that if the Korean Government is able to use the registration system for Korean nationals abroad and the reporting system for Korean nationals abroad living in Korea, the danger that North Korean nationals and Japanese Koreans with North Korean citizenship become eligible to exercise the right to vote can be prevented. Furthermore, the danger of unfair elections, which may arise from allowing Korean nationals residing abroad to vote, can be eliminated by imposing an appropriate limitation on the election campaign abroad, introducing ways of identifying voters and restricting the spending of campaign funds before and afterwards. *Ex post facto* control may be achieved by putting matters on trial.

In this international era, when more and more Korean nationals are emigrating to foreign countries, the Court ruled that the fact that they have done so voluntarily is not a justifiable reason to deny them the exercise of the right to vote, which is a fundamental right available to every citizen.

The Government has prime responsibility for guaranteeing the fairness of elections. Any technical problems in managing overseas elections can be overcome through the innovation of information and communications technology.

The Court also held that the potential for the avoidance of military service and payment of taxes cannot be used as a reason to deny the right to vote of Korean nationals abroad. Under Article 1.2 of the Constitution, status does not depend on obligation. Furthermore, Korean nationals residing abroad are exempt from the duty to pay taxes by virtue of the agreement on the payment of double taxation. They are not in violation of their duties. Some Korean nationals living abroad, including women, are not concerned with military service.

The Court concluded that the statutory provisions at issue in this case, which make registering as a resident a prerequisite and a determining factor for eligibility for the right to vote, have no just legislative purpose. They are therefore in breach of the right to vote, the right to equality of Korean nationals abroad, and the principle of universal suffrage.

Supplementary information:

As a consequence of this decision, amendments and additions were made to Articles 37.1 and 38.1 of Public Official Election Act (POEA) and other related provisions of other Acts on 12 February 2009.

Cross-references:

Former decision from which this decision clearly departs:

- Decision of 25.03.1999, 2004Hun-Ma99, 11-1 KCCR *Korean Constitutional Court Report* (Official Digest), 218.

Two decisions with similar issues:

- Decision of 28.06.2007, 2004Hun-Ma643, 19-1 KCCR *Korean Constitutional Court Report* (Official Digest), 843;
- Decision of 28.06.2007, 2004Hun-Ma772, 19-1 KCCR *Korean Constitutional Court Report* (Official Digest), 899.

Languages:

Korean, English (translation by the Court).

*Identification:* KOR-2010-1-002

a) Korea / **b)** Constitutional Court / **c)** / **d)** 29.11.2007 / **e)** 2006Hun-Ka 13 / **f)** / **g)** 19-2 KCCR *Korean Constitutional Court Report* (Official Digest), 535 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

4.5.6.1 Institutions – Legislative bodies – Law-making procedure – **Right to initiate legislation.**

4.7.11 Institutions – Judicial bodies – **Military courts.**

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

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

Keywords of the alphabetical index:

Death penalty / Punishment, penal, adequate / Sentence, proportionality.

Headnotes:

Under the Military Criminal Act, the killing of a superior results in the imposition of the death penalty.

The decision as to the type of conduct which will be defined as a crime and the punishment to be inflicted is primarily an issue that falls within the remit of the legislator, unless the decision is exercised in such an arbitrary fashion that it violates the principle of proportionality or the rule against excessive restriction, both of which derive from Article 37.2 of the Constitution.

When the legislator chooses to regulate a crime with punishment, such punishment must be enacted proportionately in terms of the degree of unlawfulness of the crime and liability. Excessive punishment, viewed against these criteria, which departs from the principle of proportionality, cannot be tolerated by the Constitution.

The most important factors that should be taken into account when defining the type and range of a punishment are the legal interest protected by this punishment and the nature of the crime. Where the legal interest differs, the statutory punishment may differ accordingly, and where the nature of the crime differs, the statutory punishment should differ accordingly, even if the legal interest is the same.

Summary:

I. The complainant was indicted for murdering a superior, convicted and sentenced to death at a General Military Court of the Third Army Headquarters on 23 November 2005 under Article 53.1 of the Military Criminal Act (hereinafter, the “provision”), which provides that the death penalty will be imposed on anybody who kills a superior. His appeal to the High Military Court of the National Defense on 21 April 2006 was dismissed. He then appealed to the Supreme Court. During the pending second appeal to the Supreme Court, he filed a motion to request a constitutional review. The Supreme Court granted the motion and asked the Constitutional Court for this constitutional review on 31 August 2006.

II. In a 7-1-1 decision, the Constitutional Court found the provision to be unconstitutional.

1. Summary of the Majority Opinion

The Court noted that the provision uniformly punishes the murder of a superior in the military with the death penalty in time of peace regardless of the motive and the mode of the act. Moreover, it is not an appropriate enactment of criminal penalty, not only in terms of criminal policy, but also in terms of current world legislative trends.

The Court ruled that the provision runs counter to the substantive ideas of the rule of law respecting and protecting human worth and dignity. It has lost its legitimacy in the criminal penalty system because it does not take heed of the proportionality between the nature of the crime and the responsibility of the offender, providing an excessive penalty by comparison with the gravity of the crime.

The current Criminal Act in Korea provides that, without distinguishing between murder and manslaughter, somebody who intentionally kills another shall be punished by death, or life imprisonment or at least five years in prison. This wide-ranging statutory punishment gives the judge a degree of flexibility, when trying a case, in choosing one of the sentences in consideration of the special circumstances of the criminal act and the nature of the crime, and allows him or her to pronounce a suspension of execution when grounds for mitigation

and extenuating circumstances exist. The Criminal Act also provides that a person who kills their own or their spouse's lineal ascendant will be punished by death, imprisonment for life or a prison sentence of at least seven years.

By contrast, a member of the military personnel who kills a superior is subject to the death penalty under the current Military Criminal Act. Compared with the Criminal Act, capital punishment under the current Military Criminal Act is too severe to regulate the crime of killing a superior in peace time, as the courts have no choice but to hand down a death sentence without inquiring as to the motive of the offender or the circumstances of the specific act.

The Court concluded that such excessive punishment is grossly disproportionate to the severity of the crime and thus cannot be justified in the light of the penal system. It cannot be viewed as an appropriate enactment of punishment in the light of criminal policy and current legislative trends.

2. Summary of different opinions

1. The legislative purpose of the provision can be justified in that it seeks to accomplish the distinctive mission of national defence by establishing a chain of command in the military.

However, the extent of such need differs between cases where the victim is a superior officer who holds the right to command and cases where he or she is a mere senior who lacks the right to command. The provision does not distinguish between these cases; neither does it attach significance to whether the crime was committed while confronting an enemy. The killing of a superior covers all these circumstances and is punishable only by death. A law that uniformly punishes a crime with the maximum penalty without considering the extent of need in accomplishing the legislative purpose violates the principle of proportionality between liability and punishment and also departs from the principle of minimum restriction of fundamental rights.

However, the provision in question does not violate the Constitution in cases where the offender, while confronting an enemy, kills a superior officer who holds the right to command. There are both constitutional and unconstitutional aspects to the provision, and the National Assembly needs to reconcile this problem. The Court should therefore have ruled that the provision was incompatible with the Constitution and should have directed Parliament to replace it with new legislation.

2. Where the Requesting Court has declared the death sentence imposed by the trial court to be justifiable, the sentence will still be maintained by the application of a different provision, even if the provision requested for review is declared unconstitutional. If the death sentence is deemed unjustifiable, the Requesting Court may still reverse the original judgment and avoid such sentence without requesting a constitutional review.

The request for constitutional review in the instant case is unfounded and should be dismissed.

Supplementary information:

As a consequence of this decision, Article 53.1 of Military Criminal Act was amended on 2 November 2009. It now provides that anybody who kills their military superior will be sentenced to death or life imprisonment.

Languages:

Korean, English (translation by the Court).



Identification: KOR-2010-1-003

a) Korea / **b)** Constitutional Court / **c)** / **d)** 29.05.2008 / **e)** 2007Hun-Ma1105 / **f)** Case of Age Limits in the Open-Competitive Civil Service Exam for Rank 5 Position / **g)** 20-1(B) KCCR *Korean Constitutional Court Report* (Official Digest), 329 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

3.16 General Principles – **Proportionality.**

5.4.3 Fundamental Rights – Economic, social and cultural rights – **Right to work.**

5.4.4 Fundamental Rights – Economic, social and cultural rights – **Freedom to choose one's profession.**

Keywords of the alphabetical index:

Age, limit / Civil servant, recruitment / Examination, competitive.

Headnotes:

The State Public Officials Act and one of the annexes to the Decree on Public Service Entrance Examination impose an upper age limit of thirty-two years on applicants to take the open competitive examination for a rank 5 position. This constitutes a direct restriction on the right to hold public office and can only be deemed legitimate if the provisions of the Decree conform to the principle against excessive restriction demanded by Article 37.2 of the Constitution.

Summary:

I. The applicant, who was born on 8 February 1971, had been preparing for the 2008 open competitive Civil Service entrance examination for a rank 5-position. The applicant filed this constitutional complaint on the grounds that Article 36 of the State Public Officials Act and Annex 4 to Article 16 of the Decree on the Civil Service Entrance Examination, which establish an upper-age limit of thirty-two years of age on candidates for the open competitive examination for rank 5, and this encroached on the applicant's right to hold public office and the right to equality.

The provision of the Act under dispute allows for the setting of minimum requirements regarding 'age' in civil service entrance examinations. However, the details of such limits are subject to Presidential Decree. As a result, this provision does not directly infringe upon the applicant's basic rights, because the detailed contents of such limits are supposed to be determined and enforced by subordinate regulations to which the authority to decide details is delegated by this particular provision of the Act. The existence of an infringement of the applicant's fundamental rights hinges on the detailed content set out in subordinate regulations, rather than by the provision itself.

II. The Court found that the disputed provision of the Decree was incompatible with the Constitution. All the Justices, bar Justice Lee Kong-hyun, concurred with this decision and it was held that the provision should remain in force pending its revision by the legislature, which should have been accomplished by 31 December 2008.

As to whether the contested provision of the Decree meets the constitutional requirement under Article 37.2 of the Constitution, the opinions of Justices are divided as follows:

1. Opinion of incompatibility with the Constitution by Justice Lee Kang-kook, Justice Kim Hee-ok, Justice

Min Hyeong-ki, Justice Lee Dong-heub and Justice Song Doo-hwan

One of the purposes of this provision is the effective distribution of quality human resources to various parts of society in line with their individual abilities, by dissuading talented applicants from spending too much time and effort on preparation for civil service examinations, as well as to establish the career civil service system by training and educating career public officials. Hiring people who are approaching retirement age would appear to be an inappropriate way of promoting efficiency in the civil service system, which may vindicate the establishment of certain upper age limits for candidates for the civil service entrance examinations. The provision of the Decree, which is under dispute, was enacted to promote public welfare, a legislative purpose which can serve as a ground for restriction of fundamental rights.

The establishment of an age requirement for an open-competitive civil service entrance examination, as set out by the provision, cannot be regarded as an inappropriate means of achieving the legislative purpose mentioned above.

However, it is unreasonable to say that applicants up to the age of thirty-two pass the threshold of the minimum qualifications necessary to perform the official duties of a rank 5 position, while those who are over that age automatically lose such qualifications. This consideration is clearly reflected in the non-competitive civil service entrance examination for rank 5, which places no age limits on applicants for the examination. It is also unreasonable that the upper-age limit for the open-competitive examinations for rank 6 and 7 positions is thirty-five, as opposed to thirty-two for rank 5. A more logical solution would be to provide for a higher age limit for applicants for the rank 5 position than for applicants for rank 6 or 7 positions. It may sometimes be preferable for the holders of higher positions (such as rank 5 public officials) to be older than those under their supervision in the hierarchical civil service system, in the interests of smooth administrative practice.

2. Opinion of unconstitutionality by Justice Cho Dae-hyen, Justice Kim Jong-dae and Justice Mok Young-joon

The majority view was that one of the purposes of the challenged provision of the Decree is to dissuade many talented applicants from spending too much time and effort on preparation for the examination, enabling them instead to deploy their respective abilities in the correct parts of society. However, this purpose may not be persuasive enough to validate the unreasonable restriction on the right to hold public

office for rank 5 positions. Instead, the purpose should be accomplished by providing a social infrastructure making it more attractive for applicants to work in other sectors of the society than to hold a position as a rank 5 public official.

It is unclear whether the provision can clearly demonstrate a positive effect on the training and education of career public officials or the civil service careers system. By contrast, the negative effect of the provision, which restricts the right to hold public office of people over the age of thirty-two, is direct and obvious. The public interests, which the provision was expected to have realised do not clearly outweigh the disadvantages caused by the restriction on the right to hold public office of persons over the age of thirty-two.

Age discrimination draws a distinction between sectors of the population based on a condition for which they cannot be responsible. In today's modern society, where life expectancy has improved dramatically, it is becoming less acceptable to restrict fundamental rights on the basis of age. It is more reasonable for workers to enjoy their opportunity to work, provided this does not exceed retirement age, or a maximum age to work within a certain position.

For the reasons outlined above, the provision constitutes a direct infringement on the right of persons over the age of thirty-two to hold public office.

3. Opinion of constitutionality by Justice Lee Kong-hyun

Age restrictions in a civil service entrance examination should be imposed with care in the context of constitutional recognition, as there is a potential for a restriction on the right to hold public office. When deciding to impose such a restriction, the legislator is usually compelled to take various situations, including the supply and demand of manpower, into consideration. Such legislative discretion should be respected, unless it exceeds reasonable grounds. The decision over age restrictions on the right to hold public office is a matter of choice by the legislator in order to effectively achieve the legislative purpose. Unless a means to achieve the purpose is clearly irrational or unfair, the decision should be left to legislative discretion. (9-1 KCCR 674, 683, 96Hun-Ma89, 26 June 1997; 18-1(B) KCCR 134, 143, 2005Hun-Ma11, 25 May 2005).

As to whether the upper age limit of thirty-two years in the contested provision of the Decree was a patently unfair or irrational means of achieving the legislative purpose mentioned above, it was found that it could not be deemed as exceeding the scope of legislative

discretion. The age limit was determined based on reasonable consideration of various facts, such as the length of time to achieve the professional experience necessary for those who are in charge of 'planning and managing public policy', the length of time available to serve the people as public officials before retirement; the time and expense required to train and educate newly-appointed high-ranking public officers; and the length of time for promotion. Because the provision appears to provide applicants with sufficient time and opportunities to prepare for the examination (typically eight to ten years from the average age of graduation from college), the provision could not be described as offering insufficient opportunity to take the examination.

The constitutional complaint should be denied, because the provision of the Decree does not encroach on the applicant's right to hold public office.

Supplementary information:

As a consequence of this decision, amendments and additions were made to Article 36 of the State Public Officials Act and Annex 4 to Article 16 of the Decree on Public Service Entrance Examination on 6 February 2009, removing the upper age limit.

Languages:

Korean, English (translation by the Court).



Identification: KOR-2010-1-004

a) Korea / **b)** Constitutional Court / **c)** / **d)** 26.06.2008 / **e)** 2005Hun-Ma506 / **f)** Prior Review of Broadcast Advertisements / **g)** 19-1 KCCR *Korean Constitutional Court Report* (Official Digest), 859 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

4.15 Institutions – **Exercise of public functions by private bodies.**
5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression.**

Keywords of the alphabetical index:

Censorship.

Headnotes:

The 1987 Broadcasting Act required the Korean Broadcasting Commission (hereinafter the “Commission”) to conduct prior review of broadcast advertisements. Later, in 2000, the relevant articles of the Act were repealed and replaced by provisions of a new Act, under which the Commission is required to entrust a private entity to conduct this prior review.

Specific types of commercial broadcast items, which are subject to prior review, are to be decided upon by Presidential Decree. Article 21.2 of the Enforcement Decree stipulates that “commercials prescribed by the Presidential Decree in Article 32.2 of the Broadcasting Act are television commercials, radio commercials and data broadcasting commercials (limited to commercials that carry images and voices)”.

Under Article 21.1 of the Constitution, all citizens enjoy freedom of speech and the press. Article 21.2 of Constitution stipulates that licensing or censorship of speech and the press shall not be permitted.

The Constitutional Court has presented the following as constituent elements of prior censorship prohibited by the Constitution: there should be a duty to submit expressive materials for approval, and prior review proceedings mainly directed by an administrative agency; there should be a procedure for banning the publication of unapproved expressive materials and coercive measures should exist for the compulsory execution of the process of prior review (8-2 KCCR 212, 223, 93Hun-Ka13, et al., 4 October 1996; 8-2 KCCR 395, 402-403, 94Hun-Ka6, 31 October 1996; 13-2 KCCR 134, 147-149, 2000Hun-Ka9, 30 August 2001).

Summary:

I. The applicant, the proprietor of “Dried Fish”, applied for a broadcast advertisement to the “broadcasting company” for a commercial to advertise “Dried Fish” on 25 March 2005. The application was refused on the basis that it had not passed the prior review as specified in Article 32 of the Broadcasting Act and Article 21.2 of the Enforcement Decree of the Broadcasting Act (hereinafter the “Enforcement Decree”). The applicant filed a constitutional complaint on 23 May 2005, alleging an infringement of his fundamental right to free expression. Meanwhile, the

Act had been revised on 29 February 2008 as Act no. 8867, which transferred the authority of prior review from the Korean Broadcasting Commission to the Korean Communications Standards Commission.

II. The Constitutional Court, by a vote of 7 (unconstitutional) to 1 (unconstitutional, but for a different reason) to 1 (incompatible), ruled that prior review of broadcast advertisements is a form of censorship banned by the Constitution. It therefore violates the Constitution, for the following reasons:

1. Majority Opinion of Seven Justices

In general, advertisements propagate ideas, knowledge and information to unspecified masses. They are also subject to protection of the freedom of speech and the press under Article 21.1 of the Constitution. In this context, broadcast advertisements are included in this protection. Article 21.2 of the Constitution stipulates that licensing or censorship shall not be recognised. The definition of censorship is the screening and selection of opinions or ideas before publication as a preventive measure, on the initiative of the administrative power. Such prior censorship is strictly prohibited, even if it is based on statute.

In view of the formation, duties, and arrangement of affairs of the Korean Broadcasting Commission, it qualifies as an administrative authority. The private entity entrusted with the administrative functions, established in administrative law under the new legislation, is under the command and supervision of the Government in terms of the matters entrusted to it. The Commission has the right to enact and revise regulations for review, which become the standard against which television advertisements are inspected; and the Review Board’s operational, office, and personnel expenses are paid by the Korean Broadcasting Commission. For these reasons, it can be said that the prior review performed by the Review Board is an extension of the functions of the Korean Broadcasting Commission, carried out in the form of “entrusting”.

Article 32 of the former Broadcasting Act was revised on 29 February 2008 as Act no. 8867. The new Act gave the authority of prior review to the Korean Communications Standards Commission. However, the formation, function and arrangement of affairs of the Korean Communications Standards Commission are largely identical to those of the Korean Broadcasting Commission. Therefore, allowing the revised Act to stand, despite the similarity, would result in maintaining prior review, which constitutes governmental censorship, which runs counter to the principle of a democratic state based on the rule of law.

For reasons of legal certainty and judicial economy, the revised Act should also be declared unconstitutional. The Court accordingly declared Article 32.2 and 32.3 of the revised Broadcasting Act unconstitutional, as well as the former Broadcasting Act.

2. Concurring Opinion of Justice Cho Dae-hyen

Commercial advertisements, as in the instant case, are primarily profit-seeking activities with a view to the sales promotion and publicising of a business or product. This generally falls under the freedom to engage in commercial activities. Such commercial activities are, therefore, subject to restriction under Article 37.2 of the Constitution.

The provisions at issue violate Article 21.2 of the Constitution to the extent that they regulate those broadcast advertisements that fall into the category of “speech and the press” stipulated in Article 21.1 of the Constitution in the subject matters of prior review. With regard to those broadcast advertisements that do not fall into this category of “speech and the press”, the provisions also violate Article 37.2 of the Constitution to the extent that they fail to provide the reasons for public interests that require prior review or the minimum level of such prior review.

3. Dissenting Opinion of Justice Mok Young-joon (Incompatibility with the Constitution)

According to the Constitution, the absolute prohibition against prior censorship does not apply to televised commercial advertisements. Some of the provisions are clearly in violation of the rule against excessive restriction under the Constitution, although others contain constitutional elements. A decision of incompatibility with the Constitution should be declared, allowing subsequent legislations to eliminate the unconstitutional elements in the provisions.

Supplementary information:

As a consequence of this decision, Article 32.2 of the Broadcasting Act was repealed and Article 21.2 of the Enforcement Decree of the Broadcasting Act was amended.

Languages:

Korean, English (translation by the Court).



Lithuania

Constitutional Court

Important decisions

Identification: LTU-2010-1-001

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 03.02.2010 / **e)** 36/2006-8/2009-49/2009 / **f)** On payments of insured amount of compulsory insurance against civil liability of holders of vehicles for non-pecuniary damage / **g)** *Valstybės Žinios* (Official Gazette), 16-758, 06.02.2010 / **h)** CODICES (English, Lithuanian).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Damage, compensation, loss, non-economic / Insurance, compulsory / Legitimate expectation / Civil liability.

Headnotes:

The Constitution places the legislator under an obligation to put in place measures to facilitate the implementation of the right to compensation for material and moral damage inflicted on a person.

Summary:

The Vilnius District Court and two regional courts sought an assessment of the constitutional compliance of Article 11.1 (wording of 5 March 2004) of the Law on Compulsory Insurance against Civil Liability of Holders of Vehicles. Concerns were expressed over the maximum insurance sum of 500 Euros set for non-pecuniary damage. Often, this sum does not cover all the damage caused.

The Court stressed the need to compensate the person for the material and moral damage inflicted. The Constitution places the legislator under an obligation to put in place measures to facilitate the implementation of this right to compensation.

The legislation must create all the necessary preconditions for fair compensation of the damage inflicted. The constitutional principle of justice also implies that the damage should under normal circumstances be covered by the person who caused it or somebody else liable for his or her actions.

In its endeavours to ensure that any damage caused to a person is compensated in a timely and efficient manner, the legislator may establish legal regulation to the effect that, on the basis of the contract, the obligation to recover damage caused to other persons is undertaken by a person other than the one who caused the damage or was liable for the actions of the latter, in order to establish what is known as the “insured method of damage recovery”. When setting out the basic principles and conditions of compulsory insurance, the legislator may prescribe maximum sums of insurance. It often happens that, on the basis of a compulsory insurance contract, certain entities undertake to compensate for damages caused by another. In such cases, the legislator is under no obligation to prescribe a sum of the magnitude to ensure recovery of all damages inflicted in full. However, he or she must not deny the constitutional right of a person to claim, on general grounds, full reimbursement of the damage that was caused to him or her, when the insurance sum does not cover the full amount of the damage inflicted. This includes the right to claim damages from the person who caused the damage or from somebody else who is liable for their actions.

Also, in setting out the conditions of compulsory insurance, the legislator must make sure that the performance of the duty to pay insurance contributions does not become too onerous for the person who has to insure his or her civil liability for causing damage.

The legal regulation in question requires the insurer to pay compensation of up to 500 Euros for non-pecuniary damage. The Court noted that the legislator’s intention here was to create conditions which would allow insurers to fulfil their obligations under the insurance contract instead of allowing them to avoid recovery for non-pecuniary damage, as the petitioners had suggested. It does not jeopardise a person’s constitutional right to claim, on general grounds, full reimbursement for the damage they have suffered, either from the person who caused the damage or somebody responsible for his or her actions.

The petitioners also argued that the legal regulation breached the principle of equality, as the maximum insurance sum operated more in favour of the interests of insurance companies than those of injured parties, who would not receive all of their compensation, or the insured, who would have to make up the rest of the compensation.

The Court noted that the legal regulation affected the interests of the following:

1. insurers who pay compulsory insurance sums as required by law, to cover the insured event;
2. persons who have caused damage with a motor vehicle and have insured their civil liability;
3. those who have suffered damage during road accidents and who receive appropriate insurance compensation.

Insurers, insurance premium payers and victims have different rights and obligations, and fall into different categories of persons, with differing legal positions. The same legal regulation is established and applies to all three categories. There are therefore no grounds to state that the rights and interests of victims have less protection than that of insurance companies, or that victims are discriminated against by comparison with insurance companies.

There was one dissenting opinion to the ruling, signed by two judges.

Languages:

Lithuanian, English (translation by the Court).



Identification: LTU-2010-1-002

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 26.02.2010 / **e)** 19/2008-25/2009 / **f)** On privatisation of the 34% block of shares of the JSC “Lietuvos dujos” / **g)** Valstybės Žinios (Official Gazette), 25-1179, 02.03.2010 / **h)** CODICES (English, Lithuanian).

Keywords of the systematic thesaurus:

3.4 General Principles – **Separation of powers.**
 3.18 General Principles – **General interest.**
 4.6.2 Institutions – Executive bodies – **Powers.**
 4.10.8.1 Institutions – Public finances – Public assets – **Privatisation.**
 5.4.7 Fundamental Rights – Economic, social and cultural rights – **Consumer protection.**

Keywords of the alphabetical index:

Energy sector / Energy, prices, regulation.

Headnotes:

In certain cases it is clearly apparent from the content of a Government resolution assenting to a certain draft agreement (*inter alia* from the aim, object and conditions of the agreement), and from other circumstances under which it was adopted, that this Government resolution is in conflict with the general welfare of the nation, and poses a threat to the independence of the State of Lithuania and its territorial integrity, the constitutional order, the security of the state or other vitally important interests of the state. If this is the case, the Constitutional Court must draw attention to it and acknowledge that the Government, in assenting to the draft Agreement, acted *ultra vires*.

Summary:

The parliament and a group of parliamentarians lodged a petition with the Constitutional Court. They had concerns as to the constitutional compliance of two Government Resolutions on Assenting to a Draft Agreement on the Purchase and Sale of thirty-four percent of the Shares of the Joint-Stock Company “*Lietuvos dujos*”. Under these Resolutions, the Government undertook not to regulate the prices of natural gas and to reimburse the losses. These provisions were established in the Agreement mentioned above. The petitioners argued that when it undertook these obligations, the Government was regulating economic activity in such a way that it no longer served the general welfare of the nation and no longer defended the rights of consumers. Instead, only the interests of the public joint-stock company “*Gazprom*” were protected. The commitment to reimburse losses to the public joint-stock company “*Gazprom*” if the Government did not fulfil its commitment not to regulate prices for natural gas restricted the implementation of Article 46.3 and 46.5 of the Constitution. The legal regulation, which is designed for the general welfare of the nation and the protection of consumer rights (regulation of gas prices), became undesirable from an economic perspective as it could result in financial sanctions being applied to the State of Lithuania.

This type of commitment could be regarded as a basic property liability of the state. Decisions concerning basic property liabilities of the state are adopted by the parliament (*Seimas*) upon the proposal of the Government, but not by the Government itself.

The Court emphasised that the assent of the Government to the corresponding draft agreement should simply be viewed as a permit to conclude the transaction (the conditions of which, as is taken for granted in commercial practice, are not made public),

and not as its conclusion. Such a draft Agreement should not be viewed as part of a legal act entrenching certain legal regulations of the same legal power as other parts of this Government resolution; it is not a legal act at all.

The Constitutional Court therefore held that the provisions challenged by the petitioners were fixed in the Agreement to which the Government had assented, but not in the Resolutions (which confirm the Government’s assent to the Agreement). The draft Agreement on the purchase and sale of the shares and the draft annexes thereto and the Agreement itself are not legal acts. Therefore, under the Constitution and the Law on the Constitutional Court, they are not subject to review by the Constitutional Court.

The Constitutional Court noted that in certain cases it is clearly apparent from the content of a Government resolution assenting to a certain draft agreement (*inter alia* from the aim, object and conditions of the agreement), and from other circumstances under which it was adopted, that this Government resolution is in conflict with the general welfare of the nation, and poses a threat to the independence of the State of Lithuania and its territorial integrity, the constitutional order, the security of the state or other vitally important interests of the state. If this is the case, the Constitutional Court must draw attention to it and acknowledge that the Government, in assenting to the draft Agreement, acted *ultra vires*.

In its assessment of the Government’s activities, the Court noted that parliament had recognised that privatisation of the transmission of natural gas and distribution enterprises was one of the strategic aims of the national energy sector. There was no ban in the legislation or other acts of the parliament on the privatisation of the shares of the joint-stock company “*Lietuvos dujos*” which belonged to the state by right of ownership. The Government had the power, by virtue of legislation and other acts of parliament, to decide on the sale of these shares. A conclusion could therefore be drawn that the Government, in adopting a decision to assent to the draft agreement on the purchase and sale of thirty-four percent of the shares of “*Lietuvos dujos*” between the State Property Fund and the public joint-stock company “*Gazprom*”, was implementing the provisions of laws and corresponding resolutions of the parliament.

There was one dissenting opinion to this ruling.

Languages:

Lithuanian, English (translation by the Court).



Identification: LTU-2010-1-003

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 22.03.2010 / **e)** 16/08 / **f)** On the extension of notary powers / **g)** *Valstybės Žinios* (Official Gazette), 34-1620, 25.03.2010 / **h)** CODICES (English, Lithuanian).

Keywords of the systematic thesaurus:

3.9 General Principles – **Rule of law.**
 5.2.1.2 Fundamental Rights – Equality – Scope of application – **Employment.**
 5.2.2.7 Fundamental Rights – Equality – Criteria of distinction – **Age.**

Keywords of the alphabetical index:

Notary, profession, exercise.

Headnotes:

A legal regulation provided for the possibility of extending a notary's powers by an order of the Minister of Justice upon the representation of the Chamber of Notaries until he or she reached the age of seventy. No criteria were established which could be followed in order to determine whether his or her powers should be extended.

Summary:

The Vilnius District Administrative Court requested an assessment as to the constitutional compliance of a legal regulation which provided for the possibility of an extension to a notary's powers, but which failed to establish any criteria which could be followed in order to determine whether or not to extend them. It expressed concerns that this state of affairs might create conditions whereby other persons might try to influence the notary, directly or indirectly.

The Court noted that the concept of a notarial office of the "Latin type" (the Latin system of regulation of notaries' offices) is entrenched in the Lithuanian legal system and is characteristic of Continental Civil Law. Notaries in Lithuania perform functions of a public nature, but they are not state or municipal servants. They are engaged in autonomous professional activity, but their functions, other activities and powers are set out by law. The notarial profession is

a state-controlled one. It can be summarised as the performance of functions ensuring a public interest, involving the legal entrenchment of subjective rights and legal facts of natural and legal persons and safeguarding the legal interests of these persons and the state, which is carried out by persons engaged in autonomous professional activity. The state, having transferred these functions to notaries, exercises control over their performance.

The Court noted that in cases when other "non-state" institutions are assigned to carry out certain state functions by law, a duty devolves on the legislator, in setting out the requirements which must be met by somebody willing to carry out such activities (such as the term of his or her powers and the grounds for their expiry), to heed the imperatives arising from Articles 29 and 48 of the Constitution and the principle of a state under the rule of law. A legal regulation must be established allowing persons exercising the right to freely choose a job or business activity entrenched in Article 48 of the Constitution and *inter alia* engaging in the same state-controlled professional activity to be granted the same conditions of professional activity, and the same term of powers. Any other state of affairs would create preconditions for the violation of the imperatives stemming from Articles 29 and 48 of the Constitution and the principle of a state governed by the rule of law.

There is no provision for the grounds on the basis of which a notary's powers could be extended, either in Article 23 (wording of 23 January 2003 with subsequent amendments) of the Law on the Notary Office or in other articles of this Law. This implies that the term of a notary's powers is not determined by grounds established in legislation of equal application to all, but rather on the Minister of Justice's right to decide, at his or her discretion, and upon representation by the Chamber of Notaries, whether or not to extend them. The Court observed that the legal regulation under dispute had the potential of giving rise to a situation where some notaries could be dismissed from office when they reached the age of sixty-five, whilst others could have their term of office extended until they reached the age of seventy. It therefore created preconditions for unequal treatment of persons within the same group (in this case, engaged in the same professional activity).

The Court also noted that certain circumstances might arise where a temporary extension of a notary's powers for a fixed period might be the only way to guarantee the continuation of the functions ascribed to the profession by the state, such as the juridical certification of subjective rights and legal facts of natural and legal persons. This would secure the public interest. The legislator is only allowed to establish a legal regulation

to allow a notary's powers to be extended temporarily when there is no other way to ensure, for a fixed duration, the discharge of functions assigned to him or her by the state, in the furtherance of the public interest.

The Court pointed out that the fact that the legal regulation under dispute was out of line with the Constitution did not mean that the notaries' powers which were extended under its remit could be questioned or terminated on the said grounds alone.

Languages:

Lithuanian, English (translation by the Court).



Identification: LTU-2010-1-004

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 31.03.2010 / **e)** 30/07 / **f)** On the powers of the college of the municipal council / **g)** *Valstybės Žinios* (Official Gazette), 38-1794, 03.04.2010 / **h)** CODICES (Lithuanian).

Keywords of the systematic thesaurus:

4.8.6.2 Institutions – Federalism, regionalism and local self-government – Institutional aspects – **Executive**.

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

Keywords of the alphabetical index:

Municipal council / Local self-government.

Headnotes:

The college of municipal council cannot be considered an institution through which territorial communities exercise their right to local self government. The legislator therefore has no right to establish a legal regulation, according to which the internal structural subdivisions of municipal councils or other officers match or replace the municipal councils, and take on the exercise of powers attributed to the municipal council as a representative body of territorial community.

Summary:

The Vilnius District Administrative Court asked the Constitutional Court to assess whether the powers of municipal councils to transfer their right to adopt certain decisions to the college of the municipal council were in conflict with the Constitution. The applicant argued that constitutional doctrine allows municipal councils to transfer the right to adopt certain decisions to the executive bodies accountable to them where this has been established *expressis verbis* in the law. However, these powers cannot be transferred to municipal institutions that are not executive bodies accountable to the municipal councils under the law. The college of municipal council cannot be considered as an executive body, because its membership is drawn from members of the municipal council, which is a representative body.

The Court concurred with the applicant's argument. It stated that the college of municipal council, the membership of which is drawn from members of the council, cannot be considered as an executive body accountable to the council, or as an institution of municipal control or another municipal institution possessing authoritative power. It is an internal structural subdivision of the municipal council which is intended to help the council in its work. Its membership is composed of some of the members of the municipal council and it is part of the council. It can consider certain questions within the council's competence and can provide some recommendations to the municipal council, but it cannot adopt final decisions. The right to adopt decisions on questions that fall within the remit of the municipal council as a representative body of a territorial community cannot be transferred to a part of it.

The Court observed that the college of municipal council cannot be considered as an institution through which territorial communities exercise their right to local self government. The legislator therefore has no right to establish a legal regulation, according to which the internal structural subdivisions of municipal councils or other officers match or replace the municipal councils, and take on the exercise of powers attributed to the municipal council as a representative body of territorial community.

Languages:

Lithuanian, English (translation by the Court).



Luxembourg Constitutional Court

Important decisions

Identification: LUX-2010-1-001

a) Luxembourg / **b)** Constitutional Court / **c)** / **d)** 15.05.2009 / **e)** 00050/09 / **f)** Case of X v. Y / **g)** *Mémorial, Recueil de législation* (Official Gazette), A, no. 127, 08.06.2009 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

5.2.1.2.1 Fundamental Rights – Equality – Scope of application – Employment – **In private law.**
5.2.2.13 Fundamental Rights – Equality – Criteria of distinction – **Differentiation *ratione temporis*.**

Keywords of the alphabetical index:

Descent, legitimate / Descent, natural / Descent, action disclaiming / Descent, action challenging acknowledgement / Descent, period within which action must be brought.

Headnotes:

No difference should be made between the provisions in the Civil Code with respect to the time period allocated to disclaim paternity of a child born in wedlock and a child born out of wedlock.

Summary:

I. J.F.-R., the legitimate father of T.G.-F., brought an action before a civil chamber of the Luxembourg district court to disclaim paternity of the child T.G.-F.

The district court referred the following question to the Constitutional Court for a preliminary ruling:

Is Article 316 of the Civil Code, in so far as it provides that a husband who is present at the place of birth must bring an action to disclaim paternity within six months of the birth compatible with Article 10² of the Constitution, which provides that Luxembourg nationals are equal before the law, when under Article 339 of the Civil Code a person who acknowledges a natural child may challenge that

acknowledgement if the child has not had uninterrupted and lawful possession of that status for more than three years since the act of acknowledgement, and if the child has not reached the age of six years?

II. The Constitutional Court considered that in reserving a less favourable situation for children born out of wedlock, the drafters of the Civil Code intended to secure respect for the institutions and the rules on which they intended society to be organised; that the 1979 legislature, in the Bill amending the Law on filiation (Parliamentary Document no. 2020 to 2020⁵) set itself the aim of “removing the existing discrimination between the various categories of filiation and ensuring that the biological truth prevailed as much as possible in the establishment of filiation”; that a necessary consequence of the desire to ensure that the biological truth prevailed was the considerable extension of the very short period during which the husband could disclaim paternity under the former Article 316 of the Civil Code, which was only one month if the father was at the place of birth of the child and two months after his return or discovery of the fraud if the birth had been concealed from him; that those periods were extended uniformly to six months by the Law of 13 April 1979 in accordance with the opinion of the Council of State, which recommended that the relevant periods be extended and observed that that solution would take account of the husband’s legitimate interests; that, moreover, with respect to a challenge of an acknowledgement of a link of illegitimate filiation, the former Article 339 of the Civil Code merely provided that any acknowledgement on the part of the father or the mother could be challenged by any person having an interest in mounting such a challenge; that the drafters of the Bill observed that that option to cancel the child’s filiation is scarcely in the interest of the child and that the exercise of the action must be limited in time; that they thus note that “in order to ensure that the child does not become the hostage of his or her parent’s inclinations or disagreements ... the Bill precludes that action after the child has reached the age of six years”; that the periods introduced by the new Law are thus deemed to protect both the interests of the child and those of the person who has acknowledged paternity and interested third parties.

The Court further considered that the wording of the present Article 339.3 and 339.4 of the Civil Code clearly sets the inalienable right of the child to challenge filiation against the limited right of the person acknowledging filiation, who is no longer able to challenge it if the child has had uninterrupted and lawful possession of his or her status for more than three years since the acknowledgement, or if he or

she has reached the age of six years; that analysis of the parliamentary proceedings shows that the legislator intended to ensure that the interest of the child prevailed and that this interest tends towards the establishment of the biological truth in the link of filiation, to the detriment – where appropriate – of the legitimate family; that the father's action seeking recognition of the biological reality of filiation to the detriment of a previously existing link of apparent filiation must also be considered to correspond with the interest of the child; that in both of the opposite situations, husband or the person acknowledging paternity, the men in question are in comparable legal situations, as their action tends each time to make the child's legal filiation correspond with the biological reality; that it follows that by subjecting a married man and a person acknowledging paternity to two different legal regimes with respect to the action challenging paternity the law draws a distinction that is not rationally justified, appropriate and proportionate to the aim pursued.

The Court concluded from those considerations that Article 316 of the Civil Code is not compatible with Article 10^{2.1} of the Constitution insofar as it subjects an action to disclaim paternity brought by the husband to shorter periods than those granted by Article 339 of the Civil Code to a person acknowledging a natural child.

Languages:

French.



Identification: LUX-2010-1-002

a) Luxembourg / **b)** Constitutional Court / **c)** / **d)** 08.01.2010 / **e)** 00051/10 / **f)** / **g)** *Mémorial, Recueil de législation* (Official Gazette), A, no. 8, 20.01.2010 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

5.2.1.2.1 Fundamental Rights – Equality – Scope of application – Employment – **In private law**.
5.2.2.12 Fundamental Rights – Equality – Criteria of distinction – **Civil status**.

Keywords of the alphabetical index:

Sale between spouses, prohibition.

Headnotes:

The prohibition on sales between spouses had its basis in the principle of the immutability of matrimonial regimes, and the revocability of gifts between spouses; that it was intended to ensure the integrity of the reserved portion of the estate and prevent fraud on the rights of third parties.

Summary:

I. M.T., the wife of A.J.M., brought an action before a civil chamber of the Luxembourg district court for cancellation of the transfer between her and her husband of shares in the incorporated company A.M.C. She claimed that the transfers had been made in breach of Article 1595 of the Civil Code, which prohibited sales between spouses. The opposing parties submitted in essence that the provisions relied on were not compatible with the constitutional principle that all citizens are equal before the law.

On that point, the Court referred the following question to the Constitutional Court for a preliminary ruling:

“Is Article 1595 of the Civil Code, in that it prohibits sales between spouses, compatible with the constitutional norm, enshrined in 10^{2.1} of the Constitution, that all citizens are equal before the law in light of the different treatment thus established between married persons and those who are not married?”

II. The Court considered that the prohibition on sales between spouses, as established by the legislator at the material time, had its basis in the principle of the immutability of matrimonial regimes, and the revocability of gifts between spouses; that it was intended to ensure the integrity of the reserved portion of the estate and prevent fraud on the rights of third parties;

Since the amendment of Article 1397 of the Civil Code by the Law of 16 August 1975, spouses may, while the marriage is in existence and on the conditions laid down in that provision, alter their matrimonial regime; from that aspect the purpose of the prohibition on sales between spouses was no longer rationally justified;

Furthermore, the general rules of civil law that allow simulated or fraudulent acts to be challenged are capable of providing redress for any fraudulent sales between spouses;

The Court considered that the difference in treatment resulting from the fact that the prohibition of sales restricted the married partners' freedom to enter into contracts when that freedom remained unfettered for unmarried partners was disproportionate and inappropriate;

The Court concluded that Article 1595 of the Civil Code was contrary to Article 10².1 of the Constitution.

Languages:

French.



Identification: LUX-2010-1-003

a) Luxembourg / **b)** Constitutional Court / **c)** / **d)** 08.01.2010 / **e)** 00053/10 / **f)** / **g)** *Mémorial, Recueil de législation* (Official Gazette), A, no. 43, 17.03.2010 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

5.2.1.2.1 Fundamental Rights – Equality – Scope of application – Employment – **In private law.**

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

Keywords of the alphabetical index:

Adoption, full, of an adult.

Headnotes:

Not permitting the full adoption of an adult Luxembourg, when the simple adoption of an adult Luxembourg is permitted, is not contrary to the Constitution.

Summary:

I. The spouses C.S. and S.Z. applied to a civil chamber of the Luxembourg district court for full adoption of the adult K.P.

By judgment, that court referred the following question to the Constitutional Court for a preliminary ruling:

“Is Article 367-1 of the Civil Code, in so far as it does not permit the full adoption – as an adopted person – of an adult Luxembourg, when the simple adoption of an adult Luxembourg is permitted, compatible with Article 10².1 of the Constitution, which provides that ‘Luxembourgers are equal before the law’, as that article has been interpreted, namely that a difference established by the legislature with respect to the legal situation of certain categories of persons must be based on objective disparities and be rationally justified, appropriate and proportionate to the aim pursued?”;

II. The Court considered that:

- the implementation of the constitutional rule on equality presupposes that the categories of persons between whom discrimination is alleged are in a comparable legal situation by reference to the measure called in question;
- the regimes of full adoption and simple adoption are not comparable when they each meet specific needs and pursue distinct aims;
- full adoption entails the irrevocable substitution of adoptive filiation for filiation of origin, enabling the person concerned to be wholly integrated within a new family; simple adoption must be fundamentally distinguished from full adoption, in that it merely adds, in favour of the adopted person, a link of adoptive relationship that may be inspired by considerations other than those associated with irrevocable integration within a new family;
- a person who undergoes simple adoption is therefore in a distinct legal situation from a person who undergoes full adoption;
- it follows that Article 367-1 of the Civil Code, in that it does not permit the full adoption of an adult, is not contrary to Article 10².1 of the Constitution.

Languages:

French.

*Identification:* LUX-2010-1-004

a) Luxembourg / **b)** Constitutional Court / **c)** / **d)** 19.03.2010 / **e)** 00054/10 / **f)** / **g)** *Mémorial, Recueil de législation* (Official Gazette), A, no. 49, 01.04.2010 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

5.2.1.2.1 Fundamental Rights – Equality – Scope of application – Employment – **In private law.**

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

Keywords of the alphabetical index:

Penalty, equal treatment, different situations.

Headnotes:

The application of a provision of the Criminal Code may lead to different treatment of those responsible for the same type of accident, whose conduct was the same and who caused damage of the same type, namely the death of one or more persons; that, moreover, anyone who, through negligence, has caused a railway accident having led to the deaths of a large number of persons not on board the train will incur a lighter penalty than a person whose negligent conduct caused a comparable accident in which a single occupant of the train met his death; that thus the application of Article 422 of the Criminal Code may result in a person who caused less serious damage being dealt with more severely than other persons, even on the basis of identical facts which caused an accident of the same type.

Summary:

I. By judgment of 29 January 2009, the Luxembourg district court, sitting as a criminal court, convicted P.M., C.T., P.K. and G.F. for offences against Article 422 of the Criminal Code for having, as principals, unintentionally caused a head-on collision

on the Luxembourg border at Zoufftgen between a CFL TER (regional express) passenger train travelling towards Thionville and a SNCF FRET (goods) train travelling on the same track towards Bettembourg, with the consequence that the rail accident caused the deaths of several persons and physical injuries to other persons, and of offences against Articles 419 and 420 of the Criminal Code for having, as a result of negligence having as its consequence the head-on collision referred to above, unintentionally caused the death of one person and physical injuries to other persons, offences which were treated as a single offence, and imposed prison sentences and fines. The Court also determined the civil claims submitted by the parties claiming civil damages.

On appeal by the accused P.M., C.T. and P.K., a number of civil parties and the prosecution, the Court of Appeal, sitting as a criminal court, by judgment of 14 October 2009, referred the following question to the Constitutional Court for a preliminary ruling:

“Is Article 422 of the Criminal Code, read with Articles 418 and 419 of that code, compatible with Article 10² of the Constitution, in so far as Article 422 provides for:

- more severe penalties for certain persons for offences identical to Articles 418 and 419 of the Criminal Code;
- more severe penalties applicable only to a certain category of persons working in public transport where, through lack of care or precaution, they cause an accident involving the means of public transport in question?”;

Article 422 of the Criminal Code provides:

- “Where a railway train is involved in an accident of such a kind as to endanger the persons on board, a person who has unintentionally caused that accident shall be sentenced to a term of imprisonment of between eight days and two months and a fine of between 251 euros and 2,000 euros, or to only one of those penalties.
- Where the accident results in physical injuries, the person responsible shall be sentenced to a term of imprisonment of between one month and three years and a fine of between 500 euros and 3,000 euros.
- Where the accident has caused the death of a person, the term of imprisonment shall be between six months and five years and the fine shall be between 500 euros and 6,000 euros”;

Articles 418 and 419 of the Criminal Code provide:

- Article 418: "Anyone who has caused harm by lack of care or precaution, but without intending to harm another person, shall be guilty of homicide or of causing unintentional injury";
- Article 419: "Anyone who has unintentionally caused the death of a person shall be sentenced to a term of imprisonment of between three months and two years and a fine of between 500 euros and 10,000 euros. Where that person is a newly-born child, the term of imprisonment may be increased to five years";

II. First part of the question:

The Court stated that the implementation of the constitutional rule on equality presupposes that the categories of persons between whom discrimination is alleged are in a comparable situation by reference to the impugned measure; that Articles 418 and 419 of the Criminal Code, on the one hand, and Article 422 of the Criminal Code, on the other hand, relate to comparable situations and that they make it an offence to cause the death of a person unintentionally; that the legislator may, without infringing the constitutional principle of equality, subject certain categories of persons to different legal regimes, provided that the difference established is based on objective disparities, that it is rationally justified, appropriate and proportionate to the aim pursued; that the criterion of differentiation underlying the more severe penalties provided for in Article 422 of the Criminal Code responds to an objective difference in situation, namely the occurrence of a railway accident that has caused the death of persons on board the train.

The Court considered that the legislator alone is competent to determine the requirements of public policy and the most appropriate means of achieving them; that it is for the legislator to determine whether it is desirable to impose more severe penalties when an offence is particularly harmful to the general interest; that the Constitutional Court could take issue with such a choice only where it leads to a manifestly unreasonable treatment of comparable offences; that by imposing harsher penalties for the negligent and improvident conduct that was the cause of that railway accident, the legislator pursued the aim of ensuring the safety of rail transport; that the penalties laid down by Article 422 of the Criminal Code are intended to prevent accidents which endanger the lives of a large number of persons by encouraging greater attention and precaution in any conduct apt to cause a railway accident; that the measure introduced with the aim of preventing train accidents

is in direct relation to the aim pursued by the legislator; that in the light of the objective pursued by the legislator and its very wide discretion and also the fact that the criminal courts are called upon to adapt the penalty to the gravity of the negligence and the importance of the consequences, the aggravation of the penalty in Article 422 of the Criminal Code is reasonably proportionate to the aim pursued.

The Court further considered that it is true that the application of Article 422 of the Criminal Code may lead to different treatment of those responsible for the same type of accident, whose conduct was the same and who caused damage of the same type, namely the death of one or more persons; that, moreover, anyone who, through negligence, has caused a railway accident having led to the deaths of a large number of persons not on board the train will incur a lighter penalty than a person whose negligent conduct caused a comparable accident in which a single occupant of the train met his death; that thus the application of Article 422 of the Criminal Code may result in a person who caused less serious damage being dealt with more severely than other persons, even on the basis of identical facts which caused an accident of the same type; that, however, since the application of the criterion laid down by Article 422 of the Criminal Code leads in the great majority of cases to a more severe penalty being imposed on those responsible for railway accidents and since the situations in which the victims are persons not on board the train are relatively rare, the difference in treatment introduced by the provision at issue does not appear to be manifestly unreasonably.

As to the second part of the question:

The Court considered that, where it is called upon to adjudicate on compliance with the rule on equality before the law laid down in Article 10².1 of the Constitution, the Constitutional Court can only compare a situation not covered by the general law by comparison with the general law and examine whether the distinction thus put in place by the legislator is appropriate; that the principle of equality does not mean that situations which are comparable by reference to criteria other than those which the legislator had in mind when it established a derogation from the general law must be treated in the same way; that the application of a criterion for comparison other than that of public transport accidents, such as the criterion of endangering a large number of persons, would lead to the comparison of a large number of types of negligent conduct with the provision forming the subject-matter of the question referred to the Constitutional Court; that by punishing imprudence that jeopardises the safety of persons travelling on a railway train more

severely than in the case of ordinary accidents, the legislator did not infringe the rule on equality, even though those responsible for accidents on other means of public transport are not punished by penalties outside the scope of the general law.

The Court concluded from the foregoing considerations that Article 422 of the Criminal Code is not contrary to Article 10².1 of the Constitution.

Languages:

French.



Mexico Supreme Court

Important decisions

Identification: MEX-2010-1-001

a) Mexico / **b)** Supreme Court / **c)** First Chamber / **d)** 28.11.2001 / **e)** 154 / **f)** Judicial review 184/2000, 1272/2000, 1199/2001, 1256/2001 and 1254/2001 / **g)** *Semanario Judicial de la Federación*, Tome XV, April 2002, 430; IUS 187,036; *Relevant Decisions of the Mexican Supreme Court*, 455-456 / **h)**.

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Tax authority, powers / Tax inspection, duration, limit / Tax inspection, account review, duration / Time limit, element of right.

Headnotes:

Tax inspection activities must always have a limited duration.

Summary:

I. In the years 2000 and 2001, a number of companies filed relief proceedings alleging that Article 46-A of the Federal Tax Code, in force between 1995 and 1997, was unconstitutional. The reason was that it set forth a general rule by which on-site inspections and taxpayer account reviews could last up to a maximum of nine months, a timeframe that could be extended on two occasions. But it also referred to certain groups of taxpayers excluded from the application of that general rule. As a result, the plaintiffs challenged the Article because they had been excluded from the application of the

above mentioned general rule. They claimed that this article infringed Articles 1, 31.IV and 16 of the Federal Constitution. As far as the first two articles are concerned, the Court resolved that the challenged Article 46-A of the Federal Tax Code did not infringe them, and only the grievance regarding the violation of Article 16 of the Federal Constitution was admissible.

Article 16.1, 16.8 and 16.10 of the Federal Constitution set forth an individual guarantee, according to which individuals may not be disturbed in his/her person, papers or residence and that the latter is inviolable. However, this article does allow the authorities to disturb the individuals or to gain access to their residence in order to fulfill a precise purpose and without overlooking the requirements applicable to such action or to the warrant. It must therefore be understood that these actions are temporarily defined in order to achieve the objective sought with them, as the contrary would mean constant bother or permanent interference in the domicile, thereby violating the protection afforded by the aforementioned constitutional article.

II. As a result, the First Chamber concluded that Article 46.A.1.2 of the Federal Tax Code, in force between 1995 and 1997, violates the guarantee of legal security set forth in Article 16 of the Constitution. Although Article 46.A.1.2 of the Federal Tax Code establishes a general rule defining the maximum duration of home inspections or reviews of the accountability that the tax authorities must comply with, it excludes certain taxpayer groups, specifying no maximum duration for any inspections performed on them and therefore leaving the duration of this inspections at the discretion of the aforementioned authorities and maybe even making it indefinite.

The regulatory portion of Article 46.A of the Federal Tax Code is therefore unconstitutional, not because this rule excludes groups of taxpayers from the general rule on the maximum duration of inspections or account reviews, but because, with regard to these groups, there is no specified timeframe limiting the duration of those inspections or account reviews.

Languages:

Spanish.



Identification: MEX-2010-1-002

a) Mexico / **b)** Supreme Court / **c)** Plenary / **d)** 29.01.2002 / **e)** 155 / **f)** Action of unconstitutionality 10/2001 / **g)** *Semanario Judicial de la Federación*, Tome VX, February 2002, 416; IUS 187, 885; *Relevant Decisions of the Mexican Supreme Court*, 457-458 / **h)**.

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Abortion, punishment, exception / Punishment, terms.

Headnotes:

The protection of the right to life since the moment of conception is derived from the Federal Constitution. The lack of punishment of abortion under certain specific circumstances is not in breach of the Constitution.

Summary:

On 29 and 30 January 2002, the Supreme Court ruled on the action of unconstitutionality 10/2000 filed by a number of deputies of the Legislative Assembly of the Federal District, who requested that Article 334.III of the Federal District Criminal Code and Article 131bis of the Federal District Code of Criminal Procedures, adopted through a reform published in the Federal District Official Gazette on 24 August 2000, should be declared null and void.

As far as the aforementioned Article 334.III, is concerned, the Court recognised its validity and pointed out that said section contemplates a provision unrelated to the principle of legal certainty in criminal matters. This principle is contained in Article 14 of the Constitution, which prohibits imposing, by straightforward analogy or even by deduction, any punishment that has not been decreed by a law exactly applicable to the crime for which the individual is tried. The only thing Article 334.III determines is that, even satisfying the requirements set forth therein for the crime to exist, the punishment specified in the crime of abortion shall not be imposed. It is therefore clear that this principle was not being violated.

Given that Article 334.III sets forth an absolving reason, by considering that when the unlawful conduct (the abortion) – prohibited by Article 329 of the aforementioned code – is perpetrated, but the requirements set forth under Article 334.III are satisfied, the punishment set forth under Articles 330, 331 and 332 may not be applied, there can be no doubt that it does not violate the guarantee of equality set forth under Article 4 of the Federal Constitution. Indeed, this regulation does not authorise the deprivation of life of the product of conception, it only provides that under certain circumstances (possible malformation of the fetus established by two doctors) the crime (abortion) is not followed by a sanction.

As far as Article 131bis of the Federal District Code of Criminal Procedures is concerned, the Supreme Court rejected the action of unconstitutionality and ordered to close the case because the necessary eight qualified votes were not obtained. Therefore, it was not possible to declare the unconstitutionality of the challenged article, according to Article 72 of the Regulatory Act of Sections I and II of Article 105 of the Constitution.

Finally, the Supreme Court decided that the protection of the right to life as a product of conception derives from the Federal Constitution, international treaties and federal and local laws. These legal instruments set forth the protection of the legal asset of human life in the context of physiological gestation. The unborn is deemed a living being and the causing of the death thereof is punishable. Furthermore, it is specified that the product of conception is protected from that moment and may be designated as an inheritor or beneficiary.

Languages:

Spanish.



Identification: MEX-2010-1-003

a) Mexico / **b)** Supreme Court / **c)** First Chamber / **d)** 30.01.2002 / **e)** 156 / **f)** Direct judicial review 968/99 / **g)** *Semanario Judicial de la Federación* Tome XV, February 2002, 29; IUS 187, 762; *Relevant Decisions of the Mexican Supreme Court*, 459-460 / **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.**

5.3.15 Fundamental Rights – Civil and political rights – **Rights of victims of crime.**

Keywords of the alphabetical index:

Criminal procedure, guarantees / Investigation, preliminary, criminal, mandatory / Limitation, effect on investigation.

Headnotes:

The limitation of the legal criminal proceedings does not impede to conduct a preliminary investigation.

Summary:

The First Chamber of the Supreme Court exercised its power to hear relief proceedings under review 968/99. The background of the decision concerned events that took place on 2 October 1968, in Plaza de las Tres Culturas in Tlatelolco, in connection with the student movement in Mexico that year.

On resolving the matter, it was decided that the fact that the prosecuting authorities are legally not in a position to hear the facts in question due to the limitation of the criminal action and, consequently, did not start or conduct the respective preliminary investigations, amounts to a violation of the guarantees of legality and legal security to the detriment of the plaintiff. The prosecuting authorities should have determined the crime or crimes arising from the facts brought to their consideration, making it necessary to file criminal proceedings, which begin precisely with preliminary investigations.

Similarly, should the prosecuting authorities resolve that they are not in a position to hear the facts in question due to the limitation of the criminal action, the plaintiff is under no obligation to employ the normal remedy – set forth under Article 135 of the Federal Criminal Proceedings Code – before filing relief proceedings. As the aforementioned resolution was not preceded by a preliminary investigation, it had no impact on not exercising the criminal action.

Languages:

Spanish.



Identification: MEX-2010-1-004

a) Mexico / **b)** Supreme Court / **c)** Second Chamber / **d)** 08.02.2002 / **e)** 158 / **f)** Contradicting resolutions 12/2000 Between the First Circuit Seventh Collegiate Administrative Court and the former Fifth Collegiate Court of the Fourth Circuit / **g)** *Semanario Judicial de la Federación*, Tome XV, March 2002, 320; IUS 187, 358; *Relevant Decisions of the Mexican Supreme Court*, 465-467 / **h)**.

Keywords of the systematic thesaurus:

4.6.8.1 Institutions – Executive bodies – Sectoral decentralisation – **Universities.**

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

Keywords of the alphabetical index:

Administrative act, nature / Education, public / University, autonomy / Student, right, termination / Education, student, termination of studies by University, legal nature.

Headnotes:

Amparo proceedings against the decision of autonomous public universities denying the continuation of the enjoyment of the public educational service provided are valid.

Summary:

The Second Chamber of the Supreme Court resolved a situation of conflicting decisions under procedure no. 12/2000. The subject matter is of paramount importance for Mexico's university life, as the contradiction consisted of determining whether or not relief proceedings were admissible against the resolutions passed by public universities denying an individual the educational service they provide.

The Chamber pointed out that there were two conflicting decisions. The First Circuit Administrative Court argued that any acts that deny a subject the educational public service provided by an autonomous public university are not acts of authority for the purpose of relief proceedings, given that, among other things, the intention of such actions is to regulate the internal relations of members of the

university in accordance with their internal regulations, and not on the basis of a legal norm. On the contrary, the former Fourth Circuit Court – now known as the Fourth Circuit Criminal and Civil Court – considered that a university has the status of “authority” when its resolutions affect the legal sphere of an individual, as is the case where the rights of a student are suspended for an unspecified time or when, among other acts performed by a university's public servants, some acts are found to satisfy the basic requirements of processes of authority, permitting action without the agreement of the individual and imposing resolutions against their will. In those cases, such acts may be subject to *amparo* proceedings.

In order to resolve existing contradictions, the Second Chamber pointed out that autonomous public universities are generally established as decentralised agencies of the respective federal or local public administration. They are part of the corresponding political entity and, hence, constitute authentic state agencies. This does not override the fact that, as far as the legal relations established in the national legal order are concerned, they have their own standing and assets, which distinguish them from other state or autonomous powers and bodies of the political entity to which they belong.

The Second Chamber also reasoned that the autonomy of said universities constituted a characteristic of self-government derived from a legislative act of Congress or the local legislatures, which affords them academic and patrimonial independence in order to set, in accordance with the provisions of the Federal Constitution and the respective laws, the terms and conditions under which they will provide their educational services, the requirements for entry, the promotion and permanence of their academic staff and the way they administer their assets. Thus, the power to make decisions implied by this autonomy is subordinate to the constitutional principles that govern the actions of any state agency.

The action of a public university that expels an individual or materially prevents him or her, for an unspecified time, from enjoying the rights he or she had as a student, amounts to a real administrative power. It is the expression of a relationship of superiority derived from the law and implies taking a unilateral action that in itself extinguishes the legal standing of the individual, who had until then the rights and obligations that correspond to a student. This is done without the need to appear before the jurisdictional authority, the said resolution taking effect in a valid manner in the legal world.

In this scheme of things, the moment an individual complies with the requirements that allow him or her to acquire the standing of a student as set forth in the respective legal and administrative provisions, a set of rights and obligations become incorporated into his or her legal sphere, as a result of which a resolution allowing a public university to expel the student or deprive him or her of said legal situation for an unspecified period, amounts to an act of authority that may be challenged in relief proceedings. In other words, this is an act perpetrated by a state agency, on the basis of a legal power that places the corresponding public university in a relationship of superiority with regard to its students and allows it to unilaterally extinguish the legal status derived from the standing of a university student.

Languages:

Spanish.



Identification: MEX-2010-1-005

a) Mexico / **b)** Supreme Court / **c)** Plenary / **d)** 28.02.2002 / **e)** 159 / **f)** Incident of non execution 493/2001 / **g)** *Semanario Judicial de la Federación*, Tome XV, April 2002, 11; IUS 187, 084; *Relevant Decisions of the Mexican Supreme Court*, 469-470 / **h)**.

Keywords of the systematic thesaurus:

3.18 General Principles – **General interest**.
 4.4.6.1.1.3 Institutions – Head of State – Status – Liability – Legal liability – **Criminal liability**.
 4.6.10.1.3 Institutions – Executive bodies – Liability – Legal liability – **Criminal liability**.
 4.7.16.2 Institutions – Judicial bodies – Liability – **Liability of judges**.

Keywords of the alphabetical index:

Authority, notion / Collective interest / Civil servant, status / Supreme Court, decision, binding nature.

Headnotes:

The execution of a sentence granting relief may be applied to all types of authorities, without any condition whatsoever concerning the allocation of the budget needed.

Summary:

In connection with the compliance of sentences in relief proceedings, the Supreme Court reasoned that the measures established under Article 107.XVI of the Federal Constitution apply to any type of authority, including those elected by direct universal suffrage. This Article contemplates that, when the responsible authority insists on repeating the act complained against or attempts to elude the final sentence in relief proceedings (while the Supreme Court deems the compliance binding), the authority shall be removed from his or her post at once and brought before the corresponding District Criminal Judge, without any distinction being made with regard to the origin of the post of authority. This upholds the principle according to which the law should not make any distinction nor should whoever applies it.

Furthermore, when compliance with a sentence in relief proceedings involves compensating the plaintiff for damages as a restitution, it would be incorrect to privilege the particular financial interest of the aggrieved party, who would be paid with government funds, above the collective interest of the other citizens. This is because the aim of relief proceedings is not to settle conflicts between the plaintiff and the rest of the population, also subject to authority, but rather conflicts between the plaintiff and the responsible authorities. Therefore, the legal relationship derived from relief proceedings is set forth between the plaintiff and the responsible authorities and the obligation to reinstate arises exclusively with regard to the aggrieved party, without said relationship involving other members of society who are external to the matter of non-execution. As a result, the restitution, by way of compensation, does not cause them any prejudice whatsoever.

Languages:

Spanish.



Identification: MEX-2010-1-006

a) Mexico / **b)** Supreme Court / **c)** Plenary / **d)** 25.04.2002 / **e)** 161 / **f)** Constitutional controversy 22/2001 / **g)** *Semanario Judicial de la Federación*, Tome XV, May 2002, 607; *Relevant Decisions of the Mexican Supreme Court*, 475-476 / **h)**.

Keywords of the systematic thesaurus:

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

4.4.3.1 Institutions – Head of State – Powers – **Relations with legislative bodies.**

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

4.10.8.1 Institutions – Public finances – Public assets – **Privatisation.**

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

Keywords of the alphabetical index:

Authority, administrative, power, discretionary / Electricity, privatisation.

Headnotes:

A presidential decree giving the Executive the power to determine limits of electric power that can be purchased without a public tender violates Articles 73.X and 134 of the Federal Constitution, according to which the Congress is competent to legislate on the acquisition of electric power.

Summary:

The Supreme Court declared that Articles 126.2, 126.3 and 135.II and *in fine* of the Regulation of Electrical Energy Service Act were invalid because the presidential decree, dated 22 May 2001, reforming them and adding these precepts involved a violation of the limit of the regulatory power set forth under Article 89.I of the Federal Constitution. Indeed this Article requires that the regulation should be subordinate to the law and the Electric Energy Service Act impaired the legal nature of the concepts of self-supply and joint generation set forth under Article 36 and 36bis by modifying the limits of electric power that can be acquired without a public bidding process. The concept of surplus is also modified. The latter means that the purpose of obtaining these permits is no longer consumption by the holders, but rather that the main activity of the holders becomes the generation of electric power to be sold to the Federal Electricity Board. This means diverging from the principles set forth under Article 27.6, *in fine*, of the Federal Constitution and privatising *de jure* and *de facto* the provision of the public electric power service.

On issuing the challenged decree, the Federal Executive abused its functions, invading the sphere of powers of the Congress which, under Articles 73.X and 134 of the Constitution, is the legitimate body to legislate on the matter of the acquisition of electric power. This decree afforded the Ministry of Energy a broad degree of discretion, contrary to the concept of the sale of surpluses contemplated by the Electrical Energy Service Act.

Finally, it was noted that the Federal Executive exempts from the public bidding process any contracts that the Federal Electricity Board executes with private parties concerning the selling of the electric power they generate, which means that the state lacks any guarantee that the Federal Electricity Board will execute a contract with the party offering the best option. In other words, the state is being denied any assurance that the economic resources of this agency are being administered in an efficient, effective, impartial and honourable manner.

Languages:

Spanish.

**Identification:** MEX-2010-1-007

a) Mexico / **b)** Supreme Court / **c)** Second Chamber / **d)** 26.04.2002 / **e)** 162 / **f)** Contradicting Resolutions 40/2001-PL Between the Third Collegiate Administrative Court of the Sixth Circuit and the First Collegiate Court of the Fourteenth Circuit / **g)** *Semanario Judicial de la Federación*, Tome XV, May 2002, 175; IUS 186, 921; *Relevant Decisions of the Mexican Supreme Court*, 477-478 / **h)**.

Keywords of the systematic thesaurus:

2.1.3.1 Sources – Categories – Case-law – **Domestic case-law.**

4.6.6 Institutions – Executive bodies – **Relations with judicial bodies.**

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:

Administrative act, reasoning, reference to case-law, obligation / Supreme Court, decision, binding nature.

Headnotes:

The administrative authorities are not obliged to apply case-law on the unconstitutionality of laws if they fulfill the obligations of motivating their acts.

Summary:

On resolving contradicting Resolutions 40/2001-PL between the Sixth Circuit Third Administrative Court and the First Collegiate Court of the Fourteenth Circuit Court, the Second Chamber of the Supreme Court noted that the contradiction concerned the binding nature of precedents for the administrative authorities.

The Fourteenth Circuit Court deemed that the administrative authority was bound to comply with precedents because, in spite of the fact that Articles 192 and 193 of the Amparo Act generally refer to courts and not to the authorities that comprise the public administration, these must be included; they are obliged to provide grounds and motives for any burdening acts, so they must apply the law as interpreted by the agencies empowered thereby. On the contrary, the Sixth Circuit Administrative Court argued that the administrative authorities were not obliged to provide grounds for their acts in their case-law, according to an accurate interpretation of Article 16.1 and Article 94.8 of the Federal Constitution; the principle of legality does not go as far as demanding that the administrative authorities support each other in their case-law and Articles 192 and 193 of the Amparo Act clearly set out who is bound by it and this does not include said authorities.

The Second Chamber of the Supreme Court decided that the obligation of the administrative authorities to provide grounds and motives for their acts did not imply doing as interpreted by the competent bodies of the Federal Judiciary. Precedents are not a general but an individual regulation, in accordance with the principle of relativity of sentences in relief proceedings. This means that the acts of administrative authorities do not violate Article 16 of the Federal Constitution if they are not based on precedents declaring the unconstitutionality of a law, as this only binds jurisprudential bodies.

Languages:

Spanish.

*Identification:* MEX-2010-1-008

a) Mexico / **b)** Supreme Court / **c)** Plenary / **d)** 23.05.2002 / **e)** 164 / **f)** Contradicting resolutions 2/2000-PL Between the Upper Chamber of the Federal Judiciary Electoral Court and the Mexican Supreme Court / **g)** *Semanario Judicial de la Federación*, Tome XV, June 2002, 5, 81 and 82; IUS 186, 765; 186, 705; 186, 798; *Relevant Decisions of the Mexican Supreme Court*, 481-483 / **h)**.

Keywords of the systematic thesaurus:

1.3 Constitutional Justice – **Jurisdiction**.
2.1.3.1 Sources – Categories – Case-law – **Domestic case-law**.
4.9.1 Institutions – Elections and instruments of direct democracy – **Competent body for the organisation and control of voting**.

Keywords of the alphabetical index:

Constitutional Court / Court, competence, exclusive / Law, unconstitutionality, declaration, competence.

Headnotes:

The Federal Judiciary Electoral Court is not competent to rule on the constitutionality of a general regulation.

Summary:

On deciding on the electoral constitutional review proceedings 209/99, the Federal Judiciary Electoral Court issued a criterion that clashed with that issued by the Mexican Supreme Court when ruling on the action of unconstitutionality 6/98. The Supreme Court was therefore required to decide whether or not there was a contradiction between the decisions of the Supreme Court and the Electoral Court.

Conflicting decisions were registered with the number 2/2000-PL and were decided on 23 May 2002. The ruling of the Supreme Court played a key role in clearing up any doubts on the existing jurisdiction of the Federal Judiciary's jurisdictional bodies. The Supreme Court argued that it was not possible to have valid conflicting rulings issued by both the Supreme Court and the Electoral Court, given that the latter has no power whatsoever to issue decisions on

the constitutionality of general regulations, even with the pretext of determining that it only does not to apply them. This situation arises, first of all, from the fact that one essential requirement for the existence of conflicting decisions is the existence of conflicting criteria issued by two or more courts that are equally competent to solve matters of a certain type. This condition does not exist in the case of the aforementioned courts. While the Supreme Court has exclusive power to interpret the Federal Constitution and to declare that any general regulations in conflict with the content thereof are unconstitutional or invalid – in view of the fact that the action of unconstitutionality is the only way the unconstitutionality of this type of regulation may be tackled – the Electoral Court is competent to resolve only the constitutionality of electoral acts or resolutions and even interpret a constitutional precept, provided there is no applicable jurisprudence of the Supreme Court in this regard and that such interpretation is not intended to verify the compliance of an electoral law with the Constitution. Moreover, the Electoral Court should also be obliged to comply with any decisions issued by the Supreme Court on this matter.

In this case, the Electoral Court interpreted Article 54.IV of the Federal Constitution, because it did not share the view of the Supreme Court in ruling on the action of unconstitutionality 6/98, enabling the scope of the aforementioned precept – and that of Article 116 of the Constitution – to be set by way of the thesis P/J 69/98, P/J 70/98, P/J 71/98, P/J 72/98 and P/J 73/98. Thus, the Electoral Court exceeded its jurisdiction and failed to comply with the case-law of the Supreme Court. It therefore infringed Articles 94.8 and 235 of the Federal Judiciary Act, obliging it to comply with the precedents of the Court even if it might not share them.

In conclusion, the Court established that it is not possible to have conflicting decisions issued by the Supreme Court and the Electoral Court as, otherwise, far from safeguarding legal security – which is the purpose of conflicting decisions – this would render it void by implying that opposing decisions issued by bodies that have different jurisdiction according to the Constitution are admissible.

Languages:

Spanish.



Netherlands Council of State

Important decisions

Identification: NED-2010-1-001

a) Netherlands / **b)** Council of State / **c)** Third Chamber (first instance) / **d)** 15.01.2010 / **e)** 201000115/1/H2 / **f)** Political association Stop Wilders.nu v. Central Electoral Committee for the election of the members of the municipal council of the municipality of The Hague / **g)** *Landelijk Jurisprudentienummer: LJN:BK9420, Administratiefrechtelijke Beslissingen: AB 2010, 38* / **h)** CODICES (Dutch).

Keywords of the systematic thesaurus:

4.9.7.2 Institutions – Elections and instruments of direct democracy – Preliminary procedures – **Registration of parties and candidates.**
5.3.32 Fundamental Rights – Civil and political rights – **Right to private life.**

Keywords of the alphabetical index:

Political party, name / Politician, reputation.

Headnotes:

An appellation by which a political grouping wishes to be known on the list of candidates for an election does not invade a politician's privacy merely by using his or her family name without his or her consent.

Summary:

The central electoral committee for the election of the members of the municipal council of the municipality of The Hague (hereinafter, the “central electoral committee”) turned down the application for registration submitted by the political association ‘Stop Wilders.nu’ (hereinafter, the “Stop Wilders’ party”). The ‘Stop Wilders’ party then lodged an appeal to the Administrative Jurisdiction Division of the Council of State. The Electoral Council was requested by the Administrative Jurisdiction Division of the Council of State to provide information.

According to Article G 3.1 of the Elections Act a political grouping which is an association having full legal capacity and whose appellation has not already been registered with the central electoral committee for elections to the House of Representatives or the provincial council may submit a written request to the central electoral committee for elections to the municipal council to enter the appellation by which it wishes to be known on the list of candidates for that election in a register kept by the central electoral committee. The fourth paragraph stipulates that the central electoral committee will only refuse the request if – *inter alia* – the appellation is contrary to public policy.

On the one hand the central electoral committee was of the opinion that the appellation by which the 'Stop Wilders' party wished to be registered on the list of candidates invaded Mr Wilders' privacy by using his family name without his consent. On the other hand, the 'Stop Wilders' party argued that the appellation was not aimed at Mr Wilders himself but at his political views. The Electoral Council stated that the parliamentary history of the Elections Act indicated that answering the question as to whether an appellation is contrary to public policy does not involve assessment of the objective or activities of the political grouping concerned. Registration does not amount to a licensing system; it is merely aimed at promoting the distinguishability of the list of candidates for the benefit of the voters. Besides, the Electoral Council was of the opinion that the privacy of Mr Wilders had not been violated. It was sufficiently clear to the Electoral Council that the appellation was aimed at political views he propounded and sought to stimulate public debate in this respect.

The Administrative Jurisdiction Division of the Council of State agreed with the Electoral Council, starting from the premise that political groupings are free to choose the appellation by which they wish to be known on the list of candidates. A broad interpretation of the grounds for refusal was held not to be in line with the purpose of the Elections Act. The sole circumstance that the family name of a politician was part of the appellation did not render the appellation contrary to public policy. If this was felt to be undesirable, the Elections Act should be amended.

Supplementary information:

Mr Geert Wilders is a member of the Lower House of the States General (the House of Representatives) and party chairman of the Party for Freedom.

Languages:

Dutch.



Identification: NED-2010-1-002

a) Netherlands / **b)** Council of State / **c)** Third Chamber (appeal – Government Information (Public Access) Act) / **d)** 17.02.2010 / **e)** 200906298/1/H3 / **f)** RTL Nederland v. Minister of General Affairs / **g)** *Landelijk Jurisprudentienummer:* LJN: BL4132, *Administratiefrechtelijke Beslissingen:* AB 2010, 91, *Jurisprudentie Bestuursrecht* 2010, 86 / **h)** CODICES (Dutch).

Keywords of the systematic thesaurus:

3.20 General Principles – **Reasonableness.**
4.6.2 Institutions – Executive bodies – **Powers.**

Keywords of the alphabetical index:

Council of Ministers, meetings, confidentiality / Information, restriction.

Headnotes:

The Minister of General Affairs had the right to decide not to disclose minutes taken of the proceedings at the Council of Ministers meetings relating to its position in the build-up to the war in Iraq.

Summary:

RTL, a broadcasting company, applied to the Minister of General Affairs (hereinafter, the "Minister") for disclosure of minutes taken of the proceedings at the Council of Ministers meetings relating to its position in the build-up to the war in Iraq. The Minister refused the application. RTL contested the decision, but the Minister dismissed the objections. RTL then applied to the administrative court. The District Court upheld the Minister's decision. RTL then appealed to the Administrative Jurisdiction Division of the Council of State.

Article 45 of the Constitution provides that the Ministers together constitute the Cabinet (1st paragraph) and that the Cabinet shall consider and decide upon overall government policy and shall promote the coherence thereof (3rd paragraph). Section 11 of the Government Information (Public Access) Act stipulates that where an application concerns information contained in documents drawn up for the purpose of internal consultation, no information shall be disclosed concerning personal opinions on policy contained therein (1st paragraph). Information on personal opinions on policy may be disclosed, in the interests of effective, democratic governance, in a form that cannot be traced back to any individual. If those who expressed the opinions in question or who supported them agree, information may be disclosed in a form that may be traced back to individuals (2nd paragraph).

No dispute arose about the issue that the minutes taken of the proceedings at the Council of Ministers meetings are drawn up for the purpose of internal consultation within the meaning of Section 11.1 of the Government Information (Public Access) Act. Therefore, the Administrative Jurisdiction Division of the Council of State agreed with the District Court that the minutes contained information concerning personal opinions on policy. According to the case-law of the Administrative Jurisdiction Division of the Council of State, the decision to disclose information concerning personal opinions on policy is at the discretion of the public authority concerned. According to parliamentary history, the public authority may decide not to disclose any information, irrespective of whether those whom it may concern agree with disclosure. The Minister's decision not to exercise his power under Article 11.2 of the Government Information (Public Access) Act was not unreasonable. First, on the basis of Article 45 of the Constitution it was the Cabinet's task to promote the coherence of government policy. Secondly, a duty of secrecy applied under Section 26 of the Standing Orders for the Council of Ministers. Finally, the Council of Ministers was too small for information to be disclosed in a form that could not be traced back to any individual.

Supplementary information:

The Council of Ministers currently consists of twelve Ministers.

Languages:

Dutch.



Identification: NED-2010-1-003

a) Netherlands / **b)** Council of State / **c)** Third Chamber (appeal – Government Information (Public Access) Act) / **d)** 03.03.2010 / **e)** 200903769/1/H3 / **f)** X and others v. Minister of Defence / **g)** *Landelijk Jurisprudentienummer*. LJN: BL6245, *Administratiefrechtelijke Beslissingen*: AB 2010, 109, *Nederlands Juristenblad* 2010, 563 / **h)** CODICES (Dutch).

Keywords of the systematic thesaurus:

2.1.1.4.1 Sources – Categories – Written rules – International instruments – **United Nations Charter of 1945**.

2.2.1.5 Sources – Hierarchy – Hierarchy as between national and non-national sources – **European Convention on Human Rights and non-constitutional domestic legal instruments**.

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:

Information, restriction.

Headnotes:

The refusal by the Minister to disclose documents relating to peace keeping operations carried out by the United Nations was lawful in the light of *inter alia* Article 6 ECHR.

Summary:

X and others, surviving relatives of those killed after the Fall of Srebrenica, applied for disclosure of documents relating to the peace keeping operations carried out by the United Nations in the former Republic of Yugoslavia. The Minister of Defence (hereinafter, the “Minister”) refused the application. X and others contested the decision, but the Minister dismissed their objections. X and others then applied to the administrative court. The District Court upheld the Minister's decision. X and others then appealed to the Administrative Jurisdiction Division of the Council of State.

The documents, the disclosure of which had been applied for, belonged to the United Nations, so that they had to be considered as documents in the sense of the Convention on the privileges and immunities of the United Nations (hereinafter, the "Convention"). Article II.4 of the Convention stipulates that the archives of the United Nations, and in general all documents belonging to it or held by it, shall be inviolable wherever located. Although the documents were in the possession of the Minister, it was at the UN's discretion whether or not to disclose them. Under Section 3 of the Government Information (Public Access) Act the Minister was, however, obliged to decide on applications for disclosure, thereby respecting the UN's decision. In this case, the UN had decided not to disclose the documents concerned given their confidential nature.

Given the preamble to the Convention, Article II.4 of the Convention gives content to Article 105 of the Charter of the United Nations (hereinafter, the "Charter") that provides *inter alia* that the UN enjoys in the territory of each of its Member States such privileges and immunities as are necessary for the fulfilment of its purposes. The General Assembly has adopted the Convention for this purpose in line with Article 105.3 of the Charter. Therefore, it was not for the national courts in a concrete case to adjudicate upon the question whether confidentiality of the documents concerned is necessary for the fulfilment of the purposes of the UN.

Article 6.1 ECHR did not apply, since the Minister's decision based on Section 3 of the Government Information (Public Access) Act could not be regarded as a determination of civil rights and obligations or of any criminal charge in the sense of this treaty provision. The right to apply for disclosure of information under the Government Information (Public Access) Act exclusively serves the public interest and good and democratic governance and not the private interest of the applicants.

Languages:

Dutch.



Norway Supreme Court

Important decisions

Identification: NOR-2010-1-001

a) Norway / **b)** Supreme Court / **c)** Panel / **d)** 13.11.2009 / **e)** 2009-2153A / **f)** / **g)** *Norsk retstidende* (Official Gazette) 2009, 1439 / **h)** CODICES (Norwegian, English).

Keywords of the systematic thesaurus:

5.3.13.10 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Trial by jury**.

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

Keywords of the alphabetical index:

Jury, reasoning, fair trial.

Headnotes:

A criminal system where a jury determines the question of guilt without giving a reason for its decision is not in conflict with the right to a fair trial where there are other mechanisms to satisfy these purposes. However, in certain cases the Court is obliged to elaborate on the reasoning for the assessment of guilt where necessary to ensure verifiability.

Summary:

The Supreme Court stated that the Court of Appeal is obliged to elaborate on the reasoning for the assessment of guilt where necessary to ensure verifiability.

The reasoning is to be given in accordance with the Court's discussion of the sentencing. It was noted that elaboration is only required in a few cases. This particular case concerned sexual assault on a child. The defendant was acquitted by the District Court (a composite court giving a reason), but found guilty by the jury in the Court of Appeal.

Cross-references:

- *Norsk retstidende* (Official Gazette), 2009, 750.

Languages:

Norwegian, English (translation by the Court).



Poland

Constitutional Tribunal

Important decisions

Identification: POL-2010-1-001

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 20.05.2009 / **e)** Kpt 2/08 / **f)** / **g)** *Monitor Polski* (Official Gazette), 2009, no. 32, item 478; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2009, no. 5A, item 78 / **h)** CODICES (Polish).

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.**

4.4.6.1.2 Institutions – Head of State – Status – Liability – **Political responsibility.**

4.6.10.2 Institutions – Executive bodies – Liability – **Political responsibility.**

4.17.1 Institutions – European Union – **Institutional structure.**

Keywords of the alphabetical index:

European Council.

Headnotes:

The Polish Council of Ministers, under Articles 146.1, 146.2 and 4.9 of the Constitution, determines the standpoint of the Republic of Poland to be presented at a session of the European Council. The Prime Minister (who presides over the Council of Ministers) represents the Republic of Poland at the sessions of the European Council and presents the agreed standpoint.

The President of the Republic of Poland, as the supreme representative of the Republic, may decide under Article 126.1 of the Constitution to participate in a session of the European Council, if he finds it useful for the realisation of the tasks of the President of the Republic specified in Article 126.2 of the Constitution.

The participation of the President in a session of the European Council requires the co-operation of the President with the Prime Minister and the minister competent in this regard, according to the principles set out in Article 133.3 of the Constitution. The goal of the co-operation is to ensure uniformity of actions taken on behalf of the Republic of Poland and in relations with the European Union.

The co-operation of the President with the Prime Minister and the competent minister enables the President to make reference – in matters related to the realisation of his tasks specified in Article 126.2 of the Constitution – to the standpoint of the Republic of Poland determined by the Council of Ministers. The co-operation also makes it possible to determine the extent and form of the intended participation of the President in a session of the European Council.

In performing their constitutional tasks and exercising their competence, the President, the Prime Minister and the Council of Ministers should follow the principle of co-operation between powers enshrined in Article 133.3 of the Constitution.

Summary:

I. The dispute over authority between the President of the Republic and the Prime Minister emerged in connection with the European Council session which took place in Brussels on 15-16 October 2008. The President and the Prime Minister claimed they were the Head of State or of Government mentioned in Article 4 of the Treaty on European Union. A motion to settle the dispute over authority between the President and the Prime Minister under Article 189 of the Constitution, has been lodged by the Prime Minister in order to determine the central constitutional authority of the state, which is entitled to represent the Republic of Poland at the European Council sessions and present the standpoint of the state.

II. A dispute over authority to be settled by the Constitutional Tribunal must be real. The authority initiating proceedings in this matter should substantiate the real character of the dispute and its legal interest in settling the dispute. Furthermore, the Tribunal settles disputes over authority regardless of the rank of the provision establishing the authority.

The Tribunal has stated that both the subjective and objective premises to settle the dispute over authority have been met. Both the President and the Prime Minister are central constitutional authorities of the state. The discrepancies in the understanding of competence to represent the Republic of Poland at the European Council sessions presented by the

parties during hearings before the Constitutional Tribunal prove that the dispute is real.

According to Article 146.1 of the Constitution, the Council of Ministers shall conduct the internal affairs and foreign policy of the Republic of Poland. This legal provision expresses the presumption of exclusive authority of the Council of Ministers within the substantially understood “conducting of foreign policy”. However, this does not mean the Council of Ministers enjoys exclusive authority as regards the foreign representation of the Republic of Poland. Particular attention should be paid to Article 133.1 of the Constitution, determining that the President of the Republic is the “representative of the state in foreign affairs”. Thus, according to Article 146.2 of the Constitution, all matters related to the representation of the state belong to the Council of Ministers, except for those clearly reserved for the President of the Republic, and requiring the co-operation with the Prime Minister and the minister competent in this regard.

Article 126.2 of the Constitution, according to which “the President of the Republic of Poland shall be the supreme representative of the Republic of Poland” regulates the constitutional tasks, but not the competence of the President. Those tasks should be performed together and in co-operation with other state organs. The President does not enjoy exclusive competence to perform those tasks and he may not perform them freely.

Assigning the constitutional role of the supreme representative of the Republic to the President does not imply providing him with the power to conduct foreign policy. The Constitution differentiates between the President’s standing as the supreme representative of the Republic, and the President’s function as the representative of the state in foreign relations; the latter being a manifestation of an obvious attribute of every republican head of state.

The Constitution does not provide general competence of the President to participate in the sessions of the European Council. However, the President may decide to participate in a particular session of the European Council, under Article 126.1 of the Constitution, if he finds it useful for the realisation of his tasks under Article 126.2 of the Constitution. Nevertheless, the standpoint of the Republic of Poland is determined by the Council of Ministers pursuant to Article 146.1, 146.2 and 4.9 of the Constitution. The Republic of Poland is represented at the sessions of the Council of Europe by the Prime Minister, who also presents the standpoint of the Republic of Poland. The President may comment on the standpoint of the Republic of

Poland in matters regulated in Article 126.2 of the Constitution. The co-operation between the President and the Prime Minister should include determining the extent and form of the intended participation of the President in a particular session of the European Council.

The participation of the President in a session of the European Council has certain political and constitutional consequences. The presence of the President, because of the diplomatic hierarchy, makes him the head of the national delegation. Furthermore, there is no rule according to which the fact alone of being the supreme representative of a state (without participating in the current ruling process) would give the right to participate in a session of the European Council.

The relations between the Republic of Poland and the European Union do not have a uniform character, but as a whole, they fit within the “internal affairs and foreign policy” mentioned in Article 146.1 and within the “affairs of the state” mentioned in Article 146.2 of the Constitution. The more a particular session of the European Council is devoted to matters of traditional internal policy, the more difficult it becomes to find a reason for a state authority other than the Council of Ministers to participate in that session.

The European Council may not decide on matters which might constitute a threat to the inviolability and integrity of the territory of the Member States, including the Republic of Poland. However, the sessions of the European Council on possible changes to the treaties, which constitute the foundation of the EU, might concern the sovereignty of the Republic of Poland, which would justify the participation of the President.

The duty of state organs to co-operate is a legal obligation to try to achieve uniformity of actions taken with regard to foreign and EU policies. It includes a prohibition of forming two parallel and independent centres of foreign policy. Co-operation under Article 133.3 implies that the President may not conduct a competitive policy to the government policy. This would be contrary to the Polish *raison d'état*.

In the case of a session of the European Council, co-operation implies, in particular, informing the President through the Prime Minister or through the minister competent in foreign affairs about the subject of the session. Should the President show interest in the subject (and should the subject be covered by Article 126.2 of the Constitution), the Council of Ministers should provide full information on the standpoint of the government in this regard.

The Tribunal has settled the dispute over authority between the President of the Republic and the Prime Minister *en banc* (15 judges) with three dissenting opinions.

Cross-references:

Decisions of the Constitutional Tribunal:

- Judgment K 15/04 of 31.05.2004, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2004, no. 5A, item 47; *Bulletin* 2004/2 [POL-2004-2-017];
- Judgment K 24/04 of 12.01.2005, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2005, no. 1A, item 3; *Bulletin* 2005/1 [POL-2005-1-002];
- Judgment K 18/04 of 11.05.2005, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2005, no. 5A, item 49; *Bulletin* 2005/1 [POL-2005-1-006];
- Judgment K 40/05 of 20.07.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2006, no. 7A, item 82; *Bulletin* 2006/3 [POL-2006-3-013];
- Judgment Kpt 1/08 of 23.06.2008, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2008, no. 5A, item 97.

Languages:

Polish.



Identification: POL-2010-1-002

a) Poland / b) Constitutional Tribunal / c) / d) 28.10.2009 / e) Kp 3/09 / f) / g) *Monitor Polski* (Official Gazette), 2009, no. 72, item 917; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2009, no. 9A, item 138 / h) CODICES (Polish).

Keywords of the systematic thesaurus:

3.10 General Principles – **Certainty of the law.**
 3.12 General Principles – **Clarity and precision of legal provisions.**
 4.17.1.1 Institutions – European Union – Institutional structure – **European Parliament.**

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

5.3.41.3 Fundamental Rights – Civil and political rights – Electoral rights – **Freedom of voting**.

5.3.41.5 Fundamental Rights – Civil and political rights – Electoral rights – **Direct / indirect ballot**.

Keywords of the alphabetical index:

Election, European Parliament / Election, voting / *Vacatio legis*.

Headnotes:

The legislator should not make significant changes to electoral law less than six months before the elections. The term “elections” in this context embraces not only the act of voting, but also all the activities covered by the electoral calendar. A significant change to electoral law is a change which clearly affects the process of voting and its results, and which requires prior notification to the norm’s addressees about its enactment. Replacing single day voting in European Parliament elections with a voting process lasting two days is an example of a significant change.

Since the amended electoral law would only apply with effect from the next elections (in five years’ time), there is no need to introduce a different *vacatio legis*.

The time span regarding acts prior to the “election day” must be counted from the first day of voting, while the time span for acts taking place after the “election day” must be counted from the second day of voting.

Summary:

I. The President of the Republic lodged a motion for the preliminary review of the constitutionality of Articles 3.2 and 4 of the Act of Parliament of 12 February 2009 (hereinafter, the “Act”) which amended legislation on elections to the Presidency of the Republic, the state referendum and the electoral ordinance to the European Parliament. Article 3.2 of the Act stipulates that elections to the European Parliament will last two days. The *vacatio legis* is covered by Article 4 of the Act.

The President also raised the question of the constitutionality of proxy voting.

The standard of constitutional control was Article 2 of the Constitution. Under Article 2, the Republic is a democratic state under the rule of law and implementing the principles of social justice.

II. The President suggested that the *vacatio legis*, regulated in Article 4 of the Act is inadequate, because the entry into force of the Act would occur after the electoral calendar had been set.

The second argument raised by the President was a lack of clarity of the provision of the Act stipulating that elections to the European Parliament will last for two days rather than one. The act on the state referendum, which also lasts two days, includes a norm which clearly indicates when the electoral campaign ends (providing for a twenty-four hour interval between the end of the electoral campaign and the beginning of the voting), while the act on European Parliament elections only stipulates, that the electoral campaign ends twenty-four hours before “election day”. The President had concerns that this might result in the interval between the end of the electoral campaign and the beginning of the voting being reduced from twenty-four to eight hours (as the electoral campaign ends at midnight and the polls open at 8 am).

As the legal provision regulating proxy voting was not raised in the *petitum* of the motion, the Tribunal did not adjudicate on its constitutionality.

Once the *vacatio legis* elapses, an act enters into force and becomes binding. However, according to the Constitutional Tribunal, the constitutional problem raised by the President is of a different nature. It concerns the interval between the last amendment to electoral law and “election day”. The legislator enjoys a wide margin of appreciation in his or her choice of the *vacatio legis*. However, he or she may not act arbitrarily; he or she must act with the maximum level of diligence, taking into account such factors as the effectiveness of achieving the aim of the act, the smooth running of the legal system into which the norm will be incorporated and avoiding any surprises for the addressees of the Act. As for the President’s question, according to both the Code of Good Practices in Electoral Matters of the Venice Commission and the jurisprudence of the Constitutional Tribunal (Decision K 31/06), significant amendments to electoral law should be made at least six months before “election day”. In its judgment dated 3 November 2006 (ref. no. K 31/06), the Constitutional Tribunal reconstructed the functioning of a *sui generis* suspension period before the election day, during which the legislator will not make changes to electoral law due to respect for the principles of a democratic state under the rule of law and the personal rights of the electorate.

Referring to its established case-law, the Constitutional Tribunal noted that significant amendments to electoral law include amendments with an influence on the

voting and its results, on the designating of electoral districts, on electoral thresholds or on the algorithms used to assess the results of the elections. In this context, introducing two days of voting in elections to the European Parliament constitutes a significant amendment to electoral law.

However, because the European Parliament elections took place in Poland on 7 June 2009, the provisions of the Act would only apply with effect from the next elections. The electoral calendar has been exhausted; there are no grounds to claim that Article 4, together with Article 3 of the Act, impinges on Article 2 of the Constitution.

Only the amendment regulated in Article 3.1 of the Act would apply in accordance with the Constitution, should the Act come into force unduly late. Under this Article, the number of Members of the European Parliament elected in the Republic is regulated by the law of the European Union. The Tribunal noted that under Article 92.2 of the Constitution, an international agreement ratified upon prior consent granted by statute will take precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes.

The time span for acts preceding “election day” must be counted from the first day of voting. The time span for acts taking place afterwards must be counted from the second day of voting. In the present case, there are no grounds to declare the provisions under challenge unconstitutional, as it is possible to reconstruct the precise legal norm. However, in future the legislator should be more diligent and avoid situations whereby new provisions give rise to such uncertainty.

In order to determine the conformity of the disputed provision with Article 2 of the Constitution, the Tribunal examined the definitive character of the norm (its precision, clarity and legislative correctness). The norm in question is far from being legislatively correct, but the problem is not insurmountable; a reconstruction of precise legal norms could be achieved with the help of correct legal interpretation. No grounds therefore existed to declare the norm contrary to Article 2 of the Constitution simply because of an infringement of the principles of legislative technique.

The Tribunal did not find any legislative omission in Article 3.2 of the Act. The inconsistency of the new regulations with regulations relating to “electoral silence” is of a horizontal character. The Tribunal does not have competence to perform a legal review of legal provisions of the same rank and may not appraise the legislator’s lack of consequence in case

of a different regulation of similar institutions in different statutes.

The Tribunal issued this decision in a plenary session (15 judges). No dissenting opinions were raised.

Cross-references:

Decisions of the Constitutional Tribunal:

- Judgment K 15/91 of 29.01.1992, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1992, item 8;
- Judgment K 14/91 of 11.02.1992, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1992, item 7; *Special Bulletin Leading Cases 1* [POL-1992-S-001];
- Judgment U 6/92 of 19.06.1992, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1992, item 13;
- Judgment K 9/92 of 02.03.1993, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1993, item 6;
- Judgment P 2/92 of 01.06.1993, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1993, item 20; *Bulletin* 1993/2 [POL-1993-2-010];
- Judgment K 18/92 of 30.11.1993, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1993, item 41; *Bulletin* 1993/3 [POL-1993-3-019];
- Judgment U 7/93 of 01.03.1994, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1994, item 5;
- Judgment K 11/94 of 26.04.1995, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1995, item 12;
- Judgment K 25/95 of 03.12.1996, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1996, no. 6, item 52; *Bulletin* 1996/3 [POL-1996-3-018];
- Judgment U 6/97 of 25.11.1997, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1997, no. 5/6, item 65;
- Judgment K 37/97 of 06.05.1998, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1998, no. 3, item 33; *Bulletin* 1998/2 [POL-1998-2-009];
- Judgment U 7/98 of 08.12.1998, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1998, no. 7, item 118; *Bulletin* 1998/3 [POL-1998-3-024];
- Judgment K 11/99 of 15.09.1999, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1999, no. 6, item 116;
- Procedural Decision Ts 138/99 of 12.10.1999, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2000, no. 1, item 39;

- Judgment K 4/99 of 20.12.1999, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1999, no. 7, item 165; *Bulletin* 2000/1 [POL-2000-1-003];
- Judgment K 7/99 of 11.01.2000, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2000, no. 1, item 2; *Bulletin* 2000/1 [POL-2000-1-004];
- Judgment K 37/98 of 30.05.2000, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2000, no. 4, item 112;
- Judgment SK 5/99 of 17.10.2000, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2000, no. 7, item 254; *Bulletin* 2000/3 [POL-2000-3-023];
- Judgment SK 7/00 of 24.10.2000, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2000, no. 7, item 256;
- Judgment K 24/00 of 21.03.2001, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2001, no. 3, item 51;
- Judgment SK 8/00 of 09.10.2001, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2001, no. 7, item 211;
- Judgment SK 22/01 of 24.10.2001, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2001, no. 7, item 216; *Bulletin* 2002/2 [POL-2002-2-011];
- Judgment K 33/00 of 30.10.2001, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2001, no. 7, item 217;
- Judgment K 3/00 of 19.11.2001, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2001, no. 8, item 251;
- Judgment K 21/01 of 09.04.2002, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2002, no. 2A, item 17;
- Judgment K 6/02 of 22.05.2002, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2002, no. 3A, item 33; *Bulletin* 2002/3 [POL-2002-3-028];
- Judgment K 41/02 of 20.11.2002, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2002, no. 6A, item 83; *Bulletin* 2003/1 [POL-2003-1-006];
- Judgment P 13/02 of 03.12.2002, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2002, no. 7A, item 90; *Bulletin* 2003/1 [POL-2003-1-008];
- Judgment K 28/02 of 24.02.2003, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2003, no. 2A, item 13;
- Judgment K 53/02 of 29.10.2003, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2003, no. 8A, item 83; *Bulletin* 2003/3 [POL-2003-3-032];
- Judgment SK 34/03 of 16.12.2003, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2003, no. 9A, item 102; *Bulletin* 2004/1 [POL-2004-1-008];
- Procedural decision P 16/03 of 27.04.2004, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2004, no. 4A, item 36;
- Judgment P 19/03 of 16.11.2004, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2004, no. 10A, item 106;
- Judgment K 48/04 of 15.02.2005, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2005, no. 2A, item 15;
- Judgment SK 56/04 of 28.06.2005, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2005, no. 6A, item 67;
- Judgment K 31/06 of 03.11.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2006, no. 10A, item 147;
- Judgment SK 70/06 of 09.10.2007, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2007, no. 9A, item 103;
- Judgment P 42/06 of 13.11.2007, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2007, no. 10A, item 123;
- Judgment SK 39/06 of 27.11.2007, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2007, no. 10A, item 127;
- Judgment K 39/07 of 28.11.2007, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2005, no. 10A, item 129; *Bulletin* 2008/1 [POL-2008-1-005];
- Judgment K 45/07 of 15.01.2009, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2009, no. 1A, item 3;
- Judgment P 80/08 of 10.03.2009, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2009, no. 3A, item 26.

Languages:

Polish.



Identification: POL-2010-1-003

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 02.12.2009 / **e)** U 10/07 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2009, no. 210, item 1629 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

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

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

3.7 General Principles – **Relations between the State and bodies of a religious or ideological nature.**

4.6.3.2 Institutions – Executive bodies – Application of laws – **Delegated rule-making powers.**

4.14 Institutions – **Activities and duties assigned to the State by the Constitution.**

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

5.1.3 Fundamental Rights – General questions – **Positive obligation of the state.**

5.2.2.6 Fundamental Rights – Equality – Criteria of distinction – **Religion.**

5.3.18 Fundamental Rights – Civil and political rights – **Freedom of conscience.**

5.3.20 Fundamental Rights – Civil and political rights – **Freedom of worship.**

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.**

Keywords of the alphabetical index:

Education, public, religion, encouragement by the State.

Headnotes:

Calculating the final classification of a candidate's grades average on the basis of the grade obtained in the subject "religion" along with grades obtained in ethics and in compulsory core subjects, is a consequence of the introduction of the subject "religion" to the curriculum and a consequence of putting grades obtained in the subject "religion" on school reports and matriculation certificates in public schools.

The neutral and impartial role of the State may not rely on ensuring a factual equality of all religions and beliefs, extending to the domain of teaching, but it should consist in providing every individual with the freedom to follow any religion or belief, and to grant protection of rights embedded in the freedom of religion and beliefs, including the sphere of education. The freedom of religion and beliefs granted to everyone is a limit on the existing institutional inequality between churches and confessional associations and to the particular standing of the Catholic Church in the Republic, regulated in Article 25.4 of the Constitution, as well as in an international agreement between the Republic and the Holy See (the Concordat).

The challenged provision of the regulation of the Minister of National Education does not infringe the constitutional model of a secular state and fits within contemporary democratic European standards. The lawmaker may of course lay down this provision in the future.

Summary:

I. A group of Members of Parliament lodged a motion seeking the constitutional review of a regulation by the Minister of National Education of 13 July 2007, amending the regulation covering the terms and methods of grading, classifying and promoting pupils and students and conducting tests and examinations in public schools (hereinafter, the "Regulation") with Articles 25.1 and 25.2, 32.1 and 32.2, 53.3, 48.1 and 92.1 of the Constitution, and with various provisions of the act on guarantees of freedom of conscience and confession (hereinafter, the "Act"). The Regulation provided that after its entry into force, the final classification of a candidate's grades average in public schools would be calculated on the basis of the grade obtained in the subject "religion" along with grades obtained in other elective subjects and compulsory core subjects.

Article 25.1 of the Constitution stipulates that churches and other religious organisations shall have equal rights. Article 25.2 of the Constitution further stipulates that public authorities of the Republic shall be impartial in matters of personal conviction, whether religious or philosophical, or in relation to outlooks on life, and shall ensure their freedom of expression within public life. Finally, Article 25.4 of the Constitution stipulates that relations between the Republic and the Roman Catholic Church shall be determined by international treaty concluded with the Holy See, and by statute.

Under Article 53.3 of the Constitution, parents are entitled to ensure their children a moral right and religious upbringing in accordance with their convictions. The provisions of Article 48.1 shall apply as appropriate.

II. The applicants contended in their motion that, in spite of its obligation to remain neutral in the domain of religious and philosophical beliefs, the State is supporting religious teaching, motivating pupils to an additional effort. This support consists of calculating the final classification grades average on the basis of grades obtained in the subject "religion". The Members of Parliament pointed out that this restricted pupils in their freedom to choose this extracurricular subject, as they are "under pressure of an expectation of getting good grades in religion or ethics".

They also argued that the State supports a theistic worldview, ascribing the subject "religion" the same importance as it assigns to subjects communicating objective scientific knowledge. The challenged provisions introduce an element of pressure upon pupils attending religion classes because of their parents' wishes, not their own. The balance between the rights of the parents and the freedom of conscience and beliefs of the child is thus infringed.

The Members of Parliament claimed too that, according to the Episcopal Commission of Education of the Catholic Church in Poland, the grading system of the subject "religion" is supposed to incline pupils towards extracurricular religious activity in the parish, attending services and retreats, manifesting religious beliefs and participating in religious formation groups. The infringement of the constitutional principle of equality, according to the applicants, consists in differentiating between pupils participating in the subject "religion", and those who do not, the former being graded on the basis of their internalisation of principles of faith, their engagement in religious practices and the degree of their piety. What is more, according to the applicants the *catechesis* programme basis of the Catholic Church in Poland set by the Conference of the Episcopate stipulates that one of the major goals of the *catechesis* is awakening the interest in the divine message and the ability to read in the biblical teachings a divine call to one's life.

The applicants also raised arguments relating to the alleged incompatibility of the Regulation with various provisions of the Act. Article 6.2 of the Act prohibits the State from forcing citizens to participate or not to participate in religious rites. According to the Members of Parliament, *catechesis* at public schools constitutes a religious act. Furthermore, under Article 10.1 of the Act, Poland is a secular state, neutral in the field of religion and beliefs. According to the applicants, the

intervention by the state in the grading system of the subject "religion" is not in accordance with Article 20.2 of the Act, since religion ceases to be a matter of confessional association and enters into the public education system. Finally, according to the Members of Parliament, the Regulation infringes Article 20.3 of the Act, which stipulates, that a separate act regulates the principles of teaching religion at schools and kindergartens, since the principles of grading should be regulated in an act of parliament, and not in a ministerial regulation.

In a supplementary motion lodged in June 2009, the applicants pointed out that only about 1% of schools organise ethics classes. The Members of Parliament also reiterated that several cases against Poland are pending before the European Court of Human Rights, relating to the lack of a real possibility of attending ethics classes and to discrimination against pupils not attending religion classes. The applicants also pointed out that the Regulation was handed down under the delegation of Article 22.2.4 of the act on the system of education, and its constitutionality has already been questioned by the Tribunal in the signalling procedural decision S 1/07.

The Tribunal noted that under Article 12.2-12.4 of the Concordat between the Republic and the Holy See, the programme of education of the Catholic religion and the respective manuals are elaborated upon by the ecclesiastical powers. The teachers of religion must have a *missio canonica*, granted by a diocesan bishop. In matters relating to teaching and religious education, teachers of religion are subject to church regulations, and in other matters to state regulations.

In the Tribunal's opinion, the constitutional principle of equality of rights of churches and other confessional associations excludes the possibility of establishing a state religion, and providing the State with a confessional character. In accordance with the Tribunal's jurisprudence, this principle admits the possibility of a different treatment of churches and confessional associations which do not have a common feature, significant from the point of view of the respective regulation. The principle of institutional equality of rights may not be understood as a principle creating and expectative of obtaining factual equality.

Putting grades obtained in the subject "religion" on school reports and matriculation certificates has already been subject to constitutional review. In its Decision U 12/92, the Tribunal decided that putting grades obtained in the subject "religion" on school reports and matriculation certificates is a consequence of organising religion classes by public schools. In the present case, the Tribunal held that calculating final classification grades averages on the

basis of grades obtained in the subject "religion" is a consequence of putting grades on school reports and matriculation certificates, which in turn is a consequence of organising religion classes by public schools. The Tribunal quoted jurisprudence of the European Court of Human Rights, according to which the teaching of religion and the teaching of other subjects is subordinated to the same principles and the same consequences, due to the inclusion of the subjects in the curriculum, under the condition of voluntariness of the teaching of religion, as well as confessional and viewpoint pluralism.

Recalling its more recent jurisprudence (decision K 35/97), the Tribunal pointed out that grading in the subject "religion" is an element of the obligation of public schools to organise religion classes if the parents or the pupils and the parents so desire. The Minister of National Education is entrusted only with the determination of the methods and conditions of realisation of this task by the public schools.

According to the Tribunal, pupils or their parents have a choice between classes of a particular religion and ethics. The Constitution does not include separate guarantees of teaching of the atheist, pantheist or deist worldviews, as named by the applicant. The Tribunal also recalled the decision of the European Court of Human rights in the case *Saniewski v. Poland*, where the Court decided that situations in which voluntary religious education is being organised in public schools and where there is a possibility of exemption from attending obligatory religion classes, and where grades obtained in the subject "religion" or alternatively "ethics" are displayed on school reports and matriculation certificates, do not constitute an infringement of Article 9 ECHR.

The applicants had argued that the system of religious education promotes majority religions and that pupils who do not wish to attend classes of the Catholic religion do not have the possibility of attending ethics classes (only about 1% of schools in Poland organise ethics classes). However, the Tribunal decided, that this argument relates to the application of the law, which may not be subject to constitutional review.

Furthermore, the Tribunal ruled that the applicants had provided no proof that on average grades obtained in the subject "religion" are higher than grades obtained in obligatory core subjects.

The Tribunal decided that the arguments of the applicants relating to the catechetical goals, to the alleged pressure applied on pupils and to the internal character of religion teaching (and indirectly to the grades and their inclusion in the average) exceed the scope of the petition. Moreover, according to the

Tribunal it is not for the State to impose the programme of religion teaching and to reduce it to a study of religions. On the other hand, the role of the State may not be passive, since the State is supposed to ensure a diversified structure of social conscience and religious beliefs. The State should react, in co-operation with proper ecclesiastic powers, in cases of intolerance or inadmissible pressure, being a reflection of dominance of one of the religions. Institutional inequality may not lead to a limitation of "minority" churches and confessional associations in the realisation of their functions and rights based on the freedom of religion.

According to the Tribunal, the principle of a secular state, regulated in the act on guarantees, is not an adequate pattern of constitutional review of the Regulation, although it has already been a pattern of constitutional review in the decision U 12/92.

The challenged provision of the regulation of the Minister of National Education does not infringe the constitutional model of a secular state and fits within contemporary democratic European standards. The lawmaker may of course lay down this provision in the future.

The Tribunal has discontinued proceedings relating to the control of constitutionality of the Regulation against Article 92.1 of the Constitution and with Article 20.3 of the act on guarantees.

The Tribunal issued this decision in a plenary session (15 judges). One dissenting opinion was raised.

Cross-references:

Decisions of the Constitutional Tribunal:

- Judgment U 12/92 of 20.04.1993, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1992, item 9; *Bulletin* 1993/2 [POL-1993-2-009];
- Judgment K 35/97 of 05.05.1998, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1998, no. 3, item 32; *Bulletin* 1998/2 [POL-1998-2-008];
- Judgment K 12/99 of 26.10.1999, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1999, no. 6, item 120; *Bulletin* 1999/3 [POL-1999-3-027];
- Judgment K 28/98 of 09.11.1999, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1999, no. 7, item 156; *Bulletin* 1999/3 [POL-1999-3-028];
- Judgment K 10/99 of 14.12.1999, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1999, no. 7, item 162;

- Judgment SK 12/99 of 10.07.2000, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2000, no. 5, item 143; *Special Bulletin Inter-Court Relations* [POL-2000-C-001];
- Judgment K 21/00 of 13.03.2001, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2001, no. 3, item 49;
- Judgment K 16/01 of 13.11.2001, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2001, no. 8, item 250;
- Judgment P 9/01 of 12.03.2002, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2002, no. 2A, item 14; *Bulletin* 2002/3 [POL-2002-3-022];
- Judgment K 13/02 of 02.04.2003, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2003, no. 4A, item 28;
- Judgment K 50/02 of 26.04.2004, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2004, no. 4A, item 32;
- Judgment K 55/05 of 12.09.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2006, no. 8A, item 104;
- Judgment U 5/06 of 16.01.2007, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2007, no. 1A, item 3;
- See also procedural decision S 1/07 of 31.01.2007, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2007, no. 1A, item 8;
- Judgment U 8/05 of 06.11.2007, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2007, no. 10A, item 121.

Decisions of the European Court of Human Rights:

- Judgment no. 14307/88 of 25.05.1993 (*Kokkinakis v. Greece*); *Special Bulletin Leading Cases ECHR* [ECH-1993-S-002];
- Judgment no. 40319/98 of 26.06.2001 (*Saniewski v. Poland*);
- Judgment no. 44774/98 of 10.11.2005 (*Leyla Sahin v. Turkey*); *Special Bulletin Leading Cases* [ECH-2005-3-005];
- Judgment no. 15472/02 of 29.06.2007 (*Folgerø and others v. Norway*).

Languages:

Polish.



Portugal Constitutional Court

Statistical data

1 January 2010 – 30 April 2010

Total: 173 judgments:

- Prior review: 2 judgments
- Abstract *ex post facto* review: 3 judgments
- Concrete reviews: 127 judgments
- Appeals against refusals to admit: 34 judgments
- Declarations of assets and income: 2 judgments
- Political parties: 1 judgment
- Political parties' accounts: 2 judgments
- Election campaign accounts: 2 judgments

Important decisions

Identification: POR-2010-1-001

a) Portugal / **b)** Constitutional Court / **c)** Third Chamber / **d)** 13.01.2010 / **e)** 19/10 / **f)** / **g)** *Diário da República* (Official Gazette), 238 (Series II), 10.12.2010, 59945 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

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

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

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

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:

Hearing, right, scope / Hearing, right, obligation to cover all arguments.

Headnotes:

In order for proceedings to be fair, the right to a defence must be effectively upheld by ensuring that the guarantees of the adversarial principle and of equality of arms are respected. However, fairness does not necessarily require a right to active participation in proceedings, whereby the parties must debate all the possible legal ramifications of any solution before the judge adopts it, or that that a solution must always be predictable because it must already have been weighed up by the subjects in the case.

Summary:

I. In an appeal where the appellant was a professional footballer and the defendant the Portuguese Professional Football League (LPFP), the Supreme Court of Justice declared a norm contained in a collective labour agreement to be null and void on the basis that it was organisationally unconstitutional because it breached the Assembly of the Republic's exclusive legislative competence. The LPFP challenged the Supreme Court's decision, arguing that it was procedurally null and void as it (the LPFP) had not been heard with regard to the legal solution which the Supreme Court adopted, which had not been discussed by the parties during the proceedings. The LPFP contended that the proceedings had been limited to the question of whether the norm was materially unconstitutional because it was in breach of the constitutional rights to choose one's profession and to work. The decision on the grounds of organisational unconstitutionality therefore came as a surprise.

In its response, the Supreme Court of Justice considered that the question of unconstitutionality which the appellant had raised was not restricted to the material unconstitutionality of the norm in question. Constitutional precepts could be breached as the result of three types of unconstitutionality – material, organisational or formal. Given that the appellant had not invoked any of those defects in particular, the Supreme Court took the view that the question the appellant had raised could potentially encompass all three aspects of unconstitutionality. The decision was not, therefore, a "surprise" one, and there was no need to invite the respondent to exercise its adversarial right before the ruling was handed down.

The Portuguese Professional Football League then appealed to the Constitutional Court, requesting an assessment of the constitutionality of the complex of Code of Civil Procedure norms that place a duty on the judge to comply with the adversarial principle, and

to cause it to be complied with, in such a way that, except in cases where it is manifestly unnecessary to do so, the judge cannot lawfully decide questions of fact or law, even those he is entitled to address on his own initiative, unless the parties have had the opportunity themselves to pronounce on those questions. This also applies when those norms are interpreted in such a way that there is no requirement for the parties to be heard before the court pronounces a clause in a collective labour agreement to be null due to its organisational unconstitutionality, in a case in which the discussion had been limited until then as to whether that same clause was invalid on the grounds of material unconstitutionality.

In support of its appeal, the LPFP alleged that the adversarial principle is a manifestation of both the fundamental right to jurisdictional protection and the fundamental right to fair process. It argued that the constitutional dimension of this adversarial principle should prevent any question, including those which the court is entitled to address on its own initiative, from being the object of a judicial decision unless the parties are first given a procedural opportunity to pronounce on it. The LPFP also argued that each binomial "norm applied vs. constitutional norm breached" constitutes a different "question of constitutionality", and that when a court invokes the unconstitutionality of the same legal norm because it is in breach of constitutional norms or principles other than that originally raised, it is invoking a new normative "question of constitutionality" in relation to which it must ensure compliance with the adversarial principle.

II. Both jurisprudence and legal theorists have sought to make the concept of fair process more concrete, via the right to equality of arms or to equal positions in proceedings and by prohibiting the absence of a defence and ensuring the right to an adversarial process. This gives each party the right to invoke factual and legal arguments, to adduce evidence, to control the admissibility and production of the other party's evidence, and to pronounce as to the value and consequences of both arguments and evidence. Other factors in the concept of fair process include the time frame for bringing suits and lodging appeals, with a prohibition on deadlines that are too short; and the right to know the grounds on which decisions are taken, the right to a decision within a reasonable period of time, the right to know the contents of the dossier, the right to evidence, and the right to proceedings which are directed towards achieving material justice.

The right of access to the courts is essentially the right to a legal solution to conflicts, which must be reached within a reasonable period of time, and in

accordance with the guarantees of impartiality and independence, through the correct operation of the adversarial rules. In its role as the practical implementation of the principle of fair process and a corollary to the principle of equality, the right to an adversarial process entails allowing each party to “deduce” its reasons (factual and legal), to “offer its evidence”, to “control its adversary’s evidence”, and to “hold forth on the consequences of all of the above”.

However, the legislator possesses significant leeway in terms of the concrete way in which the process is modelled, and must weigh up the different rights and interests that are important in constitutional terms, including the interests of both parties.

The Constitutional Court said that in the absence of any consensus (even within constitutional jurisprudence) as to whether the same question of law is at stake when different grounds for unconstitutionality are invoked in relation to the same norm, the position which the Supreme Court of Justice took in the present case was one of the plausible legal solutions available to it. It is not up to the Constitutional Court to superimpose itself on the court against whose decision the present appeal was lodged to verify whether or not the procedural situation would have justified hearing the parties in accordance with the pertinent Code of Civil Process norms.

The Constitutional Court therefore decided not to hold the norm under review to be unconstitutional.

III. The Ruling is accompanied by two concurring and two dissenting opinions. One of the dissenting opinions was put forward by the original rapporteur. The dissenting opinions are based on the fact that lack of constitutionality is a *quaestio juris* which the court is empowered to address of its own initiative and is not restricted to the grounds or parameters invoked by the parties. Nonetheless, neither this power nor the principle of *jus novit curia* justify deciding questions of constitutionality without giving the parties the effective possibility of contributing to the formation of the court’s decision. The judge is not required to communicate his thinking in relation to, and assessment of, the case before he takes a decision, neither is he under an obligation to consult the parties over each small variation in the normative preconditions for the decision. Rather, the parties should be placed in a position where they can influence the decision-making process by their ability to comment on any legal aspects that have not yet been discussed. The dissenting Justices felt that it is incompatible with the guarantee of fair process to say that when the constitutional conformity of a given

norm has been challenged in a case, the court has the power to decide that the norm is unconstitutional for different reasons from those put forward, without first having to hear the parties.

Languages:

Portuguese.



Identification: POR-2010-1-002

a) Portugal / **b)** Constitutional Court / **c)** Third Chamber / **d)** 03.02.2010 / **e)** 49/10 / **f)** / **g)** *Diário da República* (Official Gazette), 67 (Series II), 07.04.2010, 17738 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
5.4.15 Fundamental Rights – Economic, social and cultural rights – **Right to unemployment benefits**.

Keywords of the alphabetical index:

Unemployment, benefit, exclusion, proportionality / Unemployment, benefit, application, deadline, failure to meet.

Headnotes:

In a case concerning the time limit for the application for the grant of unemployment benefit, the Constitutional Court did not question the constitutionality of the requirement that it must be the interested party who makes the application, or the imposition of a time limit for doing so. However, the position that any delay in complying with this deadline precludes the overall right to payment of benefit is unconstitutional, because it is disproportionate.

Summary:

I. The Public Prosecutors’ Office was legally obliged to bring this appeal. This is a mandatory requirement when a norm contained in a legislative act is not applied due to its unconstitutionality.

The norm in question in the present appeal was included in legislation (Executive Law no. 220/2006 of 3 November 2006). This set out the legal framework governing reparation in the event that workers who are employed by somebody else become unemployed and provides for the allocation of unemployment benefit payments in such cases. The constitutional compliance of the norm was under question, as it could be interpreted in such a way that failure to apply to the social security service for unemployment benefit within ninety consecutive days starting from the date upon which unemployment began would lead to the unemployed person losing his or her entitlement to all the benefit payments to which he or she would otherwise have been entitled to during the whole period of involuntary unemployment. The decision against which the Public Prosecutors' Office was appealing held that the norm was unconstitutional, because it was in breach of the principle of proportionality.

II. The Constitutional Court repeated the arguments it had advanced in relation to an identical situation that had arisen under the legislation in force before the publication of Executive Law 220/2006. In constitutional terms, the situation of unemployment is not simply one of those situations where there is a lack of or reduction in means of subsistence, in which the social security system is responsible for protecting citizens. Where a worker involuntarily finds him or herself out of work, the relevant article of the Constitution (which is part of a chapter entitled economic rights and duties) expressly and directly grants such workers the right to "material assistance". This is a fundamental right of specific application to workers, and it possesses a broad scope of application (it covers public administration workers and self-employed workers, among others). However, its full implementation depends on the financial and material resources that are available to the State. The fundamental nature of the right of workers to material assistance when they find themselves in a situation of involuntary unemployment implies (without of course questioning the legislator's freedom to shape the way in which the right is implemented in material terms) that the regulation of the applicable administrative procedure must be subject to the principle of proportionality. Thus, the procedural requirements must be necessary and appropriate and the consequences of failing to fulfil them must be reasonable.

A delay in making the request will result in loss of the individual payments that would have been due up to the date of submission of the application. However, it is altogether unreasonable to penalise a worker by imposing a definitive and irreversible loss of the right to unemployment benefit as a whole, for the entire

period over which he or she would be entitled to it, due to a delay in the initial submission of the request.

Unemployment benefit serves the purpose of making up for the salaried remuneration of which the worker has been deprived. Unemployment is by nature a lasting situation and not a momentary one. Complete denial of that right means denial, without sufficient grounds for so doing, the constitutionally guaranteed workers' right to material assistance in a situation of involuntary unemployment, even if the unacceptable part of the denial only applies to the period after the point at which the beneficiary has exercised his or her right in the correct way.

III. In a concurring opinion accompanying this opinion, the author expresses doubts as to whether the interpretation of the norm which was held to be unconstitutional is in fact a breach of the principle of proportionality. She says that the principle is only applicable to cases in which the legislator was bound with regard to the choice of certain 'purposes'. This applies to restrictions on constitutional rights, guarantees and freedoms, which can only be imposed in order to implement other assets or values to which the Constitution affords its protection; but it does not apply to measures that implement social rights, when the legislator is free to define whether and how the State makes benefit payments.

All social rights have negative dimensions, which place a duty on the legislator not to fail to respect them, in addition to the duty to protect and promote them. The duty not to fail to respect can be identified with the duty not to impose excessive restrictions. In the view of the author of the concurring opinion, the principle of proportionality is entirely applicable in such cases. However, she expressed doubts as to whether the same can be said of the right to unemployment benefit and to the determination of a time limit in which to apply for it.

Cross-references:

See Ruling no. 474/2002, *Bulletin* 2002/3 [POR-2002-3-008] in which the Constitutional Court held that there was a failure to comply with the Constitution, due to the omission of the legislative measures needed to make the right to material assistance pertaining to persons who involuntarily find themselves out of work executable, with regard to Public Administration workers (this is one of only two cases in which the Court has found that an unconstitutionality by omission existed). See also Ruling no. 275/2007, in which the Constitutional Court found that the norm contained in earlier legislation which corresponded to the one addressed in Ruling no. 49/10 was also unconstitutional.

Languages:

Portuguese.

*Identification:* POR-2010-1-003

a) Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 23.02.2010 / **e)** 75/10 / **f)** / **g)** *Diário da República* (Official Gazette), 60 (Series II), 26.03.2010, 15566 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

4.1.2 Institutions – Constituent assembly or equivalent body – **Limitations on powers.**

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

5.3.43 Fundamental Rights – Civil and political rights – **Right to self fulfilment.**

Keywords of the alphabetical index:

Abortion, punishment, exclusion, conditions / Abortion, responsibility / Abortion, information session, prior, obligation / Abortion, number, containment, measures / Value, constitutional, objective / Right, constitutional, protection, form, choice.

Headnotes:

In the first stages of pregnancy, the minimum content of the duty to protect intrauterine life, which falls to the State, does not require that reasons from a predetermined list be given in order to be able to put an end to that life.

The Court reaffirmed earlier jurisprudence to the effect that intrauterine life falls within the scope of the constitutional protection of the right to life, but only as an objective constitutional value. It emphasised that this only implies the existence of a duty to protect; the Constitution does not predetermine a specific form of protection. It is up to the legislator to choose one, while respecting not only the prohibition on insufficiency (the guarantee of minimum protection), but also the prohibition on excess (to the extent that it affects other constitutionally protected assets). Penal sanctions constitute the form of penalty which does

the most injury to those assets and can only be used when the protection required by the Constitution has to be so efficient that these sanctions are the only method of achieving it. In the present case, the requirements for appropriateness and necessity are not met, due to the specific nature of the conflict posed by the decision whether to abort: an “inner”, existential conflict within the personal sphere of someone who is simultaneously causing and suffering the injury. Within this singular framework, it can be argued that in the early stages of pregnancy, the State would fulfil its duty to protect by promoting a decision which is considered but for which the pregnant woman carries the ultimate responsibility, rather than threatening her with criminal sanctions.

In the Constitutional Court’s opinion, the operative discipline of the Law in question fulfilled in an effective fashion the imperative to protect. It was not clear that there was any position of indifference or neutrality towards the decision the pregnant woman is called on to make. Even if its dissuasive purpose is not expressly stated, only the desire to try to protect not only the woman’s health, but also prenatal life, makes it possible to comprehend the procedures that are required for an abortion to occur. For criminal sanctions not to ensue there must be an obligatory session in which the pregnant woman must be informed about the conditions which the State can make available in the form of support for her to go ahead with her pregnancy and the child’s birth.

In order to determine whether the duty to protect prenatal life has been fulfilled, an examination is needed of all the infra-constitutional rules that exist in this respect, not just the specific rules governing abortions in the first ten weeks of pregnancy. Heed must be taken too of a wide variety of normative regulations and public benefits and services in the fields of sex education, family planning and support for mothers and the family, all of which are the objects of numerous pieces of legislation which are listed in the Ruling, in their role as protective instruments and factors aimed at a containment of the number of abortions.

Summary:

I. This case involved two requests for the successive abstract review of the Law that provides for an “exclusion of unlawfulness in cases of abortion”. Under this Law, an abortion performed at the woman’s choice during the first ten weeks is not punishable, provided that it is carried out by or under the direction of a doctor, at an official or officially recognised health establishment, after an obligatory appointment designed to provide the pregnant woman with access to information which is of

relevance to enable her to make a free, aware and responsible decision, followed by a minimum reflection period of three days.

The core issue was the norm within the Law which stated that "Abortions performed by a doctor, or under his direction, at an official or officially recognised health establishment and with the consent of the pregnant woman are not punishable when: (...) conducted at the woman's choice, within the first ten weeks of pregnancy".

The Constitutional Court received two petitions asking it to consider the constitutional compliance of various aspects of the Law with the Constitution. One was submitted by a group of thirty-three Members of the Assembly of the Republic; the other was submitted by the President of the Legislative Assembly of the Madeira Autonomous Region (RAM). The President of the Court decided that the latter request should be incorporated within the former.

Both petitions pointed out a number of defects in the Law, involving both formal and material unconstitutionality.

The allegations of formal unconstitutionality included the view that a legislative act had been passed on the basis of a referendum when the latter did not possess binding efficacy, and that the Assembly of the Republic did not possess the legitimacy to pass it because the electoral manifestos of the two largest parties with seats in the Assembly had promised that they would only agree to change the rules governing abortion if they were directed to do so by a referendum.

II. The Court did not accept the validity of these arguments. The legal rules governing referenda State that the legislative organ with the competence to publish the legislative measure whose normative purpose corresponds to an affirmative answer to the proposal that has been submitted to the electorate is only prevented from doing so in the same parliamentary session if two conditions are met. Firstly the referendum must be binding, and secondly the negative answer must prevail. With regard to the second of the two alleged formal defects, the Court noted that the mechanisms which the Constitution typifies for the exercise of the sovereignty that lies with the people do not include any which would make it viable to control any failure to respect commitments made to the electorate by invalidating acts which do not comply with the content of the electoral manifesto that was approved by voters.

It was alleged that the Law suffered from the following material defects: it removed penalties for abortions

performed at the woman's choice during the first ten weeks of gestation, without requiring her to give any reasons to justify her decision; it completely excludes the male progenitor from both the responsibility for the process and the making of the decision to abort; the information that is to be given to the pregnant woman with a view to her decision is selectively biased; it means that human life is totally unprotected for the first ten weeks, and it requires the State to contribute to the elimination of human lives, for example via the National Health Service (SNS) and the inherent social benefits and services; whereas abortion is now acknowledged to be an act that entails a risk to the woman's physical and mental health, the regime created by the Law releases the State from its function of providing solidarity and protecting physical and mental health; and the Law leaves it to a Ministerial Order to determine the information that is given to the pregnant woman in order to help her make her decision (the minimum reflection period of three days is counted from the moment at which this information is provided). This is unconstitutional because fundamental rights are at stake.

In its Ruling the Court considered that all these partial questions led to the central question of whether, and to what extent, it is permissible not to use penal sanctions as an instrument for protecting intrauterine life.

The Court also rejected the petitioners' allegations that the minimum reflection period of three days is insufficient, and that the woman's right to physical and mental health, the right to freedom and the principle of proportionality are all violated. It also rejected the allegations to the effect that the male progenitor has no part in the decision-making process, that doctors who are conscientious objectors in relation to abortions are not allowed to take part in the obligatory information session, and that the information provided in that session is regulated by Ministerial Order.

The issue in the petition by the President of the Legislative Assembly of the Madeira Autonomous Region (RAM) was the organisational/formal validity of the normative contents of the Law. The petitioner argued the existence of a breach of legislative, administrative, financial and regional autonomy, and of the autonomous regions' constitutional and legal right to be consulted before legislation is passed.

The Court did not recognise the petitioner's legitimacy to base his request on the violation of the dignity of the human person and the inviolability of human life. It held that this dimension of the question did not entail any "breach of the autonomous regions' rights".

The petitioner argued that the normative measure he was challenging obliged medical staff to perform abortions, and that this matter fell within the region's areas of competence, given that the Political/Administrative Statute of the Madeira Autonomous Region states that "health" is a matter of regional interest.

The Court considered that the legal regime created by the Law is situated at the level of a redefinition of the scope of protection offered by a norm which creates a criminal offence, and that the regime therefore addresses a matter which lies within the exclusive legislative competence of the Assembly of the Republic. The Legislative Assembly of the Madeira Autonomous Region retains its generic regulatory competence over all matters that do not conflict with the provisions of the Law, and there is thus no breach of regional autonomy. The right of autonomous regions to prior consultation has not been breached here, because the preconditions for the existence of such a breach do not exist, given that the nature and object of the legal rules governing abortion concern the whole country.

III. The Ruling is accompanied by five dissenting opinions, whose authors justify their positions in great depth. However, the present summary, which covers two review requests, does not allow enough space for a detailed account. The Ruling itself debates the question posed by the petitioners, as to whether the Law breaches the Constitution, the Universal Declaration of Human Rights and the European Convention on Human Rights. It deals extensively with the solutions offered in comparative law.

Cross-references:

The following Rulings, which the Court had already handed down in relation to this subject, are also of interest:

- Ruling no. 25/84 of 19.03.1984;
- Ruling no. 85/85 of 29.05.1985;
- Ruling no. 288/98 of 17.04.1998, *Bulletin* 1998/1 [POR-1998-1-001];
- Ruling no. 578/05 of 28.10.2005; and
- Ruling no. 617/06 of 15.11.2006, *Bulletin* 2006/3 [POR-2006-3-002].

Languages:

Portuguese.



Identification: POR-2010-1-004

a) Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 08.04.2010 / **e)** 121/10 / **f)** / **g)** *Diário da República* (Official Gazette), 82 (Series II), 28.04.2010, 22367 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Marriage, couple, same-sex / Homosexuality, couple, marriage / Marriage, as a symbolic institution.

Headnotes:

The essential core of the constitutional guarantee applicable to marriage is not damaged by abandoning the rule that spouses must be of different sexes; and extending the ability to marry to persons of the same sex does not conflict with the recognition and protection of the family as a "fundamental element of society".

It can be argued that at the time when the Constitution was drafted and in the light of the social reality and legal context in which it emerged, the form of marriage it represents was between two persons of different sexes. However, it is also possible to conclude that those drafting the Constitution did not adopt any measures which would prevent the institution of marriage from evolving. As the right to enter into marriage was configured as a fundamental right, the legislator cannot remove it from the legal order. Marriage is perceived as a legal institution intended to regulate situations in which persons live together, in recognition of its importance as a basic form of social organisation. However, the Constitution does not define the profile of the elements that make up the legal institution of marriage; instead, it expressly charges the legislator with maintaining the necessary link between the law and social reality. The Court therefore took the view that, at each given moment in history, the ordinary legislator is charged with understanding the dominant concepts and enshrining them in the legal order.

Summary:

I. The President of the Republic asked the Constitutional Court to conduct a prior review of the constitutionality of norms contained in a Decree of the Assembly of the Republic which was sent to him for enactment and which permitted civil marriage between persons of the same sex. The request underlined the view that according to the Portuguese constitutional jurisprudence set out in Ruling no. 359/2009, the legislature is not obliged under the Constitution to allow same-sex marriages, and that an outright ban and provision for a different regime are both legitimate. The point was made in the request that historically the constitutional concept of marriage is one of a union between two persons of different sexes, and that there were grounds for doubt as to the material constitutionality of the norms in question, as they could potentially run counter to the essence of the institutional guarantee which is innate in the concept of marriage that is accepted by the Constitution.

II. The Court noted that marriage benefits from the 'institutional guarantee', which prevents the legislator from making arbitrary changes to the essential characteristics of a legal institution. However, it is not permissible to use an "institutional" way of thinking to reverse the sense of the guarantee and impose the preservation of the institution, in its existing form, from actions taken by the legislator, unless there is a direct conflict between those actions and the determination of the meaning of the fundamental right in question within the axiological framework of the system of fundamental rights. The establishment of a situation in which two people live together as a couple is a key structural element of the concept of marriage, without which the concept loses its character. However, this does not apply to the sexual diversity of persons who want to make up a couple and to submit themselves to the rules governing wedlock. The only factor for which that sexual diversity is indispensable would be participation in a "couple" relationship at a sexual level to lead to the birth of children who are biologically common to members of the couple, a purpose which is not a requirement under the Constitution or the ordinary law. The situation in which two people are joined together as a couple, in a relationship that is characterised by sharing and mutual assistance, on a common life path governed by the law, of a permanent nature, is also available to two persons of the same sex. This means that the legislator is not precluded from giving this means of freely developing one's personality the form that currently applies to the protection of relations between persons of different sexes, thus enabling interested parties to adopt the marriage format for themselves. The extension of marriage to same-sex spouses does not conflict with the recognition and

protection of the family as a "fundamental element of society", inasmuch as the Constitution loosened the bond between the formation of a family and marriage, and offered its protection to the distinct family models which exist in modern social life. Moreover, attributing the right to marry to persons of the same sex does not affect the freedom to enter into wedlock enjoyed by persons of different sexes, nor does it change the rights and duties which apply to those persons as a result of their marriage, or the representation or image which they or the community may attribute to their matrimonial status.

The Court excluded the hypothesis of a breach of the principle of equality from the grounds for its decision. It said that the fact that the legislator is bound by this principle does not preclude the freedom to shape legislation; the legislator is responsible for identifying or qualifying the factual situations that will serve as the points of reference which are to be treated in the same, or different, ways. However, the Court then stressed that while there is no doubt that from a biological, sociological or anthropological perspective, a lasting union between two persons of the same sex and a lasting union between two persons of different sexes are different realities, from the legal point of view there are material grounds for treating them in the same way. It is reasonable for the legislator to be able to favour the symbolic effect and optimise the anti-discriminatory social effect of the normative handling of this issue by extending the protection offered by the unitary framework of marriage to both these unions.

The Court therefore decided not to hold the norms before it unconstitutional.

III. The Ruling is accompanied by seven concurring opinions and two dissenting opinions. Three of the former argue that the Constitution not only permits same-sex marriage, but in fact requires it.

One of the dissenting opinions is essentially based on the view that making marriage between persons of the same sex fit within the current constitutional concept of marriage is only possible if one accepts the existence of a "constitutional mutation" that has made the difference between the spouses' genders irrelevant to the Constitution. This constitutional mutation could only operate if the constitutional legislator were to make and clearly adopt an express, prior choice within the overall framework of a constitutional revision, and could only be justified with reference to a change in the essential core of the guarantee enshrined in the Constitution; justification cannot derive from the prohibition on discrimination based on sexual orientation. This, in the author's view, would constitute an unlawful result.

The second dissenting opinion underlines the view that the solution adopted in the Ruling represents a constitutional revision or mutation with regard to marriage, undertaken by the Constitutional Court itself, in violation of the constitutional principle of the separation of powers. According to the dissenting Justice, the constitutional concept of marriage is not a descriptive or factual one, nor is it a mere concept whose intention is to proclaim a constitutional programme. In a rigid, "continental-type" constitutional system such as the Portuguese system, and in the light of the constitutional-law parameters, it cannot be considered to be an open concept. The author of the opinion also suggested that the extension of the normative concept of marriage to encompass both homosexual and heterosexual unions is not the only possible solution to the need to respect the principle of human dignity, the right to privacy, the right to equality, and the ability to enjoy general rights and freedoms without discrimination, especially those based on gender or sexual orientation.

Cross-references:

The Ruling contains extensive references to international documents – in particular the Universal Declaration of Human Rights – and the comparative jurisprudence from various European Union countries, other European countries, and other non-European common-law countries.

See Ruling no. 359/2009, *Bulletin* 2009/2 [POR-2009-2-009]. It concerned a concrete review case initiated by a homosexual couple who had been denied the possibility of marriage on the basis of the applicable provisions of the Civil Code. The norm in question was not held to be unconstitutional.

Languages:

Portuguese.



Identification: POR-2010-1-005

a) Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 20.04.2010 / **e)** 154/10 / **f)** / **g)** *Diário da República* (Official Gazette), 89 (Series II), 07.05.2010, 24798 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

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

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

4.6.9 Institutions – Executive bodies – **The civil service.**

5.4.3 Fundamental Rights – Economic, social and cultural rights – **Right to work.**

Keywords of the alphabetical index:

Civil servant, commitment / Civil servant, job security / Civil servant, employment, contract / Good administration, principle / Employment, public-sector.

Headnotes:

The change of the labour-law regime applicable to civil servants from the usual appointment-based regime to a contractual one, does not conflict with the requirement that the civil service should be the object of a specific normative complex. Alterations to previously established labour relationships are not in violation of the Constitution.

Summary:

I. A request was made for the successive abstract review of the constitutionality of a number of norms in a Law which set out the rules governing the employment contracts, careers and pay of public sector workers, by a group of Members of the Assembly of the Republic. They argued that the Law's objective was to change the configuration of the State and of the functions or tasks with which it is charged by the Constitution, by radically modifying the labour-law regime applicable to public sector workers. They also contended that the legislation compromised the State's ability to perform its constitutional functions, and in doing so clearly prejudiced citizens in general; in particular, it achieved this by weakening the rights of civil service workers, generalising the labour contract format for work performing public functions as the legal relationship for employment in the public sector, and transferring the legal regulation of the Public Administration and its workers from the field of administrative law to that of private law. According to the petitioners the bond created by a public-sector appointment has become one that is residual and dependent on the idea of a subsidiary State, which gives preference to functions dealing with criminal matters or the maintenance of public order, the defence of democratic legality, national sovereignty and territorial integrity, and the guarantee of people's freedom and security. These are the only areas to which the original bond created by a public-sector appointment still applies. In the petitioners' view, this has resulted in the renouncement by the State of

part of the tasks which the Constitution requires it to perform. In their view, the Law violates the principle under which the status of the civil service can only be governed by the Constitution; the right to job security; the constitutional principles of legal security and the protection of certainty, with the specific degree of intensity that ought to apply to the exercise of public functions; the constitutional format applicable to the structure of the Administration; and the nucleus of constitutionally defined fundamental tasks that comprise a democratic State based on the rule of law.

II. The Court observed that the petition combined two questions that needed separate analysis. Any finding of unconstitutionality in relation to one could not be allowed to preclude the possibility of a different finding with regard to the other. The questions were the right to job security within the scope of the 'specific normative complex' applicable to the public employment relationship; and the change in the law governing the format of the bond that creates the legal employment relationship, while that relationship is still in place.

The Constitutional Court began by examining the subject of the specific normative complex applicable to public functions, which may be justified by the particular nature of the Public Administration and by the devolved and decentralised structure which is enshrined in the Constitution and which should grant public sector workers effective guarantees of the rigorous exercise of the public interest they serve and the principles to which they are subject. In its view, the change from the appointment-based regime (by a unilateral act of the Administration) to a contractual regime (by joining the public interest which the Public Administration serves to the private autonomy of the private sector) clashes with the concept of a specific normative complex for the civil service. This specific normative complex exists in constitutional terms, but is not jeopardised simply by the existence of contractual forms of recruitment for Public Administration workers. The model of a social State that is enshrined in the Constitution does not require retention of the definitive appointment regime, and does not rule out the possibility of the Public Administration being governed by contractual labour criteria.

The Constitution rejects the model of a 'minimum State' and imposes that of a 'social State', but it does not defend an "assistentialist" State. The Court highlighted the fact that the question is one of constitutional law, rather than a political or ideological question. The "economic, social and cultural democracy" that underlies the constitutional idea of a democratic State based on the rule of law does not correspond to a predefined ideological model for the organisation and actions of the State and the Public

Administration, but rather to a requirement for constitutional legality that fits structurally diverse models of public administrative organisation and heterogeneous ways of achieving the public interest which the State seeks to serve.

Inasmuch as the idea of a social State is one implication of the concept of a State based on the rule of law, and given that the latter incorporates the principles of popular sovereignty and plural democratic expression and political representation, the holders of the political power that is legitimately constituted in each parliament in accordance with the popular mandate are responsible for deciding the method of implementation of the constitutional norms that set the fundamental tasks of the State. None of these norms can be interpreted to mean that the ordinary legislator is tied to an unchanging 'vision' of the State (the "broader vision of the welfare state) or to a programme for its future actions which is so detailed that it requires the retention of a given model for forming the public employment relationship.

With regard to the correct exercise of the activity of public administration within the framework of the principles enshrined in the Constitution, the Court considered that a causal nexus cannot be established between the security of the public employment relationship and the form that is given to public employment. Although stability undoubtedly promotes commitment, one cannot automatically assume that workers with an indefinite contract will be less committed to pursuing the public interest than workers who have been given a definitive appointment. Moreover, the law states that whichever format is adopted for the formation of the legal relationship involved in public employment (a definitive or temporary appointment or an indefinite or fixed or variable term contract), it must be subject to the same guarantees of impartiality. Thus, a causal correlation does not necessarily exist between the format by which the legal relationship governing public employment is formed and the degree of the worker's commitment to the pursuit of the public interest.

On the subject of pre-existing labour relationships, the Court was of the view that the Law protects the essential elements of the labour-law position of the existing beneficiaries of a bond based on a definitive appointment. Job security is not an absolute right; as is the case with other rights, limits and restrictions are possible in the light of other rights and values to which the Constitution extends its protection. Specifically with regard to public employment, it is necessary to weigh the Public Administration's constitutionally defining objective (the public interest) against the duty of good administration.

The Court then considered the question of the constitutional permissibility of applying the new legal regime to workers who were appointed before the Law was passed, which would have the effect of modifying the situation as regards the specific normative complex that applies to them, while that appointment still existed. In the light of its own jurisprudence on the principle of the protection of certainty, the Court considered that in this particular case, there could be no legitimate expectation on the part of a worker with a definitive contract that his or her labour-law position would never be subject to change.

The decision was unanimous.

Cross-references:

The following Rulings, which the Court had already handed down in relation to this subject, are also of interest:

- Ruling no. 154/86 of 06.05.1986;
- Ruling no. 287/90 of 30.10.1990;
- Ruling no. 340/92 of 28.10.1992;
- Ruling no. 683/99 of 21.12.1999.

Languages:

Portuguese.



Identification: POR-2010-1-006

a) Portugal / **b)** Constitutional Court / **c)** First Chamber / **d)** 27.04.2010 / **e)** 160/10 / **f)** / **g)** *Diário da República* (Official Gazette), 110 (Series II), 08.06.2010, 31533 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

3.18 General Principles – **General interest.**

4.7.4.3.1 Institutions – Judicial bodies – Organisation – Prosecutors / State counsel – **Powers.**

5.1.1 Fundamental Rights – General questions – **Entitlement to rights.**

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

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

Keywords of the alphabetical index:

Constraint measure, public security.

Headnotes:

The fact that the Public Prosecutors' Office cannot appeal against decisions not to apply constraint measures that it requested in criminal proceedings is not contrary to the principle of legality or any other constitutional principle.

Summary:

I. The Public Prosecutors' Office requested an assessment of the constitutionality of a norm that had served as grounds for a decision not to admit an appeal which it had lodged against a decision in a criminal case, in which the court had decided not to apply the constraint measure known as 'obligation to report periodically'. The norm in question states that: "Only the accused person, and the Public Prosecutors' Office acting for the benefit of the accused person, may appeal against decisions which apply, maintain or substitute measures provided for in the present Title" (the Title concerned provides for constraint measures and measures involving the provision of assets as guarantees). So the Public Prosecutors' Office only possesses the legitimacy to appeal if it does so for the benefit of the accused person.

The Public Prosecutors' Office was of the view that its inability to appeal when this might prejudice the accused person, in cases involving constraint measures imposed in criminal proceedings (a possibility which had existed under the previous legislation), conflicts with the status afforded to it in the Constitution, and is also in breach of other constitutional principles, such as those of legality, access to the law, and the democratic State based on the rule of law. It argued that the Public Prosecutors' Office is perceived under the Constitution as an autonomous judiciary which is the '*dominus*' of the criminal enquiries in the first of the preliminary phases of criminal proceedings and which always acts as an impartial, objective subject whilst these proceedings last. It is responsible for exercising penal action under the guidance of the principle of legality and of the defence of democratic legality.

Constraint measures may only be imposed as part of concrete criminal proceedings brought against a particular accused person who has already acquired accused status, and they are subject to the principle of legality. According to the petitioner, this constitutional vision of the Public Prosecutors' Office, when it is acting in the field of penal justice and to the extent that is relevant to the present case, must also include the function of controlling the legality of the constraint measure that is concretely imposed in those proceedings, as happened in the case which was the object of the present appeal. The petitioner went on to argue that the ways in which that control is exercised must include the right to appeal, where the Public Prosecutors' Office is of the opinion that, given the applicable precautionary procedural requirements, the court did not impose the constraint measure that was appropriate to the case in question. The Public Prosecutors' Office also cited the principle of equality of arms, an essential characteristic of Portuguese criminal procedure, to support its position. In summary, it said that the norm was in breach of three constitutional principles (the legality of criminal proceedings; equality; and the principle that protects the Public Prosecutors' Office's access to the law, in its role as representative of the State and Community) and its constitutional function as a defender of democratic legality.

II. The Constitutional Court observed that the Constitution includes the right to appeal among the guarantees of a defence that are available to accused persons, but that such appeals can only be lodged by the Public Prosecutors' Office when the latter does so solely in the interest of the defence. The right to appeal cannot be invoked by the Public Prosecutors' Office when it might lead to a decision that would be less favourable to the accused person. As to the fundamental right of access to the courts, the Court said that the correct interpretation is that the exercise of penal action by the State (acting through the Public Prosecutors' Office) is not protected by the provisions of Article 20 of the Constitution. This may be deduced from the historical meaning and the primordial function of the fundamental rights, in their role as 'rights to protection' against the State, rather than rights which the State or its organs are themselves recognised to possess. There can be no doubt that the Constitution charges the Public Prosecutors' Office with certain functions: representing the State and defending such interests as the law determines; and playing a part in the execution of the criminal policy laid down by the organs of sovereignty, exercising penal action under the guidance of the principle of legality, and defending democratic legality. The possibility also cannot be excluded that normative solutions which result in a limitation on access to the courts – perhaps solely because they provide for criteria which restrict the admission of

appeals lodged by the Public Prosecutors' Office – constitute or imply an unacceptable understanding of those constitutional functions. In this event they must be deemed unconstitutional, because they are in breach of the Constitution's provisions on the functions and competence of the Public Prosecutors' Office as an institution. Nonetheless, this should not be seen as an unconstitutionality that arises out of an injury to an alleged fundamental right pertaining to the Public Prosecutors' Office itself.

Turning to the principle of the legality of constraint measures, the Court said that this principle is justified by the principle of the presumption of innocence until the conviction sentence becomes *in rem judicatam*, and by the fact that laws that restrict the right to freedom, which everyone is recognised to possess, fall within the exclusive legislative competence of the constitutional legislator. This principle of legality means that decisions which impose or maintain constraint measures that are not provided for by law, and those replacing others that are not provided for by law, must be subject to appeal, but the same does not apply to decisions which do not impose any constraint measure. In the latter case any appeal which the Public Prosecutors' Office might bring would not be in the sole interest of the defence, and would fall outside the scope of the accused person's guarantee of a defence.

The Constitutional Court therefore denied the appeal.

III. The President of the Constitutional Court dissented from the Ruling. In his accompanying opinion he disagreed with the grounds for the decision and with the majority's interpretation of the Court's jurisprudence. On the subject of the Public Prosecutors' Office's inability to invoke the parameter of the fundamental right of access to justice because the State's exercise of penal action is not protected by the fundamental right of access to the courts, the author of the dissenting opinion considered that starting from the premise that the right of access to justice is directed against the State and the organs of its administration of justice, and that, because the Public Prosecutors' Office forms part of the state apparatus that performs this function, it cannot be seen as an active holder of a right which is exercisable against the organs of judicial power with which it works, this is an organisational or structural version of the issue that does not take complete account of the problematic dimension encompassed by this question. He went on to say that the Constitutional Court's jurisprudence recognises that the principle of access to the law is a "key norm/principle in the structure of the democratic State based on the rule of Law"; and that this conclusion is

all the more valid in a system in which the preventive protection of certain positions that are allegedly lacking in judicial oversight – particularly in the form of the imposition of constraint measures – can only be operated via the intervention of the Public Prosecutors' Office, as it is the only entity which has the ability to project such positions in proceedings (for example, the position of the victim of conduct that would seem to constitute a penal infraction). The dissenting Justice also expressed the view that there are no constitutional principles to back up the assertion that appeals against decisions involving the promotion of constraint measures can only be lodged in the interest of parties who are the object of those measures.

Languages:

Portuguese.



Romania

Constitutional Court

Important decisions

Identification: ROM-2010-1-001

a) Romania / **b)** Constitutional Court / **c)** / **d)** 08.10.2009 / **e)** 1258/2009 / **f)** Decision on the issue of constitutionality of the provisions of Law no. 298/2008 on the retention of data generated or processed by the providers of publicly available electronic communications services or public communications networks, which also amends Law no. 506/2004 on the processing of personal data and the protection of privacy in the electronic communications sector, published in the Official Gazette of Romania, Part I, no. 780 of 21 November 2008 / **g)** *Monitorul Oficial al României* (Official Gazette), 798/23.11.2009 / **h)**.

Keywords of the systematic thesaurus:

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

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

3.16 General Principles – **Proportionality**.

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

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

Keywords of the alphabetical index:

Interception, invasion of privacy, personal data, secrecy of correspondence, storage.

Headnotes:

Law no. 298/2008 on personal data processing establishes as a rule this data's continuous retention for a period of 6 months from the time of their interception.

Summary:

The author of the objection claimed that the impugned law breaches the right to privacy and to secrecy of correspondence, removing the presumption of innocence, denigrating human dignity and leading to abuse in terms of use of the information by authorised bodies. In the author's opinion, the impugned law infringes Article 25 of the Constitution on free movement, Article 26 of the Constitution on personal, family and private life, Article 28 of the Constitution on secrecy of correspondence, and of Article 30 of the Constitution on freedom of expression.

Analysing the objection, the Constitutional Court held the Law to be unconstitutional, as a whole, for the following reasons:

1. The right to respect for private life necessarily involves also the secrecy of correspondence, whether this component is expressly stated within the same text of Article 8 ECHR, or it is regulated separately, as in Article 28 of the Constitution.
2. Law no. 298/2008 transposes into the national legislation Directive 2006/24/EC of the European Parliament and the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC. The legal status of such a Community instrument makes it compulsory for EU Member States as concerns the legal solution covered, not also in terms of practical arrangements leading to this result, the States enjoy a wide margin of appreciation to adapt them to specific legislation and national realities.
3. Neither the European Convention on Human Rights, nor the Constitution preclude the adoption of legislation allowing interference of state authorities in the exercise of those rights, but state intervention must comply with strict rules, expressly mentioned in Article 8 ECHR and in Article 53 of the Constitution, respectively.
4. In accordance with the principles of limitation expressed in the case-law of the European Court of Human Rights, for example in the case of *Klass and others v. Germany* 1978, or the case of *Dumitru Popescu v. Romania* 2007, a normative act regulating measures likely to cause interference in the exercise of the right to privacy and family life, correspondence and freedom of expression must include appropriate and adequate safeguards to protect the person from any arbitrary intervention by state authorities.
5. The Constitutional Court acknowledges the power of the legislator to limit the exercise of certain fundamental rights or freedoms, as well as the need to regulate certain aspects which would provide the bodies with specific powers in criminal prosecution with effective tools for the prevention and detection of terrorism, in particular, as well as of serious crimes. Romanian legislation regulates, in the Code of Criminal Procedure, the ways in which public authorities can interfere with the exercise of rights to personal life, correspondence and free expression with respect to all guarantees required by such interference.
6. The Constitutional Court holds that Law no. 298/2008 as drafted, is likely to affect, even indirectly, the exercise of the fundamental rights or freedoms, in this case the right to personal, private and family life, the right to secrecy of correspondence and the freedom of expression, in a manner that does not meet the requirements established by Article 53 of the Constitution.
7. The Constitutional Court considers that the absence of clear legal rules that would determine the exact scope of those data needed to identify the user – individuals or legal entities – leaves room for abuse in the work of retention, processing and use of data stored by the providers of publicly available electronic communications services or of public communications networks. The restriction on the exercise of the right to private life, secrecy of correspondence and freedom of expression, must also occur in a clear, predictable and unequivocal manner as to remove, if possible, the occurrence of arbitrariness or abuse of the authorities in this area.
8. The Constitutional Court notes the ambiguous wording, not compliant with the rules of legislative technique, because the legislator does not define what is meant by “threats to national security” so that in the absence of precise criteria of delimitation, various actions, information or normal activities, of routine, of the natural and legal persons can be considered, arbitrarily and abusively, as having the nature of such threats.
9. The use of the expression “can have” leads to the idea that the data covered by Law no. 298/2008 are not retained for the exclusive use thereof by the state bodies with specific powers to protect national security and public order, but also by other persons or entities, since they “can have” not just “have” access to such data, according to the Law.
10. The legal obligation that requires the continuous retention of personal data makes the exception to the principle of effective protection of the right to personal life and freedom of expression, an absolute rule. The regulation of a positive obligation that concerns a

continual restriction on the exercise of the right to private life and on the secrecy of correspondence cancels the very essence of the right by removing the guarantees concerning its exercise.

11. In this case, the Court needs to also examine the compliance with the principle of proportionality. The Law requires continuous retention of data from the time of its entry into force, without considering the need to terminate the restriction once the cause that led to this measure disappeared. Interference with the free exercise of the right takes place continuously and independently of the occurrence of a certain justifying act, of a determinant cause and only with the purpose of prevention of crime or detection – after occurrence – of serious crime.

12. The Law under examination aims to identify not only the person who sends a message or information through any means of communication, but also the recipient of that information. This operation concerns all recipients of the law equally, whether or not they have committed criminal acts or whether or not they are under criminal investigation, which is likely to overturn the presumption of innocence and *a priori* transform all users of electronic communications services or of public communications networks in persons likely to commit crimes of terrorism or other serious crimes.

Restriction on the exercise of certain personal rights in consideration of collective rights and public interest, aimed at national security, public order or prevention of crime, was always a sensitive operation in terms of regulation, so as to maintain a fair balance between the interests and rights of the individual, on the one hand, and those of the society, on the other. It is not less true, as noted by the European Court of Human Rights in the case of *Klass and others v. Germany* 1978, that taking surveillance measures, without adequate and sufficient safeguards, can lead to “destruction of democracy on the ground of defending it”.

For the reasons set forth herein, the Court held that the law is unconstitutional as a whole.

Languages:

Romanian.



Identification: ROM-2010-1-002

a) Romania / **b)** Constitutional Court / **c)** / **d)** 14.04.2010 / **e)** 415/2010 / **f)** Decision on the unconstitutionality of certain provisions of Law no. 144/2007 on the creation, organisation and functioning of the National Integrity Agency / **g)** *Monitorul Oficial al României* (Official Gazette), 294 / 5. V. 2010 / **h)**.

Keywords of the systematic thesaurus:

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

4.7.1.1 Institutions – Judicial bodies – Jurisdiction – **Exclusive jurisdiction.**

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

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

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

Keywords of the alphabetical index:

Civil servant, rights and obligations / Burden of proof / Confiscation / Civil service, multiple posts, incompatibility.

Headnotes:

The National Integrity Agency, created by Law no. 144/2007, is empowered principally to investigate the way in which persons exercising public functions acquired their wealth and to control conflicts of interests and situations of incompatibility. In order to fulfil that role, the National Integrity Agency was authorised to demand the necessary documents and information from all institutions, relevant public authorities and other legal persons governed by public law, to order expert reports, to request information and further evidence, to draw up findings and reports, but also to refer a matter to the judicial court or, depending on the case, another criminal prosecution authority, seeking confiscation of unjustified wealth.

Summary:

A plea of unconstitutionality was raised in contentious administrative proceedings the purpose of which was to resolve an application for annulment of an unjustified confiscation of assets. As the ground for that plea, the applicant claimed that the National Integrity Agency, owing to the powers conferred on it by Law no. 144/2007, was set up as an administrative

organ which in reality pursued a judicial activity, while being responsible to Parliament.

In addition, the applicant claimed that the contested law was unconstitutional in its entirety, as it was contrary to the provisions of Articles 1.4 and 116.2 of the Constitution.

The Constitutional Court held that the Law was unconstitutional, for the following reasons:

The Court noted that the investigative activities carried out by the Agency's inspectors – during which evidence was gathered and evaluated, all necessary information requested of any institution, public authority, legal person governed by public or private law whatsoever and expert reports drawn up – were followed, pursuant to Section 46 of Law no. 144/2007, by the drafting of a finding. This finding then produced legal effects similar to an indictment, if the case was subsequently transmitted to the judicial court. Thus, by that finding, the Agency's inspector analysed and requested the judicial court to order the confiscation of unjustified wealth where there were clear discrepancies between the wealth acquired while the person concerned occupied his or her post and the income obtained during the same period and if the acquisition of a portion of the assets or of certain specific assets was unjustified.

Having regard to the procedural rules provided for in Law no. 144/2007 and the solutions which the Agency might adopt, the Court found that certain activities carried out by the Agency's inspectors were judicial in nature. Thus, pursuant to Section 46 of Law no. 144/2007, the Agency's inspector – relying on his own assessment of the evidence, and without following a procedure in which the *inter partes* principle was observed – decided that a part of a person's wealth was unjustified. Consequently, he declared the Law (*juris dictio*) and then delivered a verdict, an activity which is reserved exclusively for the judicial courts, in accordance with Article 126.1 of the Constitution, which provides that "justice is rendered by the High Court of Cassation and Justice and by the other judicial courts established by law".

The Court held, moreover, that the Agency was not a court and was not subject to the rules of organisation and functioning provided for in the chapter of the Constitution on the "Judiciary", in so far as the inspector exercised a public function with special status, in accordance with the provisions of Section 17.2 of Law no. 144/2007. The Court likewise noted that before the entry into force of Law no. 144/2007, the power subsequently exercised by the Agency's inspectors was held by a "research commission", a collegiate body composed of judges

and prosecutors, in accordance with Law no. 115/1996 on the declaration and control of the wealth of officials, dignitaries, judges and persons exercising administrative or supervisory functions.

The Court also noted that the inspector's prerogative in relation to the request for the confiscation of wealth infringed the provisions of Article 44.8 and 44.9 of the Constitution, according to which "wealth acquired lawfully cannot be confiscated. The lawfulness of the acquisition is presumed". In addition, assets used in the course of offences or petty offences can be confiscated only on the conditions laid down by law. In recognising that the inspector could, where appropriate, request the competent court to order the confiscation of a portion or a specific asset, the provisions of Section 46 of Law no. 144/2007 infringed Article 44.8 and 44.9 of the Constitution. A measure entailing the confiscation of wealth is permitted by the Constitution only in response to offences or petty offences, that is to say, in cases deemed by the law to represent a certain degree of danger for society.

The Court emphasised that the constitutional principle of the presumption that wealth was acquired lawfully must be applied to persons under investigation. Anyone claiming that a person's wealth was acquired unlawfully is therefore required to prove it. Conversely, it clearly follows from Law no. 144/2007 that the person concerned is required to prove the lawful origin of all the assets acquired during the period covered by the investigation, which thus gives rise to a reversal of the burden of proof, contrary to the presumption laid down in Article 44.8 of the Constitution that assets have been acquired lawfully.

The Court held that, by authorising the inspectors to require the competent court to order the confiscation of a portion of a person's wealth or of a specific asset, the provisions of Section 46 of Law no. 144/2007 directly determined a person's guilt and thus infringed the provisions of Article 23.11 of the Constitution on the presumption of innocence. Confiscation of wealth is sought without a final judicial decision whereby the guilt of the person concerned is established. Likewise, according to the principles applicable to criminal procedure, no one is required to prove his or her innocence, and the burden of proof is thus borne by the prosecution. In that case, the person concerned must have the benefit of the doubt (*in dubio pro reo*).

The Court noted that the provisions of Section 46 of Law no. 144/2007 were contrary to Articles 23.11, 44.8 and 44.9, 124.2 and 126.2 of the Constitution and also to Article 1.3 and 1.4 of the Constitution, according to which Romania is a State governed by

law, where the separation and the balance of powers are guaranteed and where the fundamental rights and freedoms of citizens are guaranteed. For the same reasons, the Court held that Sections 1 to 9 of the Law were also unconstitutional.

The Court observed that under Article 26.1 of the Constitution, the public authorities must respect and preserve intimate, family and private life. The free development of personality and human dignity, values enshrined in Article 1.3 of the Constitution, cannot be envisaged in the absence of respect for and protection of private life. The right to respect for intimate, private and family life forms part of the category of fundamental rights and freedoms. It is also expressly mentioned in Article 8 ECHR. That presumes that the State authorities are under an obligation to refrain from doing anything that would interfere with the exercise of the right to private life. In that regard, the Court concluded that the obligation laid down in the Law to publish statements on the wealth of the persons concerned on the Agency's website was contrary to the right to respect for and protection of private life.

The Court noted that, in the process of the adoption of Law no. 144/2007, there were inconsistencies contrary to the specific rules on legislative technique. Thus, following the publication of the Law in the *Official Gazette* of Romania, the Law was amended and supplemented by Government Emergency Order no. 49/2007, published in the *Official Gazette* of 1 June 2007. On that occasion, nineteen sections of the Law were amended and three paragraphs of Sections 39, 43 and 53 were repealed. By Law no. 94/2008 approving the Government Emergency Order, the legislator also adopted amendments to sixteen sections and new paragraphs were inserted in eight other sections. Subsequently, Government Emergency Order no. 138/2007, approved by Law no. 105/2008, also amended four sections of the initial Law.

The Court observed that Section 13 of Law no. 24/2000 on legislative technique establishes the principle of the uniqueness of regulations. Thus, the legislator must endeavour to ensure that similar rules are not contained in two or more texts and, where parallels exist, they must be eliminated, either by repeal or by the integration of the provisions concerned in a single set of rules. The Court observed that that was manifestly so in the present case, since similar rules were contained in the Law being reviewed, but also in Law no. 115/1996 on the declaration and control of the wealth of officials, dignitaries, judges and certain persons exercising administrative or supervisory functions, as amended by Law no. 161/2003 on certain measures adopted in

order to ensure transparency in the exercise of public office, public functions and the business environment and the prevention and punishment of corruption.

Languages:

Romanian.



Russia

Constitutional Court

Important decisions

Identification: RUS-2010-1-001

a) Russia / **b)** Constitutional Court / **c)** / **d)** 26.02.2010 / **e)** 4 / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 12.03.2010 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

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

2.2.1.5 Sources – Hierarchy – Hierarchy as between national and non-national sources – **European Convention on Human Rights and non-constitutional domestic legal instruments**.

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:

Decision, judicial / Judgment, execution, law / Procedure, civil.

Headnotes:

The Federal legislator must establish mechanisms under the Code of Civil Procedure to execute the decisions of the European Court of Human Rights.

Summary:

The Court was petitioned by citizens whose applications had previously been determined by judgments of the European Court of Human Rights finding a violation of Article 6 ECHR and directing the government to pay sums of money by way of just satisfaction.

The applicants subsequently applied to the domestic courts for a review of their cases pursuant to these new developments, but their applications were dismissed on the basis of Article 392 of the Code of Civil Procedure, which does not provide this possibility.

In the applicants' view, Article 15.4 of the Constitution provides that the universally recognised principles and standards of international law and the international treaties concluded by the Russian Federation form an integral part of its legal system. Moreover, they put forward the argument that the right of citizens to petition the European Court of Human Rights goes hand in hand with Russia's obligation to execute its judgments.

The payment of money by way of just satisfaction awarded by the European Court of Human Rights does not suffice to redress the wrong resulting from the violation of the rights of those concerned. Thus, the impugned judgments should also be reviewed. However, the legislation on review of judgments concedes the possibility of dismissing applications for review.

It should be noted that the Code of Criminal Procedure and the Code of Arbitration Procedure of the Russian Federation both provide for mandatory review of domestic judgments after the European Court of Human Rights has acted, particularly when a violation of the right to a fair trial has been found. In the absence of similar provisions in the Code of Civil Procedure, judicial protection becomes ineffective, incomplete and inequitable.

The final judgments of the European Court of Human Rights are binding on Russia. The state is obliged not only to pay the victim compensation, but also to restore the situation that obtained prior to the violation of his or her rights. Absence of provisions intended to establish, under the Code of Civil Procedure, means of requesting review after the judgment of the European Court of Human Rights constitutes a *de facto* violation of Article 15.4 of the Constitution.

The Constitutional Court, in determining the constitutional purport and spirit of Article 392.2 of the Code of Civil Procedure, recognised the right of the persons concerned to apply to the courts to have the judgments of the European Court of Human Rights executed. They could thus request a review of judgments delivered in breach of their rights. Until such time as the Code of Civil Procedure was revised, the courts were therefore required, by analogy, to apply Article 311.7 of the Code of Arbitration Procedure to civil proceedings.

The Constitutional Court nevertheless held that Article 392.2 of the Code of Civil Procedure was in line with the Constitution in so far as it did not expressly forbid a court to review its decision after censure by the European Court of Human Rights.

The Constitutional Court accordingly proposed that the Federal legislator amend the Code of Civil Procedure in order to ensure uniform and appropriate protection.

Languages:

Russian.



Identification: RUS-2010-1-002

a) Russia / **b)** Constitutional Court / **c)** / **d)** 19.04.2010 / **e)** 7 / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 07.05.2010 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

4.7.8.2 Institutions – Judicial bodies – Ordinary courts – **Criminal courts.**

5.1.4.2 Fundamental Rights – General questions – Limits and restrictions – **General/special clause of limitation.**

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

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

5.3.13.10 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Trial by jury.**

Keywords of the alphabetical index:

Terrorism / Procedure, criminal / Judge, impartiality, objective.

Headnotes:

First aspect: transfer of jurisdiction in terrorism cases from the Assize Court to a court composed solely of career judges does not constitute a violation of the rights of the defence.

Second aspect: the right to be tried by an Assize Court is directly prescribed by the Constitution and thus cannot be disabled simply at the behest of the other defendants exercising their rights conferred by the Code of Criminal Procedure.

Summary:

First aspect: Article 30 of the Code of Criminal Procedure was amended in 2008 to remove cases involving terrorism, mutiny and seizure of power from the jurisdiction of the Assize Court. Thereafter, such cases were to be heard by a bench of three career judges.

The applicants, who had been affected by this reform, submitted that the Constitution prescribed the right to be tried by an Assize Court. It guaranteed equal rights and freedoms for all citizens. The applicants considered that to deny certain Russian citizens their right to be tried by an Assize Court infringed the principle of equality.

Moreover, under Article 55 of the Constitution no laws violating or restricting human rights shall be enacted. The applicants submitted that denial of the right to be tried by an Assize Court restricted their rights, as this type of justice afforded a safeguard against miscarriages of justice.

According to the Constitutional Court, Article 20 of the Constitution secured to the citizens the right to be tried by an Assize Court only in the event of being charged with the most serious crimes for which the prescribed penalty was death. In this case, the Constitution linked the right to be tried by an Assize Court with the rights of the defence, and also with the right to life. In those circumstances, the legislator could not arbitrarily discard this form of judicial procedure.

As for other cases, the right to be tried by an Assize Court must be prescribed by Federal law, and so it was for the legislator to define those cases.

Consequently, the right to be tried by an Assize Court was not among the inalienable rights such as the right to a fair trial or the presumption of innocence. The universally recognised principles and the prescriptions of international law, together with the European Convention on Human Rights, did not rank it among the inalienable rights. The European Court of Human Rights did not regard the right to be tried by an Assize Court as an integral part of the right to a fair trial.

Terrorism, mutiny and violent seizure of power used to be punishable by death. At present the maximum penalty for these offences is life imprisonment. Furthermore, over the 10 years of existence of a complete moratorium on capital punishment in Russia, stable guarantees against being sentenced to death have appeared. At the current stage of development of international law, the process of abolishing capital punishment seems irreversible.

In those circumstances, the legislator is entitled to place these offences outside the jurisdiction of people's juries. In limiting citizens' rights – in this case the right to be tried by an Assize Court – the state must employ moderate measures strictly circumscribed by the aims pursued.

According to the legislator, the aim of terrorists is to influence the decisions of the public authorities by terrorising the population. The trial of a terrorism case can thus imperil the life and health of those involved in judicial process. A person facing trial may in fact seek to influence the jurors by making them fear for their own lives and those of their relatives.

The legislator must ensure the impartiality and fairness of the Court responsible for trying terrorism cases. It therefore assigned jurisdiction to a court consisting solely of career judges for deciding this type of case.

Consequently, transfer of jurisdiction from the Assize Court to a court consisting solely of career judges did not constitute a violation of the rights of the defence in this case.

Second aspect: the Code of Criminal Procedure allows persons charged with a serious offence to choose the composition of their court. At their request, the case can be tried either by a bench of three judges or by an assize jury.

Moreover, according to Article 325.2 of the Code of Criminal Procedure, a case against several persons must be tried by an assize jury even if only one defendant so requests.

Defendants who decide to co-operate with the investigating body and sign the agreement to that effect are entitled to a special examination procedure consisting in a limited hearing with the judge usually deciding on the basis of the case file.

The Court held that this provision infringed the principles of equality of all persons before the law and justice, because it did not allow defendants to fulfil their procedural rights. In the present case it was impossible for one of the defendants to avail himself of his right to a special examination procedure, as that was subject to the volition of the other defendants (even that of a single one).

The right to be tried by an Assize Court is established directly by the Constitution and thus cannot be disabled by the other defendants' intention to exercise their right under the Code of Criminal Procedure. The court, at the stage of the preliminary hearing, may order separation of the proceedings.

That is not contrary to the Constitution because it allows the case to be tried by the bench of career judges for some of the defendants and by the Assize Court for the rest.

Languages:

Russian.



Identification: RUS-2010-1-003

a) Russia / **b)** Constitutional Court / **c)** / **d)** 20.04.2010 / **e)** 9 / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 07.05.2010 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

3.10 General Principles – **Certainty of the law.**
 3.18 General Principles – **General interest.**
 3.21 General Principles – **Equality.**
 4.7.4.1.5 Institutions – Judicial bodies – Organisation – Members – **End of office.**
 5.4.14 Fundamental Rights – Economic, social and cultural rights – **Right to social security.**
 5.4.16 Fundamental Rights – Economic, social and cultural rights – **Right to a pension.**

Keywords of the alphabetical index:

Judge, independence / Pension, judges, amount / Social security.

Headnotes:

The level of protection of judges' status cannot fall below the level already reached. The legislator is competent to regulate their period of activity, but in exercising this competence must take into consideration the rightful expectations of the interested parties.

Summary:

Before Law no. 274-03 of 25 December 2008 came into force in January 2009, the minimum 5-year period of service in the office of judge included periods of activity as prosecutor, investigating judge and lawyer. Judges who had served a minimum of twenty years were entitled to a monthly pension for

life if they resigned. If they continued serving, they were entitled to a monthly salary increment corresponding to 50% of the pension amount.

Since the Federal Law of 25 December 2008, the periods of service in the offices of judge, prosecutor, examining judge and lawyer have not entered into the calculation of their retirement pension entitlements.

Consideration of this case was prompted by the complaints of several retired judges who found that the above arrangements violated the constitutional right to social security and the principles of equality and justice.

The applicants regarded the impugned provision as restricting their right to draw, after relinquishing office, the full amount of a monthly life pension or a severance allowance, paid according to their term of professional activity.

In their view, the constitutional principle of equality had been infringed. They therefore considered the impugned provision unconstitutional as it permitted reduction of the level of the guarantees applying to the status of judges.

Inviolability, security of tenure and proper pecuniary security are the guarantees of judges' independence and impartiality. The status of judges is not a matter of personal privilege, but the means of securing, for every Russian citizen, judicial protection of their rights and freedoms. Accordingly, the status of judges is laid down not only by law, but also in the Constitution. The Court had ruled on several occasions that the level of protection of the status could not fall below the level already reached.

The legislator was competent to regulate their term of service, but in exercising this competence must take into consideration the rightful expectations of the interested parties. Judges who took office prior to the Law of 25 December 2008 had anticipated that the time for which they had worked as prosecutor, investigating judge or lawyer would be included in the calculation of their length of service, but the application of the Law altered the position.

Furthermore, for those judges who had claimed their right to retirement before 10 January 2009 (effective date of the Law), length of service encompassed their work as prosecutor, investigating judge or lawyer. Conversely, judges who had made the same request after that date were denied the calculation of their length of service. This was contrary to the constitutional principles of equality and fairness.

The impugned Law was therefore declared unconstitutional.

Languages:

Russian.



Serbia

Constitutional Court

Important decisions

Identification: SRB-2010-1-001

a) Serbia / **b)** Constitutional Court / **c)** / **d)** 10.09.2009 / **e)** IY-82/2007 / **f)** / **g)** / **h)** CODICES (English, Serbian).

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**.

Keywords of the alphabetical index:

Land, agricultural, lease / Appeal, right.

Headnotes:

A specific decision on the lease of certain agricultural land owned by the state must be published by the competent local authority institution, together with approval from the competent Ministry, on the date of the approval of the Ministry. This means that there is no argument over the commencement of the term for an appeal and participation is made equal for all in the process of leasing state-owned agricultural land. Parties are also then able to exercise, under equal conditions, their right to appeal against decisions adopted, in addition to their right to a legal remedy guaranteed by the Constitution.

Summary:

The Constitutional Court was asked to assess the constitutional compliance of Article 64.3 of the Law on Agricultural Land (Official Gazette, no. 62/06), which provides that “an appeal may be filed against the decision mentioned under paragraph 2 of this Article to the Ministry within 15 days from the date of adoption of the decision”. The decisions here are about the lease of state-owned agricultural land. The petitioner argued that the method regulating the issue of the term for an appeal is directly contrary to the principles of the rule of law and the right to an appeal, since an appeal may be filed from the date of

adoption of the decision, and not from the date of the delivery of the decision.

In the course of the proceedings before the Constitutional Court, the Law on Amendments and Supplements to the Law on Agricultural Land entered into force (Official Gazette, no. 41/09). In the supplement to the initiative of 8 July 2009, an assessment was also requested of the constitutionality of Article 24.5 of this Law, as the controversial legal issue of calculation of the term for an appeal from the date of adoption of the decision is prescribed in the same way as in the integral text of the Law.

In accordance with the request stated in the initiative, and pursuant to Article 168.5 of the Constitution, the Constitutional Court also assessed the provision of Article 64.3 of the basic text of the Law that ceased to be valid, as the initiative was submitted whilst it was still in force.

The Law on Agricultural Land (Official Gazette, no. 62/06) prescribed the conditions and method of use of agricultural land owned by the state, in terms of disposal and management and leasing.

Article 64 of the Law required state-owned agricultural land to be leased through public tender (paragraph 1). Decisions on the issuing of the public tender and on leases under paragraph 1 of this Article were to be adopted by the competent local authority body under whose jurisdiction the state-owned agricultural land fell, under the approval of the Ministry (paragraph 2). Appeals could be lodged against decisions prescribed in paragraph 2 within 15 days from the date of adoption of the decision (paragraph 3).

The Law on Amendments and Supplements to the Law on Agricultural Land (Official Gazette, no. 41/09) and Article 24 amended the provisions of Article 64 of the original Law from 2006. However, the disputed provision remained the same.

The Constitutional Court established that the right to equal legal protection and to a legal remedy was guaranteed in Article 36 of the Constitution. Equal protection of the rights is guaranteed before the courts and other state authorities, holders of public power, the administrations of autonomous provinces and local government authorities (paragraph 1). Everyone is entitled to an appeal or other legal remedy against decisions on their rights, obligations or interest based on law.

Under Article 87 of the Constitution, natural resources, goods established by law to be of general interest and the property used by bodies of the Republic of Serbia are owned by the state. Other

articles and rights may fall within the category of state property pursuant to paragraph 1. Natural persons and legal entities may also gain certain rights over goods in general use under the conditions and in the manner prescribed by law (paragraph 2). The property of the autonomous provinces and local authorities and the method of its use and disposal are prescribed by law (paragraph 4).

Taking account of the above constitutional provisions and the provisions of the Law on Agricultural Land prescribing the institution of lease of agricultural land as a whole, the Court found the contested provision of Article 64.3 of this Law, namely the provision of Article 24.5 of the Law on Amendments and Supplements to the Law on Agricultural Land, to be in line with the Constitution.

In effect, the disputed provision prescribes an appeal as a legal remedy that may be filed against decisions over the lease of state-owned agricultural land, within a standard adequate deadline of fifteen days. This is undoubtedly compatible with Article 36.2 of the Constitution.

The constitutional legal issue relates to the legal provision on the calculation of the commencement of the term for an appeal to be filed, which is the date of adoption of the decision. The possibility of substantive accomplishment of the guaranteed right depends on this. Under Article 64.2 of this Law, if the competent Ministry approves the local authority's decision, the decision over the lease of state-owned agricultural land will be adopted. In the Constitutional Court's opinion, decisions on the lease of certain state-owned agricultural land must be published, together with the ministerial approval, in the manner prescribed in Article 64.2 of this Law, by the competent local authority body. This is to be done on the date of the ministerial approval, namely the date of adoption of the decision. It ensures the compatibility of the contested provision with the Constitution. The process outlined above means that there can be no arguments over the commencement of the term for an appeal and there is equality for all parties to the leasing of state-owned agricultural land, thus enabling them to exercise, under equal conditions, the right to file an appeal against the decision adopted, as well as their right to a legal remedy guaranteed by the Constitution. The Constitutional Court estimated that in this particular case the publication of the decision on the date of its adoption, which is the date the term to file an appeal commences, is in a logical and legal link with the entire process of leasing land of this type as prescribed by this Law. The process starts with the announcement of the lease of land, is conducted by

public tender and closes upon publication of the decision on the lease of land.

Such a definition of the contested provision of the Law on Amendments and Supplements to the Law on Agricultural Land, does not go beyond the framework of the constitutional powers contained in Article 87 of the Constitution, to the effect that the conditions and manner of use of goods of general interest, namely of state-owned agricultural land, are to be defined by law.

Languages:

English, Serbian.



Identification: SRB-2010-1-002

a) Serbia / **b)** Constitutional Court / **c)** / **d)** 22.12.2009 / **e)** UŽ- 165/2007 / **f)** / **g)** / **h)** CODICES (English, Serbian).

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**.

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

Keywords of the alphabetical index:

Data, personal, treatment / Weapon, licence.

Headnotes:

Members of the Ministry of Interior are obliged to keep the data they have obtained in the course of their operations and their activities in the field in the records and pursuant to the law.

This kind of information could constitute an obstacle, preventing the authorities from issuing firearm licences or divulging any information about it, until the need to use it arises. Furthermore, the information should not be mentioned in the statement of reasons of a decision dismissing a request for the issue of a firearms licence.

Summary:

The applicant filed a constitutional appeal against decisions by the Ministry of Interior, the Police Directorate, the Administration Department, the Užice Regional Directorate and the Bajina Bašta Police Station, alleging a violation of his right to property, the right to equal protection of rights and the right to a legal remedy, as well as the principle of prohibition on limitation of human and minority rights.

He contended that these decisions were not adopted pursuant to the law and had in fact violated principles which such departments should have complied with.

The Constitutional Court found the following facts to be of significance in this matter.

The first instance administrative body dismissed the applicant's request for the issue of a firearms licence and took away the *Beretta* pistol (gauge of 7.65 mm, factory number 67886). It ordered the applicant to dispose of the pistol. The ammunition was to be removed within the period of one year after the decision to remove the weapon had become final, otherwise both the pistol and the ammunition would become the property of the Ministry of Interior. In the statement of reasons of this decision, the point was also made that the pistol was confiscated because of the discovery during the proceedings that "there were obstacles as per Article 8.2 of the Law on Weapons and Ammunition", and that this person could not be issued with a firearms licence in order to protect the safety of the personal property of others or to maintain public order and peace.

The second instance administrative body dismissed the applicant's appeal as groundless. The point was made in the statement of reasons that the first instance body had properly established, as was apparent from the case file, that the applicant could not be granted a firearms licence for this particular pistol, and that pursuant to the provisions of Article 24 in conjunction with Article 8.2 of the Law on Weapons and Ammunition, it had been justifiably confiscated, as this was necessary for the protection of public order and peace.

The Constitutional Court considered various constitutional provisions to be of relevance here, including Article 36 (equal protection of rights and legal remedy), Article 58 (right to property) and Article 20 (restriction of human and minority rights). It noted too some relevant legislative provisions including the Law on General Administrative Procedure, the Law on Weapons and Ammunition and the Law on the Police.

The Constitutional Court established that members of the Ministry of Interior are obliged to keep data they have obtained in their records pursuant to the law in the course of their activities and operations "in the field". This data constitutes the kind of obstacle mentioned in Article 8.2 of the Law on Weapons and Ammunition, which hindered the Ministry of Interior from issuing the applicant with his firearms licence. As there was still a need to use this data, the applicant could not obtain any information about them, pursuant to Article 80.1.8 of the Law on the Police. These reasons could not, therefore, be mentioned in the statement of reasons of the disputed decisions. The second instance authority also noted these arguments and reasons when deciding on the applicant's appeal against the first instance decision.

The applicant was denied his right in the public interest specified by law, including compensation (which cannot be lower than the market compensation) as prescribed in Article 58.2 of the Constitution. Market compensation was provided to the applicant by order of the authority that had adopted the contested decision that the applicant was to dispose of the confiscated weapon within one year. He either had to find a buyer or sell it via a company authorised to deal in weapons and ammunition.

Part of the constitutional appeal indicates that the second instance decision excluded the possibility of initiating administrative proceedings, which is contrary to Article 198.2 of the Constitution. Thus the applicant argued that his right to equal protection and to a legal remedy under Article 36 of the Constitution had been violated.

In the case in point, administrative proceedings against the second instance decision were excluded under Article 8.10 of the Law on Weapons and Ammunition. Article 198.2 of the 2006 Constitution states that the lawfulness of final individual acts deciding on rights, obligations or interests based on law is subject to review before a court in administrative proceedings, in the absence of any other form of judicial protection prescribed by law. Under Article 15 of the Constitutional Law on Implementation of the Constitution of the Republic of Serbia, all laws not in compliance with the Constitution should have been brought into line with it prior to 31 December 2008. The second instance decision of the Ministry of Interior (Police Directorate, Administration Department) was adopted on 23 January 2007 – prior to the expiry of the general time limit for harmonisation of laws with the 2006 Constitution.

The Constitutional Court found that the second instance decision could not have breached the applicant's right to equal protection and the right to a legal remedy under Article 36 of the Constitution, because the exclusion of the possibility of administrative proceedings was prescribed by Article 8.10 of the Law on Weapons and Ammunition, on which grounds the decision was adopted. The decision was adopted within the general time limit for the harmonisation of laws with the 2006 Constitution. The Constitutional Court therefore dismissed the constitutional appeal as groundless under this heading.

The Constitutional Court also found that the contested decisions did not violate the principle of limitation of human and minority rights as defined in Article 20 of the Constitution. This particular case concerns the partial limitation of the applicant's right to property. However, this is a limitation permitted by the Constitution, for purposes allowed by the Constitution and within the scope necessary to satisfy the constitutional purpose of limitation in a democratic society. It does not affect the essence of the guaranteed right. The Constitutional Court also found that the authorities whose decisions are under challenge took careful note of the essence of the right being limited, the validity of the purpose of limitation, the character and scope of limitation, the relationship between the limitation and its purpose and any potential for accomplishing the purpose of the limitation in a less onerous fashion.

Languages:

English, Serbian.



Identification: SRB-2010-1-003

a) Serbia / **b)** Constitutional Court / **c)** / **d)** 21.01.2010 / **e)** UŽ- 290/2007 / **f)** / **g)** *Službeni glasnik Republike Srbije* (Official Gazette), no. 15/2010 / **h)** CODICES (English, Serbian).

Keywords of the systematic thesaurus:

5.3.31 Fundamental Rights – Civil and political rights – **Right to respect for one's honour and reputation.**

5.3.37 Fundamental Rights – Civil and political rights – **Right of petition.**

Keywords of the alphabetical index:

Appeal, right, other legal remedies / Defamation, against public official.

Headnotes:

A complaint or petition is always legitimate in terms of its contents if it expresses doubt or distrust over the objective and legitimate performance of somebody in a public position, in connection with a concrete case involving at least one person, irrespective of the subjective assessment of the holder of the position about whom the complaint is being made.

Allegations within a complaint or petition that are objectively harmful to an individual cannot be grounds to establish legal responsibility, because the limits of acceptable criticism are even broader, if the criticism relates to the activities or conduct of the holder of a public position.

Summary:

The applicant lodged a constitutional appeal against the judgment of the Municipal Court in Prijepolje (K 177/06 of 6 March 2007) and the judgment of the District Court in Užice, Kž. 348/07 of 5 October 2007, alleging breaches of his right “to refer to the state authorities”, and “to civil suit defence”.

The Constitutional Court found the following facts and circumstances of importance to their decision.

On 13 July 2006 the applicant and another eight persons served the State Public Prosecution Office and the Ministry of Justice with a submission entitled “A Complaint about the Activities, Conduct and Corruption of Lj. V., as the Deputy Public Prosecutor from Prijepolje and against M. C., as the Deputy Public Prosecutor from Belgrade”. On 21 June 2006 the applicant and villagers submitted to the Ministry of Interior of Serbia (the Prijepolje Police Directorate) a complaint identical in content to the one mentioned above.

On 28 July 2006, Lj. V., Deputy Municipal Public Prosecutor in Prijepolje filed a private criminal action with the Municipal Court in Prijepolje against the applicant and a further eight persons. He accused them of having committed the criminal offence of defamation on 13 July 2006, when they filed a complaint with the State Public Prosecution Office and the Ministry of Justice about his work and behaviour, in which he was also accused of corruption.

On 6 March 2007 the Municipal Court in Prijepolje adopted Judgment K 177/06, finding the applicant and other persons guilty of two criminal offences of defamation. It imposed fines on them.

On 5 October 2007 the District Court in Užice, deciding on various appeals that had been filed, adopted a judgment accepting in part the appeals of the accused persons and altering the first instance judgment in relation to the decision on fines. It dismissed the remainder of the appeals and upheld the first instance judgment.

In December 2007 the fines imposed on the majority of the accused persons, but not the applicant, were replaced with prison sentences. Each 1,000 dinars represented one day in prison.

Article 56 of the Constitution entitles everybody to address petitions and motions, of their own initiative or together with other parties, to state authorities and organisations entrusted with public powers, to the authorities of the autonomous provinces and local government authorities and to obtain their responses to the questions posed (paragraph 1). Nobody should suffer harmful consequences resulting from petitions and motions they have submitted (paragraph 2) or due to the opinions put forward in the petition or motion unless they have committed a criminal offence in so doing (paragraph 3).

In its deliberations, the Constitutional Court noted various constitutional provisions, including Article 32 (right to a fair trial), Article 33.5 (special rights of those charged with criminal offences) and Article 46 (freedom of expression). It also took note of legislative provisions including provisions of the Criminal Code, the Criminal Procedure Code, the Law on Civil Procedure and the criteria established by the case-law of the European Court of Human Rights.

In these proceedings, the Constitutional Court noted a clear collision between two rights guaranteed by the Constitution: the right to a complaint, including freedom of expression, and the right to privacy, namely the right to honour and reputation. It acknowledged the difficulties regular courts would experience in determining which of these rights should be given protection. However, it found that the criminal court, which had conducted the proceedings against the applicant, not only failed to address the “collision problem” but also completely ignored the fact that in this case, the accused persons had been availing themselves of their constitutional right to make a complaint to the state authorities. The criminal court had failed to consider properly the importance, contents and limits of the right to a complaint, and had instead become embroiled in the detailed establishment of the

truth of the allegations in the complaint. Thus, it had violated a right guaranteed by the Constitution with long-term effects on the democratic order. By not taking into account the significance of this right in terms of the principle of the legal state, the criminal court neglected the legitimate right of all citizens to complain about the activities and actions of state authorities by means of petition or motion.

A complaint or petition is always legitimate in terms of its contents if it expresses doubt or distrust over the objective and legitimate performance of a public position, in connection with a concrete case involving at least one person, irrespective of the subjective assessment of the holder of the position about whom the complaint is being made. Allegations contained in a complaint or petition that are objectively harmful to an individual cannot be grounds to establish legal responsibility, because the limits of acceptable criticism are even broader, if the criticism relates to the activities or conduct of the holder of a public position. These particular criminal judgments, in the Constitutional Court’s opinion, represent unwarranted interference by the state in the applicant’s rights.

The Constitutional Court found that even if the judgments were found to have been adopted in pursuit of a legitimate aim, to protect the reputation of another, the issue as to whether these measures were necessary in a democratic society, or, indeed, the proportionality of the criminal conviction of the applicant and the compensation awarded to the private plaintiff to the legitimate aim had not been considered and had yet to be resolved. Even assuming that this type of interference was in compliance with the law and that it was undertaken in order to accomplish the legitimate aim of the protection of the reputation and rights of another, the Constitutional Court found that it was not necessary in a democratic society and not proportionate to a legitimate aim.

The Constitutional Court held that the court in this case had violated the applicant’s right to a fair trial, as it had neglected the applicant’s right, as a citizen to lodge a complaint with the state authorities. Having identified a breach of the right to dignity of personality and reputation of the plaintiff, it had based its conviction of the applicant on the contents of the complaint submitted. According to the Constitutional Court, the court should have assessed the extent of the encroachment of the plaintiff’s right to dignity of personality and reputation against the background of the applicant’s right to a complaint. It should then have determined whose rights had suffered the most damage, due to the allegations in the complaint. The court should also have considered whether the applicant had submitted the complaint with the intention to libel or slander the plaintiff, or whether his

main intention had been to protect his own impaired rights, pointing out the real problems besetting the citizens of a local community.

The Constitutional Court therefore upheld the constitutional appeal, overturned the second instance judgment and referred the case for retrial.

Languages:

English, Serbian.



Identification: SRB-2010-1-004

a) Serbia / **b)** Constitutional Court / **c)** / **d)** 04.02.2010 / **e)** Už- 490/2009 / **f)** / **g)** / **h)** CODICES (English, Serbian).

Keywords of the systematic thesaurus:

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

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

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

5.3.31 Fundamental Rights – Civil and political rights – **Right to respect for one's honour and reputation.**

Keywords of the alphabetical index:

Defamation, through media.

Headnotes:

It is the duty of the press to convey and communicate information and ideas on all matters of public interest, including information relating to the conduct of civil servants.

The public is also entitled to receive this information. Freedom to communicate information (freedom of media), as a form of freedom of expression, represents one of the cornerstones of a democratic society. Limitations are only permissible if they are prescribed by law, in pursuit of a legitimate goal, proportionate and necessary in a democratic society.

Summary:

The applicant filed a constitutional appeal against the judgment of the First Municipal Court in Belgrade P. 8505/05 of 26 April 2007 and the judgment of the District Court in Belgrade Gž. 13971/08 of 5 February 2009, alleging a breach of the right to fair trial under Article 32.1 of the Constitution and right to equal protection of rights under Article 36.1 of the Constitution.

The Constitutional Court noted the following significant facts and circumstances in its deliberations.

The applicant filed a lawsuit before the First Municipal Court in Belgrade against the defendants (three persons and a newspaper) for compensation under Article 79 of the Law on Public Information. The lawsuit stated that the statement of one of the defendants which was published in the newspaper contained a series of false, incorrect and incomplete information, which had damaged the applicant's honour and reputation.

The first instance court dismissed the applicant's claim as unfounded and ordered him to compensate the defendants for the costs of civil litigation they had incurred. The second instance court upheld this decision.

The applicant suggested in the constitutional appeal that there had been a breach of the universal right to a public hearing before an independent and impartial tribunal established by the law which will pronounce judgment, fairly and within a reasonable time span, on the parties' rights and obligations, grounds for suspicion giving rise to the launching of proceedings and accusations brought against them (Article 32.1 of the Constitution). A breach was also alleged of the right to equal protection of rights before courts and other state authorities, entities exercising public powers and authorities of the autonomous province or local self-government (Article 36.1 of the Constitution). The Constitutional Court also considered provisions of the Public Information Law (Official Gazette, nos. 43/03, 61/05 and 71/09).

The Constitutional Court began by examining whether the civil proceedings that preceded the lodging of the constitutional appeal were altogether fair, as required by the Constitution. In its assessment of the fairness of the proceedings, the Court found that it was necessary to examine whether the courts in these proceedings, in applying substantive law, secured and established a fair balance between two conflicting values – the right to freedom of expression and the protection of the applicant's honour and reputation.

The Constitutional Court noted that the judgments under challenge contained a detailed statement of reasons explaining why there were no justifiable reasons to penalise the representatives of the media for publishing the text which the applicant suggested had damaged his honour and reputation. It was established during the civil case that the author of the text truly and authentically conveyed the statement of another person given in an interview, with that person's approval, without making any comments or allegations which would offend the applicant's honour and reputation and with due diligence. Moreover, when the text was published, the plaintiff (the applicant in the constitutional appeal) was a police officer involved in criminal proceedings and the interview was given by a citizen in the capacity of an injured person in the criminal proceedings. It had also been established that the text was published in order to inform the public about the work of civil servants (police officers) and that the applicant was not designated to be accountable anywhere in the text for the criminal offences regarding which he was involved in criminal proceedings. The presumption of his innocence had not been violated; in the course of the civil proceedings the plaintiff (the applicant in this matter) dropped the lawsuit against the person who gave the statement. As the statement of another person was accurately conveyed in the text, the source of the information was quoted and no personal comments or opinions were given by the journalist, sanctions for the views expounded by the interviewee would have seriously jeopardised the media's contribution to the discussion on issues of public importance, such as the work of civil servants (police officers in this case). The Constitutional Court assessed that a fair balance had been struck in the civil proceedings between two conflicting values – right to freedom of expression and the protection of the honour and reputation of an individual. The Constitutional Court found no indications of arbitrary, unfair or damaging application of the substantive law in relation to the applicant of the constitutional appeal. Neither were any elements identified indicating procedural unfairness in respect of guarantees within the right to a fair trial.

The Constitutional Court held that the individual acts under dispute were passed by courts established by law, which had determined the merits of the case within their competence and in proceedings conducted under the law, and had decided on the case by applying the appropriate provisions of substantive law. The courts had established that the text was published in line with the provisions of Article 3.2 of the Public Information Law and that the claim the plaintiff (the applicant in these proceedings) had lodged for compensation for immaterial damage as a result of the publication of the text, was therefore

unfounded. The applicant was given the possibility to exercise his procedural rights in the proceedings, to follow its course, to take legally permissible action and to lodge legal remedies.

The Constitutional Court found that the applicant's right to a fair trial guaranteed by Article 32.1 of the Constitution was not violated.

It also held that the applicant's right to equal protection before the courts under Article 36.1 of the Constitution was not violated; such a conclusion could not have been drawn from the judgments under dispute or the evidence submitted. The applicant offered no evidence to suggest that the courts had acted differently in the same factual and legal situation, which would have given rise to a finding of a breach of the right to equal protection before the courts. Similarly, the applicant's claims that the parties were in unequal positions throughout the proceedings due to a dominant and dictatorial regime by the representatives of the authorities who assumed a protective attitude towards the newspaper's editorial staff could not be linked to the violation of a right under Article 36.1 of the Constitution. Equality of arms in proceedings is one of the elements of the right to a fair trial guaranteed by Article 32.1 of the Constitution, which the Court had previously established not to have been violated in respect of the applicant of the constitutional appeal.

Languages:

English, Serbian.



Slovakia

Constitutional Court

Statistical data

1 January 2010 – 30 April 2010

Number of decisions made: 715

- Decisions on the merits by the plenum of the Court: 4
- Decisions on the merits by Court panels: 104
- Number of other decisions by the plenum: 9
- Number of other decisions by panels: 584

Important decisions

Identification: SVK-2010-1-001

a) Slovakia / **b)** Constitutional Court / **c)** Plenum / **d)** 23.09.2009 / **e)** PL. ÚS 14/06 / **f)** / **g)** *Zbierka zákonov* (Official Gazette), 2/2010; *Zbierka nálezov a uznesení Ústavného súdu Slovenskej republiky* (Official Digest), 90/2009; www.concourt.sk / **h)** CODICES (Slovak).

Keywords of the systematic thesaurus:

1.2.1.3 Constitutional Justice – Types of claim – Claim by a public body – **Executive bodies.**

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

1.3.4.13 Constitutional justice - Jurisdictions – Types of litigation – **Universally binding interpretation of laws.**

1.5.4.2 Constitutional Justice – Decisions – Types – **Opinion.**

4.4.3.2 Institutions – Head of State – Powers – **Relations with the executive powers.**

4.10.5 Institutions – Public finances – **Central bank.**

Keywords of the alphabetical index:

President, powers, limits, parliamentary regime.

Headnotes:

The President of the Slovak Republic, as Head of State, reviews the legally enshrined criteria for the qualifications of a candidate for the post of Vice-Governor of the Central Bank and should reject the candidate's application if, in his or her evaluation, candidate's qualifications do not meet these criteria.

Summary:

I. Under Article 128 of the Constitution the Constitutional Court has the power to issue an authoritative and universally binding interpretation of constitutional law (including the Constitution) at the request of listed public bodies if there is a dispute over differing interpretations of the constitutional law.

According to Article 102.1.h of the Constitution, the President appoints and dismisses high ranking public officials if this is prescribed by law.

Under the Law on the Central Bank, the President appoints the Vice-Governor of the National Bank of Slovakia (Central Bank) on the proposal of the government and with the consent of parliament.

In 2006, the government, with the consent of parliament, put forward a candidate for the position of Vice-Governor of the Central Bank. The President rejected this nomination claiming that the candidate did not have the necessary qualifications required by the Law on the Central Bank, namely five years' experience in the area of monetary policy. The government did not agree with this decision and sought an authoritative interpretation of Article 102.1.h of the Constitution from the Constitutional Court. It should be noted that the candidate did not, in fact, have the requisite experience.

The government argued that the President did not have the power to review the necessary qualifications of the nominee. It pointed out that it had chosen the candidate in accordance with the qualification criteria enshrined within the Law and the application was then reviewed by the Parliament applying sort of "authentic interpretation" of "its" Law. The power of the President is merely formal in nature, and its purpose is to verify whether the government and parliament acted legally, in accordance with proper procedure.

The government also observed that the Slovak Republic is a parliamentary democracy. The President performs certain executive powers. The government noted the necessity to distinguish between the executive and non-executive powers of the President. It gave a contrasting

example. The President has executive power as commander-in-chief of the Army and may therefore appoint and dismiss generals. On the other hand, the President has no executive powers in monetary policy. When appointing the Vice-Governor, he or she is limited to confirming previous procedure.

II. The Court began by pointing out that, under the Constitution, the President is a part of the executive power. Both the government and President belong to the executive power, but there is no hierarchy between them. The President has two types of power: one type can only be performed on the motion of another public body; the other may only be carried out at the discretion of the President.

Aside from the specific powers related to the appointment and dismissal of officials, Article 102 of the Constitution contains a general clause enabling the President to appoint and dismiss other public officials, if this is stated within a law. Such delegation is contained within the Law on the Central Bank, which states that on the proposal of the government with the consent of parliament, the President appoints the Vice-Governor of the National Bank. This appointment is carried out in conjunction with other public bodies.

The Court stressed that the Central Bank is an independent body, not subordinated to government. The participation of parliament and government in the appointment of the Vice-Governor guarantees the democratic legitimacy of the Central Bank, which is otherwise a politically independent body.

Textual analysis of Article 102 as a whole shows that there are three types of presidential powers:

1. "may" powers,
2. "must" powers, and finally
3. powers which are simply "carried out".

The power to appoint a Vice-Governor falls within the third category. It is impossible to discern solely from the text whether the President has some discretion.

The Court examined Czechoslovak and Slovak constitutional history. In the pre-war Czechoslovak Republic all acts of the President had to be countersigned. After the Communist *coup d'état*, the 1948 Constitution made provision for counter-signature, but only for law on the statute-book. Later, in the 1960 Constitution, the President was responsible to parliament and counter-signing did not exist. The original wording of the 1992 Slovak Constitution adopted the latter concept of presidential powers. This was modified by the 2001 amendment, which introduced countersigning for listed powers.

Some powers, therefore, are carried out by the President on his or her own political line. In carrying out these powers, the President's role cannot be considered as formalistic or confirmatory.

The Court further argued that the President, like all public bodies, is bound by law and the principle of legality. He or she cannot ignore the fact that a candidate does not meet the criteria set out in the Law. Moreover there is no sort of "authentic interpretation" of the Law by parliament which is binding on the President.

Finally the Court emphasised that the presidential power to review the necessary qualifications differs from the application of political discretion over a nominee.

The Constitutional Court accordingly formulated a binding interpretation of Article 102.1.h whereby the President, as Head of State, reviews the legally enshrined criteria for the qualifications of a candidate for the post of Vice-Governor of the Central Bank and should reject the candidate's application if, in his or her evaluation, candidate's qualifications do not meet these criteria.

Languages:

Slovak.



Slovenia

Constitutional Court

Statistical data

1 January 2010 – 30 April 2010

The Constitutional Court held 22 sessions over this period (12 plenary and 10 in chambers: 2 in civil chambers, 4 in penal chambers as well as in administrative chambers). It received 109 new requests and petitions for the review of constitutionality/legality (U-I cases) and 822 constitutional complaints (Up cases).

In the same period, the Constitutional Court decided:

- 152 cases (U-) in the field of the protection of constitutionality and legality, in which the Plenary Court made:
 - 28 decisions and
 - 124 rulings

The Constitutional Court also resolved 571 cases in the field of the protection of human rights and fundamental freedoms (5 decisions and 34 rulings rendered by the Plenary Court, 5 decisions and 527 rulings rendered by a Chamber of three judges).

Decisions are published in the Official Gazette of the Republic of Slovenia, whereas the rulings of the Constitutional Court are not generally published in an official bulletin, but are notified 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-2010-1-001

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 01.10.2009 / **e)** Up-2155/08 / **f)** / **g)** *Uradni list RS* (Official Gazette), 82/2009 / **h)** *Pravna praksa*, Ljubljana, Slovenia (abstract); CODICES (Slovenian, English).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Deceased / Respect for the dead / Personality, right.

Headnotes:

The expression of reverence by the relatives of a deceased person is protected within the framework of their right to mental integrity, which is a personality right protected by the Constitution. There are many instances where the right to reverence, the intensity of the experience and an individual's feelings may be offended, and in such cases extremely delicate issues are often touched upon. Courts must therefore carefully review each individual case to assess whether it falls within the scope of such protection and whether the alleged interference constitutes a violation of this right, taking into account all the circumstances of the case. The standpoint that the right to reverence is already guaranteed for individuals if they can visit the grave of the deceased is too narrow and runs counter to Article 35 of the Constitution.

Summary:

The Court of First Instance dismissed the applicants' claim against a municipal utility company for compensation for non-pecuniary damage due to interference with the right to reverence for the deceased. The Higher Court dismissed their appeal and upheld the First Instance Court's position on the

fact that an urn niche had had to be moved by twenty centimetres when it had to be opened because of the funeral of the applicants' father, did not result in prejudice to the applicants' right to dignified preservation of the memory of their deceased parents by means of visits to their grave.

The applicants argued that, by its conduct, the defendant violated their memory of the personality of their deceased parents (i.e. their reverence) and alleged violation of constitutional procedural guarantees (Articles 22, 23 and 25 of the Constitution). In their view, they had not had the chance to exercise their right to judicial protection or to a full dialogue in terms of content with a court, either at first or second instance. The courts allegedly did not answer any of the allegations the applicants put forward in their claim and on appeal; neither did they substantiate their legal standpoints. The applicants also alleged that the courts departed from the case-law.

The right of the relatives of a deceased person to express reverence is protected within the framework of their personality rights, more precisely within the framework of the personality right to one's mental integrity. Personality rights and an individual's privacy are protected by Article 35 of the Constitution. Reverence is respect for and the memory of the personality of the deceased, which individuals cherish according to their beliefs. The purpose of the right to reverence is also the posthumous protection of the personality of the deceased, their dignity, and the desire that the decisions they took during their lifetime will be respected after their death. If, in such instances the mental integrity of those who were closest to the deceased is also hurt, they may take action, to protect their own interests as well as those of the deceased.

In this case, the courts adopted the standpoint that the right to reverence is already guaranteed for individuals if they are able to visit the deceased's grave. Their distress, pain, and fury (which would indicate that the event had upset them and that it had provoked a certain emotional reaction) did not seem to be of significance to the courts from the perspective of the right to reverence. The courts held that the anger and feelings of helplessness of the applicants due to the defendant's conduct, which was contrary to their deceased father's wishes, did not constitute a legally recognised damage. The Constitutional Court found that this type of substantive definition of the right to reverence is too narrow in terms of the requirements which derive from Article 35 of the Constitution. As the applicants pointed out, a grave is not merely a place of physical proximity to the deceased. The right to reverence is not just satisfied by visits to the grave, but it assures relatives that the deceased are resting in peace, the conviction that the inviolability of their mortal remains and their

graves are being respected, that their passing is being respected, and that the wishes expressed during their lifetimes are respected. The standpoint that the right to reverence is guaranteed for individuals if they can visit the grave of the deceased therefore entails a violation of Article 35 of the Constitution. The Constitutional Court abrogated the challenged judgments in the contested part and referred the case for fresh adjudication.

Languages:

Slovenian, English (translation by the Court).



Identification: SLO-2010-1-002

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 01.10.2009 / **e)** Up-3871/07, U-I-80/09 / **f)** / **g)** *Uradni list RS* (Official Gazette), 88/2009 / **h)** *Pravna praksa*, Ljubljana, Slovenia (abstract); CODICES (Slovenian, English).

Keywords of the systematic thesaurus:

3.10 General Principles – **Certainty of the law.**
 3.12 General Principles – **Clarity and precision of legal provisions.**
 5.3.13.12 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to be informed about the decision.**

Keywords of the alphabetical index:

Proceedings, criminal / Judgment, final / Statute of limitation.

Headnotes:

The finality of a decision has an important influence on the rights of defendants in criminal proceedings, including human rights and fundamental freedoms. In accordance with the Criminal Procedure Act, the most important moments and phases of criminal proceedings, as well as the consequences for individuals, depend on legal finality. This applies not only in terms of the circumstances which arise for an individual upon conviction, but also in terms of his or her legitimate expectation that once the determined

time period has elapsed, the matter is finally settled and the state is no longer able to prosecute. With the finality of a judgment comes the expectation that questions of fact and of law are deemed to be finally resolved and that criminal proceedings are closed, as the case at issue is *res judicata*.

Summary:

By a final judgment, the applicant was convicted of the criminal offence of endangering safety. A fine was imposed and he was ordered to pay the costs of the criminal proceedings. He lodged a constitutional complaint against a Supreme Court judgment which had dismissed his appeal in which he argued that a breach of his constitutional rights had occurred due to the fact that the judgment issued by the Court of Second Instance was not sent to his address before the expiry of the "absolute" period of limitations.

The applicant alleged a violation of Article 22 of the Constitution (equal protection of rights in judicial proceedings) and referred to Constitutional Court Decision no. Up-762/03, regarding the Court's perspective on the constitutional significance of the institution of the absolute statute of limitations adopted therein. The Constitutional Court held in this decision that with regard to the purpose of the Statute of Limitations, it is not sufficient for a state authority to issue a decision before the period of limitation expires. Those affected by the decision must also be given the chance to acquaint themselves with its content before the limitation period expires, and the state authority must take all necessary acts to enable them to do so. This means that the state authority must, at least, send the decision to their address within the period of limitation. The applicant claimed that the Supreme Court paid no heed to this point and instead proceeded on the basis that the judgment becomes final on the date the decision is adopted at a session of the Appellate Court.

In the course of its decision process on the constitutional complaint, the Constitutional Court initiated proceedings for the review of the constitutionality of the Criminal Procedure Act (hereinafter, the "CPA"). Under this Act, the most important moments and phases of criminal proceedings, as well as the consequences for individuals, depend on legal finality. This applies not only in terms of the circumstances which arise for an individual upon conviction, but also in terms of his or her legitimate expectation that once the determined time period has elapsed, the matter is finally settled and the state is no longer able to prosecute.

There is a general provision regarding the point at which a judgment becomes final in Article 129 of the

CPA. This states that a judgment is to be considered final when it can no longer be challenged by an appeal or if an appeal is not allowed. This provision, however, only refers to the formal finality of a judgment. The precise point at which a judgment becomes final, which a court cannot reverse and which enables the appellant to become acquainted with it for the first time, cannot be established through the interpretation of the provisions regulating the rendering and announcement of decisions, or those which regulate appellate proceedings, or by the decision of the Court, on appeal.

As there is no provision within the CPA to regulate the point in time at which a judgment becomes final, this deficiency in the regulation would allow the conclusion to be drawn that a judgment becomes final on the date it is adopted. However, Article 113.1 of the CPA, which regulates the manner of consideration and voting, does not allow this conclusion. According to the established case-law, a panel may change a decision that has already been adopted by a new vote until the decision is publicly announced, or if it is not announced, until a written decision is sent. This also applies in cases where a court of second instance makes the decision during a session. In such cases, a decision is not announced, even if it has been adopted at an appellate session at which the parties were also present.

The CPA does not, therefore, regulate the statutory framework surrounding the point in time when a judgment becomes final. Article 129.1 of the CPA is of no assistance either, as it is open to two interpretations. This is unacceptable for individuals as subjects of criminal proceedings from the viewpoint of legal certainty and the principle of trust in the law. The CPA is accordingly inconsistent with Article 2 of the Constitution. The Supreme Court judgment also had to be abrogated, as it breached Article 22 of the Constitution.

Languages:

Slovenian, English (translation by the Court).



Identification: SLO-2010-1-003

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 11.11.2009 / **e)** U-I-248/08 / **f)** / **g)** *Uradni list RS* (Official Gazette), 95/2009 / **h)** *Pravna praksa*, Ljubljana, Slovenia (abstract); CODICES (Slovenian, English).

Keywords of the systematic thesaurus:

3.4 General Principles – **Separation of powers.**
 3.9 General Principles – **Rule of law.**
 4.5.4.2 Institutions – Legislative bodies –
 Organisation – **President/Speaker.**

Keywords of the alphabetical index:

Decision, judicial, non-execution.

Headnotes:

The National Council does not directly perform authoritative functions. On the basis of its tasks determined by the Constitution, it co-operates with the National Assembly within the framework of performing the legislative function. Therefore, in order for the National Council to work effectively, its President must be available at all times so that the National Council can respond promptly to the activities of the National Assembly. A regulation which does not ensure that this will happen could be an obstacle to the performance of the management responsibilities of the President of the National Council, which is a constitutional role.

Summary:

The National Council, submitted for the second time a request for the review of the constitutionality of the Act Amending the National Council Act (hereinafter, the "NCA-A"), to the extent that it regulates the non-professional performance of the office of the President of the National Council. The Constitutional Court had already decided upon the constitutionality of the contested act following the National Council's previous request. It established, in Decision no. U-I-332/05, dated 4 October 2007, that Articles 1 and 3 of the NCA-A were inconsistent with the Constitution, to the extent that they referred to the office of the President of the National Council. The Constitutional Court required the National Assembly to remedy this inconsistency within six months of the publication of the decision in the Official Gazette of the Republic of Slovenia. However, an amendment with such an effect on the professional office of the President of the National Council requires a two-thirds majority vote, which the deputies were unable to achieve, despite the Government's support for the draft laws tabled by the National Council and the fact that it had itself prepared a draft law to amend the National Council Act. As the National Assembly had not remedied the inconsistency with the Constitution, the applicant again sought an assessment of the constitutionality of the same act.

In Decision no. U-I-332/05 the Constitutional Court adopted the standpoint that in order for the National

Council to work effectively, it is essential to ensure that its President is available at all times so that the National Council can respond promptly to actions by the National Assembly. A regulation which does not ensure such could constitute an obstacle to the performance of the management responsibilities of the President of the National Council, a constitutional role. The Constitutional Court accordingly held that the challenged regulation of the non-professional office of the President of the National Council is inconsistent with the constitutional position of this body, as set out in Articles 96 and 97 of the Constitution.

By not acting in such a way as to fulfil the obligations which follow from the decision of the Constitutional Court and directly from the Constitutional Court Act, the legislature is in grave violation of the principles of a state governed by the rule of law and the principle of the separation of powers. This principle means that none of the branches of power may interfere with the powers of another branch of power, and also that none of them should omit to perform activities which it is obliged to perform within its sphere of activities – especially when such duty is imposed by a judicial decision. Not respecting judicial decisions entails denying the rule of law and the establishment of unrestrained and unlimited arbitrariness.

Having reviewed the regulation once again, the Constitutional Court held that the reasons still existed for its ruling (in Decision no. U-I-332/05) that the NCA-A is unconstitutional. In the case at issue, a new declaratory decision would be unreasonable, as the unconstitutional state of affairs would be maintained. It therefore resolved to reinforce its decision, abrogated the statutory regulation and determined that, with effect from the day following the publication of the decision in the Official Gazette, the President of the National Council was to perform his office professionally. This is a provisional implementation measure, pending the enactment of necessary legislation. Until then, the statutory regulation is inconsistent with the Constitution and this unconstitutionality must be remedied. It makes no provision for the regulation of the office of the President of the National Council or the rights which stem from this office, and, because of the effects of the abrogation, it contains no provisions regulating the performance of the office of the President of the National Council.

Languages:

Slovenian, English (translation by the Court).



South Africa Constitutional Court

Important decisions

Identification: RSA-2010-1-001

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 02.02.2010 / **e)** CCT 78/09; [2010] ZACC 2 / **f)** Moloi and Others v. Minister for Justice and Constitutional Development and Others / **g)** <http://41.208.61.234/uhtbin/cgisirsi/20100424130837/SIRSI/0/520/J-CCT78-09> / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

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:

Charge, right to be informed about.

Headnotes:

Including a statutory presumption that has been declared constitutionally invalid in a charge sheet may, depending on the circumstances, cause the accused prejudice so as to vitiate a conviction.

Summary:

I. The applicants were convicted on charges of dealing in drugs. Their charge sheets contained reference to presumptions under Section 21.1 of the Drugs and Drug Trafficking Act which imposed a reverse onus on accused persons if certain facts were established. These presumptions had been struck down as constitutionally invalid years before. This defect in the charge sheets was not corrected, nor was it commented on in the trial courts. However, there was no indication that the trial courts relied on these presumptions in convicting the applicants.

The applicants sought direct access to the Constitutional Court to have their convictions set aside as a result of the defective charge sheets.

II. The Court held that the inclusion of a presumption in a charge sheet that had been declared to be unconstitutional has the potential to cause prejudice to the accused which may be sufficient to vitiate the charge. However, this complaint had not been investigated in the trial court or on appeal to the High Court. The Court therefore signalled this issue but declined to act as a court of first and last instance in the matter, referring it to the lower courts for further investigation.

Supplementary information:

Legal norms referred to:

- Sections 1, 5.b, 13, 17, 18, 20, 21, 22 and 25 of the Drugs and Drug Trafficking Act 140 of 1992;
- Section 35.3 of the Constitution, 1996;
- Section 86 of the Criminal Procedure Act 51 of 1977.

Cross-references:

- *S v. Bhulwana; S v. Gwadiso*, *Bulletin* 1995/3 [RSA-1995-3-008].

Languages:

English.



Identification: RSA-2010-1-002

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 23.02.2010 / **e)** CCT 54/09; [2010] ZACC 4 / **f)** Albutt v. Centre for the Study of Violence and Reconciliation and Others / **g)** <http://www.constitutional.court.org.za/uhtbin/hyperion-image/J-CCT54-09A> / **h)** CODICES (English).

Keywords of the systematic thesaurus:

4.4.3.2 Institutions – Head of State – Powers – **Relations with the executive powers.**

4.4.3.3 Institutions – Head of State – Powers – **Relations with judicial bodies.**

Keywords of the alphabetical index:

Convicted person, pardon, right to apply / Convicted person, amnesty, right / Pardon, legal nature / Political offence, pardon / President, pardon.

Headnotes:

The President's exercise of the power to grant pardons must be rationally connected to the objectives sought to be achieved by it.

Summary:

I. The Truth and Reconciliation Commission (hereinafter, the "TRC") was established in the mid-1990s to hear applications for amnesty from those who had committed politically motivated crimes during the apartheid era. Through this process, the TRC sought to encourage nation building and national reconciliation. Victim participation was central to this aim, as victims of politically motivated crimes were given an opportunity to make representations on amnesty applications.

For political and historical reasons, many prisoners convicted of politically motivated crimes did not apply for amnesty before the TRC concluded its work. In 2007, the President announced that it was necessary to deal with this "unfinished business" of the TRC by establishing a special dispensation process (hereinafter, the "SDP") to consider applications for presidential pardons from these prisoners. In a speech before Parliament, the President stated that the SDP's objectives were to promote national unity and national reconciliation and that this process would "uphold and be guided by the principles, criteria and spirit that inspired and underpinned the process of the Truth and Reconciliation Commission". This commitment was repeated in documents explaining the SDP to the public.

However, when the process was formally constituted, no opportunity was afforded to victims of these crimes to make representations. Various non-governmental organisations launched an application in the High Court, seeking to interdict the President from deciding pardon applications under the SDP until the victims had been given the opportunity to make representations. The High Court found that these victims were entitled to make representations before the President could exercise his power to grant pardon. The High Court reasoned that the exercise of the presidential power to pardon under the Constitution constitutes administrative action and was therefore subject to the constitutional guarantee of fair administrative action. The High Court accordingly granted an interdict preventing the President from considering any application for pardon

under the SDP until the rights of the victims to participate in the process had been determined.

Mr Albutt, a pardon applicant under the SDP, approached the Constitutional Court for leave to appeal against the order of the High Court. The applicant contended that the President's exercise of the power to grant pardon was an executive power, not an administrative act, and therefore there was no obligation on the President to afford the victims a hearing. The State supported this stance.

II. The Constitutional Court considered it unnecessary to reach the question whether the granting of presidential pardons amounts to administrative action. Instead, it confined its analysis to the rationality of the President's scheme. The Court held that, in accordance with the spirit of the TRC process, the participation of victims was crucial to achieving the stated objectives of promoting national unity and national reconciliation. The exclusion of victims from the process was therefore not rationally linked to the objectives sought to be achieved by it. For these reasons, the Court dismissed the appeal.

The Court was careful to note that this finding applies only to pardon applications under the SDP, and does not give victims a general right to make representations on all pardon applications.

III. In a concurring judgment, Justice Froneman draws a link between the tradition of participatory democracy in African societies, the TRC process and the objectives of the SDP.

Supplementary information:

Legal norms referred to:

- Sections 33, 83.c, 84 and 237 of the Constitution, 1996;
- Section 1 of the Promotion of Administrative Justice Act 3 of 2000;
- Promotion of National Unity and Reconciliation Act 34 of 1995.

Cross-references:

- *The Affordable Medicines Trust and Others v. Minister of Health and Others*, Bulletin 2005/1 [RSA-2005-1-002];
- *Azanian Peoples Organisation (AZAPO) and Others v. President of the Republic of South Africa and Others*, Bulletin 1996/2 [RSA-1996-2-014];
- *The President of the Republic of South Africa and Others v. the South African Rugby Football Union and Others*, Bulletin 1999/2 [RSA-1999-2-005];

- *The Pharmaceutical Manufacturers Association of South Africa and Another In re: Ex Parte Application of the President of the Republic of South Africa and Others*, Bulletin 2000/1 [RSA-2000-1-003];
- *Fedsure Life Assurance Ltd and Others v. Greater Johannesburg Transitional Metropolitan Council and Others*, Bulletin 1999/1 [RSA-1999-1-001];
- *The President of the Republic of South Africa and Another v. Hugo*, Bulletin 1997/1 [RSA-1997-1-004];
- *The Minister for Justice and Constitutional Development v. Mqabukeni Chonco and 383 Others*, Bulletin 2009/3 [RSA-2009-3-013];
- *Zondi v. Member of the Executive Council for Traditional and Local Government Affairs and Others*, Bulletin 2005/3 [RSA-2005-3-013].

Languages:

English.



Identification: RSA-2010-1-003

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 09.03.2010 / **e)** CCT 59/09; [2010] ZACC 6 / **f)** International Trade Administration Commission v. SCAW South Africa (Pty) Ltd / **g)** <http://41.208.61.234/uhtbin/cgiirsi/20100429080615/SIRSI/0/520/J-CCT59-09> / **h)** CODICES (English).

Keywords of the systematic thesaurus:

- 2.3 Sources – **Techniques of review.**
- 3.4 General Principles – **Separation of powers.**
- 4.6.2 Institutions – Executive bodies – **Powers.**
- 4.16 Institutions – **International relations.**

Keywords of the alphabetical index:

Import, duty / Court, interim order / International law, domestic law, relationship / International obligation / Judicial restraint / Judicial review, minimal intrusion / Policy, financial / Trade, regulation / Policy decision, reviewability / World Trade Organisation.

Headnotes:

A court may not extend the lifespan of an anti-dumping duty beyond the maximum period specified in international law and domestic legislation.

Summary:

I. As a party to the World Trade Organisation Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (hereinafter, the “Anti-Dumping Agreement”), South Africa has enacted legislation governing the requirements and procedures for imposing anti-dumping duties on goods imported into the country.

The domestic legislation empowers a government minister to impose anti-dumping duties on the recommendation of a statutory body, the International Trade Administration Commission (ITAC), which investigates the appropriateness of any anti-dumping duties. According to the Anti-Dumping Agreement and the domestic legislation, an anti-dumping duty terminates 5 years after its imposition. However, ITAC can undertake a “sunset review” on the request of an interested party before the lapse of this period to determine whether the anti-dumping duty should be renewed. This extends the lifespan of the anti-dumping duty until the finalisation of the review. However, the Anti-Dumping Agreement and the domestic legislation provide that no sunset review or related investigation can take longer than 18 months. The result is that the maximum lifespan of an anti-dumping duty is 5 years and 18 months unless a formal decision is taken to extend it.

In this case, a local producer unsuccessfully applied to ITAC for a sunset review of a previously imposed anti-dumping duty. To the local producer’s dismay, ITAC recommended that the anti-dumping duty should not be extended. The local producer then obtained an urgent interdict in the High Court that prevented ITAC from forwarding its recommendation to the Minister and also prohibited the Minister from considering ITAC’s recommendations. The High Court also ordered that the anti-dumping duty remain in effect pending the outcome of the litigation. The effect was that the anti-dumping duty was to remain in force beyond the 5 years and 18 months maximum period.

II. The Constitutional Court unanimously overturned the interim interdict, finding that the High Court had no authority to extend the lifespan of the anti-dumping duty.

The Court held that the High Court's order was appealable even though it was an interim order. In so doing, it clarified the test for the appealability of interim orders, holding that the test must be context-sensitive, guided by what is in the interests of justice.

On the main issue, the Court held that, on a purposive interpretation, the Anti-Dumping Agreement and domestic legislation prohibit a court from extending the lifespan of an anti-dumping duty beyond the prescribed 5 years and 18 month maximum period. It emphasised that anti-dumping duties are short-term, punitive measures against offending imports that are to remain in effect only as long as is necessary to prevent injurious dumping. Allowing courts to extend anti-dumping duties beyond their statutorily determined lifespan would lead to a routine breach of international obligations on account of the laxity or tardiness of domestic authorities. This would make it impossible to effectively police or enforce the international law obligations created by the Anti-Dumping Agreement to the economic detriment of World Trade Organisation member-states, foreign producers and domestic consumers. Therefore, while a party would not be barred from seeking judicial review of decisions relating to anti-dumping duties, a court does not have the power to extend the lifespan of an anti-dumping duty beyond that permitted by the Anti-Dumping Agreement and domestic law.

The Court considered that the High Court's order breached the separation of powers by prohibiting the Minister from carrying out his legislatively assigned duties. The decision to impose, extend, amend or remove an anti-dumping duty involves complex policy considerations. As a result, it is patently an executive function that flows from the power to formulate and implement domestic and international trade policy. The Court held that there was no justification for the High Court to intrude into the executive domain by granting the interim order, and therefore it was an impermissible breach of the separation of powers.

Supplementary information:

Legal norms referred to:

- Constitution of the Republic of South Africa, 1996;
- International Trade Administration Act 71 of 2002;
- Anti-Dumping Regulations made in terms of the International Trade Administration Act 71 of 2002;
- World Trade Organisation Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade.

Cross-references:

- *Ex Parte* Chairperson of the Constitutional Assembly: *In Re* Certification of the Constitution of the Republic of South Africa, 1996, *Bulletin* 1996/3 [RSA-1996-3-016];
- *Doctors for Life v. Speaker of the National Assembly and Others*, *Bulletin* 2006/2 [RSA-2006-2-008].

Languages:

English.



Spain

Constitutional Court

Important decisions

Identification: ESP-2010-1-001

a) Spain / **b)** Constitutional Court / **c)** Plenary / **d)** 25.06.2009 / **e)** 155/2009 / **f)** Dolores Vallejo Marchal / **g)** *Boletín oficial del Estado* (Official Gazette), 181, 28.07.2009; www.boe.es/boe/dias/2009/07/28/pdfs/BOE-A-2009-12518.pdf / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

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:

Penalty, enforcement / Individual petition / Case-law, reversal.

Headnotes:

Applications for constitutional protection concerning fundamental rights are only admissible if their content is of particular constitutional importance, in accordance with the new wording of Article 50.1.b of the Implementing Act on the Constitutional Court, which has been in force since 2007.

“Constitutional importance” is a substantive condition without which no application for constitutional protection can be declared admissible, and whose existence only the Constitutional Court is empowered to appraise in each individual case.

In view of the eminently open and indeterminate nature of the concept of “constitutional importance”, and having regard to the criteria laid down in law for appraising it, the Constitutional Court has a fairly wide margin of manoeuvre in deciding whether the content of an application for constitutional protection justifies a decision on the merits under a constitutional court judgment.

The present application for constitutional protection was declared admissible on the grounds that it raised

a question concerning a fundamental right which would permit the Constitutional Court to clarify or modify its case-law, thus corresponding to the concept of “particular constitutional importance”.

The application for constitutional protection was lodged with the Plenary Assembly of the Constitutional Court in order to clarify and specify constitutional case-law on the complex issue involved, to clear up any doubts subsisting in this case-law, and to conduct a fresh examination of the point at issue (Articles 10.1.n and 13 of the Organic Act on the Constitutional Court).

The principle of legality prohibits courts from handing down a sentence exceeding, in terms of seriousness, nature or amount, the penalty applied for by the public prosecutor or any other party prosecuting. Contrary to previous case-law, this applies whether or not the sentence passed by the criminal court complies with the limits established in law.

Summary:

A woman was sentenced to eight days’ house arrest for theft without violence or housebreaking (Article 623.1 of the Penal Code). Under the criminal proceedings, the prosecutor had applied for a fine of € 6 per day for forty-five days.

In its Judgment no. 155/2009, the Constitutional Court upheld the application for constitutional protection lodged by the applicant and quashed the criminal-law decision, with a dissenting opinion from two of its members. Previous constitutional case-law had held that criminal courts could not pass a sentence exceeding the penalty applied for by the prosecution in any given set of proceedings, provided that the penalty imposed complied with the limits laid down by law for the offence in question. In its Judgment no. 155/2009 the Constitutional Court decided to improve the defence of the rights of the accused and the guarantee on the impartiality of the court by declaring that the criminal court could not pass a sentence exceeding, in terms of seriousness, nature or amount, the penalty applied for by the public prosecutor in a given set of proceedings.

Consequently, the penalty imposed in the instant case infringes the principle of legality, particularly in terms of the correlation between the prosecution submissions and the sentence, because the penalty of house arrest is heavier than the penalty applied for by the public prosecutor, i.e. a € 270 fine.

In its Judgment no. 155/2009, the Constitutional Court first of all considers the new regulations on applications for constitutional protection introduced

under Organic Act no. 6/2007 of 24 May 2007 reforming the Organic Act on the Constitutional Court, focusing particularly on the new precondition for declaring such applications admissible, i.e. that their “particular constitutional importance” should justify a decision on the merits of the case.

The Constitutional Court affirms in its judgment that the Constitution (Articles 161.1.b and 53.2) confers on the legislator extensive powers for determining the procedure for submitting applications for constitutional protection. It can therefore establish the admissibility conditions which it considers appropriate. Following the reform introduced under Organic Act no. 6/2007 of 24 May 2007, an application for constitutional protection is one of the instruments for the protection of fundamental rights listed in Article 53.2 of the Constitution. However, it is no longer enough for applicants to claim an infringement of a fundamental right or public freedom subject to protection for their application to be declared admissible; the content of the application must now also be of particular constitutional importance.

In its judgment, the Constitutional Court considers the new Article 50.1.b of its Organic Act, and proposes a list of cases in which the content of the application takes on “particular constitutional importance”.

- a. where there is no constitutional case-law on the fundamental right in question;
- b. where it would be useful to clarify or modify constitutional doctrine on a particular fundamental right following the occurrence of social or legislative changes or amendments to the case-law of the supervisory bodies of the international human rights treaties;
- c. where the violation of the fundamental right originates in an act;
- d. where a reiterated judicial interpretation of the law infringes the Constitution;
- e. where contradictory judicial decisions are delivered on the fundamental right in question or the courts fail generally and repeatedly to comply with constitutional case-law;
- f. where a judicial body manifestly fails to comply with its duty to respect the doctrine of the Constitutional Court; or
- g. where the problem addressed far transcends the case before the court and raises important social economic or political questions.

The Constitutional Court judgment stresses that this list of cases is not exhaustive. Given the dynamic nature of the exercise of constitutional jurisdiction, it cannot be precluded the future emergence of new cases in respect of which certain concepts must be

further clarified or constructed, potential cases redefined, new cases added or some cases originally mentioned eliminated.

In the instant case, the application is obviously of particular constitutional importance in that constitutional doctrine on the requirement of a correlation between the prosecution and the judgment, where the sentence is concerned, which emerges uniformly from most of the decisions given on this matter by the Constitutional Court, is very far from being applied in an absolute manner in certain other decisions, and has even on occasion given rise to heated debate within the Constitutional Court and contradictory views from its members. This problem should therefore be re-examined and the relevant constitutional doctrine specified or clarified.

Cross-references:

In its Judgment no. 70/2009 of 23.03.2009, the Constitutional Court asserts that all applications for constitutional protection which raise a question on which there is no constitutional doctrine must be considered as being of particular constitutional importance.

Languages:

Spanish.



Identification: ESP-2010-1-002

a) Spain / **b)** Constitutional Court / **c)** First Chamber / **d)** 18.05.2009 / **e)** 123/2009 / **f)** Antonio Larumbe Domingo / **g)** *Boletín oficial del Estado* (Official Gazette), 149, 20.06.2009; www.boe.es/boe/dias/2009/06/20/pdfs/BOE-A-2009-10256.pdf / **h)** CODICES (Spanish).

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:

Proceedings *in absentia* / Extra-territorial effect / Extradition.

Headnotes:

A heavy criminal sentence passed at the close of proceedings *in absentia* must be reviewable in order to guarantee the exercise of the citizens' right to be heard and defend themselves before the courts. This right is recognised in Article 24.2 of the Constitution.

Fundamental rights have a hard core which is universal in scope. The Spanish courts must under no circumstances declare valid or effective decisions which are taken by public authorities in foreign States and which attack or significantly endanger this hard core of rights available to all citizens, if they wish to avoid infringing the Constitution indirectly.

Citizens who lodge applications for constitutional protection must produce the evidence and put forward the relevant legal grounds required, which provide the reasonable basis for their applications, in accordance with their duty to co-operate with the Constitutional Court.

Summary:

In 2001, Mr Larumbe was sentenced by an Italian court to twelve years' imprisonment for a drug-trafficking offence. Being absent from the proceedings, the accused was sentenced *in absentia* in accordance with Italian legislation. After his arrest in Madrid (Spain), he was extradited to the Italy for trial. Once he had been handed over to the authorities in Italy in 2003, however, he was immediately imprisoned to serve his sentence. In 2006, he was transferred to Spain in order to serve a residual sentence in pursuance of the European Convention on the Transfer of Sentenced Persons.

In the judgment in question, the Constitutional Court recalls that the absolute content of the right to a fair trial (Article 24.2 of the Constitution) precludes sentencing accused persons *in absentia* in criminal proceedings relating to very serious offences, unless they are subsequently granted the right to a fair trial (Constitutional Court Judgment no. 91/2000 of 30 March 2000).

In the instant case, however, there is no reason to consider whether this doctrine should be applied at the time the sentenced person was serving his sentence in a Spanish prison. In its Judgment no. 123/2009, the Constitutional Court rejected the

application for constitutional protection lodged by the sentenced person on the grounds that he had neither mentioned nor proved, as he ought to have done, in his application that he had been deprived of the opportunity to defend himself effectively in Italy. It is apparent from his original application that he merely requested the Perugia court to declare his extradition and the sentence enforcement null and void, whereas the court manifestly lacked jurisdiction to take such a decision.

Cross-references:

- Constitutional Court Judgment no. 91/2000 of 30.03.2000;
- European Convention on the Transfer of Sentenced Persons, done at Strasbourg on 21.03.1983 (ETS no. 112).

Languages:

Spanish.

*Identification: ESP-2010-1-003*

a) Spain / **b)** Constitutional Court / **c)** Second Chamber / **d)** 21.05.2009 / **e)** 126/2009 / **f)** Iniciativa internacionalista – La solidaridad entre los pueblos / **g)** *Boletín oficial del Estado* (Official Gazette), 149, 20.06.2009; www.boe.es/boe/dias/2009/06/20/pdfs/BOE-A-2009-10259.pdf / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

- 4.5.10.4 Institutions – Legislative bodies – Political parties – **Prohibition.**
- 4.9.5 Institutions – Elections and instruments of direct democracy – **Eligibility.**
- 5.3.13 Fundamental Rights – Civil and political rights – **Procedural safeguards, rights of the defence and fair trial.**
- 5.3.19 Fundamental Rights – Civil and political rights – **Freedom of opinion.**
- 5.3.41 Fundamental Rights – Civil and political rights – **Electoral rights.**

Keywords of the alphabetical index:

Terrorism / Election, electoral coalition / Political party, programme.

Headnotes:

In Spain, a political party cannot be prohibited on the grounds that it defends a certain ideology, on the basis of the constitutional principle of political pluralism and the fundamental rights linked to the latter, because ideologies are free (Articles 1.1 and 16 and related provisions of the Constitution).

A political party may be declared illegal and/or dissolved if it is proven to be the instrument of a criminal or terrorist organisation: where a party takes part in criminal or violent activities or intimidation, it infringes its constitutional purpose, which is to channel the popular will (Article 6 of the Constitution).

In order to preserve the full effectiveness of the prohibition of a political party, courts are empowered by law to prohibit other political parties and nullify electoral candidatures intended to take over the activities of such prohibited parties.

Nullification of coalition candidatures for the elections to the European Parliament infringes the Constitution unless it can be proved, via judicial proceedings, that the coalition in question is succeeding or taking over the activities of political parties which have already been declared illegal. The simple fact of sharing the same ideology cannot constitute grounds for prohibition.

The dissolution of a political party is not accompanied, in respect of its leaders, members or electors, by any deprivation of their individual rights, given that such rights can only be restricted under a criminal conviction.

The fact that candidates for an election have not explicitly condemned terrorism does not on its own prove that the coalition in question is subordinate to a terrorist group.

The short deadlines set for the electoral procedure before the courts and the limits imposed on the use of evidence are justified by the principles of expedition, brevity and concentration of the phases in this type of proceedings, in which a decision must be reached before the beginning of the electoral campaign. Nevertheless, it is urgent and necessary for the legislator to ensure that the relevant proceedings respect the constitutional safeguards.

Summary:

The Spanish Government and Public Prosecutor's Office requested the Supreme Court to declare the nullification of the candidatures to the 7 June 2009 European Parliament elections of the electoral coalition entitled *Iniciativa internacionalista – La solidaridad entre los pueblos* (Internationalist initiative-solidarity among the peoples), made up of the political parties *Izquierda Castellana* and *Comuner@s*.

In its decision of 16 May 2009, the Supreme Court nullified the said candidatures, thus preventing the candidates from standing for election, on the grounds that they were taking over the activities of political parties, which had been declared illegal under the Supreme Court judgment of 27 March 2003 (*Herri Batasuna, Euskal Herritarrok* and *Batasuna*), which were considered as instruments of the terrorist organisation *Euskadi Ta Askatasuna* (ETA). In its Judgment no. 126/2009, the Constitutional Court declares that this judicial decision infringes the fundamental rights of the coalition to participate in public affairs and the freedom of ideology (Articles 23 and 16 of the Constitution), in that the only proven link between the electoral coalition and the parties declared illegal is an ideological one. Consequently, the said coalition was authorised to stand freely for the European elections.

In its judgment, the Constitutional Court considered questions of two types, viz substantive and procedural:

1. In order to nullify an electoral candidature, it is not sufficient to believe that the candidature is intended to get round the prohibition of a political party; proof must be provided that the candidature aims to succeed or take over the activities of the party declared illegal in terms of:

- a. its structures, organisation and functioning;
- b. the individuals occupying, directing and managing the candidatures;
- c. the origin of its financial or material resources;
- d. any other relevant circumstances.

a. In the instant case, no proof was ever provided that the candidature was intended to succeed the prohibited party, from the angle either of its organisation or of its structure. The documents of the terrorist organisation seized by the police make no reference to the prohibited electoral coalition or the parties which it comprises. Furthermore, these documents explicitly reject the idea of using political parties which are not part of the Basque radical separatist left wing. *Izquierda Castellana* and

Comuner@s are Castilian (not Basque) political parties, although they also belong to the extreme and/or radical left-wing and defend the right of national minorities to self-determination. Extreme left-wing Basque nationalism, as an ideology, is not prohibited under Spanish law. Moreover, it cannot be prohibited by virtue of the political pluralism and the fundamental rights linked to the Spanish legal system. Ideologies are free. The fact of sharing an ideology does not on its own prove that a given candidature succeeds a political party which has been declared illegal.

b. Nor does any document prove that there is any economic, financial or material connection between the electoral coalition and the parties that have been declared illegal or the terrorist organisation.

c. The prohibition of a political party in no way entails, in respect of its leaders, members or electors, the deprivation of their individual rights. Such rights can only be restricted under a criminal conviction. The thesis that the whole coalition was “contaminated” by the fact that some of its candidates or supporters were members of parties or candidatures declared illegal is totally invalid. Supporters of an electoral candidature are not controlled by the candidate in question, and such support merely reflects the fact that his or her participation in the election is desired by certain individuals. It should also be noted that the right to support a given candidature is an individual right of the person expressing his or her support. This right can only be restricted under a criminal conviction. The other information available in the present case on the promoters and candidates only proves that there is some degree of ideological collusion. No one can blame the coalition for attempting to pick up the votes obtained in other elections by a party declared illegal, since these votes are just as legitimate as any others in a democratic system in which all ideas have their place. Any other approach would be tantamount to a serious infringement of political pluralism, which is a fundamental value in a democratic constitutional State. The State can defend the system of freedoms against anyone attempting to destroy it by violent means; but it can only do so by legal means, drawing on definite facts and information that has been duly verified. To critics of State based on the rule of law, this is the latter’s most serious and dangerous weakness. However, the opposite shows precisely the whole legitimacy and the real value of a State governed by the rule of law.

d. The fact that the coalition did not comment on terrorist violence is insufficient on its own to justify restricting its right to political participation under conditions of equality with other political parties, and

the right to defend and promote a given ideology. It might also be noted that in the proceedings brought before the Constitutional Court, the coalition condemned and even rejected the use of any violent means of achieving political objectives in a democratic State.

2. The shortness of the deadline set for the coalition’s defence to make its submissions (only 24 hours) and the fact that only documentary evidence was admitted, did not infringe the fundamental rights to effective judicial protection, to a trial with all the requisite guarantees and to the means of proof (Article 24 of the Constitution). These restrictions are justified by the need to reconcile judicial safeguards with the expedition of the electoral procedure, so as not to impede the running of the elections. Furthermore, the coalition at no stage explained how it considered its rights to have been infringed, apart from the short deadline, or what kind of evidence it had been prevented from producing. At all events, it must be stressed that the coalition had the opportunity to present this evidence before the Constitutional Court, which it failed to do. Nevertheless, in its Judgment no. 126/2009 the Constitutional Court recalls that the electoral disputes proceedings were introduced in order to decide less complex disputes than the present case, and stresses that the legislator should endeavour to reform this procedure in order to bring it into line with constitutional guarantees and rights.

Supplementary information:

Organic Act no. 6/2002 of 27 June 2002 on political parties provides that parties considered as instruments of terrorist organisations are illegal. With a view to preserving the full effectiveness of the prohibition of a political party, the same Act empowers the judicial authorities to prohibit political parties and nullify electoral candidatures which are geared to taking over from parties that have been declared illegal.

Organic Act no. 5/1985 of 10 June 1985 on the general electoral system governs the declaration of and challenges to electoral candidatures.

In pursuance of the Law on political parties, the Supreme Court, in its judgment of 27 March 2003, dissolved the “Basatuna”, “Herri Batasuna” and “Eusakal Herritarrok” political parties on the grounds that they were instruments of the ETA terrorist organisation. The Constitutional Court subsequently declared these decisions constitutional. Between 2003 and 2009 the Supreme Court declared other political parties illegal and nullified various electoral candidatures geared to taking over from the said parties. Judgment no. 126/2009 of the Constitutional

Court was the first to find in favour of electoral candidatures which had been nullified on the grounds that they perpetuated the activities of a political party that had been declared illegal, and thus enabled those concerned to stand for election.

The European Court of Human Rights has declared that the prohibition of “Basatuna”, “Herri Batasuna” and “Eusakal Herritarrok” and of various candidatures endeavouring to take over from these parties complies with the European Convention on Human Rights.

Cross-references:

- Constitutional Court Judgment no. 48/2003 of 12.03.2003, no. 85/2003 of 08.05.2003, no. 5/2004 and n°6/2004 of 16.01.2004, no. 112/2007 of 10.05.2007 and no. 43/2009 of 12.02.2009.
- Judgement of the European Court of Human Rights, 30.06.2009 *Herri Batasuna and Batasuna v. Spain* (cases nos 25803/04 and 25817/04); *Etxeberría and others v. Spain* (case n° 35579/03); and *Herritarren Zerrenda v. Spain* (case no. 43518/04).

Languages:

Spanish.



Identification: ESP-2010-1-004

a) Spain / **b)** Constitutional Court / **c)** First Chamber / **d)** 15.06.2009 / **e)** 140/2009 / **f)** Kleber Reinerio Zaruma Narváez / **g)** *Boletín oficial del Estado* (Official Gazette), 172, 17.07.2009; www.boe.es/boe/dias/2009/07/17/pdfs/BOE-A-2009-11917.pdf / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950**.
 5.3.13.18 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Reasoning**.
 5.3.33 Fundamental Rights – Civil and political rights – **Right to family life**.

Keywords of the alphabetical index:

Expulsion / Residence permit.

Headnotes:

Any administrative resolution which orders the expulsion from Spain of a foreign national without a valid residence permit, but fails to provide reasons why this sanction is preferable to the fine generally stipulated in current legislation, infringes the fundamental right to effective judicial protection (Article 24.1 of the Constitution).

A foreign national's family situation can prevent his or her expulsion from the national territory by virtue of the right to private and family life recognised by Article 8.1 ECHR. Similarly, the United Nations Convention on the Rights of the Child requires administrative authorities to safeguard the best interests of children when adopting measures potentially affecting the latter.

The Spanish Constitution provides that its rules on fundamental rights must be interpreted in accordance with the Universal Declaration of Human Rights and the relevant international treaties and agreements ratified by Spain (Article 10.2). Furthermore, Article 39.1 of the Constitution stipulates that the public authorities must ensure the social, economic and legal protection of the family.

Summary:

A foreign national was expelled from the national territory on the grounds that he did not have the requisite documents to reside in Spain. Under the administrative proceedings brought against him, he had requested the imposition of the sanction generally provided for in such cases under the Law on aliens' rights, namely a fine rather than expulsion. He alluded in his submissions to his steady relationship with a person holding a residence permit, as evidenced by the municipal register of unmarried couples in the Municipality of Pamplona, and to the fact that he had four under-age children with this person who attended schools in the said municipality. The administration merely replied that it was not incumbent on them to take account of his personal circumstances. The Administrative Court subsequently nullified the expulsion order and replaced this sanction with a fine. The Court of Appeal, however, confirmed the expulsion, ruling that the grounds of expulsion were genuine. It merely referred to the content of the administrative file, asserting that the seriousness of the facts justified the sanction and that the appellant's family situation was immaterial.

In its Judgment no. 149/2009, the Constitutional Court granted the applicant its protection on the grounds that the challenged sanction, which had merely noted the pure and simple existence of the offence, failed to specify the grounds on which, in the instant case, expulsion was preferable to a fine. The Constitutional Court confined itself to quashing the appeal decision, which was tantamount to considering final the decision given at first instance by the court, setting aside the administrative expulsion order.

In its judgment, the Constitutional Court incorporates the case-law of the European Court of Human Rights under which the person's family situation can be taken into account to prevent expulsion: enforcement of such a measure is liable to be disproportionate to the legitimate aim pursued, namely that of safeguarding public order, thus infringing the right to private and family life as recognised by Article 8 ECHR. Similarly, the Constitutional Court quotes in its judgment Article 3.1 of the United Nations Convention on the Rights of the Child, which provides that in all actions concerning children by administrative authorities the best interests of the child must be a primary consideration.

Supplementary information:

Organic Act no. 4/2000 of 11 January 2000 on the rights and freedoms of foreign nationals in Spain and their social integration (amended on several occasions) generally provides that offences must be sanctioned with a fine; it adds that in some cases "it is possible to replace this fine with a sanction of expulsion from Spanish territory" (Articles 55 and 57). Article 55.3 expressly stipulates that the competent body must apply certain proportionality criteria in order to graduate the sanctions.

Cross-references:

- Judgements of the European Court of Human Rights, 02.08.2001, *Boultif v. Switzerland* and 17.04.2003, *Yilmaz v. Germany*.

Languages:

Spanish.



"The former Yugoslav Republic of Macedonia" Constitutional Court

Important decisions

Identification: MKD-2010-1-001

a) "The former Yugoslav Republic of Macedonia" / b) Constitutional Court / c) / d) 10.02.2010 / e) U.br.84/2009 / f) / g) *Sluzben vesnik na Republika Makedonija* (Official Gazette), 26/2010, 23.02.2010 / h) CODICES (Macedonian, English).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Election, candidacy, restriction / Election, disqualification / Election, ineligibility.

Headnotes:

Culpability for submitting incorrect data from criminal records lies with the state authorities that keep the records, and this should not result in adverse consequences for the citizen, who has legitimate expectations that the state keeps correct criminal records on its citizens, which are of relevance in the exercise of their rights, and who did not expect the data kept on them in the criminal records to be incorrect.

Summary:

Xhavid Rushani from the village of Zajas, Municipality Kichevo, filed a request with the Constitutional Court for the protection of the freedoms and rights under Article 110.3 of the Constitution. He claimed that by passing the resolution rejecting his candidacy for mayor of the municipality, the Municipal Electoral Commission of Zajas violated his right to political

activity, since this resolution was based on false data regarding his criminal record. The authorities charged with maintaining criminal records (the Court and the Ministry of Internal Affairs) did not update his criminal records and failed to erase information on criminal proceedings against the applicant, after the entry into force of the Law on Amnesty, by virtue of which the criminal proceedings against him were suspended.

The Constitutional Court, having discussed and analysed the facts of the case, held that the applicant's right to political activity had been breached, as a result of the failure to accept his candidacy for the position of Mayor of the Zajas Municipality at the local elections held in March 2009.

The Constitutional Court noted that, by its Resolution KS. no. 80/03 of 12.03.2003, the Skopje Court of Appeal suspended the criminal proceedings against the applicant before the Skopje 1 Skopje Basic Court under reference K. no. 1149/01 upon the act of indictment of the Skopje Basic Public Prosecutor's Office KO. no. 2143/01 of 18.08.2001. The criminal offence was the unauthorised possession of weapons or explosives under Article 396.2 in conjunction with paragraph 1 of the Criminal Code and proceedings were suspended due to the existence of a legal ground envisaged in Article 1.1 of the Law on Amnesty ("Official Gazette of the Republic of Macedonia", no. 18 of 08.03.2002). This fact was not taken into consideration by the Zajas Municipal Electoral Commission and the Administrative Court in their deliberations as to whether the applicant fulfilled the conditions to stand as a mayoral candidate, defined in Article 7.2.4 of the Electoral Code. As a result, it was incorrectly established that he had been sentenced to a prison term of one year for the offence for which he had been granted an amnesty, and consequently his candidacy for mayor was dismissed.

The data on criminal convictions, according to the instruction by the State Electoral Commission, was only requested from and provided by the Ministry of Internal Affairs. In the course of the proceedings, it was proved that the Ministry had not updated its records. Instead, information could have been obtained from the prospective candidate's local court, a body legally authorised to maintain criminal records. In the applicant's case, this would have shown that there was no legal act of indictment in force against him (reference was made to the certificate issued by the Kichevo Basic Court, Kr. no. 222/2009 of 06.02.2009) and that judgment had not been passed on the territory of the Kichevo Basic Court. The above certificate was issued to the applicant for his own personal needs and could not be used for other

purposes. This clearly led to an incorrect conclusion by the electoral bodies that the applicant did not satisfy the legally prescribed conditions for running for the position of mayor, as a result of which his candidacy was rejected.

The Constitutional Court also noted that the Zajas Municipal Electoral Commission (being the competent body for conducting the elections), and the Administrative Court (as the competent court to decide in administrative litigation on the legality of the individual acts adopted in the electoral procedure), missed the opportunity to correct the error that had occurred due to incorrect data from the criminal records, and to establish the correct facts of the case, which is their legal obligation. Furthermore, proof of amnesty was submitted within the deadline for applications for the position of mayor from which it was clear that their initial conclusion was that the applicant met the conditions for candidacy as mayor. Yet they failed to act on the information and as a result, caused the applicant to lose his right to take part in the elections for mayor of the Zajas Municipality held in March 2009, thereby violating his right to associate and act politically.

According to the Court, in the conduct of the electoral procedure the Zajas Municipal Electoral Commission and the Administrative Court were obliged to interpret and apply the law in favour of the citizen, and not to his or her detriment, as was the case here. They were obliged to establish the correct facts relevant to the case, and, therefore, to accept and appraise the evidence that was submitted to them during the procedure, given that pursuant to Article 66.4 of the Electoral Code, the list of candidates for mayor is submitted by the authorised proposers to the competent electoral commission at least thirty-five days before the date of the elections. The cut-off date here was 15 February 2009, as the elections were scheduled for 22 March 2009. From the documentation submitted to the Constitutional Court, it is undisputed that on 12 February 2009, the applicant, Xhavid Rushani, had submitted to the State Electoral Commission and to the Municipal Electoral Commission in Zajas, the Resolution of the Skopje Court of Appeal KS. no. 80/03 of 12.03.2009 and a certificate from the penal records, as proof that there were no legal obstacles in the way of his candidacy. As a result, the evidence demonstrating that the applicant met the legally defined conditions to stand as a mayoral candidate was submitted within the legal time limit. According to the Court, the Municipal Electoral Commission – Zajas and the Administrative Court were obliged to accept and appraise the evidence offered which refuted the only argument in disfavour of his candidacy.

The state, through its institutions, had allowed incorrect data from the criminal records to stand in the way of the exercise by a citizen of his passive electoral right, in this case, to participate in the elections for mayor of the Zajas Municipality as a candidate who met the legal conditions for nomination to this position. The Court therefore found that the dismissal of the candidacy of the applicant as a result of inaccuracies in the criminal records resulted in a breach of his right to political association and activity of this person. In accordance with the regulations, an organised group of citizens stood behind his nomination. Having established the breach of his right to political activity, the Court directed the repeal of the final and effective Resolution of the Municipal Electoral Commission – Zajas.

Languages:

Macedonian.



Identification: MKD-2010-1-002

a) “The former Yugoslav Republic of Macedonia” / **b)** Constitutional Court / **c)** / **d)** 24.03.2010 / **e)** U.br.42/2008 / **f)** / **g)** *Sluzben vesnik na Republika Makedonija* (Official Gazette), 45/2010, 01.04.2010 / **h)** CODICES (Macedonian, English).

Keywords of the systematic thesaurus:

3.3 General Principles – **Democracy**.
 3.10 General Principles – **Certainty of the law**.
 4.6.9.2.1 Institutions – Executive bodies – The civil service – Reasons for exclusion – **Lustration**.
 5.3.29 Fundamental Rights – Civil and political rights – **Right to participate in public affairs**.
 5.3.31 Fundamental Rights – Civil and political rights – **Right to respect for one's honour and reputation**.

Keywords of the alphabetical index:

Lustration, law, holders of public office.

Headnotes:

The case concerned provisions of the Lustration Law and its application to holders of public office in the period after the adoption of the 1991 Constitution, as well as provisions relating to the publication of the names of those who cooperated with the state security organisations in the Official Gazette, and the application of these provisions to holders of posts in public office, political parties, citizens' associations and religious organisations.

Summary:

Three individuals and one NGO asked the Court to review the constitutionality of the Law on Determination of an Additional Condition for the Performance of a Public Office (Official Gazette nos. 14/2008 and 64/2009), hereinafter, the “Lustration Law”, in its entirety, together with selected articles of the Law.

The applicants argued that the Lustration Law had an ideological-political character, and was an undesirable and negative example of legislation that has a retroactive impact, and that it violated fundamental rights and freedoms. It condemned the entire social-political system from 1944 to the present day, and the provision of the Lustration Law that states that it will be applied only to holders of public office or candidates for those positions in the next five years “spoke volumes” about the nature of this Law. They also claimed that there were no constitutional grounds to adopt the Lustration Law, and, as a result, it was unsustainable in the constitutional order of the Republic of Macedonia. One of the applicants claimed that the offices of the President and the office of a judge at the Constitutional Court are public offices for which the conditions for election are defined by the Constitution and for which there is a constitutional guarantee for an unobstructed performance of competences. The stipulation of additional conditions by the Lustration Law for these offices was an interference in a matter that has solely a constitutional character.

Under Article 2.1 of the Lustration Law, an additional condition was imposed on holders of public office or candidates for those positions. In the period prior to the adoption of the Declaration of the Antifascist Assembly of the National Liberation of Macedonia (ASNOM) for the fundamental rights of the citizen of Democratic Macedonia at the First Session of ASNOM on 2 August 1944 until the date of entry into force of this Law, they must not have been registered in the dossiers of the state security bodies and the civilian and military bodies of the SFRY state security as collaborators or secret informers in the operational collection of information

and data that were the subject of processing, maintenance, and use by the state security bodies, in the form of automated or manual collection of data and dossiers, created and kept for certain persons, with which fundamental rights and freedoms were violated or restricted for political or ideological reasons.

Under Article 8 of the Lustration Law, the Commission shall, *ex officio*, promptly and without debate, establish with a resolution the failure of the candidate for a holder of a public office or the holder of a public office to submit a written statement and publish it in the "Official Gazette of the Republic of Macedonia".

Pursuant to Article 13, the Commission shall, immediately after the conclusion of the procedure for verification of the facts before the Commission (that is, if a procedure was conducted before a competent court after the court decision became effective) publish in the Official Gazette the first name, the father's name, and the last name of the person who cooperated with the state security bodies.

Article 34.1 of the Lustration Law allows political parties to impose an additional condition on holders of party office, members of organs, employees in the expert services and candidates for these positions. Paragraph 2 of this Law allows associations of citizens and foundations to impose an additional condition, in line with the Law, on holders of management positions, members of organs, employees in expert services and candidates for these positions. Paragraph 3 of the same Law allows religious communities and religious groups to do the same.

The Court assessed the extension of the temporal scope of the Law, defined in Article 2 of the Law, to the period after 1991. Previously, the law only applied to those individuals who violated or restricted fundamental rights and freedoms for political or ideological reasons in order to realise material advantage or benefits in employment or promotion in the previous social-political system, which was based on a one-party rule and a legal system under which victims could not exercise their rights and perpetrators were not properly punished. After 1991, when the current Constitution was adopted, a democratic system was established on the basis of the separation of powers, with the protection of human rights and freedoms at its core, as a fundamental value of the constitutional order, on the basis of which normative rules and institutions have been established in order to protect human rights and freedoms. The Court found that the temporal extension was not constitutionally justified. The present national Constitution provides the cornerstone for the building of a democratic society in

which the rule of law and the protection of human rights and freedoms are elevated to the level of fundamental values of the constitutional order, as a result of which the inclusion of this period in the Law actually means the negation of the values and institutions established in the Republic of Macedonia in accordance with the current Constitution. This also casts doubts over the functioning of the legal system, that is, the rule of law, as a fundamental value of the current social-political system.

Lustration is a method of dealing with the past, with a view to highlighting and eliminating the potential for further violation of human rights in the current social-political system. It should apply to the period when people were able to violate human rights and misuse them for their own purposes, in the absence of established constitutional and legal mechanisms to sanction them. This would indicate that lustration should not apply to the period when the state has built a new social-political system, based on human rights and their protection. The principle of a democratic society under the rule of law implies that breaches of human rights should be sanctioned within the framework of an established and lasting legal system, and not by measures of an occasional and temporal nature, which is the case with the Lustration Law in the given historical circumstances.

The Court further noted that the solution referred to in Article 8 of the Lustration Law, whereby the names of persons who have failed to submit a statement are to be published in the Official Gazette, *ex officio* by the Commission and without a debate, is a violation of citizens' dignity, moral, and personal integrity, enshrined in Articles 11 and 25 of the Constitution. The Lustration Law also provides that the failure by a holder of a certain office or a candidate for that post to submit a statement will result in the public announcement of his or her name in a public medium. No enquiry is made into the reasons behind the failure to submit the statement and no arrangements are made to conduct proceedings to establish the facts about this person's cooperation with the secret services. This results in indiscriminate, unchecked and public stigmatisation of that person as a former associate or informer, as somebody who ordered or made use of information in order to abuse or restrict human rights and freedoms for ideological or political reasons and who gained personal or material advantage as a result. The Court found this state of affairs to be unconstitutional and a disproportionate solution, as it exceeds the justification of the stipulation of the special condition for the performance of public office. It also entails disrespect for the moral integrity and dignity of the citizen.

The Court also found that the stipulation of a possibility in Article 34 of the Lustration Law for the obligation to provide a statement (in other words, an additional condition for the performance of a public function which will also apply to those who carry out party-related duties for political parties, belong to associations of citizens and foundations and religious communities and religious groups) results in the interference by the state in their work. This oversteps the constitutional guarantees for citizens of freedom of association for the purposes of exercising and protecting their political, economic, social, cultural, and other rights and convictions. It also entails violation of the constitutional determination for the separation of the church, religious communities and religious groups from the state.

As a consequence, the Court repealed Article 2.1 in the part: "until the date of entry into force of this Law", Article 8 in the part: "and publishes it in the "Official Gazette of the Republic of Macedonia", Articles 13 and 34 of the Lustration Law.

Languages:

Macedonian.



Turkey Constitutional Court

Important decisions

Identification: TUR-2010-1-001

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 14.01.2010 / **e)** E.2009/27, K.2009/150 / **f)** Concrete Review of Law no. 492 (The Act on Fees) / **g)** *Resmi Gazete* (Official Gazette), 17.03.2010, 27524 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

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

5.3.13.12 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to be informed about the decision.**

Keywords of the alphabetical index:

Court fee, non-payment / Judgment, final, deprivation.

Headnotes:

The prohibition on the delivery of a final judgment to litigants until legal fees have been settled violates the right to a fair trial.

Summary:

I. Several first instance courts asked the Constitutional Court to assess the compliance with the Constitution of Articles 28 and 32 of the Act on Fees (Law no. 492, 02.07.1964). Under Article 28.b of this Act, final judgment will only be delivered to parties to the proceedings upon settlement of legal fees. Under Article 32, unless the fees are paid, the ensuing matters will not be proceeded with. The first instance courts expressed concern that these provisions of Law no. 492 prevent the parties who win the case from executing the judgment, despite the fact that they themselves are not obliged to pay legal fees, as this burden must be shouldered by the losing party under the law. They claimed that these

provisions violated the right to access to the courts, and were therefore in breach of Articles 2, 5, 10, 35, 36 and 90 of the Constitution.

II. The Constitutional Court emphasised that Article 36 of the Constitution bestows a universal right to litigation, either as a plaintiff or defendant, and the right to a fair trial before the courts through lawful means and procedures. It stressed too that a state governed by the rule of law respects the right to a fair trial. The right to access to a court, which forms part of the right to a fair trial, comprises the right to obtain judgment. The Court ruled that the payment of legal fees is the responsibility of the losing party under the law and refusing to deliver final judgment to the winning party deprives him or her of their right to execute the judgment and breaches the right to a fair trial. The Court accordingly found Article 28 of Law no. 492 to be in conflict with Articles 2 and 36 of the Constitution and unanimously directed its repeal. The Court rejected the unconstitutionality claim regarding Article 32 of the Law on the basis that the provision does not encroach on the litigants' rights to continue proceedings by paying fees, since the responsibility for paying fees will be determined by the Court at the end of the case.

Languages:

Turkish.



Ukraine Constitutional Court

Important decisions

Identification: UKR-2010-1-001

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 12.01.2010 / **e)** 1-rp/2010 / **f)** Regarding official interpretation of Article 99.3 of the Civil Code / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 3/2010 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

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

5.4.3 Fundamental Rights – Economic, social and cultural rights – **Right to work.**

Keywords of the alphabetical index:

Company, board, members / Company, organisational power.

Headnotes:

The provision of Article 99.3 of the Civil Code whereby “the members of an executive body may be removed at any time” should be understood as the right of a competent body of the company to remove a member or members of the executive body at any time and on any grounds provided the statutory documents of the company do not specify such reasons.

Removal of a member of the executive body of the company under the above provision is not a suspension of an employee in the meaning of Article 46 of the Labour Code.

Summary:

A limited liability company called the “International Financial Legal Consulting” asked the Constitutional Court for an official interpretation of Article 99.3 of the Civil Code and an explanation as to whether the removal of members of the executive body of the company from performing their duties by virtue of Article 99.3 falls within the category of cases of the suspension of an employee by an owner or the body

authorised by him or her which is set out in the legislation and stipulated in Article 46 of the Labour Code.

Under Articles 41.1 and 42.1 of the Constitution, everyone is entitled to own, use and dispose of his or her property, and the results of his or her intellectual, creative and entrepreneurial activity, provided this is not prohibited by law. These constitutional rights can be exercised in particular through companies which are divided into entrepreneurial and non-entrepreneurial (Articles 83.1, 83.2, 84, 85 and 86 of the Civil Code). All companies have property which is an object of management activity and information about this property must be included in their charter documents (Article 88.2 of the Civil Code).

The management of a company is performed by its bodies – a general assembly of its members and an executive body unless otherwise provided by law (Article 97.1 and 97.2 of the Civil Code). In those companies regarding which the law provides for the establishment of an executive body, the latter is charged with carrying out the management activity. Article 99 of the Civil Code sets out the basic provisions regarding the order of establishment, the activities, the name of the organisation, its authority and the means of removal of its members. The mentioned norms are set out in Chapter 7 “Basic Provisions on a Legal Entity” of the Civil Code and, pursuant to Article 83.4 of this Code, are applied to all companies, unless other regulations for separate types of companies are provided for by law.

Systematic analysis of the provisions of the Civil Code (Articles 99, 145, 147, 159 and 161), the Commercial Code (Article 89), the Law on Economic Companies (Articles 47, 62 and 63), the Law on Joint Stock Companies (Articles 52, 58, 59, 60 and 61) shows that a company’s executive body deals with all matters pertaining to day-to-day activity apart from those matters which fall under the remit of the general assembly of members of the company or another of its organs. In carrying out management activity, the executive body implements the collective will of the members of the company, who are the bearers of corporate rights. The head and other members of the executive body are obliged to act exclusively in the interests of the company and its members while managing the company within the limits of the rules established in the statutory documents (Article 92.3, second sentence of Article 161.1.3 of the Civil Code).

In compliance with Article 13.4 of the Constitution, the State ensures the protection of all subjects’ rights of property and economic management. The corporate rights of the members of the company are the object of such protection. These rights are protected in

particular in the manner envisaged by Article 99.3 of the Civil Code, according to which the members of the executive body may be removed at any time unless the statutory documents specify the reasons for their removal.

Pursuant to the provisions of the legislation regulating civil legal relations, specifically Articles 98.1 and 99.1 of the Civil Code, Article 23.1, Article 41.5.d, Article 59.1 of the Law on Economic Companies, the grounds for the acquisition of authority by an executive body of the company is the fact of its election (appointment) by the general assembly of members (shareholders) as the highest body of management of the company or, as stipulated by Article 58.5 of the Law on Joint Stock Companies, as a result of concluding an employment agreement with the members of the executive body. This agreement can be signed on the company’s behalf by the head of the supervisory board or a person authorised by the supervisory board.

The legal nature and ramifications of the removal of members of the executive body of a company (Article 99.3 of the Civil Code) or suspension of the head of the executive body (Article 61.2.1 of the Law on Joint Stock Companies) is different from the suspension of an employee on the grounds of Article 46 of the Labour Code. That is why the ability of an authorised body of the company to remove a member of the executive body is not set out in the Labour Code, but rather by Article 99 of the Civil Code. It does not fall under the remit of labour law.

The exercise by members of the company of their corporate rights to participate in the management of the company through the adoption of decisions by the relevant authority about the appointment, removal, suspension or recall of members of the executive body is also connected with their authority (or deprivation of authority) to manage the company. Such decisions by the authorised body do not fall within the framework of labour legal relations, but within corporate legal relations which arise between the company and the persons entitled to manage it.

Thus, under Article 99.3 of the Civil Code “removal” is an action by the authorised body of a company aimed at making it impossible for a member of the executive body to exercise his or her authority in the managerial sphere within the limits of corporate relations with the company. The need for such a norm depends on the special status of the member of the executive body who receives the right to manage from the authorised body of the company. Pursuant to the nature of corporate relations, the members of the company have the ability to react immediately to the activities of somebody exercising representative functions that damage the interests of the company by removing him or her.

In this regard the provisions of Article 99.3 of the Civil Code should be understood as a right of an authorised body of the company to remove a member of the executive body at any time, at its own discretion and on any grounds, provided that the statutory documents of the company do not specify the reasons of removal.

This form of protection is a special action of the bearers of the corporate rights in their relations with the person they entrusted with the management of the company. It should not be viewed in the context of labour law, in particular in terms of Article 46 of the Labour Code.

Languages:

Ukrainian.



Identification: UKR-2010-1-002

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 12.01.2010 / **e)** 2-rp/2010 / **f)** Concerning the constitutionality of the Resolution of the Cabinet of Ministers on “Some Issues of Disposal of Military Property” / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 5/2010 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

4.4.3.2 Institutions – Head of State – Powers – **Relations with the executive powers.**

4.4.3.6 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:

Military, equipment, fund / Property, right to dispose of / Cabinet of Ministers, powers.

Headnotes:

The compliance with the Constitution of certain items of a Resolution by the Cabinet of Ministers on issues arising from the disposal of military property.

Summary:

The President, pursuant to Article 106.1.15 of the Constitution, issued Decree no. 124, 6 March 2009 which curtailed the legal force of the Resolution of the Cabinet of Ministers on “Some Issues of Disposal of Military Property” no. 88, 11 February 2009 (hereinafter, the “Resolution”). The President then asked the Constitutional Court for an assessment of the constitutional compliance of the Resolution.

Under the Constitution, the Cabinet of Ministers is the highest authority within the system of executive bodies. It is guided in its activities by the Constitution and laws, as well as by Presidential decrees and resolutions of the Parliament (*Verkhovna Rada*) in accordance with the Constitution and laws. It takes measures to ensure the defence capability and national security and it exercises the management of state property in accordance with the law and other powers set out by the Constitution and laws (Articles 113, 116).

The Constitutional Court noted that under Article 25.1 of the Law on the Cabinet of Ministers, the Government, within the limits of funds allocated in the State Budget, can set up, re-organise and wind-up in accordance with the law, state economic associations, enterprises, organisations and establishments, in particular in order to fulfill certain functions for the management of state property.

In compliance with item 3 of the Regulation on procedures for the transfer and disposal of military property of the Armed Forces approved by the Resolution of the Cabinet of Ministers no. 1919, 28 December 2000 as amended (hereinafter, the “Regulation”) the Cabinet of Ministers, in the order prescribed, bestows on the subjects of economic activity the authority to dispose of military property which is suitable for other purposes, but is not suitable for the daily activities of military forces (apart from property mentioned in item 4 of the Regulation).

Thus, the decision of the Government to set up “*Ukrspetzhor*” and to give it the authority to dispose of specific military property in the domestic market was adopted within its authority and does not contravene Articles 6.2, 8.2, 19.2 or 113.3 of the Constitution.

The Constitutional Court predicated its decision on the fact that by winding-up the State Department of Excessive Property and Land, the Government terminated the legal force of acts which entitled state enterprises and organisations to dispose of military property in the domestic market which is suitable for other purposes, but which is no longer appropriate for

the daily activities of military forces pending the adoption of a separate decision.

In the view of the Constitutional Court, the termination of the legal force of these acts of the Cabinet of Ministers has not led to the illegal restriction of economic competition and the violation of the requirements of Article 42.3 of the Constitution.

The Constitutional Court observed that the provisions of item 7 of the Resolution concerning the inadmissibility of introducing amendments to the current contracts on the transfer and disposal of military property (especially the increase of the scope and the extension of the lists of this property) do not establish legal principles, guarantees of entrepreneurship or rules of competition and do not constitute norms of anti-monopoly regulation. They are aimed at implementing the current contracts in the context of a rearrangement of the procedure for the disposal of military property. Therefore, no violations to Articles 75 or 92.1.8 of the Constitution have occurred.

The Constitutional Court noted that the State Department of Excessive Property and Land is a governmental body of state management within the Ministry of Defence. When it passed the Resolution, the Cabinet of Ministers did not change the overall structure of the Armed Forces, but reorganised the Ministry of Defence which led to the elimination of the governmental body within its system – the State Department of Excessive Property and Land. The Government carried out this reorganisation in compliance with Article 116.9¹ of the Constitution according to which the Cabinet of Ministers is authorised to set up, re-organise and wind-up, in accordance with law, ministries and other central executive authorities, acting within the limits of funds allocated for the maintenance of executive authorities and Articles 22 and 25 of the Law on the Cabinet of Ministers.

In adopting the decision to eliminate the State Department of Excessive Property and Land, the Cabinet of Ministers did not violate the requirements of Article 85.1.22 of the Constitution.

The petitioner also sought a declaration recognising the Resolution as unconstitutional in its entirety, but only provided arguments supporting the unconstitutionality of Items 1, 2, 3, 6 and 7.

The absence of legal reasoning of statements concerning the constitutionality of separate provisions of the legal act is grounds to terminate the constitutional proceedings in the case in this part pursuant to Articles 39.2.4, 45.2 of the Law on the

Constitutional Court”(Item 1 §51 of the Rules of Procedure of the Constitutional Court).

Languages:

Ukrainian.



Identification: UKR-2010-1-003

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 17.02.2010 / **e)** 6-rp/2010 / **f)** Concerning constitutionality of the provisions of the Resolutions of the Cabinet of Ministers “Concerning State Migration Service”, “Concerning Organisation of Activities of the State Migration Service”, “On Introducing Amendments and Repeal of Acts of the Cabinet of Ministers” and the Order of the Cabinet of Ministers “Concerning Transition of the System of Natural Persons Registration from Paper-based to Electronic storage” / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 14/2010 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

4.6.3.1 Institutions – Executive bodies – Application of laws – **Autonomous rule-making powers.**

Keywords of the alphabetical index:

Immigration, procedure / Immigration, rule / Passport, issuing, powers.

Headnotes:

Ukraine is a democratic state, based on the rule of law. Its organs of state power are obliged to act only on the grounds, within the limits of authorities and in the manner envisaged by the Constitution and laws and their normative-legal acts must be adopted on the basis of and in compliance with the Constitution and laws (see Articles 1, 8.2 and 19.2 of the Fundamental Law).

Summary:

The Constitutional Court was asked to declare unconstitutional various provisions of the Regulation on the State Migration Service approved by the

Resolution of the Cabinet of Ministers on the State Migration Service no. 750, 17 July 2009:

- paragraph 3.1 which states that the main task of the State Migration Service is to participate in the formulation and implementation of state policy regarding the registration of natural persons;
- paragraph 3.3 which states that the main task of the State Migration Service is to systematically apply the law pertaining to the registration of the place of abode or temporary dwelling of natural persons, and the elaboration and submission of proposals for the improvement of this process;
- paragraph 3.4.2 which states that the main task of the State Migration Service is to organise the work on the issue of passports and other documentary identification for citizens residing in Ukraine;
- paragraph 3.4.4 and 3.4.5;
- paragraph 4.5;
- paragraph 4.8.2 concerning the preparation by the State Migration Service of proposals for the implementation of state policy regarding the registration of natural persons and the issue of passports;
- paragraph 4.11, 4.12;
- paragraph 4.13.4 to the effect that the State Migration Service provides for the formation of central and regional databases of issued and lost passports;
- paragraph 4.17;
- paragraph 5.4;
- paragraph 5.6 which provides for the right of the State Migration Service to monitor the compliance by bodies of executive power, citizens, enterprises, institutions and organisations with passport regulations and to submit proposals for the elimination of causes of non-compliance;
- paragraph 5.7 concerning the right of the State Migration Service to process and issue passports and other documentary identification to citizens;
- paragraph 2.2 recognising the State Migration Service as a specially authorised central body of executive power for the registration of natural persons;
- paragraph 2.3 determining the State Migration Service as a legal successor to the Ministry of Internal Affairs in terms of its authority over the registration of natural persons.

The relevant provisions of the acts of the Cabinet of Ministers, as amended in accordance with paragraph 1 of the Resolution of the Cabinet of Ministers on Introducing Amendments and Repeal of Acts of Cabinet of Ministers no. 810, 29 July 2009, namely:

- Rules for Processing and Issue of Ukrainian National Passport for Travelling Abroad and Child Travel Documentation, their Temporary Suspension and Seizure approved by the Resolution of the Cabinet of Ministers no. 231, 31 March 1995;
- Rules for Processing and Issuing Temporary Certificate on Ukrainian Citizenship approved by Resolution of the Cabinet of Ministers no. 1111, 17 July 2003;
- Resolution of the Cabinet of Ministers on Approval of the Rules for Processing and Issue by the Service for Citizenship, Immigration and Registration of Natural Persons of the Certificate of Ukrainian Citizenship” no. 491, 14 April 2004;
- Regulation on the Head Calculation Centre of the State Information System for the Registration and Documentation of Natural Persons approved by the Resolution of the Cabinet of Ministers no. 573, 29 April 2004;
- Regulation on the Ministry of Internal Affairs approved by Resolution of the Cabinet of Ministers no. 1383, 4 October 2006;
- Concept for the Development of the State Information System of Registration and Documentation of Natural Persons approved by Order of the Cabinet of Ministers no. 711, 17 June 2009.

The Cabinet of Ministers, as a superior body in the system of bodies of executive power, takes measures to ensure human rights and freedoms, public order and to combat crime (Articles 113.1, 116.1, 116.2 and 116.7 of the Constitution). In order to implement the provisions of the Fundamental Law, the Government directs its activities towards ensuring legality, fundamental rights and freedoms, combating corruption and facilitating other tasks in the fields of internal and external policy (Article 113.3 of the Constitution and Article 19.1 of the Law on the Cabinet of Ministers).

Paragraph 1 of the Resolution of the Cabinet of Ministers on the State Migration Service no. 750, 17 July 2009 (hereinafter “Resolution no. 750”) approves the Regulation on the State Migration Service. Under Article 116.9¹ of the Constitution and Article 20.1.6.5 of the Law on the Cabinet of Ministers (hereinafter the “Law”), the Cabinet of Ministers is entitled to set up, re-organise and liquidate, in accordance with the law, ministries and other central bodies of executive power, acting within the limits of funds allocated for the maintenance of such bodies, and is also empowered to approve regulations pertaining to them.

The State Migration Service is a specially authorised central body of executive power dealing with issues of migration, citizenship, immigration and the registration of natural persons (paragraph 2.2 of Resolution no. 750). Approval of regulations covering the Migration Service falls within the competence of the Government. Consequently, in this case the Cabinet of Ministers acted within the limits of its constitutional authority.

The Cabinet of Ministers is guided in its activity by the Constitution and laws, and by presidential Decrees and parliamentary Resolutions, which are adopted in accordance with the Constitution and the laws (Article 113.3 of the Constitution). Within the limits of its competence, the Cabinet of Ministers issues binding resolutions and orders (Article 117.1 of the Fundamental Law).

Pursuant to Article 5 of the Law on Citizenship, the documents which confirm Ukrainian citizenship are the national passport and, for those under sixteen years of age, the certificate of Ukrainian citizenship. In accordance with Article 10.1.14 of the Law on Police, the police are obliged to control the compliance of citizens and officials with the rules on the passport system as well as those covering entry into, leave to remain in and departure from Ukraine, as well as the transit through its territory of foreign citizens and persons without citizenship. Under Article 4.1 of the Law on the Rules on Entry and Leaving by Citizens, Ukrainian national passports for travelling abroad are processed upon request by the bodies charged with internal affairs.

Paragraph 3.1, 3.3, 3.4.2, 3.4.4 and 3.4.5 of the Regulation on the State Migration Service (the Regulation) approved by paragraph 1 of Resolution no. 750 set out the main tasks of the State Migration Service. These include involvement in the formulation and implementation of state policy on the registration of natural persons, working towards a systematic approach to legislation on the registration of residence or temporary abode by natural persons and the elaboration and submission, under established procedure, of proposals for the improvement of this process. The State Migration Service is also involved with the issue of passports and other documentary identification to citizens residing in Ukraine, assistance for persons who have lost this documentation, the conducting of reference and identity work, and setting up and ensuring the smooth running of the State Information System of Registration and Documentation of Natural Persons.

In accordance with paragraph 4.5, 4.8.2, 4.11, 4.12, 4.13.4 and 4.17 of the Regulation, the Migration Service organises the processing and issuance of

passports and other documentary identification to citizens and related activities and makes suggestions for the improvement of state policy in relation to this process. It also ensures the operation of regional passport offices and the setting up of central and regional databases on issued and lost passports, and issues arising from software and hardware at the State Information System of Registration and Documentation of Natural Persons as well as special equipment for the processing of passports and other documentary identification.

Paragraph 2 of the Resolution no. 750 stipulates that the Migration Service is a specially authorised central body of executive power for citizenship and the registration of natural persons. It is also the legal successor to the Ministry of Internal Affairs and the State Committee for Nationalities and Religions as regards their authority over this area (apart from combating illegal immigration and monitoring the compliance of citizens and officials with the passport regulations established by the legislation).

Furthermore, the Resolution of the Cabinet of Ministers on Introducing Amendments and Repeal of Acts of the Cabinet of Ministers no. 810, 29 July 2009 (hereinafter "Resolution no. 810") introduced amendments to the legislation on the processing and issuance of passports and other documentary identification to citizens residing in Ukraine.

Determination of the functions of the Ministry of Internal Affairs falls within the remit of Parliament (Article 85.1.22 of the Constitution). When the Cabinet of Ministers enacted the Resolutions in question, regarding the functions of the Migration Service in respect of the processing and issuing of passports and other documentary identification, it conferred on it the powers which were previously ascribed to the Ministry of Internal Affairs, and acted *ultra vires*. The Cabinet of Ministers violated Articles 19.2, 85.1.22, 92.1.12 and 120.2 of the Constitution. The provisions of Resolution no. 750 and the Resolution no. 810 regarding the processing and issuance of passports and other documentary identification to Ukrainian citizens residing in Ukraine, and the monitoring of the compliance of bodies of executive power, citizens, enterprises, institutions and organisations with passport regulations are incompatible with the Constitution.

Paragraph 4 of Cabinet of Ministers Resolution no. 750 transfers the state enterprises "The State Centre for Documents Personalisation" and "Document" to the administrative section of the Migration Service. Under Article 116.5 of the Constitution, the Cabinet of Ministers must administer state property in accordance with the law. Under Article 5.1 of the Law on the

Administration of Objects of State Property, the Cabinet of Ministers determines state property the administration of which is to be transferred to other administrators. Administrators, under Article 4 of the above Law, include ministries and other bodies of executive power. When administering state property, the Cabinet of Ministers, pursuant to the same Law, also determines bodies of executive power which carry out managerial functions (Article 5.2.1). The state enterprises “The State Centre of Documents Personalisation” and “Document” were accordingly transferred to the administrative sector of the Migration Service, within the limits of the constitutional authorities of the Cabinet of Ministers.

Paragraph 5 of Resolution no. 750 provides for the winding-up of the State Department for Citizenship, Immigration and the Registration of Natural Persons. Formerly, this operated within the Ministry of Internal Affairs as the government body of state administration. Under Article 116.9¹ of the Constitution and Article 20.1.6.5 of the Law, the Cabinet of Ministers has the right to set up, re-organise, and wind up, in accordance with the law, ministries and other central bodies of executive power, within the limits of the funds allocated for the maintenance of bodies of executive power. Furthermore, Article 25.2 of the Law provides for the right of the Ukrainian Government to establish, within ministries, governmental bodies, to approve regulations about them and to appoint and dismiss their heads. The right of the Cabinet of Ministers to establish governmental bodies implies the possibility of the determination of the legal status of these bodies, and their reorganisation and winding-up. The winding-up of the State Department for Citizenship, Immigration and the Registration of Natural Persons, which acted under the auspices of and was subordinate to the Ministry of Internal Affairs, should be considered as an alteration of the internal structure of this ministry in order to optimise its activities (Article 20.1.6.5 of the Law). This does not entail any consequences for its general structure as approved by Parliament (Article 1 of the Law on General Structure and Number of Personnel of the Ministry of Internal Affairs).

Paragraph 2 of the Resolution of the Cabinet of Ministers on the Organisation of the Work of the State Migration Service no. 807, 29 July 2009 (Resolution no. 807) replaced the number “3900” in paragraph 1 of the Resolution of the Cabinet of Ministers on the Approval of the Maximum Number of Personnel of the Central Body of the Ministry of Internal Affairs” no. 418, 7 March 2007 with the number “3825”. By these means the Government introduced amendments to its other Resolution, acting in line with Article 117 of the Constitution. This does not

alter the general number of personnel of the Ministry of Internal Affairs as approved by Parliament (Article 2 of the Law on General Structure and Number of Personnel of the Ministry of Internal Affairs). Paragraphs 4, 5 and 6 of Resolution no. 750 and paragraph 2 of Resolution no. 807 do not therefore contravene the Constitution.

Languages:

Ukrainian.



Identification: UKR-2010-1-004

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 01.04.2010 / **e)** 1-v/2010 / **f)** Concerning the conformity of the draft Law on introducing amendments to the Constitution (regarding the immunity of individual officials) with Articles 157 and 158 of the Constitution (case on introducing amendments to Articles 80, 105 and 108 of the Constitution) / **g)** *Ophitsiynyi Visnyk Ukrainy* (Official Gazette), 27/2010 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

4.4.6.1.1.1 Institutions – Head of State – Status – Liability – Legal liability – **Immunity**.
4.5.9 Institutions – Legislative bodies – **Liability**.

Keywords of the alphabetical index:

President, immunity / President, status, dignity and efficiency / Parliament, member, immunity.

Headnotes:

The constitutionality of proposed changes and supplements to the legislation on the immunity of Members of Parliament and the removal of the President from office.

Summary:

The Parliament (*Verkhovna Rada*), pursuant to the Resolution on Including the draft Law on Introducing Amendments to the Constitution (on guaranteeing immunities to certain officials) on the Agenda of the

Fifth Session of the Parliament of the Sixth Convocation and on forwarding the draft Law to the Constitutional Court no. 1645-VI, 20 October 2009, asked the Constitutional Court for an opinion on the conformity of the draft Law on introducing amendments to the Constitution (on guaranteeing immunities to certain officials) (registration no. 3251, 3 October 2008) (hereinafter, the “draft Law”) with the provisions of Articles 157 and 158 of the Constitution.

Under Article 85.1.1 of the Constitution, Parliament’s authority includes “introducing amendments to the Constitution within the limits and under the procedure specified in Chapter XIII of this Constitution”. Requirements on introducing amendments are set out in Articles 157 and 158 of the Constitution.

According to Article 158 of the Constitution, draft legislation on introducing amendments to the Constitution, which has been considered, but not adopted by Parliament, may be submitted to Parliament a minimum of one year from the date of the adoption of the decision on the draft legislation (Article 158.1); within the term of its authority, Parliament shall not amend the same provisions of the Constitution twice (Article 158.2).

Having analysed the draft Law, and the draft Law on introducing amendments to the Constitution (on the restriction of the immunities of Members of Parliament), (registration no. 1375, 18 January 2008) (draft Law no. 1375) considered by the Parliament of the Sixth Convocation and not adopted, the Constitutional Court concluded that the amendments proposed to the Fundamental Law by the above-mentioned draft laws differ substantially as to their matter and scope.

The Parliament of the Sixth Convocation has not considered the draft Law and has not amended Articles 80, 105 and 108 of the Constitution.

The draft Law is in line with Article 158 of the Constitution.

The Constitution is not to be amended under conditions of martial law or a state of emergency (Article 157.2 of the Fundamental Law).

At the time of delivery of the opinion, there is no martial law or a state of emergency, and so in this respect the draft Law meets the requirements of Article 157.2 of the Constitution.

Having examined whether the draft Law contains provisions that envisage the abolition or restriction of fundamental rights and freedoms, or those which are oriented toward the abolition of the independence or violation of territorial indivisibility (Article 157.1 of the

Constitution), the Constitutional Court proceeded to evaluate each of its provisions.

The draft Law proposes to remove Article 80.1, which guarantees immunity to People’s Deputies, from the current wording of the Constitution.

The Constitutional Court noted that Article 80.1 of the Fundamental Law contains general provisions concerning the guarantee of deputies’ immunity. The scope of this immunity is determined in Article 80.2 and 80.3.

In accordance with the legal position of the Constitutional Court given in its Opinion no. 1-v/2000, 27 June 2000, such amendments are only of relevance to the special status of People’s Deputies; they do not affect the matter of fundamental rights and freedoms as enshrined in the Constitution (their abolition or restriction).

The Constitutional Court considered the draft Law no. 1375, which proposed the new wording of Article 80 of the Constitution, leaving the current wording of Article 80.2 intact and removing Articles 80.1 and 80.3. It concluded that the above wording of Article 80 of the Constitution does not assume the abolition or restriction of fundamental rights and freedoms (Opinion of the Constitutional Court no. 2-v/2008, 10 September 2008).

The Constitutional Court therefore considered that the elimination of Article 80.1 of the Constitution does not affect the abolition or restriction of fundamental rights and freedoms and is not aimed at eradicating or harming independence or territorial indivisibility. It does not contravene Article 157.1 of the Constitution.

Article 80.2 stipulates that People’s Deputies are not legally liable for the results of voting or for statements made in Parliament and its organs, with the exception of liability for insult or defamation.

The draft Law proposes that the phrase “with the exception of liability for insult or defamation” be removed from Article 80.2.

This would result in the restriction of the existing rights of citizens to respect for dignity, judicial protection, the right to rectify incorrect information about themselves and members of their families, and to demand the removal of any type of information, as well as the right to compensation for material and moral damages caused by the collection, storage, use and dissemination of such incorrect information (Articles 28.1 and 32.4 of the Constitution).

Removal of the phrase “with the exception of liability for insult or defamation” from Article 80.2 restricts human and citizen’s rights and freedoms and contravenes Article 157.1 of the Constitution.

According to Article 80.3 of the Constitution, People’s Deputies shall not be held criminally liable, detained or arrested without the consent of Parliament. The draft Law suggests the Article 80.3 should be amended to read that a People’s Deputy shall not be detained or arrested without the consent of Parliament before a guilty verdict has entered into force against him or her.

The Constitutional Court has examined similar amendments in the past to Article 80.3 of the Fundamental Law and has concluded that restrictions to deputies’ immunity should not be regarded as a restriction on human rights and freedoms (Opinion no. 3-v/2000, 5 December 2000).

Therefore, the proposed amendments to Article 80.3 do not provide for the removal or restriction of human rights and freedoms and are not aimed at the abolition of the independence or the violation of territorial indivisibility. They do not contravene Article 157.1 of the Constitution.

The phrase “before a guilty verdict enters into force against him or her” is used in the Fundamental Law (Articles 81.2.2, 81.5, and 126.5.6). The draft Law uses the phrase “before the guilty verdict becomes effective”.

The draft Law proposes the removal of Article 105.1 from the Constitution, which bestows the right of immunity on the President during his term of office, replacing it with a new wording to the effect that the President will not be arrested or detained without the consent of Parliament prior to the entry into force of a guilty verdict against him or her and adding a new paragraph 3 after paragraph 2 in Article 108 of the Constitution containing the phrase “entry into force of a guilty verdict against him or her”.

Analysis of the amendments to Articles 105 and 108, proposed by the People’s Deputies, shows a lack of a consistent and systematic approach to the resolution of the issue of the interplay between the proposed amendments and other constitutional provisions.

The President is the guarantor of state sovereignty and territorial indivisibility, the observance of the Constitution and human rights and freedoms (Article 102.2 of the Fundamental Law).

Pursuant to Article 106.2 of the Fundamental Law, the President shall not transfer his or her powers to other persons or bodies. Under Article 112, in the event of the pre-term termination of the President’s authority in

accordance with Articles 108, 109, 110 and 111 of the Constitution, for the period pending the elections and the assumption of office of the new President, the existing President’s duties will be vested in the Chairperson of the Parliament. Thus, the Constitution as it stands does not allow any person to act as President if he or she is not in a position to fulfil his or her duties (in particular, if detained or arrested). The proposed changes to the Constitution do not resolve this situation.

In its consideration of the provisions of Article 111.1 of the Constitution, the Constitutional Court noted that the constitutional procedure for investigating and examining the case of the removal of the President from his or her post in case of impeachment is performed without the institution of criminal proceedings (Item 1.2 of the resolution part of the Decision no. 19-rp/2003, 10 December 2003). The draft Law contains no provisions on the amendment of Article 111 of the Fundamental Law.

The proposed amendments on sidelining Article 105.1 and supplementing it with a new paragraph, and supplementing Article 108 of the Constitution with a new item, may result in the abolition or restriction of human rights and freedoms, and the curtailing of independence or violation of territorial indivisibility, in contravention of Article 157.1 of the Constitution.

The draft Law proposes removing Article 105.2 of the Constitution, according to which: “persons guilty of offending the honour and dignity of the President are brought to responsibility on the basis of the law”.

Under the Constitution, the President is the Head of State and acts in its name. Thus the granting of immunities and the safeguarding of his or her honour and dignity, pursuant to Article 105, is an indispensable condition for the performance of constitutional obligations by the head of the state whose power derives directly from the citizens on the basis of universal, equal and direct elections.

According to the Fundamental Law, the President is the guarantor of state sovereignty and territorial indivisibility, the observance of the Constitution and human rights and freedoms (Article 102.2). These provisions place the head of state under a duty to protect human rights and freedoms by all possible lawful means. Offending the President’s honour and dignity, therefore, is to be viewed not simply as encroachments on the civil rights of a person holding the position, but also as a display of contempt against the Ukrainian State and the nation as a whole.

The suggestion in the draft Law as to the removal of Article 105.2 of the Constitution may result in restricting human rights and freedoms and a breach of the provisions prescribed in Article 157.1 of the Constitution.

Article 105.3 of the Constitution provides that the title of President is protected by law and reserved for the President for his or her lifetime, unless he or she is removed from office through impeachment. The draft Law suggests that the phrase “unless removed from office by the procedure of impeachment” be removed from Article 105.3.

The Constitutional Court proceeded on the assumption that the changes to Article 105.3 would not result in the curtailing or restriction of human rights and freedoms, and are not aimed at the removal of independence or violation of territorial indivisibility and that they do not contravene Article 157.1 of the Constitution.

Languages:

Ukrainian.



United Kingdom Supreme Court

Important decisions

Identification: GBR-2010-1-001

a) United Kingdom / **b)** Supreme Court / **c)** / **d)** 24.02.2010 / **e)** / **f)** Norris v. Government of the United States of America (no. 2) / **g)** [2009] UKHL 1 / **h)** UKSC 9 [2010] 2 *Weekly Law Reports* 579; CODICES (English).

Keywords of the systematic thesaurus:

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

2.1.3.1 Sources – Categories – Case-law – **Domestic case-law.**

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

3.16 General Principles – **Proportionality.**

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

3.18 General Principles – **General interest.**

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

Keywords of the alphabetical index:

Extradition, effect on family life / Family life, extradition, interference / Crime prevention, public interest, proportionality.

Headnotes:

There is a compelling public interest in extradition as a means to facilitate the prevention of crime and disorder. It is a likelihood inherent to the extradition process that there will be an interference with the rights protected under Article 8 ECHR. In order to render the interference disproportionate its consequences to the individual concerned would have to be exceptionally serious. In assessing whether such consequences were exceptionally serious a court could take account of the following:

1. relative gravity of the offence;

2. the effect extradition would have on the individual's family.

Summary:

I. Norris was the former Chief Executive Officer of an international company. He had retired on grounds of ill-health. His wife also suffered ill-health. The US authorities sought his extradition on grounds that his former company had engaged in unlawful price-fixing and obstruction of justice. Norris successfully resisted extradition on the first, price-fixing, ground. Extradition was granted however on the second ground both at first instance on appeal to the Divisional Court. Norris appealed to the Supreme Court of the United Kingdom. His appeal raised issues concerning the proper approach to be taken by a court weighing extradition against an individual's right to respect for private and family life under Article 8 ECHR.

II. The Supreme Court rejected the appeal holding that in the present case the offence of obstructing justice was of significant gravity and the effect of extradition on Norris' family was not so excessive as to render it disproportionate to the public interest of preventing crime and disorder.

Lord Phillips PSC, with whom all the members of the Court agreed, gave the leading judgment.

The central thrust of the appellant's (Norris) argument before the Supreme Court was that the correct approach to take, when assessing the balance to be struck between the public interest in extradition and the Article 8 ECHR right, was to balance the public interest in extraditing the particular accused against the damage which would be done to his and his family's private or family life. This would require the Court to assess the damage that would be done to the proper functioning of the extradition system, if extradition was refused in the individual case. It would require an assessment of whether that damage was so great as to outweigh the damage that would be done to the accused and his family's life. The test under Article 8.2 ECHR was whether the specific accused's extradition was necessary in a democratic society.

In his judgment, Lord Phillips first noted that there was a distinction between, on the one hand, extradition cases, and on the other hand deportation cases. The two were not synonymous and were not to be treated as equivalent. There was, as he put it, a public interest of a different order in respect of extradition than existed in respect of deportation.

Lord Phillips accepted that there could be no absolute rule that any interference with Article 8 ECHR rights was proportionate as a consequence of extradition. Extradition was part of the process for ensuring, in the context of international reciprocity, that those reasonably suspected of crime were prosecuted. It was a matter of critical importance to the prevention of crime and disorder that those reasonably suspected of a crime are prosecuted and, if found guilty, duly sentenced. In light of this any interference with Article 8 ECHR rights would have to be extremely serious if it were to outweigh the general public interest in the prevention of crime and disorder. Only if some quite exceptionally compelling feature, or combination of features arose would extradition amount to a disproportionate interference with the Article 8 ECHR right: see *Launder v. United Kingdom* (2008) 25 *European Human Rights Reports* CD 67 at 73. In assessing this question, it was the interference with the Article 8 ECHR right which had to be exceptionally serious, not the nature of the circumstances.

Lord Phillips went on to state that the importance of giving effect to extradition arrangements will always be a significant factor in assessing the balance to be struck. It would not usually be the case however that the nature of the offence would have a bearing on the extradition decision. If, however, the offence is at the lower end of the scale of gravity, that fact could form one of a combination of features, which could render an extradition decision to be a disproportionate interference with the Article 8 ECHR right. Furthermore, when considering the effect of an interference with the Article 8 ECHR right, the Court had to consider the question not just from the extraditee's perspective. It had to consider the effect on the family unit as a whole; each family member had to be considered as a victim: see *Beoku-Betts v. Secretary of State for the Home Department* [2009] AC 115.

Languages:

English.



Court of Justice of the European Union

Important decisions

Identification: ECJ-2010-1-001

a) European Union / **b)** Court of Justice of the European Communities / **c)** Grand Chamber / **d)** 12.02.2008 / **e)** C-2/06 / **f)** Willy Kempfer KG v. Hauptzollamt Hamburg-Jonas / **g)** *European Court Reports*, I-00411 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

1.6.9.2 Constitutional Justice – Effects – Consequences for other cases – **Decided cases**.
3.26.3 General Principles – Principles of Community law – **Genuine co-operation between the institutions and the member states**.

Keywords of the alphabetical index:

Preliminary ruling, effects / Cooperation, good faith, institutions, member States / *Res judicata*, review of administrative decision, obligation / Time limits, national procedural autonomy.

Headnotes:

1. In the context of a procedure before an administrative body for review of an administrative decision that became final by virtue of a judgment, delivered by a court of final instance, which, in the light of a decision given by the Court subsequent to it, was based on a misinterpretation of Community law, Community law does not require the claimant to have relied on Community law in the legal action under domestic law which he brought against the administrative decision. While Community law does not require that administrative bodies be placed under an obligation, in principle, to reopen an administrative decision which has become final, specific circumstances may nevertheless be capable, by virtue of the principle of cooperation arising from Article 10 EC, of requiring such a body to review an administrative decision that has become final in order to take account of the interpretation of a relevant provision of Community law given subsequently by the Court. The condition – which is among those capable of providing the basis for such an obligation

of review – that the judgment of the court of final instance by virtue of which the contested administrative decision became final was, in the light of a subsequent decision of the Court, based on a misinterpretation of Community law which was adopted without a question being referred to the Court for a preliminary ruling cannot be interpreted as requiring the parties to have raised before the national court the point of Community law in question. It is sufficient in that regard if either the point of Community law the interpretation of which proved to be incorrect in light of a subsequent judgment of the Court was considered by the national court ruling at final instance or it could have been raised by the latter of its own motion. While Community law does not require national courts to raise of their own motion a plea alleging infringement of Community provisions where examination of that plea would oblige them to go beyond the ambit of the dispute as defined by the parties, they are obliged to raise of their own motion points of law based on binding Community rules where, under national law, they must or may do so in relation to a binding rule of national law (see paragraphs 37-39, 44-46, operative part 1).

2. Community law does not impose any limit in time for making an application for review of an administrative decision that has become final. The Member States nevertheless remain free to set reasonable time limits for seeking remedies, in a manner consistent with the Community principles of effectiveness and equivalence (see paragraph 60, operative part 2).

Summary:

I. Kempfer KG (hereinafter, “Kempfer”) exported cattle to various Arab countries and countries of the former Yugoslavia. In accordance with the rules in force at the time, the firm applied for and received export refunds from the Hauptzollamt (principal customs office). In the course of an inquiry, the principal revenue office, Freiburg, established that some of the animals had died during transport; the Hauptzollamt accordingly demanded repayment of the export refunds paid.

Kempfer brought various actions against that decision, but did not plead any infringement of Community law. However, those actions were all dismissed and the decision requiring repayment thus became final.

Subsequently, the Court of Justice delivered a judgment in which it ruled that the condition of proof that the animals had been exported to a non-member country could be applied only before the grant of the aid and not after it had been granted. Kempfer

became aware of that decision in July 2002 and, accordingly, requested the Hauptzollamt to review and withdraw the recognition decision in issue, which the Hauptzollamt refused to do.

Kempton therefore brought an action before the Finanzgericht Hamburg, which referred a number of questions to the Court of Justice. Those questions sought clarification of the obligations borne by the national authorities under Article 10 of the EC Treaty, as interpreted in the *Kühne & Heitz* judgment of the Court of Justice.

II. In that judgment, the Court had ruled that “[t]he principle of cooperation arising from Article 10 EC imposes on an administrative body an obligation to review a final administrative decision, where an application for such review is made to it, in order to take account of the interpretation of the relevant provision given in the meantime by the Court where:

- i. under national law, it has the power to reopen that decision;
- ii. the administrative decision in question has become final as a result of a judgment of a national court ruling at final instance;
- iii. that judgment is, in the light of a decision given by the Court subsequent to it, based on a misinterpretation of Community law which was adopted without a question being referred to the Court for a preliminary ruling under Article 234.3 EC, and
- iv. the person concerned complained to the administrative body immediately after becoming aware of the decision of the Court”.

In this case, the Court interpreted the last two conditions and ruled, first, that Kempton could rely on the decision in *Kühne & Heitz* even though it had not raised any pleas based on Community law in its actions against the decision ordering repayment of the export refunds and, second, that Community law did not impose any specific time limit for making an application for review of a decision.

Cross-references:

- CJEC, 13.01.2004, *Kühne & Heitz NV v. Produktschap voor Pluimvee en Eieren* (C-453/00, ECR, p.I-00837).

Languages:

Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovakian, Slovenian, Spanish, Swedish.



Identification: ECJ-2010-1-002

a) European Union / **b)** Court of Justice of the European Communities / **c)** Grand Chamber / **d)** 15.04.2008 / **e)** C-268/06 / **f)** Impact v. Minister for Agriculture and Food e.a. / **g)** *European Court Reports*, I-02483 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

3.26.2 General Principles – Principles of Community law – **Direct effect**.

5.2.1.2.2 Fundamental Rights – Equality – Scope of application – Employment – **In public law**.

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, directive, direct effect / Right to effective judicial protection.

Headnotes:

Community law, in particular the principle of effectiveness, requires that a specialised court which is called upon, under the, albeit optional, jurisdiction conferred on it by the legislation transposing Directive 1999/70 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, to hear and determine a claim based on an infringement of that legislation, must also have jurisdiction to hear and determine an applicant's claims arising directly from the directive itself in respect of the period between the deadline for transposing the directive and the date on which the transposing legislation entered into force if it is established that the obligation on that applicant to bring, at the same time, a separate claim based directly on the directive before an ordinary court would involve procedural disadvantages liable to render excessively difficult the exercise of the rights conferred on him by Community law. It is for the national court to undertake the necessary checks in that regard (see paragraph 55, operative part 1).

Whenever the provisions of a directive appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise, they may be relied upon by individuals as against the State, particularly in its

capacity as an employer. That principle can be applied in respect of provisions of agreements which, like the framework agreement on fixed-term work which is annexed to Directive 1999/70 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, are the product of a dialogue, based on Article 139.1 EC, between management and labour at Community level and which have been implemented in accordance with Article 139.2 EC by a directive of the Council, of which they are thus an integral component.

In that regard, Clause 4.1 of that framework agreement, which prohibits, in a general manner and in unequivocal terms, any difference in treatment of fixed-term workers in respect of employment conditions which is not objectively justified, is unconditional and sufficiently precise for individuals to be able to rely upon it before a national court; that is not the case, however, as regards Clause 5.1 of the framework agreement, which assigns to the Member States the general objective of preventing the abusive use of successive fixed-term employment contracts or relationships, while leaving to them the choice as to how to achieve it (see paragraphs 57-58, 60, 68, 70, 73, 79-80, operative part 2).

When applying domestic law and, in particular, legislative provisions specifically adopted for the purpose of implementing the requirements of a directive, national courts are bound to interpret that law, so far as possible, in the light of the wording and the purpose of the directive in order to achieve the result sought by it and thus to comply with Article 249.3 EC. The obligation on a national court to refer to the content of a directive when interpreting and applying the relevant rules of domestic law is, however, limited by general principles of law, particularly those of legal certainty and non-retroactivity, and that obligation cannot serve as the basis for an interpretation of national law *contra legem*.

In those circumstances, in so far as the applicable national law contains a rule that precludes the retrospective application of legislation unless there is a clear and unambiguous indication to the contrary, a national court hearing a claim based on an infringement of a provision of national legislation transposing Directive 1999/70 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP is required, under Community law, to give that provision retrospective effect to the date by which that directive should have been transposed only if that national legislation includes an indication of that nature capable of giving that provision retrospective effect (see paragraphs 98, 100, 104, operative part 4).

Summary:

I. A dispute had arisen between a trade union and various Irish government departments concerning the working conditions applied to workers employed under fixed-term contracts. In this case, the problem was the consequence of the belated transposition of the framework agreement on fixed-term work of 18 March 1999 set out in the annex to Council Directive 1999/70/EC of 28 June 1999. The Irish Act had not entered into force until two years after the expiry of the period prescribed for transposition of the directive. During that period, certain government departments had continued to apply to workers employed under fixed-term contracts less favourable working conditions than those applicable to established civil servants. Before the Labour Court, the trade union therefore claimed back pay and pension rights. In addition, certain workers claimed that their contracts should be re-classified as contracts of indefinite duration.

The Labour Court then referred to the Court of Justice a question for a preliminary ruling on whether, when it decides a case under a provision of Community law, it is required to apply a directly applicable provision of Directive 1999/70/EC even though it has not been given express jurisdiction to do so under the domestic law of the member State concerned, and in particular the provisions of domestic law transposing the directive.

II. The Court of Justice ruled that Clause 4 of the agreement, which sets forth the principle of non-discrimination of workers employed under fixed-term contracts by comparison with those employed under contracts of indefinite duration, contains provisions which are unconditional and sufficiently precise for individuals to be able to rely on them in support of their actions. From the end of the period prescribed for transposition, civil servants employed under a contract of fixed duration could thus claim working conditions that were not less favourable than those applied to other workers.

On the other hand, that was not the case for Clause 5 of the agreement, the purpose of which is to avoid the abusive use of fixed-term contracts and under which States are required to take one or more measures consisting in providing objective reasons to justify the renewal of contracts, fixing a maximum duration for successive contracts or fixing a maximum number of renewals. The Court considered that that provision did not enable the minimum protection that must be attained to be determined sufficiently precisely and that, accordingly, it did not have direct effect.

Languages:

Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovakian, Slovenian, Spanish, Swedish.

*Identification:* ECJ-2010-1-003

a) European Union / **b)** Court of Justice of the European Communities / **c)** Second Chamber / **d)** 05.06.2008 / **e)** C-164/07 / **f)** James Wood v. Fonds de garantie des victimes de terrorisme et d'autres infractions / **g)** *European Court Reports*, I-04143 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

European Union, citizenship / Compensation, discrimination, non European Union citizen.

Headnotes:

Community law precludes legislation of a Member State which excludes nationals of other Member States who live and work in its territory from the grant of compensation intended to make good losses resulting from offences against the person where the crime in question was not committed in the territory of that State, on the sole ground of their nationality (see paragraph 16, operative part).

Summary:

I. Mr Wood is a British national. He lives, works and pays taxes in France, where he has lived for more than 20 years. He and his partner, a French national, have three children, one of whom, the eldest, died in 2004 in a road traffic accident while on a traineeship in Australia.

In 2006 the family brought a claim before the *Commission d'indemnisation des victimes d'infractions du Tribunal de grande instance de Nantes* (Compensation Board for Victims of Crime of the Regional Court, Nantes) seeking an assessment of their compensation for material loss and their non-pecuniary losses.

An agreement was reached with the Guarantee Fund and approved in November 2006 by the Compensation Board. However, that agreement excluded the deceased's father on the ground of his British nationality. The Guarantee Fund considered that Mr Wood failed to meet the conditions laid down in the French Code of Criminal Procedure, which required that the person claiming compensation must be of French nationality or, if that is not the case, that the acts must have been committed on French territory.

In order to challenge that decision, Mr Wood brought an action before the *Commission d'indemnisation du Tribunal de grande instance de Nantes*, which requested a preliminary ruling by the Court of Justice of the European Union on whether those French rules were compatible with Community law.

II. The Court first of all recalled that the principle of non-discrimination requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is based on objective circumstances independent of the nationality of the persons concerned and is proportionate to the objective pursued. The Court found that, apart from their nationality, Mr Wood's situation did not differ from that of his partner, although only she received compensation. The Court therefore held that this difference in treatment, based expressly and solely on Mr Wood's nationality, was direct discrimination that could not be justified. It therefore concluded that the French rules were incompatible with Community law.

Cross-references:

It should be noted that in the *Cowan* judgment of 2 February 1989 the Court had already made a ruling to the same effect concerning the compatibility with Community law of conditions linked with nationality that limited the benefit of State compensation designed to compensate for the injuries caused by an assault.

- CJEC, 02.02.1989, *Cowan* (C-186/87, *ECR*, p.I-00911).

Languages:

Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovakian, Slovenian, Spanish, Swedish.

*Identification:* ECJ-2010-1-004

a) European Union / **b)** Court of Justice of the European Communities / **c)** Grand Chamber / **d)** 01.07.2008 / **e)** C-341/06 P and C-342/06 P / **f)** Chronopost SA and La Poste v. Union française de l'express (UFEX) and Others / **g)** *European Court Reports*, I-04777 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Judge, impartiality, objective.

Headnotes:

1. The right to a fair trial, which derives *inter alia* from Article 6.1 ECHR, constitutes a fundamental right which the European Union respects as a general principle under Article 6.2 EU and means that everyone must be entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

In the context of an appeal, a ground of appeal alleging an irregularity in the composition of the Court of First Instance must be regarded as involving a matter of public policy which must be raised by the Community judicature of its own motion.

The fact that the same Judge in two successive formations in respect of the same case was entrusted with the duties of Judge-Rapporteur is, by itself, irrelevant to the assessment of compliance with the requirement of impartiality, since those duties are performed in a collegiate formation of the Court.

Moreover, there are two aspects to the requirement of impartiality. First, the members of the court themselves must be subjectively impartial, that is, none of its members must show bias or personal prejudice, there being a presumption of personal impartiality in the absence of evidence to the contrary. Second, the court must be objectively impartial, that is to say, it must offer guarantees sufficient to exclude any legitimate doubt in this respect. In that regard, the fact that the same Judge sits in two Chambers hearing and determining the same case in succession, cannot, by itself, give rise to doubt as to the impartiality of the court in the absence of any other objective evidence (see paragraphs 44-45, 48, 53-54, 56).

Summary:

I. By decision of 1 October 1997, the European Commission had refused to characterise as State aid the logistical and commercial assistance provided by La Poste to its subsidiary Chronopost. That decision was annulled by the Court of First Instance. Following an appeal to the Court of Justice, the case was referred back to the Court of First Instance, which again annulled the Commission's decision.

Chronopost and La Poste appealed against that decision.

In the first place, they put forward a ground of appeal alleging a procedural defect in relation to the composition of the Chamber of the Court of First Instance when the Court of Justice, on appeal, annuls a judgment and refers the case back to the Court of First Instance. In the present case, the Judge-Rapporteur in the case was already the Rapporteur when the first judgment was delivered and President of the Chamber that delivered it.

II. The Court of Justice held that the fact that the duties of Judge-Rapporteur are exercised by the same Judge in two successive formations is irrelevant to the assessment of compliance with the requirement of impartiality, since those duties are performed in a collegiate formation of the Court.

On the substance, the Court adjudicated on the question whether the Commission's position with respect to the fact that the logistical and commercial assistance provided by La Poste to Chronopost did

not constitute State aid was justified. The Court recalled the principle that its review must be restricted in the context of a complex economic assessment and found no manifest error of assessment in the Commission's reasoning.

Languages:

Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovakian, Slovenian, Spanish, Swedish.



Identification: ECJ-2010-1-005

a) European Union / **b)** Court of Justice of the European Communities / **c)** First Chamber / **d)** 10.07.2008 / **e)** C-33/07 / **f)** Ministerul Administrației și Internelor – Direcția Generală de Pașapoarte București v. Gheorghe Jipa / **g)** *European Court Reports*, I-05157 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
 3.26.1 General Principles – Principles of Community law – **Fundamental principles of the Common Market**.
 5.1.1.2 Fundamental Rights – General questions – Entitlement to rights – **Citizens of the European Union and non-citizens with similar status**.
 5.3.6 Fundamental Rights – Civil and political rights – **Freedom of movement**.

Keywords of the alphabetical index:

European Union, freedom of movement of persons, limitation, justification.

Headnotes:

1. A national of a Member State who has been repatriated from another Member State enjoys the status of a citizen of the Union under Article 17.1 EC and may therefore rely on the right pertaining to that status, including against his Member state of origin, and in particular the right conferred by Article 18 EC to move and reside freely within the territory of the Member States. In that regard, the right of freedom of

movement includes both the right for citizens of the European Union to enter a Member State other than the one of origin and the right to leave the State of origin. The fundamental freedoms guaranteed by the EC Treaty would be rendered meaningless if the Member State of origin could, without valid justification, prohibit its own nationals from leaving its territory in order to enter the territory of another Member State (see paragraphs 17-18).

2. Articles 18 EC and 27 of Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation no. 1612/68 and repealing Directives 64/221, 68/360, 72/194, 73/148, 75/34, 75/35, 90/364, 90/365 and 93/96 do not preclude national legislation that allows the right of a national of a Member State to travel to another Member State to be restricted, in particular on the ground that he has previously been repatriated from the latter Member State on account of his 'illegal residence' there, provided that the personal conduct of that national constitutes a genuine, present and sufficiently serious threat to one of the fundamental interests of society and that the restrictive measure envisaged is appropriate to ensure the achievement of the objective it pursues and does not go beyond what is necessary to attain it. It is for the national court to establish, on the basis of the matters of fact and law justifying the request for a restriction on the right to leave the first Member State whether that is so in the case before it.

A measure limiting the exercise of the right of free movement must be adopted in the light of considerations pertaining to the protection of public policy or public security in the Member State imposing the measure. Thus it cannot be based exclusively on reasons advanced by another Member State to justify a decision to remove a Community national from the territory of the latter State. That does not however rule out the possibility of such reasons being taken into account in the context of the assessment which the competent national authorities undertake for the purpose of adopting the measure restricting freedom of movement (see paragraphs 25, 28, 30, operative part).

Summary:

I. Mr Jipa had left Romania to travel to Belgium. Owing to his "illegal residence" in that member State, however, he was repatriated to Romania, under a readmission agreement between the two countries.

Subsequently, the Romanian Ministry of the Administration and Home Affairs applied to the Dâmbovită Tribunal for a decision prohibiting Mr Jipa, a Romanian national, from travelling to Belgium for a period of three years.

In that context, the Dâmbovită Tribunal referred to the Court of Justice of the European Union a question on whether the Romanian rules which allow a restriction to be placed on the right of a national of one member State to travel to the territory of another member State, notably on the ground that he had previously been repatriated from that State on account of his “illegal residence” there, were compatible with Community law.

II. The Court of Justice held that those Romanian rules were compatible with Community law, provided that the personal conduct of that national constitutes a genuine, present and sufficiently serious threat to one of the fundamental interests of society and that the restrictive measure is proportionate to the objective pursued.

Languages:

Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovakian, Slovenian, Spanish, Swedish.



Identification: ECJ-2010-1-006

a) European Union / **b)** Court of Justice of the European Communities / **c)** Grand Chamber / **d)** 25.07.2008 / **e)** C-127/08 / **f)** Blaise Baheten Metock and others v. Minister for Justice, Equality and Law Reform / **g)** *European Court Reports*, I-06241 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

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

5.1.1.3 Fundamental Rights – General questions – Entitlement to rights – **Foreigners.**

5.3.9 Fundamental Rights – Civil and political rights – **Right of residence.**

Keywords of the alphabetical index:

European Union citizenship, freedom of movement of persons / Residence, EU citizen, spouse / European Union citizen, marriage, non EU citizen, right to residence.

Headnotes:

1. Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation no. 1612/68 and repealing Directives 64/221, 68/360, 72/194, 73/148, 75/34, 75/35, 90/364, 90/365 and 93/96 precludes legislation of a Member State which requires a national of a non-member country who is the spouse of a Union citizen residing in that Member State but not possessing its nationality to have previously been lawfully resident in another Member State before arriving in the host Member State, in order to benefit from the provisions of that directive.

As regards family members of a Union citizen, no provision of Directive 2004/38 makes the application of the directive conditional on their having previously resided in a Member State. As Article 3.1 of Directive 2004/38 states, the directive applies to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in Article 2.2 of the directive who accompany them or join them in that Member State. The definition of family members in Article 2.2 of Directive 2004/38 does not distinguish according to whether or not they have already resided lawfully in another Member State.

Moreover, Articles 5, 6.2 and 7.2 of Directive 2004/38 confer the rights of entry, of residence for up to three months, and of residence for more than three months in the host Member State on nationals of non-member countries who are family members of a Union citizen whom they accompany or join in that Member State, without any reference to the place or conditions of residence they had before arriving in that Member State.

In particular, Article 5.2.1 of Directive 2004/38 provides that nationals of non-member countries who are family members of a Union citizen are required to have an entry visa, unless they are in possession of the valid residence card referred to in Article 10 of that directive. In that, as follows from Articles 9.1 and 10.1 of Directive 2004/38, the residence card is the document that evidences the right of residence for more than three months in a Member State of the family members of a Union citizen who are not nationals of a Member State, the fact that Article 5.2 provides for the entry into the host Member State of family members of a Union citizen who do not have a residence card shows that Directive 2004/38 is capable of applying also to family members who were not already lawfully resident in another Member State.

Similarly, Article 10.2 of Directive 2004/38, which lists exhaustively the documents which nationals of non-member countries who are family members of a Union citizen may have to present to the host Member State in order to have a residence card issued, does not provide for the possibility of the host Member State asking for documents to demonstrate any prior lawful residence in another Member State (see paragraphs 49-53, 70, 80, operative part 1).

2. Contrary to what the Court held in Case C-109/01 *Akrich* [2003] ECR I-9607, it cannot be required that, in order to benefit from the rights provided for in Article 10 of Regulation no. 1612/68 on freedom of movement for workers within the Community, the national of a non-member country who is the spouse of a Union citizen must be lawfully resident in a Member State when he moves to another Member State to which the citizen of the Union is migrating or has migrated.

The benefit of such rights cannot depend on the prior lawful residence of such a spouse in another Member State (see paragraphs 53-54, 58, operative part 1).

3. The Community legislature has competence to regulate, as it did by Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation no. 1612/68 and repealing Directives 64/221, 68/360, 72/194, 73/148, 75/34, 75/35, 90/364, 90/365 and 93/96, the entry and residence of nationals of non-member countries who are family members of a Union citizen in the Member State in which that citizen has exercised his right of freedom of movement, including where the family members were not already lawfully resident in another Member State.

Within the competence conferred on it by Articles 18.2 EC, 40 EC, 44 EC and 52 EC – on the basis of which Directive 2004/38 *inter alia* was adopted – the Community legislature can regulate the conditions of entry and residence of the family members of a Union citizen in the territory of the Member States, where the fact that it is impossible for the Union citizen to be accompanied or joined by his family in the host Member State would be such as to interfere with his freedom of movement by discouraging him from exercising his rights of entry into and residence in that Member State.

The refusal of the host Member State to grant rights of entry and residence to the family members of a Union citizen is such as to discourage that citizen from moving to or residing in that Member State, even if his family members are not already lawfully resident in the territory of another Member State.

Consequently, the interpretation that the Member States retain exclusive competence, subject to Title IV of Part Three of the Treaty, to regulate the first access to Community territory of family members of a Union citizen who are nationals of non-member countries must be rejected.

Indeed, to allow the Member States exclusive competence to grant or refuse entry into and residence in their territory to nationals of non-member countries who are family members of Union citizens and have not already resided lawfully in another Member State would have the effect that the freedom of movement of Union citizens in a Member State whose nationality they do not possess would vary from one Member State to another, according to the provisions of national law concerning immigration, with some Member States permitting entry and residence of family members of a Union citizen and other Member States refusing them.

That would not be compatible with the objective set out in Article 3.1.c EC of an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of persons. Establishing an internal market implies that the conditions of entry and residence of a Union citizen in a Member State whose nationality he does not possess are the same in all the Member States. Freedom of movement for Union citizens must therefore be interpreted as the right to leave any Member State, in particular the Member State whose nationality the Union citizen possesses, in order to become established under the same conditions in any Member State other than the Member State whose nationality the Union citizen possesses (see paragraphs 63-68).

4. Article 3.1 of Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation no. 1612/68 and repealing Directives 64/221, 68/360, 72/194, 73/148, 75/34, 75/35, 90/364, 90/365 and 93/96, which provides that the directive is to apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in Article 2.2 of the directive who accompany or join them, must be interpreted as meaning that a national of a non-member country who is the spouse of a Union citizen residing in a Member State whose nationality he does not possess and who accompanies or joins that Union citizen benefits from the provisions of that directive, irrespective of when and where their marriage took place and of how the national of a non-member country entered the host Member State.

First, none of the provisions of Directive 2004/38 requires that the Union citizen must already have founded a family at the time when he moves to the host Member State in order for his family members who are nationals of non-member countries to be able to enjoy the rights established by that directive. By providing that the family members of the Union citizen can join him in the host Member State, the Community legislature, on the contrary, accepted the possibility of the Union citizen not founding a family until after exercising his right of freedom of movement. That interpretation is consistent with the purpose of Directive 2004/38, which aims to facilitate the exercise of the fundamental right of residence of Union citizens in a Member State other than that of which they are a national.

Second, in the light of the necessity of not interpreting the provisions of Directive 2004/38 restrictively and not depriving them of their effectiveness, the words 'family members [of Union citizens] who accompany ... them' in Article 3.1 of that directive must be interpreted as referring both to the family members of a Union citizen who entered the host Member State with him and to those who reside with him in that Member State, without it being necessary, in the latter case, to distinguish according to whether the nationals of non-member countries entered that Member State before or after the Union citizen or before or after becoming his family members.

Third, neither Article 3.1 nor any other provision of Directive 2004/38 contains requirements as to the place where the marriage of the Union citizen and the national of a non-member country is solemnised (see paragraphs 87-90, 93, 98-99, operative part 2).

Summary:

I. The question of the compatibility of the Irish legislation with Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the member States was raised in four cases pending before the High Court of Ireland.

In each of these four cases the scenario was the same: a national of a non-member country arrived in Ireland and applied for asylum. On each occasion the application for asylum was refused. While staying in Ireland the non-member country nationals married citizens of the Union who did not have Irish nationality but were residing in Ireland. It should be noted that the marriages did not appear to be marriages of convenience. Following each of those marriages, the non-Community national concerned submitted an application for a residence card, relying on his status as the spouse of a Union citizen. The applications

were all rejected, however, on the ground that the four nationals did not satisfy the condition laid down in the Irish legislation transposing the abovementioned directive, namely prior lawful residence in another member State.

Proceedings against those decisions were brought before the High Court, which requested the Court of Justice to rule on whether such a condition of prior residence was compatible with the directive and whether the date on which the marriage took place and the way in which a Union citizen's spouse, a national of a non-member country, entered the member State concerned had any consequences for the application of the directive.

II. The Court reconsidered its judgment of 23 September 2003 in *Akrich* and held that, in the case of the members of the family of a Union citizen, no provision of Directive 2004/38 makes the application of that directive subject to the condition that they have previously been resident in a member State.

The Court also emphasised that, according to the directive, only the members of the family of a Union citizen who has exercised his or her right to freedom of movement have the right of entry and residence.

In that context, the Court therefore ruled that a non-Community spouse of a Union citizen who accompanies or joins that citizen can benefit from the directive, irrespective of when and where their marriage took place and of how the spouse entered the host member State.

As regards the date on which the marriage took place, the Court stated that it makes no difference whether nationals of non-member countries who are family members of a Union citizen have entered the host member State before or after becoming family members of that Union citizen. It added that the status of the non-Community national's previous residence or the fact that he may have entered the host member State illegally are also irrelevant.

Cross-references:

- CJEC, 23.09.2003, *Akrich* (C-109/01, ECR, p. I-09607).

Languages:

Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovakian, Slovenian, Spanish, Swedish.



Identification: ECJ-2010-1-007

a) European Union / **b)** Court of Justice of the European Communities / **c)** Grand Chamber / **d)** 03.09.2008 / **e)** C-402/05 P and C-415/05 P / **f)** Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities / **g)** *European Court Reports*, I-06351 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

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

2.1.1.4.1 Sources – Categories – Written rules – International instruments – **United Nations Charter of 1945.**

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

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

4.16 Institutions – **International relations.**

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

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

Keywords of the alphabetical index:

European Union, regulation, legal basis / Community law, act implementing resolutions of the United Nations Security Council / Terrorism, financing / Terrorism, restrictive measures / United Nations, Security Council, resolution, implementation by the EU.

Headnotes:

1. To accept the interpretation of Articles 60 EC and 301 EC that it is enough for the restrictive measures laid down by Resolution 1390 (2002) of the United Nations Security Council and given effect by Regulation no. 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban to be directed at persons or entities present in a third country or associated with one in some other way, would give those provisions an excessively broad meaning and

would fail to take any account at all of the requirement, imposed by their very wording, that the measures decided on the basis of those provisions must be taken against third countries.

Interpreting Article 301 EC as building a procedural bridge between the Community and the European Union, so that it must be construed as broadly as the relevant Community competences, including those relating to the common commercial policy and the free movement of capital, threatens to reduce the ambit and, therefore, the practical effect of that provision, for, having regard to its actual wording, the subject of that provision is the adoption of potentially very diverse measures affecting economic relations with third countries which, therefore, by necessary inference, must not be limited to spheres falling within other material powers of the Community such as those in the domain of the common commercial policy or of the free movement of capital. Moreover, that interpretation finds no support in the wording of Article 301 EC, which confers a material competence on the Community the scope of which is, in theory, autonomous in relation to that of other Community competences.

Having regard to the purpose and subject-matter of that regulation, it cannot be considered that the regulation relates specifically to international trade in that it is essentially intended to promote, facilitate or govern trade, and it could not, therefore, be based on the powers of the Community in the sphere of the common commercial policy. A Community measure falls within the competence in the field of the common commercial policy provided for in Article 133 EC only if it relates specifically to international trade in that it is essentially intended to promote, facilitate or govern trade and has direct and immediate effects on trade in the products concerned. Nor can that regulation be regarded as falling within the ambit of the provisions of the EC Treaty on free movement of capital and payments, in so far as it prohibits the transfer of economic resources to individuals in third countries. With regard, first of all, to Article 57.2 EC, the restrictive measures at issue do not fall within one of the categories of measures listed in that provision. Next, so far as Article 60.1 EC is concerned, that provision cannot furnish the basis for the regulation in question either, for its ambit is determined by that of Article 301 EC. As regards, finally, Article 60.2 EC, this provision does not include any Community competence to that end, given that it does no more than enable the Member States to take, on certain exceptional grounds, unilateral measures against a third country with regard to capital movements and payments, subject to the power of the Council to require a Member State to amend or abolish such measures (see paragraphs 168, 176-178, 183, 185, 187-191, 193).

2. The view that Article 308 EC allows, in the special context of Articles 60 EC and 301 EC, the adoption of Community measures concerning not one of the objectives of the Community but one of the objectives under the EU Treaty in the sphere of external relations, including the common foreign and security policy (the CFSP), runs counter to the very wording of Article 308 EC.

While it is correct to consider that a bridge has been constructed between the actions of the Community involving economic measures under Articles 60 EC and 301 EC and the objectives of the EU Treaty in the sphere of external relations, including the CFSP, neither the wording of the provisions of the EC Treaty nor the structure of the latter provides any foundation for the view that that bridge extends to other provisions of the EC Treaty, in particular to Article 308 EC.

Recourse to Article 308 EC demands that the action envisaged should, on the one hand, relate to the 'operation of the common market' and, on the other, be intended to attain 'one of the objectives of the Community'. That latter concept, having regard to its clear and precise wording, cannot on any view be regarded as including the objectives of the CFSP.

The coexistence of the Union and the Community as integrated but separate legal orders, and the constitutional architecture of the pillars, as intended by the framers of the Treaties now in force, constitute considerations of an institutional kind militating against any extension of that bridge to articles of the EC Treaty other than those with which it explicitly creates a link.

In addition, Article 308 EC, being an integral part of an institutional system based on the principle of conferred powers, cannot serve as a basis for widening the scope of Community powers beyond the general framework created by the provisions of the EC Treaty as a whole and, in particular, by those defining the tasks and the activities of the Community.

Likewise, Article 3 EU, in particular its second paragraph, cannot supply a base for any widening of Community powers beyond the objects of the Community (see paragraphs 197-204).

3. Article 308 EC is designed to fill the gap where no specific provisions of the Treaty confer on the Community institutions express or implied powers to act, if such powers appear none the less to be necessary to enable the Community to carry out its functions with a view to attaining one of the objectives laid down by the Treaty.

Regulation no. 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, inasmuch as it imposes restrictive measures of an economic and financial nature, plainly falls within the ambit *ratione materiae* of Articles 60 EC and 301 EC. Since those articles do not, however, provide for any express or implied powers of action to impose such measures on addressees in no way linked to the governing regime of a third country such as those to whom that regulation applies, that lack of power, attributable to the limited ambit *ratione personae* of those provisions, may be made good by having recourse to Article 308 EC as a legal basis for that regulation in addition to the first two provisions providing a foundation for that measure from the point of view of its material scope, provided, however, that the other conditions to which the applicability of Article 308 EC is subject have been satisfied.

The objective pursued by the contested regulation being to prevent persons associated with Usama bin Laden, the Al-Qaeda network or the Taliban from having at their disposal any financial or economic resources, in order to impede the financing of terrorist activities, it may be made to refer to one of the objectives of the Community for the purpose of Article 308 EC. Inasmuch as they provide for Community powers to impose restrictive measures of an economic nature in order to implement actions decided on under the common foreign and security policy, Articles 60 EC and 301 EC are the expression of an implicit underlying objective, namely, that of making it possible to adopt such measures through the efficient use of a Community instrument. That objective may be regarded as constituting an objective of the Community for the purpose of Article 308 EC.

Implementing such measures through the use of a Community instrument does not go beyond the general framework created by the provisions of the EC Treaty as a whole, because by their very nature they offer a link to the operation of the common market, that link constituting another condition for the application of Article 308 EC. If economic and financial measures such as those imposed by the regulation were imposed unilaterally by every Member State, the multiplication of those national measures might well affect the operation of the common market (see paragraphs 211, 213, 216, 222, 225-227, 229-230).

4. The Community is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter, the Treaty,

which established a complete system of legal remedies and procedures designed to enable the Court of Justice to review the legality of acts of the institutions. An international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the Community legal system, observance of which is ensured by the Court by virtue of the exclusive jurisdiction conferred on it by Article 220 EC, jurisdiction that forms part of the very foundations of the Community.

With regard to a Community act which, like Regulation no. 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, is intended to give effect to a resolution adopted by the Security Council under Chapter VII of the Charter of the United Nations, it is not for the Community judicature, under the exclusive jurisdiction provided for by Article 220 EC, to review the lawfulness of such a resolution adopted by an international body, even if that review were to be limited to examination of the compatibility of that resolution with *jus cogens*, but rather to review the lawfulness of the implementing Community measure.

Any judgment given by the Community judicature deciding that a Community measure intended to give effect to such a resolution is contrary to a higher rule of law in the Community legal order would not entail any challenge to the primacy of that resolution in international law (see paragraphs 281-282, 286-288).

5. Fundamental rights form an integral part of the general principles of law whose observance 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. In that regard, the European Convention for the Protection of Human Rights and Fundamental Freedoms has special significance. Respect for human rights is therefore a condition of the lawfulness of Community acts, and measures incompatible with respect for human rights are not acceptable in the Community.

The obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty.

It is not a consequence of the principles governing the international legal order under the United Nations that any judicial review of the internal lawfulness of the Regulation no. 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban in the light of fundamental freedoms is excluded by virtue of the fact that that measure is intended to give effect to a resolution of the Security Council adopted under Chapter VII of the Charter of the United Nations. Such immunity from jurisdiction for a Community measure, as a corollary of the principle of the primacy at the level of international law of obligations under the Charter of the United Nations, especially those relating to the implementation of resolutions of the Security Council adopted under Chapter VII of that Charter, cannot find a basis in the EC Treaty. Article 307 EC may in no circumstances permit any challenge to the principles that form part of the very foundations of the Community legal order, which include the principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in Article 6.1 EU as a foundation of the Union. If Article 307 EC, providing that agreements concluded under the conditions set out therein are to be binding on the institutions of the Community and on Member States, were applicable to the Charter of the United Nations, it would confer on the latter primacy over acts of secondary Community law. That primacy at the level of Community law would not, however, extend to primary law, in particular to the general principles of which fundamental rights form part.

The Community judicature must, therefore, in accordance with the powers conferred on it by the EC Treaty, ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law, including review of Community measures which, like the regulation at issue, are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations (see paragraphs 283-285, 299, 303-304, 306-308, 326).

6. The Community must respect international law in the exercise of its powers and a measure adopted by virtue of those powers must be interpreted, and its scope limited, in the light of the relevant rules of international law.

In the exercise of its power to adopt Community measures taken on the basis of Articles 60 EC and 301 EC, in order to give effect to resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations, the Community must attach special importance to the fact that, in accordance with Article 24 of the Charter of the

United Nations, the adoption by the Security Council of resolutions under Chapter VII of the Charter constitutes the exercise of the primary responsibility with which that international body is invested for the maintenance of peace and security at the global level, a responsibility which, under Chapter VII, includes the power to determine what and who poses a threat to international peace and security and to take the measures necessary to maintain or restore them.

The Charter of the United Nations does not, however, impose the choice of a predetermined model for the implementation of resolutions adopted by the Security Council under Chapter VII, since they are to be given effect in accordance with the procedure applicable in that respect in the domestic legal order of each Member of the United Nations. The Charter of the United Nations leaves the Members of the United Nations a free choice among the various possible models for transposition of those resolutions into their domestic legal order (see paragraphs 291, 293-294, 298).

7. So far as concerns the rights of the defence, in particular the right to be heard, with regard to restrictive measures such as those imposed by Regulation no. 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, the Community authorities cannot be required to communicate, before the name of a person or entity is included for the first time in the list of persons or entities concerned by those measures, the grounds on which that inclusion is based. Such prior communication would be liable to jeopardise the effectiveness of the freezing of funds and resources imposed by that regulation. Nor, for reasons also connected to the objective pursued by that regulation and to the effectiveness of the measures provided by the latter, were the Community authorities bound to hear the appellants before their names were included for the first time in the list set out in Annex I to that regulation. In addition, with regard to a Community measure intended to give effect to a resolution adopted by the Security Council in connection with the fight against terrorism, overriding considerations to do with safety or the conduct of the international relations of the Community and of its Member States may militate against the communication of certain matters to the persons concerned and, therefore, against their being heard on those matters.

Nevertheless, the rights of the defence, in particular the right to be heard, were patently not respected, for neither the regulation at issue nor Common Position 2002/402 concerning restrictive measures against Usama bin Laden, members of the Al-Qaeda organisation and the Taliban and other individuals,

groups, undertakings and entities associated with them, to which that regulation refers, provides for a procedure for communicating the evidence justifying the inclusion of the names of the persons concerned in Annex I to that regulation and for hearing those persons, either at the same time as that inclusion or later and, furthermore, the Council neither communicated to the appellants the evidence used against them to justify the restrictive measures imposed on them nor afforded them the right to be informed of that evidence within a reasonable period after those measures were enacted (see paragraphs 334, 338-339, 341-342, 345, 348).

8. The principle of effective judicial protection is a general principle of Community law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 ECHR, this principle having furthermore been reaffirmed by Article 47 of the Charter of fundamental rights of the European Union.

Observance of the obligation to communicate the grounds on which the name of a person or entity is included in the list forming Annex I to Regulation no. 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban is necessary both to enable the persons to whom restrictive measures are addressed to defend their rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in their applying to the Community judicature and also to put the latter fully in a position in which it may carry out the review of the lawfulness of the Community measure in question which is its duty under the EC Treaty.

Given that those persons or entities were not informed of the evidence adduced against them and having regard to the relationship between the rights of the defence and the right to an effective legal remedy, they have also been unable to defend their rights with regard to that evidence in satisfactory conditions before the Community judicature and the latter is not able to undertake the review of the lawfulness of that regulation in so far as it concerns those persons or entities, with the result that it must be held that their right to an effective legal remedy has also been infringed (see paragraphs 335-337, 349, 351).

9. The importance of the aims pursued by a Community act is such as to justify negative consequences, even of a substantial nature, for some operators, including those who are in no way responsible for the situation which led to the adoption of the measures in question, but who find themselves affected, particularly as regards their property rights.

With reference to an objective of public interest as fundamental to the international community as the fight by all means, in accordance with the Charter of the United Nations, against the threats to international peace and security posed by acts of terrorism, the freezing of the funds, financial assets and other economic resources of the persons identified by the Security Council or the Sanctions Committee as being associated with Usama bin Laden, members of the Al-Qaeda organisation and the Taliban cannot per se be regarded as inappropriate or disproportionate. In this respect, the restrictive measures imposed by Regulation no. 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban constitute restrictions of the right to property which may, in principle, be justified.

The applicable procedures must, however, afford the person or entity concerned a reasonable opportunity of putting his or its case to the competent authorities, as required by Article 1 Protocol 1 ECHR.

Thus, the imposition of the restrictive measures laid down by that regulation in respect of a person or entity, by including him or it in the list contained in its Annex I, constitutes an unjustified restriction of the right to property, for that regulation was adopted without furnishing any guarantee enabling that person or entity to put his or its case to the competent authorities, in a situation in which the restriction of property rights must be regarded as significant, having regard to the general application and actual continuation of the restrictive measures affecting him or it (see paragraphs 361, 363, 366, 368-370).

Summary:

I. Mr Kadi and Al Barakaat International Foundation were designated by the Sanctions Committee of the United Nations Security Council as a person and an entity suspected of supporting terrorism. In accordance with the United Nations resolutions, the Council of the European Union adopted Regulation no. 881/2002 ordering the freezing of the funds of persons appearing on the list annexed to that regulation, which reproduces the list established by the United Nations Security Council.

Mr Kadi and Al Barakaat International Foundation, whose names were on that list, brought an action for annulment of the regulation before the Court of First Instance, claiming that the Council was not competent to adopt the regulation in question and that the regulation infringed a number of their fundamental rights, notably the right to property and the rights of the defence. The Court of First Instance rejected those pleas and held that, in principle, the

Community judicature had no jurisdiction to review the validity of the contested regulation, since member States are required to comply with resolutions of the Security Council according to the terms of the Charter of the United Nations, an international treaty which takes precedence over Community law. Mr Kadi therefore appealed to the Court of Justice.

II. The Court of Justice held that the Community judicature has jurisdiction to review the lawfulness of a regulation implementing a decision of the United Nations Security Council. It emphasised, in that regard, that the review of lawfulness undertaken by the Community judicature concerns the Community measure designed to implement the international agreement in question and not the international agreement as such.

Furthermore, in the Court's view, the imposition of restrictive measures of an economic nature decided in the context of the common foreign and security policy offers a link to the operation of the common market that can justify the adoption of that regulation. The Court set aside the judgments of the Court of First Instance.

As for the substantive review of the contested measure in the light of fundamental rights, the Court observed that the regulation at issue made no provision for any procedure that would enable the persons concerned to know the grounds for their inclusion on the list and to put forward their views. It also observed that the Council had not informed the appellants of the evidence adduced against them. The Court thus considered that the freezing of funds constituted an unjustified restriction of Mr Kadi's right to property and therefore annulled the regulation in so far as it froze the funds of Mr Kadi and of Al Barakaat International Foundation.

Cross-references:

- CFI, 21.09.2005, *Yusuf Al Barakaat International Foundation v. Council and Commission* (T-306/01, ECR, p. II-3533).

Languages:

Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovakian, Slovenian, Spanish, Swedish.



European Court of Human Rights

Important decisions

Identification: ECH-2010-1-001

a) Council of Europe / b) European Court of Human Rights / c) Grand Chamber / d) 09.04.2009 / e) 71463/01 / f) Šilih v. Slovenia / g) *Reports of Judgments and Decisions of the Court* / h) CODICES (English, French).

Keywords of the systematic thesaurus:

5.1.3 Fundamental Rights – General questions – **Positive obligation of the state.**
5.3.2 Fundamental Rights – Civil and political rights – **Right to life.**

Keywords of the alphabetical index:

Competence *ratione temporis* / Investigation, effective.

Headnotes:

The procedural obligation to carry out an effective investigation into a death has evolved into a separate and autonomous duty of the State even when the death took place before ratification of the European Convention on Human Rights.

However, the obligation is not open-ended: only procedural acts or omissions that have occurred after ratification can fall within the European Court's temporal jurisdiction, and there must be a genuine connection between the death and the entry into force of the European Convention on Human Rights with respect to the State concerned.

Failure to fulfil a positive obligation to conduct an investigation into a death allegedly due to medical negligence, on account of the excessive length of the criminal and civil proceedings.

Summary:

The applicants' son died in hospital in May 1993 after suffering anaphylactic shock, probably as a result of an allergic reaction to a drug administered by a duty doctor. The applicants immediately lodged a criminal complaint against the doctor, but it was dismissed by the public prosecutor for lack of evidence. On 28 June 1994 the European Convention on Human Rights entered into force in respect of Slovenia. In August 1994, the applicants used their right under Slovenian law to act as subsidiary prosecutors and lodged a request for a criminal investigation. The investigation was reopened in April 1996 and an indictment was lodged on 28 February 1997; the case was twice remitted for further investigation before the criminal proceedings were discontinued in October 2000 again for lack of evidence. The applicants appealed unsuccessfully.

In the meantime, in July 1995, the applicants had also brought civil proceedings against the hospital and the doctor. The first-instance proceedings were stayed between October 1997 and May 2001 pending the outcome of the criminal proceedings and ended with the dismissal of the claim in August 2006. During that period, the case was dealt with by at least six different judges. Subsequently, the applicants lodged an appeal and an appeal on points of law, both of which were unsuccessful. When the European Court delivered its judgment, the case was still pending before the Constitutional Court.

In their application to the Court, the applicants complained that the length of the civil and criminal proceedings following the death of their son was in breach of the State's obligation to protect his right to life. They relied in that respect on Article 2 ECHR.

The issue arose as to the Court's temporal jurisdiction to hear complaints under the procedural limb of Article 2 ECHR in cases where death occurred before the date the Convention entered into force in respect of the respondent State ("the critical date"). The Court found that the procedural obligation to carry out an effective investigation under Article 2 ECHR had evolved into a separate and autonomous duty, which though triggered by acts concerning the substantive aspects of Article 2 ECHR could give rise to a finding of a separate and independent "interference". The procedural obligation could thus be considered a detachable obligation capable of binding the State even when the death took place before the critical date. Accordingly, the Court could assume temporal jurisdiction in such cases. However, the principle of legal certainty meant that its jurisdiction was not open-ended. Firstly, where the death occurred before the critical date, only procedural acts and/or

omissions occurring after that date could fall within the Court's temporal jurisdiction. Secondly, there had to be a genuine connection between the death and the entry into force of the Convention in respect of the respondent State for the procedural obligations imposed by Article 2 ECHR to come into effect; this meant that a significant proportion of the procedural steps required by that provision had to have been or ought to have been carried out after the critical date (although it was not excluded that in certain circumstances the connection could also be based on the need to ensure that the guarantees and underlying values of the Convention were protected in a real and effective manner).

Applying these principles to the circumstances of the applicants' case, the Court noted that the death of the applicants' son had occurred just over a year before the entry into force of the Convention in respect of Slovenia and that, apart from the preliminary investigation, all the criminal and civil proceedings had been initiated and conducted after that date. The Court therefore had temporal jurisdiction in respect of the procedural complaint to the extent that it related to events after the critical date.

In view of the allegation of death through medical negligence, the State had been required to set up an effective and independent judicial system to determine the cause of death and bring those responsible to account. The applicants had used two legal remedies, one criminal the other civil. The excessive length of the criminal proceedings, and in particular of the investigation, could not be justified by either the conduct of the applicants or the complexity of the case. The civil proceedings were still pending more than 13 years after they were instituted. While the applicants' requests for a change of venue and for certain judges to stand down had delayed the proceedings to a degree, many of the delays after the stay was lifted were unreasonable. It was also unsatisfactory for the applicants' case to have been dealt with by at least six different judges in a single set of first-instance proceedings, as frequent changes of judge were bound to impede effective processing. The domestic authorities had therefore failed to deal with the applicants' claim with the requisite level of diligence. There had therefore been a violation of Article 2 ECHR.

Cross-references:

- *Foti and Others v. Italy*, 10.12.1982, Series A, no. 56;
- *B. v. the United Kingdom*, 08.07.1987, Series A, no. 121;
- *Barberà, Messegué and Jabardo v. Spain*, 06.12.1988, Series A, no. 146;
- *Hokkanen v. Finland*, 23.09.1994, Series A, no. 299-A; *Bulletin* 1994/3 [ECH-1994-3-015];
- *Yağcı and Sargın v. Turkey*, judgment of 08.06.1995, Series A, no. 319-A; *Bulletin* 1995/2 [ECH-1995-2-009];
- *McCann and Others v. the United Kingdom*, 27.09.1995, Series A, no. 324; *Bulletin* 1995/3 [ECH-1995-3-016];
- *R.M.D. v. Switzerland*, 26.09.1997, *Reports of Judgments and Decisions* 1997-VI;
- *Zana v. Turkey* [GC], 25.11.1997, *Reports* 1997-VII; *Bulletin* 1997/3 [ECH-1997-3-020];
- *Kaya v. Turkey*, 19.02.1998, *Reports* 1998-I; *Bulletin* 1998/1 [ECH-1998-1-004];
- *Ergi v. Turkey*, 28.07.1998, *Reports* 1998-IV;
- *Yaşa v. Turkey*, 02.09.1998, *Reports* 1998-VI;
- *Assenov and Others v. Bulgaria*, 28.10.1998, *Reports* 1998-VIII;
- *Humen v. Poland* [GC], no. 26614/95, 15.10.1999;
- *Powell v. the United Kingdom* (dec.), no. 45305/99, ECHR 2000-V;
- *İlhan v. Turkey* [GC], no. 22277/93, ECHR 2000-VII; *Bulletin* 2000/2 [ECH-2000-2-005];
- *Moldovan and Others and Rostaş and Others v. Romania* (dec.), nos. 41138/98 and 64320/01, 13.04.2001;
- *McKerr v. the United Kingdom*, no. 28883/95, ECHR 2001-III;
- *Cyprus v. Turkey* [GC], no. 25781/94, ECHR 2001-IV;
- *Calvelli and Ciglio v. Italy* [GC], no. 32967/96, ECHR 2002-I;
- *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99, ECHR 2002-II;
- *Mastromatteo v. Italy* [GC], no. 37703/97, ECHR 2002-VIII;
- *Broniowski v. Poland* (dec.) [GC], no. 31443/96, ECHR 2002-X;
- *Lazzarini and Ghiacci v. Italy* (dec.), no. 53749/00, 07.11.2002;
- *Bălăşoiu v. Romania*, no. 37424/97, 02.09.2003;
- *M.C. v. Bulgaria*, no. 39272/98, ECHR 2003-XII;
- *Slimani v. France*, no. 57671/00, 27.07.2004;
- *Vo v. France* [GC], no. 53924/00, ECHR 2004-VIII;
- *Öneryıldız v. Turkey* [GC], no. 48939/99, ECHR 2004-XII;
- *Kanlıbaş v. Turkey* (dec.), no. 32444/96, 28.04.2005;
- *Hackett v. the United Kingdom* (dec.) no. 34698/04, 10.05.2005;
- *Süheyla Aydın v. Turkey*, no. 25660/94, 24.05.2005;
- *Moldovan v. Romania* (no. 2), nos. 41138/98 and 64320/01, ECHR 2005-VII;
- *Voroshilov v. Russia* (dec.), no. 21501/02, 08.12.2005;

- *Scavuzzo-Hager and Others v. Switzerland*, no. 41773/98, 07.02.2006;
- *Blečić v. Croatia* [GC], no. 59532/00, ECHR 2006-III;
- *Byrzykowski v. Poland*, no. 11562/05, 27.06.2006;
- *Kholodov and Kholodova v. Russia* (dec.), no. 30651/05, 14.09.2006;
- *Haroutyunian v. Armenia*, no. 36549/03, 28.06.2007;
- *Ramsahai and Others v. the Netherlands* [GC], no. 52391/99, ECHR 2007-VI;
- *Brecknell v. the United Kingdom*, no. 32457/04, 27.11.2007.

Languages:

English, French.



Identification: ECH-2010-1-002

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 09.06.2009 / **e)** 33401/02 / **f)** *Opuz v. Turkey* / **g)** *Reports of Judgments and Decisions of the Court* / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

5.1.3 Fundamental Rights – General questions – **Positive obligation of the state.**

5.2.2.1 Fundamental Rights – Equality – Criteria of distinction – **Gender.**

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:

Violence, domestic / Rights, protection, equal.

Headnotes:

The positive obligation on the State to protect the right to life in the context of offences against the person arises when the authorities knew or ought to have known of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party and requires that they

take measures within the scope of their powers which, judged reasonably, might be expected to avoid that risk.

Failure to investigate adequately incidents of domestic violence against women will constitute unjustified discrimination.

Summary:

The applicant's mother was shot and killed by the applicant's husband in 2002 as she attempted to help the applicant flee the matrimonial home. In the years preceding the shooting the husband had subjected both the applicant and her mother to a series of violent assaults, some of which had resulted in injuries which doctors had certified as life-threatening. The incidents had included beatings, an attempt to run the two women down with a car that had left the mother seriously injured and an assault in which the applicant was stabbed seven times. The incidents and the women's fears for their lives had been repeatedly brought to the authorities' attention. Although criminal proceedings had been brought against the husband for a range of offences, including death threats, serious assault and attempted murder, in at least two instances they were discontinued after the women withdrew their complaints, allegedly under pressure from the husband. However, in view of the seriousness of the injuries, the proceedings in respect of the running down and stabbing incidents continued to trial. The husband was convicted in both cases. For the first offence, he received a three-month prison sentence, which was later commuted to a fine, and for the second, a fine payable in instalments. The violence culminated in the fatal shooting of the applicant's mother, an act the husband said he carried out to protect his honour. For that offence, he was convicted of murder in 2008 and sentenced to life imprisonment. He was, however, released pending appeal and renewed his threats against the applicant, who sought the authorities' protection. It was not until seven months later, following a request for information from the European Court of Human Rights, that measures were taken to protect her.

In her application to the Court, the applicant complained that the authorities had failed to safeguard the right to life of her mother. She relied in that respect on Article 2 ECHR. The applicant also complained that she had been subjected to violence, injuries and death threats and that the authorities were negligent towards her situation. She relied in that respect on Article 3 ECHR. The applicant complained that she and her mother had been discriminated against on the basis of gender. She relied in that respect on Article 14 ECHR.

With regard to the complaint under Article 2 ECHR, the Court reiterated that where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their duty to prevent and suppress offences against the person, it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.

As to the foreseeability of the risk, the case disclosed a pattern of escalating violence against the applicant and her mother that was sufficiently serious to have warranted preventive measures and there had been a continuing threat to their health and safety. It had been obvious that the husband had a record of domestic violence and there was therefore a significant risk of further violence. The situation was known to the authorities and, two weeks' before her death, the mother had notified the public prosecutor's office that her life was in immediate danger and requested police intervention. The possibility of a lethal attack had therefore been foreseeable.

As to whether the authorities took appropriate measures, the first issue was whether the authorities had been justified in not pursuing criminal proceedings against the husband when the applicant and her mother withdrew their complaints. The Court began by examining practice in the member States. It found that, although there was no general consensus, the practice showed that the more serious the offence or the greater the risk of further offences, the more likely it was that the prosecution would proceed in the public interest even when the victim had withdrawn her complaint. Various factors were to be taken into account in deciding whether to pursue a prosecution. These related to the offence (its seriousness, the nature of the victim's injuries, the use of a weapon, planning), the offender (his record, the risk of his reoffending, any past history of violence), the victim and potential victims (any risk to their health and safety, any effects on the children, the existence of further threats since the attack) and the relationship between the offender and the victim (the history and current position, and the effects of pursuing a prosecution against the victim's wishes). In the applicant's case, despite the pattern of violence and use of lethal weapons, the authorities had repeatedly dropped proceedings against the husband in order to avoid interfering in what they perceived to be a "family matter" and did not appear to have considered the motives behind the withdrawal of the complaints, despite being informed of the death threats. As to the

argument that the authorities had been prevented from proceeding by the statutory rule that prevented a prosecution where the complaint had been withdrawn unless the criminal acts had resulted in a minimum of ten days' sickness or unfitness for work, that legislative framework fell short of the requirements inherent in the State's positive obligations with regard to protection from domestic violence. Nor could it be argued that continuing with the prosecution would have violated the victims' rights under Article 8 ECHR, as the seriousness of the risk to the applicant's mother had rendered such intervention necessary.

Turning to the Government's submission that there had been no tangible evidence that the mother's life was in imminent danger, the Court observed that it was not the case that the authorities had assessed the threat posed by the husband and concluded that detention was disproportionate. Rather they had failed to address the issues at all. In any event, in domestic violence cases perpetrators' rights could not supersede victims' rights to life and physical and mental integrity.

Lastly, the Court noted that the authorities could have ordered protective measures under the Family Protection Act (Law no. 4320) or issued an injunction restraining the husband from contacting, communicating with or approaching the applicant's mother or entering defined areas. In sum, they had not displayed due diligence and had therefore failed in their positive obligations to protect the applicant's mother's right to life.

Finally, as to the effectiveness of investigation, the criminal proceedings arising out of the death had been going on for more than six years and an appeal was still pending. This could not be described as a prompt response by the authorities to an intentional killing where the perpetrator had already confessed.

In conclusion, the criminal justice system, as applied in the applicant's case, had not acted as an adequate deterrent. Once the situation had been brought to the authorities' attention, they had not been entitled to rely on the victims' attitude for their failure to take adequate measures to prevent threats to physical integrity being carried out. There had therefore been a violation of Article 2 ECHR.

With regard to the complaint under Article 3 ECHR, the authorities' response to the husband's acts had been manifestly inadequate in the face of the gravity of his offences. The judicial decisions had had no noticeable preventive or deterrent effect and had even disclosed a degree of tolerance, with the husband receiving a short prison sentence (commuted to a fine) for the

running down incident and, even more strikingly, a small fine, payable in instalments, for stabbing the applicant seven times. Furthermore, it had not been until 1998, when Law no. 4320 came into force, that Turkish law had provided specific administrative and policing measures to protect against domestic violence, and even then, the available measures and sanctions were not effectively applied in the applicant's case. Lastly, it was a matter of grave concern that the violence against the applicant had not ended and that the authorities had continued to take no action. Despite the applicant's request for help, nothing was done until the Court requested the Government to provide information about the protective measures it had taken. In short, the authorities had failed to take protective measures in the form of effective deterrence against serious breaches of the applicant's personal integrity by her former husband. There had therefore been a violation of Article 3 ECHR.

Finally, with regard to Article 14 ECHR, in conjunction with Articles 2 and 3 ECHR, the Court noted that under the relevant rules and principles of international law accepted by the vast majority of States, a failure – even if unintentional – by the State to protect women against domestic violence breached their right to the equal protection of the law. Reports by the Diyarbakır Bar Association and Amnesty International, which were not contested by the Government, indicated that the highest number of reported victims of domestic violence was in Diyarbakır, where the applicant had lived at the relevant time. All the victims were women, the vast majority of Kurdish origin, illiterate or of a low level of education and generally without any independent source of income. The reports also suggested that domestic violence was tolerated by the authorities and that the available remedies did not function effectively. Police officers did not investigate complaints but sought to assume the role of mediator by trying to convince victims to return home and drop their complaints. Delays in issuing and serving injunctions were frequent and the courts treated such proceedings as a form of divorce action. Perpetrators of domestic violence did not receive deterrent sentences, which were mitigated on the grounds of custom, tradition or honour.

Domestic violence thus affected mainly women, while the general and discriminatory judicial passivity in Turkey created a climate that was conducive to it. The violence suffered by the applicant and her mother could therefore be regarded as having been gender-based and discriminatory against women. Despite the reforms carried out by the Government in recent years, the overall unresponsiveness of the judicial system and the impunity enjoyed by aggressors, as in the applicant's case, indicated an

insufficient commitment on the part of the authorities to take appropriate action to address domestic violence. There had therefore been a violation of Article 14 ECHR, in conjunction with Articles 2 and 3 ECHR.

Cross-references:

- *Costello-Roberts v. the United Kingdom*, 25.03.1993, Series A, no. 247-C;
- *H.L.R. v. France*, 29.04.1997, *Reports of Judgments and Decisions* 1997-III;
- *L.C.B. v. the United Kingdom*, 09.06.1998, *Reports* 1998-III; *Bulletin* 1998/2 [ECH-1998-2-008];
- *A. v. the United Kingdom*, 23.09.1998, *Reports* 1998-VI;
- *Yaşa v. Turkey*, 02.09.1998, *Reports* 1998-VI;
- *Osman v. the United Kingdom*, 28.10.1998, *Reports* 1998-VIII;
- *Çakıcı v. Turkey* [GC], no. 23657/94, ECHR 1999-IV;
- *Avşar v. Turkey*, no. 25657/94, ECHR 2001-VII;
- *Calvelli and Ciglio v. Italy* [GC], no. 32967/96, ECHR 2002-I;
- *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99, ECHR 2002-II;
- *Hoogendijk v. the Netherlands* (dec.), no. 58461/00, 06.01.2005;
- *K.A. and A.D. v. Belgium*, no. 42758/98 and 45558/99, 17.02.2005;
- *Zarb Adami v. Malta*, no. 17209/02, ECHR 2006-VIII;
- *Kontrová v. Slovakia*, no. 7510/04, ECHR 2007-VI;
- *Nikolova and Velichkova v. Bulgaria*, no. 7888/03, 20.12.2007;
- *D.H. and Others v. Czech Republic* [GC], no. 57325/00, 13.11.2007;
- *Saadi v. Italy* [GC], no. 37201/06, ECHR 2008;
- *Ali and Ayşe Duran v. Turkey*, no. 42942/02, 08.04.2008;
- *Bevacqua and S. v. Bulgaria*, no. 71127/01, 12.06.2008;
- *Demir and Baykara v. Turkey* [GC], no. 34503/97, 12.11.2008.

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 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.

- 1.3.4.7.2 Withdrawal of civil rights
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- 1.3.4.7.4 Impeachment
- 1.3.4.8 Litigation in respect of jurisdictional conflict
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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.

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³⁴ Comprises court fees, postage costs, advance of expenses and lawyers' fees.

³⁵ For questions of constitutionality dependent on a specified interpretation, use 2.3.2.

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³⁷ This keyword allows for the inclusion of enactments and principles arising from a separate constitutional chapter elaborated with reference to the original Constitution (declarations of rights, basic charters, etc.).

³⁸ Including its Protocols.

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³⁹ Presumption of constitutionality, double construction rule.

⁴⁰ Including the principle of a multi-party system.

⁴¹ Includes the principle of social justice.

⁴² See also 4.8.

⁴³ Separation of Church and State, State subsidisation and recognition of churches, secular nature, etc.

⁴⁴ Including maintaining confidence and legitimate expectations.

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⁴⁵ Principle according to which sub-statutory acts must be based on and in conformity with the law.

⁴⁶ Prohibition of punishment without proper legal base.

⁴⁷ Including compelling public interest.

⁴⁸ Only where not applied as a fundamental right (e.g. between state authorities, municipalities, etc.).

⁴⁹ Including questions of treason/high crimes.

⁵⁰ Including prohibition on monopolies.

⁵¹ For the principle of primacy of Community law, see 2.2.1.6.

⁵² Including the body responsible for revising or amending the Constitution.

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⁵³ For example, presidential messages, requests for further debating of a law, right of legislative veto, dissolution.

⁵⁴ For example, nomination of members of the government, chairing of Cabinet sessions, countersigning.

⁵⁵ For example, the granting of pardons.

⁵⁶ For regional and local authorities, see chapter 4.8.

⁵⁷ Bicameral, monocameral, special competence of each assembly, etc.

⁵⁸ Including specialised powers of each legislative body and reserved powers of the legislature.

⁵⁹ In particular, commissions of enquiry.

⁶⁰ For delegation of powers to an executive body, see keyword 4.6.3.2.

⁶¹ Obligation on the legislative body to use the full scope of its powers.

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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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⁸⁰ See also 3.6.

⁸¹ And other units of local self-government.

⁸² See also keywords 5.3.41 and 5.2.1.4.

⁸³ Organs of control and supervision.

⁸⁴ Including other consultations.

⁸⁵ For questions of jurisdiction, see keyword 1.3.4.6.

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⁸⁶ Proportional, majority, preferential, single-member constituencies, etc.

⁸⁷ For example, Panachage, voting for whole list or part of list, blank votes.

⁸⁸ For aspects related to fundamental rights, see 5.3.41.2.

⁸⁹ For the creation of political parties, see 4.5.10.1.

⁹⁰ For example, names of parties, order of presentation, logo, emblem or question in a referendum.

⁹¹ Tracts, letters, press, radio and television, posters, nominations, etc.

⁹² Impartiality of electoral authorities, incidents, disturbances.

⁹³ For example, signatures on electoral rolls, stamps, crossing out of names on list.

⁹⁴ For example, in person, proxy vote, postal vote, electronic vote.

⁹⁵ This keyword covers property of the central state, regions and municipalities and may be applied together with chapter 4.8.

⁹⁶ For example, Auditor-General.

⁹⁷ Includes ownership in undertakings by the state, regions or municipalities.

⁹⁸ Parliamentary Commissioner, Public Defender, Human Rights Commission, etc.

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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.

¹⁰⁵ For rights of the child, see 5.3.44.

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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.

¹¹² This keyword also covers "Personal liberty". It includes for example identity checking, personal search and administrative arrest.

¹¹³ Detention by police.

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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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¹²⁵

This keyword also covers "Freedom of work".

¹²⁶

Includes rights of the individual with respect to trade unions, rights of trade unions and the right to conclude collective labour agreements.

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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