

# 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.

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

## Editors:

Sc. R. Dürr, T. Gerwien, D. Jones, A. Úbeda de Torres  
A. Gorey, M.-L. Wigishoff

## Liaison officers:

Albania .....	N. Ruco	Liechtenstein.....	I. Elkuch
Algeria.....	H. Bengrine	Lithuania .....	J. Urbonaite
Andorra .....	M. Tomàs-Baldrich	Luxembourg.....	J. Jentgen
Argentina.....	R. E. Gialdino	Malta .....	A. Ellul
Armenia.....	G. Vahanian	Mexico.....	J. Flores / F. Tortolero Cervantes
Austria .....	C. Grabenwarter	Moldova .....	V. Sterbet
.....	/ B. Adamovich-Wagner	Monaco .....	C. Sosso
Azerbaijan .....	R. Guliyev	Montenegro.....	N. Dobardzic
Belarus.....	S. Chigrinov / O. Sergeeva	Morocco .....	A. Hassouni
.....	/ V. Seledovsky	Netherlands.....	M. Chebti / M. van Roosmalen
Belgium.....	A. Rasson Roland / R. Ryckeboer	Norway.....	K. Buun Nygaard
Bosnia and Herzegovina.....	Z. Djuricic	Peru .....	K. Benvenuto
Brazil .....	J.-B. Magalhaes	Poland.....	M. Nowak
Bulgaria.....	E. Enikova	Portugal.....	M. Baptista Lopes
Canada .....	D. Power / S. Giguère	Romania.....	T. Toader / R. Sabareanu
Chile.....	C. Garcia Mechsner	Russia.....	E. Pyrikov
Croatia .....	M. Stresec	Serbia.....	V. Jakovljevic
Cyprus.....	N. Papanicolaou / M. Kyriacou	Slovakia .....	G. Fet'kova / J. Stivnicky / Z. Gajdosova
Czech Republic.....	S. Matochová / T. Langasek	Slovenia .....	U. Umek
.....	/ I. Pospisil	South Africa .....	E. Cameron / C. Ferreira
Denmark .....	N. Winther	.....	S.-J. Frith / S. Luthuli
Estonia .....	K. Aule / U. Eesmaa	Spain.....	L. Pomed Sanchez
Finland .....	F. Haggblom / G. Bygglin / T. Vuorialho	Sweden .....	L. Molander / K. Norman
France.....	C. Petillon / L. Brau / V. Gourrier	Switzerland .....	P. Tschümperlin / J. Alberini-Boillat
Georgia .....	I. Khakhutaishvili	"The former Yugoslav Republic of Macedonia".....	.....
Germany .....	G. Lübbe-Wolff / M. Böckel	.....	T. Janjic Todorova
Greece .....	T. Ziamou / O. Papadopoulou	Turkey.....	A. Coban
Hungary .....	P. Paczolay / K. Kovács	Ukraine.....	O. Kravchenko
Iceland .....	H. Torfason	United Kingdom .....	J. Sorabji
Ireland.....	C. Kelly	United States of America .....	P. Krug / C. Vasil
Israel .....	Y. Mersel	.....	/ J. Minear
Italy .....	G. Cattarino		
Japan .....	H. Gunji		
Kazakhstan .....	B. Nurmukhanov		
Republic of Korea .....	M. Shin / J.S. Ha		
Latvia .....	L. Jurcena		

European Court of Human Rights .....	S. Naismith
Court of Justice of the European Union .....	Ph. Singer
Inter-American Court of Human Rights .....	J. Recinos

Strasbourg, October 2011

## **CONTENTS**

Belarus.....	449	Morocco .....	568
Belgium .....	453	Netherlands.....	570
Bosnia and Herzegovina.....	457	Norway.....	571
Brazil .....	461	Poland.....	572
Bulgaria.....	473	Portugal.....	575
Canada .....	479	Romania.....	583
Croatia .....	482	Russia.....	585
Cyprus.....	497	Serbia.....	586
Czech Republic.....	499	Slovenia .....	595
Estonia.....	504	South Africa .....	597
France.....	506	Switzerland .....	603
Georgia .....	512	“The former Yugoslav Republic of Macedonia” .....	607
Germany .....	517	Turkey.....	610
Hungary .....	535	Ukraine.....	612
Ireland.....	538	Inter-American Court of Human Rights.....	621
Korea .....	540	Court of Justice of the European Union.....	623
Liechtenstein.....	548	European Court of Human Rights.....	628
Lithuania .....	549	Systematic thesaurus.....	635
Mexico.....	553, 561	Alphabetical index.....	653

There was no relevant constitutional case-law during the reference period 1 September 2010 – 31 December 2010 for the following countries:

Armenia, Austria, Denmark, Kazakhstan, Luxembourg, Slovakia.

Précis of important decisions of the reference period 1 September 2010 – 31 December 2010 will be published in the next edition, *Bulletin* 2011/1, for the following countries:

Azerbaijan, Latvia.

# Belarus

## Constitutional Court

---

### Important decisions

*Identification:* BLR-2010-3-007

**a)** Belarus / **b)** Constitutional Court / **c)** / **d)** 15.12.2010 / **e)** D-524/2010 / **f)** On the effects of regulatory legal acts upon the termination of the exercise of the authority delegated to adopt them / **g)** *Vesnik Kanstytucijnaga Suda Respubliki Belarus* (Official Digest), no. 4/2010 / **h)** CODICES (English, Belarusian, Russian).

*Keywords of the systematic thesaurus:*

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

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

4.5.2.3 Institutions – Legislative bodies – Powers – **Delegation to another legislative body.**

4.6.3.2 Institutions – Executive bodies – Application of laws – **Delegated rule-making powers.**

*Keywords of the alphabetical index:*

Normative act / Legislative procedure.

*Headnotes:*

The Law on Normative Legal Acts of the Republic of Belarus should establish the procedure and time-limits for declaring that normative legal acts, which were adopted and issued pursuant to delegated powers, would lose their force when those delegated powers were terminated.

*Summary:*

The Constitutional Court made a decision on the appeal of the Committee of State Control.

The Constitutional Court observed that the correct legislative procedure is that when legislative bodies declare that an act delegating powers to adopt and issue any normative legal act has lost its force, the state institutions concerned should be instructed to bring their normative legal acts into conformity with the adopted/issued act on the termination of the

delegated powers. In adhering to this practice, the legislative body complies with the requirements of Article 58 of the Law on Normative Legal Acts on the necessity (in view of the adoption/issuance of a normative legal act) to declare acts of the same or lesser force to have lost force if they are at variance with legal provisions included in a new normative act, have been absorbed by them or have in fact lost their importance.

The Constitutional Court therefore held that if the delegated powers to adopt/issue a normative legal act are terminated, based on the content of the rules of Article 10 of the Law on Normative Legal Acts on the validity of normative legal acts, the time to declare a normative legal act, adopted under delegated powers, to have lost its force should under normal circumstances coincide with the point at which the delegated powers are terminated. This procedure would eliminate ambiguities and ensuing disputes over the application of normative legal acts.

In view of the above, and due to certain objective circumstances, legislative bodies should set out in the act terminating the delegated powers the deadline for their expiry at which point the act will come into force, together with instructions for state bodies to ensure in timely fashion the harmonisation of their normative legal acts with the one being adopted. In this case, draft normative legislation on declarations of loss of force, and changes and additions and new draft legislation shall be developed and adopted by authorised state bodies in the order of their entry into force, from the date of the entry into force of a new normative legal act.

The Constitutional Court was of the opinion that upon the adoption/issuance of a normative legal act terminating the delegated powers of a legislative body to adopt or issue normative legal acts, the act which is to be declared to have lost its force may remain in effect pending the adoption of another normative legal act by another state body or official or for a certain period of time, if the act which has been adopted/issued provides for the effect of acts declared to have lost their force. Most legal thinkers would consider such an approach to be justified and substantiated, as it would ensure the certainty, clarity and precision of legal provisions and their consistency within the system of legal regulation. It is important to set a reasonable time-limit for the validity of such an act, in view of the changes to the legal regulation of social relations on the termination of the delegated powers.

The Constitutional Court also pointed out that a precise definition of the scope of the temporary effects of normative legal acts is required by the legal regulation. This is because it provides for a normative

legal act, which currently regulates specific social relations; it also ensures the efficiency of legal rules and allows the objectives of legal regulation to be realised. The scope of the temporary effects of a normative legal act is linked to the implementation of the requirements of legal certainty. The regulation of such scope within a new normative legal act would allow for a timely abrogation of other normative legal acts in order to guard against the unjustified and arbitrary application of the act to relations which are no longer subject to its effects.

The Law on Normative Legal Acts is a legislative act that establishes a common procedure for preparing, drafting, adopting, issuing and implementing normative legal acts, including the delegation of powers for adopting and issuing an act. However, there is no relevant provision to regulate the procedure and time-limits for declaring that normative legal acts which have been adopted or issued pursuant to delegated powers, to have lost their force when those powers are terminated.

In the Constitutional Court's view, clear provision in normative legal acts on the procedure and time-limits for declaring their loss of force owing to the termination of the delegated powers of a state body to adopt or issue normative legal acts will promote the constitutional principle of supremacy of law and, therefore, legal certainty.

In order to safeguard the constitutional principle of the supremacy of the law (and accordingly legal certainty) and to fill a gap in the legislation as regards the temporary effects of legal rules, regulation is needed at the legislative level on the issues regarding the establishment of the procedure and time-limits for declaring that normative legal acts adopted or issued pursuant to delegated powers have lost their force upon the termination of those powers.

#### *Languages:*

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



#### *Identification:* BLR-2010-3-008

**a)** Belarus / **b)** Constitutional Court / **c)** / **d)** 21.12.2010 / **e)** D-526/2010 / **f)** On the constitutional conformity of the Law on External Labour Migration / **g)** *Vesnik Kanstytucijnaga Suda Respubliki Belarus* (Official Digest), no. 4/2010 / **h)** CODICES (English, Belarusian, Russian).

#### *Keywords of the systematic thesaurus:*

5.1.4.2 Fundamental Rights – General questions – Limits and restrictions – **General/special clause of limitation.**

5.4.3 Fundamental Rights – Economic, social and cultural rights – **Right to work.**

#### *Keywords of the alphabetical index:*

Foreigner living abroad / Foreign worker, maximum quota.

#### *Headnotes:*

Giving priority to the rights of nationals and foreigners residing permanently in the Republic of Belarus to be engaged in available jobs is based on the provisions of both the Constitution and international legal instruments.

#### *Summary:*

The Constitutional Court, in the exercise of mandatory preliminary review, considered the constitutionality of the Law on External Labour Migration.

The Law strengthens the requirement on the exercise by legal persons and individual entrepreneurs of activities related to the employment of nationals and foreigners residing permanently in the Republic of Belarus, outside the Republic of Belarus, as well as requirements regarding contracts of employment between immigrant workers and foreign employers on the territory of the Republic of Belarus. It also defines the vagaries of employment outside the country under student programmes. In addition, provisions of the Law regulate issues of employment in the Republic of Belarus of foreigners without a permanent residence permit and the exercise of labour activities by immigrant-workers in the country.

Under Article 23 of the Law, which deals with the employment of immigrant workers in Belarus, such activities are permissible if the vacancies cannot be filled by nationals of Belarus and foreigners with

permanent residence permits. In this way, the Law gives priority over the rights of nationals and foreigners residing permanently in the Republic of Belarus to take up available vacancies.

The Constitutional Court noted the provisions of Article 11 of the Constitution, under which foreign nationals and stateless persons on the territory of the Republic of Belarus enjoy rights and liberties and carry out duties on equal terms with citizens of the Republic of Belarus, unless otherwise specified in the Constitution, the laws and international treaties. Under Article 4 of the International Covenant on Economic, Social and Cultural Rights, participating States recognise that the rights provided under the Covenant can only be made subject to limitations determined by law, and any such limitations must be compatible with the nature of these rights and have as their sole purpose the promotion of the general welfare within a democratic society.

Article 2 of the Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live (adopted by United Nations General Assembly Resolution 40/144 of 13 December 1985) provides that “nothing in this Declaration shall be interpreted as giving legitimacy to the illegal entry into and presence in a State of any alien, nor shall any provision be interpreted as restricting the right of any State to promulgate laws and regulations concerning the entry of aliens and the terms and conditions of their stay or to establish differences between nationals and aliens”. Article 8 of the Declaration, which concerns the exercise by foreigners of the right to working conditions, specifies the rights enjoyed by aliens who are lawfully resident, in particular their right to work in accordance with national laws.

The Constitutional Court accordingly took the view that it is also legitimate that Article 24 of the Law allows for quotas to be established, in terms of foreigners without permanent residence permits seeking work in the Republic of Belarus. This is due to the public interest, the situation in the national labour market and the priority given to citizens and foreigners who do have permanent residence permits to take up any available jobs.

The Constitutional Court noted, however, that difficulties may arise over the interpretation and practical application of certain provisions in the Law.

In Article 36, for example, which sets out the rights and duties of employers, the legislator allows employers entering into contracts of employment with immigrant workers to include additional information and conditions in the contract, over and above what is provided for in part one of Article 32 of the Law, when

the employment contract is signed on the territory of the Republic Belarus. In this provision the legislator does not define the criteria that would allow for the evaluation of additional information and conditions from the standpoint of their legality and the possibility of their inclusion in an employment contract. This does not, however, mean that the resolution of this problem is given at the discretion of the employer.

The Constitutional Court took account of the constitutional and legal meaning of the provisions of the Law mentioned above, and their relationship with and inter-dependence on other legislative provisions. It noted that the establishment of the constitutional principle of the rule of law must be ensured in law-enforcement as well as in law-making. Governmental and other organisations, officials and citizens are required to comply with the Constitution and legislative acts adopted in accordance with it. Article 4 of the Law defines the basic principles of external labour migration, including the principle of non-employment of immigrant-workers under conditions that demean human dignity and are harmful to their health, as well as the inadmissibility of discrimination against immigrant-workers, irrespective of their professional qualities, job functions and status. Thus, the legislator has established criteria to guide employers, whilst including additional information and conditions in the contract of employment. The implementation of the principles of external labour migration envisaged in the Law would, in the opinion of the Constitutional Court, exclude unwarranted discretion in applying the law, to enforce its requirements in strict accordance with the Constitution and the provisions of international legal instruments.

The Constitutional Court recognised the Law on External Labour Migration as being in conformity with the Constitution.

#### *Languages:*

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



*Identification:* BLR-2010-3-009

**a)** Belarus / **b)** Constitutional Court / **c)** / **d)** 23.12.2010 / **e)** D-530/2010 / **f)** On the conformity with the Constitution of the Law on making alterations and addenda to the Law on Investigative Activities / **g)** *Vesnik Kanstytucijnaga Suda Respubliki Belarus* (Official Digest), no. 4/2010 / **h)** CODICES (English, Belarusian, Russian).

*Keywords of the systematic thesaurus:*

3.21 General Principles – **Equality**.

3.23 General Principles – **Equity**.

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 proceedings / Judicial protection.

*Headnotes:*

The various changes and additions to the legislation on investigative activities are based on the provisions and principles of the Constitution and generally recognised principles of international law. They also help to curb impingement on human rights and freedoms by officials and bodies carrying out investigative activities and to safeguard lawfulness in the carrying out of investigative activities. Moreover, these changes and additions ensure fair justice and equality of arms for parties to proceedings, and protect the interests of the defendant. Their impact corresponds to the constitutional principle of the rule of law which implies fairness and equality.

*Summary:*

The Constitutional Court, in the exercise of obligatory preliminary review, considered the constitutionality of the Law on making alterations and addenda to the Law on Investigative Activities.

Under the alterations and addenda made by the Law, bodies and officials carrying out investigative activities are forbidden to incite, induce or encourage individuals to commit illegal acts, artificially create conditions and to exert pressure, precluding the possibility of free choice over one's own behaviour, including the right to refuse to commit a crime.

In its constitutional review of the Law, the Constitutional Court took note of the Constitution and the generally recognised principles of international law.

In accordance with the Constitution, the Republic of Belarus safeguards legality and order (part three of Article 1), universal equality before the law and entitlement without discrimination to equal protection of rights and legitimate interests (Article 22). Nobody can be found guilty of a crime unless his guilt is proven under the procedure specified in law and established by the verdict of a court of law that has acquired legal force; a defendant is not required to prove his or her innocence (Article 26), evidence obtained in violation of the law has no legal force (Article 27); justice is administered on the basis of adversarial proceedings and equality of the parties involved in the trial (part one of Article 115).

Article 10 of the Universal Declaration of Human Right provides that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him. Article 14 of the International Covenant on Civil and Political Rights also establishes that all persons shall be equal before the courts and tribunals; in the determination of any criminal charge against him or her, or of his or her rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

The alterations and addenda to the Law on Investigative Activities are also consistent with European standards, as enshrined in the European Convention on Human Rights and by the European Court of Human Rights. Although these standards are not binding on the Republic of Belarus, they are considered by the national legislator as a guide to be used in the improvement of legislative regulation.

In carrying out investigative activities, guarantees of fair trial should be considered and observed. Where complaints are made about actions by law enforcement officials, the applicant's right to judicial protection guaranteed by the Constitution, including the right to an adversarial process and equality of the parties, should also be observed.

Equality before the law and equity are important principles of criminal responsibility. The aims of criminal procedure include the improvement of fairness, and ensuring that all offenders are subjected to fair sanctions. Sources of evidence in criminal proceedings include information from investigative activities obtained to establish the circumstances relevant to lawful, reasonable and fair resolution of the criminal case.



The Constitutional Court recognised the Law on making alterations and addenda to the Law on investigative activities as being in conformity with the Constitution.

#### *Languages:*

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



## Belgium Constitutional Court

### Important decisions

*Identification:* BEL-2010-3-011

**a)** Belgium / **b)** Constitutional Court / **c)** / **d)** 16.09.2010 / **e)** 104/2010 / **f)** / **g)** *Moniteur belge* (Official Gazette), 17.11.2010 / **h)** CODICES (French, Dutch, German).

#### *Keywords of the systematic thesaurus:*

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

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

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

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

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

#### *Keywords of the alphabetical index:*

Adoption, simple, homosexual partners, name change / Legal gap, court's role.

#### *Headnotes:*

The situation of a child adopted by the parent's same-sex spouse or cohabiting partner is no different from that of a child adopted by the husband or cohabiting partner of its biological or adoptive mother. All such children may have a like interest in retaining after adoption the name that they bore prior to it, joined to the adopter's name, since they keep the same tie with their birth family.

#### *Summary:*

I. Before the Brussels Court of Appeal, the Crown Prosecutor challenged two judgments allowing the applications of two women who had cohabited since 1998 and been married since 2005 (Belgium permits marriage between persons of the same sex), each

having a child, to register the simple adoption of each woman's child by the spouse and to declare that both children would henceforth bear the same double surname composed of their respective surnames.

The Brussels Court of Appeal enquired of the Constitutional Court whether it was compatible with the rules of equality and non-discrimination (Articles 10 and 11 of the Constitution), taken singly and in conjunction with Articles 8 and 14 ECHR, for the Civil Code to provide that where a person adopted the natural or adoptive child of his or her same-sex spouse or cohabiting partner, the latter and the adopter should declare by mutual agreement before the Court which of the two would give his or her name to the adoptee.

II. Having examined the various Civil Code provisions concerning change of an adoptee's name, the Court came to the conclusion that in all cases where simple adoption involved conferment of the adopter's name on the adoptee, the parties could ask the Court to let the adoptee keep his or her previous name or either of the two previous names, preceded or followed by the adopter's name, except in the case to which the preliminary question referred. Next, the Court noted that it could not discern in the drafting history of the provision in question any explanation regarding the lack of possibility, in the case under consideration, for adoptees to have the adopter's name preceded or followed by their birth name. It went on to point out that unlike full adoption, simple adoption did not break all the adoptee's ties with his or her birth family and that the preservation of ties justified the legislator's consistent view, at each successive amendment in the matter, that adoptees should be permitted to keep their own name followed or preceded by the adopter's name.

Asserting that it could be in the interests of all children alike to retain after adoption the name that they bore prior to it, joined to the adopter's name, the Court held that the difference in treatment was not justified. In so far as it did not allow the possibility for the parties to ask the Court to let the adoptee keep his or her name, preceded or followed by the adopter's name, the impugned provision of the Civil Code was incompatible with Articles 10 and 11 of the Constitution. The Court concluded that since the legal gap which it noted lay in the statute referred to it, the Court below had the duty of remedying the unconstitutionality found by the Court, since this finding was stated in terms of sufficient precision and completeness to permit the application of the impugned provision in accordance with Articles 10 and 11 of the Constitution.

### *Languages:*

French, Dutch, German.



### *Identification:* BEL-2010-3-012

**a)** Belgium / **b)** Constitutional Court / **c)** / **d)** 16.12.2010 / **e)** 144/2010 / **f)** / **g)** *Moniteur belge* (Official Gazette) / **h)** CODICES (French, Dutch, German).

### *Keywords of the systematic thesaurus:*

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

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

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

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

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

### *Keywords of the alphabetical index:*

Child, recognition / Paternity.

### *Headnotes:*

While as a rule it can be considered in a child's interests to have its descent from both parents established, that cannot be irrefutably presumed true in every case. There may be cases where the legal establishment of a child's paternity is prejudicial to the child, which is the reason why judicial supervision must be exercised over all such actions, irrespective of the child's age.

### *Summary:*

I. The Bruges Court of first instance enquired of the Constitutional Court whether it was compatible with the rules of equality and non-discrimination (Articles 10 and 11 of the Constitution) for a provision of the Civil Code to permit the Court to refuse

recognition of a child if this was manifestly against the child's interests, where the application for recognition concerned a child aged one year or over at the time of lodging the application.



II. The Constitutional Court noted in its judgment that Article 3.1 of the Convention on the Rights of the Child and Article 22bis of the Constitution required children's interests to be taken into account in proceedings concerning them. Next, it observed that the legislator, in amending the Civil Code by a law of 1 July 2006, had signified the intention to take the Constitutional Court's case-law into account.

On the basis of a previous judgment, the Constitutional Court found that cases could exist where legal establishment of a child's paternity was prejudicial to the child.

The Court further noted that while the age of one year constituted an objective criterion, it could not be considered relevant to the measure at issue. There could be no justification for a court hearing an application for recognition of paternity to consider the interests of a child aged over one year but not those of a child aged less than one year. Accordingly, the Court found that, in so far as it did not allow the interests of a child aged less than one year to be considered when its paternity was established by recognition, the law disproportionately interfered with the rights of the children concerned.

Indeed, the measure at issue had the effect of preventing the Court from dismissing an application for recognition if the child to be recognised had reached one year of age before the application was brought, and if the person wishing to recognise the child was certified to be the biological father.

The Court thus concluded that, if this was the case, the lack of all possibility of judicial supervision as to the interest of a dependent under-age child in having its paternity established by recognition was incompatible with Articles 10 and 11 of the Constitution.

#### *Cross-references:*

- Judgment no. 66/2003 of 14.05.2003, *Bulletin* 2003/2 [BEL-2003-2-005].

#### *Languages:*

French, Dutch, German.

#### *Identification: BEL-2010-3-013*

**a)** Belgium / **b)** Constitutional Court / **c)** / **d)** 22.12.2010 / **e)** 161/2010 / **f)** / **g)** *Moniteur belge* (Official Gazette) / **h)** CODICES (French, Dutch, German).

#### *Keywords of the systematic thesaurus:*

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

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

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

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

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

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

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

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

5.3.41 Fundamental Rights – Civil and political rights – **Electoral rights.**

#### *Keywords of the alphabetical index:*

Political parties, advertising, prohibition / Media.

#### *Headnotes:*

Absolute, permanent prohibition of advertising for political parties on radio and television constitutes an unjustified restriction on the right to freedom of expression, in so far as it may have the effect of denying certain groups access to an important means of making their positions known to the public.

#### *Summary:*

I. A number of broadcasters brought an application to set aside a French Community decree on audiovisual media services on the ground that it prohibited the

broadcasting of advertising for political parties or organisations representing employers or workers. The applicants complained of a breach of their freedom of expression (Article 19 of the Constitution and Article 10 ECHR).

II. The Court acknowledged that the applicants had an interest in overturning a provision that deprived them of advertising activity which other media were not denied.

The Court further considered that the intention of the authority issuing the decree to ensure firstly treatment which did not discriminate between political tendencies and secondly citizens' access to balanced political information constituted a legitimate aim justifying interference with freedom of expression. It made reference to the judgments of the European Court of Human Rights (ECHR) of 28 June 2001, *VgT Verein gegen Tierfabriken v. Switzerland*, § 62 and of 11 December 2008, *TV Vest AS & Rogaland Pensjonistparti v. Norway*, § 70.

The Court added that it was nevertheless expedient to verify whether the impugned provision was reasonably justified in the light of this aim. In that respect the legislator, in principle, had a limited margin of discretion when restricting freedom to express opinions which, like those of employers' or workers' organisations, were in the realm of debate concerning the public interest, even when those opinions took the form of advertising (cf. *mutatis mutandis*: ECHR, 28 June 2001, *VgT Verein gegen Tierfabriken v. Switzerland*, §§ 70-71). Strict scrutiny of proportionality must also be applied where the legislator intended to limit political parties' use of advertising resources (ECHR, 11 December 2008, *TV Vest AS & Rogaland Pensjonistparti v. Norway*, § 64).

The Court did not consider it necessary to rule on the question of whether it was reasonably justified to bar political parties, candidates and others wishing to advertise on behalf of political parties or candidates from broadcasting commercials on radio and television. Indeed, the Court found that the prohibition at issue, applicable to advertising for political parties, had an absolute and permanent effect and was not confined to the election campaign. In the Court's view, owing to its absoluteness and permanence, this ban on the broadcasting by audiovisual media of advertising for political parties and organisations representing employers and workers was not reasonably justified. It could have the effect of denying certain groups access to an important means of making their positions known to the public. The Court again referred to the aforementioned judgment of the European Court of Human Rights (ECHR, 11 December 2008, *TV Vest AS & Rogaland Pensjonistparti v. Norway*, § 73).

The Court set aside the impugned provision.

#### *Supplementary information:*

The Court's order to set aside was founded on violation of freedom of expression. It did not have to rule on the point raised of its own motion as to the breach of the division of powers in federal Belgium where the communities are responsible for radio and television broadcasting, including advertising relating to these media, and the federal authority is responsible for the regulation of electoral expenditure. Article 5 of the federal law of 4 July 1989 on limitation and control of electoral expenditure incurred for the election of the federal houses of parliament and on the funding and open accounting of political parties prohibits the broadcasting of commercials on radio, television and in cinemas, and sponsored internet messages for political parties and their candidates during the three month period prior to the elections.

#### *Languages:*

French, Dutch, German.



# Bosnia and Herzegovina Constitutional Court

---

## Important decisions

*Identification:* BIH-2010-3-003

**a)** Bosnia and Herzegovina / **b)** Constitutional Court / **c)** Plenary session / **d)** 25.09.2010 / **e)** AP 3627/07 / **f)** / **g)** / **h)** CODICES (Bosnian, English).

*Keywords of the systematic thesaurus:*

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

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

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

*Keywords of the alphabetical index:*

Compensation, damage / Currency, denomination.

*Headnotes:*

Court decisions must be reasoned and rendered within a reasonable amount of time. Failure to do so results in a breach of Article 6 ECHR.

*Summary:*

I. The applicants requested that Cantonal Court Judgment no. 001-0-Gz-07-000586/07 of 14 January 2008 be overturned. This judgment determined the applicants' claims for compensation for damages caused by the death of a close family member (Article 200 and 201 of the Law on Obligations). They also complained of the enforcement procedure applied in this judgment, claiming that their right to a fair trial under Article II.3.e of the Constitution and Article 6.1 ECHR and the right to property under Article II.3.k of the Constitution and Article 1 Protocol 1 ECHR were breached.

In this case, the Cantonal Court was dealing with the applicants' appeal twenty years after the first-instance judgment was rendered and sixteen years after the appellate proceedings in this case were discontinued. It upheld the first instance judgment, awarding amounts determined in YU dinars, which was the legal tender at the time the first instance judgment was rendered and which had subsequently changed.

II. The Constitutional Court noted that when it originally dealt with the case, the Cantonal Court disregarded explicit provisions of the Law on Central Bank of Bosnia and Herzegovina, providing for the exclusive use of the convertible mark as the only legal tender in Bosnia and Herzegovina. This should have been taken into account, as the case in question was not terminated before the legally binding decision of the Cantonal Court. The Cantonal Court did not give any reason for its decision that the applicants should receive compensation for damages in the former currency. This was in violation of the right to a decision with reasons, which is within the scope of the right to a fair trial under Article 6.1 ECHR.

The Constitutional Court also observed that the fact that compensation was awarded in the former currency, when the only legal tender was the convertible mark, deprived the award of non-pecuniary compensation for damages of the element of fairness, as stipulated in Articles 200.1 and 201 of the Law on Obligations. When the challenged judgment was being enforced, the amounts of compensation for damages relating to the death of a close family member calculated by converting the former currency into the current currency, were KM 10 for each parent of the deceased child and KM 5 for each of the deceased's brothers. (See the Municipal Court Ruling no. 017-0-I-08-001964 of 5 February 2010). The Cantonal Court gave no reasons to justify its stance that the amounts of compensation for non-pecuniary damages, which were awarded in the former currency and expressed in minimal amounts of convertible marks in the enforcement proceedings, achieved the aim of the law. Under Article 200.1 of the Law on Obligations, courts are under an obligation to award fair compensation for damages for pain and suffering due to the death of a close relative, taking into account the intensity of pain and fear of the applicant. The Cantonal Court not only failed to apply the relevant law regarding the payment of compensation in KM but also failed to comprehend that the amount resulting after the sum awarded was converted from dinars to KM did not fairly reflect the real pain and suffering the parents experienced after the death of their child. The Constitutional Court held that the applicants'

right to a fair trial under Article II.3.e of the Constitution and Article 6.1 ECHR had been breached.

Regarding the applicants' claims as to the length of the proceedings, the Constitutional Court observed that these proceedings concerned compensation for damages caused by the death of a close family member; the factual and legal issues presented were not especially complicated.

The Constitutional Court held that the period from the date the action was instituted to the date of adoption of the Constitution of Bosnia and Herzegovina (14 December 1995) fell within the period which could not be considered *ratione temporis*. However, it decided it should take into account the stage the proceedings had reached at the time of establishing the jurisdiction of the Constitutional Court. It noted that in 1994, when a state of war prevailed, the Higher Court of Bihac discontinued the appellate proceedings. The applicants asked for them to be resumed in 2007. The only justification they had for not asking for the proceedings to be resumed for such a length of time was that they were in exile. However, the Constitutional Court found it unacceptable that the Cantonal Court's decision-making process and the conduct of the enforcement proceedings since 20 March 2007 (when the applicants requested the resumption of the proceedings) were pending for over three years. The civil and enforcement proceedings (involving compensation in the form of damages for the death of a close relative which caused the applicants' pain and suffering) have yet to be completed. It accordingly held that the right to a decision within a reasonable time under Article II.3.e of the Constitution and Article 6.1 ECHR was breached, and that part of the appeal was well-founded.

#### *Languages:*

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



#### *Identification:* BIH-2010-3-004

**a)** Bosnia and Herzegovina / **b)** Constitutional Court / **c)** Plenary session / **d)** 26.11.2010 / **e)** U 9/09 / **f)** / **g)** / **h)** CODICES (Bosnian, English).

#### *Keywords of the systematic thesaurus:*

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

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

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

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

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

#### *Keywords of the alphabetical index:*

Election, constituency, number / Election, municipal / Mayor, manner of election.

#### *Headnotes:*

Measures that give rise to a difference of treatment of constituent peoples between cities – that is relatively small in comparison with the importance of the legitimate aim for the measures and the risk to inhabitants of a particular city if the attempt to establish an effective system of representative democracy in the city were to fail – is not disproportionate to the importance of the aim.

However, differences between the weights attributed to electors' votes in different constituencies were not proportionate to the legitimate aim of developing a multi-ethnic power-sharing structure.

#### *Summary:*

I. The applicant asked the Constitutional Court to review the constitutionality of several provisions of the Election Law of Bosnia and Herzegovina (hereinafter, the "Election Law"), Article VI.C paragraphs 4 and 7 of Amendment CI to the Constitution of the Federation of Bosnia and Herzegovina, and several provisions of the Statute of the City of Mostar (hereinafter, the "Statute").

The applicant alleged discrimination in relation to elections to the City Council, which was contrary to Article 14 ECHR in conjunction with Article 3

Protocol 1 ECHR. Article 28 of the Statute provides that the City Council is the highest body of the City and responsible for all issues under its jurisdiction under the Constitution and the laws. Amendments to the Constitution of the Federation of Bosnia and Herzegovina provide that the City Council shall:

- a. prepare and by a two-thirds majority vote approve the city statute;
- b. elect the Mayor;
- c. approve the city budget;
- d. enact regulations on the exercise of transferred authorities and carry out other responsibilities specified in the statute.

II. In view of the very limited extent of legislative power exercised by the Council, the Constitutional Court considered the Council to be an administrative rather than a legislative body. Elections to the Council did not, therefore, fall within the ambit of the obligation of Bosnia and Herzegovina under Article 3 Protocol 1 ECHR to hold elections which will secure 'the free expression of the opinion of the people in the choice of the legislature.' No issue arose as to the application of Article 14 ECHR in conjunction with Article 3 Protocol 1 ECHR. That part of the applicant's request was therefore dismissed as ill-founded.

The applicant also alleged that discrimination had taken place in relation to City Council elections in breach of Article II.4 of the Constitution in conjunction with Article 25 of the International Covenant on Civil and Political Rights (ICCPR). In the first part of the request the applicant contended that the people of Mostar suffered discrimination by comparison with other inhabitants of Bosnia and Herzegovina in terms of their right to participate in free elections to City Councils. The applicant identified discrimination in provisions of the Election Law and the Statute to the effect that at least four and no more than fifteen representatives of each constituent people should be on the City Council.

The City of Mostar has a special status by comparison with other cities; objective and reasonable grounds exist to allow a different organisation from that applicable to other cities of Bosnia and Herzegovina, due to problems arising from its reconstruction. The Commission for Reforming the City of Mostar (hereinafter, the "Commission") emphasised in its Report of 15 December 2003 that 'any reform of Mostar must be based not on population numbers, but on commitment to the protection of human rights, and of the rights of the Constituent Peoples and the group of others, through protection of vital national interests.' The Report presented the following data on the 1991 demographic structure of the pre-war municipality of Mostar (Bosniacs (34.6%); Croats (34%); Serbs

(18.8%); Yugoslavs (11.1%) and others (2.5%)). The provisions of Article 19.4 paragraphs 1 and 9 of the Election Law and Article 16 of the Statute reflected the last census of the City of Mostar, ensuring that all constituent peoples were represented and that none of them had an absolute majority on the City Council.

The question then arose as to whether it was rational in 2003 to base the organisation of Mostar on a 1991 census and to ignore any changes in the population which might have occurred as a result of the war of 1992-1995 and the subsequent exercise by refugees and displaced persons of their right to return to their homes of origin. The question also arose as to whether it was still rationally justifiable in 2010 (fourteen years after the war ended) to maintain special arrangements engaging Article II.4 of the Constitution.

In the Constitutional Court's opinion, the use of 1991 population figures in the circumstances existing in 2003 was not ideal but was a reasonable course of action in view of the difficulty of establishing more recent figures and the importance of encouraging refugees and displaced persons to return to their former homes in Mostar to create a multi-ethnic community in a unified city. The Constitutional Court stated that due to the post-war social and political conditions which still affect Bosnia and Herzegovina, and especially Mostar, it remains reasonable to approach the political organisation of the City of Mostar on the basis established in 2003. Applying the proportionality test, the Constitutional Court concluded that the measures under dispute did give rise to differences of treatment of constituent peoples between cities, but the difficulties faced in Mostar, as the Commission identified in its report of December 2003, have been and remain particularly intractable and severe. On the other hand, the practical impact of the differences between the ability of Croats in Mostar and of members of other constituent peoples and others in Sarajevo, Banja Luka and other cities in Bosnia and Herzegovina appeared to the Constitutional Court to be relatively small, at least in comparison with the importance of the legitimate aim for the measures and the risk to all inhabitants of Mostar if the attempt to establish an effective system of representative democracy in Mostar were to fail. On the sparse information currently available, it could not be said that the impact was likely to be disproportionate to the importance of the aim.

The Constitutional Court therefore concluded that the challenged provisions of Article 19.4, paragraphs 1 and 9 of the Election Law and Article 16 of the Statute did not discriminate against the Croat People in the exercise of their rights under Article II.4 of the Constitution in conjunction with Article 25.b of the ICCPR.

The applicant also pointed out that because the Election Law and the Statute established constituencies with significantly different numbers of voters, there were significant differences in the values of individual votes, which was at variance with the principle of equal suffrage under Article 25.b of the ICCPR.

The Constitutional Court was not convinced that the differences between the weights attaching to electors' votes in different constituencies were proportionate (from an objective and rational perspective) to the legitimate aim of developing a multi-ethnic power-sharing structure. It therefore held that a variation on this scale of the differences could not be justified as being necessary or proportionate to any legitimate aim. It found that the part of the Election Law and the Statute stating that each City area should elect three City Councillors was inconsistent with Article 25 of the ICCPR.

The applicant argued that due to the provisions of the Election Law and the Statute, citizens of the former Central Zone were discriminated against in the enjoyment of their rights under Article 25.b of the ICCPR as they did not have the same rights as citizens of city areas when electing councillors to the City Council. Citizens of the former Central Zone were also discriminated against, in the applicant's opinion, by the provisions of Article 38 of the Statute, as were councillors to be elected to the city electoral constituency, as there was no possibility of their being elected to the Committees for City Areas.

Residents of the Central Zone of Mostar were only entitled to vote for the seventeen councillors representing the city-wide constituency. Unlike residents of the six City Municipalities, they did not have the opportunity to vote for three councillors to represent their area of the city on the City Council. Due to the manner in which committees of the Council are constituted, the Central Zone was the only area of the city not represented on committees.

The Constitutional Court considered that this arrangement failed to secure 'equal suffrage' for the voters of Mostar, and was incompatible with Article 25.b of the ICCPR. Most voters in Mostar could vote for two classes of councillors; voters in the Central Zone could only vote for one. This evident inequality could not be justified; the arrangement was put in place for administrative convenience and not as a rational method of pursuing the legitimate aim of adapting the electoral system to take account of historical difficulties affecting the Constituent Peoples in Mostar. Thus the arrangement also breached the guarantee of protection against discrimination under Article II.4 of the Constitution.

The applicant suggested that citizens of the City of Mostar were discriminated against in terms of the method of electing their mayor, pointing out that the citizens of the City of Banja Luka elect and dismiss their mayor directly.

The Constitutional Court considered whether the task of electing a mayor was analogous in different cities and, if so, whether the different treatment was objectively and reasonably justified.

It decided that the task of electing a mayor for different cities was analogous; the role of mayor is broadly similar in each city. As to whether it was justifiable to use different methods, the Constitutional Court noted that the Constitution of the Federation of Bosnia and Herzegovina, to which Mostar is subject, regulates the matter differently from the Constitution of the Republika Srpska, which regulates matters in Banja Luka. These differences were not incompatible with the relevant provisions of the Election Law. The Constitution provides for a significant degree of self-government in each Entity. The Constitutional Court therefore decided that a simple difference of this sort was not unjustifiable for the purpose of Article II.4 of the Constitution unless the choice of one of the methods of electing a mayor could be regarded as unreasonable or could be proved to be part of a plan to deprive the people of a particular Entity or city of the essence of their right to participate in public affairs through a democratic political process. In the absence of any such evidence, the limited role of mayors in policy-making for the City Council, and the fact that, internationally, both direct and indirect methods of electing mayors can be found, there was nothing in this case to indicate that the choice of indirect election for the mayor of the City of Mostar amounted to unjustified discrimination by comparison to the method in use for citizens of the City of Banja Luka. Mostar citizens did not, therefore, suffer discrimination in the enjoyment of their rights under Article 25.b of the ICCPR contrary to Article II.4 of the Constitution.

III. Separate partially dissenting opinions from the Vice-President Valerija Galic and Judges Mato Tadic and Mirsad Ceman were annexed to the decision.

*Languages:*

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





# Brazil

## Federal Supreme Court

### Important decisions

*Identification:* BRA-2010-3-005

**a)** Brazil / **b)** Federal Supreme Court / **c)** First Panel / **d)** 21.05.2002 / **e)** 319181 / **f)** Extraordinary Appeal / **g)** *Diário da Justiça* (Justice Gazette), 28.06.2002 / **h)**.

*Keywords of the systematic thesaurus:*

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

1.5.4.3 Constitutional Justice – Decisions – Types – **Finding of constitutionality or unconstitutionality.**

4.7.1.3 Institutions – Judicial bodies – Jurisdiction – **Conflicts of jurisdiction.**

*Keywords of the alphabetical index:*

Tobacco, trade / Statute, unconstitutionality.

*Headnotes:*

Refusal to apply a law on the grounds that it is unconstitutional is tantamount to declaring the law unconstitutional. Only the absolute majority of an Appellate or Superior Court, or the majority of its special body, can declare the law unconstitutional.

*Summary:*

I. An extraordinary appeal was filed against a decision refusing to apply Article 272 of Decree no. 2.637/1998, regarding the applicant's right to trade cigarettes in packets containing fewer than twenty cigarettes. Under this article, trade was only allowed in cigarettes, including display for sale, in packets or other containers which have twenty cigarettes.

II. The First Panel of the Supreme Court of Brazil, by unanimous vote, granted the extraordinary appeal, on the grounds that the decision was not taken by the legitimate body. The Court held that under Article 97 of the Constitution, which enshrines the principle of

*en banc* jurisdiction, the unconstitutionality of a statute or a normative act of the Government can only be declared by the absolute majority of the Judges of an Appellate or Superior Court, or the majority of its special body. When the Appellate Federal Court of the 1<sup>st</sup> Region refused to apply the Decree on the grounds that it violated the principle of free competition, it actually declared its unconstitutionality (although the decision did not expressly state this). It did not have the power to do so.

The reasoning in this case, combined with other precedents, led the Supreme Court to issue Binding Precedent no. 10, which reads as follows: "The decision of a panel of an Appellate or Superior Court that refuses to apply a statute or a normative act of the Government on the grounds that it is unconstitutional, but do not expressly declare its unconstitutionality, violates the *en banc* jurisdiction clause".

*Supplementary information:*

- Article 272 of Decree 2.637/1998;
- Binding Precedent no. 10 of the Supreme Court of Brazil;
- Article 97 of the Federal Constitution (*en banc* jurisdiction): "The Appellate or Superior Courts may declare a statute or a normative act of the Government unconstitutional only by the vote of the absolute majority of their members or of the members of the respective special body";
- Article 93.11 of the Federal Constitution: "In the Appellate or Superior Courts with more than twenty-five judges, a special body may be constituted, with a minimum of eleven and a maximum of twenty-five members, to exercise delegated administrative and jurisdictional duties which are under the powers of the *en banc* court, half of the positions being filled according to seniority and the other half through election by the *en banc* court".

*Languages:*

Portuguese, English (translation by the Court).



**Identification:** BRA-2010-3-006

**a)** Brazil / **b)** Federal Supreme Court / **c)** Plenary / **d)** 02.10.2002 / **e)** 2574 / **f)** Direct Unconstitutionality Action / **g)** *Diário da Justiça* (Justice Gazette), 29.08.2003 / **h)**.

**Keywords of the systematic thesaurus:**

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

1.5.4.4.1 Constitutional Justice – Decisions – Types – Annulment – **Consequential annulment.**

**Keywords of the alphabetical index:**

Reinstatement, norm.

**Headnotes:**

When a norm that revokes a previous one is declared unconstitutional, the previous norm is automatically reinstated. To avoid a previous norm being reinstated, despite the fact that it too is unconstitutional, the applicants must indicate the sequence of related norms.

**Summary:**

I. A Direct Unconstitutionality Action was dismissed on the grounds that the applicants in an action for judicial review did not pursue the declaration of unconstitutionality of a sequence of previous norms which were linked to the norm the constitutionality of which was under challenge.

Once a norm that revokes a previous one is declared unconstitutional, through the process of judicial review, the previous norm is automatically reinstated, through a process known as "*represtinação*".

A situation could arise whereby a previous norm, which was deemed unconstitutional, could be reinstated by the nullifying of the subsequent norm on the grounds of its unconstitutionality. The same undesirable unconstitutional state of affairs would be upheld by means of a declaration of unconstitutionality.

II. In its deliberations, the Court considered whether it might be possible *sua sponte* to include other norms connected with a norm under challenge through the process of judicial review but which had not themselves been challenged by the applicants in the direct unconstitutionality action.

The Court dismissed the direct unconstitutionality action on the basis that the applicants should have specifically indicated the sequence of norms which were linked to each other (each one revoking the earlier norm) so that an unconstitutional norm would not be reinstated. It was noted that claimants in such cases usually file a new action with the necessary corrections.

**Languages:**

Portuguese, English (translation by the Court).

**Identification:** BRA-2010-3-007

**a)** Brazil / **b)** Federal Supreme Court / **c)** Plenary / **d)** 18.12.2002 / **e)** 325822 / **f)** Extraordinary Appeal / **g)** *Diário da Justiça* (Justice Gazette), 14.05.2004 / **h)**.

**Keywords of the systematic thesaurus:**

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

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

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

**Keywords of the alphabetical index:**

Tax, imposition / Tax, immunity, church.

**Headnotes:**

Temples of all creeds enjoy tax immunity. This implies that there is a prohibition on taxation of property, revenue and/or services related in any way to the essential purposes of religious entities.

**Summary:**

I. The Diocese of Jales referred to the Court an Extraordinary Appeal against a judgment issued by the Justice Tribunal of the State of São Paulo regarding its understanding that tax immunity as guaranteed by Article 150.VI.b of the Constitution should be limited at municipal level only to temples in which religious celebrations take place and to any other buildings causally linked to that end.

The applicants argued that such a limitation violates the right to tax immunity of temples of all creeds, as guaranteed by the Constitution.

II. A majority of the Plenum of the Court upheld the constitutional right to tax immunity for all temples of any creed so that the appellate decision could be reformed and such a right established with regard to the Diocese of Jales, São Paulo.

*Supplementary information:*

- Article 150.VI.B of the Constitution.

*Languages:*

Portuguese, English (translation by the Court).



*Identification:* BRA-2010-3-008

**a)** Brazil / **b)** Federal Supreme Court / **c)** Plenary / **d)** 07.04.2003 / **e)** 344882 / **f)** Extraordinary Appeal / **g)** *Diário da Justiça* (Justice Gazette), 06.08.2004 / **h)**.

*Keywords of the systematic thesaurus:*

4.6.4.2 Institutions – Executive bodies – Composition – **Election of members.**

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

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

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

*Keywords of the alphabetical index:*

Election, candidate, status, office-holder, relationship.

*Headnotes:*

Re-election was forbidden in Brazil until Constitutional Amendment no. 16/97, which allowed those currently holding office to run for re-election provided they leave office at least six months before Election Day. The same norm applies to the spouses or relatives of those holding office.

*Summary:*

I. As the article regarding the barring of spouses or relatives of those holding an electoral mandate from standing as candidates for the same office was not modified by the Constitutional Amendment no. 16/97, the Supreme Court was asked to decide whether, having regard to this new regulation and the systemic consistency of constitutional norms, it needed to reconsider the requirements concerning the eligibility of a candidate who is a spouse or a relative of the Chief of the Executive Power in case the respective relative or spouse holding office left office six months before the re-election bid?

II. The Plenum of the Court ruled that any interpretation which took into consideration the sole article barring spouses and relatives from running for office would not be consistent with the systemic balance constitutional norms need. It also resolved that the same norms that apply to those holding office should apply to those wishing to run for office (i.e. the spouses or relatives of those holding office may run for office provided the latter have left office at least six months before Election Day).

*Supplementary information:*

- Article 14.7 of the Constitution.

*Languages:*

Portuguese, English (translation by the Court).



*Identification:* BRA-2010-3-009

**a)** Brazil / **b)** Federal Supreme Court / **c)** Plenary / **d)** 08.05.2003 / **e)** 2396 / **f)** Direct Unconstitutionality Action / **g)** *Diário da Justiça* (Justice Gazette), 01.08.2003 / **h)**.

*Keywords of the systematic thesaurus:*

1.3.4.3 Constitutional Justice – Jurisdiction – Types of litigation – **Distribution of powers between central government and federal or regional entities.**

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

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

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

*Keywords of the alphabetical index:*

Workers, health, protection / Asbestos, production.

*Headnotes:*

A law prohibiting all types of asbestos production is unconstitutional. The health of workers should, however, be protected.

*Summary:*

I. Mato Grosso do Sul State legislation contained provisions on the production of asbestos. Chrysotile is being still ordered in Brazil; this is not the case for amphibolite. The state legislation sought to ban the marketing of any type of product containing asbestos and also dealt with the protection of the health of workers and the implementation of measures aimed to tackle any problems having arisen from the use of asbestos related products.

At issue here was concurring legislative competence at Federal and State level on matters such as production and consumption (Article 24.V of the Constitution), environmental protection and pollution control (Article 24.VI of the Constitution) and health protection (Article 24.XII of the Constitution).

Constitutional jurisprudence states that in cases of concurring legislative competence, member states can only legislate to the extent to which the Federal level has not. Thus, in instances where there is no federal legislation, state legislation may freely dispose of the matter and even establish general rules. Where the federal legislation has only established general rules, state legislation may fill in the blanks and specify regional aspects in providing the necessary regulation. Nevertheless, due to its complementary nature, local legislation cannot be passed which would be in full conflict with existing federal regulation.

The Governor of the State filed a Direct Action of Unconstitutionality before the Supreme Court, arguing the necessity to protect jobs and tax collection levels within his State.

II. The Court noted the fact that Federal legislation regulates asbestos production, and the extent to which concurring legislative competence may be exercised under existing federal law. It resolved to declare unconstitutional Article 1 of Mato Grosso do

Sul State law (banning the production, marketing or stocking of asbestos or of any asbestos-containing products), Article 2 (prohibiting the pulverisation of asbestos in any form) and Article 3 (establishing fines and determining the need to control the transportation of asbestos-containing materials between states). It declared constitutional all other articles establishing workers' health protection programmes aimed at work activities which involve or which may have involved materials containing asbestos.

*Supplementary information:*

- Articles 22.I, 22.XII, 25.1, 170.II, 170.IV, 18, 5.II, 5.LIV, 24.V, 24.VI, 24.XII of the Constitution.

*Languages:*

Portuguese.



*Identification:* BRA-2010-3-010

**a)** Brazil / **b)** Federal Supreme Court / **c)** Plenary / **d)** 26.08.2004 / **e)** 855 / **f)** Extradition / **g)** *Diário da Justiça* (Justice Gazette), 01.07.2005 / **h)**.

*Keywords of the systematic thesaurus:*

4.4.3.3 Institutions – Head of State – Powers – **Relations with judicial bodies.**  
 5.1.1.3 Fundamental Rights – General questions – Entitlement to rights – **Foreigners.**  
 5.1.1.4.3 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Detainees.**  
 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:*

Terrorism / Terrorism, fight / Extradition.

*Headnotes:*

Custody transfer to the State of Chile can only be authorised by the President himself under constitutional power, despite the granting of the request of the alien State by the Supreme Court.

*Summary:*

I. The case concerned the extradition of a Chilean citizen for an act of terrorism, for which he was sentenced in Chile to life imprisonment. Extradition to Chile was possible under a diplomatic agreement on commuting life imprisonment to a maximum of 30 years in prison under Brazilian law.

II. In general terms, once the Court has authorised the extradition, the transfer of custody of the person facing extradition to the requesting State becomes possible only after the conclusion of criminal proceedings against him or her in Brazil and after his or her time in prison is over, except in cases where the President decides, by virtue of his discretionary power, to recognise the political character of the person's crime on the basis of opportunity, convenience or utility. Alternatively, the President may exercise his prerogative and determine the immediate implementation of the extradition order.

However, under the Constitution, terrorist acts do not subsume to the notion of political crime as the Fundamental Law proclaims the condemnation of terrorism as one of the key principles governing the Brazilian state.

The Court decided to extradite the Chilean citizen concerned, highlighting in its decision the need to uphold democratic principles and international cooperation as key factors in combating terrorism.

*Supplementary information:*

- Articles 4.VIII, 5.XLIII, 5.XLVII.B of the Constitution.

*Languages:*

Portuguese, English (translation by the Court).

*Identification:* BRA-2010-3-011

**a)** Brazil / **b)** Federal Supreme Court / **c)** Plenary / **d)** 23.02.2005 / **e)** 2617 / **f)** Complaint in Regulatory Appeal / **g)** *Diário da Justiça* (Justice Gazette), 20.05.2005 / **h)**.

*Keywords of the systematic thesaurus:*

1.6.3.1 Constitutional Justice – Effects – Effect *erga omnes* – **Stare decisis**.

4.5.8 Institutions – Legislative bodies – **Relations with judicial bodies**.

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

*Keywords of the alphabetical index:*

State legislation / Complaint.

*Headnotes:*

Within the Brazilian constitutional order, one may file a complaint before the Supreme Court to ensure compliance with decisions by lower Courts. However, the *erga omnes* effect of judicial review does not breach the legislation.

*Summary:*

I. A complaint had been filed, seeking a declaration of the unconstitutionality of a Minas Gerais state law on public safety security tax, which had been adopted after another law from a different State in Brazil with exactly the same content had already been declared unconstitutional.

II. The Court dismissed the action on the grounds that *erga omnes* effect of judicial review cases does not bind the legislative Power; it only binds the executive Power and all organs of the judiciary. Legislatures are accordingly free to enact new legislation with a similar content to any law which may have been declared unconstitutional by the Supreme Court.

*Supplementary information:*

- Article 102.2 of the Constitution and Article 28 (sole paragraph) of the Federal Law no. 9.868/99.

*Languages:*

Portuguese, English (translation by the Court).



*Identification:* BRA-2010-3-012

**a)** Brazil / **b)** Federal Supreme Court / **c)** Plenary / **d)** 16.03.2005 / **e)** 3273 / **f)** Direct Unconstitutionality Action / **g)** *Diário da Justiça* (Justice Gazette), 02.03.2007 / **h)**.

*Keywords of the systematic thesaurus:*

1.2.1.1 Constitutional Justice – Types of claim – Claim by a public body – **Head of State**.  
5.3.39.4 Fundamental Rights – Civil and political rights – Right to property – **Privatisation**.

*Keywords of the alphabetical index:*

Oil regulation / Natural gas regulation / Monopoly, characteristic.

*Headnotes:*

The existence or development of an economic activity without the equivalent ownership of the property employed in the production process is not unconstitutional. The concept of economic activity (as a business activity) is independent of the notion of ownership of productive assets.

*Summary:*

I. The Governor of the State of Parana filed an application seeking the suspension of certain provisions of Federal Law no. 9.478/97, which provided for the national energy policy and activities related to the oil monopoly.

Based on this federal law, the National Petroleum Agency (ANP) published a notice inviting stakeholders to participate in the sixth round of bidding for the exploration and production of oil and natural gas.

II. In its judgment, the Brazilian Supreme Court established certain distinctions between legal monopolies, classifying them as follows:

- i. those that aim to spur economic investment and
- ii. those which have an effect of organising the economy as a whole.

The first type of monopoly refers to industrial property and the protection of patents, brands, and know-how. Under such a private monopoly, the holder of industrial property rights is guaranteed exclusivity of its exploration.

The concept of monopoly is not suited to effectively clarify the characteristics of property; the notion of property *per se* alludes directly to the monopoly of ownership. Thus, the concept of property always carries the idea of an exclusive domain by the holder. Expressions such as “monopoly of ownership” or “monopoly of a certain good” are redundant.

The Court also emphasised that under Article 177 of the Constitution, all activities that are the monopoly of the Union (such as research and the extraction of petroleum and natural gas, petroleum refining, import and export of oil products, maritime transport of crude oil). Article 20 of the Constitution enumerates the exclusive property of the Union (such as vacant land, river islands, territorial seas, tide lands, mineral resources and archaeological sites). Activities and assets are therefore distinct from one another.

On the other hand, the ownership of the outcome of goods (or service-providing activities) cannot be interpreted as falling under the monopoly of the development of certain economic activities.

Monopoly concerns activity, not ownership, and so the ownership of the outcome of the exploitation of deposits of petroleum, natural gas and other hydrocarbon fluids can be attributed to third parties for the Union, without harm to the monopoly of the reserve, as contemplated in Article 177 of the Constitution.

For that reason, the holder of a public monopoly is not required to exploit it directly; that holding may be exercised by another person or legal entity under public or private law.

The law states that “The Union may contract with state or private companies carrying out activities set out in Sections I to IV of this article, subject to conditions established by law.”

As the provision prohibiting the transfer or grant of any participation in oil exploration, either in kind (oil) or value (money) was excised by Constitutional Amendment no. 9/95, the Union may transfer the property of the product of exploitation of petroleum and natural gas to third parties, subject only to the applicable regulation.

One of the Justices declared that oil exploration can be taken as an “expression of public sector and not private-sector economy”. However, it was also said that it “concerns economic activity *stricto sensu*, and is therefore subject to the provisions of Article 173.II.1 of the Constitution, thus being subject to the “special legal regulation of private companies”. Therefore, oil exploration operates in competition with private

companies who are willing to conform to bidding procedures and contracts under Article 177.1 of the Constitution.

Finally, the Court observed that reality must not be excluded from interpretation of the Constitution. Correct interpretation cannot be consistent with theories nurtured only by idealism which do not take praxis as a foundation. Furthermore, interpretation must be carried out in the current historical context. It resolved to reject the Direct Unconstitutionality Action.

#### *Supplementary information:*

- Articles 177 and 173 of the Constitution and Federal Law no. 9.478/97.

#### *Languages:*

Portuguese.



#### *Identification: BRA-2010-3-013*

a) Brazil / b) Federal Supreme Court / c) Full Court / d) 23.06.2005 / e) 452994 / f) Extraordinary Appeal / g) *Diário da Justiça* (Justice Gazette), 29.09.2006 / h).

#### *Keywords of the systematic thesaurus:*

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

Remission of sentence, loss / Crime, gravity.

#### *Headnotes:*

The loss of a prisoner's earned time due to the commission of a serious offence is constitutional.

#### *Summary:*

I. An extraordinary appeal was lodged against a decision ordering the loss of part of a prisoner's earned time due to the commission of a serious offence whilst serving prison sentence. The applicant argued that Article 127 of Act 7.210/1984 (Sentence Execution Act), which regulates the loss of earned time due to the commission of serious offences, ran counter to the Constitution, violating vested rights and *res judicata*.

II. The Supreme Court of Brazil, by majority decision, denied the appeal on the basis that the article was not contrary to the Constitution. It held that the statute did not violate the *res judicata*, as it was in force before the applicant was convicted. The Court also held that vested rights were not in jeopardy because the earned time was subject to a condition (good behaviour on the part of the prisoner).

The reasoning in this decision, combined with other precedents, led the Supreme Court to issue Binding Precedent 9, which reads as follows: "The provision of Article 127 of Act 7.210/1984 (Sentence Execution Act) was received by the Constitution in force and the limitation period established on Article 58, *caput*, does not apply to it".

III. Dissenting opinions were put forward, to the effect that it would be impractical to disregard the days of actual work as this would violate the principle of human dignity.

#### *Supplementary information:*

- Binding Precedent no. 9;
- Article 5.36 of the Federal Constitution;
- Article 127 of the Act 7.210/1984 (Sentence Execution Act).

#### *Languages:*

Portuguese, English (translation by the Court).



*Identification:* BRA-2010-3-014

**a)** Brazil / **b)** Federal Supreme Court / **c)** Plenary / **d)** 01.09.2005 / **e)** 3540 / **f)** Direct Unconstitutionality Action / **g)** *Diário da Justiça* (Justice Gazette), 10.11.2006 / **h)**.

*Keywords of the systematic thesaurus:*

3.17 General Principles – **Weighing of interests.**  
5.5.1 Fundamental Rights – Collective rights – **Right to the environment.**

*Keywords of the alphabetical index:*

Environment, integrity, sustainable / Natural space, license / Special territories, protection.

*Headnotes:*

The principle of sustainable environment is a means for interpreting the notion of a more just and perfect balance between economic demands and ecology.

*Summary:*

I. The Attorney General approached the Court seeking judicial review of the Code of Environmental Law as amended by Provisional Executive Order no. 2166-67 of 24 August.2001 on the basis that all acts of suppression or diminution of protected natural spaces must be addressed by a formal statute adopted by the Parliament in conformity to Article 22.5.1III of the Constitution.

II. The Supreme Court noted the permanent tension between the need for national development (Article 3.II of the Constitution) and the need to preserve environmental integrity (Article 225 of the Constitution).

It adopted the principle of sustainable development as a means for interpreting the notion of a more just and perfect balance between economic demands and ecology.

III. The Plenum of the Court overruled the provisional remedy issued by the Rapporteur, thus declaring the constitutional validity of the new Code of Environmental Law, as it did not in fact suppress or alter the legal nature of existing protected natural spaces; it merely established new procedures for licences in order to achieve better control over works of any nature to be carried out in such areas.

*Supplementary information:*

- Articles 3.II, 170.VI and 225 of the Constitution and Article 4.1.2 of the Law no. 4771 (Code of Environmental Law).

*Languages:*

Portuguese, English (translation by the Court).

*Identification:* BRA-2010-3-015

**a)** Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 23.02.2006 / **e)** 82959 / **f)** *Habeas Corpus* / **g)** *Diário da Justiça* (Justice Gazette), 01.09.2006 / **h)**.

*Keywords of the systematic thesaurus:*

1.6.5.4 Constitutional Justice – Effects – Temporal effect – **Ex nunc effect.**  
3.10 General Principles – **Certainty of the law.**  
5.1.1.4.3 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Detainees.**  
5.3.5.1 Fundamental Rights – Civil and political rights – Individual liberty – **Deprivation of liberty.**  
5.3.13 Fundamental Rights – Civil and political rights – **Procedural safeguards, rights of the defence and fair trial.**

*Keywords of the alphabetical index:*

Crime, gravity / Conviction / Sentence, serving / Imprisonment conditions.

*Headnotes:*

It is possible for those convicted of hideous crimes to be granted less stringent prison conditions.

*Summary:*

I. A writ of *habeas corpus* was filed against a decision of the Superior Court of Justice allowing work release to somebody convicted of indecent assault. The applicant questioned why somebody convicted of the crime of torture could be allowed less stringent prison conditions but not somebody convicted of indecent assault.



II. The Supreme Court, by majority decision, granted the order of *habeas corpus* and ruled Article 2.1 of the Act 8.072/1990 (Hideous Crimes Act) unconstitutional, *incidenter tantum*, to allow less stringent prison conditions to be awarded to those convicted of hideous crimes, including indecent assault.

It explained that the Torture Act, which came into force after the Hideous Crimes Act, granted better treatment to those convicted of torture as it allowed less stringent prison conditions. This triggered an inconsistency within the penal system as the crime of torture is as hideous as indecent assault.

The Court accordingly held that the Hideous Crimes Act violated the essential core of the principle of individual conviction, as it disregarded each person's singular characteristics and his or her capacity for reformation by ruling out the possibility of the introduction of less stringent prison conditions. This was in breach of the principle of human dignity and humanity of the conviction. Finally, the Court held that the principle of individual conviction is a constitutional safeguard which not only applies at the point of conviction but also to the execution of the conviction. The judge in charge of this phase therefore has jurisdiction to assess the requirements with a view to introducing less stringent prison conditions.

Taking into consideration the principle of legal certainty and the exceptional social interest, the Court ruled that the declaration of unconstitutionality would have *ex nunc* effects, and would not apply to cases when the Act was found constitutional.

The reasoning in this decision, combined with other precedents, led the Supreme Court to issue Binding Precedent no. 26, which provides that in order to grant less stringent prison conditions to persons convicted of hideous crimes, or crimes of the same level, in the execution of the sentence, the judge shall observe the declaration of unconstitutionality of Article 2 of the Act 8.072/1990 and assess whether the person convicted meets the objective or subjective requirements to be granted the benefit. The judge may order a criminal examination in order to discern whether this is the case.

III. A dissenting opinion was attached, to the effect that the principle of sentence individualisation was not contravened as the legislators, using their exclusive discretionary power, provided for different instruments to fight criminality and gave a proportionate response which was compatible to the seriousness of such crimes.

### *Supplementary information:*

- Binding Precedent no. 26;
- Article 2.1 of the Act 8.072/1990.

### *Languages:*

Portuguese.



### *Identification: BRA-2010-3-016*

**a)** Brazil / **b)** Federal Supreme Court / **c)** Plenary / **d)** 03.08.2006 / **e)** 351487 / **f)** Extraordinary Appeal / **g)** *Diário da Justiça* (Justice Gazette), 10.11.2006 / **h)**.

### *Keywords of the systematic thesaurus:*

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.**

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

5.3.13.10 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Trial by jury.**

5.3.15 Fundamental Rights – Civil and political rights – **Rights of victims of crime.**

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

### *Keywords of the alphabetical index:*

Genocide / Crime, against life, intentional / Human diversity, indigenous groups, massacre.

### *Headnotes:*

The protection of human diversity is to be assured in its collective and trans-individual dimension, whenever a racial, an ethnic or a religious group is put at risk by violent actions aimed at their individual rights, such as the right to life, the right to physical and mental integrity and the right of free movement.

*Summary:*

I. The applicants lodged an extraordinary appeal before the Court, against a judgment issued by the Superior Justice Tribunal, to the effect that a single judge has competence to hear and adjudicate on a case against those accused of conspiring to commit genocide and to conceal the bodies. The genocide in question was committed against Indians, within a mining area.

The offenders asked for that decision to be reversed, on the basis that under the Constitution, those accused of homicide should be tried by jury.

II. By a unanimous decision, the Plenum of the Court decided to uphold the appellate decision and confirm the competence of the single judge to hear the case as stated.

As an *obiter dicta*, the Court defined the crime of genocide as a crime against “human diversity” as such, the protection of human diversity is to be assured in its collective and trans-individual dimension, whenever a racial, ethnic or religious group is put at risk by violent actions aimed at their individual rights, as are the right to life, the right to physical and mental integrity and the right of free movement.

*Supplementary information:*

- Articles 4.III, 5.XXXVIII.D, 12.III.A, 19.IV, 19.XI and 231 of the Constitution.

*Languages:*

Portuguese, English (translation by the Court).

*Identification:* BRA-2010-3-017

**a)** Brazil / **b)** Federal Supreme Court / **c)** Plenary / **d)** 03.08.2006 / **e)** 2733 / **f)** Direct Unconstitutionality Action / **g)** *Diário da Justiça* (Justice Gazette), 10.11.2006 / **h)**

*Keywords of the systematic thesaurus:*

1.3.4.3 Constitutional Justice – Jurisdiction – Types of litigation – **Distribution of powers between central government and federal or regional entities.**

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

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

*Keywords of the alphabetical index:*

Toll, payment, waiver.

*Headnotes:*

The legislative power cannot replace the executive power in public contract administration.

*Summary:*

I. A Direct Unconstitutionality Action was filed to seek judicial review of a Law edited by legislative initiative of the local General Assembly from the federate State of Espírito Santo, which exempted bikers from payment of tolls and gave students a 50% discount on toll fees.

The Governor of the State of Espírito Santo filed a direct unconstitutionality action seeking the declaration of unconstitutionality of Law no. 7.304 of 29 August 2002.

The applicant pointed out to the Court that heed should be taken of the necessity for economic-financial balance of contracts signed with the Administration.

II. The Plenum of the Supreme Court of Brazil ruled the local law unconstitutional for breach of separation of powers since the Legislative Power, by enacting this law, had in fact substituted the Executive Power in public contract administration.

*Supplementary information:*

- Law no.7.304/2002 of the State of Espírito Santo.

*Languages:*

Portuguese, English (translation by the Court).



*Identification:* BRA-2010-3-018

**a)** Brazil / **b)** Federal Supreme Court / **c)** Plenary / **d)** 06.08.2006 / **e)** 3741 / **f)** Direct Unconstitutionality Action / **g)** *Diário da Justiça* (Justice Gazette), 23.02.2007 / **h)**.

*Keywords of the systematic thesaurus:*

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

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

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

*Keywords of the alphabetical index:*

Political parties, funding / Electoral propaganda.

*Headnotes:*

All laws regulating elections should be enacted at least one year prior to Election Day unless they simply contain regulations on incidental matters with no bearing on the actual elections.

*Summary:*

I. The Christian Social Party (PSC) filed a direct unconstitutionality action seeking the application of the constitutional principle whereby new laws regulating elections cannot be adopted less than one year before an election (the principle of prior regulation) so that Law no. 11.300/2006 would not come into force for the forthcoming elections. The Law regulated election propaganda, the financing of the electoral campaign and procedures for controlling the source of funds.

The applicant also argued that Article 35.A should be declared unconstitutional on the basis of a violation of the fundamental right to freedom of expression due to the prohibition of publication of election polls fifteen days before Election Day.

II. The Supreme Court also decided *sua sponte*, on the basis of an ‘extension of consequences’, to proceed with the judicial review of a resolution drafted by the Superior Electoral Tribunal, as it gave rise to

the immediate applicability of the electoral law under scrutiny. It also examined the necessity to apply the principle of prior regulation.

The legislation under scrutiny prohibited the publication of opinion polls and surveys fifteen days before Election Day.

The Plenum of the Supreme Court ruled that the principle of prior regulation did not in fact apply to the present case. The law under judicial review did not have the effect of introducing distortion to the election process but was simply a regulation aimed at introducing better practices for election financing and accounting for fund sources. It also resolved to declare Article 35.A of Law no. 11.300/2006 unconstitutional for violation of the right to freedom of expression on the basis that free and plural access to information is at the core of democracy itself.

*Supplementary information:*

- Article 35.A of Law no. 11.300/2006.

*Languages:*

Portuguese.



*Identification:* BRA-2010-3-019

**a)** Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 28.03.2007 / **e)** 1074 / **f)** Direct Claim of Unconstitutionality / **g)** *Diário da Justiça* (Justice Gazette), 25.05.2007 / **h)**.

*Keywords of the systematic thesaurus:*

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

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

*Keywords of the alphabetical index:*

Tax Debt / Court, deposit.

*Headnotes:*

To demand a deposit as a preliminary requirement to hear a lawsuit about tax debt (before the debt is discussed) violates the right of access to courts.

*Summary:*

I. A direct claim of unconstitutionality was filed against the head provision of Article 19 of Law no. 8.870/1994, which subjects the hearing of lawsuits about debts with the National Institute of Social Security (the Portuguese acronym for which is INSS) to a prior deposit of the debt which is to be challenged. In the applicant's view, this obligation violated Article 5.35 and 5.55 of the Federal Constitution. Under Article 5.35, the law must not exclude any injury or threat to a right from consideration by the Judicial Branch. Article 5.55 safeguards the adversarial system and the full defence clause in judicial or administrative proceedings.

II. The Supreme Court noted that a preliminary deposit is a warranty that payment will ultimately be made, once the legitimacy and value of the debt have been discussed in judicial proceedings. However, it unanimously resolved to uphold the claim, on the basis that the provision under challenge poses a limitation on access to court.

The reasoning in this case led the Supreme Court to issue Binding Precedent 28, to the effect that the requirement for a preliminary deposit as a requirement for hearing a lawsuit about tax debt is unconstitutional.

*Supplementary information:*

- Binding Precedent no. 28.

*Languages:*

Portuguese, English (translation by the Court).

*Keywords of the systematic thesaurus:*

5.3.27 Fundamental Rights – Civil and political rights – **Freedom of association**.  
5.4.11 Fundamental Rights – Economic, social and cultural rights – **Freedom of trade unions**.

*Keywords of the alphabetical index:*

Propaganda, prohibition / Demonstrations, regulation, use of speakers.

*Headnotes:*

The prohibition of loud speakers or any sort of sound device during demonstrations is unconstitutional.

*Summary:*

I. The Worker's Party, and various trade unions filed a Direct Unconstitutionality Action seeking the declaration of unconstitutionality of Federal District Law no. 28.089/1999 which prohibited loud speakers or any sort of sound device during a demonstration in three main areas of the Capital.

II. The Court unanimously resolved to declare District Law no. 28.089/1999 unconstitutional on the ground that it violated the constitutional right to freedom of expression.

*Supplementary information:*

- Decree of the Federal District no. 20.098/99.

*Languages:*

Portuguese, English (translation by the Court).

*Identification:* BRA-2010-3-020

**a)** Brazil / **b)** Federal Supreme Court / **c)** Plenary / **d)** 28.06.2007 / **e)** 1969 / **f)** Direct Unconstitutionality Action / **g)** *Diário da Justiça* (Justice Gazette), 30.08.2007 / **h)**.

# Bulgaria

## Constitutional Court

---

### Statistical data

1 September 2010 – 31 December 2010

Number of decisions: 6

### Important decisions

*Identification:* BUL-2010-3-002

**a)** Bulgaria / **b)** Constitutional Court / **c)** / **d)** 28.09.2010 / **e)** 10/10 / **f)** / **g)** *Darzhaven vestnik* (Official Gazette), 80, 12.10.2010 / **h)**.

*Keywords of the systematic thesaurus:*

1.4.8.4 Constitutional Justice – Procedure – Preparation of the case for trial – **Preliminary proceedings.**

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

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

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

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

*Keywords of the alphabetical index:*

Evidence, witness statement, anonymous / Preliminary investigation, duration / Counsel, officially assigned, powers.

*Headnotes:*

The function of officially assigned reserve counsel has been created in the Code of Criminal Procedure. This person will initially have limited powers (examining their client's file and assisting with judicial

procedures) and take full charge of the accused person's defence, at that individual's request or without their consent, where the counsel of their choice is absent without valid reason and representation by counsel is mandatory. The assigning of a reserve counsel, even when the accused person has chosen their counsel, is not contrary to the right to defence, provided for by the Constitution, or the principles of a fair trial.

The Constitution and international treaties contain no absolute prohibition on basing a criminal charge and handing down a sentence on statements by anonymous witnesses, confirmed solely by evidence gathered via special intelligence means, on condition that it comes from different information sources and the charge is proven beyond all doubt.

The repeal of provisions granting the accused person the right to initiate the lodging of the indictment with the Court or the closure of the criminal proceedings does not constitute a violation of the Constitution and international treaties, on condition that there is provision for the implementation, at the initiative of the accused, of effective mechanisms for the completion of the preliminary investigation within a reasonable time.

*Summary:*

I. The Constitutional Court received an application seeking to have some of the amendments to the Code of Criminal Procedure which entered into force in May 2010 declared unconstitutional and not in conformity with the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the Convention).

II. It rejected the application for the following reasons.

In respect of the "reserve counsel":

The reserve counsel is assigned under the procedures provided for in the law on legal assistance if a serious crime is involved and where such assignment is of "particular importance" in allowing criminal proceedings to be undertaken within a reasonable time. They may be assigned even if the accused person has chosen a lawyer. Initially, their powers are limited – examining their client's file and assisting with the judicial procedures in which the accused is involved. They may fully exercise their rights of counsel with the consent of the accused or without that person's consent, if representation by counsel is mandatory and the lawyer chosen by the accused is absent without valid reason, despite being called to appear under the established procedure.

The purpose of the reserve counsel is to speed up the criminal process. Their involvement makes it possible to save the time that would be required by an officially assigned lawyer to become familiar with the file if, during the criminal procedure, it proves imperative that one be assigned.

The Constitutional Court accepts that the new procedure does not give rise to an alternative means of examining criminal cases. Its purpose is to ensure the involvement of a lawyer who will be able to provide an accused person with qualified legal assistance without losing any time, if that person cannot be defended by the lawyer of their choice. It does not place any of the participants in the proceedings at an advantage over another and therefore does not infringe the principle of equality before the law.

The involvement of a qualified counsel contributes to establishing the truth during an adversarial process (Article 121.1 and 121.2 of the Constitution). Having a reserve counsel is in keeping with this idea. Their assignment does not cut down the chances of involving a lawyer in the trial and does not prevent the lawyer chosen from providing the accused with the legal assistance they need.

There is no infringement of the right of the accused to benefit from the assistance of a counsel of their choice (Article 6.3.c of the Convention). Claims that the prosecutor could, during the preliminary investigation, assign a counsel of their own preference and thereby compromise the fairness of the trial are unfounded. The reserve counsel is assigned by the competent bar and not by the authority tasked with their formal appointment. Indeed, where possible, the bar should even assign the lawyer chosen by the accused.

When the reserve counsel participates in the procedure as of right with the consent of the accused, there is no infringement of that person's right to defend their own case or to receive assistance from another person. And if the accused prefers the reserve counsel, who is already familiar with their file, over the lawyer they initially chose, their choice must be respected.

But what happens when the accused does not consent?

An accused person's choice of lawyer is not merely a matter of signing a fee agreement and paying the lawyer. Under international treaties, the absence without reason of the counsel chosen does not result in the postponement of the trial, provided that an officially assigned lawyer is appointed. With the

interests of justice in mind, the legislator goes even further, by stipulating that the participation of the reserve counsel in the procedure without the consent of the accused is possible only in the event of the unjustified absence of the counsel chosen and where representation by a lawyer is mandatory.

The absence of the counsel chosen should not infringe the rights and interests of others – those of accomplices, victims, parties lodging civil claims etc. – or the interest of society in having effective and swift criminal justice. When the chosen counsel is absent without valid grounds, their replacement by a reserve counsel is a proportionate and legally justified measure.

The reserve counsel's participation as of right in the proceedings does not mean that the accused would be inadmissibly constrained to accept their legal assistance. The reserve counsel may only assume the task of defending the accused without their consent if representation by a lawyer is mandatory. And in that case the non-consent of the accused has no legal importance.

In respect of the amendment to Article 177.1 of the Code of Criminal Procedure:

This amendment deletes the text which prohibits upholding a charge and convicting a person on the basis of a combination of statements by anonymous witnesses and evidence gathered through special intelligence means.

The Constitution assigns the same value to all types of evidence and means of obtaining evidence. It does not provide for predefined evidential value, the sole exception being stipulated in Article 31.2 which states that no one may be convicted solely on the basis of their own confession. This approach reduces the risk of judicial error and enables the Court to take its decisions in reasonable certainty, on the basis of an in-depth and objective examination of the facts. In any case, a person may only be convicted when the charge is indisputably proved.

The admissibility and assessment of evidence lie outside the scope of the Convention. These questions are a matter for the States' national legislations and judicial authorities. Even after the amendments to Article 177.1 of the Code of Criminal Procedure, Bulgarian legislation provides for approaches complying with the international requirements of a fair trial: the charge and conviction may not be based solely on statements by anonymous witnesses, including those by an under-cover agent; under the amended Article 177.1 of the Code of Criminal Procedure the charge and conviction may not be

founded solely on evidence gathered through special intelligence means. As investigation through an under-cover agent is a special intelligence means, a person may not be convicted if the information obtained through the questioning of that agent is confirmed solely by other special intelligence means.

In certain rare cases, a charge may be based solely on a combination of statements by anonymous witnesses and special intelligence data which have an identical source of information (in the case of phone-tapping, for example, only statements made by individuals who are unknown to the parties and will be questioned as anonymous witnesses qualify as evidence). In such a case, the Criminal Court should not hand down a conviction if there is no other evidence supporting the charge. However, this exception does not justify the introduction of a legislative text prohibiting convictions on the basis of a combination of statements by anonymous witnesses and special intelligence data.

In respect of the repeal of chapter twenty-six:

The repealed chapter granted an accused person, after the expiry of a set deadline, the right to ask the Court to examine their case and set a deadline of 2-3 months during which the authorities tasked with the preliminary investigation were to lodge the charge with the Court of First Instance, failing which the criminal proceedings would be closed. In this manner, it guaranteed that the preliminary investigation would take place within a reasonable time. Its repeal does not entail the abolition of the procedural deadlines provided for in Article 38.1 of the Constitution. The deadlines for preliminary investigation in criminal proceedings, as established by the law, remain applicable. A new guarantee of compliance with them flows from Article 234.7 of the CCP, which stipulates that investigations carried out after the set deadlines are of no legal consequence and the evidence gathered may not be used by the Court in judging the case.

The disputed amendment does not infringe effective protection of the rights of the accused to be tried within a reasonable time, within the meaning of Article 6.1 of the Convention. The 2005 Code of Criminal Procedure obliges the authorities responsible for the preliminary investigation to comply scrupulously with the procedural deadlines. Additional legal guarantees for the swifter examination of cases were created by amendments to the Constitution in 2006 and the new law on the judiciary of 2007. The repeal of chapter 26 of the CCP does not affect this system of norms. It is justified by the legitimate aim of perfecting legislation in the interests of better administration of justice in the light of Article 31.4 of the Constitution.

The main failing of the repealed procedure was that it used a formal criterion, of a purely quantitative nature, to evaluate the notion of "reasonable time" regarding the preliminary investigation which, in most cases, was geared to delays for subjective reasons. In certain more complex cases, it afforded unjustified advantages to the accused – for example, in the event of difficulties of an objective nature regarding the tracing of witnesses, the gathering of supplementary evidence, including via letters rogatory sent abroad, procedural delays caused by the accused etc.

The European Court of Human Rights (ECHR) uses three criteria to evaluate reasonable length of proceedings: the complexity and nature of the case, the conduct of the judicial authorities and the conduct of the owner of the right. The requirement laid down by Article 6.1 ECHR is violated solely through delays that may be imputed to the state authorities. The challenged repeal is justified by the constitutional aim of guaranteeing the interests of justice in the spirit of the "right to a fair trial", within the meaning of the European Convention on Human Rights. Since, in certain exceptional cases, these amendments would result in a restriction of the rights of the accused, due account must be taken of a balancing mechanism (Article 234.8 and 234.9 of the CCP), making it possible to cancel coercive measures after the expiry of deadlines coinciding with those provided for in the repealed chapter.

The challenged repeal does not create a legal loophole incompatible with Article 13 ECHR, which stipulates that anyone whose rights and freedoms are violated shall have the right to an effective remedy before a national authority. That remedy is effective when it makes it possible to prevent or curtail the violation or provide for compensation for damage suffered by the individual whose rights have been violated. Indeed, at the time of the repeal of the chapter in question, in 2003, there was no effective remedy guaranteeing the reasonable length of preliminary investigations in criminal proceedings. Effective alternative remedies were subsequently introduced. 2007 saw the setting up of the Inspectorate under the Supreme Judicial Council, an independent body which may take measures, at the initiative of the accused, to ensure that the preliminary investigation takes place within a reasonable time. The repeal of this chapter is not contrary to the right to an effective remedy, within the meaning of the applicable international treaties.

#### *Languages:*

Bulgarian.



*Identification:* BUL-2010-3-003

**a)** Bulgaria / **b)** Constitutional Court / **c)** / **d)** 11.11.2010 / **e)** 12/10 / **f)** / **g)** *Darzhaven vestnik* (Official Gazette), 91, 19.11.2010 / **h)**.

*Keywords of the systematic thesaurus:*

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

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

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

2.1.1.4.18 Sources – Categories – Written rules – International instruments – **Charter of Fundamental Rights of the European Union of 2000.**

3.5 General Principles – **Social State.**

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

5.2.2.13 Fundamental Rights – Equality – Criteria of distinction – **Differentiation *ratione temporis*.**

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

*Keywords of the alphabetical index:*

Employment / Paid leave, right, limitation / Retrospective effect.

*Headnotes:*

The law amending and supplementing the Labour Code cannot have retrospective effect, especially where a fundamental constitutional right, such as the right to paid leave, is at stake. When a right is created under the authority of the legal system and when the retrospective effects of a later law give rise to legal consequences that are unfavourable for the owners of that right, the fundamental principles of the rule of law enshrined in the Constitution are infringed.

The limitation of the right to paid leave is not unconstitutional, as long as it only produces effects in the future.

*Summary:*

I. The Court received two independent applications from the President of the Republic and 51 members of Parliament, seeking to establish the unconstitutionality of paragraph 3.e of the transitional provisions of the Labour Code (hereinafter, “TPLC”), paragraph 8.a of the transitional and final provisions of the law on state officials (hereinafter, “TFPLSO”), Articles 176.3 and 224.1 of the Labour Code (hereinafter, “LC”) and Articles 59.5 and 61.2 of the law on state officials (hereinafter, “LSO”) and the non-conformity of some of these norms with treaties to which Bulgaria is party (the Universal Declaration of Human Rights (hereinafter, “UDHR”), the International Covenant on Economic, Social and Cultural Rights (hereinafter, “ICESCR”), Convention no. 52/1936 of the International Labour Organisation (hereinafter, “ILO”), the European Social Charter (revised) (hereinafter, “ESC”), the EU Charter of Fundamental Rights and Directive 203/88/EC of the European Parliament and the Council).

II. Given the nature of the two cases the Court joined them for examination at the same time.

Paragraph 3.e of the TPLC provides that all paid annual leave granted in respect of the previous calendar years and not taken at 1 January 2010 may be taken up to 31 December 2011.

As of 1 January 1993, the three-year time limit for the taking of paid annual leave was abolished. Employees were able to use untaken paid annual leave until termination of the employment relationship. Certain mechanisms ensured that such leave was taken in due course. The accumulation of untaken leave is due to the law not being strictly applied.

Paragraph 3.e of the TPLC governs the use of untaken leave prior to the entry into force of that law.

It relates to rights already acquired because the entitlement to paid annual leave was created under another set of legal rules. It opens the way for a new legal assessment of the effects produced by a right introduced by a previous law. In this case, there is an infringement of the fundamental principle of the non-retrospective effect of the law, according to which a law may not have the retrospective effect of revoking rights. The time limit set for employees to use their untaken paid annual leave accrued from previous years is not sufficient.

Paragraph 3.e of the TPLC introduces a limitation of a right that is contrary to Article 57.1 of the Constitution, which stipulates that fundamental rights are inalienable. It also infringes the constitutional provisions of



Article 16, under which the right to work is guaranteed and protected by the law, of Article 48.1, enshrining the right to work, and of Article 48.5, governing the right to leave. Consequently, the owners of that right are restricted in its exercise.

When a fundamental civil right cannot produce the legal effects provided for in the legislation in force at the time of its creation and the retrospective effect of a later law produces unfavourable consequences for the holders of that right, there is a violation of the principles of legal security and predictability, which are essential components of the rule of law. Paragraph 3.e of the TPLC is therefore contrary to Article 4 of the Constitution.

It infringes the principles of the welfare state, by introducing a restriction of a social right, which is prohibited by indent 5 of the Preamble to the Constitution.

Paragraph 8.a of the TFPLSO governs the conditions in which state officials may take their paid annual leave accrued during previous calendar years. It is identical in content to § 3.e of the TPLC. The arguments of unconstitutionality of § 8 are therefore the same and, on that basis, it is contrary to Articles 48.5; 16; 48.1; 57.1; 4 and indent 5 of the Preamble to the Constitution.

Article 176.3 of the LC stipulates that the right to paid annual leave lapses upon expiry of a time limit of two years following the year for which the leave was granted. Where leave is postponed, this time limit commences as from the end of the year during which the grounds preventing the employee from taking it disappear.

As a general legal mechanism, the stipulation appeared in the LC up until 1 January 1993.

Extinctive limitation provides for a period of inactivity on the part of the owner of a right. Article 176.3 of the LC therefore provides for the extinction of the exercise of the right to leave and not of the right itself.

Stipulating an extinctive limitation period is a question of state legal policy. The limitation provided for in Article 176.3 of the LC has no retrospective effect and its role is to encourage the exercise of that right. As a result, it does not contravene the Constitution and the Court dismissed the application.

Article 59.5 of the LSO is identical to Article 176.3 of the LC in terms of content and governs the extinction of the exercise of the right to paid annual leave of state officials. The Court dismissed the application of the members of parliament seeking to establish the

unconstitutionality of this provision on the basis of the same arguments and conclusions as those set out above.

Under Article 224.1 of the LC, upon legal termination of the employment relationship, the worker or official is entitled to a payment to compensate for untaken paid leave granted for the current calendar year which is proportional to the years taken into account for the calculation of length of service and leave not taken owing to the employer's actions or because of maternity, to which entitlement is not extinguished by limitation.

Analysis of Article 224.1 of the LC shows that the limitation of the right to a compensation payment relates only to the current calendar year and leave postponed in accordance with Article 176 of the LC. There may be many reasons for not taking paid annual leave. The law states that, in such cases, the right to leave must be exercised before 31 December of the respective year. Article 224.1 of the LC contradicts Article 176.3 of the LC, which provides for a period of limitation of two years. This contradiction between the two provisions is crucial and sufficient justification to rule that Article 224.1 is unconstitutional because it infringes the principles of the rule of law. It is also contrary to Article 48.5 read in conjunction with Articles 16 and 48.1 of the Constitution. The Constitutional Court ruled that the passage in Article 224.1 of the LC reading "... granted for the current calendar year which is proportional to the years taken into account for the calculation of length of service and untaken leave, postponed in accordance with Article 176..." was unconstitutional.

Article 61.2 of the LSO is similar to Article 224.1 of the LC and is therefore open to the same arguments of unconstitutionality.

The international treaties that have entered into force in respect of Bulgaria are part of domestic law and have primacy over domestic legislative provisions which run counter to them (Article 5.4 of the Constitution).

International legal instruments define the general framework governing the right to leave. Under Article 24 of the UDHR everyone has the right to periodic leave with pay. Paragraph 3.e of the TPLC and paragraph 8.a of the TFPLSO deprive workers and officials of the possibility of exercising their right to paid annual leave, which conflicts with Article 24 of the UDHR.

They also run counter to the requirements of Article 2.1 of the UDHR which stipulates that everyone is entitled to all the rights and freedoms set forth in the Declaration, without distinction of any kind.

Paragraph 3.e of the TPLC and § 8.e of the TFPLSO do not comply with Article 7.d and Article 2.2 of the ICESCR, which recognises, respectively, the right to periodic paid leave and the obligation of States to guarantee that those rights are exercised without discrimination.

Nor do they comply with Article 2 of ILO Convention no. 52 on holidays with pay.

Article 224.1 of the LC and Article 61.2 of the LSO do not comply with Article 6 of ILO Convention no. 52 with respect to the payment of compensation for paid annual leave not taken upon termination of the employment relationship, whereas the right to such compensation may not be exercised in all cases where the entitlement to leave is not extinguished by limitation. Bulgarian labour legislation provides for the payment of compensation for untaken paid leave in all cases where the employment relationship is terminated and not only for termination for a reason imputable to the employer as stipulated by Article 6 of the Convention.

Under Article 2.3 of the ESC (revised) the contracting Parties undertake to provide for a minimum of four weeks' annual holiday with pay. Articles F.1 and G.1 of the ESC provide that derogations from that requirement are possible in time of war or public emergency. Paragraph 3.e of the DTFCT and paragraph 8.a of the TFPLSO prevent the effective exercise of the right to leave, in the absence of grounds justifying such a restriction of this right and therefore clash with the above-mentioned provisions of the ESC.

Paragraph 3.e of the DTFCT and paragraph 8.a of the TFPLSO contravene Article 31.2 read in conjunction with Article 52.1 of the EU Charter, providing that all workers have a right to an annual period of paid leave. Any restriction of fundamental rights set forth in the Charter must take account of the principal content of those rights. The relevant argument in this case is that the workers and officials are deprived of a right to leave that they had already acquired. The challenged provisions are therefore contrary to Article 7 of Directive 2003/88/EC of the European Parliament and Council concerning certain aspects of the organisation of working time, which obliges all Member States to take the measures necessary to ensure that every worker is entitled to minimum paid annual leave which may not be replaced by an allowance in lieu, except where the employment relationship is terminated.

*Languages:*

Bulgarian.



# Canada

## Supreme Court

### Important decisions

*Identification:* CAN-2010-3-004

a) Canada / b) Supreme Court / c) / d) 08.10.2010 / e) 32537 / f) R. v. Sinclair / g) *Canada Supreme Court Reports* (Official Digest) / h) [www.droit.umontreal.ca/doc/csc-scc/en/index/html](http://www.droit.umontreal.ca/doc/csc-scc/en/index/html); 324 *Dominion Law Reports* (4th) 385; 406 *National Reporter* 1; 259 *Canadian Criminal Cases* (3d) 443; [2010] S.C.J. no. 35 (*Quicklaw*); CODICES (English, French).

*Keywords of the systematic thesaurus:*

3.17 General Principles – **Weighing of interests.**  
 4.11.2 Institutions – Armed forces, police forces and secret services – **Police forces.**  
 5.3.13.1.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Criminal proceedings.**  
 5.3.13.27 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to counsel.**

*Keywords of the alphabetical index:*

Criminal proceedings, custodial interrogation / Right to counsel, purpose / Evidence, obtained legally, admissible.

*Headnotes:*

In the context of a custodial interrogation, the purpose of Section 10.b of the Canadian Charter of Rights and Freedoms is to support detainees' right to choose whether to co-operate with the police investigation, by giving them access to legal advice on the situation they are facing. This is achieved by requiring that they be informed of the right to consult counsel and, if a detainee so requests, that he or she be given an opportunity to consult counsel. Achieving this purpose may require that the detainee be given an opportunity to re-consult counsel where developments make this necessary, but it does not demand the continued presence of counsel throughout the interrogation.

*Summary:*

After being arrested for murder, S was advised of his right to counsel and twice spoke by telephone with a lawyer of his choice. He was later interviewed by a police officer for several hours. S stated on a number of occasions during the interview that he had nothing to say about the investigation and wished to speak to his lawyer again. The officer confirmed that S had the right to choose whether to talk, but he refused to allow S to re-consult his lawyer. He also told S that he did not have the right to have his lawyer present during the interview. The officer continued the questioning. In time, S implicated himself in the murder. Following a voir dire, the trial judge ruled that the police had not infringed S's Section 10.b right and that the interview was admissible. The Court of Appeal and a majority of the Supreme Court of Canada agreed.

Section 10.b of the Charter does not mandate the presence of defence counsel throughout a custodial interrogation. In most cases, an initial warning, coupled with a reasonable opportunity to consult counsel when the detainee invokes the right, satisfies Section 10.b. But in this case, the police had to give S an additional opportunity to consult counsel where developments in the course of the investigation made this necessary to serve the purpose underlying Section 10.b. That purpose is providing the detainee with legal advice relevant to his right to choose whether to cooperate with the police investigation. This principle has led to the recognition of the right to a second consultation with a lawyer where changed circumstances result from: new procedures involving the detainee; a change in the jeopardy facing the detainee; or reason to believe that the first information provided was deficient. These categories are not closed. In this case, the test for a second legal consultation was not met. Before the interview took place, S was advised of his right to counsel and twice spoke with counsel of his choice. In the course of the interview, the police repeatedly confirmed that it was his choice whether he wished to speak with them. There were no changed circumstances requiring renewed consultation with a lawyer and no Section 10.b breach was thus established.

In a separate opinion, a dissenting judge concluded that given the unfolding of new information up to that point in the interview, S's requests to consult his lawyer again were reasonable, and the police refusal of that further consultation was a breach of Section 10.b.

In another separate opinion, three dissenting judges concluded that S's right to counsel was infringed because the police prevented him from obtaining the

legal advice to which he was entitled. His access to legal advice would have mitigated the impact of the police's relentless and skilful efforts to obtain a confession from him. This breach of S's right to counsel went to the core of the self-incrimination right that Section 10.b is meant to protect.

### *Supplementary information:*

The principles set out in *R. v. Sinclair* were applied in two companion appeals:

In *R. v. McCrimmon*, [2010] x S.C.R. xxx, M was arrested in relation to assaults committed against five women over the course of the preceding two months. Upon being informed of the reasons for his arrest and of his right to counsel, he stated that he wished to speak to a lawyer. When the police failed to reach the particular lawyer he requested, M spoke to duty counsel briefly. During the course of the police interrogation that followed, he stated several times that he wanted to speak to a lawyer and to have a lawyer present but his requests were denied. Eventually, M made incriminatory statements. The trial court, the court of appeal, and a majority of the Supreme Court of Canada held that there was no change in circumstances that have rise to M's right to consult again with counsel and thus no Section 10.b breach.

In *R. v. Willier*, [2010] x S.C.R. xxx, the police informed W of his right to counsel following his arrest for murder and facilitated a brief telephone conversation between him and duty counsel. Offered another opportunity to speak to counsel the next day, he made an unsuccessful attempt to call a specific lawyer. When reminded of the immediate availability of duty counsel, W opted to speak with the latter a second time and later expressed satisfaction with the advice he received. The police officer told W that he would proceed with the interview, but that W would be free at any time during the interview to contact a lawyer. W did not attempt to contact his lawyer again before providing a statement to the police during the interview that followed. The trial judge held that W's right to counsel under Section 10.b had been breached, the statement was excluded, and W was acquitted. A majority of the Court of Appeal found no Charter breach, reversed the acquittal, and ordered a new trial. The Supreme Court of Canada upheld the acquittal. The Court found that W was properly presented with another route by which to obtain legal advice and that he had expressed satisfaction with the advice he received.

### *Languages:*

English, French (translation by the Court).



### *Identification:* CAN-2010-3-005

**a)** Canada / **b)** Supreme Court / **c)** / **d)** 24.11.2010 / **e)** 33332 / **f)** *R. v. Gomboc* / **g)** *Canada Supreme Court Reports (Official Digest)* / **h)** [www.droit.umontreal.ca/doc/csc-scc/en/index/html](http://www.droit.umontreal.ca/doc/csc-scc/en/index/html); [2010] S.C.J. no. 55 (*Quicklaw*); CODICES (English, French).

### *Keywords of the systematic thesaurus:*

- 3.17 General Principles – **Weighing of interests.**
- 4.11.2 Institutions – Armed forces, police forces and secret services – **Police forces.**
- 5.3.32.1 Fundamental Rights – Civil and political rights – Right to private life – **Protection of personal data.**
- 5.3.35 Fundamental Rights – Civil and political rights – **Inviolability of the home.**

### *Keywords of the alphabetical index:*

Search and seizure, installation of digital recording ammeter which measures electricity consumption / Constitutional rights, violation / Privacy interest, information obtained from digital recording ammeter.

### *Headnotes:*

The police did not violate G's right to be secure against unreasonable search and seizure pursuant to Section 8 of the Canadian Charter of Rights and Freedoms by installing the digital recording ammeter without a warrant. In this case, there was no objectively reasonable expectation of privacy.

### *Summary:*

I. Officers conducted a reconnaissance of a residence believed to be involved in producing marijuana and made inquiries of neighbours. Based on the observations of the officers and the neighbours questioned, the police contacted the utility company to request the installation of a digital recording ammeter

which would measure electrical power flowing into the residence which was owned by G. The resulting information showed a pattern consistent with a marijuana grow operation. A second external viewing was conducted and on the basis of observations and the information provided to police, including the digital recording ammeter graph, the police obtained a search warrant. As a result of the search, the police seized a significant amount of marijuana and numerous items relating to a marijuana grow operation. G was charged with possession of marijuana for the purposes of trafficking and production of marijuana and theft of electricity. The trial judge relied on provincial regulations made pursuant to Alberta's Electric Utilities Act as statutory support for police access to the digital recording ammeter data. The digital recording ammeter evidence was therefore admitted and G was found guilty of the drug-related offences. The Court of Appeal allowed G's appeal and ordered a new trial. In a majority decision (7-2), the Supreme Court of Canada set aside the Court of Appeal's judgment and restored the conviction entered at trial.

II. Four judges held that, when considering the totality of the circumstances, there was no reasonable expectation of privacy in this case. Digital recording ammeter technology is employed late in an investigation and after conventional investigative methods support the inference that marijuana is being grown in the home. These judges noted that before reaching the question of whether a search is reasonable within the meaning of the Canadian Charter of Rights and Freedoms, the accused must first establish that a reasonable expectation of privacy existed to trigger the protection of Section 8. They held that determining the expectation of privacy requires examination of whether disclosure involved biographical core data, revealing intimate and private information for which individuals rightly expect constitutional privacy protection. Not only was there no statutory barrier to the utility company's voluntary cooperation with the police request, but express notice that such cooperation might occur existed. Further, the evidence available on the record offers no foundation for concluding that the information disclosed by the utility company yielded any useful information at all about household activities of an intimate or private nature that form part of the inhabitants' biographical core data. Finally, G's electricity consumption history was not confidential or private information which he had entrusted to the utility company. The utility company had a legitimate interest of its own in the quantity of electricity its customers consumed. Consequently, it is beyond dispute that the utility company was within its rights to install a digital recording ammeter on a customer's line on its own initiative to measure the electricity being consumed. While a territorial privacy interest

involving the home is a relevant aspect of the totality of the circumstances informing the reasonable expectation of privacy determination, the Canadian Charter of Rights and Freedoms' protection of territorial privacy in the home is not absolute. Where there was no direct search of the home itself, the informational privacy interest should be the focal point of the analysis.

III. In a separate opinion, three judges agreed that, in this case, there was no reasonable expectation of privacy but they noted that this case may well have been differently decided but for a crucial factor: the relationship between G and his utilities provider is governed by a recently enacted public statute, which entitles G to request confidentiality of his customer information. He made no such request. Nor did he challenge the constitutionality of the relevant provision. This combines to determinately erode the objective reasonableness of any expectation of privacy in the digital recording ammeter data.

The two dissenting judges concluded that, considering the totality of the circumstances, a reasonable person would not accept that the type of information at issue, collected for the reasons and in the manner that it was, should be freely available to the state without prior authorisation. G is presumed to have a subjective expectation of privacy within his home. The existence of an obscure regulation that the reasonable person is unlikely to understand does nothing to render G's subjective expectation objectively unreasonable. G had a reasonable expectation of privacy in the digital recording ammeter data, the intrusion and transmittal of the information gleaned constituted a search and this search was not authorised by law.

#### *Languages:*

English, French (translation by the Court).



# Croatia

## Constitutional Court

---

### Important decisions

*Identification:* CRO-2010-3-011

**a)** Croatia / **b)** Constitutional Court / **c)** / **d)** 29.09.2010 / **e)** U-I-4170/2004 / **f)** / **g)** *Narodne novine* (Official Gazette), 123/10 / **h)** CODICES (Croatian, English).

*Keywords of the systematic thesaurus:*

3.5 General Principles – **Social State.**

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

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

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

*Keywords of the alphabetical index:*

Disability, discrimination / Disabled person, benefit, right / Disabled person, social assistance, entitlement, conditions.

*Headnotes:*

Limiting the exercise of the right to a personal disability allowance by the recipient's age has no objective and reasonable justification. This legal situation causes inequality among recipients with the same status. The legal provision which introduced it is therefore discriminatory. This different treatment is also contrary to the public interest and diminishes the importance of the principles protected by the Constitution.

Since the right to a personal disability allowance and the right to an assistance and care allowance are exercised on the same legal grounds (a degree of disability) and have the same purpose (monetary aid due to increased needs in satisfying the basic activities of everyday life), the prohibition of their cumulation is reasonable and justified. This does not lead to discrimination against "severely ill persons". These are two different monetary rights, which, under the legislation in dispute, are not exercised under the same conditions.

*Summary:*

I. The applicant, a natural person, asked the Constitutional Court to assess the constitutional compliance of Article 55 of the Social Welfare Act (hereinafter, "SWA"). The Constitutional Court accepted his request, and repealed that part of Article 55 which reads "insofar as the onset of such an impairment or condition preceded the individual's 18<sup>th</sup> birthday". It did not accept his request for a constitutional review of Article 57 SWA.

The sector of the social welfare system which deals with disabled persons grants them the right to certain kinds of financial aid to help them overcome the difficulties resulting from their physical and health condition. Examples include one-off assistance, allowance for assistance and care, personal disability allowance and jobseeker's allowance. They are also entitled to certain social welfare services, including the right to care from outside their own families, assistance and care at home, counselling and help with tackling specific problems. Other types of assistance are available in accordance with the applicable regulations.

Article 55 SWA stipulates the conditions a disabled person must meet in order to exercise the right to a personal disability allowance, namely a severe physical or mental disability or severe permanent changes in health which manifest themselves before the individual's eighteenth birthday. The recipient must not already be availing him or herself of this right on other grounds.

Article 57 SWA precludes somebody already in receipt of personal disability allowance from receiving an allowance for assistance and care at the same time.

The applicant expressed concerns over the constitutionality of the regulation of the right to a personal allowance in Article 55 SWA, suggesting that it was discriminatory to restrict it in terms of the recipient's age, so that it could only be exercised by persons whose disability had appeared before they reached the age of 18. If their disability appeared after that, they were excluded. The applicant argued that the regulation could lead to inequality in the exercise of this right.

In support of his argument that Article 57 ran counter to the Constitution as it was not possible to concurrently exercise the right to a personal disability allowance and the right to an allowance for assistance and care, the complainant described the purpose of the personal disability allowance. He did not, however, give a fuller explanation of his view that

the “meaning of the right to an allowance for assistance and care” is completely different. Finally, he contended that the impossibility of the cumulation of the two rights constituted “discrimination against severely ill persons”.

#### Article 55 of the SWA

This is not a “classic” case of discrimination based on disability. It is not a case of inequality between disabled and non-disabled persons, but of inequality within the same group of disabled persons with the same degree of disability. The only differentiating factor, in terms of the exercise of this right, is the timing of the onset of the disability (i.e. age).

II. The Constitutional Court began its review by examining the nature of the personal disability allowance. It noted that, under the SWA, this is a monetary benefit which can be claimed by someone with severe disabilities who, due to physical impairment or permanent changes in their health, needs increased social care and therefore belongs to a socially threatened group. It is strictly personal to its recipient; it cannot be transferred to another person or inherited. It is justified and reasonable to expect that individuals in an identical legal and actual situation will be in the same legal position in exercising this right.

The Constitutional Court held that the State has the legitimate right to regulate the social welfare system within the framework of its social policy and strategy, and that this system must comply with constitutional principles and obligations in formal and substantive law. Article 2.4.1 of the Constitution gives Parliament the power to take independent decisions on the regulation of national economic, legal and political relations. In establishing these relations the legislator must respect the demands laid down by the Constitution, especially those emerging from the principle of the rule of law and those protecting certain constitutional standards and values. In this case these are equality, social justice, respect for human rights and the prohibition of discrimination.

However, the legitimate aim which Article 55 of the SWA was to have realised in recognising the right to a personal disability allowance (financial assistance granted by the State, as part of the constitutionally guaranteed special and increased care for disabled persons, helping those with severe disabilities to satisfy their basic everyday needs and assisting with their inclusion in society) was objectively not achieved. The disputed regulation prevented all individuals with the same degree of disability stipulated in Article 55 from exercising the right to a personal disability allowance.

The Constitutional Court found that part of Article 55 SWA which read “insofar as the onset of such impairment or condition preceded the individual’s 18<sup>th</sup> birthday” to be in breach of Article 14 in conjunction with Article 58 of the Constitution.

#### Article 57 of the SWA

Articles 43 to 49 of the SWA define the circle of recipients of the assistance and care allowance and the conditions for its realisation. It may be granted to individuals who require full-time care and assistance from another person as they are unable to fulfil their everyday needs on their own, provided that they are not eligible for a care and assistance supplement on any other grounds. The need for full-time assistance and care from another person may result from physical or mental disabilities, permanent changes in health conditions or advanced age. The allowance may also be granted to individuals needing full-time care and assistance from another person due to temporary changes in their health condition.

The Constitutional Court found that the applicant’s contention that Article 57 of the SWA is in breach of the Constitution was not well founded. Since the right to a personal disability allowance and the right to an assistance and care allowance are exercised on the same legal grounds (a degree of disability) and have the same purpose (financial assistance due to increased needs in satisfying the basic activities of everyday life), the Constitutional Court held that the prohibition of their cumulation was reasonable and justified; the exercise of one right excludes the exercise of the other.

The Constitutional Court held that the provision did not result in discrimination against “severely ill persons”, in the meaning of the applicant’s submission, as Articles 55 and 57 of SWA grant two different monetary rights to disabled persons on the grounds of their disability. Under the provisions of the SWA, they are not exercised under the same conditions.

Therefore, the Constitutional Court did not accept the proposal for the constitutional review of Article 57 SWA.

#### Cross-references:

- ECHR, *Van der Musselle v. Belgium* (Application no. 8919/80), Judgment of 23.11.1983, *Special Bulletin Leading Cases – ECHR* [ECH-1983-S-004]; Vol. 70, Series A of the Publications of the Court;

- ECHR, *Abdulaziz Cabales and Balkandali v. The United Kingdom* (Applications nos. 9214/80, 9473/81 and 9474/81), Judgment of 28.05.1985, *Special Bulletin Leading Cases – ECHR* [ECH-1985-S-002]; Vol. 94, Series A of the Publications of the Court;
- ECHR, *Stec and others v. The United Kingdom* (Applications nos. 65731/01 and 65900/01), Judgment [GC] of 12.04.2006, *Reports of Judgments and Decisions* 2006-VI.

#### Languages:

Croatian, English.



#### Identification: CRO-2010-3-012

**a)** Croatia / **b)** Constitutional Court / **c)** / **d)** 20.10.2010 / **e)** U-VIIR-4696/2010 / **f)** / **g)** *Narodne novine* (Official Gazette), 119/10 / **h)** CODICES (Croatian, English).

#### Keywords of the systematic thesaurus:

1.3.4.6 Constitutional Justice – Jurisdiction – Types of litigation – **Litigation in respect of referendums and other instruments of direct democracy.**

4.9.2.1 Institutions – Elections and instruments of direct democracy – Referenda and other instruments of direct democracy – **Admissibility.**

#### Keywords of the alphabetical index:

Referendum, legislative / Referendum, national / Referendum, conditions / Referendum, wording.

#### Headnotes:

The procedure for holding a referendum is strictly formal; under the Constitution and law, a referendum can only be called to seek an answer from voters to a specific and clearly formulated question. The referendum question should be put forward at the start of the process of collecting the signatures which voters give to request the holding of a referendum.

#### Summary:

I. The objective of these constitutional court proceedings is to establish whether the constitutional requirements have been met to call a referendum under the particular circumstances of a specific case.

The Government of the Republic of Croatia submitted to Parliament the Proposal of the Labour (Amendments) Act (hereinafter, the “Proposal to Amend LA”), with the Final Proposal of the Act.

The Organisation Committee for Voter Support for the Need to Request Calling a Referendum was founded on 4 June 2010, after voters had identified that it was necessary to call a referendum on the amendment of certain provisions of the Labour Act contained in the Proposal to Amend LA. At its session of 4 June 2010 in Zagreb the Organisation Committee passed the Decision on Collecting Voter Support for the Need to Request Calling a Referendum, which read as follows:

“1. Voters shall declare themselves on the need to request calling a referendum by answering the following question:

‘Are you in favour of retaining the existing legislation on the extended application of the legal rules contained in collective agreements and on the termination of collective agreements?’

YES

NO’

The referendum question referred to Article 4 of the Proposal to Amend LA”.

The period for gathering voter signatures for calling the referendum lasted from 9 June to 23 June 2010 inclusive. On 14 July 2010 the Organisation Committee submitted a formal request to Parliament to call the referendum on the Proposal to Amend LA, with the Final Proposal of the Act. The Ministry of Administration and the Ministry of Interior verified that it was supported by at least 10% voters in the Republic of Croatia in accordance with Article 87.3 of the Constitution.

Under Article 95 of the Constitutional Act on the Constitutional Court, Parliament asked the Constitutional Court to establish whether all requirements in Article 87.1-3 of the Constitution for the holding of a referendum were satisfied, given that on 3 September 2010 the Government withdrew from legislative procedure the Proposal to Amend LA, with the Final Proposal of the Act.



II. The Constitutional Court noted that a referendum is a basic form of direct popular decision-making in the exercise of power within the meaning of Article 1.3 of the Constitution.

Under Article 86.3 of the Constitution, at least ten per cent of the total number of voters may request that Parliament calls a referendum, in accordance with the relevant law, on amending the Constitution, draft legislation or other issues within the remit of Parliament.

However, under Article 95.1 of the Constitutional Act on the Constitutional Court, before it decides to call a referendum in this case, Parliament may ask the Constitutional Court to verify whether the referendum question complies with the Constitution, and whether the requirements stipulated in Article 86.1-3 of the Constitution for calling a referendum have been met.

The subject of the constitutional court proceedings dealt with the latter question (the meeting of the requirements set out in Article 86.1-3).

The Constitutional Court found that in withdrawing the Proposal to Amend LA from legislative procedure, Government took into consideration the popular will expressed in 717,149 valid signatures to call a referendum, gathered in a process dating from 9 to 23 June 2010 (inclusive). This action on the part of the Government was a realisation of the objective for which the voters signed when they called for a referendum: the Proposal to Amend LA was withdrawn from legislative procedure. In such a legal situation, the holding of the referendum loses legal sense and objective and reasonable justification. The Constitutional Court found that the requirements to hold the referendum ceased to exist on 3 September 2010, when the Proposal was withdrawn from legislative procedure.

The Constitutional Court took into account the will of voters expressed in this case in the process of securing support for the need to request the calling of a referendum, and the fact that the Government had withdrawn the Proposal to Amend LA from legislative procedure, so that the preconditions for holding the referendum ceased to exist. Because of the deficient legal solution, it found it reasonable and objectively justified to establish, for this case, the following rule:

“No proposal for an action that contains an opposite answer to the answer “YES” to the referendum question, given in point I of this pronouncement, may be introduced in legislative procedure before the expiry of one year from the date this decision is published in *Narodne novine*, unless a referendum is first called and held about that proposal on the basis

of the valid signatures of the 15.95% (717,149) voters gathered between 9 June and 23 June 2010”.

The above rule is based on the equivalent application of Article 8.2 of the Referendum Act, which the Constitutional Court adapted to the general meaning and legal nature of the institute of the state referendum, but also to the special circumstances of this case.

The Constitutional Court stated that in future, this issue should be resolved by the legislator.

#### *Cross-references:*

- Decision no. I-774/2000 of 20.12.2000, *Bulletin* 2000/3 [CRO-2000-3-018];
- Decision no. U-I-177/2002 of 20.04.2006;
- Decision no. U-I-2051/2007 of 05.06.2007;
- Code of Good Practice on Referendums, adopted by the Council for Democratic Elections at its 19<sup>th</sup> meeting [Venice, 16.12.2006] Venice Commission at its 70<sup>th</sup> Plenary session [Venice, 16-17.03.2007], Study no. 371/2006, CDL-AD(2007)008rev, Strasbourg, 20.01.2009.

#### *Languages:*

Croatian, English.



#### *Identification: CRO-2010-3-013*

**a)** Croatia / **b)** Constitutional Court / **c)** / **d)** 03.11.2010 / **e)** U-III-1/2009 / **f)** / **g)** *Narodne novine* (Official Gazette), 126/10 / **h)** CODICES (Croatian, English).

#### *Keywords of the systematic thesaurus:*

3.9 General Principles – **Rule of law**.  
 3.10 General Principles – **Certainty of the law**.  
 5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts**.

#### *Keywords of the alphabetical index:*

Administrative decision, judicial review / Civil procedure, rule, application / Merits, failure to decide.

*Headnotes:*

If a lawsuit in an administrative dispute is to be dismissed *a limine* – without the competent court first being obliged to invite the plaintiff to undertake the omitted activity within a defined deadline and how to achieve this, and to warn him of the consequences of not complying with the court's demands – then a clear, precise and generally accessible statutory procedural rule must exist with foreseeable consequences for those to whom it applies.

*Summary:*

The applicant, a foreign citizen, lodged a constitutional complaint against the ruling of the Administrative Court of 4 June 2008.

He had filed a lawsuit in an administrative dispute because no decision had been made in statutory terms on his request for permanent residence in the Republic of Croatia.

The Administrative Court had dismissed his complaint as inadmissible, in accordance with Article 146.1 of the Civil Procedure Act (hereinafter, "CPA") in conjunction with Article 60 of the Administrative Disputes Act (hereinafter, "ADA"), because the applicant (who was the plaintiff in the administrative dispute), had given his address as D., Bosnia and Herzegovina, in the lawsuit he brought before the Administrative Court. He did not have an agent in the Republic in Croatia and did not appoint one when he filed the lawsuit.

The applicant stated that in its ruling the Administrative Court adopted the stance that the lawsuit would have to be dismissed, as the plaintiff had no agent in the country to receive written communications from the Court. It did not examine the merits of the case and the grounds for the lawsuit but resolved matters simply by dismissing the lawsuit. It made no effort to invite him to appoint an agent, and he discovered for the first time that he should have done so from the Administrative Court's ruling.

Under Article 60 of the ADA, if the ADA contains no provisions on the procedure in administrative disputes, the provisions of the CPA shall be applied in the appropriate manner.

Under Article 146.1 CPA, if the applicant (or his representative) is abroad, they must appoint an agent in Croatia when they file proceedings, in order to receive court communications. If they fail to do so, the court will dismiss the complaint. This provision was introduced in the CPA by the Civil Procedure

(Amendments and Revisions) Act, which came into force on 1 December 2003.

The case concerns the interpretation of procedural rules concerning the admissibility of an appeal in an administrative dispute. In its practice the Administrative Court, by interpreting two procedural acts, developed a procedural rule about the admissibility of an appeal in an administrative dispute, which it has been applying since 2007.

The Constitutional Court recalled that in its Decision no. U-III-1001/2007 of 7 July 2010, it held that the guarantee of the right to a fair trial, enshrined in Article 29.1 of the Constitution also applies to disputes before the Administrative Court regulated in Article 19.2 of the Constitution.

The Constitutional Court noted that the applicant in this case had access to the Administrative Court, but only to the extent that his lawsuit was declared inadmissible.

The Constitutional Court found that the direct (rather than "appropriate", as stipulated in Article 60 ADA) application of Article 146.1 CPA in administrative disputes led to a dismissal *a limine* of the applicant's lawsuit, despite the fact that the ADA does not order the application of this procedural step and it is not provided for as a reason for dismissing a lawsuit.

The Constitutional Court also noted that the manner of application of Article 29.1 of the Constitution depends on the specific features of the given court proceedings. When it applies the procedural rules in the CPA in an "appropriate" manner in an administrative dispute (provided that the ADA "does not contain provisions on the procedure in administrative disputes" – Article 60 of the ADA), the Administrative Court must be mindful of the fact that the structure of civil proceedings and administrative dispute are not identical. Civil and administrative courts have different roles within the domestic legal order.

In this case, the Administrative Court did not pay sufficient attention to these facts. The Constitutional Court held that the applicant was disproportionately hindered in his constitutional right of access to court. It therefore identified a breach of the very essence of his right to court as well as a violation of his right to a fair trial, as enshrined in Article 29.1 of the Constitution.

*Cross-references:*

- Decision no. U-III-1001/2007 of 07.07.2010;
- Decision no. U-I-659/1994 *et al* of 11.10.2000;
- ECHR, *Sotiris and Nikos Koutras ATTEE v. Greece* (Application no. 39442/98), Judgment of 16.11.2000, *Reports of Judgments and Decisions* 2000-XII;
- ECHR, *Běleš and others v. Czech Republic* (Application no. 47273/99), Judgment of 12.11.2002, *Reports of Judgments and Decisions* 2002-IX.

*Languages:*

Croatian, English.

*Identification:* CRO-2010-3-014

**a)** Croatia / **b)** Constitutional Court / **c)** / **d)** 03.11.2010 / **e)** U-III-64744/2009 / **f)** / **g)** *Narodne novine* (Official Gazette), 125/10 / **h)** CODICES (Croatian, English).

*Keywords of the systematic thesaurus:*

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

5.3.1 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.**

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

*Keywords of the alphabetical index:*

Detainee, rights / Prisoner, treatment, inadequate conditions / Disabled prisoner, rights.

*Headnotes:*

The state must ensure, when implementing prison sentences and measures depriving people of their freedom, that the person in custody is placed in

prison or detention under conditions that ensure respect for his or her human dignity.

*Summary:*

I. The applicant lodged a constitutional complaint for inhuman treatment in the Prison Hospital in Z. (the “Prison Hospital”) during his detention on remand from 4 September 2008 until the judgment of the Pula County Court of 17 February 2009 became final and he was sentenced to four years of imprisonment for a criminal offence under Article 173.2 of the Criminal Act. This decision was upheld by the Supreme Court in its judgment of 7 July 2009, at which point he was sent to prison in Z.

The applicant argued that his treatment violated his human dignity, guaranteed in Articles 25 and 35 of the Constitution, and Article 3 ECHR.

The applicant is severely disabled, having been diagnosed with spastic paraplegia after injuries sustained in a traffic accident in 1998. He was in prison in P. from 4 September 2008, but as it had no facilities for prisoners with special needs, he was sent to the Prison Hospital, which was the only prison hospital in the Croatian system of prisons and penitentiaries. However, he was soon placed on the second floor. There was no lift, so he could not get out of the building; he mentioned he had no sun or air for fifteen months. He went on to say that he was in a room of 18-20 m<sup>2</sup> in which there were six patients and six beds, and that there was not enough room for him to turn around in his wheelchair. He emphasised that he had been able to function normally before his sojourn in the Prison Hospital, travelling two or three kilometres each day in his wheelchair. He could not do this there; instead, he was forced to lie on the bed in the Prison Hospital. His health deteriorated greatly as a result. He argued that the Prison Hospital is not equipped for persons with special needs such as himself.

Articles 23.1 and 25.1 of the Constitution contain one of the fundamental values of a democratic society. They absolutely prohibit torture or inhuman or degrading treatment or punishment, regardless of the circumstances or the behaviour of the victim. When implementing prison sentences and measures depriving people of freedom the State must ensure that the person in custody is placed in prison or detention under conditions that ensure respect for his or her human dignity.

Article 3 ECHR also prohibits torture and inhuman or degrading treatment or punishment.

II. The Constitutional Court found that the statements by the Head of the Prison System Department and the director of the Prison Hospital at the preliminary meeting of 14 June 2010, held at the Constitutional Court in accordance with Article 69.2 of the Constitutional Act on the Constitutional Court, showed that the quality of the medical aid provided for the applicant was at a satisfactory level. However, they also showed that the applicant, who was a tetraplegic, was placed on the second floor of the hospital building without a lift, that there were so many beds in his room that it was almost impossible for him to use his wheelchair, that he was often left to the mercy and help of other inmates in that room to perform his basic needs such as washing, shaving, dressing and relieving himself (up to the point at which the applicant, according to the governor of the Prison Hospital, "got used to" the hospital regime of the "reflex bowel movement") and that he could only go out of doors if the hospital staff or fellow inmates physically carried him in his wheelchair.

The Constitutional Court observed that this situation, which lasted for a long time, from 5 September 2008 to 5 March 2010, would have made the applicant feel humiliated, due to his total dependence on others. Furthermore, it was an objective expression of inhuman treatment. Therefore the Constitutional Court found that the applicant's constitutional rights in Articles 23 and 25.1 of the Constitution and Article 3 ECHR had been breached.

In its decision, the Constitutional Court instructed the government to establish efficient supervision over the quality of health protection in the prison system as a whole, to enable, within an appropriate time span lasting no more than three years, the unhindered movement of persons with special needs, and to release sufficient funds for the installation of a lift in the Prison Hospital, as there was an obvious need for this.

#### Cross-references:

- Decision nos. U-III-4182/2008 and U-III-678/2009 of 17.03.2009, *Bulletin* 2009/1 [CRO-2009-1-003];
- ECHR, *Kudła v. Poland* (Application no. 30210/96), Judgment [GC] of 26.10.2000, *Reports of Judgments and Decisions* 2000-XI;
- ECHR, *Hirst v. the United Kingdom* (Application no. 74025/01, § 69), Judgment [GC] of 06.10.2005, *Reports of Judgments and Decisions* 2005-IX; *Bulletin* 2005/3 [ECH-2005-3-004];
- ECHR, *Price v. the United Kingdom* (Application no. 33394/96), Judgment of 10.07.2001, *Reports of Judgments and Decisions* 2001-VII;
- ECHR, *Engel v. Hungary* (Application no. 46857/06), Judgment of 20.05.2010;

- ECHR, *Farbtuhs v. Latvia* (Application no. 4672/02), Judgment of 02.12.2004;
- ECHR, *Mouisel v. France* (Application no. 67263/01), Judgment of 14.11.2002, *Reports of Judgments and Decisions* 2002-IX;
- ECHR, *Testa v. Croatia* (Application no. 20877/04), Judgment of 12.07.2007;
- ECHR, *Cenbauer v. Croatia* (Application no. 73786/01), Judgment of 09.03.2006, *Reports of Judgments and Decisions* 2006-III;
- ECHR, *Stawomir Musiał v. Poland* (Application no. 28300/06), Judgment of 20.01.2009.

#### Languages:

Croatian, English.



#### Identification: CRO-2010-3-015

a) Croatia / b) Constitutional Court / c) / d) 08.12.2010 / e) U-I-3760/2007 *et al* / f) / g) *Narodne novine* (Official Gazette), 142/10 / h) CODICES (Croatian, English).

#### Keywords of the systematic thesaurus:

1.3.5.4 Constitutional Justice – Jurisdiction – The subject of review – **Quasi-constitutional legislation**.  
1.3.5.5 Constitutional Justice – Jurisdiction – The subject of review – **Laws and other rules having the force of law**.

#### Keywords of the alphabetical index:

Constitutionality, question, admissibility / Constitution, interpretation, jurisdiction / Constitutional act, definition / Constitutional Court, jurisdiction, limits.

#### Headnotes:

The Court does not have jurisdiction to review the conformity of "ordinary" and organic acts with constitutional acts if these acts are "constitutional" in name only, and were not passed in accordance with the procedure determined for amending the Constitution and therefore cannot – from their contents and legal nature – be considered constitutional acts with the force of the Constitution itself.

### Summary:

In view of its lack of competence to decide, the Constitutional Court rejected a proposal from a political party to review the compliance of various legislative provisions with Article 4 of the Constitutional Act on the Implementation of the Constitution of the Republic of Croatia (*Narodne novine*, no. 28/01; hereinafter, "CAIC/01"). The laws in question were Election of Members of the Croatian Parliament (Amendments) Act (hereinafter, "A EMCPA"), Electoral Registers Act (hereinafter, "ERA") and Financing Political Parties, Independent Lists and Candidates Act (hereinafter, "FPPA").

Under Article 4 CAIC/01, the laws regulating the election of Members of the Croatian Parliament must be passed before the scheduled elections to membership of the Croatian Parliament are held.

The proponent observed that when the acts regulating the parliamentary election were passed, the constitutional provision in Article 4 of the CAIC/01 was not heeded, as the legislation was passed after the expiry of the deadline stipulated in CAIC/01. In the proponent's view, they were passed contrary to Article 4 of the CAIC/01, i.e. in breach of constitutional legislation. As the laws did not comply with the constitutional principles, they were unconstitutional. This encroached on citizens' constitutionally-protected rights in terms of legal certainty and the right to fair and free elections.

The Constitutional Court noted that in its proposal, the proponent started from the incorrect assumption that the CAIC/01 has the legal force of the Constitution, leading it to conclude, wrongly, that the Constitutional Court has the jurisdiction to review the conformity of the A EMCPA, ERA and FPPA with Article 4 CAIC/01.

The Constitutional Court had expressed the view in previous case-law that unless an act has been passed in accordance with the procedure for amending the Constitution, it cannot be considered a constitutional act, i.e. a regulation with constitutional force. Its constitutional nature and position in the hierarchy of legislation in the domestic legal order is judged from the procedure by which it was passed. This is also relevant in terms of assessing whether the Constitutional Court has the jurisdiction to control its substantive constitutionality.

It also follows from the above that the Constitutional Court may review the conformity with the Constitution of acts that are "constitutional" in name only. Therefore, it does not have the jurisdiction to review the conformity with the Constitution only of the

constitutional acts that were passed in the procedure for amending the Constitution, because only these constitutional acts have the power of the Constitution. At the relevant moment there was only one such constitutional act in the Croatian legal order; this being the Constitutional Act on the Constitutional Court. Because of the legal force of this act, the provisions of "ordinary" and organic legislation may be reviewed for conformity with particular provisions of the Constitutional Act on the Constitutional Court.

As CAIC/01 was not passed in accordance with the procedure for amending the Constitution, but under the legislative procedure (in two readings), the Constitutional Court found that it did not have jurisdiction to review the compliance of the challenged A EMCPA, ERA and FPPA with CAIC/01 because this act (despite its name) does not have the power of the Constitution.

The Constitutional Court was, however, prompted by some of the issues the proponent raised (and on the grounds of its authority to monitor the realisation of constitutionality and legality provided for in Article 128.5 of the Constitution and Article 104 of the Constitutional Act on the Constitutional Court) to notify Parliament about problems observed in connection with the constitutional acts on the implementation of the Constitution.

### Cross-references:

- Decision no. I-774/2000 of 20.12.2000, *Bulletin* 2000/3 [CRO-2000-3-018];
- Notification no. U-X-6670/2010 of 08.12.2010, *Bulletin* 2010/3 [CRO-2010-3-019].

### Languages:

Croatian, English.



### Identification: CRO-2010-3-016

**a)** Croatia / **b)** Constitutional Court / **c)** / **d)** 08.12.2010 / **e)** U-I-3789/2003 *et al* / **f)** / **g)** *Narodne novine* (Official Gazette), 142/10 / **h)** CODICES (Croatian, English).

*Keywords of the systematic thesaurus:*

4.5.3.4.3 Institutions – Legislative bodies – Composition – Term of office of members – **End.**

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

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

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

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, non-resident voters / Election, electoral expenses, reimbursement / Election, campaign, media access / Electoral system / Member of Parliament, mandate.

*Headnotes:*

Parliament has the exclusive power to decide on the system for electing its members and to set out the rules within the system it chooses. Its choice cannot *per se* be subject to constitutional review in proceedings before the Constitutional Court, unless a particular legislative solution impinges on the constitutionally guaranteed values of universal and equal suffrage and on other constitutional values and principles connected with the realisation of representative rule and the democratic multi-party system.

*Summary:*

I. A number of concerns had arisen in connection with the Croatian electoral system, and its conformity with the principle of direct and equal suffrage, as well as the mandate of members of its national Parliament and whether it should be possible for them to be recalled before the end of their prescribed term of office. A question had also arisen over the compliance of the current system of compensation for electoral expenses with the principle of equal suffrage, and the role of the national electronic media during election times.

Concerns were also raised over the fact that citizens resident abroad were allowed to vote in elections over two days, at consular polling stations, whereas citizens resident in Croatia could only vote over the course of one day; the suggestion was made that the

provision in question introduced inequality and gave citizens resident abroad an unfair advantage over those based in Croatia, which could be classed as discrimination.

II. The Constitutional Court rejected various proposals to review the constitutionality of Articles 2.2, 7.1, 10.1.1, 10.1.2, 10.1.3, 18.1, 20, 30, 38 and 80.2 of the Election of Members of the Croatian Parliament Act (hereinafter, the “EMCPA”) and Article 2 of the Election of Members of the Croatian Parliament (Amendments) Act (hereinafter, the “A EMCPA”).

It also rejected proposals for the constitutional review of Articles 4, 9, 20, 29, 31, 32, 35, 43, 44, 56, 58, 60, 61, 68, 69 and 95 EMCPA and discontinued the proceedings for the constitutional review of Articles 34, 53, 54 and 55 EMCPA, having established that there were no grounds for it to decide on the merits of the case, that it was not competent to decide, or that the requirements for conducting the constitutional court procedure no longer existed.

The reasons given by the Constitutional Court in support of its decision not to accept the proposals for the constitutional review of the EMCPA are explained as follows, article by article; the proponents had challenged many of the provisions of this Act.

Article 2.2 of the EMCPA

Article 2.2 of the EMCPA stipulates that the mandate of Members of Parliament is representative, not imperative, and they cannot be recalled.

According to some of the proponents, voters should be able to recall their representatives in cases when, in the voters’ opinion, they are under-performing in their work or not performing at all.

The Constitutional Court found that Article 2.2 EMCPA is not in breach of Article 1.3 of the Constitution because the Members of Parliament (“MPs”) have a representative, as opposed to an imperative, mandate.

Articles 7.1, 18.1, 20 and 38 of the EMCPA

The proponents argued that these provisions ran counter to Articles 1.3 and 45 of the Constitution. In their view, voters should elect their representatives as individuals, not as a list of candidates from which it is only possible to “encircle” political parties.

The Constitutional Court pointed out that Parliament has exclusive jurisdiction to determine the electoral system for the election of MPs and the rules in the

electoral system chosen (the proportional electoral system with closed lists of candidates and determination of the number and size of the constituencies). The legislator's choice cannot in itself be subject to constitutional review in proceedings before the Constitutional Court, unless a particular legislative solution impinges on universal and equal suffrage and on other constitutional values and principles connected to the realisation of representative rule and the democratic multiparty system.

The Constitutional Court found that the impugned articles of the EMCPA, which start from the rules of the proportional electoral system, conform to the constitutional principles of direct elections and universal and equal suffrage enshrined in the Constitution.

#### Articles 10.1.1, 10.1.2 and 10.1.3 of the EMCPA

Under these provisions, the mandate of a Member of Parliament will cease earlier than the term for which he was elected if he or she resigns, is divested of his or her business capacity by a legally effective court decision, or if a prison sentence in excess of six months is imposed on him or her.

In the proponent's opinion, there were no circumstances in the legal order whereby the term of an elected MP could end before the expiry of four years (the term of office for MPS set out in Article 72.1 of the Constitution).

The Constitutional Court held that the legislator, in setting out the rules for parliamentary elections, did not contravene Article 72.1 of the Constitution by allowing an MP's mandate to be terminated in the manner envisaged in the EMCPA. In the view of the Constitutional Court, the proponent did not consider Article 72.1 of the Constitution in the light of the principle of the rule of law and the democratic multiparty system as the highest values of the constitutional order which are the grounds for interpreting the Constitution itself. It therefore held that the proponent's objections were not well founded.

#### Article 30 of the EMCPA

Under this provision, in order to establish the equality of all the political parties that declared lists and to allow them to present their programmes and promote themselves, Parliament must, within fifteen days of the entry into force of the Election of Members of the Croatian National Parliament (Amendments) Act (*Narodne novine*, no. 53/03), adopt Rules on the Proceedings of Electronic Media with National

Concessions in the Republic of Croatia during the Election Campaign. The content of these Rules is also prescribed under the provision.

The proponent challenged the conformity of Article 30 EMCPA with Articles 16 and 30.2 of the Constitution. He noted that the article was realised during preparations for the parliamentary elections in November 2003 and suggested it was superfluous.

The Constitutional Court did not find his proposal grounded, as this particular case does not concern the unconstitutionality of Article 30 of the EMCPA. It concerns the rationale behind the legislator's policies in the field of electoral law (in this case, a narrower role for the national electronic media during election campaigns). The provision does not have a disproportionately prejudicial impact on any constitutional value aimed at protecting and promoting voters' rights and democratic electoral processes.

#### Article 80.2 EMCPA

The proponent suggested that this article introduces inequality among voters who are residents of the Republic of Croatia and those who are foreign residents, since the latter may vote for two days in diplomatic-consular missions, unlike voters in Croatia who have to vote over the course of one day.

The Constitutional Court held that allowing voters who reside abroad to vote in diplomatic-consular missions over two days (allowing them to cast their votes despite the smaller number of polling stations, the distances they may have to travel and other justified reasons), does not place them in a privileged position, neither does it discriminate against citizens in Croatia, who can only vote over the course of one day.

#### Article 2 A EMCPA

In the proponent's view, Article 2 A EMCPA, which regulates the right to compensation for expenses incurred in electoral campaigns, introduces two categories of participants in elections: those with MPs in Parliament on the date its term ended and those without them. He argued that in terms of the right of equal suffrage, guaranteed in Article 45 of the Constitution, all those taking part in elections must be compensated for election expenses under the same conditions.

The Constitutional Court pointed out that "equal suffrage" means that the legislator must ensure, through the electoral system, that all citizens with voting rights have the same number of votes (they

may have one or several votes, depending on the will of the legislator and the electoral system chosen). Equal suffrage in Article 45 of the Constitution does not include equality for political parties in relation to compensation for expenses incurred in an electoral campaign. The legislator has the power to decide how and in accordance with which standards electoral expenses will be compensated. It therefore held that the above article cannot be examined from the aspect of Article 45 of the Constitution.

#### *Languages:*

Croatian, English.



#### *Identification:* CRO-2010-3-017

**a)** Croatia / **b)** Constitutional Court / **c)** / **d)** 08.12.2010 / **e)** U-I-4398/2008, U-I-152/2010 / **f)** / **g)** *Narodne novine* (Official Gazette), 142/10 / **h)** CODICES (Croatian, English).

#### *Keywords of the systematic thesaurus:*

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

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

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

#### *Keywords of the alphabetical index:*

Constitutional Court, jurisdiction, limits / Election, candidate, requirement / Election, local, candidate / Municipality, election / Mayor, election.

#### *Headnotes:*

Decisions as to how to appoint or elect the holders of executive office in local government fall within the legislator's remit and cannot be subject to Constitutional Court review provided the legislative solutions adopted comply with the constitutionally guaranteed right to local self-government.

The legal restriction on one person standing simultaneously as candidate for two elected posts of

executive character (for instance, at both municipal and county level) does not impinge on a person's passive right to be elected for any executive office at local elections. The rule on the incompatibility of holding executive and representative office simultaneously at local level does not imply a prohibition on standing for election for the two offices at the same time, but rather the obligation to choose between them, should the candidate in question be elected to both offices.

#### *Summary:*

The Constitutional Court rejected proposals from the Municipal Council of the Primošten Municipality and the Association of Municipalities in the Republic of Croatia to review the constitutionality of Articles 4.3 and 9.1 of the Elections of Municipal Prefects, Town Mayors, County Prefects and the Mayor of the City of Zagreb Act (hereinafter, the "Act").

Both the objections put forward by the applicants in their submissions were related to the problem of incompatibility between certain duties in local government.

The first objection concerned the statutory prohibition, set out in Article 4.3 of the Act, on running for the office of municipal and county prefect at the same time, and on running for office as town mayor and county prefect at the same time.

The second objection concerned the incompatibility of holding executive office in a local unit and in a local representative body at the same time (the rule as to the incompatibility of holding two different offices – representative and executive – after elections). If a candidate is elected to both offices, under this rule he or she must choose between them. This rule is set out in Article 9.1 of the Act.

The Constitutional Court considered Articles 4.1, 16, 132.1 and 132.2 of the Constitution in its examination of the proposals.

The Act has, for the first time in national legal and political history, introduced the direct election of municipal prefects, town mayors and county prefects.

Beginning with Article 4.3 of the Act, everyone is entitled to stand for election as a member of the local representative body at local elections regardless of whether he or she is at the same time also running for municipal prefect, town mayor or county prefect. Under the relevant provisions of the Act and the Election of Members of the Representative Bodies of the Units of Local and Regional Self-Government Act



there is no obstacle in the way of candidates for the office of municipal prefect, town mayor and county prefect and their deputies also standing as candidates in the lists for local representative office.

Pursuant to the above, Article 4.3 of the Act does not restrict the right to self-government within the meaning of Article 132.1 and 132.2 of the Constitution. The Act also complies with Article 4.1 of the Constitution; the legislator, by allowing everyone to stand for elections for membership of the local representative body, is not encroaching on the constitutionally guaranteed right to local and regional self-government.

The Constitutional Court found that the Act does not prevent anyone from standing for any local executive office. This is a universal right, available to all under equal conditions. Thus the legislative restriction on one person running for two elected executive posts at the same time (at town or municipality level and at county level), as set out in Article 4.3 of the Act, does not impinge on the essence of the right to stand for office or the right for any person to be elected for any executive office at local elections.

The Constitutional Court accordingly held that the proposals for the instituting of proceedings for the constitutional review of Article 4.3 of the Act were ill-founded.

Turning to Article 9.1 of the Act, at issue here was the incompatibility between holding office in a local unit (such as municipal prefect, town mayor or county prefect) and holding a legislative seat (i.e. being a member of the representative body of the same local unit in which the person holds executive office, or a member of the representative body of another municipality, town or county).

The Constitutional Court, in its assessment of the grounds for the initiation of a constitutional review, considered whether any reasons existed, which might, from a constitutional perspective, prevent the legislator from declaring that holding office as municipal prefect, town mayor, county prefect, mayor of the city of Zagreb, and deputies of the above was incompatible with membership of a local representative body.

The Constitutional Court did not identify any such reasons; representative office and executive office are not necessarily compatible.

It therefore found the proposals to initiate proceedings for the constitutional review of Article 9.1 of the Act to be ill-founded.

### *Languages:*

Croatian, English.



### *Identification:* CRO-2010-3-018

**a)** Croatia / **b)** Constitutional Court / **c)** / **d)** 08.12.2010 / **e)** U-X-6472/2010 / **f)** / **g)** *Narodne novine* (Official Gazette), 142/10 / **h)** CODICES (Croatian, English).

### *Keywords of the systematic thesaurus:*

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

4.9.4 Institutions – Elections and instruments of direct democracy – **Constituencies.**

### *Keywords of the alphabetical index:*

Election, constituency, number / Election, constituency, size / Election, constituency, boundary / Election, constituency, number of voters.

### *Headnotes:*

Urgent legislative amendments are needed, to bring the territories and boundaries of the general constituencies into line with changes in the number of voters and with other demographic and similar changes, which could, over time, have an adverse impact on the principle of the equal weight of votes. The amended legislation should clearly identify the competent bodies for implementing the procedure of delimitation (defining and harmonising of constituency territories and boundaries) and the rules to bring this process about.

The most important of these rules are those governing the time span, the powers of monitoring and proposing delimitation, rules relating to the supervisory bodies and their supervisory authority over the process of drawing the constituency boundaries and those relating to the participation of the public in the process. Also of importance are rules as to the powers and procedures for supervision of the direct application in the field of the “constituency map” accepted in the Constituencies Act.

Close attention should be paid, during the process of legislative amendment, to geographical mapping standards. These relate to the delimitation stage when the constituency boundaries are drawn. These boundaries should coincide wherever possible with the administrative boundaries of administrative-territorial units (also taking into account the natural boundaries created by prominent topographical features such as mountain passes, rivers or islands). Standards are also important with regard to the geometrical shape of constituencies, which should not be unnatural or irregular; attention must be paid to the continuity of the constituency boundaries and its compact territory.

### *Summary:*

I. Pursuant to its authority to monitor the execution of constitutionality and legality set out in Article 128.5 of the Constitution and Article 104 of the Constitutional Act on the Constitutional Court, the Constitutional Court issued a Notification to parliament on the unequal weight of votes in constituencies regulated in Articles 2 to 22 of the Act on Constituencies for the Election of Members of the House of Representatives of the Croatian National Parliament (Official Gazette no. 116/99), referred to as the "Constituencies Act".

In its session of 8 December 2010 the Constitutional Court considered the admissibility of several proposals for the constitutional review of the Election of Members of the Croatian Parliament Act, Constituencies Act, Electoral Registers and the Financing of Political Parties, Independent Lists and Candidates Act.

During the Court's deliberations, it became apparent that there was a need to notify parliament of certain problems concerning the application of the Constituencies Act at the forthcoming national parliamentary elections.

In some of the proposals, the proponents indicated unlawful differences in the number of voters in the constituencies in terms of Article 35 of the Election of Members of the Croatian Parliament Act.

II. The Constitutional Court noted that Croatia has a proportional electoral system and that its territory is divided into ten large multi-seat general constituencies. Fourteen MPs are elected in each of the general constituencies, on the basis of closed lists of candidates. This proportional electoral system requires the prior determination of the territories and boundaries of the general constituencies for electoral purposes.

Accordingly, both the legality and the general democratic character of the elections depend on the equal distribution of the voters in the general constituencies (the equality of votes directly depends on this distribution). This issue could be crucial to determination of the constitutionality of the entire election process. If an excessive difference in the number of voters per general constituency could directly and immediately affect the election results (i.e. if it led to different election results with all the other elements of the electoral system being or remaining equal), this would not be in conformity with the Constitution.

Under Article 36.1 of the Election of Members of the Croatian Parliament Act, Constituencies Act, the constituencies are determined by the Constituencies Act in such a way that the number of voters in the constituencies must not differ by more than  $\pm 5\%$ .

The Constitutional Court noted that the legislation in question was passed on 29 October 1999; it has not been revised or amended since then. It has been applied at three parliamentary elections over the past eleven years.

Data provided by the State Electoral Commission showed that there were already excessive differences in the number of voters in some general constituencies at the parliamentary elections held on 25 November 2007.

Recent data about the number of voters in the general constituencies was not available, but nonetheless, the Constitutional Court came to the conclusion that unless Articles 2 to 11 of the Constituencies Act are updated with the real voter status on the territory, the differences between them in terms of the number of voters could become constitutionally unacceptable at the forthcoming national parliamentary elections.

Because constituencies undergo changes over time, it is necessary to monitor changes in the number of voters in the general constituencies defined in the Constituencies Act. Where necessary, their territories and boundaries must at a suitable time before the next parliamentary elections are held, be brought into harmony with the actual status of the voters in them.

The Constitutional Court noted the lack of provision in the domestic legal system for special procedures and the bodies competent to monitor and compile reports, on a continuous and permanent basis, on the periodical need to harmonise the territories and boundaries of the general constituencies, as defined in the Constituencies Act.

Article 36.2 of the Election of Members of the Croatian Parliament Act also requires compliance with another democratic legal standard in the procedure of constituency delimitation, namely respect, to the greatest extent possible, of the administrative boundaries of administrative-territorial units (counties, towns and municipalities).

This requirement stems from the approach that the administrative-territorial units in every State are also an expression of the region's geographical characteristics.

The Constitutional Court noted that even if the equal weight of votes in constituencies is achieved, if the principles mentioned above are not respected, this could in certain cases lead to their being unlawful, due to the requirements in Article 36.2.

#### *Cross-references:*

- Ruling no. U-I-220/2008 of 08.12.2010.

#### *Languages:*

Croatian, English.



#### *Identification:* CRO-2010-3-019

**a)** Croatia / **b)** Constitutional Court / **c)** / **d)** 08.12.2010 / **e)** U-X-6670/2010 / **f)** / **g)** *Narodne novine* (Official Gazette), 142/10 / **h)** CODICES (Croatian, English).

#### *Keywords of the systematic thesaurus:*

- 3.10 General Principles – **Certainty of the law.**
- 3.12 General Principles – **Clarity and precision of legal provisions.**
- 4.9.3 Institutions – Elections and instruments of direct democracy – **Electoral system.**

#### *Keywords of the alphabetical index:*

Law, electoral, amend, requirement / Law, enactment, deadline / Constitution, new.

#### *Headnotes:*

The purpose of Article 5 of the Constitutional Act on the Implementation of the 2010 Constitution is to bring the relevant electoral legislation in line with the new constitutional text so as to realise the constitutionality of electoral procedure, and the legal certainty of the objective electoral legal order. New electoral rules of constitutional significance in the legal order can only be stabilised by timely harmonisation with the Constitution. Some of the normative concepts within Article 5 are rather vague, making its legal effects uncertain. The wording of certain of the provisions allowed for a broad scope of application, which was not in accordance with the principle of the rule of law. These issues needed to be addressed, in order to meet the requirements of the principle of legal certainty.

#### *Summary:*

Some of the normative concepts in Article 5 of the Constitutional Act on the Implementation of the 2010 Constitution (henceforth CAIC/10) are rather vague, making its legal effects uncertain. These are the concept of “regular elections”, the concept of “holding” regular elections (which is linked to the date when parliament is due to enact legislation to regulate the election of Members of the Croatian Parliament), and the concept of “laws that regulate the election of Members of the Croatian Parliament”.

On the basis of its authority to monitor the execution of constitutionality and legality stipulated in Article 128.5 of the Constitution and Article 104 of the Constitutional Act on the Constitutional Court, the Constitutional Court notified the Croatian Parliament as to the application of Article 5 of the Constitutional Act on the Implementation of the Constitution (*Narodne novine*, no. 28/01).

At its session of 8 December 2010 the Constitutional Court decided on the admissibility of proposals to institute proceedings to review the conformity with the Constitutional Act on the Implementation of the Constitution (*Narodne novine*, no. 28/01; hereinafter, “CAIC/01”) of the Election of Members of the Croatian Parliament (Amendments) Act (“the “EMCPA”), the Electoral Registers Act and the Financing Political Parties, Independent Lists and Candidates Act.

In these proceedings the Court passed a ruling rejecting the proponents' proposals for the review of constitutionality of the given laws with Article 4 of the CAIC/01 as it was not competent to decide on their conformity with the law which, despite its name, has no constitutional force.

During the constitutional court proceedings the Constitutional Court noted that some parts of Article 4 of the CAIC/01 are vague and unclear. However, there were no grounds for the Constitutional Court to proceed upon this case, as the CAIC/01 was no longer in force.

Furthermore, the Constitutional Court noted that Article 5 of the CAIC/10, which is currently in force, has the same content as Article 4 of the CAIC/01. It stipulates that laws regulating national parliamentary elections must be passed at least one year before the elections are held.

The three normative concepts within Article 5 of the CAIC/10 which are vague and which cast doubts over its legal effects are:

a. Regular elections

The Constitutional Court noted that Article 5 of the UZPU/10 relates only to regular elections of Members of the Croatian Parliament, not to early or extraordinary elections.

Under Articles 72.1, 73.1 and 77.1 of the Constitution, all parliamentary elections that are held after parliament is dissolved and before the four-year term of the members has expired are to be considered early elections.

The current (sixth) sitting of the Croatian Parliament was constituted on 11 January 2008 on the basis of the results of the elections of Members of the Croatian Parliament, held on 25 November 2007. The four-year mandate of the representatives accordingly ends on 11 January 2012.

Article 5 of the UZPU/10 will only apply if the sixth sitting of the Croatian Parliament does in fact conclude when the representatives' four-year mandate expires (i.e. on 11 January 2012).

b. The concept of "holding" regular elections and the date before which the Croatian Parliament is obliged to pass laws to regulate the election of Members of the Croatian Parliament

Article 5 of the CAIC/10 obliges the Croatian Parliament to pass laws that regulate the election of Members of the Croatian Parliament, and links this obligation to the date of "holding" the regular elections.

Article 73.1 of the Constitution stipulates that regular elections of Members of the Croatian Parliament shall be held no later than sixty days after the expiry of the

mandate. 11 March 2012 is therefore the latest constitutional date for holding the forthcoming parliamentary elections.

In accordance with the above, the date of the regular elections is in principle definable (from 11 February to 11 March 2012), but it is not determined.

In such a legal and constitutional situation, in order to avoid legal uncertainty, the Constitutional Court deemed it necessary to set the deadline for the legislator's obligation in Article 5 of the CAIC/10. It held that legislation to regulate the election of Members of the Croatian Parliament should be passed no later than 11 March 2011, this being the expiry of the deadline of one year before the forthcoming parliamentary elections are held.

c. Laws that regulate the election of Members of the Croatian Parliament

The Constitutional Court noted that the wording "laws that regulate the election of Members of the Croatian Parliament" within Article 5 of the CAIC/10 allowed a very broad scope of application for the norm, which was not in accordance with the principle of the rule of law in a democratic society. There was a degree of uncertainty over issues related to the meaning of the notion "law" within the meaning of Article 5 of the CAIC/10 and to the parts of the relevant laws covered by Article 5 of the CAIC/10 as well as the issue of which specific laws belong to the body of "laws that regulate the election of Members of the Croatian Parliament". These issues had to be addressed, in accordance with the principle of the legal certainty of the objective legal order.

The Constitutional Court noted that the obligation "to pass laws" within the meaning of Article 5 of the CAIC/10 only related to the passing of new laws, should parliament choose to enact them at all, this being within its exclusive constitutional remit, or to revisions and amendments of electoral legislation already in force. Therefore, the obligation to "pass laws" within the meaning of Article 5 of the UZPU/10, the deadline for the realisation of which is 11 March 2011, is exhausted once parliament has fulfilled its obligation to harmonise the legislation for national parliamentary elections with the 2010 Constitution.

In this Notification, the Constitutional Court confined itself to stating the body of legislation already in force which regulate national parliamentary elections within the meaning of Article 5 of the CAIC/10.

*Cross-references:*

- Ruling no. U-I-3760/2007 of 08.12.2010, *Bulletin* 2010/3 [CRO-2010-3-015].

*Languages:*

Croatian, English.



## Cyprus Supreme Court

---

### Important decisions

*Identification:* CYP-2010-3-003

**a)** Cyprus / **b)** Supreme Court / **c)** / **d)** 01.12.2010 / **e)** / **f)** Criminal Appeal 202/2009 / **g)** / **h)**.

*Keywords of the systematic thesaurus:*

1.1.1.2 Constitutional Justice – Constitutional jurisdiction – Statute and organisation – **Independence**.  
3.9 General Principles – **Rule of law**.  
3.18 General Principles – **General interest**.

*Keywords of the alphabetical index:*

Criminal proceedings, decision to bring / Attorney General, State Prosecutor.

*Headnotes:*

The Attorney General acted within his power, as conferred by Article 113.2 of the Constitution, in deciding not to prosecute or conduct any criminal proceedings regarding the applicant's complaint. Under the Constitution, the Attorney General is entrusted with power to conduct, take over, continue or discontinue (criminal) proceedings at his discretion (Article 113.2). This power is of a quasi-judicial nature and is not reviewable either under Article 146 of the Constitution or by a prerogative writ (order).

*Summary:*

The applicant sought leave by an *ex parte* application to apply for prerogative orders, namely an order of *certiorari* quashing the decision of the Attorney General not to prosecute or conduct any criminal proceedings regarding the applicant's complaint and an order of *mandamus* requiring the Attorney General to exercise his authority and perform his public function as conferred by Article 113.2 of the Constitution by making the necessary prosecution.

---

The position of the applicant, as shown in her affidavit accompanying the *ex parte* application, was that her cousin had made false statements and presented false certificates with the intention of depriving the heirs of the estate of her deceased father.

The applicant complained to the police and the file of her case was submitted to the Attorney General, who decided that her complaint did not warrant any prosecution. The applicant argued that the Attorney General's decision was unjustified and violated her constitutional rights and her rights under the European Convention on Human Rights.

The Honourable Justice of the Supreme Court, who dealt with the application at first instance, after referring to the relevant case law, decided that the application should be dismissed. The Attorney General acted within his power conferred by Article 113.2 of the Constitution, in deciding not to prosecute or conduct any criminal proceedings regarding the applicant's complaint. This power of the Attorney General, as was pointed out by the Honourable Justice, is of a quasi-judicial nature and is not reviewable either under Article 146 of the Constitution or by a prerogative writ (order).

The applicant lodged an appeal, complaining that the above view expressed by the Honourable Justice of the Supreme Court was erroneous and that the Attorney-General's decision not to prosecute was in breach of the public interest and thus unconstitutional.

The Supreme Court exercising its appellate jurisdiction held that the first instance judgment was correct in its reasoning. It was reiterated that the Attorney General is, under the Constitution, entrusted with power to conduct, take over, continue or discontinue (criminal) proceedings at his discretion (Article 113.2). This power is exercised in the public interest. For the purposes of Article 113.2, the Attorney General is the sole arbiter of public interest. Acts and omissions of the Attorney General regarding the investigation and prosecution of crime are therefore not subject to judicial review under Article 146 of the Constitution or by a prerogative order for the reason that such acts are inextricably linked to the judicial process.

For all the above reasons the appeal was dismissed unanimously.

The Civil Appeal Bench of the Supreme Court was composed of the Hon Justices: Constandinides, Nicolaides, Papadopoulos, Nicolatos, Pamballis and its judgment was prepared and delivered by the Hon. Justice Nicolatos.

*Languages:*

Greek.



# Czech Republic

## Constitutional Court

### Statistical data

1 September 2010 – 31 December 2010

- Plenary decisions on merits: 10
- Senate decisions on merits: 63
- Other plenary decisions: 7
- Other senate decisions: 1 069
- Other procedural decisions: 28
- Total: 1 177

### Important decisions

*Identification:* CZE-2010-3-010

**a)** Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 07.09.2010 / **e)** Pl. ÚS 22/09 / **f)** On the statutory limitation of a judge's representation of parties or other persons involved in court and administrative proceedings / **g)** *Sbírka zákonů* (Official Gazette), no. 309/2010; www.nalus.usoud.cz / **h)** CODICES (Czech).

*Keywords of the systematic thesaurus:*

4.7.15.2 Institutions – Judicial bodies – Legal assistance and representation of parties – **Assistance other than by the Bar.**

5.2 Fundamental Rights – **Equality.**

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

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:*

Judge, independence / Judge, impartiality / Parties to legal proceedings.

*Headnotes:*

The principle of an independent judiciary is an essential requirement of a democratic state governed by the rule of law. A statutory provision that limits a

judge's ability to represent parties to proceedings or other persons involved in them is therefore legitimate and commensurate with the aim pursued, namely the protection of the independence, impartiality and fairness of judicial decision making and the dignity of judicial office.

*Summary:*

I. In its Judgment of 7 September 2010, the Plenum of the Constitutional Court dismissed a petition from the disciplinary panel of the Supreme Court seeking the repeal of § 80.5.b of Act no. 6/2002 Coll., on Courts, Judges and Lay Judges and State Administration of the Courts, and Amending Certain Other Acts (hereinafter, the "Act on Courts and Judges"), specifically the part that reads that a judge may not represent parties to court proceedings or act as the representative of the injured party or a party involved in court or administrative proceedings, with the exception of statutory representation and cases that involve representation of a secondary party to proceedings to which the judge himself or herself is a party.

According to the petitioner, the contested provision impermissibly and beyond the framework of the norms of the constitutional order (Article 82.3 of the Constitution and Article 44, first sentence, before the semi-colon, of the Charter) prevents judges from taking any procedural steps in proceedings when representing persons related to them or other persons. Moreover, the Act draws an impermissible distinction between situations where the judge is himself or herself a party to a case and where he or she is not. The petitioner contended that in these cases, such conduct by a judge cannot violate the dignity of judicial office or endanger or weaken confidence in independent, impartial and fair decision making.

II. The Constitutional Court considered its case law on the principle of independent and impartial courts, and noted that in view of the provisions of the Constitution and the Charter referred to by the petitioner, it cannot be considered unconstitutional for a statute to forbid a judge from acting as a representative, as mediator for a resolution of a legal dispute or as attorney of a party to proceedings. The Constitution and the Charter expressly permit further limitations to be provided by statute.

The Constitutional Court found the specific limitations on a judge's ability to represent other persons in proceedings legitimate, as a judge is under an obligation to conduct himself or herself in his or her personal life in such a manner that his or her conduct does not violate the dignity of the judicial office and does not endanger or weaken confidence in

independent, impartial, and fair decision making. The Constitutional Court pointed out that the term “independence” must be interpreted in accordance with the case law of the European Court of Human Rights from an objective viewpoint (viewed in terms of how independence and impartiality may appear to an external observer). The office of a judge is a public office, and if a judge was allowed to represent people, even if they were related to him or her, the possibility could not be ruled out of a breach of the dignity of judicial office and it could also threaten and weaken confidence in independent, impartial and fair decision making by the courts. In the Constitutional Court’s opinion the limitation under review imposed on judges is also in line with the promotion of the constitutional values mentioned above.

III. The judge rapporteur in the case was Vlasta Formánková. No dissenting opinions were filed.

#### *Languages:*

Czech.



#### *Identification:* CZE-2010-3-011

**a)** Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 29.09.2010 / **e)** Pl. ÚS 33/09 / **f)** On the authority and power of a municipal mayor to enter into contracts / **g)** *Sbírka zákonů* (Official Gazette), no. 332/2010; [www.nalus.usoud.cz](http://www.nalus.usoud.cz) / **h)** CODICES (Czech).

#### *Keywords of the systematic thesaurus:*

3.10 General Principles – **Certainty of the law.**  
5.3.32 Fundamental Rights – Civil and political rights  
– **Right to private life.**

#### *Keywords of the alphabetical index:*

Law, foreseeability / Mayor, transitional period, powers.

#### *Headnotes:*

A formalistic approach to the law, which gives priority to a linguistic interpretation of a statutory provision may lead to a breach of the principle of legal certainty

and predictability (fundamental attributes of a law-based state) and may affect the public’s confidence in the law.

The right to an undisturbed private life includes the right to protection of domicile, both owned and rented.

#### *Summary:*

I. In response to the applicant’s petition, panel II of the Constitutional Court, in its Judgment of 2 November 2009, overturned the decision of the District Court in Mladá Boleslav of 30 October 2008 and that of the Regional Court in Prague of 8 April 2009 because they violated the applicant’s fundamental right to private life.

Proceedings before the ordinary courts resulted in the applicant being obliged to vacate a flat which was owned by the municipality and which he had been using under a lease agreement. The agreement was made between the municipality and the applicant in the period before the new assembly’s constitutive meeting. At this point, the municipality’s mayor had only limited powers, which, according to the ordinary court, did not give him the authority to conclude the lease agreement. They therefore held it was invalid. The applicant filed a constitutional complaint against this decision, alleging that the interpretation and application of the law were excessively restrictive. He also pointed out that the action on vacation of the flat was filed after two years of peaceful use of the flat and proper fulfilment of all obligations arising under the lease agreement.

II. The Constitutional Court focused on the issue of the mayor’s authority to conclude lease agreements in the transitional period between elections to the municipal assembly and the municipal assembly’s constitutive meeting. It noted that giving priority to linguistic interpretation of the law would lead to the illogical conclusion that during the transitional period the mayor could not exercise the authority of municipality’s executive bodies although by law outside the transitional period he possesses and exercises that authority. The Constitutional Court was of the view that if the law authorises the mayor to form and express the municipality’s will in a specific defined area, no rational grounds exist to restrict that competence during the transitional period. Moreover, this limitation of competence only occurs due to an interpretation of the law that is formally possible, but constitutionally completely unacceptable.

The formalistic approach to the law, established in this case by giving priority to a linguistic interpretation over a teleological one, led to violation of the principle of protecting public confidence in the law, legal



certainty and the predictability of the law. These principles must apply to all actions by public authorities, including those of local government. In addition, in this case, a breach of the right to private life had occurred. This, according to the settled case-law of the European Court of Human Rights, includes the right to protection of domicile. The Constitutional Court found that arbitrary interpretation and application of a legal regulation by ordinary courts impinged on the applicant's right to a private life.

III. The judge rapporteur in the matter was Eliška Wagnerová. No dissenting opinions were filed.

#### *Languages:*

Czech.



#### *Identification:* CZE-2010-3-012

**a)** Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 06.10.2010 / **e)** Pl. ÚS 39/08 / **f)** On certain aspects of the organisation of the judiciary (temporary assignment of judges to the Ministry of Justice, appointment of deputy chairmen of the Supreme Court, introducing terms of office for court officials) / **g)** *Sbírka zákonů* (Official Gazette); no. 294/2010; www.nalus.usoud.cz / **h)** CODICES (Czech).

#### *Keywords of the systematic thesaurus:*

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

4.4.3.3 Institutions – Head of State – Powers – **Relations with judicial bodies.**

4.7.4.1.2 Institutions – Judicial bodies – Organisation – Members – **Appointment.**

4.7.8 Institutions – Judicial bodies – **Ordinary courts.**

#### *Keywords of the alphabetical index:*

President of the Republic / Balance of power / Administration of courts / Appointment, temporary / Judiciary, independence.

#### *Headnotes:*

The principles of the separation of powers and the independence of the judiciary rule out the possibility

of joining the judiciary and judges with the executive branch. Therefore, a legal regulation allowing the temporary assignment of judges to work at the Ministry of Justice is unconstitutional, as is a regulation that does not contain a means of protecting court officials from temporary removal from office by the Ministry of Justice, and a regulation permitting the President of the Republic to determine the number of vice chairmen of the Supreme Court.

A time limit for holding the office of chairman or vice chairman of a court is not, in and of itself, inconsistent with the principle of the separation of powers, if it is comparable to the term of office of other officials in an independent position and if there is a commensurate regulation of stricter conditions for an early suspension from temporary office.

#### *Summary:*

I. In its Judgment of 6 October 2010, the plenum of the Constitutional Court partly granted and partly dismissed a petition from a group of senators of the Senate of Parliament, seeking the repeal of selected provisions of Act no. 314/2008 Coll. (amending the Act on Courts and Judges) and selected provisions of the Act on Courts and Judges and the Administrative Procedure Code.

II. Having verified that the legislative process was conducted properly, the Constitutional Court concentrated on reviewing the substance of the individual contested parts of the Act on Courts and Judges, the Administrative Procedure Code, and transitional provisions of Act no. 314/2008 Coll.

As regards the legal regulation of temporary assignment of judges to the Ministry of Justice under § 68 of the Act on Courts and Judges, the Constitutional Court referred to its conclusions in Judgment file no. Pl. ÚS 7/02, where it had already repealed an analogous regulation on the grounds of a conflict with the principle of the separation of powers. The legal regulation now under dispute extended the possibility of assigning judges for up to three years, which, in the Constitutional Court's opinion, made the connection with the executive branch even more serious. Therefore, this part of the petition was granted.

The Constitutional Court also considered the contested § 100a of the Act on Courts and Judges, which permits the Minister for Justice to temporarily remove a court chairman or vice chairman from office if disciplinary proceedings have been opened against them. It stated that such a regulation can conflict with the principle of the separation of powers and with the independence of the judiciary, only if the possibility of

removal from office is also tied to the minister being the plaintiff in the disciplinary proceedings. In such a case, it is the minister who, through the disciplinary complaint, creates the conditions permitting him or her to remove a court official from office. The regulation lacks any means of appeal which would allow the official to defend himself or herself against this provision. Therefore, the Constitutional Court found only § 100a.1.b of the Act on Courts and Judges to be unconstitutional.

The Constitutional Court did not identify any constitutional problems with the creation of more than one vice chairman of the Supreme Court. However, it considered the statutory construction to be insufficiently definite. In the Constitutional Court's opinion, the President of the Republic cannot have unlimited authority to determine the number of Supreme Court vice chairmen. This defect can be corrected either by a statutory determination of the number of Supreme Court vice chairmen, or by a regulation analogous to the appointment of vice chairmen in district, regional and high courts, i.e. at the proposal of the court chairman. However, as the number of vice chairmen is not in itself pose a threat to judicial independence, the Constitutional Court limited itself to repealing § 102.1 of the Act on Courts and Judges.

The principle of a time limit on holding certain offices is not, in the Constitutional Court's opinion, in and of itself, inconsistent with the principle of the separation of powers. However, the time limit on holding office must be balanced by stricter conditions for early suspension from office: the shorter the term of office, the stricter the conditions that must be imposed on the ability to remove someone from office early.

As regards the possibility of repeatedly holding a time-limited office, the Constitutional Court stated that the legal regulation must not create conditions for "personnel corruption" that would endanger independence and impartiality. The possibility of repeated appointment may motivate officials to act in ways that ensure them further appointments (or the outside world may perceive their actions in this way), which endangers the independence and impartiality of the judiciary. For that reason the Constitutional Court repealed the provision permitting court chairmen and vice chairmen to be appointed to office repeatedly after their term expires.

The Constitutional Court did not find transitional periods terminating the terms of office of current officials to be unconstitutional; on the contrary, it considered their length to be commensurate with the regular terms of office or the current length of time in the office. The only exception was the transitional

period set for the chairman of the Supreme Court (5 years), which, in the Constitutional Court's opinion, was disproportionate to the regular term of office and to the transitional period set for the chairman of the Supreme Administrative Court (10 years). The Constitutional Court also identified in these provisions an impermissible hidden individual legal act directed against the current chairwoman of the Supreme Court. It therefore repealed the provision, but postponed the effectiveness of this part of the judgment as the legislator now has the task of determining transitional periods for chairmen and vice chairmen of both of the supreme courts in the same manner.

III. The judge rapporteur in the case was Jiří Mucha. A dissenting opinion to part of verdict I was filed by judge Jan Musil, which argued that the temporary assignment of a judge to the Ministry of Justice does not in any way violate the constitutional principle of thorough separation of the judicial and the executive power, the principle of judicial independence, or the principle of incompatibility of judicial office with a position in public administration.

A dissenting opinion to verdict IV was filed by judges Ivana Janů, Vladimír Kůrka, Jan Musil and Pavel Rychetský. The dissenting judges stated that the possibility of repeatedly electing a court officer could not automatically be seen as an institution that encourages "personnel corruption" because, on the contrary, it results – with respect to the personal integrity of judges – in high quality court administration.

A dissenting opinion to the reasoning of verdict IV was filed by judge Pavel Holländer, who stated that the possibility of repeated appointment to the office of court chairman or vice chairman, in connection with the length of the term of office, creates a situation where the role of state administration predominates, to the detriment of the role of a judge. This results in violation of the constitutional principle of an independent judicial power and independent judges.

A dissenting opinion to verdict V was filed by judge Eliška Wagnerová, in whose opinion in this case there was no important public interest that would justify the disproportionate interference in the principle of uninterrupted exercise of public offices, and the regulation as enacted could raise suspicion of political influence on the selection of management in the judiciary by the legislative and executive branches.

#### *Languages:*

Czech.



### Identification: CZE-2010-3-013

**a)** Czech Republic / **b)** Constitutional Court / **c)** First Chamber / **d)** 10.11.2010 / **e)** I. ÚS 2462/10 / **f)** Extradition of a foreigner who is an asylum seeker in relation to insufficient guarantees of a fair trial in Georgia / **g)** *Sbírka nálezů a usnesení* (Collection of decisions and judgments of the Constitutional Court), [www.nalus.usoud.cz](http://www.nalus.usoud.cz) / **h)** CODICES (Czech).

#### Keywords of the systematic thesaurus:

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

5.3.11 Fundamental Rights – Civil and political rights – **Right of asylum.**

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

#### Keywords of the alphabetical index:

Foreigner, expulsion / Extradition, proceedings / Extradition, safeguard.

#### Headnotes:

Extradition proceedings can violate the prohibition of torture if general courts give precedence to the guarantees of a fair trial generally proclaimed and promised by the requesting party over specific arguments by the applicant and other international (non-governmental) organisations.

#### Summary:

I. Upon a petition from the applicant, Z. N., panel I. of the Constitutional Court, by its judgment of 10 November 2010, overturned the resolution of the Regional Court in Brno of 9 December 2009, the resolution of the High Court in Olomouc of 22 March 2010, and the decision of the Minister of Justice of the Czech Republic of 9 August 2010 due to conflict with Article 7.2 of the Charter of Fundamental Rights and Freedoms, Article 3 ECHR, and Article 3 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

The Republic of Georgia, of which the applicant was a citizen, had asked for him to be extradited in order to serve a prison sentence of fifteen years to which he had been sentenced in his absence for committing the crime of murder under the Georgian Criminal Code. Since 1994, the applicant has lived in the Czech Republic, where he has twice applied for international protection. He did not succeed in his first application and the second application proceeding is not yet complete and remains pending before the Regional Court, based on the applicant's complaint against a decision of the Ministry of the Interior. Although under the Act on Asylum an administrative complaint has suspensory effect, in parallel extradition proceedings it was decided by the decisions mentioned above to extradite him to Georgia.

II. The Constitutional Court noted that the applicant's case involved concurrent asylum and extradition proceedings. It stated that under Article 43 of the Charter, the Czech Republic shall grant asylum to aliens who are being persecuted for the assertion of their political rights and freedoms; however, asylum may be denied to a person who has acted contrary to fundamental human rights and basic freedoms. On the other hand, the Czech Republic and Georgia are parties to the European Convention on Extradition. Thus, this case involves a conflict between two international commitments of the Czech Republic, namely the commitment to extradite persons who are subject to criminal prosecution by relevant bodies of the requesting state, and the commitment to observe international treaties on human rights and fundamental freedoms. The Constitutional Court has previously addressed this issue in Judgment file no. I. ÚS 752/02, where it stated that it is appropriate to give precedence to commitments arising from treaties on the protection of human rights.

The Constitutional Court also addressed the applicant's arguments about insufficient guarantees of the principles of a fair trial in Georgia, and examined the compliance of the disputed decisions with Article 7.2 of the Charter, Articles 3 and 13 ECHR and Article 3 of the Convention against Torture. In this regard it stated that it had addressed similar issues in Judgment file no. IV. ÚS 553/06, where it stated that "the decision to expel a foreigner who is an asylum applicant can evoke problems in terms of Article 3 ECHR, if there are serious, verified reasons to believe that the person in question is exposed to a real risk that he would be subject to torture or inhuman or degrading treatment or punishment (the "real risk" test)." Although that judgment concerned a decision to extradite, there was no reason not to apply the conclusion to the present case, i.e. to extradition proceedings.

The Constitutional Court pointed out that the general courts had paid insufficient respect in the extradition proceedings to reports presented repeatedly from international organisations, which pointed to insufficient guarantees of a fair trial in Georgia, and expressly recommended that the applicant should not be extradited. The general courts also ignored relevant information contained in a report from the Czech ambassador to Georgia and did not carry out an adequate review of the Georgian court decision on the basis of which the applicant was to be extradited. In the Constitutional Court's opinion the applicant submitted sufficient evidence and reports to demonstrate that, in the aggregate, there are substantial reasons to fear that he faces the danger of torture or cruel and inhuman treatment or punishment if he returns to Georgia.

III. The judge rapporteur in the case was František Duchoň. No dissenting opinions were filed.

#### *Languages:*

Czech.



## Estonia

### Supreme Court

#### Important decisions

*Identification:* EST-2010-3-008

**a)** Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 18.06.2010 / **e)** 3-4-1-5-10 / **f)** / **g)** *Riigi Teataja III* (Official Gazette), 2010, 40, 239 / **h)** [www.nc.ee/?id=11&tekst=RK/3-4-1-5-10](http://www.nc.ee/?id=11&tekst=RK/3-4-1-5-10); [www.nc.ee/?id=1176](http://www.nc.ee/?id=1176); CODICES (Estonian).

*Keywords of the systematic thesaurus:*

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

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

*Keywords of the alphabetical index:*

Procedural provisions, relevance / Summary proceedings, constitutionality / Right of appeal / Criminal proceedings, simplified proceedings / Declaration of unconstitutionality.

*Headnotes:*

Assessment of the relevance of procedural provisions must be based on whether these procedural provisions were to be applied in the particular proceedings in order to reach a judgment.

Preclusion of the filing of appeals in summary proceedings is constitutional, as the accused could ask for the matter to be heard under the general procedure after judgment.

The regulations regarding criminal procedure are unconstitutional insofar as they do not allow the person to request, while his or her case is before the Court, a declaration that relevant regulations regarding summary proceedings are unconstitutional, and in that they do not provide an effective right to defence.

*Summary:*

I. The Criminal Procedure Act provided for simplified proceedings known as summary proceedings. The filing of appeals on decisions at first instance was precluded but the accused could request the hearing of the matter under the general procedure.

II. Preclusion of the filing of appeals does not mean that a court judgment made in summary proceedings is necessarily final. If the accused asks for the matter to be heard pursuant to the general procedure after judgment has been handed down, he or she has the right to contest the judgment made pursuant to the general procedure in a higher court. This results in lengthier proceedings, but, after judgment has been handed down in summary proceedings, two subsequent reviews of the matter are assured, and the individual's right to a hearing guaranteed. An individual is entitled to a hearing of his or her court case within a reasonable time span, but he or she has no right to proceedings which are faster or simpler than usual.

If the right of appeal of Counsel is precluded, this restricts the right of the person being defended to an effective defence. There was no obligation under the law for an accused to be informed of the appointment, name or contact details of his or her Counsel. Neither did the legislation prescribe that the criminal file, a copy of which was delivered to the accused's Counsel, must set out a person's telephone number or e-mail address. There was no requirement for a copy of the judgment made in summary proceedings to be communicated to Counsel, and once judgment had been given, he or she had no right to request hearing of the criminal matter pursuant to the general procedure. Neither the accused nor Counsel had the possibility to present opinions or file requests. There was no court hearing or hearing of the statements. After the receipt of a statement of charges, Counsel could perform no procedural acts. Indeed, as Counsel had no part in the summary proceedings, his or her obligation to participate could be described as illusory. Counsel is under a duty to act in the interests of the person being defended, even when he or she does not understand the need to act. Different provisions in their conjunction do not ensure effective defence for the accused in summary proceedings. The right to defence of a person cannot be effectively ensured in situations where it is impossible to request, while the person's case is before the Court, the constitutional review of a relevant provision.

The regulations regarding summary proceedings were declared to be in conflict with the Constitution in the part in which they failed to ensure the effective right of defence, including failure to allow a

person to request, whilst their case is before the Court, a declaration that a relevant provision is unconstitutional.

*Languages:*

Estonian.

*Identification:* EST-2010-3-009

**a)** Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 22.11.2011 / **e)** 3-4-1-6-10 / **f)** The application by the Chancellor of Justice to declare null and void Article 1 of the Tallinn City Government Regulation no. 75 of 30 July 2009 "The Prices of the Service of Water-Supply and Waste-Water Drainage in the Main Sphere of Action of the Public Water System and Sewerage of Tallinn" / **g)** / **h)** www.riigikohus.ee; CODICES (Estonian).

*Keywords of the systematic thesaurus:*

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

*Keywords of the alphabetical index:*

Act, application, general / Act, application, specific.

*Headnotes:*

The nature of an act is revealed not by its title, but by its content. When adjudicating upon the nature of an act, one must take into account the regulations in their concrete form. The general applicability of the act to an undefined circle of people, the size of the territory in which it applies and the undefined duration of its validity cannot be perceived as the only factors directly indicating it to be an act of general application.

The possibility of disputing the act in the courts may affect decisions as to its nature.

*Summary:*

Under Article 2.1 of the Constitutional Review Court Procedure Act the Supreme Court adjudicates on requests to verify the conformity with the Constitution of legislation of general application. According to Article 4.1 and 4.2, the basis for this verification can include a reasoned request, which the Chancellor of Justice and others may submit.

The Chancellor of Justice may submit an application to the Supreme Court to repeal legislation of general application passed by local government, or a provision of such legislation which has entered into force. (See Article 6.1.1 of the above Act as well as Article 142 of the Constitution). Thus the conformity with the Constitution of local government legislation which is of specific application cannot be verified by the Supreme Court.

The Constitutional Review Chamber of the Supreme Court found that the Tallinn City Government Regulation on "The Prices of the Service of Water-Supply and Waste-Water Drainage in the Main Sphere of Action of the Public Water System and Sewerage of Tallinn" is not an act of general application. It returned the request without review.

*Cross-references:*

- Supreme Court *en banc*, Decision no. 3-4-1-1-00 of 17.03.2000, *Bulletin* 2000/1 [EST-2000-1-003];
- Constitutional Chamber of the Supreme Court, Decision no. 3-4-1-4-02 of 10.04.2002, *Bulletin* 2002/1 [EST-2002-1-003].

*Languages:*

Estonian.



## France

### Constitutional Council

#### Important decisions

*Identification:* FRA-2010-3-006

**a)** France / **b)** Constitutional Council / **c)** / **d)** 15.11.2007 / **e)** 2007-557 DC / **f)** Act on immigration control, integration and asylum / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 21.11.2007, 19001 / **h)** CODICES (French).

*Keywords of the systematic thesaurus:*

- 5.1.1.3 Fundamental Rights – General questions – Entitlement to rights – **Foreigners**.
- 5.2.2.2 Fundamental Rights – Equality – Criteria of distinction – **Race**.
- 5.2.2.3 Fundamental Rights – Equality – Criteria of distinction – **Ethnic origin**.
- 5.3.9 Fundamental Rights – Civil and political rights – **Right of residence**.
- 5.3.32.1 Fundamental Rights – Civil and political rights – Right to private life – **Protection of personal data**.
- 5.3.33.1 Fundamental Rights – Civil and political rights – Right to family life – **Descent**.

*Keywords of the alphabetical index:*

DNA test / File.

*Headnotes:*

The use of DNA testing to ascertain the filiation of a child during a family reunion procedure is constitutional, provided that the general legal rules on filiation are observed.

Creation of a file based on differences in ethnic origin or race violates the constitutional principle of equality before the law without distinction based on racial or ethnic origin guaranteed by Article 1 of the Constitution.

*Summary:*

The Constitutional Council was asked to examine the Act on immigration control, integration and asylum and found, firstly, subject to certain qualifications, that the article of the Act relating to DNA testing was constitutional and, secondly, that the article of the Act on ethnic statistics was unconstitutional.

The Constitutional Council found, subject to certain exceptions, that the article of the Act on DNA testing was constitutional. This article describes the conditions under which and arrangements whereby minor children applying for a visa for longer than three months, or their legal representative, may, during a family reunion procedure, request that their identity be established through DNA profiling so as to provide evidence of their relationship by descent to their mother, where it has been impossible to provide such evidence through a civil status document.

The Constitutional Council noted that when this legislation was drafted, it had not been the intention to apply the French law on filiation to foreign nationals. No exception had been created to the private international law established by the Civil Code. Consequently, a foreign child's descent was governed by his or her foreign mother's personal law. The Council found that the Act referred to it had neither the purpose nor the effect of establishing special rules for foreign nationals on the establishment or proof of parentage. All the evidence allowed by the foreign mother's personal law could therefore be used. In particular, this article could not be applied to filiation through adoption, which would continue to be proved by producing a judgment. With these qualifications, ensuring that all methods of establishing filiation were equal, the law did not make any distinctions that were contrary to the principle of equality with regard to persons' situations.

By restricting the new tool of DNA testing to procedures to prove filiation through the mother, the legislator had rightly taken account of other constitutional principles such as the right to a normal family life, respect for the child's and the father's privacy and the preservation of law and order, which included the prevention of fraud. The balancing of these different principles was not manifestly undermined by the new procedure, which was subject to a request by the person concerned.

The other distinctions made by the law and its implementing regulations were also in conformity with the Constitution during the trial period, as they were based on the existence of shortcomings in foreign states' registration of civil status.

These provisions did not exempt the diplomatic or consular authorities from checking the validity and authenticity of each civil status document produced, the evidential value of which was still governed by Article 47 of the Civil Code. With the qualification that systematic use of DNA testing in those states in which the trial would be taking place was prohibited, the disputed provisions did not infringe the right to live a normal family life, as guaranteed by the Constitution.

The Constitutional Council found that the provision of the legislation before it on ethnic statistics was unconstitutional. This provision allowed studies to be conducted, subject to the authorisation of the independent administrative authority, the CNIL (National Commission for Information Technology and Liberty), to measure the diversity of persons' origins, discrimination and integration.

Firstly, although the process required for studies to be conducted to measure diversity of origins could cover objective data, it could not be based on ethnic origin or race without infringing the principle enshrined in Article 1 of the Constitution (equality before the law without distinction as to origin or race).

Secondly, and in any event, the amendment on which this provision was based was totally unconnected with the legislation before the court, which originally only contained rules relating to the entry of foreign nationals to France and their residence in the country. This alone meant that the provision in question had been adopted following a defective procedure, and it was declared unconstitutional.

*Cross-references:*

- Decision of the Constitutional Council no. 2004-490 DC, 12.02.2004, Institutional Act granting autonomous status to French Polynesia;
- Decision of the Constitutional Council no. 2003-474 DC, 17.07.2003, Programme Act on the overseas territories.

*Languages:*

French.



*Identification: FRA-2010-3-007*

**a)** France / **b)** Constitutional Council / **c)** / **d)** 20.12.2007 / **e)** 2007-560 DC / **f)** Treaty amending the Treaty on European Union and the Treaty establishing the European Community / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 29.12.2007, 21813 / **h)** CODICES (French).

*Keywords of the systematic thesaurus:*

1.3.4.11 Constitutional Justice – Jurisdiction – Types of litigation – **Litigation in respect of constitutional revision.**

1.3.4.14 Constitutional Justice – Jurisdiction – Types of litigation – **Distribution of powers between Community and member states.**

2.2.1.6.1 Sources – Hierarchy – Hierarchy as between national and non-national sources – Community law and domestic law – **Primary Community legislation and constitutions.**

3.1 General Principles – **Sovereignty.**

3.16 General Principles – **Proportionality.**

4.5.2.1 Institutions – Legislative bodies – Powers – **Competences with respect to international agreements.**

*Keywords of the alphabetical index:*

Simplified revision / Subsidiarity / Treaty of Lisbon / Powers, transfer.

*Headnotes:*

The Treaty of Lisbon, which was signed on 13 December 2007, radically alters the Treaty establishing the European Community and the Treaty on European Union. Whereas the provisions relating to the fundamental rights of the Union do not call for any constitutional amendments, the rules on the transfer of powers and the functioning of the European Union and the new powers granted to national parliaments may only be ratified at national level if the Constitution has been revised beforehand to make it compatible with the Treaty.

*Summary:*

The French Constitution confirms the existence of a European Community legal order incorporated into domestic law and distinct from international law. Having received from the President of the Republic a referral under Article 54 of the Constitution as to the constitutionality of the Treaty of Lisbon, the Constitutional Council reviewed only those provisions which it had not already found to be constitutional in

its decision on the Treaty establishing a Constitution for Europe. It found many of the Treaty provisions to be incompatible with the Constitution and concluded, as provided for by Article 54 of the Constitution, that authorisation to ratify the Treaty could only be given after the Constitution had been revised.

The first part of the Treaty of Lisbon related to fundamental rights. Firstly, the Treaty assigned legal force to the Charter of Fundamental Rights of the European Union, which the Constitutional Council had already examined in the context of Decision no. 2004-505 DC (19.11.2004, Treaty establishing a Constitution for Europe). The substance of the Charter's articles and its effects on the core conditions of sovereignty did not require the Constitution to be revised. Secondly, the Treaty provided for the accession of the European Union to the European Convention on Human Rights with effect from the date of approval of the Treaty by all the member states. In France, ratification was dependent on legislative authorisation through an Act of Approval, which could, if necessary, be referred to the Constitutional Council.

As to the provisions on the powers and functioning of the Union, some of these restated those of the Treaty establishing a Constitution for Europe. For the same reasons as it had given in its previous decision, the Council considered that these provisions called for a revision of the Constitution in order for them to be compatible with it.

Other provisions relating to the powers and functioning of the Union which did not exactly match those of the previous treaty also required a revision of the Constitution. Firstly, the Council found that the clauses which transferred powers affecting the core conditions for the exercise of national sovereignty to the European Union exceeded the limits on the transfer of powers set by Article 88.2 of the Constitution, and hence that a revision of the Constitution was required. More specifically, the Council considered that the transfer of powers relating to spheres not covered by the previous treaty, which were inherent in the exercise of national sovereignty and came under "ordinary legislative procedure", such as measures to combat terrorism, border controls, action against trafficking in human beings, and judicial co-operation on civil and criminal matters, called for constitutional amendments. Secondly, the Council considered that the provisions which replaced unanimous voting with qualified majority voting in the Council of Ministers (thus preventing opposition by a single state) and those which assigned the European Parliament new decision-making powers (depriving states of their power to act on their own initiative) were incompatible



with the Constitution. The same applied to the provision under which the Council of Ministers could, by unanimous decision and provided that it was not opposed by any national parliament, submit certain aspects of family law with cross-border impact to ordinary legislative procedure.

With regard to the new powers granted to national parliaments in the context of the European Union, the Council found, for the same reasons as it had given in Decision no. 2004-505, that the power of the French Parliament to oppose a simplified revision or ensure that the principles of subsidiarity and proportionality were respected required a revision of the Constitution. Additions would also have to be made to the Constitution to ensure effective exercise of national parliaments' new powers – which had not appeared in the Treaty establishing a Constitution for Europe, and which the Council had not therefore had the opportunity to rule on – particularly the possibility of objecting to the subjecting of family law matters to a qualified majority rather than a unanimous vote.

#### Cross-references:

- Decision of the Constitutional Council no. 92-308 DC, 09.04.1992, Treaty on European Union;
- Decision of the Constitutional Council no. 97-394 DC, 31.12.1997, Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related instruments;
- Decision of the Constitutional Council no. 2004-505 DC, 19.11.2004, Treaty establishing a Constitution for Europe.

#### Languages:

French.



#### Identification: FRA-2010-3-008

**a)** France / **b)** Constitutional Council / **c)** / **d)** 08.01.2009 / **e)** 2008-573 DC / **f)** Act on the commission provided for in Article 25 of the Constitution and election of the members of the National Assembly / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 14.01.2009, 724 / **h)** CODICES (French).

#### Keywords of the systematic thesaurus:

4.5.3 Institutions – Legislative bodies – **Composition**.  
 4.6.3.2 Institutions – Executive bodies – Application of laws – **Delegated rule-making powers**.  
 4.9.4 Institutions – Elections and instruments of direct democracy – **Constituencies**.

#### Keywords of the alphabetical index:

Boundary changes / Legislation, delegated.

#### Headnotes:

The use of delegated legislation (government orders) to change the boundaries of electoral constituencies is not unconstitutional in itself because this is not a process restricted to the legislature. However, the statutory authorisation must not allow the principle of equality of suffrage to be undermined. The boundaries of electoral constituencies must therefore be established on predominantly demographic lines.

#### Summary:

The aim of the Act referred to the Constitutional Council was to reorganise France's legislative election constituencies. Under Article 1 it arranged for the appointment of the commission provided for in Article 25 of the Constitution, which issues a public opinion on government or private members bills defining electoral constituencies or modifying the distribution of the seats of National Assembly or Senate members. Under Article 2 it authorised the government to change the boundaries of electoral constituencies by means of orders.

In the applicants' view, this Act undermined the principle of the independence of the commission provided for by Article 25 of the Constitution and the political pluralism enshrined in Article 4, as it made no provision for equitable participation by the political parties making up the parliament.

The Constitutional Council noted that the Act included several provisions to safeguard the independence of the commission (such as non-renewable terms of office and suspension of a member who had failed to perform his or her duties), the members of which were from the *Conseil d'État*, the Court of Cassation and the Court of Auditors, with the proviso that the latter could only be elected by those actually serving within their respective bodies. In the Council's view, this independence and the fact that membership of the commission could not be combined with elected office precluded any infringement of Article 4 of the Constitution.

The applicants objected to the authorisation to legislate in this manner because the independent commission had not been asked for its opinion on it, and it amounted to a relinquishment by the legislature of its powers in the field of electoral boundary changes, a subject reserved for it by "legal tradition". The Council pointed out that this law was not in itself the means by which constituencies were delimited; it relied instead on an order to carry out this process. As the law did not prohibit the draft order from being referred to the commission for an opinion, this provision did not violate Article 25 of the Constitution. Furthermore, the "legal tradition" referred to had no constitutional force, because it was not a fundamental principle enshrined in French legislation and there was no law which had reserved such matters for the legislature. The statutory authorisation was therefore compatible with the Constitution. However, the Council did address several reservations on interpretation to the government.

Electoral boundaries had to be established on predominantly demographic lines (Articles 1 and 3 of the Constitution). In the instant case, the statutory authorisation had stated that the government could make adjustments "based in particular on changes in the population of each constituency and the number of voters entered on the electoral registers" but with a minimum of 2 deputies per *département*. The Council criticised these provisions on the ground that they established demographic bases which varied according to constituencies and that this minimum was no longer warranted in view of the ratio between the maximum number of deputies which had now been set by the Constitution and the growth in the population. Likewise, although the government could establish constituencies on non-adjointing territories, not following municipal boundaries, or with populations up to 20% higher or lower than the average population of electoral constituencies, it could only do so within certain limits, through measures that were proportionate to the aim pursued and in accordance with the public interest. The Council also set out several reservations on interpretation which the government would be required to take into account when altering constituency boundaries. Firstly, there was no public interest requirement for all overseas communities to constitute at least one electoral constituency, and there could only be an exception to this, where the population of such a community was very low, if it was a particularly long way from another overseas *département* or community. Secondly, the number of National Assembly members representing French nationals living outside France would have to be set according to the total number of people recorded in consular registers. Lastly, the delimitation of the constituencies of members of the National Assembly

representing French nationals living outside France would have to take account, save in exceptional cases justified by geographical considerations, of the maximum difference of 20% between the population of each constituency and the average population allowed in overseas *départements* and communities.

The final article of the Act under examination by the Constitutional Council set out detailed provisions on the representation of French nationals living outside France. In response to the applicants' argument that the election of National Assembly members to represent such persons through a two-round single-member majority vote in view of their special situation was an infringement of the principle of equality of suffrage, the Council pointed out that each member of the National Assembly represented the French nation as a whole; consequently the voting system proposed did not infringe any constitutional requirements.

In a decision given on the same day (Decision no. 2008-572 DC, 8 January 2009, Institutional Act on the application of Article 25 of the Constitution), the Council ruled on the provisions of the Institutional Act on the composition of the commission provided for in Article 25 of the Constitution. It found the legislation to be partially compliant with the Constitution, whilst specifying that a seat in the National Assembly or the Senate should only remain vacant temporarily.

#### *Cross-references:*

- Decision no. 2008-572 DC, 08.01.2009, Institutional Act on the application of Article 25 of the Constitution;
- Decision no. 2010-602 DC, 18.02.2010, Act ratifying Order no. 2009-935 of 29.07.2009 on the distribution of seats and the delimitation of constituencies for the election of members of the National Assembly.

#### *Languages:*

French.



*Identification: FRA-2010-3-009*

**a)** France / **b)** Constitutional Council / **c)** / **d)** 23.07.2010 / **e)** 2010-18 QPC / **f)** M. Lahcène A. (war veteran's card) / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 24.07.2010, 13729 / **h)** CODICES (French).

*Keywords of the systematic thesaurus:*

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

5.3.10 Fundamental Rights – Civil and political rights – **Rights of domicile and establishment.**

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

*Keywords of the alphabetical index:*

Non-discrimination, principle / War veterans.

*Headnotes:*

The differential treatment set out in the Code of Military Invalidity Pensions and War Victims, which makes the granting of the war veteran's card to members of the French auxiliary forces during certain armed conflicts dependent on the beneficiary's nationality and/or place of residence, is contrary to the principle of equality before the law deriving from Article 6 of the Declaration of the rights of Man and the Citizen.

*Summary:*

The Constitutional Council declares the discrimination established by Article L. 253-1bis of the Code of Military Invalidity Pensions contrary to the equality principle. This provision stipulated that the war veteran's card could be issued to "members of the French auxiliary forces" (the armed forces made up of combatants from Algeria, Morocco and Tunisia) who, on the date of application for the card, held French nationality or else were resident in France. The granting of this card entitles the veteran in question to a pension, the Combatant's Cross and certain benefits granted by the National Office of War Veterans and War Victims.

The appellant, an Algerian national resident in Algeria at the time of his application for the war veteran's card, was refused the latter, whereas he would have been eligible, in accordance with the Code, if he had held French nationality or been resident in France. The appellant challenges this provision on the basis of the equality principle enshrined in Articles 1 and 6 of the Declaration of the Rights of Man and the

Citizen of 1789 and the principle of non-discrimination deriving from Article 1 of the 1958 Constitution and the Preamble to the 1946 Constitution. The Government observe that these conditions highlight the moral link between the combatants and the Nation and demonstrate their attachment to the Nation.

The Council considers that in the light of the purpose of the Law (the "gratitude of the Nation"), and in order to grant the card, the legislature should not have established differential treatment of the members of the auxiliary forces in accordance with their nationality or place of residence. In condemning this provision, the Council is clarifying the case-law initiated in Decision no. 2010-1 QPC of 28 May 2010 in which it condemned a legislative provision establishing differential treatment on the basis of the nationality of beneficiaries of civilian or military retirement pensions, declaring invalid a provision based on nationality and residence.

*Cross-references:*

- Decision of the Constitutional Council no. 2010-1 QPC, 28.05.2010, *Consort L.*

*Languages:*

French.



# Georgia

## Constitutional Court

---

### Important decisions

*Identification:* GEO-2010-3-001

**a)** Georgia / **b)** Constitutional Court / **c)** First Panel / **d)** 27.08.2009 / **e)** 1/2/434 / **f)** Public Defender of Georgia v. Parliament of Georgia / **g)** *Sakartvelos Respublika* (Official Gazette) / **h)** CODICES (Georgian, English).

*Keywords of the systematic thesaurus:*

3.5 General Principles – **Social State**.

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

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

*Keywords of the alphabetical index:*

Appeal, right / Right, limitation / Legitimate aim.

*Headnotes:*

A general prohibition of the right to appeal is in contravention of the constitutionally-protected universal right of access to a court and there is no legitimate aim to justify it.

*Summary:*

I. At issue in these proceedings was Article 22.2 of the Law on Social Assistance, pursuant to which “the assessment methodology of socio-economic conditions, as well as the level and the amount of social assistance set by the Government, is not subject to appeal.” The complainant expressed concern that this norm precludes appeal, both in the general and constitutional courts, and that it contravenes Article 42 of the Constitution, under which everybody is entitled to apply to a court for the protection of his or her rights.

The complainant observed that the social protection of citizens is an obligation of the state, not a manifestation of goodwill, and drew attention to the range of provisions of international conventions,

recognizing rights to social assistance and social security and the corresponding obligations of the state in this sphere. Any legal act concerning social protection, including acts that define the methodology for assessing socio-economic conditions and the level and amount of social assistance set by the Government falls within the category of acts regulating legal rights. It should therefore be subject to appeal to court for the protection of the rights to social assistance and social security. This implies the right to question in court the methodology that defines the beneficiary groups, based on the level of their personal income and other economic conditions, and the right to request a specific amount of social assistance on the basis of the rights to social security and assistance, which should be guaranteed by the Constitution and relevant international instruments.

Other human rights may be violated as a result, such as the right to private life, equal protection before the law and property. Provision is needed for court remedies to protect these rights.

The respondent argued that the impugned provision does not prevent the exercise of the right of access to court, but that it should be viewed as a restriction, as complainants can apply to the Constitutional Court. Article 42 of the Constitution does not protect an individual's right to refer to both judicial institutions. The requirement for this right is satisfied if the state creates an effective mechanism for the protection of a right in at least one of the judicial institutions. The respondent also observed that the right to fair trial is an instrumental one; its exercise implies the existence of other rights which might need protection by court remedy. The domestic law (with the exception of the Constitution) does not protect the right to social assistance. Social assistance is simply a manifestation of goodwill by the state and cannot therefore become subject to appeal in the general court system. Moreover, the respondent indicated at the hearing that the existence of judicial litigation about social rights could violate the principle of separation of powers.

II. The Constitutional Court declared that Article 42 is an instrumental right, which ensures protection of rights and legal interests through the judiciary. This constitutional provision obliges the state to ensure access to court in the resolution of every issue that directly or indirectly affects the content and scope of a right, not only in cases of violation of Constitutional rights. It also emphasized that the right of access to court is not an absolute guarantee. Limitations can be imposed on the right, provided they are necessary in a democratic society for a legitimate purpose.

The Judges had divided views on the justiciability of the right to social assistance and social security, specifically whether the Constitution guarantees the right to request and receive the minimum amount of assistance and whether the courts are in a position to define what the minimum requirements should be to satisfy the status of beneficiary (such as income level and economic conditions). Judgment could not therefore be rendered on the issue.

The Court unanimously declared that the stipulation that “the assessment methodology of socio-economic conditions, and the level and amount of social assistance set by the Government, is not subject to appeal” could give rise to a breach of the right to equal protection before the law. The possibilities of differential treatment and disputes arising regarding discrimination or any of the constitutional rights cannot be eliminated. The competent court can only decide within the scope of an individual case whether differential treatment on the basis of the methodology complies with legal requirements.

The norm contains a general prohibition about appeals to the Court, and was interpreted by the Court in such a way that it prohibited appeal both to the general and to the constitutional courts. General and constitutional courts have different powers and aspects of protection of human rights. The right to appeal to the Constitutional Court cannot be an equivalent alternative to the right to appeal to the general courts; both are guaranteed by Article 42 of the Constitution.

The possibility could not be ruled out that the norm under dispute might run counter to the domestic legislation and to international acts as an inseparable part of the legal system. The Constitutional Court can only review the constitutionality of an issue; its lawfulness should be subject to scrutiny by the general courts. The legislator grants a wide discretion to the government for regulating the issues raised by the norm, but this is not a basis for the claim that the exercise of discretionary powers by government is not generally subject to judicial control.

In the view of the Constitutional Court, a general prohibition of the right to appeal is an interference with the right of access to court. Interference with this right cannot be justified by any legitimate aim mentioned by the respondent.

The norm is not, therefore, in conformity with Article 42.1 of the Constitution, as it precludes access to the Court in case of violation of the right of equal protection before the law or other fundamental rights.

### *Languages:*

Georgian, English.



### *Identification:* GEO-2010-3-002

**a)** Georgia / **b)** Constitutional Court / **c)** First Panel / **d)** 10.11.2009 / **e)** 1/3/421, 422 / **f)** Citizens of Georgia Giorgi Kipiani and Avtandil Ungiadze v. the Parliament of Georgia / **g)** *Sakartvelos Respublika* (Official Gazette) / **h)** CODICES (Georgian, English).

### *Keywords of the systematic thesaurus:*

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

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

### *Keywords of the alphabetical index:*

Appeal, right / Media, broadcasting, complaints.

### *Headnotes:*

Parents are free to raise their children in accordance with their moral views and to influence their moral and mental development. They are not, however, entitled to demand that broadcasters or other private persons transmit programmes which suit their view of morality. If a broadcaster transmits a programme which is morally unacceptable to a particular parent, this cannot be considered as a violation of that parent’s freedom. Therefore, the state is not obliged under the Constitution to ensure a right to access to the Court in this respect.

However, freedom of expression may be granted priority over other rights. The Court will weigh up in each case the violated right or the risk of its violation, as a result of a particular programme or advertisement, against the necessity of interference with the freedom of expression, having regard as it does so to the value of the form and content of expression, its importance to the public and the problems which may arise from the exercise of this right. If someone’s rights have been breached in this way, he or she should be able to seek redress from the Court or claim damages.

### Summary:

I. Articles 52, 54, 56 and 59 of the Law on Broadcasting impose various content-based requirements on broadcasters. Article 52 places them under an obligation to ensure the facts they cover are accurate, and gives concerned persons the right to ask for the inaccurate facts to be retracted or corrected in a proportionate and timely fashion and under certain conditions. Article 54 requires accurate and fair coverage of facts and a clear division between fact and opinion. The author of the opinion should be identified and the various differing opinions arising from the news should be covered properly and without discrimination. Similar restrictions in Article 56 prohibit the broadcast of programmes spreading war propaganda, instigating conflict or violence of any kind and those with a tendency to humiliate people or to discriminate against them on the basis of some characteristic or status. Article 56.4 prohibits the transmission of programmes or advertisements which present pornography or contain obscenity, and which impinge on human dignity or fundamental rights. Article 56.5 prohibits the transmission of programmes that are harmful to the mental, physical and moral development of children and adolescents at times when it is very likely they will watch them. Article 59 of the Law of Broadcasters stipulates the obligation to broadcast news and social-political programmes at "prime-time", so that audiences can be given up to date information on national and international current events.

Under Article 42.1 of the Constitution, everyone is entitled to apply to court for the protection of his or her rights and freedoms.

The complainants argued that the impugned norms of the Law on Broadcasting deprive citizens and legal persons of the right to apply to court for protection of their rights. The cancellation of the mechanism of appeal within the norms contravenes Article 42 of the Constitution and Article 6 ECHR.

According to the complainants, the purpose of applying to the Court is to demand compensation for moral and material damages and to prevent such cases from arising in future. The norms deprive the complainants of the possibility of applying to the Court for compensation for material and moral damages when the broadcaster has violated its obligations.

According to the respondent, the subjects established in the framework of effective mechanism of self-regulation for the adjudication of complaints constitute "courts" for the purpose of Article 42.1 of the Constitution. These organs satisfy all the criteria

mentioned above. The Code of Conduct under which the self-regulation mechanisms are to be structured is not yet enacted, but it will provide for a two-stage system for considering complaints, which would comply fully with the requirements of Article 42.1 of the Constitution. The complainants would then be able to apply to these organs with their complaint, which will eliminate the possibility of breaches of the right enshrined in Article 42.1.

II. The Constitutional Court stated that provisions adopted by the legislative power in terms of limitation of access to court remove particular justiciable issues from the competence of courts and jeopardise the protection of individual rights and freedoms and the ability of the judicial power to check and balance the political powers. Any such measure should, therefore, be subject to the heightened scrutiny of the Constitutional Court. However, in *Citizen Anatoly Kozlovski v. the Parliament*, the Constitutional Court stated that the exercise of the right of access to the Court "...presupposes the existence of a specific right, the protection of which triggers the entitlement to apply to the Court".

The Constitutional Court noted the lack of provision in Article 52 of the Law for the protection of the rights of dignity and reputation, or the obligation not to spread defamation. These concepts are protected in the Law on Freedom of Speech and Expression and relevant articles of the Civil Code. The prohibition in the impugned norms does not, therefore, prevent the complainant from enjoying the right of reply to court in respect of defamation or statements impinging on dignity.

Compensation for material and moral damages resulting from defamation and encroachment on the rights of dignity and reputation is provided by the relevant legislation. In this respect, the norms do not hinder a person from applying to court for compensation for damages.

The Constitutional Court did not accept the complainant's argument to the effect that access to the Court is necessary in order to protect the morals and psychological well-being of adolescents. Consideration of issues of morality in the courts would have a negative impact on the freedom of the broadcaster. It is difficult objectively to determine what complies or conflicts with morality. Exposure of these issues in court would have a constraining effect on the freedom of broadcasting and would be damaging to society as a whole. Parents are free to raise their children in accordance with their moral viewpoints and to influence their moral and mental development. They are not, however, entitled to demand that broadcasters or other private persons

transmit programmes which suit their view of morality. If a broadcaster transmits a programme which is morally unacceptable to a particular parent, this cannot be considered as a violation of that parent's freedom. Therefore, the state is not obliged under the Constitution to ensure right to access to court in this respect.

With regard to Article 56.4 of the Law on Broadcasting, the Constitutional Court noted that in this particular case, it was not possible to evaluate the likelihood of violation of a right or the causing of damages implied in this norm. However, as was clear from the impugned norms, the legislator considered the risk to be a real one and so the construction of the norm is not vague in this regard. Article 56.4, in conjunction with the other norms under dispute, indicates that if a broadcaster violates a fundamental human right, the person affected will have no right of access to court. It should be noted that the present case deals with deprivation, as opposed to limitation, of the right to fair trial.

In certain cases, freedom of opinion and expression may be granted priority over other rights. The lawfulness of such a procedure will be assessed by the Court on the basis of the principle of proportionality. The Court will weigh up in each case the violated right or the risk of its violation, as a result of a particular programme or advertisement, against the necessity of interference with the freedom of expression, having regard as it does so to the value of the form and content of expression, its importance to the public and the problems which may arise from the exercise of this right. If somebody whose rights have been breached in this way cannot seek redress from the Court, or claim recompense for damages resulting from this breach, this is in contravention of Article 42.1 of the Constitution.

In view of the above, the Constitutional Court declared unconstitutional the words of Article 14.2 of the Law on Broadcasting "save for the rules set forth in Articles 52, 54 and 56 ... of the present Law" in the part concerning the words in Article 56.4 "transmission of a programme or advertisement which ... contain obscenity, that infringe on the dignity or fundamental right of a human and citizen", the words of Article 591.1 and 591.2 of the Law on Broadcasting "the rules set forth in Articles 52, 54, 56... of the present Law" in the part concerning the words in Article 56.4 "transmission of a programme or advertisement which ... contain obscenity, that infringe on the dignity or fundamental right of a human and citizen" in respect with Article 42.1.

It found the remainder of the impugned norms to be constitutionally compliant (wording of Article 14.2 of the Law on Broadcasting "save for the rules set forth in Articles 52, 54 and 56... of the present Law" in the part concerning Articles 52.1, 54.1 and 56.5, the words of Article 591.1 and 591.2 of the Law on Broadcasting "the rules set forth in Articles 52, 54, 56... of the present Law" in the part concerning Articles 52.1, 54.1 and 56.5, Article 17.4 of the Law on Protection of Minors from Harmful Influences in respect of Article 42.1 of the Constitution).

#### *Languages:*

Georgian, English.



#### *Identification: GEO-2010-3-003*

**a)** Georgia / **b)** Constitutional Court / **c)** Second Panel / **d)** 07.12.2009 / **e)** 2/3/423 / **f)** Citizens of Georgia Giorgi Kipiani and Avtandil Ungiadze v. the Parliament of Georgia / **g)** *Sakartvelos Respublika* (Official Gazette) / **h)** CODICES (Georgian, English).

#### *Keywords of the systematic thesaurus:*

5.3.13.2 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Effective remedy.**  
5.3.17 Fundamental Rights – Civil and political rights – **Right to compensation for damage caused by the State.**

#### *Keywords of the alphabetical index:*

Detainee, rights.

#### *Headnotes:*

Persons that were unlawfully or unfairly detained are entitled to receive full compensation for physical damage they have suffered where the damage was caused by the state, local government authorities or officials.

*Summary:*

I. The second part of Article 165 of the Criminal Procedure Code allows for the right to receive compensation for damage incurred as a result of unlawful or unfair detention, but only where the damage was caused by the breaking of rules covering the holding of persons in detention facilities. Compensation could not be sought for damage inflicted in other circumstances.

Under Article 18.7 of the Constitution, a person who is unlawfully arrested or detained is entitled to receive compensation, and under Article 42.9, anyone who has unlawfully sustained damage by state or local government authorities and officials is entitled to full compensation from state funds through court proceedings.

The complainants argued that the impugned norm ran counter to the Constitution, as it allowed for the possibility that full compensation would not be made for physical damage inflicted on a person during unlawful or unjustified detention; physical damage would only be compensated if it was caused by a breach of the rules governing the holding of a person in prison facilities. As a result, the norm was not in conformity with the Constitution, which stipulates that if a person suffers damage inflicted by public officials, they will receive full compensation.

The complainant argued that damage inflicted on the health of a person in prison, even if the relevant rules are not broken, may give rise to circumstances that are directly connected with being held in a detention facility. An unlawfully detained person might, for instance, come down with cardiovascular, neural or respiratory tract diseases or experience a worsening of their condition as a result of being held in an enclosed space. Compensation cannot be claimed for physical damage incurred under such circumstances.

The respondent pointed out that, under Article 18.7 of the Constitution, a physical person is only entitled to compensation in specific instances, if other norms of the article under scrutiny have been violated and he or she has been unlawfully detained or arrested. The stage of holding a person in detention, to which the disputed norm applies, does not fall within the scope of this constitutional norm.

In the respondent's opinion, the second part of Article 165 of the Criminal Procedure Code does not work either positively or negatively for a person at the stage of his or her arrest or detention. The allegation that the disputed norm deprived a person of the right to compensation, when he or she has been unlawfully or unfairly detained, is groundless.

Compensation for damage caused by the State against a person is only established under the Constitution in cases where the State commits an unlawful act against him or her. Article 165 of the Criminal Procedure Code would suggest that a person will receive compensation if the norms determining the regime for holding a detained person are disregarded. The disputed norm is in line with the Constitution and there are no grounds to recognise it as unconstitutional.

II. According to the Constitutional Court, the precondition for the right to compensation, as provided by Articles 2.9 and 18.7 of the Constitution, is not only the fact of an unlawful act on the part of state bodies and officials, but also, at the same time, the circumstance that as a result of such an unlawful act (which can include detention), a person sustained material or non-material damage. If a causal connection is established between an unlawful act by state bodies and officials and damage inflicted on a person, the damage should be fully compensated.

The disputed norm, by unconstitutionally narrowing the circle of subjects of the basic right, deprives persons outside this circle not only of the right to compensation, but also of legal remedies for this right. It also violates the requirements of Articles 18 and 42 of the Constitution from this perspective.

There is no basis in the Constitution for the establishment of exceptional circumstances where there is no compensation for damage caused by state bodies or officials as a result of unlawful detention or any other unlawful acts. Under the disputed norm, physical damage is not compensated when there is a causal link between unlawful or unjustified detention and a person's illness but the rules governing the holding of persons in detention centres have not been broken.

It was held that the second part of Article 165 of the Criminal Procedure Code did not comply with standards established by Articles 18.7 and 42.9 of the Constitution.

*Languages:*

Georgian, English.





# Germany

## Federal Constitutional Court

---

### Important decisions

*Identification:* GER-2010-3-013

**a)** Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 20.07.2010 / **e)** 1 BvR 748/06 / **f)** / **g)** / **h)** CODICES (German).

*Keywords of the systematic thesaurus:*

5.4.21 Fundamental Rights – Economic, social and cultural rights – **Scientific freedom.**

*Keywords of the alphabetical index:*

Universities, organisation / Universities, constitution / Universities, management bodies / University bodies, relation *inter se*.

*Headnotes:*

Safeguarding the freedom of science, research and teaching by means of organisational provisions requires that the holders of this freedom can, through their representatives in university bodies, avert dangers to the freedom of science, research and teaching and contribute their professional competence to the university in the interest of the realisation of these freedoms. The legislator must therefore guarantee to the holders of fundamental rights a sufficient level of participation.

The entire structure of the university constitution can be unconstitutional in particular if the management body is assigned substantial competences to decide on human and physical resources in science-related areas, but if in comparison, hardly any competences and no significant rights of participation and supervision remain with the body in which university lecturers are represented.

*Summary:*

I. The applicant is a university professor at the Faculty of Law of Hamburg University. His constitutional complaint is directed against §§ 90 and 91 of the Hamburg Higher Education Act (*Hamburgisches*

*Hochschulgesetz*, hereinafter, the “Act”), which govern the relation *inter se* of the university bodies at faculty level. § 90 provides for the legal position and the duties of the dean’s office; § 91 defines the position and the duties of the faculty council. Both provisions have been amended several times in the past, each time to the detriment of the faculty council.

The applicant argues that those provisions violate his academic freedom because they deny him collegial and representative rights of participation in decision-making. He further argues that § 90 of the Act concentrates almost all fundamental competences that are relevant to research and teaching on the dean’s office. In contrast, the faculty council is said not to have sufficient decision-making rights, rights of supervision and rights to impose sanctions.

II. The Federal Constitutional Court has decided that sentence 3 of § 90.1, sentences 2 and 3 of § 90.4 and 90.5 no. 1 and no. 2 first alternative and no. 7, as well as § 91.2 of the Act are incompatible with sentence 1 of Article 5.3 of the Basic Law. The combined effect of these provisions on the appointment and the competences of the dean’s office do not meet the requirements of the freedom of science, research and teaching.

The freedom of science, research and teaching, which is provided for in sentence 1 of Article 5.3 of the Basic Law, requires regulating university organisation, and thus the decision-making process on matters of university organisation, in such a way that research and teaching can be pursued in a free and undisturbed manner at a university. The participation of the academics, as holders of fundamental rights, in the organisation of the academic work serves to protect them from decisions that are inadequate with regard to academic standards. That participation is therefore guaranteed by fundamental rights to the extent that the freedom of research and teaching can be endangered by decisions which relate to university organisation. Safeguarding the freedom of science, research and teaching by means of organisational provisions therefore requires that the holders of the freedom can, through their representatives in university bodies, resist dangers to the freedom of science, research and teaching and bring their professional competence to the university in the interests of the realisation of those freedoms. The legislator must guarantee to the holders of fundamental rights a sufficient level of participation. As for resolving the issue of whether provisions create structures which may have an endangering effect, the specific competences which are assigned are not decisive but the entire structure of the university constitution is. The structure can be unconstitutional, in particular, if

the management body is assigned substantial competences to decide on human and physical resources in science-related areas, and if in comparison, hardly any competences and no significant rights of participation and supervision remain with the body in which university lecturers are represented. The challenged provisions do not fully comply with these constitutional standards.

The competences of the dean's office by which it largely executes legal requirements and resolutions passed by collegial bodies are constitutionally unobjectionable.

It is, for instance, unobjectionable that according to § 90.5 no. 3 of the Act, the dean's office submits to the university Board proposals for the performance-based allocation of variable pay to professors, for the proposals have no binding effect. Moreover, this competence is restricted by a differentiated provision with regard to the criteria for awarding the variable pay, its amount and the framework for awarding it.

Furthermore, the competence of the dean's office to decide about teaching duties, which is provided for in § 90.5 no. 4 of the Act, also does not meet with objections under constitutional law because it is complemented by other provisions of the Act in such a way that the pursuit of science is secured.

The decisions made by the dean's office must observe the provisions which are constituent for the university lecturer's administrative status. Apart from this, it is safeguarded that the competence under § 90.5, no. 4 of the Act serves above all to organise teaching activities and to coordinate the courses offered and may not be used to impair the freedom of research or teaching.

Finally, if it is interpreted in conformity with the Constitution, the competence of the dean's office to decide on the appointment proposals submitted by the appointment committee, which is provided for in § 90.5 no. 2 second alternative of the Act, does not violate the freedom of science, research and teaching. It is in the hands of the faculty council itself, in which the group of the university lecturers has the absolute majority of seats and votes, to provide in the faculty statutes, which the faculty council adopts, that the appointment committees preparing the appointment proposals are installed by the faculty council and not by the dean's office. The dean's office decides on the appointment proposals without being formally bound by the appointment proposal submitted by the appointment committee. Under an interpretation in conformity with the Constitution, it will, however, only in special exceptional cases be allowed to depart from the proposal of the

appointment committee. Moreover, the university Board has to take not only the proposal made by the dean's office, but also the vote of the appointment committee, into consideration.

In contrast, the competences of the dean's office to manage the budget resources assigned to the faculty by the Board and to decide upon the allocation of posts within the faculty (§ 90.5 no. 1 of the Act) and to examine, when the post of a professor or junior professor is vacant or becomes vacant, its future use on the basis of the university's structure and development plan (§ 90.5 no. 2 first alternative of the Act), are, in connection with the subsidiary fall-back competence of the dean's office under § 90.5 no. 7 of the Act, not compatible with the freedom of science, research and teaching.

In these areas, the dean's office is assigned extensive steering competences. These competences are not sufficiently compensated by rights of participation, influence, information and supervision of the faculty council as the collegial body of representation of the holders of fundamental rights.

The faculty council, for instance, lacks a right to participate in the structure and development planning, which is the basis for the examination of the use of posts. It is not provided by statute that the structure and development plan of the university is developed from within the faculties. Instead, the plan is adopted by the university council, in which the influence of the university lecturers is strongly restricted. The individual faculty has no legal possibility to influence the elaboration of the structure and development plan.

The faculty council's possibility to supervise is merely restricted to the "supervision of the dean's office", which is not specified in further detail, and to the right to "give an opinion on all matters regarding the faculty". It does not even have a right to be informed by the dean's office, which would make it possible to exercise the right of supervision in a meaningful and effective manner.

The imbalance in the relation between the management body and the collegial body is also not compensated by the possibility of effectively influencing the composition of the dean's office. According to sentence 3 of § 90.1 of the Act, the faculty council has only a restricted right to participate in the election of the dean. The faculty council merely has to confirm the dean, who has been selected by the Board. This ensures that no one may be appointed dean against the will of the faculty council. The provision, however, meets with reservations if the faculty council's right to vote is a necessary

instrument of supervision for this collegial body because in other respects, it has been deprived of almost all essential competences in favour of the management body.

The unconstitutionality of the overall structure of the university organisation established by §§ 90 and 91 of the Act results in any event from the faculty council's insufficient rights with regard to voting the dean out of office. The faculty council merely has the right to propose, with a majority of three quarters of its members, to the Board to vote the dean out of office (sentence 3 of § 90.4 of the Act). The faculty council is not itself competent to decide upon voting the dean out of office (sentence 2 of § 90.4 of the Act). The Board is not bound by the faculty council's proposal so that it is not possible for the faculty council to part with a dean in a self-determined manner. This is especially serious in the overall structure of the university organisation because the faculty council also has no other rights to exert an influence, rights of supervision and of veto and rights to be informed. The lack of a competence to vote a dean out of office makes a supervision of the dean's office by the faculty council de facto impossible.

#### *Languages:*

German, press release in English on the website of the Federal Constitutional Court.



#### *Identification:* GER-2010-3-014

**a)** Germany / **b)** Federal Constitutional Court / **c)** Second Chamber of the First Panel / **d)** 30.08.2010 / **e)** 1 BvR 1631/08 / **f)** / **g)** / **h)** *Gewerblicher Rechtsschutz und Urheberrecht* 2010, 999-1002; *Europäische Grundrechte-Zeitschrift* 2010, 641-648; *MultiMedia und Recht* 2010, 767-769; *Recht der internationalen Wirtschaft* 2010, 792-796; *Kommunikation und Recht* 2010, 728-732; *Zeitschrift für Urheber- und Medienrecht* 2010, 874-881; *Computer und Recht* 2010, 701-704; CODICES (German).

#### *Keywords of the systematic thesaurus:*

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

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

5.4.12 Fundamental Rights – Economic, social and cultural rights – **Right to intellectual property.**

#### *Keywords of the alphabetical index:*

Copyright / Reprographic levy / Court of Justice of the European Union, duty to refer a matter / Lawful judge, right.

#### *Headnotes:*

If a court of last instance is obliged to refer a matter to the Court of Justice of the European Union according to Article 267.3 of the Treaty on the Functioning of the European Union (TFEU) and fails to do so, this is a violation of the right to a lawful judge if the interpretation and application of the duty to refer have been handled in a manner which, on reasonable construction of the concepts determining the Basic Law, no longer appears comprehensible or is obviously untenable.

The opinion that printers and plotters are not among the devices subject to remuneration must be reviewed against the standard of the fundamental right to property and possibly after referral to the Court of Justice of the European Union, against the standard of Directive 2001/29/EC.

#### *Summary:*

I. In German copyright law, reproductions of a copyrighted work made for one's own use are permissible within certain limits. In consideration of the fact that the manufacturers and importers of reprographic devices create the possibility for the user to appropriate third-party copyrighted material by reproduction, they must pay what is known as a reprographic levy to the copyright holders. The previous version of § 54a.1 of the Copyright Act (*Urheberrechtsgesetz*), in force until 31 December 2007 (hereinafter, the "Act"), provided for such a payment of the manufacturers and importers if it was to be expected from the nature of the work that it would be reproduced by photocopying or in a procedure with a comparable effect.

The applicant, which was the plaintiff in the original proceedings, protects the copyright of authors of written works as a copyright collecting society. The

defendant in the original proceedings imports and sells office products including printers and plotters. The parties disputed as to whether printers and plotters are among the reprographic devices subject to an obligation of payment under § 54a.1 of the Act. The applicant filed a claim against the defendant for information on matters including the type and number of the printers and plotters sold by the defendant and on the specifications of these devices. It also applied for a declaration that the defendant had an obligation of payment based on a specific rate. While the Regional Court (*Landgericht*) and the Higher Regional Court (*Oberlandesgericht*) granted the plaintiff's claim in essence, the Federal Court of Justice (*Bundesgerichtshof*) rejected its claim. As grounds, it stated in particular that under the law applicable at the time only the reproduction of print works (analogue originals) was subject to the obligation of payment, but the reproduction of digital originals was not. Therefore, according to the Court, printers and plotters were not subject to the levy, even when used in combination with other devices (such as PCs and scanners).

The applicant submits that this decision violates the right of exploitation guaranteed to the authors of digital originals as property in Article 14.1 of the Basic Law (*Grundgesetz* – GG). In addition, it submits that there is a violation of the right to a lawful judge, because the Federal Court of Justice should first have submitted the question as to whether its interpretation of national copyright law contravened the mandatory requirements of Article 5.2.a of the Copyright Directive 2001/29/EC to the Court of Justice of the European Union. Under this provision, Member States may pass legislation restricting the rights of reproduction of the authors of a work, for example with reference to copies by means of “any kind of photographic technique” or “some other process having similar effects”, but subject to the condition that the rightholder receives “fair compensation”.

II. The Second Chamber of the First Panel of the Federal Constitutional Court reversed the judgment and referred the matter back to the Federal Court of Justice.

1. The judgment challenged by the complaint fails to consider the obligation to refer the matter to the Court of Justice of the European Union (hereinafter, “ECJ”) under Article 267.3 of the Treaty on the Functioning of the European Union (hereinafter, “TFEU”) and therefore violates the guarantee of a lawful judge under sentence 2 of Article 101.1 of the Basic Law.

Under the case-law of the ECJ, a national court of last instance must comply with its obligation to refer a

question of European Union law to the ECJ if it arises in proceedings pending at the national court. This only does not apply if the court has found that the question raised is irrelevant to the issue or that the provision in question has already been interpreted by the ECJ or that the correct application of European Union law is so obvious as to leave no scope for any reasonable doubt. However, the Federal Constitutional Court reviews only whether the interpretation and application of Article 267.3 TFEU by the national (non-constitutional) court is obviously untenable. In this regard, the decisive factor is not primarily whether the non-constitutional court's interpretation of the substantive European Union law relevant to the case in question is justifiable, but whether its handling of the obligation to refer under Article 267.3 TFEU is justifiable.

The decision challenged violates the guarantee of a lawful judge. There is no indication that the Federal Court of Justice considered European law and a reference to the ECJ at all, even though there are strong arguments in favour of an obligation to refer. At the very least, considering the Copyright Directive, defensible opinions different from that held by the Federal Court of Justice certainly do not appear impossible. It is doubtful whether the authors of digital originals may be excluded from the enjoyment of a reprographic levy system under European Union law, for the Copyright Directive does not expressly distinguish between analogue and digital originals. The wording of Article 5.2 of the Directive and the recitals do not exclude the possibility that the Directive is aimed solely at the result of the process of reproduction and not at the nature of the original. For the interpretation of the Copyright Directive provision in question, there is neither confirmed case-law of the ECJ, nor is the correct application of European Union law obvious. On the contrary, the legal question is highly disputed, which corresponds to the equally contentious interpretation of the similarly worded German law. In addition, the Member States have differing provisions as to whether devices or media are to bear any charges, and if so which devices or media, and what “fair compensation” the rightholders are to receive; with regard to the Spanish legislation, a reference for a preliminary ruling is already pending at the ECJ.

2. The Federal Court of Justice will also have to review whether the fundamental right to property under Article 14.1 of the Basic Law does not in itself call for an interpretation of § 54a of the Act by which the applicant's claim is to be granted. In this case, a reference to the ECJ might be unnecessary, because answering the question of European law would not be relevant to the decision.

The constitutive elements of copyright as property within the meaning of the Constitution include the fundamental attribution of the economic results of creative activity to the author by way of the provisions of private law, as well as the author's freedom to dispose of these results on his or her own responsibility.

The argument of the Federal Court of Justice that the authors of digital originals should receive no remuneration whatsoever fails to consider less drastic means, which in this case may consist in a limitation of the amount of remuneration. In addition, the interpretation and application of copyright law must, even in the light of the large number of technological innovations in this area, guarantee the intellectual property rights of authors. In view of the rapid proliferation of digital data storage and data reproduction, a restrictive interpretation of § 54a of the Act might result in a complete gap in the protection of certain authors. Finally, objections to the judgment of the Federal Court of Justice need to be considered with regard to its assumption that in the case of digital originals – unlike print originals – the rightholder has often consented to reproduction, and that a person who makes texts and images freely accessible on the internet must at least expect that they will be downloaded and printed out. This assumption leaves the question unanswered as to why, on the one hand, authors receive no remuneration in cases of lack of consent, and why, on the other hand, the imputed consent to reproduction should at the same time imply a waiver of any remuneration whatsoever.

#### *Languages:*

German, press release in English on the website of the Federal Constitutional Court.



#### *Identification:* GER-2010-3-015

**a)** Germany / **b)** Federal Constitutional Court / **c)** First Chamber of the First Panel / **d)** 08.09.2010 / **e)** 1 BvR 1890/08 / **f)** / **g)** / **h)** *Wettbewerb in Recht und Praxis* 2010, 1384-1388; *Europäische Grundrechte-Zeitschrift* 2010, 649-652, *Neue Juristische Wochenschrift* 2010, 3501-3502; CODICES (German).

#### *Keywords of the systematic thesaurus:*

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.**

#### *Keywords of the alphabetical index:*

GM milk / Statement, damaging to business / Claim, factual, ambiguous / Term, meaningless, specific meaning resulting from context / Balancing of legally protected interests.

#### *Headnotes:*

The term “GM milk” is recognisably a slogan-type statement requiring elaboration, and there can be no objection in constitutional terms to its use in the public debate for the vacuous summary assessment of the business practices of a dairy group whose companies do not abstain from using genetic engineering methods across the entire production process.

#### *Summary:*

I. The constitutional complaint refers to the dismissal of a civil action for an injunction to desist from making statements which are damaging to a company's business.

The applicant is the parent company of a corporation of international enterprises producing milk and dairy products. Their products use milk from cows which have also been fed with genetically modified animal feed. The defendant in the original proceedings is an association. It has set itself the goal of, among other things, informing consumers about the risks which are, in its opinion, associated with the use of genetically modified organisms in food production. For that reason the association called on the applicant to require its milk suppliers to refrain from using genetically modified animal feed. The applicant did not comply with this request. In various public campaigns the defendant thereupon described the milk sold by the claimant as “GM milk” in order to draw attention to its concerns.

The applicant believes that the term “GM milk” when used in reference to its products constitutes an incorrect factual claim that the milk processed by its companies was itself genetically modified.

It applied to the civil courts for an injunction against the defendant. The Federal Court of Justice (*Bundesgerichtshof*) rejected the application for an

injunction. That court held that the defendant's use of the term "GM milk" was protected under the fundamental right to freedom of expression. Precedence had to be given to that fundamental right in the required weighing of interests over the applicant's interests, which were likewise protected under the Basic Law. The term "GM milk" itself was meaningless. Its meaning only resulted from the context in which it was used. Consequently, the term objected to did not contain an incorrect factual claim, since the defendant had in all its campaigns unequivocally made it clear that its protest was directed against the use of genetically modified animal feed. From that, it could not be concluded that it was alleging that the milk the applicant's companies were using was itself genetically modified.

In its constitutional complaint against the decision of the Federal Court of Justice the applicant complains of the violation of its occupational freedom as well as the unconstitutional interference with its general personality rights and its right to the established and exercised commercial enterprise.

II. The Federal Constitutional Court did not accept the constitutional complaint for adjudication as the conditions for acceptance are not met and, in particular, it has no prospect of success.

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

The contested judgment of the Federal Court of Justice does not raise any constitutional objections. In particular, the Federal Court of Justice was correct to regard the term "GM milk" in reference to the applicant's products as vacuous and to judge its use in the specific context as permissible. It may be necessary to grant an injunction in cases where the factual claim in question is ambiguous and one of the possible, not unobvious interpretations violates the general personality rights of the legal person affected. However, there must first be a careful assessment of whether such ambiguity actually exists. By contrast, the injunction cannot be granted in the case of slogan-type statements which appear ambiguous to the addressee from the outset as well, so that they are not understood as independent claims regarding a specific matter but rather as a kind of shorthand which only derives its specific meaning from the wider context. In such cases no concrete factual claim is being made which could lead the addressee of the statement to any misconception on account of untrue factual statements. The fact that the Federal Court of Justice evaluated the term "GM milk" at issue here in this manner as a recognisably slogan-type statement requiring elaboration and which only derives its specific meaning in the context of an overall

campaign does not exceed the non-constitutional court's scope of assessment.

Against this background, the Federal Court of Justice was correct to give precedence to the defendant's interest in making a statement, which is protected by the freedom of expression, over the applicant's opposing interest in the defendant's desisting from making that statement. It is irrelevant whether, as well as the fundamental right to occupational freedom, other legal positions asserted by the applicant are also protected under fundamental rights, since the result of the Federal Court of Justice's weighing of interests is at any rate constitutionally justified. The Federal Court of Justice was correct to be decisively guided in its weighing of the legally protected interests on both sides by the fact that the applicant's enterprises do not abstain from using genetic engineering methods across the entire production process and that thus the criticism of its business practices is not totally without basis in fact. In addition, according to the uncontested findings of the non-constitutional courts, the reference merely to the use of genetically modified animal feed in all cases in which the defendant used the term "GM milk" was clear from the context in which the statement was made.

#### *Languages:*

German.



#### *Identification:* GER-2010-3-016

**a)** Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 12.10.2010 / **e)** 2 BvF 1/07 / **f)** / **g)** to be published in the Official Digest / **h)** CODICES (German).

#### *Keywords of the systematic thesaurus:*

4.6.3.2 Institutions – Executive bodies – Application of laws – **Delegated rule-making powers.**

#### *Keywords of the alphabetical index:*

Livestock husbandry / Laying hens / Animal welfare, state policy, aim / Ordinance, procedure, hearing requirements.

### Headnotes:

The duty, set out in sentence 2 of § 16b.1 of the Animal Welfare Act (*Tierschutzgesetz*), to hear the Animal Welfare Commission (*Tierschutzkommission*) before issuing ordinances and general administrative regulations helps comply with the constitutional mandate arising from Article 20a of the Basic Law. An ordinance which has been issued in violation of sentence 2 of § 16b.1 of the Animal Welfare Act at the same time violates Article 20a of the Basic Law.

### Summary:

I. In a decision of the year 1999, the Federal Constitutional Court declared the Hen Keeping Ordinance (*Hennenhaltungsverordnung*) of 10 December 1987 null and void. It regarded the area requirements for conventional cage keeping provided for in this Ordinance as incompatible with the requirements of the Animal Welfare Act. In addition, it found that the citation requirement of sentence 3 of Article 80.1 of the Basic Law ["Statutory instruments shall contain a reference to their legal basis."] was violated.

In order to close the gap in the legislation created by the judgment of the Federal Constitutional Court and to implement an EU Directive (Directive 1999/74/EC) which was issued shortly after the judgment, provisions on the keeping of laying hens were added to the Animal Welfare Livestock Husbandry Ordinance (*Tierschutz-Nutztierhaltungsverordnung*, hereinafter, the "Ordinance") in 2002. This addition abolished the conventional keeping of hens in cages. What are known as "enriched cages" in Directive 1999/74/EC (larger cages which also had to have particular furnishings – perches, nest, scratching area) – were also not permitted. The only forms of keeping that were still provided for were barn housing and aviaries.

As a result of a drafting recommendation by the *Bundesrat*, the requirements for keeping laying hens and the associated transitional periods were again amended by the Second Ordinance to Amend the Ordinance, enacted in August 2006. Keeping in cages was reintroduced, no longer in the form of conventional cages, but in the form of the small colony system. Its requirements are higher than the minimum requirements of Directive 1999/74/EC. The transitional provisions were more generous.

It was originally intended that the Ordinance should only be amended by the introduction of provisions on pig keeping. However, in April 2006 the *Bundesrat* approved this amendment only subject to the proviso

that the above provisions on the keeping of laying hens were inserted. The text of the intended new provision as amended by the *Bundesrat's* drafting recommendation of April 2006 was notified promptly to the European Commission in April 2006. At the beginning of May 2006, the Cabinet took note of the *Bundesrat's* drafting recommendation with approval. Thereupon, the Animal Welfare Commission was involved.

The application for judicial review, which was made by the government of the federal Land (state of) Rhineland-Palatinate, is directed against the provisions on the keeping of laying hens. It challenges the procedure by which the provisions came into existence and asserts that the poultry rearing conditions provided for are contrary to animal welfare.

II. The Federal Constitutional Court held that the provision on the keeping of laying hens in small colonies is incompatible with the Basic Law. It also held that the relevant transitional provisions were incompatible with the Basic Law. There must be a reform of these provisions by 31 March 2012.

The provisions submitted for review are not within the terms of the enabling statute for ordinances required by Article 80.1 of the Basic Law. This is because the Animal Welfare Commission was not heard in the manner required under the Animal Welfare Act. If the statute requires a hearing before legislation is passed, it intends the result of the hearing to be included for informational purposes in the legislator's decision on the weighing of interests. The hearing is not properly carried out if it is only carried out *pro forma*, without the legislator having the possibility or readiness to take account of the decision in the weighing of interests. In the present case, the hearing was not carried out in such a way that its information could enter the consultations.

Even before the Animal Welfare Commission hearing, the Cabinet had taken note with approval of the *Bundesrat's* drafting recommendation of April 2006. The notification to the European Commission had also taken place before the Animal Welfare Commission hearing. In an Order of January 2005, the Federal Government made a statement on the essential elements of notification. According to this, it is customary to notify draft ordinances only after the necessary hearings, and only following this to involve the Cabinet. However, in no case is it provided that the notification or the Cabinet involvement should take place before the intended hearings. If, in contrast, in the present case the Animal Welfare Commission was not involved until after the draft ordinance had both passed the Cabinet stage and been notified to the European Commission, this

suggests that the contents of the ordinance were already decided at the time when the Animal Welfare Commission dealt with it.

This is supported and confirmed by the particular situation that the *Bundesrat's* drafting recommendation had created. In the year 2005, the European Court of Justice found against the Federal Republic of Germany for failure to implement directives on pig keeping, and in consequence the ordinance procedure also came under pressure of time with regard to adjustment. Under this pressure, the competent ministry was unable to escape the *Bundesrat's* suggestion. As a result, the procedure was shaped under the impression that there was a *de facto* compulsion to pass the ordinance with the contents desired by the *Bundesrat*: this is shown not only by the deviation from the sequence of hearing, notification and Cabinet involvement provided for in the Order of January 2005, but also by the fact that in this case the notification was made following the *Bundesrat* procedure, contrary to the recommendation of this Order that delegated legislation requiring approval should only be forwarded to the *Bundesrat* after the notification standstill period. A *Bundesrat* drafting recommendation does not invalidate a statutory requirement for a hearing on the passing of delegated legislation. On the contrary: if the drafting recommendation provides for substantial amendments, the Ordinance may only be issued with the intended amendments after a new hearing. Nor can the pressure of time in which the authority issuing delegated legislation found itself with regard to the necessary adjustment of the Ordinance to requirements of Community law justify such a deviation from the procedural requirements. It is a matter for the competent legislative bodies to introduce necessary measures for the implementation of directives in such good time that the national law-making procedure can take place in compliance with the procedural requirements of German law.

The authority issuing delegated legislation, in breaching the hearing requirements, also violated Article 20a of the Basic Law.

Article 20a of the Basic Law requires the state to protect animals. Animal welfare is a concern of constitutional status which is to be taken into account in the decision on the weighing of interests. The legislative bodies must take account of animal welfare as an aim of state policy in appropriate provisions; in this connection, they have a broad drafting discretion. However, if the legislator, in using this discretion, has restricted the discretion of the authority issuing delegated legislation by procedural provisions which are specifically intended to encourage the creation of results of the legislative procedure which are substantively in accordance with animal welfare, and

which thus serve animal welfare as an aim of state policy, this violates not only non-constitutional law, but also Article 20a of the Basic Law, if the statutorily prescribed procedure is not followed. Delegated legislation which was passed in violation of the hearing requirements of sentence 2 of § 16b.1 of the Animal Welfare Act thus violates Article 20a of the Basic Law at the same time.

#### *Cross-references:*

- Judgment 2 BvF 3/90 of 06.07.1999, *Official Digest* 101, 1.

#### *Languages:*

German, press release in English on the website of the Federal Constitutional Court.



#### *Identification:* GER-2010-3-017

**a)** Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 12.10.2010 / **e)** 1 BvL 14/09 / **f)** / **g)** *Entscheidungen des Bundesverfassungsgerichts* (Official Digest) 127, 263 / **h)** *UV-Recht Aktuell* 2010, 1319-1337; *ZFSH/SGB Sozialrecht in Deutschland und Europa* 2010, 727-733; *Zeitschrift für das gesamte Familienrecht* 2010, 2050-2055; CODICES (German).

#### *Keywords of the systematic thesaurus:*

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

#### *Keywords of the alphabetical index:*

Marriage and family, protection / Liability exclusion privilege, members, family / Joint household / Social welfare authority, recourse / Joint household, child born out of wedlock, child living separate from parent.

#### *Headnotes:*

If a parent whose child does not live permanently with him or her because the parents are separated, assumes actual responsibility for his or her child and has frequent contact with the child within the



framework of his or her legal possibilities, including regular visits and overnight stays in the parent's home, there is a joint household (*häusliche Gemeinschaft*) between the parent and the child within the meaning of sentence 1 of § 116.6 of the Tenth Book of the Code of Social Law (*Zehntes Buch Sozialgesetzbuch*), which is subject to the same protection under Article 6.1 of the Basic Law that is applicable to a parent and child who live together on a daily basis.

### Summary:

I. Pursuant to § 116 of the Tenth Book of the Code of Social Law (hereinafter, the "Code") a claim for compensation is transferred from the injured party to the social welfare authority to the extent the social welfare authority must make social welfare payments to the injured party because of the event that caused the injury. In accordance with sentence 1 of § 116.6 there is an exception to this claim transfer for claims arising from non-intentional injury to family members. The prerequisite for this is that the family member lives together in a joint household with the injured party.

The defendant in the original proceedings is the father of a son born out of wedlock in 2000, over whom the parents exercised joint care and custody. The boy lived with his mother. The defendant completely fulfilled his obligation to make maintenance payments. There were regular visits between him and his son every second weekend in the child's grandparents' house, which is where the defendant also lived. In 2001, the child, who was unsupervised for a few minutes, fell into an unsecured rain barrel on the property and was under water for approximately 10 minutes. The child suffered very severe injuries from this, which foreseeably will lead to the need for lifelong care and supervision. Since 2002 the responsible social welfare authority has provided social welfare benefits to the child. It is the plaintiff in the original proceedings; it sued the defendant for compensation based upon the right transferred to it in accordance with § 116.1 of the Code for violation of his duty of proper supervision. In the original proceedings the Regional Court assumed that the defendant was grossly negligent in his violation of the duty of proper supervision and, thus, the family law exclusion from liability pursuant to § 1664.1 of the Civil Code (*Bürgerliches Gesetzbuch*) did not apply to him. However, it regarded sentence 1 of § 116.6 of the Code as unconstitutional because it violated the general principle of equality and the constitutionally guaranteed protection of the family. By way of proceedings involving the concrete review of a statute (*konkrete Normenkontrolle*) the Court presented the

question to the Federal Constitutional Court whether sentence 1 of § 116.6 of the Code is compatible with the Basic Law to the extent it does not provide for a liability exclusion privilege for the father of a child who is subject to a duty of maintenance and who does not live in a joint household with the child, in contrast to a family member who lives in a joint household.

II. The Federal Constitutional Court has decided that sentence 1 of § 116.6 of the Code is compatible with the Basic Law.

Sentence 1 of § 116.6 of the Code does not violate the protection of the family guaranteed by Article 6.1 of the Basic Law. The assertion of a claim for compensation by one family member against another family member subsequent to a transfer of the claim does not involve a family-produced financial burden. Rather, it involves a burden that, while it affects the family, arose from the actions of a family member that are the basis of the claim for compensation. The state in principle is not obligated by Article 6.1 of the Basic Law to compensate a financial burden that arose from the injurious action for which a family member is responsible.

Likewise, Article 6.5 of the Basic Law, which prohibits children born out of wedlock from being placed in a worse position than children born within a marriage, is not violated by sentence 1 of § 116.6 of the Code. The provision does not differentiate as to whether the injuring or injured family member is a child born to married parents or out of wedlock. More accurately it differentiates whether the family member who caused the injury lives together in a joint household with the injured family member. This difference also does not lead to indirect unequal treatment between children born to married parents and children born out of wedlock. This is because nowadays it can no longer be assumed that as a rule children born out of wedlock grow up with only one parent and children born within a marriage grow up in a joint household with both parents.

Further, it does not violate the general principle of equality in Article 3.1 of the Basic Law that sentence 1 of § 116.6 of the Code excludes the transfer of a claim for compensation to the social welfare authority when the party that caused the injury lives in a joint household together with the family member who was injured, but not when they live separately from one another. This unequal treatment is justified by sufficient grounds.

Pursuant to the established legislative goal, indirect economic disadvantage to the injured party should be avoided by the liability exclusion privilege. The danger of such an adverse effect from the recourse of

the social welfare authority against the party who caused the injury is larger when that party lives in a joint household with the injured party. This also applies when the injured party is a child and the party who caused the injury is their parent with a duty of maintenance. Recourse against the parent living separately and obligated to make maintenance payments only reduces the parent's financial resources for financing his or her own life. Recourse as a rule, however, does not have any effect on the amount of maintenance owed to the child. This is because the social welfare authority's claim for recourse is not taken into account in regard to the law on maintenance and in the event of the consumer insolvency of the parent owing a duty of maintenance the claim for maintenance of the injured child, which has priority for payment before the claim for recourse of the social welfare authority, remains undiminished. If, on the other hand, a claim for recourse was made against the parent with whom the injured child lives, this would reduce the income that the joint household has available. Through this the injured child would also lose finances for its maintenance and, thus, its quality of life would be affected.

Similarly, the danger of a disruption in the domestic peace between the injured family member and the family member that caused the injury upon the pursuit of recourse by the social welfare authority is significantly larger when both live in a joint household. The event that caused the injury created the potential for conflict between the party that caused the injury and the injured party, which may seriously burden their relationship. If the recourse taken by the social welfare authority creates a financial burden, this could significantly increase household tensions. Both of them, in contrast to when the injured party and the party who caused the injury live separately, would be subject to this permanently and inevitably. This affects a child injured by a parent in a particular way and would have negative effects on the child's development.

The factual prerequisite for an exclusion of the transfer of the claim, that the party who caused the injury lives with the injured party in a joint household, however, is to be interpreted in cases of a child and their parent who live separately in light of the protection also of the family existing between them pursuant to Article 6.1 of the Basic Law and the parental rights of the parent living separately arising from Article 6.2 of the Basic Law. If one parent has joint custody with the other parent with whom the child primarily lives or if the other parent has sole custody based on the best interests of the child, and the parent regularly makes the agreed or court-ordered child maintenance payments and has regular contact with the child as agreed or granted to the

parent, which also includes visits and overnight stays by the child in his or her home, this parent has fulfilled his or her parental responsibility in regard to the child to the full extent of what is legally possible. Life in a joint household with a parent living separately is to be placed on equal footing with a joint household in which the child lives with a parent on a daily basis in regard to the protective goal pursued by sentence 1 of § 116.6 of the Code. This type of living together should not be less protected regarding the negative effects resulting from a transfer of a claim to the social welfare authority. In such a parent-child relationship the parent responsible for making maintenance payments regularly provides maintenance for the child from his or her household budget that is beyond his or her maintenance payment obligation, which would no longer be possible as it was up until then if the social welfare authority seeks recourse against him or her based upon a transfer of the child's claim for compensation to it. The avoidance of tensions and disputes based upon the assertion of transferred compensation claims is as important for a joint household where the parent and child partially live together as it is for a joint household where the parent and child continuously live together.

If the above prerequisites were presented in regard to the defendant and his child in the original proceedings, which the Regional Court must assess, recourse cannot be pursued against him.

#### *Languages:*

German, press release in English on the website of the Federal Constitutional Court.



#### *Identification:* GER-2010-3-018

**a)** Germany / **b)** Federal Constitutional Court / **c)** First Chamber of the Second Panel / **d)** 09.11.2010 / **e)** 2 BvR 2101/09 / **f)** / **g)** / **h)** *Deutsches Steuerrecht* 2010, 2512-2517; *Wertpapier-Mitteilungen* 2010, 2376-2380; CODICES (German).

*Keywords of the systematic thesaurus:*

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

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

*Keywords of the alphabetical index:*

Complaint, constitutional, subsidiarity, substantive / Evidence, use, prohibition, effect, long-term / Investigation proceedings, fiscal criminal law / Home, search / Income tax, evasion, investigation proceedings / "Tax CD" from Liechtenstein / Search, criminal proceedings, suspicion, reasonable / Legal institutional separation, principle.

*Headnotes:*

The initial suspicion required for searching a home may, without a violation of the Constitution, be based on data which an informant from Liechtenstein has sold to the Federal Republic of Germany on a data carrier.

*Summary:*

I. Investigations are underway against the applicants on suspicion of income tax evasion in the 2002 to 2006 assessment periods. The Local Court (*Amtsgericht*) ordered a search of the applicants' home. It based the requisite initial suspicion on it having become known in the context of the investigations against a Liechtenstein trustee that the applicants had investments in Liechtenstein. Income on investment from those assets was said not to have been declared. Probable taxes of between 16,390 € and 24,270 € were said to have been evaded by these means from 2002 to 2006.

At the request of the applicants, the public prosecution office permitted them to inspect the investigation files at its disposal. It stated that the data from Liechtenstein had been made available to the Tax Investigation Service by the Federal Intelligence Service by means of administrative assistance. Inspection of the seizure register with regard to the data carrier and of records of the informant's interrogation could not be granted since these documents were not available to the investigating authorities.

The applicants lodged a complaint against the search order – with the Regional Court (*Landgericht*) which had jurisdiction – on the ground that the information on which the search was based could not be used as

evidence. The collection of the data forming the subject-matter of the proceedings was said to violate international law and their use to violate domestic law.

The Regional Court rejected the complaints as unfounded. The applicants lodged a constitutional complaint against the rulings of the Local and Regional Courts.

II. The Federal Constitutional Court did not accept the constitutional complaint for adjudication because it is partially inadmissible and has no prospects of success in other respects.

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

1. Insofar as the applicants complain that the court should have clarified how the criminal prosecution authorities had gained possession of the data and what role had been played by the Federal Intelligence Service in this, their constitutional complaint is inadmissible. In the proceedings before the non-constitutional courts, the applicants requested neither explicitly nor by implication that the criminal prosecution authorities clarify the facts with regard to the acquisition of the data carriers. Hence, they deprived the non-constitutional courts of the opportunity to make a statement on this or to carry out the appropriate investigations. This complaint, therefore, cannot be heard in the constitutional complaint proceedings because of substantive subsidiarity.

2. The constitutional complaint is unfounded in other respects. The impugned rulings do not violate the applicants' fundamental right to the inviolability of the home set out by Article 13.1 of the Basic Law. It is constitutionally unobjectionable for the non-constitutional courts to have used also the information from the data from Liechtenstein as a basis for the initial suspicion necessary for the search.

The question of whether the data from Liechtenstein may be used as a basis for presuming reasonable suspicion for a search in criminal proceedings is not a matter of the direct application of a prohibition on the use of evidence, which, in principle, relates solely to the direct use of unlawfully acquired evidence in criminal proceedings with respect to the question of guilt. Whether and to what extent facts subject to a prohibition on the use of evidence may be used to give rise to an initial suspicion in respect of a search, by contrast, relates to the long-range effect (*Fernwirkung*) of prohibitions on use. It is recognised in this respect that procedural errors resulting in a prohibition on the use of evidence do not necessarily have a long-range effect on the entire criminal proceedings.

Independently of this, there is no constitutional legal principle setting out that in case of a procedural error in the taking of evidence, it would always be inadmissible to use the evidence obtained. The assessment of the question of what consequences a possible violation of procedural provisions in criminal proceedings has, and whether this includes, in particular, a prohibition on the use of evidence, is a matter primarily for the non-constitutional courts with jurisdiction. It is to be ruled upon – by weighing the conflicting interests – according to the circumstances of the specific case, in particular, the nature of the prohibition and the seriousness (*Gewicht*) of the violation.

In the view of the Federal Constitutional Court, the inadmissibility or unlawfulness of the taking of evidence does not necessarily lead to a prohibition on the use of evidence. This also applies to cases of an erroneous search. A prohibition on the use of evidence is, however, constitutionally required at least in cases of grievous, deliberate or arbitrary procedural violations in which the fundamental rights safeguards have been systematically disregarded. An absolute prohibition on the use of evidence resulting directly from fundamental rights has only been recognised by the Federal Constitutional Court in those cases in which the absolute core area of private life is affected.

The impugned rulings are not objectionable against this background. There is no need of a final decision on whether and to what degree office-holders acted unlawfully or indeed criminally under domestic law in acquiring the data, or have violated international agreements. The courts have presumed such violations for their assessment of whether the data may not give rise to an initial suspicion required for the search. Insofar as the impugned rulings reach the conclusion – after weighing the various interests – that the data from Liechtenstein may be used as grounds for the initial suspicion for the search, this is reasonable and cannot lead to a finding of a constitutionally relevant failure to strike a proper balance (*Fehlgewichtung*). The use of the data does not affect the absolute core area of private life. The data relate only to business contacts of the applicants with financial institutions. Furthermore, items of evidence obtained from private individuals are in principle useable, even if this took place in a criminal manner. For this reason, criminal offences committed solely by the informant do not have to be taken into consideration from the outset in assessing a possible prohibition on the use of evidence.

Also, the factual and legal assessment of the courts that a violation of the requirement of legal institutional separation – complained of by the applicants – did not apply, is not objectionable.

This requirement states that secret services do not have any coercive police powers. They may, hence, not carry out any interrogations, searches or seizures, and may not be deployed to specifically obtain incidental findings for non-intelligence purposes. The courts presumed that the Federal Intelligence Service merely obtained and passed on the data by means of administrative assistance, and did not have them produced, procured or collected, but that the informant approached the Federal Intelligence Service on his own initiative. There is nothing to prove the contrary claim of the applicants that the Federal Intelligence Service had only been deployed to use its special capabilities. Finally, it cannot be recognised that the putative breaches of the law are grievous, deliberate or arbitrary procedural violations in which the fundamental rights safeguards have been systematically disregarded.

#### *Languages:*

German.



#### *Identification:* GER-2010-3-019

**a)** Germany / **b)** Federal Constitutional Court / **c)** Second Chamber of the Second Panel / **d)** 13.11.2010 / **e)** 2 BvR 1124/10 / **f)** / **g)** / **h)** CODICES (German).

#### *Keywords of the systematic thesaurus:*

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

#### *Keywords of the alphabetical index:*

Internet protocol address, information, request, no judicial order.

#### *Headnotes:*

The disclosure of an individual internet protocol address does not necessarily constitute such a serious encroachment on the area of protection covered by Article 10.1 of the Basic Law (secrecy of telecommunications) that a request for information based on the general investigation clause in

Article 161.1 of the Code of Criminal Procedure (*Strafprozessordnung*) is always inadmissible.

### Summary:

I. The applicants object to the obligation to provide information about an internet protocol address without a judicial order having been previously obtained.

The second applicant is a company providing IT services to banks, in particular, through the provision and technical operation of "online banking". The first applicant is the head of the legal department in the second applicant's company.

In the course of investigation proceedings concerning computer fraud committed against an online banking user, the public prosecution office asked the second applicant to disclose the internet protocol address of the person ordering a certain bank transfer. The public prosecution office based its request for information on the general investigation clause in Article 161.1 of the Code of Criminal Procedure in conjunction with the provisions of the Telemedia Act (*Telemediengesetz*).

The applicants did not comply with the request to supply the information. The public prosecution office thereupon imposed an administrative fine against the first applicant. The applicants' appeals were unsuccessful.

The applicants' constitutional complaint is directed against the aforementioned orders and decisions. They are, in particular, of the opinion that the request for information should have been based on a judicial order.

II. The Federal Constitutional Court did not accept the constitutional complaint for adjudication.

Insofar as the first applicant complains of a violation against Article 2.1 of the Basic Law (general freedom of action) in conjunction with Article 10.1 and 10.2 of the Basic Law (secrecy of telecommunications), the constitutional complaint is inadmissible on account of its lacking substantiated grounds which comply with legal requirements.

The imposing of the administrative fine on the first applicant is associated with an encroachment on the applicant's general freedom of action according to Article 2.1 of the Basic Law, whose legal basis results from sentence 1 of Article 161a.2, in conjunction with sentence 2 of Article 70.1 of the Code of Criminal Procedure. The constitutional review of the interpretation and application of these provisions in a

particular instance is restricted to the question of whether specific constitutional law has been violated. This is the case where a decision by a court is based on a basically false conception of the importance of the fundamental rights whose violation is being asserted, or where the result of that interpretation itself violates the asserted fundamental rights. Based on these standards, the applicant has not sufficiently substantiated any violation of specific constitutional law. In particular, it is not possible to establish, on the basis of the complaint submitted, whether the contested decision by the Local Court (*Amtsgericht*) fails to recognise the significance and scope of Article 10 of the Basic Law.

It appears open whether the ordering by the state authorities that the applicant supply the information constitutes an encroachment on the area of protection covered by this provision.

The secrecy of telecommunications guarantees the confidentiality of individual communications where, on account of the spatial distance between the sender and receiver, these rely on that communication being transmitted by others and thus permits access in a particular way by third parties – including state agencies. The fundamental right also covers new transmission methods. The area of protection covers the content of the communication, as well as all further particulars of the communications relationship and refers to the fact of the communication and the communications data of the participants, connections and numbers which the participants use to enter into contact. That includes internet protocol addresses.

By contrast, those communication data which are recorded and stored with the telecommunications customer after the communication has ended are not covered by the protection conferred by Article 10.1 of the Basic Law. They are protected by the right to informational self-determination (Article 2.1 in conjunction with Article 1.1 of the Basic Law) and, possibly, by Article 13.1 of the Basic Law (inviolability of the home). The protection of the secrecy of telecommunications ends at that point at which the addressee is in receipt of the message and transmission is completed. The specific risks associated with communication across a spatial distance do not fall within the domain of the recipient, who can take his or her own precautionary measures.

Placing a service under the regulatory regime of the Telecommunications Act (*Telekommunikationsgesetz*) or the Telemedia Act does not have any impact on the area of protection covered by Article 10.1 of the Basic Law. This provision does not follow the purely technical definition of telecommunications as applied in the Telecommunications Act, but takes as its point of

reference the holder of fundamental rights and his or her need for protection on account of the intervention of third parties in the communications process.

The applicants have not sufficiently substantiated that the internet protocol address in question was recorded during an ongoing telecommunications transmission process by the second applicant, as the provider of the telecommunications service, and that it thus occurred outside the domain of the communications customers.

Nor can it be established from the applicants' submissions whether a possible encroachment on Article 10.1 of the Basic Law would be justified and whether the legal opinion on which the contested decisions is based, according to which a judicial order is not required for the information to be supplied about the internet protocol address, fails to recognise the constitutional requirements with which the basis for authorisation must comply.

The limitation contained in sentence 1 of Article 10.2 of the Basic Law does not explicitly provide for the need for a court order for encroachments, and the rest of the wording of the provision does not make any qualified requirements as regards the form which the basis for authorisation must take.

According to the case-law of the Federal Constitutional Court, the opposite applies where the encroachment is in a particular case so serious that the requirements regarding the safeguarding of proportionality and the guaranteeing of effective legal protection can only be met by way of a prior judicial review. This can be the case as regards the request for and transmission of telecommunications data where these are stored for an extended period of time in large quantities and where an analysis would permit detailed conclusions to be drawn regarding the communication activities and movements of a specific person.

As regards the question of what weight is to be attached to the encroachment on a person's privacy in the course of requesting and using the data, the purpose to which they are to be put and the manner in which they are supplied – secretly or openly – are thus of importance, as is the reason for and extent of the storage. The retrieval of communications data from a data record compiled by systematic storage without cause over an extended period of time constitutes a more intensive encroachment than the request for data which a telecommunications provider records for a short period depending on the respective operational and contractual circumstances.

The applicants' submissions contain no details regarding on what legal basis, for which purpose and how long the second applicant stores the internet protocol addresses and to what extent further data are collated in that context. It is, therefore, impossible to either assess the severity of the encroachment associated with the request for information or to specify more concretely the requirements regarding the proportionality of the retrieval and the use of the requested data.

Even taking into account the principles established in the judgment of 2 March 2010 concerning data retention, it is not possible to say that the disclosure of an individual internet protocol address, regardless of the aforementioned issues, would at any rate constitute such a serious encroachment on the area of protection covered by Article 10.1 of the Basic Law that a request for information based on the general investigation clause in Article 161.1 of the Code of Criminal Procedure would necessarily be inadmissible.

#### *Cross-references:*

- Judgment no. 1 BvR 256/08 *et al.* of 02.03.2010, *Bulletin* 2010/1 [GER-2010-1-005].

#### *Languages:*

German.



#### *Identification:* GER-2010-3-020

**a)** Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 24.11.2010 / **e)** 1 BvF 2/05 / **f)** / **g)** to be published in the Official Digest / **h)** *Europäische Grundrechte-Zeitschrift* 2010, 755-780; CODICES (German).

#### *Keywords of the systematic thesaurus:*

3.16 General Principles – **Proportionality**.  
 3.17 General Principles – **Weighing of interests**.  
 3.18 General Principles – **General interest**.  
 5.2 Fundamental Rights – **Equality**.  
 5.3.32.1 Fundamental Rights – Civil and political rights – Right to private life – **Protection of personal data**.

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

5.4.4 Fundamental Rights – Economic, social and cultural rights – **Freedom to choose one's profession.**

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

5.4.21 Fundamental Rights – Economic, social and cultural rights – **Scientific freedom.**

*Keywords of the alphabetical index:*

Genetic engineering / Resource, natural, protection / Genetically modified organisms, introduction into the environment / Informational self-determination, right.

*Headnotes:*

Article 74.1, no. 26, second alternative of the Basic Law gives the federal legislature comprehensive competence to make law on genetic engineering, which includes human genetic engineering and animal and plant genetic engineering.

In view of the fact that the state of scientific knowledge is as yet not finally confirmed in the assessment of the long-term consequences of the use of genetic engineering, the legislator has a particular duty of care, under which it must adhere to its mandate in Article 20a of the Basic Law to protect natural resources, *inter alia* out of responsibility for future generations.

The creation of transparency with regard to the deliberate introduction of genetically modified organisms into the environment (§16a of the Genetic Engineering Act (*Gesetz zur Regelung der Gentechnik*)) makes a contribution to the process of public opinion-forming and constitutes an independent and legitimate purpose of legislation.

The supplementation and concretisation of private law relating to neighbours in § 36a of the Genetic Engineering Act achieves an appropriate and well-balanced adjustment of the conflicting interests by contributing to an amicable coexistence of methods of production that are conventional or organic or which use genetic engineering.

*Summary:*

I. The government of the federal Land (state of) Saxony-Anhalt made an application for judicial review relating to the Genetic Engineering Act (hereinafter, the "Act").

The applicant regards the provisions of the Act on

- claims in the case of interference with use (§ 36a);
- the location register (§ 16a);
- the treatment of products placed on the market (§ 16b); and
- the definitions of "genetically modified organism" and "placing on the market" (§ 3 nos. 3 and 6)

as substantially unconstitutional, stating the following reasons:

The provision on claims in the case of interference with use ultimately leads to a special liability, tantamount to a guarantee, for the agricultural use of genetically modified organisms. This unilaterally shifts the liability risk to the users of genetically modified organisms. The provision is incompatible with occupational freedom (Article 12.1 of the Basic Law), the fundamental right to property (Article 14.1 of the Basic Law) and the principle of equality (Article 3.1 of the Basic Law). It infringes the principles of the rule of law and of proportionality.

The location register violates the right to informational self-determination (Article 2.1 in conjunction with Article 1.1 of the Basic Law) of the users of genetically modified organisms, their occupational freedom and the protection of their property under constitutional law. In particular the publication of personal data on locations in which genetically modified organisms are cultivated encourages the politically motivated destruction of fields.

The provisions on the precautionary duty to be observed with regard to the treatment of genetically modified organisms and with regard to good professional practice and the requirements imposed on the suitability of person and equipment in this context disproportionately restrict occupational freedom.

The amended definitions of "genetically modified organism" and "placing on the market" are incompatible with the freedom of science and research (sentence 1 of Article 5.3 of the Basic Law) and with occupational freedom. The supply of a product to third parties now constitutes an act of placing on the market that requires permission even if the product accidentally, or due to unavoidable technological means, contains genetically modified organisms due to a release of such organisms which had already been approved. In combination with the new provision on liability in § 36a of the Act, this makes every experimental release an incalculable economic risk to research and the enterprises engaging in research.

II. The Federal Constitutional Court has found the challenged provisions formally and substantively constitutional.

The legislative competence of the federal legislator follows from Article 74.1 no. 26 second alternative of the Basic Law, which gives the federal legislator comprehensive competence to make law on genetic engineering, which includes human genetic engineering and genetic engineering in relation to animals and plants.

Where the challenged provisions encroach upon the fundamental right to informational self-determination, the freedom of science and research, occupational freedom and the fundamental right to property, this is justified.

In the challenged provisions, the legislator pursues legitimate aims of public interest. In realising these aims, it must be given a broad discretion, precisely against the background of the broad social and scientific debate on the use of genetic engineering and its appropriate government regulation.

With the possibility of making deliberate changes to genetic makeup, genetic engineering intervenes in the elementary structures of life. It is extremely difficult or impossible to reverse the consequences of such intervention. Once genetically modified material has been released into the environment, it is difficult or impossible to restrict its spread. In view of the fact that the state of scientific knowledge is as yet not finally confirmed in the assessment of the long-term consequences of the use of genetic engineering, the legislator has a particular duty of care. In making law, it must balance not only the constitutionally protected interests affected by the use of genetic engineering on the one hand and their regulation on the other hand. Similarly, it must adhere to its mandate in Article 20a of the Basic Law to protect natural resources, *inter alia* out of responsibility for future generations.

The intended protection in particular of humans, the environment and the property of others against harmful effects of genetically modified organisms and taking precautions against such dangers arising, ensuring the coexistence of a variety of agricultural forms of production and the balancing of interests between neighbouring landowners protects in particular human life, health and the environment, and also the fundamental right to property and occupational freedom, as interests of constitutional status which would otherwise be endangered. Other important public interests also recognised under European law, such as the protection of consumers and informing the public, are strengthened. In this respect, the creation of transparency with regard to

the deliberate introduction of genetically modified organisms into the environment, which is intended to follow from the establishment of the location register, makes a contribution to the process of public opinion-forming and constitutes an independent and legitimate purpose of legislation. In order to create such transparency, it is permissible to make particular data generally accessible to the public, without further connection to particular purposes. The right to informational self-determination does not in principle exclude the creation of data generally accessible to the public, even if they are of a personal nature.

The provisions challenged are suitable and necessary to achieve these legislative objects. They are also appropriate.

In amending the definitions of “genetically modified organism” and “placing on the market”, the legislature ensured that approved experimental release into the environment and its unintended consequences are also subject to the state’s powers of supervision and intervention, and to the responsibility of science for the consequences, under the Act. The fact that these are unintended or unavoidable technical events does not decrease the risk entailed by the release of genetically modified organisms into the environment and the marketing of genetically modified products of undesired or harmful, possibly irreversible, effects. That risk is to be controlled in terms of the greatest possible precautions.

The location register contains details on the experimental release and cultivation of genetically modified organisms, in order to make it possible to monitor any effects of these organisms, in particular, on humans, on the environment and on conventional and organic farming and to inform the public. In dividing the location register into a section accessible to the public and a section not accessible to the public, the legislator created a workable and constitutionally unobjectionable compromise between the state’s and the public’s interest in freely available information on the one hand and the interest in confidentiality of the persons involved on the other hand. It may not be raised as an objection to the provisions that the location register increases the likelihood of wilful destruction of genetically modified cultures. Even before it was introduced, there were repeated obstructions of the release and cultivation of genetically modified organisms.

The provisions on the treatment of products placed on the market leave the authorities and non-constitutional courts enough latitude to comply proportionately with their precautionary duty, with good professional practice and with the requirements of suitability of person and equipment in the individual



case. This relates, in particular, to the question of what in the individual case constitutes precautionary duty and good professional practice. The requirements, which are broadly defined here, make it possible for the de facto basic conditions of treatment of genetically modified organisms to be appropriately taken into account and for the scope of the duties to be restricted to the degree which is necessary in the each case to avoid substantial interference with the interests protected by the Act.

§ 36a of the Act does not create a new type of special liability for the use of genetically modified organisms, but supplements and puts into concrete terms the existing strict liability of originators of nuisance in the private law relating to neighbours; the provision is integrated in this structure. The provision achieves an appropriate and well-balanced adjustment of the conflicting interests by contributing to an amicable coexistence of methods of production that are conventional or organic or which use genetic engineering and to a genuine freedom of choice for producers and consumers.

Taken as a whole, the balance struck by the legislator in each case in favour of the aims of public interest pursued is unobjectionable, in particular against the background of the fact that the effects of genetic engineering are as yet not finally confirmed. The limit of reasonableness is not exceeded for the persons who are addressed by the statute.

The general principle of equality before the law of Article 3.1 of the Basic Law is also not violated. Where fact situations are treated unequally, this is based on special factual and legal features of the use of genetic engineering and is justified by the public interest aims of the legislator.

#### *Languages:*

German, press release in English on the website of the Federal Constitutional Court.



#### *Identification:* GER-2010-3-021

**a)** Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 07.12.2010 / **e)** 1 BvR 2628/07 / **f)** / **g)** to be published in the Official Digest / **h)** CODICES (German).

#### *Keywords of the systematic thesaurus:*

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

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

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

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

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

#### *Keywords of the alphabetical index:*

Unemployment, assistance, abolishing / Retroactive effect, genuine and false.

#### *Headnotes:*

If a federal supreme court rejects a challenge to the non-admission of an appeal on points of law because in its opinion all significant aspects of a constitutional question have been clarified in its previous decisions, this is not contrary to the admissibility of a constitutional complaint when the applicant is able to present reasonable and weighty grounds for a review of these precedents and the matter involves an unclarified question of constitutional law.

The statutory claim for unemployment assistance (*Arbeitslosenhilfe*) pursuant to §§ 190 through 206 of the Third Book of the Code of Social Law (*Drittes Buch Sozialgesetzbuch*) in the version applicable until 31 December 2004 was not subject to the fundamental right of protection of property in Article 14 of the Basic Law.

The elimination of unemployment assistance with effect as of 1 January 2005 is compatible with the Basic Law.

#### *Summary:*

I. Unemployment assistance was a replacement for income provided by the state and financed through tax revenues upon unemployment. Among others, a prerequisite for the grant of unemployment assistance was the need of the applicant. Its amount was not oriented toward the need of the recipient, but rather,

toward his or her last salary earned. Unemployment assistance was granted for periods of time. Prior to each renewed grant, all eligibility prerequisites for the claim were to be re-examined. Pursuant to sentence 1 of § 428.1 and sentence 2 of § 198, no. 3 of the Third Book of the Code of Social Law (hereinafter, the "Code"), there was also a possibility for claiming unemployment assistance with relaxed prerequisites: those employees who were above the age of 58 and did not fulfil the legal prerequisites of the claim because they were not ready to work and did not use or did not want to use all means to end their unemployment situation also had a claim for unemployment assistance. This was the practice when an unemployed person made a corresponding declaration to the Federal Employment Agency (*Bundesagentur für Arbeit*).

The rules regarding unemployment assistance were amended by the Fourth Act for Modern Services on the Labour Market (*Viertes Gesetz für moderne Dienstleistungen am Arbeitsmarkt*) of 24 December 2003 so that it could only be granted until 31 December 2004. The amendment became effective on 1 January 2004. In addition, unemployment assistance was completely deleted from the catalogue of benefits for employment promotion. Unemployment benefit II (*Arbeitslosengeld II*) was put in its place, the calculation of which no longer related to the previous income of the persons in need of assistance, but rather, in general to their need.

The applicant received unemployment assistance. In June 2004 he submitted a declaration within the meaning of sentence 1 of § 428.1 of the Code and thereupon received unemployment assistance until the end of the year. His application for a grant of unemployment benefit II from January 2005 onward was rejected by the benefits provider. It based the rejection upon the fact that the monthly income to be set off against the applicant's and his wife's total calculated need exceeded that need. The applicant's lawsuit for continued payment of unemployment assistance was unsuccessful before the social courts.

II. The Federal Constitutional Court rejected the constitutional complaint of the applicant, to the extent it was admissible, as unfounded. The abolishing of unemployment assistance is compatible with the Basic Law.

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

The abolishing of unemployment assistance does not violate the applicant's fundamental right to property (Article 14.1 of the Basic Law). This is because the statutory claim for unemployment assistance is not

property within the meaning of this fundamental right. This also applies to the grant of unemployment assistance under the relaxed prerequisites of sentence 1 of § 428.1 of the Code. Social-law claims only enjoy the fundamental right of protection of property when the matter involves legal assets that serve to secure subsistence and relate to not insignificant personal contributions of the owner.

The latter point does not relate to the statutory claim for unemployment assistance. There was no direct financial connection between the contributions to unemployment insurance and the expenses for unemployment assistance. The contributions income only served to finance unemployment benefits (a time-limited insurance payment), but not unemployment assistance, which (basically unlimited in duration) was always paid out of tax revenues. Unemployment assistance from a financial legal point of view also was not conceived of as a unit financed by both contributions and taxes. The fundamental differences between unemployment benefits and unemployment assistance also exclude the assumption that both types of aid were combined into one uniform claim.

Unemployment assistance was aid motivated by socio-political concerns that was paid upon need without relation to the provision of contributions by the insured person and was not paid as a modified continuation of unemployment benefits.

The abolishing of unemployment assistance does not violate the principle of legitimate expectations. This is because it did not develop any retroactive effect. The applicant also was not protected from a change in the legal situation based on any other reasons.

Genuine retroactive effect (*echte Rückwirkung*), where a statute subsequently changes situations in the past that have already been concluded, or establishes its temporal application at a point in time prior to the promulgation of the statute, does not exist here. This is because both the deadline for new or renewed grants of unemployment assistance until 31 December 2004 as well as its abolition from 1 January 2005 onward only affected future grants.

Similarly, false retroactive effect (*unechte Rückwirkung*), which exists when a statute affects current, not yet concluded circumstances and legal relationships in the future and, thus, at the same time subsequently devalues the affected legal position, does not exist here. Unemployment assistance was only granted for a certain period of time and only upon a renewed examination of the prerequisites to a claim. A right that could have been protected by the principle of legitimate expectations against its subsequent devaluation, thus, arose at the earliest

upon each period of new or renewed grant of unemployment assistance. It only related to the time until the expiration of each grant period.

The general reliance of a citizen on the continuation of a legal situation and, therefore, his or her expected future entitlement to benefits is not a legal position subject to constitutional law protection. Similarly, the submission of a declaration pursuant to sentence 1 of § 428.1 of the Code does not rise to the level of a disposition for the unemployed person that could form the basis of an expectation of continuation of a claim that is worthy of protection.

#### *Languages:*

German, press release in English on the website of the Federal Constitutional Court.



## Hungary Constitutional Court

### Important decisions

*Identification:* HUN-2010-3-008

**a)** Hungary / **b)** Constitutional Court / **c)** / **d)** 08.12.2010 / **e)** 193/200 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 2010/185 / **h)**.

*Keywords of the systematic thesaurus:*

4.9.4 Institutions – Elections and instruments of direct democracy – **Constituencies**.

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, constituency, boundary / Constituency, formation.

*Headnotes:*

The formation of constituencies is closely linked to the realisation of the right to vote. Therefore statutory regulation is necessary to demarcate the specific voting districts and define the authoritative standpoints relating to changes to constituency boundaries.

*Summary:*

I. This decision arose from the constitutional review of certain parts of Act XXXIV of 1989 on the election of Members of Parliament, and certain provisions of Act C of 1997 on Electoral Procedure as well as Decree no. 2/1990 on the demarcation of specific voting districts (the “Decree”).

The Constitutional Court took as its starting point Decision no. 22/2005. In this Decision, the Constitutional Court criticised the rules concerning the formation of constituencies as being highly inadequate. Neither the above-mentioned Acts, nor any other law defined any authoritative standpoints relating to changes to constituency boundaries.

Therefore, the Constitutional Court stated, Parliament had neglected its duty as legislator and created an unconstitutional situation. In addition, the Court set out a constitutional requirement to the legislator that the number of people entitled to vote in individual voting districts should differ to the least extent possible, and only for an adequate constitutional reason. The legislator must also aim at the slightest possible difference in defining the mandates to be won on regional electoral lists. The mandates will have to be adjusted according to the number of voters registered in a directory. The legislator must try to ensure that the principle of equality is manifest both in the case of voting districts and that of regional lists.

The Court in its current decision stressed that the formation of constituencies is closely linked to the realisation of the right to vote. Therefore statutory regulation is necessary for the manifestation of the above constitutional requirements. Parliament is to pass a statute on this subject for the passage of which a two-thirds majority of the Members of Parliaments is required.

Consequently, the Constitutional Court annulled Article 50.2 of the Act on the election of Members of Parliament, which empowered the Government to determine the ordinal numbers, seats and boundaries of individual and territorial constituencies. It also declared null and void Article 152 of the Act on Electoral Procedure, which authorised the Government to determine the sequence number, seat and territory of parliamentary single mandate and regional constituencies. Finally, the Court *pro futuro* annulled the whole Decree as of 31 December 2011 to allow the legislator to put in place authoritative standpoints relating to changes of constituency boundaries and to form the boundaries.

#### *Languages:*

Hungarian.



#### *Identification:* HUN-2010-3-009

**a)** Hungary / **b)** Constitutional Court / **c)** / **d)** 28.10.2010 / **e)** 184/2010 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 2010/165 / **h)**.

#### *Keywords of the systematic thesaurus:*

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

3.13 General Principles – **Legality.**

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

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

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

#### *Keywords of the alphabetical index:*

Taxation / Tax, punitive / Redundancy payment / Retroactive legislation.

#### *Headnotes:*

An act providing for the introduction of a special retroactive 98% tax, if the income was given contrary to good morals by organisations managing state property or by state owned or governed organisations, was considered to be a “confiscatory” tax.

#### *Summary:*

I. On 22 July 2010 the parliamentary majority adopted a constitutional amendment on retroactive tax obligation, which permitted the legislature to tax retroactively incomes received from public funds (ranging from pensions to extra bonuses for former high-ranking government officials) if the income was given “contrary to good morals” by state organisations. Under Article 70/I.2 of the Constitution, in cases of income received from public funds serving as a contribution to public revenues, special taxes may be introduced by statute retroactively as of the beginning of the given tax year if the income was given contrary to good morals by organisations managing state property or by organisations owned mostly by the state or governed by the state.

Based on this constitutional provision, Act XC of 2010 (hereinafter, the “Act”) was adopted concerning a 98% tax on public sector severance pay above HUF 2 million (approximately EUR 70.000). It was to be applied to the pay received by public sector employees who left their jobs after 1 January 2010. Several petitioners challenged the Act before the Constitutional Court.

II. The Constitutional Court justices unanimously declared the Act unconstitutional, and annulled it *ex tunc*. The Court did not examine explicitly the constitutionality of the new constitutional amendment, but took this for granted by applying it in the current case. According to the reasoning of the Court, the

constitutional amendment makes an exception to the prohibition of retroactive legislation only in cases of incomes paid *contra bono mores*. Despite this, under the challenged Act the 98% tax was applied to severance pay received legally, in accordance with “good morals”. The 98% tax was aimed not only at incomes that the new government considered to be against ‘good morals’, such as excessive public sector bonuses, but also at the wages and salaries of public sector workers, such as civil servants and public sector employees such as teachers and doctors which have been completely legitimate until now. In the Court’s view, payments received according to former statutory regulations could not be seen as incomes *contra bono mores* and could not, therefore, be taxed retroactively to the beginning of the year 2010, even under the new constitutional amendment. Moreover, although the constitutional amendment paves the way for the legislator to introduce special taxes on certain incomes, 98% seemed to be a “confiscatory” tax and was therefore contrary to the newly enacted Article 70/I.2 of the Constitution.

#### *Supplementary information:*

Shortly after the Court decision, the parliamentary majority launched a new version of the constitutional amendment allowing any income from public funds to be taxed retroactively up to five years. The only constitutional hurdle from a taxation perspective is to ensure that the income is not revoked in its entirety. Article 70/I.2 of the Constitution currently in force reads as follows: ‘In case of incomes received from public funds serving as a contribution to public revenues, statute may retroactively as of the beginning of the fifth tax year before the given tax year, introduce a special tax that shall not reach the amount of the income where this income was given by organisations managing state property or by organisations owned mostly by the state or governed by it.’ Besides the constitutional provision, Parliament voted again for extra tax on certain income. Act CXXIV of 2010 states that with effect from 2005, public sector employees must pay extra taxes on severance payments which exceed the HUF 3,5 million (approximately EUR 12.500) threshold. There is a HUF 2 million cap for managers of state-owned enterprises, companies owned by local governments and senior officials in the public sector, including municipalities.

Another consequence of Decision no. 184/2010 was the reduction of the Constitutional Court’s competences. More information can be found in the text of Act XXXII of 1989 on the Constitutional Court currently in force.

#### *Languages:*

Hungarian.



# Ireland

## Supreme Court

### Important decisions

*Identification:* IRL-2010-3-002

**a)** Ireland / **b)** Supreme Court / **c)** / **d)** 03.11.2010 / **e)** 2010/959 JR / **f)** Doherty v. Government of Ireland & Anor / **g)** [2010] IEHC 369 / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

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

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

5.3.41.6 Fundamental Rights – Civil and political rights – Electoral rights – **Frequency and regularity of elections.**

*Keywords of the alphabetical index:*

Judicial review / Election, additional, constituency / Court, powers, delimitation.

*Headnotes:*

An unreasonable delay by Government in initiating the procedure for the holding of a bye-election can breach a citizen's constitutional rights to such a degree as to warrant the Court granting relief.

*Summary:*

I. The High Court is a superior court which, under Article 34 of the Constitution, has full original jurisdiction in all matters, including civil and constitutional matters. The Court ordinarily sits as a one-judge court; the judgment in this case was by Kearns P. (President of the Court). There is a right of appeal to the Supreme Court from all decisions of the High Court in constitutional matters (there is also a right of appeal in all civil matters, with the exception of a small number of matters excluded by law). This decision has been appealed to the Supreme Court.

The applicant in this case was a member of *Seanad Éireann* (the senate) who was registered as a voter in the parliamentary constituency of Donegal South West. Donegal South West is a three-seat

constituency i.e. the voters are entitled to elect three members of *Dáil Éireann* (the house of deputies). Three members of parliament were elected to *Dáil Éireann* by the electorate of Donegal South West at the last general election in May 2007.

One of the three members of parliament in the constituency was subsequently elected to the European Parliament and consequently, from 6 June 2009 onwards, there was a vacancy in the constituency. Unlike many other countries, Ireland does not have a list system for the filling of such vacancies; Article 16.7 of the Constitution simply states: "elections for membership of *Dáil Éireann*, including the filling of casual vacancies, shall be regulated in accordance with law."

Section 39.2 of the Electoral Act 1992, enacted to regulate the filling of such vacancies, sets down the following procedure: the Chairman of *Dáil Éireann*, as soon as he or she is requested to do so by *Dáil Éireann*, must direct the Clerk of *Dáil Éireann* to issue a writ to the relevant officer in the constituency, directing that officer to hold an election (known as a bye-election) for the purposes of filling the vacancy. There is no time-limit for the holding of a bye-election set down in the Constitution or Section 39.2 of the 1992 Act. In practice, the process can only be initiated with the consent of the government as the government ordinarily has a majority in *Dáil Éireann*.

In the instant case, the government had resisted three separate attempts (in July 2009, May 2010 and September 2010) by a number of different political parties to initiate the process of holding a bye-election to fill the vacancy. The applicant therefore made an application to the High Court seeking a declaration from the Court that there had been excessive delay in filling the vacancy. The applicant contended that Section 39.2 of the 1992 Act requires to be interpreted as meaning that a bye-election must be held within a reasonable time (it must be emphasised that the applicant limited his application to a declaration; he did not seek a court order compelling the government to hold a bye-election).

II. The High Court first had to decide whether the matter was justiciable i.e. whether it constituted a dispute capable of litigation in the courts. The State's argument was that the matter was not justiciable due to the doctrine of separation of powers. The Court defined the question as follows:

- i. does the Court have a function in determining whether the provisions of Section 39.2 of the 1992 Act must be interpreted as meaning that a bye-election must be held within a reasonable time; or

- ii. do the terms of Section 39.2 of the 1992 Act provide *Dáil Éireann* the discretion to decide whether and when it shall initiate the process under Section 39.2 for the purposes of holding a bye-election?

In considering this question, the High Court recognised the stated position in previous case-law that the doctrine of the separation of powers precludes the courts from accepting every invitation to interfere with Parliament's conduct of its own affairs; and that controversies surrounding purely political issues or the fiscal or expenditure policy of the State are entirely outside the remit of the courts. The High Court also recognised that internal matters and the internal workings of *Dáil Éireann*, which do not involve citizens outside *Dáil Éireann*, are not within the remit of the courts' power of review.

However, having regard to previous case-law, the Court recognised that the courts had deemed intervention to be justified when an actual or threatened breach of an individual's constitutional rights was at issue. The applicant's argument in the instant case was that, as a registered voter in the constituency concerned, his constitutional and legal rights had been infringed. The Court expressed the view that "a citizen's rights are trampled upon and significantly diluted when no effect is given to rights for representation clearly delineated in the Constitution. These are rights which might usefully be characterised as forming part of the "constitutional contract" between the citizen and the State."

The Court, having reviewed the relevant constitutional provisions concerning elections and the proper representation of the electorate in Parliament, concluded that those provisions are "in no sense aspirational": the statement in Article 16.7 of the Constitution that "the filling of casual vacancies, shall be regulated in accordance with law" implied something more than mere legal regulation of the filling of vacancies. (Original emphasis in the Court's judgment).

The High Court therefore concluded that the matter was justiciable.

The Court then turned to the question of whether the provisions of Section 39.2 of the 1992 Act must be interpreted as meaning that a bye-election must be held within a reasonable time. It is well-established in case-law that all legislation enacted subsequent to the enactment of the Constitution in 1937 enjoys a "presumption of constitutionality". The High Court noted the position in case-law that this presumption not only entails a presumption that the constitutional interpretation of such a law was that intended by

Parliament, but also that Parliament intended that any proceedings, procedures, discretions and adjudications permitted under such law are to be conducted in accordance with the principles of constitutional justice.

The Court held that to interpret Section 39.2 of the 1992 Act as containing no requirement that a bye-election must be held within a reasonable time would be contrary to Articles 5 and 16 of the Constitution, which concern the democratic nature of the State and electoral matters. The Court concluded that interpreting Section 39.2 of the 1992 Act as meaning that a bye-election must be held within a reasonable time was justifiable and not contrary to the express wording of the section itself.

The High Court also considered Article 3 Protocol 1 ECHR, which requires that elections must be held "at reasonable intervals". The Court considered that it would be absurd to apply a requirement that a general election must be held within a reasonable time but to refrain from applying the same requirement with respect to bye-elections. As Section 2.1 of the European Convention on Human Rights Act 2003 places an obligation on the Irish courts to interpret and apply a statutory provision, "insofar as is possible", in a manner compatible with the State's obligations under the Convention, the Court held that it was obliged to interpret Section 39.2 of the 1992 Act by reference to Article 3 Protocol 1 ECHR.

The Court finally considered the question of whether there had been an unreasonable delay by the government in initiating the procedure for the holding of a bye-election. Having previously noted that the delay in filling the vacancy, at almost eighteen months, was the longest in the history of the State (one of the longest delays previously had been eleven months), and that none of the time-limits for filling vacancies in other countries was of a similar length, the High Court concluded: "the delay in this case is so inordinate as to amount to a breach of the applicant's constitutional rights to such a degree as to warrant the Court granting some relief [i.e. legal remedy]."

The Court therefore made the declaration sought by the applicant that there had been an unreasonable delay in initiating the procedure for the holding of a bye-election in the constituency of Donegal South West. The bye-election was promptly held by the government following issue of the judgment.

*Languages:*

English.



## Korea

### Constitutional Court

#### Important decisions

*Identification:* KOR-2010-3-005

**a)** Korea / **b)** Constitutional Court / **c)** / **d)** 26.02.2009 / **e)** 2005Hun-Ma764, 2008Hun-Ma118 (cases consolidated) / **f)** Restriction on Right to Prosecute Offenders of Traffic Accidents Causing Serious Injury / **g)** 21-1(A) *KCCR, Korean Constitutional Court Report* (Official Digest), 156 / **h)**.

*Keywords of the systematic thesaurus:*

5.1.3 Fundamental Rights – General questions – **Positive obligation of the state.**

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

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.**

5.3.15 Fundamental Rights – Civil and political rights – **Rights of victims of crime.**

*Keywords of the alphabetical index:*

Insurance, vehicle, comprehensive / Right to make a statement / State, duty, protection of life and safety / Victim, traffic accident.

*Headnotes:*

The Korean criminal procedure rules out any possibility of private prosecution, for example by victims, giving prosecutors the exclusive right to criminal prosecution. The victim does, however, enjoy fully protected constitutional rights to make a statement or to testify in the course of a criminal case, which ensures the procedural adequacy of criminal justice.

Restrictions on constitutional rights are unconstitutional unless they are prescribed by law, pursue a legitimate aim set out in law and, are the least restrictive means adopted in order to achieve this aim.



The test of reasonableness is usually applied when assessing the lawfulness of different treatment. However, in cases where the Constitution specifically requires equality or where difference in treatment leads to a significant restriction on fundamental rights, the right to legislation will be reduced and a strict standard of review will be applied.

When assessing whether the State has fulfilled its duty to protect the lives and personal safety of individuals, the Constitutional Court can only find the State to be in breach of this duty if it has failed to take any protective measures or if the measures it did take were clearly inadequate or insufficient for protecting legal interests.

### Summary:

I. The case was brought by two applicants. One was a college student who, while crossing a three-lane road, was hit by the left front fender and windshield of a car and suffered a closed fracture of the cranial vault requiring 12 months of treatment and severe side effects including hemiparesis and facial paralysis, which eventually led him to quit school. Another complaint was submitted by a male driver and one of his passengers, who suffered a herniated disc in the neck, parietal scalp laceration, multiple scalp lacerations and broken ribs from an accident which occurred when a trailer truck went into the back of the car. Two other passengers died in the accident. The driver and passenger have been suffering from severe after-effects since the injury, including post-traumatic stress syndrome and insomnia.

Under Article 4.1 of the Act on Special Cases Concerning the Settlement of Traffic Accidents (hereinafter, the "Instant Provision"), drivers who are fully insured and commit a crime by inflicting bodily injury through inattention or gross negligence in a traffic accident will not be prosecuted.

The prosecutors found it was not possible due to Article 4.1 to prosecute the drivers concerned. The applicants contended in their complaints that this provision contravened the principle of prohibition of insufficient protection, right to equality, and the right to make a statement during a trial.

II. The Constitutional Court concluded that the Instant Provision violated the rule against excessive restriction and impinged on the victim's right to make a statement in a criminal case when he or she had been injured due to the driver's inattention or gross negligence.

The rationale behind the provision, in view of the increase in the number of cars and motorists, was to encourage drivers to subscribe to comprehensive insurance, allowing traffic accident victims to receive prompt and adequate compensation for their injuries, and to curb the increase in the number of repeat offenders involved in traffic accidents. It was in pursuit of a legitimate goal and satisfied the test of suitability of means.

In cases where the victim's life has been endangered, or he or she has become disabled or developed intractable or incurable diseases as a result of a traffic accident (i.e. where severe injury had been inflicted in terms of Article 258.1 and 258.2 of the Criminal Act), measures such as summary indictment or stay of prosecution should be available as alternatives to regular prosecution, depending on the cause of the accident and particular qualities of the victim (such as advanced age), whether the victim has been negligent and if so to what extent. However, the provision of unconditional immunity to drivers simply because they have subscribed to insurance was found to be in breach of the rule of the least restrictive means.

The Constitutional Court then considered the right to equality in a situation where traffic accident victims who have suffered serious injury due to inattention or gross negligence on the part of the driver are not entitled to make a statement in the criminal proceedings although that right does apply to victims who have died as a result of the accident.

It found the situation of victims who end up in a vegetative state or who must endure severe disability or incurable diseases for the rest of their lives due to their serious injuries to be no less unlawful than that caused by a traffic accident leading to death. Therefore, the restriction on the victim's right to make a statement during proceedings of a trial by not prosecuting the driver responsible for inflicting the injury, which does not apply when the traffic accident results in death, represented discrimination without reasonable grounds.

Differentiation of treatment between these groups of traffic accident victims in the exercise of their right to statement depending on the application of the various exceptions prescribed in the Instant Provision impinged on the right to equality of victims who have suffered serious injury due to the accidents.

The Constitutional Court concluded that the state had fulfilled its duty of protection of life and personal safety. The state can achieve this through a combination of preliminary and *ex post facto* measures, including punishment of drivers who have caused traffic accidents through inattention or negligence and the

overhauling of traffic regulations dealing with the obtaining of driving licences, continuing education for the public, maintenance and expansion of traffic safety facilities and a compensation system for traffic accident victims. Criminal punishment is one of many effective and appropriate measures available to the state; it cannot be the sole and ultimate method of protecting legal interests. The Instant Provision was not therefore in breach of the principle of the prohibition of insufficient protection.

#### *Supplementary information:*

As a consequence of this decision, Article 4.1 of the Act on Special Cases Concerning the Settlement of Traffic Accidents was amended on 12 April 2011. It now provides that traffic accident victims whose survival is in jeopardy or who must endure severe disability or incurable diseases for the rest of their lives due to their serious injuries shall be the exception to non-prosecution of perpetrator drivers with comprehensive vehicle insurance.

#### *Languages:*

Korean, English (translation by the Court).



#### *Identification:* KOR-2010-3-006

**a)** Korea / **b)** Constitutional Court / **c)** / **d)** 26.02.2009 / **e)** 2006Hun-Ma626 / **f)** Disabled Candidate's Right to Equality under the Public Official Election Act / **g)** 21-1(A) *KCCR, Korean Constitutional Court Report* (Official Digest), 211 / **h)**.

#### *Keywords of the systematic thesaurus:*

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

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

5.2 Fundamental Rights – **Equality.**

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

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

#### *Keywords of the alphabetical index:*

Election, campaign staff, number / Election, public official / Election, candidate, disability.

#### *Headnotes:*

If it appears that the right to equality has been violated, not because severely disabled candidates have been singled out and prevented from mounting certain types of election campaign, but because severely disabled candidates and non-disabled candidates have been treated the same, the standard of review for the provision should be that of reasonableness.

In the phrase “everyone is equal under the law,” equality means the prohibition of unequal treatment under the law. It does not necessarily mean that every socio-economic inequality should be corrected and everyone should receive completely equal treatment in every situation.

If a statute results in a grave limitation on the exercise of the right to mount an election campaign, the case must be reviewed on the basis of the principle of proportionality.

A statutory provision which appears to be neutral and imposes a uniform restriction on campaign methods deployed both by disabled and non-disabled candidates, resulting in *de facto* discrimination against disabled candidates due to failure to consider the difference between them and thereby upsetting the balance between the legislative purpose (guaranteeing real freedom and fairness in election) and the means of achieving that end (imposing restrictions on campaign methods) is in violation of the right to equality.

The campaign method of using campaign literature, books or booklets, which is known to be the most effective way of giving electors information about a candidate, must be constitutionally protected as freedom of political expression.

#### *Summary:*

I. The applicants, severely disabled candidates in local elections, filed a constitutional complaint, arguing that the contested provisions of the Public Official Election Act (hereinafter, the “POEA”) impinged on their basic rights, including the right to equality.

The POEA imposes a variety of restrictions on election campaigns, such as the number of political campaign staff and campaign methods. No provision

is made for additional personal assistants for candidates who are severely disabled or whose spouses are severely disabled, other than campaign staff who may distribute name cards. Moreover, blind candidates are not allowed to use tape-recorded materials for their election campaigns. The applicants argued that these restrictions impinged on their constitutionally guaranteed fundamental rights.

II. The Constitutional Court noted the provisions of the POEA which placed the same restrictions on severely disabled candidates and non-disabled candidates alike, in terms of the total number of campaign staff and the number of persons who could distribute campaign business cards. It decided unanimously to dismiss this aspect of the applicants' complaint, on the grounds that there was no possibility for the provisions of the POEA to infringe on their basic rights including the right to equality.

Regarding the provision of the POEA placing the same restrictions on severely disabled candidates and non-disabled candidates in terms of election campaign methods, four Justices presented an incompatibility opinion and one Justice presented an unconstitutionality opinion; meaning that five-majority Justices concurred in an opinion to the effect that this provision was incompatible or unconstitutional. However, the Court lacked the necessary quorum of six Justices for a ruling of unconstitutionality or incompatibility and found the provision to be constitutionally compliant.

An assistant or carer performs inherently different work from campaign staff, as described in the provision at issue. The applicants, who are severely disabled candidates, can receive help from assistants irrespective of the limitation imposed by the provisions of the POEA on the number of campaign staff. There is no specific provision in the POEA allowing a severely disabled candidate or the spouse of a severely disabled candidate to receive help from a personal assistant or carer in distributing campaign business cards; it is naturally to be inferred that they should be accompanied by such an assistant. The Constitutional Court accordingly decided that the uniform restriction imposed by the POEA on both disabled and non-disabled candidates as to the number of campaign staff was not in breach of their basic rights, including that of equality.

The majority of the Justices were of the view that a legal measure should be put in place, to "level the playing field" for disabled candidates by providing them with extra campaign methods which could be effective substitutes for verbal communication. For instance, they could be permitted one or two extra campaign staff to assist them with the smooth running

of communication with electors (in addition to the number of staff stipulated in the POEA). They could also be permitted a higher volume of campaign literature than that stipulated in the POEA.

#### *Cross-references:*

Former decisions concerning similar issues:

- Decision of 23.12.1999, 1998Hun-Ma363, 11-2 *KCCR, Korean Constitutional Court Report* (Official Digest), 770, 787;
- Decision of 30.08.2001, 1999Hun-Ba92, 13-2 *KCCR, Korean Constitutional Court Report* (Official Digest), 174, 205-210;
- Decision of 25.10.2001, 2000Hun-Ma193, 13-2 *KCCR, Korean Constitutional Court Report* (Official Digest), 526, 539-541.

#### *Languages:*

Korean, English (translation by the Court).



#### *Identification: KOR-2010-3-007*

**a)** Korea / **b)** Constitutional Court / **c)** / **d)** 26.03.2009 / **e)** 2007Hun-Ka22 / **f)** 50 Times Administrative Penalty Fee for Violations of Public Official Election Act / **g)** 21-1(A) *KCCR, Korean Constitutional Court Report* (Official Digest), 337 / **h)**.

#### *Keywords of the systematic thesaurus:*

4.9.8.2 Institutions – Elections and instruments of direct democracy – Electoral campaign and campaign material – **Campaign expenses.**

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

5.3.16 Fundamental Rights – Civil and political rights – **Principle of the application of the more lenient law.**

#### *Keywords of the alphabetical index:*

Administrative penalty fine, fixed amount / Election, public official, voter, bribery / Proportionality, offence, penalty.

*Headnotes:*

It is within the scope of legislative discretion to consider relevant circumstances when deciding how a violation of administrative law should be punished.

If the legislature decides to impose an administrative penalty, the issue of setting the amount of administrative penalty is within the scope of legislative discretion.

It is for the Constitutional Court to determine whether the legislature has exercised its discretion in an unreasonable and arbitrary fashion, and to assess whether the statutory provision in question violates the principle of equality or the principle of proportionality and the principle of prohibition of excessive restriction by deploying excessive means to achieve the purpose.

It is within the legislative discretion, unless it is clearly unreasonable or arbitrary, to decide the type of administrative penalty for a particular violation against administrative law.

*Summary:*

I. The applicants in these proceedings had each received a box of dried fish, costing around 9,000 KRW (equivalent to 8.23 USD), sent by a member of the 00 party. However, the boxes were endorsed with the name of a candidate from that party, running for the post of city mayor. The local Election Commission imposed an administrative penalty fine of 450,000 KRW (representing 9000 KRW x 50) on each applicant, in accordance with Articles 116 and 261.5.5 of the Public Official Election Act. The applicants filed a case against the decision with the District Court, which upheld the Election Commission's decision. They turned to the Appeal Court for recourse.

The Appeal Court asked the Constitutional Court for a constitutional review of Article 261.5.1 of the Public Official Election Act, suggesting that the provision in question might be unconstitutional in that it allowed a uniform administrative penalty fee to be imposed upon any person receiving goods from persons connected with an election and that the fine would be fifty times the amount worth the money received or the value of the food or goods. There was no possibility for reduction.

II. The Court found that in cases where people have received goods, food, books or travel, in violation of the regulations prohibiting bribery, which is subject to an administrative penalty fee, there can be a big

difference in the level of violation, depending on the reasons behind it, the context and method used, the relationship between those giving the goods and those receiving them, and what happened after the goods were given.

The imposition of a uniform penalty, based only on the value of the goods received and with no regard for individual situations, cannot be considered proper punishment corresponding to levels of responsibility for specific violations. Moreover, the provision did not present clearly the specific standard of minor cases which can be distinguished from the criminal provision of Article 257.2 of the Public Official Election Law. Thus, in contrast to the original legislative purpose, which was the regulation of low-level bribery, it would apply to somebody receiving expensive goods under the principle of legality and strict interpretation in criminal law. The level of punishment would not be appropriate under the principle of liability and this state of affairs could cause clear inequity between those violating the relevant law.

The court declared the provision incompatible with the Constitution and directed the courts, government bodies and municipalities to suspend its application and apply a revised provision which would be drafted in order to eliminate the unconstitutionality.

Two dissenting Justices attached opinions to the effect that the provision did not violate the Constitution, observing that from a historical perspective, Korean election culture demands robust legislative regulation on bribery in the form of money, goods, or foods passing from candidates to voters. In their view, the imposition of an administrative penalty fee of 50 times the value of the goods received is a quick and effective method of regulation, which captures the attention of voters and is an appropriate means to achieve the legislative purpose. Also the "50 times" fee established by the provision only applies to goods received amounting to less than 1 million KRW (equivalent to 914.33 USD). The imbalance between the violation and responsibility could be put in perspective by the fact that an administrative penalty fee would not be imposed if the violation had been committed without intent or fault, or due to a misunderstanding of the legal position, under the Act on the Regulation of Violations of Public Order.

*Supplementary information:*

As a consequence of this decision, Article 261.5 of Public Official Election Act was amended on 25 January 2010 in the form of Article 261.6. It provides that anybody receiving goods and foods in connection with an election will pay an administrative penalty fine of more than 10 times less than 50 times of the value of the goods received.

*Languages:*

Korean, English (translation by the Court).

*Identification:* KOR-2010-3-008

**a)** Korea / **b)** Constitutional Court / **c)** / **d)** 26.03.2009 / **e)** 2007Hun-Ma843 / **f)** Resident Recall against the Head of Local Government / **g)** 21-1(A) *KCCR, Korean Constitutional Court Report* (Official Digest), 592 / **h)**.

*Keywords of the systematic thesaurus:*

3.3 General Principles – **Democracy.**

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

4.9.2.1 Institutions – Elections and instruments of direct democracy – Referenda and other instruments of direct democracy – **Admissibility.**

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

5.3.29.1 Fundamental Rights – Civil and political rights – Right to participate in public affairs – **Right to participate in political activity.**

*Keywords of the alphabetical index:*

Election, candidate / Election, voters' list / Mayor, suspension.

*Headnotes:*

The legislature enjoys a wide discretion in enacting statutes, but should not impose excessive constraints on the right of the head of local government to serve in public office, as he or she will have been elected by popular vote. Care must be taken to ensure that the residents' recall system, which is by nature a political process, does not encroach on the core part of representative democracy.

When the Court applies rationality as its standard of review, a statute will not be deemed unconstitutional unless it is clearly unreasonable or arbitrary.

*Summary:*

I. The applicant, the Mayor of Hanam City, lodged an appeal with the Appeal Court alleging that the City Election Committee had accepted the residents' recall petition against him in spite of various deficiencies. Whilst the appeal was pending, he asked the Constitutional Court for a constitutional review, as certain city residents, who opposed his plans to set up a large-scale crematorium, as part of his previous campaign pledge to boost the local economy, had filed two consecutive recall petitions against him, and he was to be suspended from the date of notification of the petition to the announcement of the results of the vote.

The applicant alleged that certain provisions of the Resident Recall Act (hereinafter, the "Act") violated his right to hold public office, as the reasons for the recall and the suspension for a temporary period of his powers as mayor were not specified.

II. The Constitutional Court dealt first with his allegation as to the lack of definition of the reasons for the recall petition under Article 7.1. b of the Act, and concluded that this provision did not violate the applicant's right to hold public office. The legislature enjoys a wide discretion when providing for a system of resident recall. There is no need for a limit on the grounds for recall, due to the necessity to monitor and curb undemocratic and arbitrary policy drives. In any case, it would not be easy to specify the grounds for resident recall, in terms of the broad scope of business and legislative techniques available. Limitations on the grounds for recall would be accompanied by judicial review, which would be inappropriate and would also delay matters.

Under Article 7.1.b of the Act, the signatures of fifteen percent of the residents are needed, in order to request a recall vote. According to the Court, this part of the provision did not violate the rule against excessive restriction; neither did it impinge on the right to hold public office. It is within the legislative discretion to stipulate such a requirement. The limitations on requesting a recall vote are sufficient to prevent abuse, and the requirement of signatures from fifteen percent of the residents is in place to reflect the opinion of the greatest number of residents, preventing biased and unfair requests from residents from a particular area.

Article 8 of the Act stipulates a request period for a resident recall vote. The Court held that this did not encroach on the right to hold public office, despite the fact that there is no mechanism to prevent a second request for a recall vote on the same grounds, provided that the second request is filed one year

after the date of the first recall vote. In the Court's view, Article 8 satisfies three legislative purposes. It allows elected public officials to promote policies in line with their convictions at the beginning of their terms of office, it deals with the problem of the lack of efficacy of the measure of resident recall when an official is nearing the end of his or her term of office and it prevents the system being abused by repeated recalls when an earlier vote has been rejected.

The Court also concluded that a temporary suspension for the period mentioned above would not impinge on the fundamental substance of the right to hold public office; neither would it violate the rule against excessive restriction. The suspension period could be as short as twenty or thirty days and the public interest sought by the provision in point (imposing restrictions on the right to hold public office by making it subject to a residents' recall vote) would not be disproportionate. Requirements governing the suspension of the authority of public officials in cases of residents' recall are lenient by comparison to those governing the suspension of the authority of public officials (such as the President) when impeachment may be at issue. The applicant's allegation of infringement of equity, drawing a comparison with public officials subject to impeachment should be rejected.

III. Four Justices put forward a partial dissenting opinion as to the unconstitutionality of Article 21.1 of the Act, based on the fact that it automatically suspends the authority of a public official subject to a residents' recall vote, should such a vote be proposed. The grounds for proposing a residents' recall are not limited, neither are the requirements for proposing a recall. If notification of a residents' recall vote was to automatically suspend the authority of the public official concerned, this could pave the way for considerable abuse of the system. They also stated that the requirements, by comparison with those that apply to a public official subject to impeachment, were potentially excessively lenient, which contravenes the principle of equality of elected public officials in local government.

#### Languages:

Korean, English (translation by the Court).



#### Identification: KOR-2010-3-009

**a)** Korea / **b)** Constitutional Court / **c)** / **d)** 26.03.2009 / **e)** 2007Hun-Ka22 / **f)** 50 Times Administrative Penalty Fee for Violation of Public Official Election Act / **g)** 21-1(A) *KCCR, Korean Constitutional Court Report* (Official Digest), 211 / **h)**.

#### Keywords of the systematic thesaurus:

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

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

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

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

#### Keywords of the alphabetical index:

Election invalidity / Public official, election / Public officer, incompatibility.

#### Headnotes:

Only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*). The criminal law must construe the elements of crime accurately and give a very clear definition of an offence, allowing an individual to discern and to reasonably foresee from the wording of the relevant provision (with assistance from the court over interpretation if necessary) the acts and omissions for which he or she may be criminally liable.

Restriction of constitutional rights is unconstitutional unless it is prescribed by law, in pursuit of a legitimate aim set out in law and the means adopted are necessary, proportionate and represent the least restrictive method for achieving this aim.

#### Summary:

I. The case was brought by two applicants. One was a local government council member, elected on 31 May 2006 and the other was a governor of local government, elected on the same date.

Both applicants were indicted for violation of Article 113.1 of the Public Official Election Act (hereinafter, the "POEA"). They were fined 1,500,000 KRW (equivalent to 1,389 USD) and each sentenced to six months in prison. Consequently, both election results were invalidated and the

applicants were dismissed from their positions. They both appealed, and asked the Supreme Court to request a constitutional review by the Constitutional Court of certain parts of the POEA. Once the Supreme Court had denied their appeals and requests, they filed constitutional complaints with the Constitutional Court.

Under Article 113.1 of POEA precludes a candidate (including someone who intends to become a candidate) from making a contribution to those “having connections with” voters even if the recipients reside outside the constituency.

The applicants took issue with the language of these provisions of the POEA (the fact that the term “candidate” includes someone intending to become one, as well as the words “having connections with”). In their view, it infringed on their rights to personality, equality, the pursuit of happiness and the right to hold public office and was also in violation of the rule against excessive restriction.

II. By a 5 to 4 vote, the Constitutional Court found that the provision at issue was not unconstitutional.

If a contribution to those having a connection with the electorate brings influence to bear on those with such a connection, such influence has to be blocked out, even if the recipients of the contribution are not part of the electorate. The provision describes this relatedness as “having connection with.” This is an abstract expression, but the legislative intent of the provision is easily understood, taking into consideration the legislative purpose of prohibiting contributions, the relationship with other provisions, and technical limitations on legislating.

In the practical application of the provision, there is little risk of inconsistent interpretation, due to subsidiary interpretation by the judge. It does not, therefore, fall within the category of arbitrary interpretation and enforcement on the part of the authorities; neither does it violate the rule of clarity and the principle of *nulla poena sine lege*.

Whether somebody belongs to a group which is restricted in terms of contributions under Article 113.1 of POEA is determined not only by subjective intent but also by indications of his or her intention to become a candidate, based on factors such as personal status, contacts and behaviour.

As to whether somebody falls within the category of persons intending to become candidates, the question arises as to which election is the basis for determination (the present election, future elections or concurrent, multiple elections). The Court noted

that the question should be determined on the basis of the present election; the phrase “a person intending to become a candidate” presents no problem in terms of the rule of clarity.

The legislative purpose of the provision restricting contributions is to guarantee the fairness of elections by penalizing election campaigns which may distort the free will of the electorate with unjustified financial interest. The legitimacy of the legislative purpose and the appropriateness of the means are therefore acknowledged. The range of contributions prohibited is covered by Article 112, and the National Election Commission Rule prescribes a list of non-prohibited contributions. Certain contributions may not fit into the category of non-prohibited acts, such as the regular activities of a political party, activity *ex officio*, or customary act as defined in Article 112.2, but it may be possible to justify them as a type of customary *ex officio* action forming part of a conventional life style within the boundary of a historically created social order. (the Supreme Court of Korea, 29.06.2007 declared 2007do3211). On this basis, the Court found that the rule of the least restrictive means was not violated.

Without fairness in elections, the will of the people over their choice of candidate would be distorted and representative democracy would itself be threatened. In order to protect the fairness of elections and democracy, restrictions on basic rights within the scope of non – infringement of essential elements is permissible, as it satisfies the balance of different legal interests.

The Court found the provision at issue to be in line with the rights to personality, equality, the pursuit of happiness and the right to hold public office and that it did not violate the rule against excessive restriction.

#### Cross-references:

Former decisions concerning similar issues:

- Decision of 27.11.1997, 1996Hun-Ba60, 9-2 *KCCR Korean Constitutional Court Report* (Official Digest), 629;
- Decision of 30.06.2005, 2003Hun-Ba90;
- Decision of 28.12.2006, 2005Hun-Ba23.

#### Languages:

Korean, English (translation by the Court).



# Liechtenstein

## State Council

---

### Important decisions

*Identification:* LIE-2010-3-003

**a)** Liechtenstein / **b)** State Council / **c)** / **d)** 01.09.2009 / **e)** StGH 2019/161 / **f)** / **g)** / **h)** CODICES (German).

*Keywords of the systematic thesaurus:*

3.20 General Principles – **Reasonableness**.  
 3.22 General Principles – **Prohibition of arbitrariness**.  
 5.1.1.4.3 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Detainees**.  
 5.3.5.1.3 Fundamental Rights – Civil and political rights – Individual liberty – Deprivation of liberty – **Detention pending trial**.

*Keywords of the alphabetical index:*

Crime prevention, individual and general / Law, application, incorrect / Release, conditional / Abuse, right.

*Headnotes:*

General and outright exclusion of an offence or a group of offenders, without examination on each occasion of the actual case in point, is not countenanced by the legislation governing conditional release, and would ultimately result in rendering this legal institution devoid of substance. The stance that consists of considering the case before the court indiscriminately and without reference to the case in point is contrary to the principle proscribing the abuse of rights, because it results in an unjustifiable use of the law and is based on a decision that does not need to be objectively founded.

*Summary:*

I. The Court (*Landgericht*), ruling as a court with jurisdiction in criminal cases, dismissed the application for conditional release submitted on the basis of § 46 of the Penal Code (StGB) by a trustee convicted of misappropriation, stating grounds of general deterrence, having regard to the special

position of trust held by trustees in Liechtenstein. The higher court upheld this decision.

II. The State Council allowed the individual appeal brought against the decision for infringement of the principle proscribing abuse of rights, as there had been no specific analysis of the case in point.

*Languages:*

German.





# Lithuania

## Constitutional Court

---

### Important decisions

*Identification:* LTU-2010-3-009

**a)** Lithuania / **b)** Constitutional Court / **c)** / **d)** 07.09.2010 / **e)** 07/08 / **f)** On state awards conferred on individuals / **g)** *Valstybės Žinios* (Official Gazette), 106-5466, 09.09.2010 / **h)** CODICES (English, Lithuanian).

*Keywords of the systematic thesaurus:*

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

1.3.5.6 Constitutional Justice – Jurisdiction – The subject of review – **Decrees of the Head of State.**

4.4.3.1 Institutions – Head of State – Powers – **Relations with legislative bodies.**

*Keywords of the alphabetical index:*

State award / Honour, state / President, powers.

*Headnotes:*

The legal regulation that establishes the powers of the Presidium of the Supreme Council of the Republic of Lithuania with regard to state awards is in conflict with the constitutional provisions providing that state awards are conferred by the President of the Republic.

*Summary:*

I. A group of parliamentarians brought a case before the Constitutional Court, challenging the presidential decree which conferred a state award on a Russian citizen. They argued that the award was conferred on him in the absence of any documents describing him or his merits, in contravention of the procedural rules set out in the law and with a title and class of order which differed from that set out in the Law on Orders, Medals and Other Decorations then in force. They reached the conclusion that the President of the Republic had taken over the powers of Parliament (*Seimas*) in the establishment of the system of state awards as well as the titles of state awards.

II. The Court noted that, under the Constitution, Parliament may establish state awards by enacting legislation. Such legislation could, for example, set out the system for making the awards, the type of awards that could be granted, the insignia and the grounds for conferring them. The President of the Republic confers state awards (which are established by means of legislation passed by Parliament) by issuing decrees. Consent is not needed from the Prime Minister or the corresponding Minister.

The Court noted its own doctrine regarding state awards, namely that this is a sign of the state's estimation towards a person. State awards are a way of honouring, in the name of the state, people who have shown meritorious conduct towards the State of Lithuania through exceptional deeds demanding extraordinary efforts and perhaps self-sacrifice, providing exceptional benefits to the state, society as a whole and certain spheres of national life. Parliament enjoys a wide degree of discretion when establishing state awards and the system underlying them, but it must follow the constitutional concept of state awards, which implies that they are granted for merit and, specifically, meritorious conduct towards Lithuania (the State, society as a whole and certain spheres of national life). The grounds under which persons can receive awards must be clear and must be established by the law. The law should also establish a procedure for nominating somebody for a state award. If somebody receives one, this is not implementation of a right or a legitimate expectation, even though he may have displayed meritorious conduct towards Lithuania. Rather, it is an assessment of his merits, which depends on the discretion and will of the President of the Republic. The President of the Republic has a relatively broad freedom of discretion to decide whether or not to give somebody an award. The President is not under a constitutional obligation to grant a certain state award to a certain person or persons for certain merits. However, when granting state awards the President of the Republic must heed the requirements to perform the duties of his office conscientiously and to be equally just to all.

The Court also noted that one of the legislator's duties under the Constitution to the legislator is to establish grounds for conferring state awards which would make it clear which persons should not receive state awards at all. The legislator should not establish a final list of persons to be awarded or of merits which would attract an award. In its regulation of the procedure for conferring state awards, and whilst consolidating the powers of corresponding subjects such as Ministers to nominate persons who are to receive state awards and establishing the procedure for the consideration of issues surrounding the conferring of state awards in

certain institutions, the legislator may not establish a legal regulation which would deny the power of the President of the Republic to confer state awards, which stems from the Constitution. Amendments to and limitations on the powers of the President of the Republic in this area, and the establishment of a procedure for implementing these powers whereby the President's actions would be bound by the decisions of institutions or officials not provided for in the Constitution would entail changes to the President's constitutional competence.

III. One dissenting opinion was attached to this decision.

#### *Languages:*

Lithuanian, English (translation by the Court).



#### *Identification:* LTU-2010-3-010

**a)** Lithuania / **b)** Constitutional Court / **c)** / **d)** 27.10.2010 / **e)** 32/2010-33/2010 / **f)** On the constitutional compliance of the conduct of two parliamentarians against whom impeachment proceedings had been instituted / **g)** *Valstybės Žinios* (Official Gazette), 128-6545, 30.10.2010 / **h)** CODICES (English, Lithuanian).

#### *Keywords of the systematic thesaurus:*

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

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

#### *Keywords of the alphabetical index:*

Member of Parliament, position, abuse.

#### *Headnotes:*

Use of the certificate of voting of another parliamentarian at plenary sittings of Parliament and deliberate voting in the place of another parliamentarian constitute a gross violation of the Constitution.

A Member of Parliament went on a personal trip abroad and as a result, failed to attend, without compelling and valid reasons, the plenary sittings of Parliament and Parliamentary Committee sessions. This was held to constitute a gross violation of the Constitution and to imply the breach of the parliamentarian's oath. The fact that the parliamentarian used a diplomatic passport on a personal trip abroad was found not to be unconstitutional.

#### *Summary:*

I. A constitutional justice case was initiated by parliamentary resolution, in order to determine whether the activities of two Members of the Parliament which were indicated in the conclusion of the Parliamentary Special Commission for the Investigation into the Reasonableness of Proposals Submitted by Members of Parliament (*Seimas*) to Institute Impeachment Proceedings were in conflict with the Constitution. The Court had to examine the compliance with the Constitution of certain activities including using another parliamentarian's certificate in order to vote, deliberately voting in his place or making public statements that bore no relation to reality, as to how another parliamentarian came to vote in the place of another. It also examined the fact that the parliamentarian went on a foreign trip and therefore failed to attend, without good reason, plenary sessions of Parliament as well as parliamentary committee sessions, told deliberate lies to Parliament in order to cover up non-attendance at parliamentary sessions and left behind a parliamentarian's certificate and made no attempt to find it, giving rise to conditions whereby somebody else could use that certificate. and making use, during a personal trip abroad, of a diplomatic passport which had been issued to him.

II. The Court emphasised that the Constitution unreservedly requires Members of Parliament to take an oath of loyalty to the State of Lithuania alone. They must also pledge to respect and observe the Constitution and laws. When they take this oath, Members of Parliament unreservedly undertake to respect all constitutional values. The Constitution also requires that all Members of Parliament unreservedly pledge to conscientiously serve their homeland, democracy, and the welfare of the people of Lithuania. The act of the oath of a Member of Parliament has important legal significance; when he takes it, he publicly and solemnly accepts an obligation to act in line with the obligations of the oath and not to break it under any circumstances. Loyalty to the State of Lithuania is inseparable from loyalty to the Constitution; in breaking the oath of loyalty to the State of Lithuania, a person also grossly violates the Constitution.

The Court also noted that the responsibility of state power for the public is inseparable from the constitutional principle of a state under the rule of law; it is consolidated from a constitutional perspective by establishing that state institutions are to serve the people, and that the scope of power is to be limited by the Constitution; in a democratic state under the rule of law, state institutions and their officials must be guided by law in their activities.

Under the Constitution, a Member of Parliament is a professional politician. The continuity of the activity of Parliament implies the continuity of the activity of the Member of Parliament. The constitutional status of the Member of Parliament as a representative of the nation implies a constitutional duty on his part to represent it and thus also his duty to take part in parliamentary sessions. This duty also includes an obligation to participate in the work of structural sub-units of Parliament to which he belongs and to discharge all the other powers of Members of Parliament as set out in the Constitution, in the legislation and the Statute of the Parliament.

The Court concluded that by voting on numerous occasions at plenary sessions of Parliament in the place of another Member of Parliament, the parliamentarian disregarded the principle of the free mandate of Members of Parliament which is entrenched in the Constitution, *inter alia* the requirement of the individuality of the mandate, and the prohibition that arises from it on voting at a parliamentary session in the place of another. By taking this action, he expressed his own will rather than that of another parliamentarian, and usurped the right of a Member of Parliament to vote at his own discretion in the course of the adoption of laws and other acts of Parliament and he also distorted the results of voting. In using the other parliamentarian's vote during plenary parliamentary sessions, he held his office dishonestly, violated the imperatives arising from the Constitution, showed disrespect for the Constitution and laws, and discredited the authority of Parliament as the representation of the Nation.

The Court also concluded that because the parliamentarian went on a foreign tour of Asian states and therefore failed to attend, without compelling and valid reasons, the plenary sittings of Parliament, he neglected his duties, put his interests ahead of those of the nation and the state and deliberately failed to perform the duties set out for Members of Parliament in Constitution and the laws, thus showing disrespect for the Constitution and the laws. He did not act in the way he should have done under the oath he had sworn. Through this conduct, he discredited the authority of Parliament as representative of the nation and broke his oath, which entails a gross breach of the Constitution.

III. Two dissenting opinions were attached to the decision, in which the view was expressed that the conduct outlined above on the part of the two parliamentarians was not sufficiently serious to constitute or to imply a breach of the oath.

#### *Languages:*

Lithuanian, English (translation by the Court).



#### *Identification:* LTU-2010-3-011

**a)** Lithuania / **b)** Constitutional Court / **c)** / **d)** 09.11.2010 / **e)** 26/2009 / **f)** On elections to the European Parliament / **g)** *Valstybės Žinios* (Official Gazette), 133-6800, 13.10.2010 / **h)** CODICES (English, Lithuanian).

#### *Keywords of the systematic thesaurus:*

3.3.1 General Principles – Democracy – **Representative democracy**.  
 4.9.3.1 Institutions – Elections and instruments of direct democracy – Electoral system – **Method of voting**.  
 5.3.41.2 Fundamental Rights – Civil and political rights – Electoral rights – **Right to stand for election**.

#### *Keywords of the alphabetical index:*

European Parliament, member, election / Political parties / Electoral candidature, list.

#### *Headnotes:*

The legislator may not establish a legal regulation whereby citizens of the Republic of Lithuania and citizens of other Member States of the European Union who reside permanently in Lithuania may only stand for election to the European Parliament if they are entered in lists of candidates for election to the European Parliament which are drawn up by political parties.

#### *Summary:*

I. The Supreme Administrative Court of Lithuania introduced a petition before the Constitutional Court

with a view to assessing whether a legal regulation to the effect that candidates for election to the European Parliament can only be nominated by political parties is in compliance with the Constitution. The petitioner expressed concerns over the constitutionality of such a system, where the only guaranteed way of standing as a candidate is to be nominated in a list drawn up by a political party.

II. The Court emphasised that political parties fall within the category of associations, the aim and purpose of establishment and activity of which are inseparable from pursuit of political power. Under the Constitution, no legal regulation is allowed which could prevent political parties or the candidates they nominate or support from participating in elections to representative political institutions. Consequently, under the Constitution, the proportional electoral system entrenched in the Lithuanian Law on Elections to the European Parliament, where candidates entered on lists of political parties compete for mandates as Members of the European Parliament, is allowed. However, the right of political parties to nominate candidates for election to the European Parliament may not be entrenched as the exclusive one. As the legislature has opted for the proportional electoral system, in addition to enshrining within the law the right of political parties to take part in elections, it must also designate other collective subjects which may be able to participate and which are entitled to put candidates forward, by means of lists, in elections to representative political institutions.

The Court also noted that the Constitution enshrines the institution of political organisations as well as that of political parties. Political parties are a type of political organisation: they are associations, with essential aims or tasks which are exclusively related to political activity, striving to be elected to institutions of political power and to participate in exercising the state power. The Constitution allows for the existence of other organisations alongside political parties, which people join in order to conduct activities which are useful to society. These associations also raise certain political aims, such as taking part in elections to representative political institutions. Such organisations, which are founded in order to meet various socially important needs and which also raise political aspirations, are in line with the constitutional concept of political organisations. It should be noted that the constitutional concept of political organisations does not only encompass those which function on a permanent basis. It also embraces political organisations which are founded for participation in specific elections to the European Parliament (such as associations for elections). Political organisations must be distinguished from

political parties; the peculiarities of founding them and their activities must be established in legislation. The legislator, in defining the concept of political organisations in the law, may allow for their diversity. This includes political organisations which are founded in order to implement certain political aspirations, for instance to take part in specific elections to the European Parliament.

If the legislator, having opted for the proportional electoral system alone, established a legal regulation entrenching the exclusive right of political parties or the members or candidates they support to participate in the formation of representative political institutions, this would mean that the opportunities for the exercise of the passive electoral right of those citizens who do not belong or are not affiliated to any political party would be burdened in a disproportionate manner by comparison with the opportunities of persons who belong to or who are affiliated to a political party with ties that fall short of formal membership. Such a legal regulation would also unreasonably exclude other collective subjects, such as political organisations, from taking part in elections to representative political institutions, as they would not be included in the lists of candidates for election. It would create preconditions to violate the imperatives of justice and proportionality stemming from the Constitution, *inter alia* from the constitutional principle of a state under the rule of law, and to disregard the principles of electoral law stemming from the Constitution. Thus, as the legislature has established the proportional electoral system in the Republic of Lithuania, the regulation in the Law on Elections to the European Parliament whereby only political parties can present lists of candidates for elections to the European Parliament is not constitutionally justifiable.

III. No dissenting opinions were attached to this decision.

*Languages:*

Lithuanian, English (translation by the Court).



# Mexico

## Supreme Court

---

### Important decisions

*Identification:* MEX-2010-3-016

**a)** Mexico / **b)** Supreme Court / **c)** Plenary / **d)** 04.03.2003 / **e)** 171 / **f)** Constitutional challenge 51/2002 Municipality of Santiago Amoltepec, Sola de la Vega, State of Oaxaca, against the Executive and Legislature of the above federal entity / **g)** *Semanario Judicial de la Federación*, Tome XVIII, December 2003, 597; IUS 182, 713; *Relevant Decisions of the Mexican Supreme Court*, 567-568 / **h)**.

*Keywords of the systematic thesaurus:*

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.**

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

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

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

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

*Keywords of the alphabetical index:*

Municipal council, dissolution.

*Headnotes:*

Municipal councils are entitled to defend themselves, before their dissolution is declared, and proper procedures must be followed, in accordance with the Constitution.

*Summary:*

I. A constitutional challenge (51/2002) was launched against Decree 111, dated 30 July 2002, which declared the full dissolution of the Municipal Council of Santiago Amoltepec, Sola de la Vega, State of Oaxaca, published on the same date as an attachment to the State of Oaxaca Official Gazette. It was alleged in the challenge that the Decree had breached Articles 14, 16 and 115 of the Federal Constitution.

II. The Supreme Court ruled that the challenged decree had breached Article 14 of the Federal Constitution, as members of the Council were not given the opportunity to introduce evidence in the procedure that must be followed when the dissolution of a Council is declared. The decree also violated Article 14 of the Federal Constitution because it lacked due basis and motivation, in that Article 115 of the Federal Constitution, paragraph IX of the State of Oaxaca Constitution and Articles 67, 69 and 74 of the Local Municipal Law do not authorise local legislatures to dissolve councils, but only to declare their dissolution following prior compliance with the formalities of the procedure established for this purpose.

Article 115.1 of the Federal Constitution stipulates that the municipalities are another basis of the territorial division and political and administrative organisation of the states, and that they are administered by a popularly elected city council. Local legislatures may declare, with the agreement of two-thirds of their membership, the dissolution of councils for any serious cause provided for in local legislation, provided that the council members are offered the chance to present evidence and submit the defence that best serves their interests.

In order to declare the dissolution of a municipal council, a procedure must be implemented, allowing a right of defence for council members, ensuring that the relevant local constitutions and laws set out accurately the serious causes that may result in dissolution, as well as other necessary requirements, as established under Article 41 of the Federal Constitution.

In this case, there was no proof whatsoever that the municipal council of Santiago Amoltepec, Sola de la Vega, State of Oaxaca was informed of the initiation of the proceedings for its dissolution. As a result, it was denied the possibility of a timely and appropriate defence. Therefore, the Supreme Court overturned Decree 111 of 30 July 2002 and held that the dissolution of the Council in question was null and void.

*Languages:*

Spanish.

*Identification:* MEX-2010-3-017

**a)** Mexico / **b)** Supreme Court / **c)** Second Chamber / **d)** 09.05.2003 / **e)** 188 / **f)** Contradicting Resolutions 123/2002 Between the First Collegiate Labour Court of the Sixth Circuit and the Third Collegiate Administrative Court, Eighth Collegiate Civil Court, and Sixth Collegiate Labour Court of the First Circuit; First Administrative and First Collegiate Civil Court of the Second Circuit; First Collegiate Labour Court of the Third Circuit, First Collegiate Court, Eighth Circuit, First Collegiate Court of the Fifth Circuit and First Collegiate Court of the Twentieth Circuit / **g)** *Semanario Judicial de la Federación*, XVII, June 2003, 285; IUS 184, 002; *Relevant Decisions of the Mexican Supreme Court*, 551-552 / **h)**.

*Keywords of the systematic thesaurus:*

1.2.2.5 Constitutional Justice – Types of claim – Claim by a private body or individual – **Trade unions**.

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

5.3.13.26 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to have adequate time and facilities for the preparation of the case**.

*Keywords of the alphabetical index:*

Proceedings, defect, remedy / Procedural fairness, principle.

*Headnotes:*

If a trade union brings constitutional relief proceedings and the opposing party is also a trade union, the Court is not obliged to allow the substitution of a defective complaint. This does not mean that the complaining trade union is under a procedural disadvantage in terms of the principle of equality of arms.

*Summary:*

I. In case 123/2002, the Second Chamber of the Supreme Court resolved conflicts which had arisen between various Circuit Courts. It noted that there was a conflict between the opinion of the Sixth Circuit First Collegiate Labour Court and that of the Third Circuit First Collegiate Labour Court. It held that the Third Circuit Court's opinion should be laid down as jurisprudence.

The Sixth Circuit Labour Court ruled that in direct relief proceedings where the disputed act decreed the cancellation of the registration of the union (where unions participated as plaintiffs and as aggrieved third parties), substitution of the complaint in accordance with the procedure set out in Article 76.IV of the *Amparo* Act can be made when the constitutional action is exercised by a union in defence of its interests and to the benefit of its members. However, the Third Circuit Labour Court ruled that in such circumstances, it is not legally valid to substitute a defective legal complaint when different unions are involved in the proceedings as plaintiff and aggrieved party.

II. Examination of the history of the practice of substituting defective complaints shows that the legislator, in accordance with the distributive justice principle, instituted it in favour of specific subjects (considered to be the weaker parties to relief proceedings) in the interests of procedural balance. This allowed for the setting aside of certain formalities that ran counter to the administration of justice.

With regard to relief proceedings in the sphere of labour relations (Article 76bis.IV of the *Amparo* Act), the legislator established that this should be applied exclusively in favour of workers who have resorted to a lawsuit as individuals or corporate entities in defence of rights granted under Article 123 of the Mexican Labour Act which have been jeopardised by any act of authority, whatever its origin. If a fundamental right established under constitutional or ordinary labour legislation has been affected to the detriment of the worker or workers who has launched the lawsuit or who is availing himself or herself of one of the remedies established under the *Amparo* Act, the constitutional control agency must enforce the substitution in favour of the plaintiff.

The rationale behind the possibility of substituting defective complaints is to achieve a procedural balance between the parties. This balance is not disturbed when different unions are participating in the proceedings as plaintiff and defendant, as both parties are unions and therefore in a position of equality. There is no need for the substitution in such cases.

*Languages:*

Spanish.

*Identification:* MEX-2010-3-018

**a)** Mexico / **b)** Supreme Court / **c)** First Chamber / **d)** 14.05.2003 / **e)** 167 / **f)** Contradicting Resolutions 57/2002 – PS Between the First Collegiate and Fifth Collegiate Criminal Courts of the First Circuit / **g)** *Semanario Judicial de la Federación*, Tome XVIII, August 2003, 175; IUS 183, 484; *Relevant Decisions of the Mexican Supreme Court*, 555-557 / **h)**.

*Keywords of the systematic thesaurus:*

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

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

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

5.3.15 Fundamental Rights – Civil and political rights – **Rights of victims of crime.**

*Keywords of the alphabetical index:*

Procedural fairness, principle / Law, amendment / Victim, equal treatment / Proceedings, defective.

*Headnotes:*

Replacing an incomplete penal charge in favour of the victim of the crime is not legally valid when he or she is also the plaintiff in proceedings for constitutional relief.

*Summary:*

I. Conflicting opinions had emerged from First Circuit Criminal Courts in their decisions over the substitution of defective charges in the case of the plaintiff or the victim of a crime. The Seventh Criminal Court found that it was lawful to replace a defective charge filed against the victim and plaintiff, basing its decision on Article 76bis.II of the *Amparo* Law. The Fifth

Collegiate Criminal Court concurred with this approach, but based its decision on Section VI of the same Article. The conflict which needed to be resolved was whether Sections II or VI of Article 76bis of the *Amparo* Act should be taken as a basis to complement defective charges in favour of the plaintiff.

A second conflict also arose as a result of cases upheld by the First and Seventh Criminal Courts of the First Circuit. The Seventh Criminal Court was of the opinion that the term “offender” in Article 76bis.II of the *Amparo* Act (regarding substitution of deficient charges) should not always be interpreted as meaning the accused. The reforms in Article 20 of the Constitution of September 2000 establish that equal recognition is to be given to safeguarding the interests of the accused and those of the victim or plaintiff in order to achieve a balance between and equal protection of their procedural rights. The regulatory law is required to grant equal treatment. The Court also noted that it was not necessary to await the modification of the relevant provisions, as the Constitution requires that relief is provided by institutions protecting individual rights. Social justice is not compromised by the victim receiving a fair hearing in a timely and expeditious manner.

The First Circuit Court, however, argued that in cases where the victim or plaintiff is appealing against decisions of the prosecuting authorities, substitution of the charge is of no assistance, as none of the assumptions contained in Article 76bis of the *Amparo* Law are effective. Although criminal matters are contemplated in Section II of this Article, substitution is possible under the hypothesis that it is in favour of the “offender” (that is, the individual serving a sentence, also referred to as the “accused” or “defendant”) but not if it is in favour of the victim or plaintiff, who is in opposition to the person in whose favour substitution is sought. Substitution should be available to the person charged with a crime and not to the person who suffers from the perpetration of an offence. Thus, in the absence of reform to Article 76bis of the *Amparo* Law, the principle of literal interpretation should prevail.

II. With regard to the first conflict, the First Chamber of the Supreme Court held that under Article 76bis of the *Amparo* Law, authorities who are aware of the constitutional dispute are required to replace the defective charge where there has been a clear legal violation against the plaintiff or petitioner. If he or she has been rendered defenceless, replacement is even possible in certain circumstances in civil, administrative, agricultural and labour matters. Section II of the above precept specifies the cases where substitution is legally valid. Examination of the reasons for the addition of the article in question

shows that this concept only comes into play when the deficient concepts of violation or grievance are expressed in the relief proceedings by the offender in the criminal proceedings; it serves as reassurance that the decision, whether it is favourable or adverse, is lawful. Section VI cannot, therefore, serve as a basis for substitution in favour of the victim of the crime whenever the latter appears as plaintiff in relief proceedings. If the legislator had intended it to apply to criminal, employment or agricultural cases, such an imperative would have been established for all matters, rather than the indication "in other matters". Then, if the legislator had become aware of the existence of an evident violation of the law rendering the plaintiff defenceless, he would have been obliged to substitute the deficiency in favour of the plaintiff.

III. The Chamber then examined the second conflict, and concluded that the hypothesis established under Article 76bis.II of the *Amparo* Law does not automatically apply to the aggrieved party whenever he or she appears as plaintiff in the lawsuit arising from criminal proceedings. Analysis of the reasons for the reforms that led to the enactment of this provision show that substitution of the charge in question is only applicable when the deficient concepts of violation or grievances are expressed as relief by the offender in the criminal proceedings. It is also risky to equate the victim with the offender, given that the same legal hypothesis is not applicable to both. The former represents the antagonistic figure to the person cited in the section; that is, the individual guilty of the offence. The Chamber emphasised that this occurs independently of the reform in question, whereby a subparagraph B was added to Article 20 of the Constitution to recognise the rights of the victim or plaintiff in criminal proceedings as individual guarantees. Relief proceedings are governed by different legislation from that which regulates criminal proceedings.

#### *Languages:*

Spanish.



#### *Identification: MEX-2010-3-019*

**a)** Mexico / **b)** Supreme Court / **c)** Plenary / **d)** 25.08.2003 / **e)** 198 / **f)** Relief proceedings under review 3488/98 / **g)** *Semanario Judicial de la Federación*, Tome XVIII, August 2003, 50 and 51; IUS 183, 480; 183, 479; *Relevant Decisions of the Mexican Supreme Court*, 575 / **h)**.

#### *Keywords of the systematic thesaurus:*

4.6.2 Institutions – Executive bodies – **Powers**.  
4.7.1.1 Institutions – Judicial bodies – Jurisdiction – **Exclusive jurisdiction**.  
5.3.35 Fundamental Rights – Civil and political rights – **Inviolability of the home**.

#### *Keywords of the alphabetical index:*

Search, warrant / Search warrant, judicial / Search warrant, validity / Administrative authority, power.

#### *Headnotes:*

Search warrants ordered by administrative authorities are unconstitutional. Under the Constitution, and on the basis of the inviolability of citizens' homes, only the judicial authority has the power to issue them.

#### *Summary:*

I. Under Article 16.8 of the Federal Constitution, the issuance of search warrants falls within the sole remit of the judicial authority. Certain formal requirements are in place to ensure fairness. Administrative authorities, however, only have the power, in citizens' homes, to ensure compliance with health and police regulations and to request the production of accounting books and papers in order to support compliance with tax provisions. Article 16.11 of the Constitution authorises administrative authorities to issue written orders for site visits to be conducted in conformity with the respective laws, which state the location and the material to be inspected and to allow for the production of a circumstantiated report in the presence of two witnesses proposed by the person whose home is being inspected, or, if he or she is absent or refuses to cooperate, by the authority conducting the site visit.

The plaintiff challenged Articles 156 and 157 of the State of Nuevo León Tax Code, which allows administrative authorities to order search warrants.



II. The Supreme Court indicated in its ruling that Article 16 of the Federal Constitution protects the inviolability of citizens' homes. This is the basis on which the Constitution establishes that the issuance of search warrants falls solely within the remit of the judicial authority and that administrative authorities only have the power to conduct site visits in order to ascertain whether health or police regulations have been complied with, and to require the production of accounting books and papers to establish whether tax provisions have been complied with.

Therefore, the two types of authority granted to other types of authoritative bodies are clearly distinguishable. Only the judicial authority may validly issue search warrants, whereas the issuance of site visit orders is the responsibility of the administrative authority. Consequently, legislation authorising administrative authorities to issue search warrants are unconstitutional, as constitutional law does not grant them such authority. The Supreme Court held that Articles 156 and 157 of the State of Nuevo León Tax Code were unconstitutional insofar as they authorised the administrative authority to issue search warrants, so that the administrative authority did not have to confine itself, in citizens' homes, to checking compliance with health or police regulations or asking for accounting books and papers to be produced in order to verify compliance with tax legislation.

#### *Languages:*

Spanish.



#### *Identification:* MEX-2010-3-020

**a)** Mexico / **b)** Supreme Court / **c)** Second Chamber / **d)** 19.09.2003 / **e)** 201 / **f)** Judicial review 940/2003 / **g)** *Semanario Judicial de la Federación*, Tome XVIII, November 2003, 268 and 269; IUS 182, 796; 182, 762; *Relevant Decisions of the Mexican Supreme Court*, 583-584 / **h)**.

#### *Keywords of the systematic thesaurus:*

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

4.6.9 Institutions – Executive bodies – **The civil service.**

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

5.4.3 Fundamental Rights – Economic, social and cultural rights – **Right to work.**

#### *Keywords of the alphabetical index:*

Constitution, federal and regional / Labour, contract / Legislative power, limitation / Civil servant, rights and obligations.

#### *Headnotes:*

Local legislatures may enact legislation governing the labour relationships between States and municipalities and their employees, on the basis set out in the Constitution.

#### *Summary:*

I. In its ruling on relief proceedings under review 940/2003, the Second Chamber of the Supreme Court established an important criterion regarding the possibility of extending labour rights recognised under the Federal Constitution to local Constitutions. The plaintiff in the case had alleged that Article 8 of the Law for Civil Servants of the State of Jalisco and its Municipalities breached the provisions set out in clauses XI and XIV of paragraph B of Article 123 of the Federal Constitution in relation to Articles 14, 16, 115, 116, and 133 of the Federal Constitution by establishing the right to stable employment for federal employees.

II. The Court recalled that in several of its decisions, it had concluded that state legislatures could establish laws over and above the minimum laws set out in the Federal Constitution with regard to employees. Clause XIV of paragraph B of Article 123 of the Federal Constitution leads one to understand that executive employees enjoy the protective measures of their salaries and Social Security benefits. Yet clause XI of the article, along with the final clause of Articles 115.VIII and 116.V of the Federal Constitution, have been interpreted by the Court as meaning that the employees mentioned above are excluded from stability of employment and from the rights arising from this prerogative. The Court has also recognised that Article 123 of the Federal Constitution is limited to protecting the minimal labour rights that can be validly improved by any other legal stipulations or provisions.

The legislative process arising from Article 123.B of the Constitution can be construed as meaning that this article provides the minimum basis of protection for employees. Thus, if paragraph XIV of Article 123 of the Constitution establishes that executive employees shall enjoy the protective measures of their salaries and social security benefits, it only follows that such workers are entitled to the minimum rights mentioned. It does not imply that these rights can never be extended. Also, the right to continuity of employment enjoyed by civil servants does not exclude administrative staff. Although the Constitution itself appears to differentiate between administrative staff and executive employees, clauses IX and XIV of paragraph B (above) clearly demonstrate that such distinction is inadmissible.

Under the Constitution, local legislatures may enact laws that govern the labour relationships between the states and their employees, on the basis set out in Article 123 of the Federal Constitution and its regulatory provisions. It is therefore feasible that, in the normal working environment of executive employees, as established under the laws governing their functions, they are entitled to enjoy continuity of employment.

#### *Languages:*

Spanish.



#### *Identification:* MEX-2010-3-021

**a)** Mexico / **b)** Supreme Court / **c)** First Chamber / **d)** 21.01.2004 / **e)** 207 / **f)** Judicial review 2346/2003 / **g)** *Semanario Judicial de la Federación*, Tome XIX, March 2004, 1305; 130; IUS 181, 938; *Relevant Decisions of the Mexican Supreme Court*, 599-602 / **h)**.

#### *Keywords of the systematic thesaurus:*

5.2.1.2.2 Fundamental Rights – Equality – Scope of application – Employment – **In public law.**  
5.3.42 Fundamental Rights – Civil and political rights – **Rights in respect of taxation.**

#### *Keywords of the alphabetical index:*

Case-law, development / Civil servant, status / Tax, personal income / Tax, exemption / Worker, public, private, difference.

#### *Headnotes:*

The reasoning contained in a judgment issued in constitutional proceedings and actions of unconstitutionality are binding case-law.

#### *Summary:*

I. The plaintiff requested relief proceedings in the federal courts against the issuance, promulgation, extension, and publication of the Income Tax Act, particularly Article 109.XI amended by the Decree published in the Official Gazette on 30 December 2002. He suggested that the tax lacked fairness and that taxpayers in the same legal situation would be treated in a different way. Under the above provision, the income of persons in the service of the Federation and the states, subject to general labour conditions, would be exempted with regard to the income they obtained through bonuses, Christmas bonuses and holiday pay, regardless of the amount.

The judge *a quo* granted relief but the plaintiff was unsatisfied by this and filed a review in which he claimed the violation of Articles 77 to 79 of the *Amparo* Law, arguing that the judge had unduly granted relief against the acts complained about, when pronouncing Article 109.XI of the Income Tax Act to be unconstitutional. The plaintiff added that the argument was inadmissible because it was groundless; the article in question infringed the constitutional principle of tax fairness, as it did not include, within the exemption, the payment of taxes corresponding to private sector workers. He then argued that the legislator had not failed to comply with the constitutional requirement of fairness, by not extending the exemption to private sector workers, but had limited himself to following the intention of the Constituent which, by way of Article 123 of the Federal Constitution, drew a distinction between private and public sector workers. He also observed that in view of the difference that existed between the two sections of Article 123 of the Federal Constitution, it had become necessary to pass two laws: the Labour Act and the Federal State Workers Act. The plaintiff therefore concluded that civil servants are treated differently from other workers. He claimed that the unequal treatment that arose between what were, in his opinion, two different groups of workers, was fair. This would seem to demonstrate that Article 109.IX of the Income Tax Act

did not violate the constitutional guarantee that the judge *a quo* deemed had been infringed, as there were objective reasons allowing the legislator to set out different tax treatments.

According to the plaintiff, the article in question respected the guarantee of tax fairness by covering categories of subjects whose differences, in his view, were well-known and connected with objective elements. He therefore concluded that the aim of the exemption was fair, drawing a distinction between private and public sector workers.

The plaintiff also highlighted the violation of the provisions of Articles 77 and 78 of the *Amparo* Act, pointing out that it was inaccurate to consider that the exemption under scrutiny lacked any objective justification. In his view, its purpose was to achieve an economic balance between different classes of workers. Similarly, contrary to what was said by the judge *a quo*, this case did not concern a decree which would stop certain subjects being taxed for no reason, but rather it was an exemption which could be readily justified and which would not contradict the principle of fairness. The plaintiff therefore requested that the judgment be overturned.

II. The First Chamber of the Supreme Court was competent to resolve the motion to reopen the case, as established under the provisions of Article 107.VIII.a of the Federal Constitution; Article 84.I.a of the *Amparo* Law; and Article 21.XI of the Federal Judiciary Act, and in keeping with the provisions of Point Four, in connection with Point Three, Section II, of Plenary Session General Agreement 5/2001, passed on 21 June 2001, and published in the Official Gazette on 29 June 2001. The Chamber pointed out that Articles 43 and 73 of the Regulatory Act of Sections I and II of the Federal Constitution set out the binding nature of the reasons contained in the considerations, whereas clauses that provide the reasoning of the resolution points of judgements approved by at least eight votes, have the standing of jurisprudence and are binding on Chambers, Circuit Courts and District Courts alike. The judge *a quo* had made these considerations before granting relief.

The First Chamber considered the grievances groundless, with regard to the substance of the unconstitutionality argument put forward. It was of the view that, contrary to the plaintiff's argument, Article 109.XI of the Mexican Income Tax Law did in fact contravene the guarantee of tax fairness, as it incorporated unequal treatment into tax legislation, by limiting exemptions for natural persons providing an independent personal service to an employer and by giving preferential treatment to natural persons

providing a subordinated personal service to the Federation or states. The Chamber argued that both cases involved natural persons who provide a subordinated personal service, and are in the same legal situation and regulated in exactly the same way by tax legislation, in terms of Chapter I of Title IV of the Income Tax Act.

The First Chamber also considered that the challenged article set forth an unjustified distinction, as public sector employees and private sector employees are, in terms of taxation, in the same situation, in that both groups provide a subordinated personal service, following their employer's instructions, performing work on the conditions and with the means provided by the employer. Therefore, if such employees obtain bonuses, both groups must pay the same taxes.

In this case, Article 109.XI of the Income Tax Act stipulates that any bonuses obtained by employees of the Federation or states, subject to general labour conditions, are not subject to income tax, while those obtained by employees in terms of Article 123.A of the Federal Constitution shall be taxable with regard to whichever portion exceeds the parameters set forth in the first paragraph of the above article. As a result, there was clearly a difference between tax-related situations that may be deemed the same, in the absence of objective and reasonable justification. This was upheld by the Supreme Court when it resolved the action of unconstitutionality 9/2003 by declaring that Article 109.XI.2 of the Income Tax Act, amended by a Decree published in the Official Gazette on 30 December 2002, was null and void as it breached the constitutional principle of tax fairness by granting, without justification, the differentiated treatment mentioned above. The criterion derived from this case was binding, as established under the provisions of Articles 43 and 73 of the Regulatory Law of Sections I and II of the Constitution, and Article 105 of the Federal Constitution, and these grounds were considered by the Chamber in its deliberations over the merits of the grievances put forward by the appellant authority.

The First Chamber decided to uphold the sentence appealed against in the motion to reopen the case and grant relief to the plaintiff, in order to remove from its legal sphere the fiscal obligation of paying income tax during the period in which the law in question was in force, and exclusively for income derived from bonuses with a periodicity other than monthly, Christmas and holiday bonuses.

*Languages:*

Spanish.



*Identification:* MEX-2010-3-022

**a)** Mexico / **b)** Supreme Court / **c)** First Chamber / **d)** 03.09.2004 / **e)** 214 / **f)** Contradicting opinions 24/2004-PS, between the Eighth and Thirteenth Collegiate Civil Courts of the First Circuit / **g)** *Semanario Judicial de la Federación*, Tome XX, December 2004, 107; IUS 179, 922; *Relevant Decisions of the Mexican Supreme Court*, 627-629 / **h)**.

*Keywords of the systematic thesaurus:*

5.3.34 Fundamental Rights – Civil and political rights – **Right to marriage**.  
 5.3.38.2 Fundamental Rights – Civil and political rights – Non-retrospective effect of law – **Civil law**.  
 5.3.39 Fundamental Rights – Civil and political rights – **Right to property**.

*Keywords of the alphabetical index:*

Divorce, property claim / Marriage, separation of goods, divorce / Marriage, property, separation.

*Headnotes:*

A rule allowing spouses to ask the Family Court Judge for compensation of up to 50% of the value of the goods acquired by the other spouse during the marriage is not punitive by nature, but rather reparatory, and could be requested and granted in favour of either an innocent spouse or a guilty one in divorce proceedings. It can therefore be applied to marriages concluded before this rule was introduced and did not pose a problem in terms of the non-retroactivity of laws.

*Summary:*

I. The First Circuit Eighth Collegiate Civil Court considered that Article 289bis of the Federal District Civil Code was not applicable to marriages executed prior to 1 June 2000, because this would modify the property rights guaranteed under the separation of goods regime adopted by the spouses before this provision entered into force. However, the First Circuit Thirteenth Collegiate Civil Court considered that the compensation set out in the provision did not amount to a penalty or sanction for spouses ordered to pay it, neither did it modify the rights acquired under the

separation of goods regime. Its application to marriages concluded before the specified date did not infringe the guarantee of non-retroactivity of the law.

II. The First Chamber of the Supreme Court noted the existence of conflicting opinions as to whether the compensation set forth in the article in question could be claimed and granted by a Judge in divorce proceedings filed after the article came into force, but derived from marriages concluded beforehand. The First Chamber resolved that its own criterion should prevail with the standing of jurisprudence, insofar as it does not violate the guarantee of non-retroactivity of the law, given that Article 289bis of the Federal District Civil Code applies to divorce proceedings in connection with marriages concluded before this provision came into force.

According to the First Chamber, the provision makes it possible, in the divorce claim, and given the possibility of dissolving the separation of goods regime that had been agreed, for spouses to ask the Family Court Judge for compensation of up to 50% of the value of the goods acquired by the other spouse during the marriage. In view of Article 14.1 of the Federal Constitution, which prohibits the retroactivity of laws to the prejudice of any person, it was necessary to determine whether the compensation set forth in the provision could be applied to divorce claims filed before it came into effect. Nonetheless, from the point of view of the guarantee of non-retroactivity of the law, the application of the provision to marriages concluded before it came into force did not pose a problem, as this was a regulation on the settlement of a marital economic regime, applicable exclusively to settlements made after the provision came into force, which set aside its retroactive application.

The First Chamber pointed out that Article 178 and the following articles of the Federal District Civil Code, both before and after the 2000 reform, stipulated that the marriage must be concluded under the patrimonial regimes of marital union or separation of goods, but it allows the spouses to freely modulate the specific aspects of these regimes which should be applied if appropriate. If the spouses do not exercise their free will, in full or in part, the Code provides for the procedure to be followed.

In the view of the Chamber, it was not possible to argue that the application of Article 289bis of the Civil Code for the Federal District to marriages concluded before the provision came into effect would be tantamount to a retroactive application of the law to the prejudice of a person, as the article provides for a penalty. According to the First Chamber, the origin of the compensation contained in the above article was

in response to the need to find a means to remedy any unfairness that may arise when the economic regime of separation of goods is settled. This compensation is conceived by the Code as something which a Judge has the discretion but is not obliged to grant, provided a series of circumstances set out in the law takes place.

The First Chamber also explained that the compensation is set in accordance with the economic prejudice suffered by the spouse who has been involved in certain activities, which has meant that they have lost other opportunities and has had an unbalanced effect, which is viewed as being particularly serious in certain cases. The compensation is also complemented by the obligation of the spouses to contribute to the covering of family-related burdens, as set out in Article 164 of the Federal District Civil Code. In effect, the fact that two people marry under the separation of goods regime does not free them from the obligation to contribute to the covering of family-related burdens. The spouse who does not work outside the home covers the family's economic burdens through a non-monetary contribution. The law takes into consideration the fact that this method of contributing to marital – and family – related burdens may prejudice him or her to an extent that may seem disproportionate when a marriage concluded under the separation of estates regime is dissolved. In economic terms, the aim is to compensate the cost of opportunity associated with the inability to perform the same activity in the conventional labour market, where he or she would have obtained the corresponding economic compensation.

As a result, the First Chamber pointed out that the compensation described was not punitive by nature, but rather reparatory, and could be requested and granted in favour of either an innocent spouse or a guilty one in appropriate divorce case. Thus the maximum limit of the compensation stands at 50% of the goods that the spouse working outside the home has acquired during the time the marriage lasted, because it is during this period that the interaction between two types of work on the part of the spouses took place and whose effects on the estate of the spouses it may be necessary to correct.

#### *Languages:*

Spanish.

## Mexico Electoral Court

### Important decisions

*Identification:* MEX-2010-3-023

**a)** Mexico / **b)** Electoral Court of the Federal Judiciary / **c)** High Chamber / **d)** 28.02.2007 / **e)** SUP-JDC-20/2007 / **f)** Enfranchisement of Mexican prisoners / **g)** *Official Collection of the decisions of the Electoral Court of the Federal Judiciary of Mexico* / **h)** CODICES (Spanish).

*Keywords of the systematic thesaurus:*

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

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

5.2 Fundamental Rights – **Equality.**

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

*Keywords of the alphabetical index:*

Election, prisoner, vote, prohibition / Imprisonment, disenfranchisement.

*Headnotes:*

The regime of parole does not imply imprisonment; therefore, it should not lead to the disenfranchisement of citizens under Article 38.II of the Federal Constitution.

*Summary:*

I. On 14 September 2006, Mr Omar Hernández Caballero (the appellant) was granted the regime of parole which, according to Article 196 of the Organic Law of the Judiciary of the State of Mexico (federal entity where the appellant was convicted), has the purpose of the social reinstatement of the individual. Nonetheless, on 6 December 2006, the Federal Electoral Registry denied the issuance of the voter identification card to Mr Hernández Caballero, considering that he was a disenfranchised felon.

II. In an opinion presented by Electoral Justice Salvador Nava Gomar, the Court points out that it is important to note that under Article 38.III and 38.IV of the Federal Constitution, citizens are disenfranchised when imprisoned or if a judicial sentence specifically determines the suspension of political rights as a punishment. In the case in question, the appellant was disenfranchised as a direct and necessary consequence of serving time in prison. However, as stated in Article 43 of the Penal Code of the State of Mexico, the suspension of rights as a necessary consequence of another sanction starts and ends with the punishment that caused the disenfranchisement. Therefore, even though imprisonment carries as a consequence the suspension of political rights, as soon as the time or cause of suspension ends, rehabilitation of the individual should operate without the need of a specific judicial declaration.

The International Covenant on Civil and Political Rights, which is binding for Mexico, establishes that every citizen should be able to take part in the conduct of public affairs, should have the right to vote and be elected, and have access, on general terms of equality, to public service in his or her country (Article 25). Any restriction to these prerogatives should be reasonable and not impair their effectiveness.

The decision also considered the importance of Article 9.1 of the United Nations Standard Minimum Rules for Non-custodial Measures (Tokyo Rules), which states that the competent authority has to have at its disposal a wide range of post-sentencing alternatives in order to assist offenders in their early reintegration into society.

Consequently, the electoral justices of the Court unanimously determined that, as soon as Mr Hernández Caballero concluded his term in prison and entered into a regime of parole, he had to begin his reinstatement in society. Therefore, the Court ordered the Federal Electoral Registry to allow the voter identification card of the appellant to be issued, guaranteeing his right to vote. This credential is a necessary document, not only to vote in elections, but also to realise different administrative, banking and professional processes. The possibility of being able to practice these activities is clearly linked to the reinstatement of ex-felons to society.

#### Cross-references:

- Judgment of the Court of Arbitration of Belgium no.187/2005 of 06.02.2006, *Bulletin* 2005/3 [BEL-2005-3-018];

- European Court of Human Rights, Grand Chamber, *Hirst v. United Kingdom* (no. 2), 06.10.2005 and *Sauvé v. Canada* (Chief Electoral Officer). 3 S.C.R. 519, 2002 SCC 68. Docket: 27677, 31.10.2002.

#### Languages:

Spanish.



#### Identification: MEX-2010-3-024

**a)** Mexico / **b)** Electoral Court of the Federal Judiciary / **c)** High Chamber / **d)** 21.03.2007 / **e)** SUP-JDC-144/2007 / **f)** Access to federal electoral justice / **g)** *Official Collection of the decisions of the Electoral Court of the Federal Judiciary of Mexico* / **h)** CODICES (Spanish).

#### Keywords of the systematic thesaurus:

4.5.4 Institutions – Legislative bodies – **Organisation**.  
5.2 Fundamental Rights – **Equality**.  
5.3.29 Fundamental Rights – Civil and political rights – **Right to participate in public affairs**.

#### Keywords of the alphabetical index:

Political party, leadership, right to access / Political activity, right to participate / Parliament, group, president, removal.

#### Headnotes:

Article 35 of the Federal Constitution guarantees the rights of citizens. One of them is the right to associate freely and to take part in the conduct of public affairs.

Political party activists or members, as Mexican citizens, have the right to participate in the political activity of the country if these rights have not been suspended by any of the provisions of Article 38 of the Federal Constitution.

Nevertheless, in case political-electoral rights of political party activists or members are violated, it is very important to determine if the competent body to resolve the situation is the Electoral Court or if it is an internal question to be settled within the parliament or parliamentary faction.

### Summary:

I. On 3 October 2006, the LIX Legislature of a local Congress of Mexico (in the state of Campeche) formally declared the constitution of the parliamentary groups of the political parties represented in that Congress. It was also stated that Mr Mario Pacheco Ceballos would be the coordinator of the parliamentary group of the National Action Party (PAN). Nonetheless, the President of the Directive Committee of PAN in the state of Campeche informed the representatives of her faction in the local Congress that, from 21 February 2007 onwards, Ms. Yolanda Montalvo López would substitute Mr Pacheco as coordinator of their Parliamentary Group.

Therefore, Mr Pacheco filed Proceedings for the Protection of the Political and Electoral Rights of Citizens before the Electoral Court of Mexico, setting out the following grievances:

1. The undue procedure of removal of a coordinator of a parliamentary group.
2. The absence of legal powers of the President of the Directive Committee of PAN to remove a parliamentary coordinator.
3. The violation of the right of audience or trial of the appellant, considering that he was not notified by the necessary legal means about the removal from the appointed position; and the lack of a procedure to duly inform him about the reasons for such removal.

II. Five of the seven electoral justices of the Court considered that the appeal was unfounded, considering Articles 9.3 and 79 of the Law of Electoral Dispute Resolution of Mexico; therefore, the case was dismissed. Electoral Justice Manuel González Oropeza was the judge rapporteur but, as he dissented from the majority, Electoral Justice Pedro Esteban Penagos López acted as counter-rapporteur. They considered that the case concerned parliamentary Law, which applies to the internal organisation of the different groups in accordance with the legislative powers regarding the organisation, functions, division of responsibilities, exercise of attributions, duties, and privileges of members, as well as the relations between political parliamentary groups.

These judges considered that the removal of the coordinator of a parliamentary group does not transcend the internal organisation of a local Congress. Thus, it did not affect in a direct and immediate manner the political-electoral rights of the citizen, like the right to participate in public affairs of the country or the right of affiliation. The coordination of a parliamentary faction is not a position subject to popular election.

III. On the other hand, two electoral justices, Chief Electoral Justice María del Carmen Alanis Figueroa and Electoral Justice Manuel González Oropeza dissented, considering that the disputed act could be judged as Proceedings for the Protection of the Political and Electoral Rights of Citizens. This was by virtue of the right of audience of the appellant regarding Articles 17, 41.IV and 99.V of the Federal Constitution. They considered that the appellant was deprived of the rights and obligations within the aforementioned legislative organisation and within the political faction where he was a member. These facts were considered as prejudicing the right to access, under equal conditions, a position of party leadership and to participate in political activities of the country.

### Languages:

Spanish.



### Identification: MEX-2010-3-025

**a)** Mexico / **b)** Electoral Court of the Federal Judiciary / **c)** High Chamber / **d)** 06.07.2007 / **e)** SUP-JDC-695/2007 / **f)** Challenges regarding interpretation according to the Constitution / **g)** *Official Collection of the decisions of the Electoral Court of the Federal Judiciary of Mexico* / **h)** CODICES (Spanish).

### Keywords of the systematic thesaurus:

2.1.1.4.11 Sources – Categories – Written rules – International instruments – **American Convention on Human Rights of 1969.**

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

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

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

### Keywords of the alphabetical index:

Election, constitutional requirements / Treaty, ratification / *Dubio pro libertate*, principle / *Dubio pro homine*, principle.

*Headnotes:*

According to Article 133 of the Federal Constitution, international treaties that are signed by the Executive and ratified by the Senate are considered Supreme Law of the Union, as well as laws issued by Congress and the Constitution itself.

When international treaties broaden the application of fundamental rights established in the legal system, all legal provisions have to be harmonised and apply the norms which are most favourable to liberties. To maximise fundamental rights, it is important to apply the principle in *dubio pro libertate* or in *dubio pro homine*.

*Summary:*

I. Article 42 of the local Constitution of the Mexican state of Baja California establishes that members of the federal or local Congress, municipal presidents and other representatives of local government cannot be elected as state governors, even if they give up office. Nonetheless, Article 41.VI of the same local Constitution states that to be state governor it is necessary that candidates are not employed in the federal, local or municipal government, unless they provisionally renounce their office 90 days before the election.

Notwithstanding the provisions of Article 42 of the local Constitution, the municipal president of Tijuana, Baja California, from 1 December 2004 to 30 November 2007, Mr Jorge Hank Rhon, presented himself as a candidate for the governor election of the aforementioned Mexican state to be held on 5 August 2007. The local Electoral Institute granted Mr Hank Rhon registration as candidate, but this was contested by an opposing coalition in the local Electoral Court. This Court revoked his registration and he filed Proceedings for the Protection of the Political and Electoral Rights of Citizens before the High Chamber of the Electoral Court of the Federal Judiciary of Mexico.

II. In the decision, presented by Electoral Justice Pedro Esteban Penagos López, the Court stated that, considering that Article 42 of the Baja California Constitution prohibits municipal presidents in office to be candidates in governor elections and that Article 41.VI provides the possibility to be registered as candidate if the officer in question provisionally gives up office 90 days before election, the Electoral Justices of the Court had to interpret the law as set out by Article 2 of the Law of Electoral Dispute Resolution.

Therefore, the Electoral Justices recognised that, according to Article 133 of the Federal Constitution, international treaties that are signed by the Executive and ratified by the Senate are part of the legal system of our country. Article 23 of the American Convention on Human Rights (Pact of San José) establishes that every citizen has the right to vote and to be elected and that law may regulate the exercise of these prerogatives *only* on the basis of “age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings.” This provision is in accordance with the criteria of the Supreme Court of Justice of Mexico, which states that limitations to political-electoral rights of citizens are only justified when the circumstance or situation is inherent in the person himself or herself (i.e. age, nationality, mental capacity, etc.).

The Electoral Court of the Federal Judiciary gave preeminence to the interpretation of Article 41.VI over Article 42 of the local Constitution, quashed the decision of the local Electoral Court and allowed Mr Hank Rhon the possibility of registration as candidate. This decision tried to maximise the fundamental right of being elected in genuine regular elections.

III. There was one concurring vote elaborated by Electoral Justice Salvador Nava Gomar.

*Cross-references:*

- Judgment of the Constitutional Court of Albania, no. 186 of 23.09.2002, *Bulletin* 2002/3 [ALB-2002-3-007].

*Languages:*

Spanish.

*Identification: MEX-2010-3-026*

**a)** Mexico / **b)** Electoral Court of the Federal Judiciary / **c)** High Chamber / **d)** 01.11.2007 / **e)** SUP-JRC-375/2007 / **f)** Investigation powers of election management bodies and freedom of expression / **g)** *Official Collection of the decisions of the Electoral Court of the Federal Judiciary Mexico* / **h)** CODICES (Spanish).



*Keywords of the systematic thesaurus:*

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

2.1.1.4.11 Sources – Categories – Written rules – International instruments – **American Convention on Human Rights of 1969.**

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

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

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

5.3.31 Fundamental Rights – Civil and political rights – **Right to respect for one's honour and reputation.**

*Keywords of the alphabetical index:*

Election, campaign, media, defamation / Election, campaign, defamation, facts, establishment.

*Headnotes:*

Election management authorities should be able to initiate summary administrative proceedings in order to determine the truth of facts and establish whether audiovisual advertising is contrary to the electoral guiding principles in such matters.

Freedom of expression should not lead to defamation.

*Summary:*

I. An electoral process to elect local representatives in the state of Tamaulipas, Mexico, began on 1 April 2007. On 20 September 2007, the National Action Party (PAN) presented a complaint before the Electoral Council of the Electoral Institute of Tamaulipas (local election management body) against the Revolutionary Institutional Party (PRI). On October 2007 the Electoral Council ruled that the complaint was unfounded because it was not possible to determine that PRI had prepared an election advertisement that contained defamatory messages against PAN, or that it was broadcast on television following PRI's instructions. The local Electoral Court confirmed this decision; PAN took the case to the last instance: the Electoral Court of the Federal Judiciary of Mexico.

PAN argued that when they presented the complaint before the local election management body, regarding the alleged violations to the electoral law, the Electoral Council had the obligation to initiate an exhaustive investigation to find out who had participated in or ordered the preparation and transmission of the election advertisement. If these actions were indeed contrary to the electoral guiding principles, the electoral authority should have taken the necessary measures to avoid their pernicious effects, impose the appropriate sanctions and, as a consequence, set up the corresponding administrative dispute resolution procedure.

II. In the opinion presented by Electoral Justice Flavio Galván Rivera, the High Chamber of the Electoral Court unanimously ruled in favour of the National Action Party. The decision considered that the local election management body did not take the measures in their power which were necessary for following up on the requirements imposed on the corresponding television broadcasting companies – TELEAZTECA, S.A. de C.V. and TELEVISA NORESTE, S.A. de C.V. – to provide answers about the broadcasting of the aforementioned election advertisement.

In addition, the Court considered –after analysing the contents and images of the election advertisement in question– that this kind of electoral advertising infringed the provisions of Articles 60.II, 60.VII, 138.4 and 142 of the Electoral Code of the State of Tamaulipas. According to the decision, the advertisement or video (called *Transformers* because of its type of images and contents) was clearly identified with the intention to favour a determined political option, presenting it to the electorate as the only viable choice. Moreover, the election advertisement contained messages like “defend yourself against the threat”, “punish the enemy, destroy it and live in peace with your family; it's your prerogative”, contents that were considered violent and defamatory and which did not contribute to the formation of the opinion of the electorate in a democratic context.

Therefore, as recognised in Article 19 of the International Covenant on Civil and Political Rights and Article 13 of the American Convention on Human Rights (both binding on Mexico), everyone has the right of freedom of thought and expression, which can be subject to restrictions such as the respect of the rights and reputation of others. As established in Jurisprudence 14/2007 of the High Chamber of the Electoral Court of the Federal Judiciary, the protection of honour and reputation during an electoral process is justified, as these are fundamental rights that are recognised in the exercise of freedom of expression.

*Cross-references:*

- Judgment of the High Court of Justice (Supreme Court) of Israel no. 5432/03 of 03.03.2004, *Bulletin* 2006/2 [ISR-2006-2-002];
- Judgment of the Constitutional Court of Bosnia and Herzegovina no. AP-1005/04 of 02.12.2005, *Bulletin* 2005/3 [BIH-2005-3-005].

*Languages:*

Spanish.

*Identification:* MEX-2010-3-027

**a)** Mexico / **b)** Electoral Court of the Federal Judiciary / **c)** High Chamber / **d)** 11.06.2008 / **e)** JRC-105/2008 / **f)** The Inapplicability of Electoral Norms – When Bad Theories Lead to Bad Choices / **g)** *Official Collection of the decisions of the Electoral Court of the Federal Judiciary of Mexico* / **h)** CODICES (Spanish).

*Keywords of the systematic thesaurus:*

- 3.10 General Principles – **Certainty of the law.**
- 3.11 General Principles – **Vested and/or acquired rights.**
- 4.6.4.3 Institutions – Executive bodies – Composition – **End of office of members.**
- 5.3.38 Fundamental Rights – Civil and political rights – **Non-retrospective effect of law.**

*Keywords of the alphabetical index:*

Administrative authority, independence.

*Headnotes:*

A legal reform cannot divest acquired rights of the Electoral Councillors of the Electoral Institute of the Federal District (local election management body) by shortening their appointment in order to implement a staggered replacement system.

*Summary:*

I. On 23 December 2005, the Legislative Assembly of the Federal District, in accordance with Article 125 of the Government Statute of the Federal District, designated the Chairman, Councillors, and Substitute Councillors of the Electoral Institute of the Federal District for a seven-year period. However, on 28 April 2008, Article 125 was reformed to include a staggered replacement system. The reform, in the second transitional article, ordered the Legislative Assembly of the Federal District to make the proper adjustments with respect to how and which Councillors would be subject of the abovementioned staggered replacement system. On 13 May 2008, the Government Commission of the Legislative Assembly of the Federal District issued an agreement with respect to which procedure of staggered replacement was to be adopted. This agreement also included the convocation of the new electoral councillors.

In that context, the Party of the Democratic Revolution and the Convergence Party each filed a request for constitutional electoral review challenging the aforementioned Agreement of the Government Commission of the Legislative Assembly of the Federal District, since it conflicted with the principle of non-retrospective effect of the law set out in Article 14 of the Federal Constitution. It also went against Articles 16, 116.IV.b and 122.C.1 and 122.C.V.f of the Federal Constitution. Also, it infringed the principles of legality and certainty of laws by having indeterminate effects on the Substitute Councillors. Furthermore, the Legislative Assembly lacked the jurisdictional capacity to ratify the appointment of electoral commissioners and to evaluate the performance of the incumbent commissioners.

II. In the opinion presented by Electoral Justice José Alejandro Luna Ramos, the High Chamber of the Electoral Court of the Federal Judiciary decided that there was indeed a conflict with Article 14 of the Federal Constitution; thus it annulled the Agreement of the Government Commission of the Legislative Assembly of the Federal District. To determine the existence of such conflict, the High Chamber stated that the incumbent Councillors had acquired the rights to a seven-year period because of their appointment of 2005. In addition, the High Chamber stated that the agreement contravened the principle of certainty of law pertaining to the integration of the local electoral management bodies, thereby threatening the independence of the Electoral Institute of the Federal District.

*Languages:*

Spanish.



*Identification:* MEX-2010-3-028

**a)** Mexico / **b)** Electoral Court of the Federal Judiciary / **c)** High Chamber / **d)** 24.07.2008 / **e)** JDC-1126/2008 / **f)** Mechanisms for citizens' participation – Regulations of consultations in the Federal District / **g)** *Official Collection of the decisions of the Electoral Court of the Federal Judiciary of Mexico* / **h)** CODICES (Spanish).

*Keywords of the systematic thesaurus:*

1.3.4.6 Constitutional Justice – Jurisdiction – Types of litigation – **Litigation in respect of referendums and other instruments of direct democracy.**  
 3.10 General Principles – **Certainty of the law.**  
 3.13 General Principles – **Legality.**  
 4.9.2 Institutions – Elections and instruments of direct democracy – **Referenda and other instruments of direct democracy.**  
 4.9.7 Institutions – Elections and instruments of direct democracy – **Preliminary procedures.**

*Keywords of the alphabetical index:*

Consultation, public, *per saltum*.

*Headnotes:*

Public consultations falling under federal jurisdiction need not comply with the Law on Electoral Proceedings of the Federal District since this Law pertains only to consultations on topics falling under local jurisdiction and local administration procedures, obligations and actions. Notwithstanding, an electoral complaint is the adequate and proper mechanism for challenging the procedures of public consultations.

*Summary:*

I. On 19 July 2008, the “Convocation for the Public Consultation relative to the Energy Reform” was published in the Official Gazette of the Federal District. Mr José Bernardo Rodríguez Vega filed a petition to protect the political-electoral rights of citizens before the Electoral Institute of the Federal District (local election management body) citing procedural failures in the abovementioned convocation. On 2 July 2008, the High Chamber of the Electoral Court of the Federal Judiciary deemed the petition unfounded and referred it as an electoral

complaint to the Local Electoral Court of the Federal District. Complying with the ruling, the Local Electoral Court of the Federal District reviewed the electoral complaint and ruled it inadmissible. Subsequently, Mr Rodríguez Vega (the appellant) filed a petition to protect the political-electoral rights of citizens against the ruling of the Local Court of the Federal District.

The appellant argued that the Local Electoral Court of the Federal District violated the guarantees of certainty of law and legality by dismissing the electoral complaint. Moreover, the appellant argued that the electoral complaint was indeed the appropriate legal recourse in that it protected the principle of legality (compliance with the law) of all acts of the local election management body, including determinations of public consultations. Mr Rodríguez Vega also stated that the ruling made by the Local Electoral Court incongruently affirmed that public consultations are a mechanism of participation, and then dismissed the complaint.

II. In the opinion presented by Chief Electoral Justice María del Carmen Alanís Figueroa, the High Chamber of the Electoral Court of the Federal Judiciary analysed the petition made by Mr Rodríguez Vega and determined the following:

The Local Electoral Court of the Federal District did not violate the guarantees of certainty of law and legality since the Local Electoral Court did not have the ruling made by the High Chamber of the Electoral Court of the Federal Judiciary on 2 July 2008 imposed on it, in view of the fact that this ruling did not qualify the juridical feasibility of the complaint. Thus, the Local Electoral Court's dismissal was not unlawful.

The ruling made by the Local Electoral Court did not contradict the dismissal given that the Local Electoral Court only mentioned that the electoral complaint was the adequate recourse for challenging the results of plebiscites, referenda, popular initiatives and the election of citizens' committees, but it was not appropriate for challenging the actions and resolutions of a public consultation. From this it cannot be inferred that the Local Electoral Court pronounced itself; thus, it did not contradict itself as Mr Rodríguez Vega argued.

However, the High Chamber of the Electoral Court of the Federal Judiciary, taking into account Articles 2.II, 76 and 77 of the Law on Electoral Proceedings of the Federal District, ruled that the dismissal of the aforementioned electoral complaint was unlawful since this recourse is suitable for ensuring the principle of legality (compliance with the law) of all

actions taken by the Local Electoral Institute, including all procedures for public consultations.

This part of the ruling would have ordinarily resulted in sending the electoral complaint back to the Local Electoral Court. However, the time constraints made it impossible for the challenge to be returned to the Local Electoral Court because it would have prevented the utmost regard being had for the principle of an effective remedy. Therefore, the High Chamber of the Electoral Court of the Federal Judiciary made the decision to rule on the question of law *per saltum*.

Then, the High Chamber of the Electoral Court of the Federal Judiciary ruled the petition unfounded since the procedure that was being challenged did not fall within the mechanisms stipulated in and protected by the Law on Electoral Proceedings of the Federal District. The object of the public consultation was not one falling under local jurisdiction as it referred to the reform of the federal laws relating to the energy sector in Mexico. Thus, neither the convocation nor the public consultation had to comply with that Law.

#### *Languages:*

Spanish.



## Morocco Constitutional Council

### Important decisions

*Identification:* MAR-2010-3-004

**a)** Morocco / **b)** Constitutional Council / **c)** / **d)** 29.12.2008 / **e)** 728/2008 CC / **f)** Finance Law no. 40-08 for 2009 / **g)** *Bulletin officiel* (in Arabic), no. 5695, 31.12.2008; *Revue du Conseil constitutionnel*, 9/2010 / **h)** CODICES (French).

*Keywords of the systematic thesaurus:*

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

*Keywords of the alphabetical index:*

Finance Law, content / Budget, parliamentary supervision.

*Headnotes:*

Provisions which, by their very nature, cannot be included among those geared to improving the conditions for the recovery of the resources provided for in Article 3 of the Organic Law on the Finance Law, should not fall within the purview of the Finance Law and are contrary to the Constitution. While internal and external loans are authorised by Parliament, such authorisation, which covers the Finance Law in its entirety, has nothing to do with the empowerment set out in Article 45 of the Constitution, under which Parliament may empower the Government, under certain conditions, to take measures which normally fall within the remit of the law.

*Summary:*

I. The Constitutional Council was asked by 104 members of the House of Representatives to declare unconstitutional Articles 2, 8, 26, 27, 40, 41 and 42 of the Finance Law no. 40-08 for 2009, as well as this Law in its entirety, on the grounds that the articles in question could not be dissociated from the overall provisions.

II. Regarding Article 2, the orders submitted for ratification were set out in detail rather than presented in a general manner, and were therefore quoted consecutively, specifying the object and objective of each order. Furthermore, the request for parliamentary empowerment and the submission of orders issued in pursuance of previous authorisation for ratification were combined in the same article in compliance with the provisions and conditions set out in Article 45 of the Constitution, and Article 2 had been adopted in accordance with the procedure laid down in Article 37 of the Organic Law on the Finance Law. On the basis of the foregoing comments, the Constitutional Council ruled that Article 2 was not contrary to the Constitution.

Regarding the provisions of Article 8, the Constitutional Council considers that these cannot, by their very nature, be included among those geared to improving the conditions for the recovery of the resources provided for in Article 3 of the Organic Law on the Finance Law. Consequently, they should be declared unconstitutional.

Regarding the provisions of Article 26, the Constitutional Council considers that the Organic Law on the Finance Law did not impose on the Government any specific reference frame for classifying the provisions of the Finance Law contained in each of its articles in particular, and that the relevant provisions of Article 26 fulfilled the conditions set out in Article 45 of the Constitution and had been adopted in accordance with the procedure stipulated in Article 37 of the Organic Law on the Finance Law. On the basis of the above, Article 26 is not contrary to the Constitution.

It emerges from the Constitutional Council's examination of the provisions of Article 27 that they do not, by their very nature, fit within the framework of legislative empowerment as laid down in Article 45 of the Constitution. This means that it is incumbent on the Government to distribute certain posts in the framework of its recognised competences, with a view to ensuring the execution of the laws, in accordance with Article 61 of the Constitution. The said provisions are therefore not contrary to the Constitution.

With regard to Article 40, the 2009 Finance Law comprises estimated appropriations corresponding to tax reimbursements, without any adjustment of expenditure and receipts, which appropriations were the subject of a request for parliamentary empowerment under the Budget Law in question and, consequently, the provisions of Article 40 are not contrary to the Constitution. Regarding Articles 41 and 42, the Constitutional Council held that if internal

and external borrowing is authorised by Parliament, such authorisation, which concerns the whole Finance Law, has nothing to do with the empowerment set out in Article 45 of the Constitution, under the terms of which Parliament can authorise the Government, under certain conditions, to adopt measures falling within the ambit of the Law. For these reasons, the provisions of Articles 41 and 42 are not contrary to the Constitution.

*Languages:*

French.



# Netherlands

## Council of State

### Important decisions

*Identification:* NED-2010-3-005

**a)** Netherlands / **b)** Council of State / **c)** Third Chamber / **d)** 01.12.2010 / **e)** 201000882/1/H3 / **f)** X. in appeal against the judgment of The Hague District Court in the case of X. v. Police Force *Manager* of Haaglanden police region / **g)** *Landelijk Jurisprudentienummer, LJN: BO5710* / **h)** CODICES (Dutch).

*Keywords of the systematic thesaurus:*

2.1.1.4.18 Sources – Categories – Written rules – International instruments – **Charter of Fundamental Rights of the European Union of 2000.**

*Keywords of the alphabetical index:*

Crime, report, access / Information, access, denied.

*Headnotes:*

A decision by a police force manager to deny access to police documents should have been reviewed in the light of the law in force at the time the decision was made.

*Summary:*

I. The applicant asked the police force manager of the Haaglanden police region for access to police documents relating to a report of a crime he had allegedly committed. The police force manager rejected his application. The applicant objected to this decision. The police force manager partly granted and partly dismissed his objections. When the applicant lodged an appeal with the District Court, it held in favour of the police force manager. The applicant appealed to the Administrative Jurisdiction Division of the Council of State, arguing *inter alia* that his rights under the Charter of Fundamental Rights of the European Union had been violated.

Article 6.1 of the consolidated version of the Treaty on European Union, as amended by the Treaty of Lisbon,

which entered into force on 1 December 2009, stipulates *inter alia* that the Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

II. The Administrative Jurisdiction Division of the Council of State held that the applicant's claim failed insofar as it was based on the Charter of Fundamental Rights of the European Union as amended on 12 December 2007 and which entered into force on 1 December 2009. The District Court was under a duty to review the police force manager's decision in the light of the law which was in force when the decision was made. Since the Charter only became legally binding when the Treaty of Lisbon entered into force on 1 December 2009, the District Court was correct not to include it in its review of the police force manager's decision of 29 December 2008.

The Administrative Jurisdiction Division of the Council of State also held that the applicant's claim failed in that it was based on the Charter of Fundamental Rights of the European Union in the version of 2000. In its Judgment of 27 June 2006, the Court of Justice of the European Union had held that the Charter of 2000 is not a legally binding instrument and that the principal aim of the Charter, as is apparent from its preamble, is to reaffirm 'rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention on Human Rights, the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court ... and of the European Court of Human Rights'. It followed, therefore, that no additional rights stem from the Charter, which can be relied on in their own right.

*Cross-references:*

- Court of Justice of the European Union, 27.06.2006, no. C-540/03 (*European Parliament v. Council of the European Union*);
- Administrative Jurisdiction Division of the Council of State, 01.12.2010, no. 201003052/1/V3 ([www.raadvanstate.nl/uitspraken](http://www.raadvanstate.nl/uitspraken)).

*Languages:*

Dutch.



# Norway

## Supreme Court

---

### Important decisions

*Identification:* NOR-2010-3-003

**a)** Norway / **b)** Supreme Court / **c)** Plenary / **d)** 03.12.2010 / **e)** 2010-02057-P / **f)** / **g)** *Norsk retstidende* (Official Gazette), 2010 / **h)** CODICES (Norwegian).

*Keywords of the systematic thesaurus:*

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

*Keywords of the alphabetical index:*

Law, retrospective, crimes against humanity, war crimes / Statute-barred.

*Headnotes:*

The provisions on crimes against humanity and war crimes in the Penal Code of 2005, which entered into force in 2008 could be applied to acts that took place in Bosnia-Herzegovina in 1992.

*Summary:*

The crucial issues were whether criminal liability in this case was statute-barred, and whether the application of the new provision to these acts would represent a violation of Article 97 of the Constitution, which prohibits laws being given retroactive effect. The Supreme Court held that the crimes were not statute-barred. However, a majority of eleven justices held that the application of Sections 102 and 103 of the Penal Code of 2005 to the crimes would violate Article 97 of the Constitution. Developments in international law and Norway's interest in assisting international criminal courts could not undermine the fundamental requirement that a criminal conviction must have authority in Norwegian law. A minority of six justices were of the view that conviction pursuant to Sections 102 and 103 of the Penal Code of 2005 would not be manifestly more onerous than conviction pursuant to Section 223 of the Penal Code of 1902,

which applied at the time, coupled with the possibility of trial before an international court, and held that conviction pursuant to Sections 102 and 103 of the Penal Code of 2005 would not violate Article 97 of the Constitution.

*Languages:*

Norwegian, English (translation by the Court).



# Poland

## Constitutional Tribunal

### Statistical data

1 September 2010 – 31 December 2010

Number of decisions taken:

Judgments (decisions on the merits): 32

- Rulings:

- in 17 judgments the Tribunal found some or all of the challenged provisions to be contrary to the Constitution (or other act of higher rank)
- in 15 judgments the Tribunal did not find the challenged provisions to be contrary to the Constitution (or other act of higher rank)

- Initiators of proceedings:

- 13 judgments were issued upon the request of courts – the question of law procedure
- 2 judgments were issued upon the request of individuals (natural persons) – the constitutional complaint procedure
- 2 judgments were issued upon the request of legal entities without legal personality (a registered partnership and a housing community) – the constitutional complaint procedure
- 9 judgments were issued upon the request of the Commissioner for Citizens' Rights (i.e. Ombudsman)
- 2 judgments were issued upon the request of MPs (Deputies or Senators)
- 2 judgments were issued upon the request of the National Bailiff Council
- 1 judgment was issued upon the request of a Trade Union
- 1 judgment was issued upon the request of the President of the Republic – preliminary review procedure

- Other:

- 6 judgments were issued by the Tribunal in plenary session
- 7 judgments were issued with dissenting opinions

## Important decisions

*Identification:* POL-2010-3-006

**a)** Poland / **b)** Constitutional Tribunal / **c)** / **d)** 24.11.2010 / **e)** K 32/09 / **f)** / **g)** *Dziennik Ustaw* (Journal of Laws), 2010, no. 229, item 1506; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2010, no. 9A, item 108 / **h)** CODICES (Polish).

*Keywords of the systematic thesaurus:*

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

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

2.2.1.6.1 Sources – Hierarchy – Hierarchy as between national and non-national sources – Community law and domestic law – **Primary Community legislation and constitutions**.

3.1 General Principles – **Sovereignty**.

3.3 General Principles – **Democracy**.

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

4.16.1 Institutions – International relations – **Transfer of powers to international institutions**.

4.17.2 Institutions – European Union – **Distribution of powers between Community and member states**.

*Keywords of the alphabetical index:*

European Union, Treaty of Lisbon / Treaty, domestic law, effect / Normative act.

*Headnotes:*

The incurring of international liabilities and the management of them do not result in the loss or limitation of the sovereignty of the state, but rather serve to confirm it. Likewise, membership of the European institutions does not constitute a limitation on the sovereignty of the state, but rather serves as its manifestation.

The provisions of the Treaty of Lisbon, which had come into question, should strike a balance between preserving the subjectivity of the Member States and that of the European Union. The guarantees of that balance in the Constitution are “normative anchors”, which serve to protect the sovereignty of the state, in the form of Articles 8.1, 90 and 91 of the Constitution.



The values expressed in the Constitution and the Treaty of Lisbon determines the axiological identity of Poland and the European Union. The draft of economic, social and political systems contained in the Treaty, which stipulates the respect for dignity and freedom of the individual, as well as respect for the national identity of the Member States, is fully consistent with the basic values of the Constitution, confirmed in the Preamble of the Constitution, which includes the indication of historical, traditional and cultural context that determines national identity, which is respected in the EU within the meaning of Article 4.2 of the Treaty on European Union.

Neither Article 90.1 nor Article 91.3 may constitute the basis for conferring the competence to enact legal acts or to make decisions which would be inconsistent with the Constitution on an international organisation or international institution. In particular, the provisions indicated may not be used to confer competences in such a way that they would prevent the Republic of Poland from functioning as a sovereign and democratic state.

Some of the attributes of sovereignty are exclusive power of jurisdiction over the territory of a particular state and its citizens, the conduct of foreign policy, decision-making over war and peace, freedom to recognise other states and governments, the maintenance of diplomatic relations, decision-making over military alliances and membership of international political organisations, and conduct of independent financial, budget and fiscal policies.

Article 90 of the Constitution should not be interpreted in such a way as to exhaust its meaning after one application. Such an interpretation would arise from the assumption that conferral of competences on the European Union in the Treaty of Lisbon is a “one-off” occurrence and would pave the way for further conferral, bypassing the requirements specified in Article 90. Such an understanding of Article 90 would also deprive that part of the Constitution of the characteristics of a normative act.

### *Summary:*

I. A group of Senators (hereinafter, the “applicant”) lodged an application to determine the conformity of Article 1.56 of the Treaty of Lisbon, to the extent it amends Article 48 of the Treaty on European Union in conjunction with Articles 2.12, 2.13 and 289 of the Treaty of Lisbon, as regards Article 2 A.2, Article 2 B.2, and Article 2 F, which have been inserted in the Treaty on the Functioning of the European Union, and the new wording of Article 308 of the Treaty on the Functioning of the European Union, with Article 8 and Article 90.1 of the Constitution (case no. K 37/09).

An application challenging the constitutionality of other provisions of the Treaty of Lisbon was lodged by a group of Deputies of the lower house of Parliament (the *Sejm*) in case no. K 32/09.

II. The President of the Constitutional Tribunal decided that cases K 32/09 and K 37/09 should be examined in full bench, under the common reference number K 32/09.

After a break in the hearing and deliberations, due to the exit of the representative of the group of Deputies and his further absence, the Tribunal resolved to discontinue the proceedings with regard to the examination of the application by the group of Deputies, due to the applicant’s absence from the hearing.

The applicant challenged the constitutionality of the competences of EU organs in the light of the qualified majority voting regime in the Council, the simplified revision procedures as well as that of the flexibility clause, introduced by the Treaty of Lisbon. In the applicant’s opinion, the relevant Treaty regulations allow the EU to enhance its competence beyond what is permitted by the condition of transfer of competences, enshrined in Article 90 of the Constitution. The applicant also suggested that the provisions of the Constitution had been infringed by the lack of legislative participation of adequate constitutional organs as a precondition for the amendment of primary EU law.

The Constitutional Tribunal stated that a distinction should be drawn between limitations of sovereignty, arising from the will of the state and in accordance with international law, and infringements of sovereignty. Although states remain the subjects of the integration process, maintaining “the competence of competences”, the new rules of qualified majority voting, the simplified revision procedures and the flexibility clause introduced by the Treaty of Lisbon do not impinge upon the Constitution.

One may speak of an axiological identity of Poland and of the EU, due to values expressed in the Polish Constitution and in the Treaty of Lisbon. However, the transfer of competences under Article 90 of the Constitution may not lead to a situation whereby Poland ceases to function as a sovereign and democratic state. The “normative anchors” safeguarding Polish sovereignty and democracy are Articles 8.1, 90 and 91 of the Constitution. Attributes of sovereignty include the conduct of foreign policy or independent fiscal policies.

The transfer of competences by Poland to the EU should not be treated as a one-off occurrence. Rather, each transfer of competences should conform to Article 90 of the Constitution.

The Tribunal discontinued the proceedings relating to legislative negligence which consisted in this case of an alleged lack of a specific regulation as regards the mechanism of cooperation between the Council of Ministers and the *Sejm* and the Senate in matters related to Poland's membership of the European Union. It may not be effective to state the unconstitutionality of statutory omission or negligence, with regard to the consequences of binding Poland with an international agreement, such as the Treaty of Lisbon, due to Article 27 of the Vienna Convention on the Law of Treaties, signed at Vienna on 23 May 1969. There is also a clear line of authority showing that the Constitutional Tribunal does not have the competence to review the constitutionality of legislative negligence.

III. The Tribunal issued this decision in plenary session. One dissenting opinion was raised.

#### Cross-references:

##### Decisions of the Constitutional Tribunal:

- Resolution W 7/94 of 10.05.1994, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1994, item 23; *Bulletin* 1994/2 [POL-1994-2-007];
- Procedural decision K 3/95 of 07.03.1995, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1995, item 5;
- Judgment K 32/00 of 19.03.2001, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), no. 3, item 50;
- Judgment SK 8/00 of 09.10.2001, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), no. 7, item 211;
- Judgment K 2/02 of 28.01.2003, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), no. 1A, item 4; *Bulletin* 2003/2 [POL-2003-2-013];
- Judgment K 11/03 of 27.05.2003, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), no. 5A, item 43;
- Judgment K 24/04 of 12.01.2005, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), no. 1A, item 3; *Bulletin* 2005/1 [POL-2005-1-002];
- Judgment K 18/04 of 11.05.2005, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), no. 5A, item 49; *Bulletin* 2005/1 [POL-2005-1-006];

- Judgment SK 25/02 of 08.11.2005, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), no. 10A, item 112;
- Judgment U 5/04 of 18.07.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), no. 7A, item 80;
- Judgment K 31/06 of 03.11.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), no. 10A, item 147;
- Judgment K 54/05 of 12.03.2007, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), no. 3A, item 25;
- Judgment K 35/06 of 02.09.2008, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), no. 7A, item 120;
- Procedural decision Ts 189/08 of 14.05.2009, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), no. 3B, item 202;
- Judgment SK 31/08 of 02.06.2009, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), no. 6A, item 83;
- Judgment Kp 5/08 of 16.12.2009, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), no. 11A, item 170.

##### Decision of the Austrian Constitutional Tribunal:

- Decision (*Beschluss*) SV 2/08 *et al.* G 80/08 *et al.* of 30.09.2008.

##### Decision of the Czech Constitutional Court:

- Decision Pl. ÚS 19/08 of 26.11.2008.

##### Decisions of the Federal Constitutional Court of Germany:

- Judgment (*Urteil*) 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09 of 20.06.2009; *Bulletin* 2009/2 [GER-2009-2-019];
- Decision (*Beschluss*) 2 BvR 2661/06 of 06.07.2010.

##### Decision of the Hungarian Constitutional Court:

- Decision 143/2010. (VII. 14.) AB.

##### Decision of the Latvian Constitutional Court:

- Decision 2008-35-01 of 07.04.2009; *Bulletin* 2009/2 [LAT-2009-2-002].

Decisions of the Court of Justice of the European Union:

- Judgment TS 45/86 (*Commission v. Council*);
- Opinion TS 2/94 (ECHR).

*Languages:*

Polish, English (translation by the Tribunal).



## Portugal Constitutional Court

### Statistical data

1 September 2010 – 31 December 2010

Total: 229 judgments, of which:

- Abstract *ex post facto* review: 2
- Concrete reviews: 109
- Appeals against refusals to admit: 28
- Declarations of assets and income: 1
- Matters concerning political parties: 3
- Political party accounts: 3

### Important decisions

*Identification:* POR-2010-3-011

**a)** Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 22.09.2010 / **e)** 338/10 / **f)** / **g)** *Diário da República* (Official Gazette), 216 (Series I), 08.11.2010, 4994 / **h)** CODICES (Portuguese).

*Keywords of the systematic thesaurus:*

4.5.8 Institutions – Legislative bodies – **Relations with judicial bodies.**

5.2.1.2.1 Fundamental Rights – Equality – Scope of application – Employment – **In private law.**

*Keywords of the alphabetical index:*

Collective labour agreement, freedom not to join / Employee, labour, economic and social conditions / Employment, dismissal / Employment, working conditions.

*Headnotes:*

It is not the Constitutional Court's place to question choices that the legislature makes when it adopts legislative measures designed to foster employment and business. Rather, it should simply issue declarations or findings of unconstitutionality in relation to those measures which, when submitted to

it for examination, cannot be justified because they are not in conformity with the Constitution.

When considered individually, the workers' rights and guarantees that are protected by the Constitution must be reconciled with other constitutionally relevant rights and interests, and workers' individual rights cannot be taken in isolation from their collective rights, including the right to collective contracts. One must start from the premise that, overall, the latter right is exercised for the benefit of the workers concerned.

### *Summary:*

I. A group of Members of the Assembly of the Republic asked the Court to declare a set of norms that amended certain provisions of the Labour Code unconstitutional with generally binding force. In the petitioners' view, the amendments resulted in a worsening of the conditions imposed on workers, which would in turn result in a serious retrograde step in social terms in the Labour Law, concerning several aspects:

II. The Court replied as follows:

1. The norm that permits a collective labour regulatory instrument to waive the labour law – the Court emphasised that this permission is mitigated by the fact that the law cannot simply be waived by a Ministerial Order on working conditions, and that it does not apply to matters which are deemed to be at the core of the labour law, with regard to which collective regulatory instruments can only waive the law if the change is in the worker's favour. These matters are:

- a. Rights involving personality, equality, and non-discrimination;
- b. The protection of parenthood;
- c. Work by minors;
- d. Workers whose capacity to work is diminished by disability or chronic illness;
- e. Student workers;
- f. The employer's duty to inform;
- g. Limits on the duration of normal daily and weekly working hours;
- h. The minimum duration of rest periods, including the minimum duration of the annual holiday period;
- i. The maximum duration of work by night workers;
- j. The form in which remuneration is provided and the guarantees applicable thereto;
- k. The Chapter on the prevention and reparation of work-related accidents and occupational illnesses, and the legislation that regulates it;
- l. The transfer of a company or establishment; and
- m. The rights of workers' elected representatives.

2. The admissibility of fixed-term labour contracts in cases in which an employer launches a new business with an uncertain duration, or a company or an establishment belonging to a company with less than 750 workers starts operating. The Court felt that this restriction on the right to job security is justified by other rights or interests protected by the Constitution, such as support for free private economic initiative that will contribute to fulfilment of the right to work.

3. The possibility of 'service commissions' involving workers from outside the company in question and which can be terminated by simple prior notification. The end of a service commission automatically implies the termination of the labour contract itself, whereas under the previous regime, the contract continued to exist unless the parties agreed otherwise.

The Court recalled its own jurisprudence, in which it had held that the provision of labour under a 'commission' regime corresponds to a change in the status of senior managers, which is extended to include their personal secretarial staff. These posts, and others like them, evidently possess a nature that implies the existence of personal trust, and are therefore exercised on a precarious basis. In some cases, these posts are perceived as being exercised under the type of contract applicable to a power of attorney or the provision of services under the regime applicable to the liberal professions, or another type of contract that is different from the labour contract. The principle of job security does not therefore apply, inasmuch as this situation does not fall within the scope of application of the respective norm.

4. The organisation of working time – the petitioners questioned a number of norms that permit individual adaptability, group adaptability, the 'hour bank' system, and concentrated working hours. The Court held that the issue is one of a redistribution of working times, which means that it entails legitimate ways of restricting fundamental rights, which the Court considered to be justified. Moreover, the law stipulates that the fact that a worker is responsible for young children must mean that he or she is dispensed from working under an adaptability regime. In the Court's view, the same should apply to reasons involving a worker's health or physical or psychological integrity, given that these are fundamental rights which are directly binding on private entities and cannot be undermined by a collective labour agreement.

5. The norm that allows the investigative phase of disciplinary proceedings to be optional. The Court felt that this would increase the risks of an incorrect

disciplinary decision, which could then result in recourse to the courts. Disciplinary proceedings can result in sanctions due to a worker's behaviour. Rights to a hearing and to a defence are inherent within the legal order of a state based on the rule of law and they require the fulfilment of certain procedural demands. The Court accordingly held that the solution adopted in the law was unconstitutional.

6. The norm that allows an employer to oppose the reinstatement of a worker when the former is a microenterprise, or the latter is a director or senior manager, and there are facts and circumstances which mean that the worker's return would seriously prejudice and disrupt the company's operation. The Court held that this is a restriction which is justified in terms of other constitutionally relevant assets or interests. It is not the employer that decides whether the preconditions for the application of this norm are met; this must be objectively judged by a court, which, if it deems that they are fulfilled, must replace reinstatement with compensation that can amount to double the sum to which the worker would be entitled under normal conditions. This solution does not apply to cases in which the unlawfulness of the dismissal is based on political, ideological, ethnic, or religious reasons.

7. Choice of applicable collective agreement – the petitioners contested a norm that allows workers who are not members of any trade union to choose which collective regulatory instruments are to be applied to them, including collective agreements that were negotiated by trade unions to which they do not belong. The petitioners argued that such a norm enables people who do not belong to a trade union to take advantage of the latter's work, thereby promoting the choice not to belong to trade unions and the consequent weakening of the latter and of their bargaining position when negotiating collective agreements.

The Court held that this norm is legitimised by the principle of equality with regard to the general conditions governing work, and that placing workers under an obligation to join a given trade union would also violate the Constitution. In addition, the Labour Code contains a mechanism designed to ensure that trade unions can safeguard themselves against the possibility that workers who do not belong to a given union can benefit from a collective agreement entered into by that union: collective agreements can themselves stipulate that workers who want to benefit from choosing to be governed by them must pay a certain amount to the trade unions involved, as a contribution towards the costs of the negotiations.

8. Continued effect and lapse of collective agreements – here, the object of the request was a norm that allows a collective agreement to remain in force once it has collapsed, for the time that it takes to negotiate its successor, including conciliation, mediation and voluntary arbitration processes, or for a minimum of 18 months, and, if the negotiations culminate in a new agreement, that the old one should remain in effect until the new one comes into force.

The petitioners argued that this regime, which does not oblige employers to negotiate new agreements, damages the freedom to form, belong to and operate trade unions.

The Court considered that while it is true that only certain aspects of the status of workers with regard to the labour relationship continue to be valid in such situations, the aspects that do remain (remuneration, category, length of service, and social benefits) constitute the essential core of the status of workers.

The Court thus declared that the norm which permitted an employer to opt not to include an investigative phase in disciplinary proceedings was unconstitutional, that the other norms were not unconstitutional, and that this should have general binding force.

III. The ruling was the object of 7 dissenting opinions which, however, did not constitute a majority because each of them only targeted part of the totality of issues.

#### *Cross-references:*

- See rulings nos. 107/88 of 31.05.1988, 581/95 of 31.10.1995, 659/97 of 04.11.1997 and 306/2003 of 25.06.2003 (*Bulletin* 2003/2 [POR-2003-2-006]).

#### *Languages:*

Portuguese.



*Identification:* POR-2010-3-012

a) Portugal / b) Constitutional Court / c) Plenary / d) 27.10.2010 / e) 399/10 / f) / g) *Diário da República* (Official Gazette), 230 (Series II), 26.11.2010, 57854 / h) CODICES (Portuguese).

*Keywords of the systematic thesaurus:*

4.10.7 Institutions – Public finances – **Taxation**.  
5.3.38.4 Fundamental Rights – Civil and political rights – Non-retrospective effect of law – **Taxation law**.

*Keywords of the alphabetical index:*

Expectation, legitimate / Tax, complaint.

*Headnotes:*

The prohibition on tax retroactivity that is enshrined in the Constitution only encompasses the authentic, specific or perfect retroactivity of the tax. In terms of direct income taxes, non-retroactivity does not cover situations in which the tax-related fact the new law is seeking to regulate did not occur entirely under the old law, but continues when the new law is in force.

*Summary:*

I. The President of the Republic requested an abstract post hoc review of norms allowing for the imposition of an increased rate of tax on income which private individuals earned at a moment in time prior to the entry into force of the norms in question.

These norms are included in laws that were passed as part of the Stability and Growth Pact (PEC), and were intended to respond to the current financial situation and the urgent need to reduce the deficit and the costs of the accumulated public debt, by securing increased tax income. The petitioner did not challenge the intention *per se* but challenged the constitutionality of the application of an increased rate of tax to income that had been earned before the laws entered into force.

II. The Court emphasised that the Constitution clearly prohibits the retroactivity of tax law, but that the sense of that prohibition is not unequivocal. In its most recent jurisprudence on tax matters the Court has held that the form of retroactivity which is forbidden is only specific or “authentic” retroactivity – i.e. the one which takes the shape of the application of a new law to earlier tax-related facts (earlier than the entry into force of the new law).

In the present ruling, the Court was dealing with norms that apply to tax-related facts which did not produce all their effects under the previous law. This means that there was no true retroactivity in this case.

The tax on the income of individual persons (IRS) is a direct tax that is based on tax-related facts which come about successively, and the tax-related fact that is subject to taxation only becomes complete on the last day of the tax period. The tax-related fact that gives rise to the payment of the tax is complex and its temporal element is configured as a lasting one. This means that it is a periodic tax and that each specific income that is received is not taxed in its own right, but instead tax is paid on the whole of the various incomes that are received in a given year. In addition, for the purposes of the time limit on the right to charge the tax and its prescription, each fact that generates income when considered individually is not deemed to be an autonomous tax-related fact in its own right.

The Constitutional Court had already held that “inauthentic” retroactivity is not covered by the constitutional prohibition, and that in the case of periodic taxes, the possibility of passing laws during the course of a given tax period with the intention of producing effects in relation to that whole period must be admitted. Such laws must, however, be subjected to the tests of the principles of a state based on the rule of law, such as the test of the protection of trust.

With regard to the present case, there was no constitutionally protected expectation that the legislator should make all IRS-related amendments by the 1<sup>st</sup> of January each year.

A variety of reasons led the legislator to make these amendments when the fiscal year was already underway, and given the current international economic/financial situation, it would not have been reasonable to think that the prevailing economic trend would not have any consequences. Nor can it be said that this measure was something that taxpayers could not have reasonably and objectively expected. Moreover, in the view of the Court, the fact that the norms before it produced effects as of 1 January 2010 was not intolerable or unbearable for taxpayers.

The Court thus concluded that the norms whose constitutionality was under review in this ruling pursue a constitutionally legitimate goal (that of securing fiscal revenue for the purpose of balancing the public accounts), they were urgent and pressing, and, within the context of the announcement of combined measures to fight the deficit and the

accumulated public debt, were not capable of affecting the principle of trust that is innate in a state based on the rule of law. In the light of these factors, the Court was unable to find the norms unconstitutional.

III. The ruling was the object of five dissenting opinions; one of them was partial.

#### Cross-references:

- See rulings nos. 67/91 of 09.04.1991, 172/00 of 22.03.2000, 128/2009 of 12.03.2009 and 85/2010 of 03.03.2010.

#### Languages:

Portuguese.



#### Identification: POR-2010-3-013

**a)** Portugal / **b)** Constitutional Court / **c)** Third Chamber / **d)** 09.11.2010 / **e)** 407/10 / **f)** / **g)** *Diário da República* (Official Gazette), 241 (Series II), 15.12.2010, 60737 / **h)** CODICES (Portuguese).

#### Keywords of the systematic thesaurus:

5.2.2.13 Fundamental Rights – Equality – Criteria of distinction – **Differentiation *ratione temporis***.

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

#### Keywords of the alphabetical index:

Minors, interest / Parents, rights and duties / Judicial proceedings, pending, application / Divorce, custody.

#### Headnotes:

Subjecting the new regime to the criterion of whether or not a given case is pending on the date on which a legal regime, which will regulate parental responsibilities in the interest of minors comes into force would appear to be an arbitrary decision.

#### Summary:

I. The Public Prosecutors' Office was legally obliged to lodge an appeal in this case, as the first instance court declined to apply a norm contained in a Law, on the grounds of its unconstitutionality. The Law made certain changes to the Civil Code with regard to paternal authority, which was renamed 'parental responsibilities', and to the exercise of those responsibilities by parents who are not married to one another and do not live under conditions analogous to those of spouses. The norm in question established a transitional regime under which the new provisions did not apply to cases that were pending before the courts at the time.

The case before the Court of First Instance involved the question of the regulation of the way in which parental responsibilities were to be exercised in a situation in which, while filiation had been established in relation to both parents, the latter were not living under conditions analogous to those of spouses. Under the new regime such a situation is subject to the provisions under which parental responsibilities are exercised jointly. In the case in question, this is the standard regime, under which both parents exercise parental responsibilities jointly in relation to particularly important matters, unless a court decides otherwise on duly substantiated grounds.

Under the previous regime, if the parents were not married and did not cohabit in a *de facto* union, they either had to agree that paternal authority would be exercised jointly, or, in the absence of such agreement, paternal authority would be ascribed to the parent with custody of the minor. There was a presumption *iuris tantum* that custody would be awarded to the mother. In the latter situation, the parent who was not responsible for the exercise of paternal authority was given the power to supervise his/her child's education and living conditions.

The court *a quo* held that the transitional norm, under which the new regime governing the exercise of parental responsibilities did not immediately apply to cases that were currently pending before the courts, was unconstitutional, because it was in breach of the principle of equality.

Under the transitional norm, even after it came into force, cases that were currently pending before the courts continued to be subject to the regime contained in the old law. This transitional regime was designed to waive application of the general regime set out in the Civil Code. Under the latter (at least with regard to the regulation of the exercise of parental responsibilities), the principle is that when new laws directly affect the content of certain legal

relations, they are applied immediately. The court *a quo* considered that by requiring the continued application of the old regime, the new law was in breach of the constitutional principle of equality.

II. The Constitutional Court has developed a line of authority over the years, to the effect that the principle of equality does not operate diachronically, and therefore the Article of the Constitution which governs this principle does not usually apply to phenomena involving the succession of laws. This jurisprudential guideline covers the norms contained in transitional law, inasmuch as the underlying principle is as valid for the general phenomenon of the succession of laws over time as it is with regard to the special condition of those norms with the specific function of regulating the way in which that succession operates. The power to change existing laws (changing the way in which people are treated) by revoking old regimes and putting new ones in place is a power that is inherent to the legislator in a state based on the rule of law. The legislator, in pursuit of its democratic mandate, possesses sufficient constitutional legitimacy to evaluate the legislative policy reasons that lead it to modify the existing legal order. The legislator's competence to freely shape legislation must not only include the power to create new legislation and revoke old laws, but also the power to decide how, in transitional periods, the scope of application of laws that succeed one another in time should be delimited.

The freedom to shape legislation is substantial but subject to limits, in particular those derived from the principle of the state based on the rule of law, and from the values of legal security and the protection of trust inherent within that principle.

As well as being subject to the principle of trust, in certain circumstances transitional law can also be subordinated to the principle of the prohibition of arbitrariness that is derived from the constitutional principle of equality. Whenever there are unequal treatments for situations that are the same and synchronic, the way in which the point in time at which a norm becomes applicable can (at that time or in the future) conflict with the principle of equality. The Court therefore considered whether the part of the norm that prevented the application of the regime governing the exercise of parental responsibilities to cases that were pending before the courts (in situations where filiation had been established with regard to both parents but they were not living in conditions analogous to those of spouses) was rendered unconstitutional by a breach of the principle of equality.

The *raison d'être* of the criterion that defined the situations to which the old law continued to apply after the new law had come into force, must derive from the presumption that the legislator deemed it necessary to safeguard the parties' expectations in relation to the law that would be applicable at the moment of their complaint expectations that may have led them to pursue certain procedural strategies.

However, whilst this reason is valid for divorce proceedings in the strict sense of the term (cases with the sole purpose of the dissolution of the conjugal bond and the terms under which that dissolution is to occur, the regime governing which was also amended by the provisions of the Law that contained the norm before the Court), it is not valid for cases where what is at stake is not the spouses' relations with each other, but the terms that will regulate the relations between children and their parents. Parties' expectations or planned procedural strategies are not particularly relevant to the judicial regulation of the exercise of parental responsibilities. The sole purpose of the process of regulating the exercise of parental responsibilities is the interest of the minor. The objective of this purpose is not the resolution of a conflict of interests between the parties, but decisions on a substantive reality that presupposes making value judgements in the public interest which go far beyond subjective rights or available interests in divorce proceedings.

When it enacted the new law, the legislature was of the view that parental responsibilities must in principle always be exercised jointly; both while a marriage is in place and in the event of a divorce, the dissolution of a *de facto* union, or in cases where the parents are neither married nor living in a *de facto* union. Through the application of the paradigm of the joint exercise of parental responsibilities to every possible situation, the legislature implemented the constitutional principle which says that parents have the right and the duty to educate and maintain their children.

The view was taken that the new regulatory regime would fulfil the fundamental duty of educating children better than the old solution. The change in the content of parents' powers/duties with regard to their children that was brought about by the new Law was designed in accordance with the latter's superior interests (or with the legislature's idea of the best way to protect those interests), and not with the parents' "interests" or "legal positions".

Once the legislature decided that the new regime would serve the interests of minors better, there was no reason why it should not apply to cases pending before the courts. To make the unequal forms of



treatment derived from the application of the old law and that of the new law dependent on the criterion of whether or not a case was currently pending would appear to be an arbitrary decision.

III. Two dissenting opinions were attached to the ruling.

*Cross-references:*

- See rulings nos. 34/86 of 18.02.1986, 43/88 of 25.02.1988, 309/93 of 23.04.1993, 188/2009 of 22.04.2009 and 153/2010 of 14.04.2010.

*Languages:*

Portuguese.



*Identification:* POR-2010-3-014

**a)** Portugal / **b)** Constitutional Court / **c)** Third Chamber / **d)** 15.12.2010 / **e)** 496/10 / **f)** / **g)** *Diário da República* (Official Gazette), 19 (Series II), 27.01.2011, 5445 / **h)** CODICES (Portuguese).

*Keywords of the systematic thesaurus:*

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

5.3.25.1 Fundamental Rights – Civil and political rights – Right to administrative transparency – **Right of access to administrative documents.**

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

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

*Keywords of the alphabetical index:*

Enterprise, public, access to information.

*Headnotes:*

The obligation of public enterprises incorporated in the form of companies with the corporate object of the management and disposal of public real estate assets

to provide private individuals with the right of access to their archives is not unconstitutional.

Public companies, even if they are subject to market forces and competition, do not fall within the subjective scope of the right to economic initiative provided for in the Constitution. Such companies manage the real assets that are allocated to the Administration, and the management of those assets and their acquisition and disposal is itself an administrative activity.

This activity is subject to the general principles applicable to administrative activities, in particular those of legality, the pursuit of the public interest (while respecting the legally protected rights and interests of private entities), equality, proportionality, justice, impartiality, and good faith.

*Summary:*

I. Two real estate companies lodged an appeal against a decision handed down by the Supreme Administrative Court in response to a request for an order to provide information, consult a file or issue certificates. In this case, a journalist had asked for access to documents regarding the disposal in 2005, 2006 and 2007 of real estate property belonging to the state, which had previously been allocated for use by the Ministry of Justice. The appellants argued that if interpreted such that it allows any citizen to gain unlimited access to all documents held by public companies, one of the articles in the Law governing Access to Administrative Documents (LADA) was unconstitutional.

II. The Court observed that the issue at stake here was the right of private entities to gain access to the archives of public companies with the corporate object of managing and disposing of public real estate assets; the Court did not examine the general duty of all public companies to provide information linked to judicial proceedings, whatever the scope or purpose attributed to them by their articles of association or the law and whatever the conditions under which they act in the marketplace. The Court limited the extent of its assessment of the constitutionality of the norm to the interpretation to the effect that the norm guaranteed access for all to documentation of public enterprises incorporated in the form of companies whose corporate object is the management and disposal of public real estate assets, when the documentation relates to that activity, subject to the limits derived from the restrictions on the right of access set out within the Law containing the norm.

The Court emphasised that the Constitution enshrines two fundamentally different, albeit related, rights of access to administrative information by citizens who are the object of public administration: the right to “case-related” administrative information (the right of citizens, whenever they ask, to be informed by the Administration as to the situation and progress of cases in which they are directly interested, and of definitive decisions that are taken in those cases); and the right to “non-case-related” administrative information (the right of access to administrative archives and records, without prejudice to the provisions of the law governing matters related to internal and external security, criminal investigation, and people’s private lives). The former protects the position of the citizen as a subject in a specific case or as a party with an interest in the decisions taken in it. The latter is a right that pertains to everyone, regardless of any individual interest. General access by citizens who are the object of public administration to the Administration’s documents and records (the open archive principle) without the need for justification, is a fundamental right, analogous in nature to that of constitutional rights, freedoms and guarantees, although its essential purpose is to safeguard the public interest. This open archive principle is also enshrined at the level of the European Union. The Treaty of Amsterdam established a principle of general accessibility of files regarding the actions of Community institutions; and, as a Community source, this principle has been imposed in specific areas of the internal laws of the Member States, particularly those relating to public contracts and the environment. In 2009, given the importance of the transparency of public authorities in a pluralist democratic society, the Council of Europe also approved a Convention on access to public documents.

The Law governing Access to Administrative Documents regulates the right of access (as a right *uti cives*) to administrative archives and records outside the subjective and chronological framework of a concrete administrative case. Within the scope of application of this right, everyone is entitled to gain access to administrative documents without having to justify their request. This right includes the rights to consult the documents, reproduce them, and be informed of their existence and contents.

The subjective scope of the application of the access regime poses particular problems in term of documentation in the possession of public sector enterprises, especially when these are incorporated as companies and pursue their activities under the auspices of private law.

The question in the current appeal was whether the imposition of this duty on entities that were created in the form of companies, all or most of whose shareholders are public, in order to manage and dispose of state-owned real estate assets, is a disproportionate restriction on certain dimensions of two fundamental rights (the right to property and the right of private economic initiative) and on a number of fundamental principles of the Economic Constitution (the part of the Constitution that deals with the economy) – namely the principle of the coexistence of the public, private and cooperative and social sectors, and the principle of competition.

The Court held that even when public companies are incorporated in a private form, are governed by private law and act without the powers pertaining to the authorities, they are one of the instruments that the state uses in order to pursue its activities, and possess a sphere of rights, the justification of which lies in the powers and responsibilities which the state has bestowed on them. Their legal personality does not exist outside the entity of the state. They differ from private legal persons, which are the instruments of the natural persons who combine their efforts and their capital to autonomously and freely pursue the venture in which they wish to engage. It is only when the formation and activity of a legal person is a manifestation of the free development of natural persons that it makes sense to attribute fundamental rights to that legal person. It would be inappropriate to the instrumental nature of the organisations which the state itself has created to perceive them as the holders of rights that can be opposed to the legislator.

The Constitutional Court did not uphold the appellants’ argument that the court *a quo* should have distinguished between the particular situation of public companies which are subject to the logic of the market and to competition and other types of public company, which possess special public-law prerogatives; and that to subject such public companies to information-related obligations that are totally different from those facing private companies, without a mechanism for adequately weighing up the particular situation, would undermine the right to property and the freedom of enterprise, the principle of the coexistence of the public, private and cooperative and social sectors, the principle of competition, and the very principle of equality itself (given that public companies are the object of very different treatment from that afforded to private companies, with which they are in competition).

The Court accordingly resolved to refuse the appeal.

III. Two judges appended dissenting opinions to the ruling. In their view, the appellant public companies are purely competitive in nature, engage in private business activity and find themselves in the marketplace in a situation that is equivalent to that of other, competing companies from the private sector. In the view of the dissenting Justices, the appellants, as private administrative entities or private companies with a public function, can only be subject to those principles of administrative activity that represent negative limits on their activities, not to positive criteria as to what they ought to do.

*Languages:*

Portuguese.



## Romania Constitutional Court

### Important decisions

*Identification:* ROM-2010-3-002

**a)** Romania / **b)** Constitutional Court / **c)** / **d)** 20.10.2010 / **e)** 1354/2010 / **f)** Decision on the constitutionality of Articles I.1 and II of Emergency Order no. 62/2010 amending and amplifying Law no. 221/2009 on sentences of a political character and similar administrative measures imposed during the period from 6 March 1945 to 22 December 1989 / **g)** *Monitorul Oficial al României* (Official Gazette), 761/15.11.2010 / **h)**.

*Keywords of the systematic thesaurus:*

3.21 General Principles – **Equality**.  
5.1.1.4.3 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Detainees**.  
5.2.2.13 Fundamental Rights – Equality – Criteria of distinction – **Differentiation *ratione temporis***.  
5.3.38.2 Fundamental Rights – Civil and political rights – Non-retrospective effect of law – **Civil law**.

*Keywords of the alphabetical index:*

Non-pecuniary damage, redress / Final and binding decision.

*Headnotes:*

A statutory provision instituting differential treatment between applicants taking action directed at compensation is contrary to the principle of equality of citizens before the law, when such a difference of treatment does not have an objective and reasonable justification.

*Summary:*

I. The Defender of the People (Ombudsman) brought before the Constitutional Court a plea of unconstitutionality requesting a review of the provisions of Articles I.1 and II of Emergency Order no. 62/2010 (hereinafter “the Order”) amending and amplifying Act no. 221/2009 on sentences of a political character

and similar administrative measures imposed during the period from 6 March 1945 to 22 December 1989.

The statutory provisions whose constitutionality was challenged had the following substance:

“The payment of a sum in compensation for non-pecuniary damage may attain the maximum amount of:

1. 10 000 euros for a person on whom a sentence of a political character was imposed during the period from 6 March 1945 to 22 December 1989, or an administrative measure of a political character.
2. 5 000 euros for the husband/wife or descendants in the first degree of kinship.
3. 2 500 euros for descendants in the second degree of kinship.

The provisions of the law as amended and amplified are applicable to actions and claims in respect of which final judgment has not been delivered up to the time when the present Order takes effect.”

To substantiate his plea of unconstitutionality, the Defender of the People (Ombudsman) submitted that in setting a ceiling on the amount of compensation payable to persons whose actions or claims had not yet been settled by the adoption of a final judicial ruling, the Order instituted different legal treatment from that applicable to persons already in receipt of a final ruling on their actions or claims under the same laws. This could lead to an injustice, to the extent that, persons in a like situation and concurrently bringing actions for redress of non-pecuniary damage might receive different legal treatment, consisting of awarding somebody who had already obtained a final decision unlimited compensation, but compensation limited by the Order to someone who, for reasons beyond his control, had not yet obtained such a ruling.

The Defender of the People (Ombudsman) thus considered that the impugned provisions violated the fundamental right to equality as secured by Article 16 of the Constitution.

II. In response to this plea of unconstitutionality, the Court found as follows:

1. The impugned statutory provisions did not institute a uniform legal treatment for persons on whom a sentence of a political character or a similar administrative measure had been imposed, because they generated an inequality between similarly placed recipients as to the compensation granted in respect of non-pecuniary damage.

2. The impugned statutory provisions created an inequality without relying on a sound, objective and cogent reason. Thus they contravened the established constitutional precedent that the principle of equality before the law required equal treatment to be established for situations which did not have different objectives. In this case, the different legal treatment meted out to persons claiming redress for non-pecuniary damage was determined by the speed with which the claim had been handled by the courts and had culminated in the adoption of a final judicial ruling. To lay down such a criterion, random and unrelated to the conduct of the person concerned, was in contradiction with the principle of equality before the law. Thus the establishment of differential treatment in such a context had no objective and reasonable justification.

The Court held that the impugned provisions created discrimination between persons who, despite being in objectively identical situations, received different legal treatment, which was contrary to the provisions of Article 16 of the Constitution.

3. The Court further ruled that the law infringed the principle of non-retroactivity enshrined in Article 15.2 of the Constitution, in that it applied to situations in respect of which a provisional judicial ruling, delivered at first instance, could have been pronounced.

4. The Court also found the impugned provisions contrary to Article 115.6 of the Constitution as they affected a fundamental right, namely equality of citizens in rights, enshrined in Article 16.1 of the Constitution.

Having regard to the foregoing arguments, the Court noted that the violation of these constitutional provisions infringed Article 1.5 of the Constitution providing for mandatory observance of the Constitution, of its supremacy and of the laws.

For these reasons, the Constitutional Court found the impugned statutory provisions unconstitutional.

*Languages:*

Romanian.



# Russia

## Constitutional Court

### Important decisions

*Identification:* RUS-2010-3-005

**a)** Russia / **b)** Constitutional Court / **c)** / **d)** 29.11.2010 / **e)** 20 / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 17.12.2010 / **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.**

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

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

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

*Keywords of the alphabetical index:*

Prisoner, correspondence, censorship / Lawyer, professional secrecy.

*Headnotes:*

The right to correspondence between a client and his lawyer may be restricted exceptionally.

The opening of a letter addressed to the lawyer is admissible only in the prisoner's presence and by reasoned decision of the administration.

*Summary:*

I. The Constitutional Court of the Russian Federation delivered its decision on Articles 20 and 21 of the Law on remand of suspects and defendants.

The provisions of these articles were challenged by two persons held in a remand prison who intimated that the prison administration forbade prisoners to send their lawyers letters in sealed envelopes and

censored this correspondence, which was supposed to be confidential.

The applicants considered the impugned provisions contrary to Article 48 of the Constitution guaranteeing the rights of the defence and the right to receive qualified legal aid. They submitted that the confidentiality of the relationship between a lawyer and his client was a component part of this aid. Moreover, free and uncensored correspondence between a lawyer and his client was an essential element of the right to a fair trial and of the right to respect for privacy.

II. The Court held that the impugned provisions, and those of the Code of Criminal Procedure and of the Law on the legal profession, did not provide for mandatory censorship of the correspondence between lawyers and their clients.

The right to receive the assistance of a lawyer was a fundamental human and civic right. It could be considered a precondition for any fair trial. The guarantee of confidentiality of communication between a lawyer and his client was a necessary component of the right to receive qualified legal aid.

The State was bound to ensure conditions enabling defendants and suspects to convey freely to their lawyers the information which they would not disclose to third parties.

Confidentiality was a peremptory condition of trust and consequently of all qualified legal aid.

To be held on remand was the severest coercive measure, restricting rights, freedoms and the inviolability of the human person to the utmost. In these circumstances, the guarantees of legal aid acquired particular significance and must afford the possibility of communicating directly with one's lawyer, whether personally or in writing.

Thus censorship of the correspondence of a citizen held on remand could only be regarded as an exception to the general rule.

A similar judgment has been delivered by the European Court of Human Rights and similar standards are set out by international instruments.

The right to correspondence between a client and his lawyer may be restricted, by way of an exception, when the administration of the remand prison has justifiable suspicions that the correspondence may have an unauthorised content, threaten the prison's security, or be of a criminal nature.

Even in these cases, however, the opening of a letter addressed to the lawyer is admissible only in the prisoner's presence and by reasoned decision of the administration.

In making this interpretation, the Court found the provisions of the law consistent with the Constitution.

*Languages:*

Russian.



## Serbia Constitutional Court

---

### Important decisions

*Identification:* SRB-2010-3-005

**a)** Serbia / **b)** Constitutional Court / **c)** / **d)** 21.01.2010 / **e)** UŽ-445/2008 / **f)** / **g)** / **h)** CODICES (English, Serbian).

*Keywords of the systematic thesaurus:*

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

*Keywords of the alphabetical index:*

Civil proceedings, duration, excessive.

*Headnotes:*

The duration of court proceedings may depend on several factors. However, court proceedings lasting nearly twenty-five years cannot be justified, and are in breach of the right to a hearing within a reasonable time, an important element of the right to a fair trial.

*Summary:*

I. The applicant filed a constitutional appeal against the judgment of the District Court of 7 February 2008, for violation of the right to fair trial enshrined within Article 32.1 of the Constitution.

This judgment brought to an end litigation which the complainant had initiated in 1983, before the Municipal Court, after a series of actions and omissions on the part of the Municipal and District Courts. The complainant argued that it violated his right to a fair trial. The proceedings had (unjustifiably in his opinion) lasted almost twenty-five years, and, over the years, some of the files were lost and had to be reconstructed. He also noted that ten judges participated in the proceedings and not one of them carried out an assessment in the field. Finally, in his opinion, the judgment was entered on the basis of the court expert's findings, in which the expert entered

incorrect and false data. On the basis of these facts, the First Instance Court should not have issued the judgment denying the appeal; neither should it have been confirmed at second instance.

II. The Constitutional Court examined the files of the case of the Municipal Court in the litigation which was conducted by the complainant. It noted that the case documents were incomplete and disorganised, and that some of the paperwork listed on the folder of the case files was missing. The stamp acknowledging receipt of the submissions of the clients could not definitively be identified as that of the Court. Data which was labelled as indicating receipt of the paperwork did not match the actual time when the submissions were filed at court. Minutes from the various hearings had not been signed and certified in accordance with the provisions of the Civil Procedure Code.

The Constitutional Court observed that the proceedings began with the filing of charges by the complainant on 10 October 1983 and were completed with the issuing of the final decision of the District Court of 7 February 2008, which dismissed the complainant's appeal as being groundless and upheld the judgment of the Municipal Court of 29 May 2007. The judgment was submitted to the plenipotentiary of the plaintiff (the complainant in these proceedings) on 20 March 2008. One of the plaintiffs declared a revision in terms of this judgment to the Supreme Court of Serbia on 17 April 2008, but this was rejected as inadmissible by the Supreme Court on 3 September 2008.

The proceedings lasted from 10 October 1983 to 3 September 2008. A period of almost twenty-five years elapsed from the filing of the original suit papers to final completion of the legal remedies. However, the case had less than eight months before the Second Instance Court and less than four months before the Supreme Court.

The Constitutional Court found that the complainant's right for his case to be heard within a reasonable time, guaranteed by Article 32.1 of the Constitution, had been breached. This right, as an element of the right to fair trial, offers protection to parties to proceedings against unjustifiable adjournments and obstructions to the proceedings, and, along with the court decisions issued, it ensures its effectiveness.

The question arose as to the period in relation to which the Constitutional Court is responsible for assessing whether the right to a trial within a reasonable time has been breached. The Constitutional Court established that the period during which Serbian citizens are guaranteed the rights and freedoms established by the Court and the

constitutional and judicial protection in proceedings following a constitutional appeal began to run on 8 November 2006, the date of entry into force of the Constitution. However, in view of the unique nature of court proceedings, the Constitutional Court reached the conclusion that in this particular case, the duration of the court procedure under challenge can be taken into consideration when appraising the reasonableness of the time limit.

These proceedings lasted almost twenty-five years, which in itself indicates that the proceedings were not completed within a reasonable time. Whilst the Constitutional Court acknowledged that the duration of a court procedure is a relative category, which is dependent on various factors such as the complexity of factual and legal matters in a given case, the conduct of the parties to the proceedings, the conduct of the relevant authorities charged with the matter (such as courts), and the significance of the right being asserted, a set of proceedings lasting almost twenty-five years could not be justified by any of the above factors.

The constitutional appeal indicated that the right to a fair trial was breached in this case. Attention was drawn to the lack of adequate evidence put forward during the proceedings, and to the lack of proper evaluation of the evidence that was presented. However, the constitutional appeal contained no relevant constitutional and legal reasons in support of its allegations. The Constitutional Court was consequently asked to re-examine, as a higher instance court, the legality of the Court decisions on the basis of which the charges filed by the complainant were dismissed. The allegations within the constitutional appeal could not, therefore, be accepted as grounded.

#### *Languages:*

English, Serbian.



#### *Identification: SRB-2010-3-006*

**a)** Serbia / **b)** Constitutional Court / **c)** / **d)** 18.03.2010 / **e)** UŽ-2129/2009 / **f)** / **g)** *Službeni glasnik Republike Srbije* (Official Gazette), no. 36/2010 / **h)** CODICES (English, Serbian).

*Keywords of the systematic thesaurus:*

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

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

*Keywords of the alphabetical index:*

Detention, length / Freedom, deprivation, measure.

*Headnotes:*

Someone who is deprived of their liberty is guaranteed the right to appeal against this measure. He or she is also guaranteed a review and a timely decision by the Court, after its investigatory procedures, as to the lawfulness of their detention. These are important elements of the right to a fair trial.

*Summary:*

I. The complainant filed a constitutional appeal to the Constitutional Court against a decision by the District Court of 12 November 2009, alleging a breach of his rights under Article 27.3 of the Constitution.

He explained that the Municipal Court had extended his period of detention by its decision of 19 October 2009. He lodged a complaint against the decision on 21 October 2009, but the District Court rejected it as ungrounded in its decision of 12 November 2009. The Second Instance Court decision was issued twenty-three days after the complaint against the first instance decision (extending his detention) was filed. Article 27.3 of the Constitution stipulates the right to a timely decision from the Court. The complainant argued that this right was not respected.

Having examined the supporting documents enclosed with the constitutional appeal, the Constitution Court found the following facts and circumstances to be of relevance. An investigation was conducted against the complainant before the Municipal Court, as there was reasonable suspicion that he had committed the criminal act of banditry.

He was in detention from 19 August 2009. The Municipal Court resolved by its decision of 19 October 2009 to extend his detention to 19 November 2009. The complainant received the Municipal Court's decision (of 19 October) to extend his detention on 20 October 2009, and lodged a complaint, which was received by the District Court

on 21 October 2009. On 12 November 2009, the District Court rejected the complaint as ungrounded.

II. The Constitutional Court emphasised that the right to freedom is one of the fundamental human rights guaranteed by the Constitution; detention is a particularly sensitive example of its limitations. The provisions of Article 27.3 of the Constitution enshrine basic protection from arbitrary deprivation of liberty. The person deprived of their liberty is guaranteed recourse to court to appeal against the measure, as well as a review and a timely decision from the Court, at the conclusion of its investigatory procedure, as to the lawfulness of the arrest and detention.

The question had arisen as to whether the period of investigation of the lawfulness of detention by the Court was in compliance with the obligation of urgency under Article 27.3 of the Constitution. The Constitutional Court expressed its stance that a clearly set time limit of 48 hours for issuing and delivering the decision on the complaint on the decision on the detention extension would imply that subsequent decisions should also be issued within the shortest period possible.

In these particular proceedings, the District Court as the Second Instance Court decided upon the complaint over the decision to extend the detention period. However, the Constitutional Court held that the Municipal Court, as the First Instance Court which issued the decision under appeal, was involved in the proceedings following the complaint. The case therefore had to be considered as a whole, in terms of its duration before both courts. The proceedings relating to the decision to extend the detention period were implemented both before the Court whose decision was denied by the complaint (the First Instance Court) and before the Court deciding on the decision (the Second Instance Court), as the complaint was filed at the Second Instance Court through the First Instance Court and as the First Instance Court was authorised to appraise the timeliness and admissibility of the complaint.

The Constitutional Court noted that the process of the complaint against the Municipal Court's decision of 19 October 2009 lasted twenty-three days altogether. The complaint was not, in its opinion, considered speedily, due to omission on the part of the Municipal Court. As a result, the complainant's rights under Article 27.3 of the Constitution were violated. However, in terms of the proceedings following the complaint before the District Court, which lasted two days in total, the District Court's performance met the standard of urgency in its decision-making in this particular case, in accordance with all the accepted domestic and international criteria.



*Languages:*

English, Serbian.

*Identification:* SRB-2010-3-007

**a)** Serbia / **b)** Constitutional Court / **c)** / **d)** 21.04.2010 / **e)** IUz-52/2008 / **f)** / **g)** *Službeni glasnik Republike Srbije* (Official Gazette), no. 34/2010 / **h)** CODICES (English, Serbian).

*Keywords of the systematic thesaurus:*

4.9.6 Institutions – Elections and instruments of direct democracy – **Representation of minorities.**

4.9.13 Institutions – Elections and instruments of direct democracy – **Post-electoral procedures.**

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

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

5.3.41 Fundamental Rights – Civil and political rights – **Electoral rights.**

*Keywords of the alphabetical index:*

Election, electoral list / Election, candidate list, minimum signatures / Election, public nature.

*Headnotes:*

Respect for the constitutional principle of free and direct elections within the system of proportional representation and closed electoral lists would suggest that those proposing the list should distribute the councillors' mandates to the candidates according to the order in which their names are stated in the list.

A mandate is a public legal relationship between the voters and the representatives. It cannot be the subject of a contract between the councillor and the submitter of the electoral list. Councillors must be able to express their opinions freely, in the performance of their duties.

*Summary:*

I. On 2 July 2009 the Constitutional Court initiated proceedings to assess the constitutionality of the provisions of Articles 18, 43 and 47 of the Law on Local Elections (Official Gazette, no. 129/07).

The Law on Local Elections prescribes a uniform, proportional system of distribution of mandates, as well as closed (linked) lists of candidates. Under this system, the proposer of the list defines the list independently; the elector has only one vote and may only vote for one list.

Under Article 43 of this Law, those submitting the electoral list must inform the electoral commission, within the allotted time span following the date the election results are announced, as to which candidates from the electoral list are to be assigned the councillor mandates. The election commission must then assign all mandates obtained by that list to candidates from the list, in accordance with the order in the list.

II. The Constitutional Court found that Article 43 violated the constitutional principles relating to public representation and free and direct elections. It took the view that the contents of the right to candidacy are exhausted in the right of those proposing the electoral list to freely nominate the candidates for positions as councillors and their order in the list. A political party and other proposers of the electoral lists may not be granted the power to elect (in effect to decide), after the elections have been conducted and the will of the voters expressed, who is to be a councillor in the assembly of the local government authority.

Article 47 allows for an institute of the contract between candidates for councillor positions and the submitters of electoral list, which may in turn prescribe the right of those submitting the list to resign on behalf of councillors from the position of councillors in the local government assembly, on which basis those submitting the electoral list gain the right to free disposal of councillors' mandate. It also allows for the possibility of blank resignation.

The Constitutional Court noted that the capacity of councillors is accomplished by direct election by citizens, and that councillors are at liberty to exercise their functions and represent citizens in the local government assembly. However, this does not imply that councillors are free to dispose of their mandates in the manner prescribed in the contested provisions of Article 47, but rather that they are independent from outside influence when votes are taken and decisions made in the local representative assembly.

A mandate is a public legal relationship between the voters and the representatives; it cannot be the subject of a contract between those standing for election as councillors and those submitting the electoral list.

Furthermore, the institute of a blank resignation contained in Article 47 is not compatible with the basic legal principle that the expression of will as to resignation should be in compliance with the actual will of the holder of a public function. It is also at variance with the constitutional provision prescribing that a public function may cease at the personal request of the holder of a public function.

The right of citizens to be elected also implies that councillors are entitled to keep and peacefully enjoy their mandates within the period for which they have been elected, and that they are guaranteed protection against arbitrary deprivation.

The Constitutional Court took the view that the contested provisions also limited councillors' rights to freedom of thought and expression. They must be free to express their opinions (to speak and to vote in accordance with their beliefs) in the performance of their duties. This constitutionally guaranteed right is important for all citizens and of particular significance for elected representatives, as they represent citizens and their interests in the assembly.

The Constitutional Court noted that Article 18 prescribed the conditions for submitting the electoral list. These were general conditions, relating equally to all participants in the election process. It prescribed two cumulative conditions necessary to define an electoral list. At least thirty voters had to support the proposal for each candidate by their signatures and the proposer had to propose at least one third of the candidates for the total number of vacant positions as councillors. There was no specific provision at this stage of the election process for members of national minorities. Article 18.2 of the Law made some provision for smaller election units; the electoral list in local self-government units with fewer than twenty thousand voters need to be supported by at least two hundred voters.

In the view of the Constitutional Court, the provisions of Article 18 setting out the minimum number of voters to support the electoral list and the minimum number of councillors to be proposed in the list in order for the electoral list to be legally valid did not have the potential to bring members of the national minorities into an unequal position in relation to members of the majority population. The Constitutional Court noted that national minorities in the Republic of Serbia tend, according to information from the competent statistical

institution, to be concentrated in certain areas and that, in some municipalities, the national minorities are the majority population. Therefore the requirements in the legislation should not in principle pose any particular problem for the political parties of the national minorities.

#### *Languages:*

English, Serbian.



#### *Identification: SRB-2010-3-008*

**a)** Serbia / **b)** Constitutional Court / **c)** / **d)** 28.05.2010 / **e)** VIIIU-102/2010 / **f)** / **g)** *Službeni glasnik Republike Srbije* (Official Gazette), no. 34/2010 / **h)** CODICES (English, Serbian).

#### *Keywords of the systematic thesaurus:*

4.7.4.1.3 Institutions – Judicial bodies – Organisation – Members – **Election**.  
 4.7.4.1.5 Institutions – Judicial bodies – Organisation – Members – **End of office**.  
 4.7.5 Institutions – Judicial bodies – **Supreme Judicial Council or equivalent body**.  
 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:*

Judge, appointment, conditions, fulfilment.

#### *Headnotes:*

Persons who are elected as judges in Serbia must fulfil three specific conditions for election; it is up to the High Judicial Council to assess how well they meet the criteria.

The right of applicants who are not appointed as judges to receive substantiated decisions about the termination of their judicial function is an element of the right to a fair trial and should be safeguarded in the election process.

*Summary:*

I. ZS appealed to the Constitutional Court against a decision of the High Judicial Council (hereinafter, the "HJC") dated 25 December 2009 which terminated as of 31 December 2009 the judicial office of judges not elected pursuant to the Law on Judges (Official Gazette, no. 116/08).

He stated that when the HJC published an advertisement for the election of judges in Serbia, he held office as a judge of the District Court, and had submitted timely applications for election as judge of the Appellate as well as the Higher Court. He fulfilled all conditions for election and there was no reason for his judicial function to be terminated, because under Article 13 of the Decision on the Criteria and Standards for the Assessment of Professional Qualifications, Special Qualifications and Fitness for the Election of Judges and Presidents of Courts (hereinafter, the "Decision") it is assumed that a judge elected under the previous regulations, who is holding judicial office at the time of the election, and has applied for election to a court of the same type or instance, meets the criteria and standards from this Decision. The applicant discovered that he had not been elected because the Decision on the Election of Judges to Permanent Judicial Function in Courts of General and Special Jurisdiction (Official Gazette, no. 106/09) did not contain his name. He was only formally informed afterwards that his judicial office was being terminated by the adoption of this Decision.

The applicant noted that the Decision, apart from stating that the judicial function of 837 judges was being terminated on 31 December 2009 and listing their names, contained only a brief and generalised explanation in respect of all non-elected judges stating that their judicial functions were being terminated as they had not fulfilled the requirements for election. It would appear that in regard to the applicant and to the other judges who were not elected, the HJC had determined that they cumulatively did not meet any of the requirements prescribed for election, but no concrete reasons were set out in the Decision as to why they did not meet them.

II. The Constitutional Court found Articles 36.2 and 148 of the Constitution, Article 99.1 of the Law on the Constitutional Court and Article 67 and Articles 43 to 54 of the Law on Judges to be of relevance in its deliberations as to the admissibility of the complaint.

Article 32.1 of the Constitution, Article 43 and Article 45.2 to 45.6 of the Law on Judges, Article 13 of the Decision on the Criteria, Article 17.2 of the Law

on HJC (Official Gazette, no. 116/08) and Article 32.1 of the Rules of Procedure of the HJC (Official Gazette, no. 43/09) were of relevance to the Constitutional Court's deliberations as to whether the applicant's claims were justified.

On 25 March 2010, the Court established legal positions with regard to two questions which had arisen over the rights of judges whose judicial office was terminated due to non-election. Firstly, judges in this position were entitled to appeal to the Court and secondly, decisions determining the termination of their judicial office must contain individualised reasons for their non-election.

The Constitutional Court notified the HJC about the position it had taken, and ordered it to reply to the statements made in the appeal. However, the HJC did not act within the period specified.

Once the deadline had expired, the HJC made a submission to the Constitutional Court, asking it to reject the applicant's appeal as unfounded and to uphold the disputed Decision, amended with individualised reasons for the termination of judicial office as contained in the submission. According to the HJC, the actions of the applicant when acting as an investigative judge in four cases of the District Court cast doubt over "the professional and special qualifications of the candidate in accordance with Article 14 of the Decision on the Criteria". It also asserted that other claims in his appeal were unfounded.

The submission did not appear to represent a response on the part of the agency to the numerous claims made in the appeal, but rather an amendment to the reasoning given in the Decision. The Constitutional Court therefore continued the appeal proceedings.

The Constitutional Court observed that anybody seeking election as a judge must cumulatively meet three specific criteria – possession of professional and special qualifications and fitness for the performance of a judge's function. It is up to the HJC to determine how well these criteria are met. However, the election of judges in this particular case was distinctive, as it included all judges who were then performing their duties in accordance with regulations in force earlier. It was assumed that they met the criteria, but this presumption was rebuttable. The right to a fair trial, which includes the right of non-elected judges to receive substantiated decisions as to the termination of their judicial functions, should have been safeguarded in the election procedure.

The Constitutional Court noted procedural shortcomings in the Decision. Its brief generalised substantiation made it impossible for the Court to assess its lawfulness in relation to the applicant in terms of material law, and for the applicant to make efficient use of his right to appeal. As a result, the Constitutional Court could only assess the merits of the appeal and not the merits of the lawfulness of the Decision.

It upheld the appeal and overturned that part of the Decision which related to the applicant. It ordered the HJC to render a new decision within thirty days, on the applicant's application for election as a judge. The HJC would then have to decide whether he should be elected to a permanent judicial function. If it decided at that point that he did not fulfil the prescribed requirements, it would have to issue a decision terminating his judicial authority, stating which of the conditions he did not meet. It would also have to present concrete reasons and evidence to substantiate its decision.

#### *Languages:*

English, Serbian.



#### *Identification:* SRB-2010-3-009

**a)** Serbia / **b)** Constitutional Court / **c)** / **d)** 15.07.2010 / **e)** IU-166/2006 / **f)** / **g)** *Službeni glasnik Republike Srbije* (Official Gazette), no. 79/2010 / **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.**

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

#### *Keywords of the alphabetical index:*

Media, broadcasting, licence, granting.

#### *Headnotes:*

The establishment of sanctions for violation of broadcasters' obligations prescribed by the law does not imply restriction of the freedom of media.

#### *Summary:*

I. The Constitutional Court was asked to examine the conformity with the Constitution and the European Convention for the Protection of Human Rights and Fundamental Freedoms of the provisions of Articles 17.1, 32.2, 53.4 and 53.5, 54, 57.1 and 63 of the Broadcasting Law (Official Gazette, nos. 42/02, 97/04, 76/05, 79/05 and 62/06).

Under Article 17.1, the Republic Broadcasting Agency (hereinafter, the "Agency") may issue a caution or warning against a broadcaster, and temporarily or permanently revoke its broadcasting licence. The Agency's Council (hereinafter, the "Council") can revoke licences on a temporary basis (Article 63) and, if a broadcaster has not fulfilled its obligations and its licence has been temporarily revoked three times, its licence will then be revoked on a permanent basis.

II. The applicant argued that the stipulation in the above provisions of the Broadcasting Law allowing the Council to revoke broadcasters' licences resulted in a breach of the constitutionally guaranteed right to freedom of media. The Constitution only allows for restrictions on this right where a court decision has established that there are valid reasons for such restriction.

The Constitutional Court observed that by endowing a special body with the authority to pronounce certain measures, the legislator has stipulated the relations within the framework of the powers set out in the Constitution. The provisions under dispute do not imply restriction on the freedom of media. Rather, they establish sanctions for the violation of the obligations of broadcasters set out by legislation, in conformity with the Constitution and international conventions and standards. Under the Broadcasting Law, a broadcaster may lodge an administrative lawsuit against the Council's revocation of its licence, and may also file a constitutional appeal on the basis of Article 170 of the Constitution.

The applicant expressed concern over the constitutionality of that part of Article 32.2 of the Law which prescribes that the Council passes general acts and decisions, on the basis of which broadcasters' rights are decided, by majority vote. The applicant pointed out that instead of establishing all circumstances and facts properly and completely, the Council issues its decisions "by simple vote".

The Constitutional Court noted that Articles 97 and 137 of the Constitution give the legislator the power to put special bodies in place, to carry out regulatory functions in certain areas. Whether the Council passes its decisions by simple vote or by qualified majority is a matter of expediency of the legal solution; its appraisal is not, on the basis of the provisions of Article 167 of the Constitution, within the Constitutional Court's remit.

With regard to Article 53.4, which prescribes the responsibility of the Agency to determine and publicise non-discriminatory, objective, and measurable criteria for decision-making, the applicant suggested that the legislator only "obliged" the Agency to publicise those criteria in the course of dealing with applications which had already been submitted. The applicant suggested that this was unconstitutional.

Article 53.5 of the Broadcasting Law stipulates that the Agency must issue its decisions in line with the established criteria, and must favour decisions which provide greater safeguards in terms of improved quality and diversity of programmes. It should also take account of the contributions made to the realisation of the principle of setting up relations in the area of broadcasting during the previous period. The applicant argued that this provision is at variance with the Constitution as it prescribes "extremely immeasurable, therefore uncontrollable criteria, subject entirely to the subjective appraisal of the Council's members."

The Constitutional Court observed that these provisions placed the Agency under a duty to publish the criteria on the basis of which its decisions are issued. They also set out the advantages the Agency is obliged to establish on the basis of the documentation submitted. As a result, applicants who are unsuccessful in obtaining licences are guaranteed adequate protection of their rights in proceedings before the Agency (i.e. before the relevant Court).

Article 54 allows for the possibility of filing a complaint against the Council's decision, which the Council will decide upon. The applicant suggested that this provision excluded the two instance system of decision-making, resulting in a breach of the human rights and freedoms guaranteed under Articles 13 and 47 ECHR. The Constitutional Court, however, found that this was not the case. Under the Constitution, everyone is entitled to an appeal or other legal remedy against decisions affecting their rights, obligations or lawful interests (Article 36.2), and the lawfulness of final individual acts deciding on these rights, obligations or interests is subject to reassessment before the court in administrative proceedings (Article 198). Article 37 of the Broadcasting Law

envisages that administrative lawsuits may be instituted against the Agency's decisions. Moreover, an administrative act may be challenged in an administrative lawsuit if the authority in question has exceeded the limits of its legal powers or if it has not been issued in pursuance of the aim for which the powers were granted. Article 54 was therefore also found to be in compliance with the European Convention.

Article 57.1 states that deposits will be returned to unsuccessful applicants for broadcasting licences within seven days of the issue of the decision (a shorter time limit than that applicable to the issue of a decision on a complaint). The Constitutional Court noted that this provision sets out the procedure for issuing broadcasting licences, pursuant to the Constitution and stipulated by law. Whether an obligation to pay a deposit should be regulated and the time span for the Agency to return deposits is a matter of expediency, the appraisal of which, on the basis of Article 167, did not fall within the Constitutional Court's jurisdiction.

#### *Languages:*

English, Serbian.



#### *Identification: SRB-2010-3-010*

**a)** Serbia / **b)** Constitutional Court / **c)** / **d)** 04.11.2010 / **e)** UŽ-316/2008 / **f)** / **g)** *Službeni glasnik Republike Srbije* (Official Gazette), no. 97/2010 / **h)** CODICES (English, Serbian).

#### *Keywords of the systematic thesaurus:*

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

5.3.37 Fundamental Rights – Civil and political rights – **Right of petition.**

#### *Keywords of the alphabetical index:*

Defamation, criminal / Right, protection.

*Headnotes:*

A submission, appeal, brief or any other written documentation submitted by a physical entity to a state body, seeking protection of its rights and interests from potentially illegal activity on the part of another physical entity does not have the nature of a petition.

*Summary:*

I This case arose as a result of a private prosecution for defamation brought by the applicants against their neighbour, R.M. They claimed that their right to a fair trial under Article 32.1 of the Constitution was breached by the lower instance court decisions to acquit him. In their view, the courts did not apply the provisions of Article 56 of the Constitution (right to petition) correctly, as the limitations of the right to petition were overstepped by the criminal act committed (i.e. the defendant's defamatory statements). The defendant should therefore have been sentenced for the criminal act, not acquitted from the charges.

R.M filed a petition against his neighbours (the applicants) with the Police Station because they frequently harassed him on the road and shots were sometimes fired over his house. He alleged that his dog had been poisoned and, previously, his sheep and pigs. He asked the police to attend in order to verify these matters.

The police officers acted as requested in R.M's written petition. They spoke to the applicants but did not establish the validity of any of R.M's allegations. They did, however, issue the applicants with a warning.

The complainants, acting as private plaintiffs, filed private charges with the Municipal Court against R.M. for the criminal act of defamation which he had committed by filing a written petition at the Police Station, making false allegations against them which damaged their honour and reputation.

The Municipal Court resolved to acquit R.M from the criminal defamation charges, stating that when he wrote the petition, he did not intend to defame or insult the private plaintiffs (the applicants in these proceedings). The elements of the criminal act of defamation did not exist here; no illegality was to be found in the action R.M. took in writing the petition to the Police Station.

The applicants appealed to the District Court, which upheld the Municipal Court's decision, accepting in full the stance it had taken and its reasons for acquitting the defendant.

II. The Constitutional Court examined the allegations and reasoning of the constitutional appeal from the standpoint of the provisions of Article 32.1 of the Constitution, the Criminal Procedure Code and the Criminal Code. It found that the above judgments did not violate the applicants' constitutional right to a fair trial.

The constitutionally protected right to a fair trial guarantees that proceedings will be heard and completed within a reasonable time before an independent and impartial tribunal established by the law, where the parties' rights and obligations will, be decided upon in a public hearing, together with the grounds for suspicion resulting in the institution of the proceedings and the accusations made. The Constitutional Court held that the judgments were issued by courts established by law, that they performed impartially and within the limits of their jurisdiction; that the applicants, as private plaintiffs, were enabled to participate and put their case forward, and that the judgments were based on a legally conducted procedure and a legally and constitutionally acceptable interpretation of procedural and substantive law.

With regard to the content of Article 56 of the Constitution, the Constitutional Court held that submissions, appeals, briefs or any other written documents submitted by a physical entity to a state body, seeking protection of rights and interests which are under threat from the potentially illegal activity of another physical entity, do not have a character of a petition in terms of Article 56.

The Constitutional Court emphasised that the courts did not in anyway invoke or call upon the provisions of Article 56 of the Constitution in the judgments. It does not emanate from the transcripts of the judgments, as the applicants suggested, that the courts weighed up the defendant's right to petition against the applicants' right to honour and reputation and accorded priority to the right to petition. The courts established in the judgments under dispute that the actions of the defendant did not contain any substantial characteristics of the criminal act of defamation; it was not unlawful for him to file a written petition with the Police Station seeking the protection of his personal and property rights and interests, and on that basis he was acquitted of the charges. The applicants' allegations interpreted the proceedings of the lower instance courts in a different fashion; they represented their subjective interpretation of the reasons for the rendering of the judgments, and, in the Constitutional Court's view, were not assertions based on fact.

*Languages:*

English, Serbian.



## Slovenia

### Constitutional Court

#### Statistical data

1 September 2010 – 31 December 2010

The Constitutional Court held 25 sessions during the above period, 14 of which were plenary and 11 were in Chambers. 3 of the latter sessions were in civil chambers, 4 in penal chambers and 4 in administrative chambers. The Constitutional Court accepted 92 new requests and petitions for the review of constitutionality/legality (U-I cases) and 494 constitutional complaints (Up cases).

In the same period, the Constitutional Court decided 86 cases in the field of the protection of constitutionality and legality, as well as 504 cases in the field of the protection of human rights and fundamental freedoms.

Judgments are published in the Official Gazette of the Republic of Slovenia, whereas the decisions of the Constitutional Court are not generally published in an official bulletin, but are handed over to the parties to the proceedings.

However, the judgments and decisions 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-2010-3-006

**a)** Slovenia / **b)** Constitutional Court / **c)** / **d)** 18.03.2010 / **e)** Rm-1/09 / **f)** / **g)** *Uradni list RS* (Official Gazette), 25/2010 / **h)** *Pravna praksa*, Ljubljana, Slovenia (abstract); CODICES (Slovenian, English).

*Keywords of the systematic thesaurus:*

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

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

3.1 General Principles – **Sovereignty.**

3.8.1 General Principles – Territorial principles – **Indivisibility of the territory.**

*Keywords of the alphabetical index:*

International agreement, constitutionality / Border, national, definition / Border, dispute, settlement.

*Headnotes:*

The Basic Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia is an applicable constitutional act and, as such, a permanent and inexhaustible constitutional source of Slovenian statehood.

Section II of the Basic Constitutional Charter protects the national borders and in conjunction with Article 4 of the Constitution forms the applicable and relevant constitutional determination of the territory of the Republic of Slovenia.

The part of Section II of the Basic Constitutional Charter which protects the national borders between the Republic of Slovenia and the Republic of Croatia must be interpreted within the meaning of the international law principles of *uti possidetis juris* (on land) and *uti possidetis de facto* (at sea).

In accordance with Section II of the Basic Constitutional Charter, the land border between Slovenia and Croatia is constitutionally protected where the border between the republics of the former Socialist Federative Republic of Yugoslavia was drawn, whereas the maritime border is protected along the line up to the High Sea to the point where the Republic of Slovenia *de facto* exercised its authority before its independence.

The Arbitration Agreement between the Government of the Republic of Slovenia and the Government of the Republic of Croatia does not determine the course of the state borders between the Parties to the Agreement, but it establishes a mechanism for the peaceful settlement of the border dispute.

*Summary:*

The Constitutional Court adopted Opinion no. Rm-1/09-26 on 18 March 2010 in proceedings to review the constitutionality of a treaty, which were launched at the government's instigation. The Constitutional Court found that Articles 3.1.a, 4.a and 7.2 and 7.3 of the Arbitration Agreement between the Slovenian and the Croatian governments, which must be interpreted and reviewed as a whole in terms of content, are not inconsistent with Article 4 of the Constitution in conjunction with Section II of the Basic Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia (hereinafter, the "BCC").

Questions arising from the coming into being and the ceasing to exist of states, and those of the state territory and state borders, fall primarily in the domain of international law. State borders by definition concern two or more states and are in general a result of their mutual agreement. However, in the case of Slovenia, the state borders are also regulated in national law, specifically in Section II of the BCC; Article 4 of the Constitution also refers to the state territory.

The Constitutional Court emphasised that the BCC, which was adopted on 25 June 1991, is a constitutional act. With its adoption, the Republic of Slovenia established itself as a sovereign and independent state, breaking its ties definitively with the Socialist Federal Republic of Yugoslavia (hereinafter, the "SFRY"). The constitutional power of the BCC, however, was not just limited to the time of its adoption; it is a permanently applicable law and a permanent and inexhaustible constitutional foundation of the statehood of the Republic of Slovenia.

An essential element of statehood is also a territory in which the state is the highest legal and *de facto* authority. The territory of the Republic of Slovenia was defined by Section II of the BCC, which also defined its state borders. Section II of the BCC constitutionalised the state borders. However, Section II did not determine the borders in the manner that is customary in treaties, as it did not describe their course or determine them by geographic coordinates.



The Constitutional Court concluded that Section II of the BCC protected the state borders of the Republic of Slovenia and, in conjunction with Article 4 of the Constitution, formed an applicable and relevant constitutional definition of the state territory. Those drafting the Constitution intended these provisions to establish the state territory and state borders as one of the fundamental values which must be protected at the constitutional level.

When the Republic of Slovenia became independent, the land border between Slovenia and Croatia, as it existed within the former SFRY, became an internationally recognised state border, substantiated by the international law principle of *uti possidetis juris*. In accordance with Section II of the BCC, the land border between Slovenia and Croatia is constitutionally protected where the border between the republics of the former SFRY was drawn. By contrast, the maritime border between the republics within the former SFRY was not determined. However, the Republic of Slovenia exercised *de facto* authority in the Bay of Piran and in general terms. The territorial situation at sea on the date independence was gained is protected by the principle of *uti possidetis de facto*. The maritime border is thus protected along the line up to the High Sea, to the point where Slovenia in effect exercised its authority before independence. Moreover, when it became independent, Slovenia became a coastal state. As a coastal state cannot exist without an appropriate area of sea, it follows that part of the Adriatic Sea and the territory under it falls within Slovenia's state territory. The determination of which part of the sea and the pertinent maritime zones forms Slovene state territory is primarily a question for resolution in accordance with the rules and principles of international law. However, these are only effective to the extent that states observe them when concluding border treaties or to the extent that they are a basis for the decisions of international tribunals.

The Constitutional Court ruled that the Arbitration Agreement between the Slovenian and Croatian governments did not determine the course of the borders between the Parties to the Agreement, but rather it was an agreement that established a mechanism for the peaceful resolution of border disputes.

#### *Languages:*

Slovenian, English (translation by the Court).



## South Africa Constitutional Court

### Important decisions

*Identification:* RSA-2010-3-008

**a)** South Africa / **b)** Constitutional Court / **c)** / **d)** 02.09.2010 / **e)** CCT 59/10; [2010] ZACC 14 / **f)** Stuttards Stores (Pty) Ltd and Others v. Salt of the Earth Creations (Pty) Ltd and Others / **g)** www.constitutionalcourt.org.za/uhtbin/cgisirsi/zV1kWJUM9/MAIN/0/57/518/0/J-CCT59-10 / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

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

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:*

Bias, judicial officer / Bias, judicial, risk / Bias, suspicion / Decision, judicial, evaluation / Decision, reasons / Judge, impartiality, perception / Judge, recusal / Judgment, reason / Judge, interest / Reasonable apprehension, test.

*Headnotes:*

The granting of a recusal application on the basis of suspicion of bias based on the judge having copied verbatim a substantial part of one of the parties' submissions into his judgment will not be in the interest of justice if it will have no practical effect on the material dispute between the parties.

*Summary:*

I. The applicants appealed to a Full Court of the High Court, Pretoria (Full Court) against the refusal by Basson J, a High Court judge, to recuse himself from further proceedings in a matter in which he had handed down judgment. The basis for the recusal application was that Basson J failed to utilise'

independent legal reasoning. The bulk of his judgment consisted of a verbatim 'copy and paste' from the written argument of the respondent's counsel.

II. The Full Court dismissed the appeal. The applicants' application for leave to appeal to the Constitutional Court (the Court) was unsuccessful on the grounds that it was not in the interest of justice to grant a hearing. The Court held that the application for recusal had become purely academic as Basson J had not heard any of the subsequent proceedings and had already retired from the bench. Further, the door was still open to the applicants' to challenge the merits of Basson J's initial judgment by appealing against it.

The Court refrained from addressing the question whether extensive use of one party's argument could lead to a perception of bias. The Court did, however, express the view that although some reliance on counsel's heads of argument may not be improper it is more prudent for a judge to formulate a judgment in his or her own words.

#### Cross-references:

- *Mphahlele v. First National Bank of SA Ltd* [1999] ZACC 1; 1999 (2) *South African Law Reports* 667 (CC); 1999 (3) *Butterworths Constitutional Law Reports* 253 (CC);
- *Strategic Liquor Services v. Mvumbi NO and Others* [2009] ZACC 17; 2010 (2) *South African Law Reports* 92 (CC); 2009 (10) *Butterworths Constitutional Law Reports* 1046 (CC);
- *Van Wyk v. Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)* [2007] ZACC 24; 2008 (2) *South African Law Reports* 472 (CC); 2008 (4) *Butterworths Constitutional Law Reports* 442 (CC).

#### Languages:

English.



#### Identification: RSA-2010-3-009

**a)** South Africa / **b)** Constitutional Court / **c)** / **d)** 30.09.2010 / **e)** CCT 07/10; [2010] ZACC 17 / **f)** Van Vuren v. Minister for Correctional Services and Others / **g)** [www.constitutionalcourt.org.za/uhtbin/cgisirsi/hVMxseARic/MAIN/0/57/518/0/J-CCT07-10](http://www.constitutionalcourt.org.za/uhtbin/cgisirsi/hVMxseARic/MAIN/0/57/518/0/J-CCT07-10) / **h)** CODICES (English).

#### Keywords of the systematic thesaurus:

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

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

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

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

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

#### Keywords of the alphabetical index:

Criminal law, retroactive / Detention, duration / Imprisonment, length / Sentence, commuting / Sentence, life imprisonment / Sentence, reduction, application, conditions / Parole, eligibility, detention period, minimum extension.

#### Headnotes:

Where the application of a statute regulating prison administration and community corrections would result in the retroactive deprivation of a person's liberty by extending the minimum detention period for parole eligibility, the law that should be applied to affected incarcerated persons is the law in force on the effective date of their incarceration.

#### Summary:

I. The applicant (Mr Van Vuren), an incarcerated person serving a life sentence, challenged certain provisions in the Correctional Services Act, 111 of 1998 (the Act). Mr Van Vuren's challenge was made on the grounds that the Act, if given retrospective effect, would extend the minimum detention period for parole eligibility and thereby infringe upon his fair trial rights. Mr Van Vuren sought leave to appeal against the High Court decision dismissing his application to compel the relevant authorities to consider him for parole; alternatively he urged the Court to grant his application for direct access and invalidate the provisions in question as being inconsistent with the Constitution.

II. In construing the impugned legislation the Court, per Nkabinde J, applied the importance of promoting the spirit, purport and objects of the Bill of Rights and also paid heed to the general presumption against retrospectivity in the rule of law.

The Court granted the application for direct access. It determined the matter by construing the provisions in a constitutionally compliant manner so as not to require retrospective application.

The Court reasoned that the interests of the community's right to be protected against crime had to be balanced against recognition of the inherent human dignity of the offender and the interests of the offender in becoming repossessed of the fuller scope of his rights.

The Court held that Mr Van Vuren was eligible to be considered for parole in terms of the policies and guidelines that existed at the time of his sentence and ordered the relevant authorities to consider him for parole with immediate effect.

Yacoob, J in a minority judgment found that the impugned legislation was not reasonably capable of being construed so as to make Mr Van Vuren subject to the parole policies and guidelines in place at the time of his sentencing.

#### Cross-references:

- *Xinwa and Others v. Volkswagen of SA (Pty) Ltd* [2003] ZACC 7; 2003 (6) *Butterworths Constitutional Law Reports* 575 (CC); 2003 (4) *South African Law Reports* 390 (CC);
- *De Lange v. Smuts and Others*, *Bulletin* 1998/2 [RSA-1998-2-004];
- *Bato Star Fishing (Pty) Ltd v. The Minister of Environmental Affairs and Tourism and Others*, *Bulletin* 2004/1 [RSA-2004-1-004];
- *The Minister of Correctional Services and Others v. Kwakwa and Another*, *Bulletin* 2002/1 [RSA-2002-1-003];
- *David Dikoko v. Thupi Zacharia Mokhatla*, *Bulletin* 2006/2 [RSA-2006-2-007];
- *Ferreira v. Levin and Others; Vryenhoek and Others v. Powell and Others*, *Bulletin* 1995/3 [RSA-1995-3-010];
- *Fose v. Minister of Safety and Security*, *Bulletin* 1997/2 [RSA-1997-2-005].

#### Legal norms referred to:

- Section 136 of the Correctional Services Act 111 of 1998;

- Section 1.11 of the Criminal Law Amendment Act 105 of 1997;
- Section 65.5 of the Correctional Services Act 8 of 1959;
- Sections 1.a and 1.c, 39.2 and 172 of the Constitution of the Republic of South Africa, 1996.

#### Languages:

English.



#### Identification: RSA-2010-3-010

**a)** South Africa / **b)** Constitutional Court / **c)** / **d)** 23.11.2010 / **e)** CCT 34/10; [2010] ZACC 21 / **f)** Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v. Hidro-Tech Systems (Pty) Ltd and Another / **g)** <http://41.208.61.234/uhtbin/cgiisirsi/20110113145757/SIRSI/0/520/J-CCT34-10> / **h)** CODICES (English).

#### Keywords of the systematic thesaurus:

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

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

#### Keywords of the alphabetical index:

Contract, award / Contract, public law / Failure to act / Fraud, fight, investigation / Investigation, effective, requirement / Investigation, obligation / Public contract, tender, obligation / Tender, public, conditions / Disadvantage, historical.

#### Headnotes:

Section 217 of the Constitution provides for the enactment of national legislation to serve as a framework for organs of state when implementing a preferential procurement scheme aimed at redressing historical disadvantage. When allegations of fraudulent misrepresentation and fronting arose in a tendering process that was subject to a preferential procurement policy, and those allegations were ostensibly true, the municipality issuing the tender was under a constitutional and statutory duty to investigate.

*Summary:*

I. The Preferential Procurement Policy Framework Act (Procurement Act) is the legislation enacted in terms of Section 217 of the Constitution. It provides for the establishment of preferential procurement policies aimed at alleviating the disadvantage caused by past discrimination.

In this case, the respondent (Hidro-Tech) suspected that the applicant (Viking Pony) was fraudulently abusing the preferential procurement policy in order to secure contracts from the City of Cape Town (City) by misrepresenting the level of black representation in the management of the company.

Hidro-Tech submitted a complaint to the City, whereafter the City obtained an external audit of the Viking Pony's corporate composition. After several complaints were made to the City about the inadequacy of the investigation, Hidro-Tech initiated legal proceedings to compel the City to conduct a more substantial investigation. The High Court and the Supreme Court of Appeal found Hidro-Tech's complaints justified and ordered the City to investigate.

II. The Constitutional Court found that the City had both a constitutional and statutory duty to take appropriate action against a tenderer who was awarded a contract allegedly on account of false information in tendering documents. The kind of response required would depend on the particular circumstances of each case, and on the obligations imposed on the organ of state.

In this case, the City breached its duty to properly investigate Hidro-Tech's allegations of fronting by Viking Pony. The City was ordered to launch a proper and effective investigation.

*Cross-references:*

- *Bato Star Fishing (Pty) Ltd v. Minister of Environmental Affairs and Tourism and Others*, *Bulletin* 2004/1 [RSA-2004-1-004];
- *Department of Land Affairs and Others v. Goedgelegen Tropical Fruits (Pty) Ltd*, *Bulletin* 2007/2 [RSA-2007-2-008].

## Legal norms referred to:

- Section 217 of the Constitution of the Republic of South Africa, 1996;
- Preferential Procurement Policy Framework Act 5 of 2000.

*Languages:*

English.

*Identification: RSA-2010-3-011*

**a)** South Africa / **b)** Constitutional Court / **c)** / **d)** 25.11.2010 / **e)** CCT 38/10; [2010] ZACC 25 / **f)** Law Society of South Africa and Others v. Minister for Transport and Another / **g)** [www.constitutional.court.org.za/uhtbin/cgisirsi/faYNTsYpn5/MAIN/248340010/9#top](http://www.constitutional.court.org.za/uhtbin/cgisirsi/faYNTsYpn5/MAIN/248340010/9#top) / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

3.20 General Principles – **Reasonableness**.  
5.4.19 Fundamental Rights – Economic, social and cultural rights – **Right to health**.

*Keywords of the alphabetical index:*

Accident, road traffic, compensation, limitation, adequacy / Common law, principle, constitutionality / Compensation, limitation, justification / Health-care, reasonable, access / Compensation, access to private healthcare, adequacy / Government purpose, legitimate.

*Headnotes:*

The abolition of a road accident victim's residual common law right to claim compensation from a wrongdoer for losses which were not compensable under the Road Accident Fund Amendment Act is not irrational as it forms part of an interim scheme in order to ensure financial sustainability for the Road Accident Fund. Medical tariffs for health services prescribed by regulations under the Act, which do not adequately compensate for medical treatment, are irrational as they are not capable of providing seriously injured victims access to reasonable healthcare.

*Summary:*

I. This case concerned a constitutional challenge mounted by the Law Society of South Africa and ten other applicants in respect of the new road accident

compensation scheme. At issue were two provisions of the Road Accident Fund Amendment Act, 2005 (the Act) as well as a regulation issued in terms of the Act. The High Court dismissed the constitutional challenges and the applicant sought leave to appeal to the Constitutional Court. The Minister of Transport (Minister) and the Road Accident Fund (Fund) opposed the application.

The challenged provisions were: Section 21, which abolished a road accident victim's residual common law right to claim compensation from a wrongdoer for losses which were not compensable under the Act; Section 17.4.c, which limited the amount of compensation that the Road Accident Fund (Fund) is obliged to pay for claims for loss of income or a dependant's loss of support arising from the bodily injury or death of a victim of a road accident; and Regulation 5.1, which prescribed a particular tariff for fees payable for health services provided to accident victims by public health establishments.

II. The applicants' challenge was that the amendments were irrational.

The Constitutional Court held that the abolition of the common law claim was a necessary and rational part of an interim scheme which the Minister had adopted in order to achieve the financial viability of the Fund. The amendment was therefore rational as it achieved a legitimate government purpose.

The applicants also contended that the amendments unjustifiably limited the right to security of person; the right not to be deprived of property arbitrarily; the right of access to healthcare services and the right to an effective remedy. The Court rejected these contentions.

The contention that Regulation 5.1 unjustifiably limited the right of access to healthcare services, was, however, upheld. Evidence highlighted that the tariff prescribed by this regulation was far below the costs necessary for private medical services, therefore restricting road accident victims who cannot afford private medical treatment to treatment in public health institutions. The Court therefore held that the regulation was inconsistent with the Constitution and ordered the Minister to make a fresh determination.

#### Cross-references:

- *AAA Investments (Proprietary) Limited v. The Micro Finance Regulatory Council and Another*, *Bulletin* 2006/2 [RSA-2006-2-006];
- *The Affordable Medicines Trust and Others v. The Minister of Health and Another*, *Bulletin* 2005/1 [RSA-2005-1-002];

- *Union of Refugee Women and Others v. The Private Security Industry Regulatory Authority and Others*, *Bulletin* 2006/3 [RSA-2006-3-017];
- *The Pharmaceutical Manufacturers Association of South Africa and Another In re: the Ex parte Application of the President of the Republic of South Africa and Others*, *Bulletin* 2000/1 [RSA-2000-1-003];
- *Engelbrecht v. Road Accident Fund and Another* [2007] ZACC 1; 2007 (6) *South African Law Reports* 96 (CC); 2007 (5) *Butterworths Constitutional Law Reports* 457 (CC);
- *Thompson Newspapers Co v. Canada (Attorney General)* [1998] 1 SCR at 53;
- *The Rail Commuters Action Group and Others v. Transnet Ltd t/a Metrorail and Others*, *Bulletin* 2004/3 [RSA-2004-3-012];
- *Fose v. Minister of Safety and Security*, *Bulletin* 1997/2 [RSA-1997-2-005].

Legal norms referred to:

- Sections 1.c, 12.1, 25.1, 27.1 and 38 of the Constitution of the Republic of South Africa, 1996;
- Sections 21 and 17.4.c of the Road Accident Fund Amendment Act 19 of 2005.

#### Languages:

English.



#### Identification: RSA-2010-3-012

**a)** South Africa / **b)** Constitutional Court / **c)** / **d)** 30.11.2010 / **e)** CCT 39/10; [2010] ZACC 26 / **f)** Bengwenyama Minerals (Pty) Ltd and Others v. Genorah Resources (Pty) Ltd and Others / **g)** [www.constitutionalcourt.org.za/uhtbin/cgiisirs/Bfkzir9WtT/MAIN/0/57/518/0/J-CCT39-10](http://www.constitutionalcourt.org.za/uhtbin/cgiisirs/Bfkzir9WtT/MAIN/0/57/518/0/J-CCT39-10) / **h)** CODICES (English).

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

*Keywords of the alphabetical index:*

Administrative procedure, fairness / Community rights, principles / Consultation, public / Land, ownership, right / Land, right of use / Procedural fairness, principle / Property right, communal / Community, right to be consulted.

*Headnotes:*

Where an applicant wishes to obtain prospecting rights over communal land such applicant is required to consult with the community, as owner, because the granting and execution of a prospecting right represents a grave and considerable invasion of the use and enjoyment of the land where prospecting occurs.

*Summary:*

I. In this matter, the community, in the form of the Bengwenyama-Ye-Maswazi Tribal Council and the Trustees of the Bengwenyama-Ye-Maswati Trust, launched an application in the North Gauteng High Court (the High Court), along with Bengwenyama Minerals (Pty) Ltd to review a decision by the Department of Mineral Resources (the Department) to award a prospecting right to Genorah Resources (Pty) Ltd (Genorah) over two properties upon which the community resides. The High Court dismissed the application and an appeal to the Supreme Court of Appeal (SCA) was also unsuccessful.

II. The Constitutional Court, per Froneman J, granted leave to appeal against the SCA's judgment and allowed the appeal. It concluded that Genorah had not consulted with the community in good faith as was required by the provisions in the Mineral and Petroleum Resources Development Act (the Act) mandating such consultation.

The Court held further that where an application has been made for a prospecting right over communal land which may have the effect of depriving that community of a preferent right to prospect over that land, an obligation rests upon the Department to inform that community of the application and its consequences. The community should be provided with an opportunity to make representations. The Department had acted in a procedurally unfair manner by failing to provide the community with an opportunity to make representations in respect of Genorah's application.

The Court also found that Genorah had failed to comply with the environmental safeguards contained in the Act. The award of the prospecting right to

Genorah over the community's land was accordingly set aside.

*Cross-references:*

- *Stephen Segopotso Tongoane and Others v. Minister for Agriculture and Land Affairs and Others*, Bulletin 2010/2 [RSA-2010-2-004];
- *Zondi v. Member of the Executive Council for Traditional and Local Government Affairs and Others*, Bulletin 2005/3 [RSA-2005-3-013];
- *Steenkamp v. Provincial Tender Board of the Eastern Cape*, Bulletin 2006/3 [RSA-2006-3-012];
- *Merafong Demarcation Forum and Others v. President of the Republic of South Africa and Others*, Bulletin 2008/2 [RSA-2008-2-009].

## Legal norms referred to:

- Sections 24 and 25.4-25.7 of the Constitution of the Republic of South Africa, 1996;
- Sections 3, 5, 6 and 7.1 of the Promotion of Administrative Justice Act, 3 of 2000;
- Sections 16.4, 39.2 and 104 of the Mineral and Petroleum Resources Development Act, 28 of 2002.

*Languages:*

English.



# Switzerland

## Federal Court

---

### Important decisions

*Identification:* SUI-2010-3-004

**a)** Switzerland / **b)** Federal Court / **c)** First Social Law Chamber / **d)** 16.08.2010 / **e)** 8D\_8/2009 / **f)** T. v. Police force of the Republic and Geneva Canton / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 136 I 323 / **h)** CODICES (French).

*Keywords of the systematic thesaurus:*

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

*Keywords of the alphabetical index:*

Administrative act, judicial review / Internal act / Decision, administrative, judicial review / Staff member, transfer / Police, officer.

*Headnotes:*

Article 29a of the Federal Constitution (guarantee of access to the courts).

Transfer of a police officer decided on the basis of a provision of the Geneva Law on the police, which requires the officer to accept a change of posting, while setting limits on this change. The inadmissibility decision given by the Administrative Court which considered that this transfer was an internal measure of a non-disciplinary nature.

Delimitation between an impugnable decision and an internal act. In the instant case, the decision goes beyond the organisation of the police services and is liable to affect the legal situation of the officer as the holder of rights and obligations vis-à-vis the State. The resultant challenge enjoys the guarantee of access to the courts laid down in Article 29a of the Federal Constitution.

*Summary:*

T. was recruited as an inspector with the Geneva Cantonal Police. In time he was appointed deputy chief inspector, chief inspector, group leader and, on 1 July 2005, Head of the X Brigade. During an interview with his superiors on 8 January 2009, he was informed orally of his transfer to the Central Police State on the following 1 February. According to his new job description, he would now be working under the technical direction of a lawyer and would have primarily administrative tasks to accomplish, without any command duties. His salary would remain unchanged.

T. complained to the Head of Police that no formal decision had been made on his transfer, that his procedural rights had not been respected and that this transfer would relegate him to a subordinate position. The Head of Police sent him a letter referring to the 8 January 2009 interview and to certain dysfunctions, specifying that the transfer was being effected in accordance with the relevant legislation and was non-disciplinary in nature.

T. appealed to the Administrative Court of Geneva Canton, the cantonal higher court dealing with ordinary appeals, which declared his appeal inadmissible. With reference to its case-law, it set out that the act complained of in the instant case was not a decision. The change of the appellant's posting appeared to have been based on service management considerations and should be designated as an internal management measure. This was the obvious conclusion, even if the appellant regarded his transfer as a sanction. The Administrative Court concluded that the transfer measure had not been a sanction in disguise and that an appeal against it was inadmissible.

By means of a subsidiary constitutional appeal, T. asked the Federal Court to set aside the decision of the Administrative Court and to send the case back to the latter for trial. He complains of a violation of the guarantee of access to the courts laid down in Article 29a of the Federal Constitution. The appellant complains of arbitrary implementation of the cantonal procedural legislation, contending that by declaring his appeal inadmissible, his initial judges deprived him of his right to consideration by a court of the merits of the challenged measure. The Federal Court admitted the appeal.

Article 29a of the Federal Constitution grants everyone the right to have their case determined by a judicial authority. However, the Confederation and the Cantons may by law preclude the determination by the courts of certain exceptional categories of case. This rule extends judicial review to all matters,

including administrative acts, by laying down a general guarantee of access to the courts.

Article 29a of the Federal Constitution in principle extends judicial review to all legal disputes, and specifically to disputes concerning the rights and obligations of (natural or legal) persons. It also covers certain material acts of the administration. The guarantee is compatible with the usual conditions for admissibility of appeals or actions.

A decision, as a legal act, has the purpose of settling the situation of litigants as legal persons, who are therefore distinct from the State entity or, in other words, external to the administration. In this context, decisions contrast with internal or organisational acts, which concern situations inside the administration. Accordingly, an act which affects the rights and obligations of a staff member as a legal person, e.g. establishing his or her salary or various allowances, or disciplinary sanctions, is a decision. On the other hand, an act which is aimed at the enforcement of tasks incumbent on the staff member, setting out the duties required for the service, e.g. job descriptions or instructions on how to decide a particular case, is an internal legal act.

According to the rules applicable to the instant case, the person's superiors must decide on his or her appointment in accordance with his or her abilities and needs. The duration of the appointment depends on the exigencies of the service. These regulations require the staff member to accept a change of posting, while setting limits thereupon. This would suggest that a transfer is only justified if it is required for the needs of the service and if the new appointment corresponds to the staff member's abilities. In particular, the staff member is not obliged to accept an activity which is at odds and unconnected with his or her abilities. Consequently, even if a transfer has no financial consequences for the person in question, it is not simply an organisational matter for the police services but is also liable to affect the staff member's legal situation as a holder of rights and obligations vis-à-vis the State. Its purpose may go beyond the execution of tasks incumbent on the staff member in his usual sphere of activity or the instructions he or she is given in the exercise of these tasks. In the instant case, the new job description is completely different in content from that of a police squad leader. The challenge which can be submitted in this case is a legal one under the guarantee of access to the courts as laid down in Article 29a of the Federal Constitution. The judgment must consequently be set aside and the case sent back to the initial court for consideration of the merits of the dispute.

### *Languages:*

German.



### *Identification:* SUI-2010-3-005

**a)** Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 27.08.2010 / **e)** 1C\_214/2010 / **f)** WWW Suisse et consorts v. X. AG / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 136 II 436 / **h)** CODICES (German).

### *Keywords of the systematic thesaurus:*

1.3.5 Constitutional Justice – Jurisdiction – **The subject of review.**

1.4.4 Constitutional Justice – Procedure – **Exhaustion of remedies.**

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:*

Concession / Decision of a political nature / Parliament, decision.

### *Headnotes:*

Decisions of a predominantly political nature. Article 29a of the Federal Constitution (guarantee of access to the courts), Article 86.3 of the Federal Law on the Federal Court (appealable decisions).

By reason of the close link between Article 86.3 of the Law on the Federal Court and the guarantee of access to the courts laid down in Article 29a of the Federal Constitution, judicial examination can only be explicitly excluded in exceptional cases. By virtue of the aforementioned Article 86.3, the cantons must be able to remove from the jurisdiction of the Administrative Court politically sensitive parliamentary decisions which cannot be the subject of judicial review (recital 1.2).

Although the challenged cantonal decision on the granting of a water franchise does have a political dimension, it does not consist solely in the franchise as granted but also comprises detailed regulations on



the rights and obligations of the concessionaire. These aspects are liable to judicial review and are not predominantly political in nature. Consequently, judicial proceedings are appropriate for examining whether the project complies with the relevant legislation, especially the principles of the law of construction, spatial planning and environment (recital 1.3).

### *Summary:*

The Parliament of Glaris Canton granted a limited company a franchise to exploit hydraulic energy on the River Linth. The franchise defines the exact scope of this operation: it concerns a specified stretch of the River Linth, for a scheduled duration of 80 years, with a guaranteed residual flow of 2 000 litres per second. The Parliamentary decision was published in the Cantonal Official Journal, mentioning that public-law appeals could be lodged with the Federal Court.

Various organisations working to protect nature and the environment lodged public-law appeals with the Federal Court. They allege violation of legal provisions on the protection of nature and the environment. They request that the franchise be reduced to 30 years and that the residual flow be increased to 5 000 litres per second. The Federal Court did not address the case, instead inviting the Administrative Court of Glaris Canton to consider the merits of the appeal.

The Law on the Federal Court requires the remedies at the cantonal level to have been exhausted before an appeal can be declared admissible. It stipulates that the cantons must provide for higher courts operating at a level immediately below that of the Federal Court. In the case of decisions of a predominantly political nature, the cantons may set up a body other than a court. These Federal law regulations implement the provisions of Article 29a of the Constitution, which grants everyone the right to have their case determined by a judicial authority. However, the Confederation and the Cantons may by law preclude the determination by the courts of certain exceptional categories of case.

In the light of this requirement, the question arises whether a direct appeal to the Federal Court was immediately available or whether it was necessary to appeal to the Cantonal Administrative Court first. The reply to this question depends on whether the case in question is political or not.

The fact of awarding a water franchise to a private company does have a political aspect. The private company is authorised to exploit a public river over a long period. The act complained of not only concerns

the granting of the franchise, but also describes the rights and duties of the franchise-holder in detail. The latter must comply with legal provisions on river management and water quality, and take account of the legislation on conservation of the environment, nature and landscapes. These aspects are of a legal nature and can therefore be examined by a judicial body. To that extent, the question of residual flow is also a matter to be dealt with in court, considering whether the scheduled residual flow corresponds to the requirements of the Federal Law on the protection of water, or whether the flow must be increased to 5 000 litres per second, as the appellants conclude.

In short, the act complained of and the franchise are primarily legal in nature. Consequently, a direct appeal to the Federal Court is excluded. The Federal Court therefore did not consider the appeal lodged by the organisations responsible for protecting nature and the environment and referred the case to the Administrative Court of Glaris Canton for consideration on the merits.

### *Languages:*

German.



### *Identification:* SUI-2010-3-006

**a)** Switzerland / **b)** Federal Court / **c)** First Social Law Chamber / **d)** 31.08.2010 / **e)** 8C\_133/2010 / **f)** D. v. Family Allowance Fund of Zug Canton / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 136 I 297 / **h)** CODICES (German).

### *Keywords of the systematic thesaurus:*

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**.

### *Keywords of the alphabetical index:*

Social security, family allowance / Social security, treaty / Treaty, international, direct applicability.

*Headnotes:*

Article 8.1 and 8.2 of the Federal Constitution (equal treatment and prohibition of discrimination), and Articles 3 and 26 of the 20 November 1989 Convention on the Rights of the Child.

By making eligibility for family allowances for children resident in a foreign country subject to the condition of the latter having concluded a social security convention with Switzerland on this point, the applicable provisions are in breach neither of Article 8.1 and 8.2 of the Federal Constitution (recitals 6 and 7), nor of Articles 3 and 26 of the 20 November 1989 Convention on the Rights of the Child (recital 8).

*Summary:*

D., an Indian national, lives and works in Switzerland. His three children live with their mother in India. The Family Allowance Fund of Zug Canton refused to grant D. family allowances as from 1 January 2009, the date of entry into force of the Federal Law on family Allowances. It based its decision on a provision of the Regulations on Family Allowances which lays down that family allowances are only paid for children resident abroad if an international convention provides for such payment and if various other conditions are met.

D. applied in vain to the Zug Canton Administrative Court. Having submitted a public-law appeal, he asks the Federal Court to set aside the decisions of the Administrative Court and the Family Allowance Fund and to grant him family allowances as from 1 January 2009. The Federal Court has rejected the appeal.

The provision of the Regulations on Family Allowances to the effect that family allowances for children resident abroad can only be paid if an international convention provides for such payment is in conformity with the Federal Law on family allowances. Switzerland has concluded a social security convention with India. This convention has not yet been ratified and is not yet in force. Consequently, the cantonal authorities have not violated the Federal Law or the Regulations by withholding family allowances from D.

The appellant alleges a violation of Article 8 of the Federal Constitution. According to Article 8.1, everyone is equal before the law. The principle of equal treatment requires similar situations to be dealt with similarly and different situations to be dealt with differently. Treatment which differs depending on whether or not the children's foreign residence is in a

country with which Switzerland has concluded a convention is compatible with equality of treatment, given the objective reason for this difference of treatment. Public law is governed by the territoriality principle, and only an international convention can forge a bond with Switzerland justifying the payment of family allowances for children who reside abroad.

According to Article 8.2 of the Federal Constitution, no one may be discriminated against, in particular on grounds of origin, race, gender, age, language, social position, way of life, religious, ideological, or political convictions, or because of a physical, mental or psychological disability. Discrimination is an aggravated form of inequality. Prohibition of discrimination does not prevent the legislature from referring to one of the aforementioned criteria provided that the difference of treatment is based on a just reason. This applies to the instant case: the decisive point is not the appellant's status as a foreigner in Switzerland, but the fact that the appellant has children who are resident in a country with which Switzerland is not bound by any international convention. The allegation of discrimination is therefore ill-founded.

Lastly, the applicant refers to the Convention on the Rights of the Child. The appeal for violation of treaty law presupposes that the provisions of the treaty are directly applicable ("self-executing"). Where the convention contains declaratory provisions, case-law takes account of these in considering certain matters. This applies to Article 3.1, according to which the best interests of the child shall be a primary consideration in all actions concerning children. The appellant, however, cannot infer any specific rights from this provision. It also applies to Article 26, which invites States Parties to recognise for every child the right to benefit from social security, including social insurance.

*Languages:*

French.



## “The former Yugoslav Republic of Macedonia” Constitutional Court

### Important decisions

*Identification:* MKD-2010-3-004

**a)** “The former Yugoslav Republic of Macedonia” / **b)** Constitutional Court / **c)** / **d)** 15.09.2010 / **e)** U.br.83/2009 / **f)** / **g)** *Sluzben vesnik na Republika Makedonija* (Official Gazette), 127/2010, 24.09.2010 / **h)** CODICES (Macedonian, English).

*Keywords of the systematic thesaurus:*

5.2.2.1 Fundamental Rights – Equality – Criteria of distinction – **Gender**.

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

*Keywords of the alphabetical index:*

Survivor’s pension, conditions / Discrimination, gender.

*Headnotes:*

A 10-year age difference in favour of women laid down in a law that governs the allocation of pensions breaches the principle of gender equality.

*Summary:*

A petition brought by an individual to the Constitutional Court led to the constitutional review of provisions of the Law on Pension and Disability Insurance relating to conditions for obtaining a survivor’s pension for widows and widowers.

According to Article 72 of the Law, a widow shall acquire the right to a survivor’s pension if she has reached the age of 45 at the moment of the death of her spouse (husband). According to Article 73 of the same Law, a widower shall acquire the right to a survivor’s pension if he has reached the age of 55 at the moment of the death of his spouse (wife).

The petitioner claimed that these provisions are unconstitutional as they are discriminatory towards men.

The Court departed from Articles 8.1.3 and 8, 9, 34, 35 and 40 of the Constitution. It found that the disputed provisions violate the constitutional principle of equality and prohibition of discrimination on the grounds of gender.

The contested legal provisions define a different age for women (45 years of age) and men (55 years of age) to acquire the right to a survivor’s pension in the same situation (a deceased spouse – a beneficiary of a pension), and the difference is not based on an objective difference between the husband and wife, their biological or functional difference with regard to the work as a ground for obtaining a pension, in which case different conditions could be envisaged to acquire the right to a pension. This has been done for personal pensions (64 years for a man, 62 years for a woman). But, in the present case, the difference is based only on the fact that the spouse of the deceased male insuree is a woman, and on the fact that the spouse of the deceased female insuree is a man. In addition, the 10-year difference to acquire the right to a family pension (55 years for a widower, 45 years for a widow), which is unreasonably wide, is also a ground to believe that there is no objective reason for the existence of a difference between a widow and a widower in the acquisition of the right to a family pension. Therefore, the Court found that such provisions violate the principle of equality on the grounds of sex defined in Article 9 of the Constitution, and the social and legal certainty of the citizens as defined in Articles 8, 34 and 35 of the Constitution.

*Languages:*

Macedonian, English.



*Identification:* MKD-2010-3-005

**a)** “The former Yugoslav Republic of Macedonia” / **b)** Constitutional Court / **c)** / **d)** 15.12.2010 / **e)** U.br.139/2010 / **f)** / **g)** / **h)** CODICES (Macedonian, English).

*Keywords of the systematic thesaurus:*

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

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

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

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

*Keywords of the alphabetical index:*

Communication, eavesdropping, electronic.

*Headnotes:*

Legal provisions of the Law on Electronic Communications that authorise the Ministry of the Interior to intercept communications without a court order (as provided by the Criminal Procedure Law and Law on Interception of Communications) are unconstitutional. They do not contain sufficient guarantees against possible misuse by the body authorised to use technical means for the continuous and independent interception of communications, as well as for storing data collected from these intercepted communications. Legal regulations for the use of measures that intercept communications should contain clear rules regarding circumstances and conditions under which the state bodies may use them, the type of interception, the circumstances justifying it and the body responsible for ordering the interception of communications.

In addition, the disputed provisions on the interception of communications that limit the constitutional guarantee of the inviolability of all forms of communications should be subject to a law adopted by a 2/3 majority of the members of the parliament.

*Summary:*

Several individuals, NGOs and foundations petitioned the Constitutional Court to initiate proceedings for the constitutional review of several provisions of the Electronic Communications Law. The contested articles of the Law set out the Ministry of the Interior as the body authorised to intercept communications and provided it with constant and direct access to the communication network and services. These articles also authorised the Ministry of the Interior to

independently takeover data on traffic, as well as independently establish the current geographic, physical and location of the technical equipment of the subscribers, i.e. users, irrespective of their telecommunication activity. The contested articles of the Law regulated the communication of data on traffic, the position and location and the technical equipment upon the request of the competent state authorities (no court order is needed).

The Court departed from Articles 8.1.1.3, 15, 18, 25 and 26, as well as amendments XIX, XXI and XXV of the Constitution. It found the allegations of the petitioners to be founded.

The Court held that the contested articles of the Law regulated the interception of communications in a manner that differs from the one in other laws (the Criminal Procedure Code and the Law on Interception of Communications, both of which were adopted by a 2/3 majority of the members of parliament). In the Court's opinion, the concept of the basic text of the Law (which essentially contained technical provisions) has been changed by adding the contested articles which, by their nature, are provisions regulating grounds for exceptions to the rights of inviolability of letters and of all other forms of communication. As such, the contested articles created an original, direct and normative authorisation for the Ministry of the Interior to intercept communications, by ignoring or not having to directly call upon previous regulations of the procedure and the rules for the interception of communications by the Criminal Procedure Code and the Law on the Interception of Communications, under which the interception of communications of any kind may not take place without a court order.

By not regulating the way in which measures for the interception of communications should be implemented, which body should issue the order, the length of time of the measure taken, the cases in which it is constitutionally allowed for the public authorities to interfere with the privacy of citizens, the disputed provisions open the door to unconstitutional and unauthorised intrusions into privacy, in particular in cases where they are based on legal provisions that are not clear, subject to improvisation or interpretation, and provide direct power to the authorised bodies to implement the measure of interception of communications without placing their authorisation within a strict legal framework, such as in the present case.

Therefore, data stored as a result of the interception of communications or records of the contents of communications, according to the case-law of the European Court of Human Rights, are an

unauthorised interference into the privacy of communications when the implementation of the interception of communications measure is not based on a law that is sufficiently clear in its terms and there is no difference with respect to whether the interception device records the communications or only makes an entry, which it controls. This is the position of the Court in, *inter alia*, the case of *Valenzuela Contreras v. Spain* (1998).

Although the methods and techniques used for the interception of communications are secret and aimed at the detection of the content of communications in order to prevent or detect criminal offences, conduct criminal proceedings, or when the interests of the security and defence of the Republic are at stake. The Court found that the challenged provisions of the Law do not contain sufficient guarantees against a possible misuse by the authorised authority given the technical means available for the continued and independent interception of communications, as well as in the storing of data collected from intercepted communications. Also, the provisions governing the interception of communications must be sufficiently clear and predictable and not be subject to improvisation nor interpretation in order not to interfere unconstitutionally and illegally with citizens' right to correspondence and their freedom of communication. Or, more specifically, the legal regulation that refers to the application of the measures for the interception of communications should contain a very clear definition of the circumstances and conditions under which the public authority is authorised to resort to the use of such measures, the manner in which the interception is to be carried out, the cases in which the interception of communications is justified and define the body that issues the order for the interception of communications. Anything else will lead to unlimited power and will breach the principle of the rule of law.

The Court further noted that the interpretation of the relevant constitutional provisions should be based on the general legal principles contained in the European Convention on Human Rights as interpreted by the European Court of Human Rights' case-law and it referred to the case *Lordachi and Others v. Moldova*, in which the European Court of Human Rights confirmed its previous position made in the decision on the admissibility of the case of *Weber and Saravia v. Germany* and once again summarised its case-law on the requirement for legal predictability as follows: “In its case-law on secret measures of surveillance, the Court has developed the following minimum safeguards that should be set out in statute law in order to avoid abuses of power: the nature of the offences which may give rise to an interception order; a definition of the categories of people liable to have

their telephones tapped; a limit on the duration of telephone tapping; the procedure to be followed for examining, using and storing the data obtained; the precautions to be taken when communicating the data to other parties; and the circumstances in which recordings may or must be erased or the tapes destroyed”.

Hence, the contested articles of the Law, due to their imprecision, the lack of further regulation with regard to the conditions and procedure in which there may be an exception to the guaranteed constitutional right of privacy, according to the assessment of the Court, pose a real threat of a self-determined and arbitrary interference by the state bodies in the private life and correspondence of citizens which may have a negative impact on the honour and reputation of citizens without having a real basis in the Constitution nor in the law. As a result of this situation, the contested articles may not be interpreted as provisions guaranteeing the fundamental freedoms and rights of the individual and citizen recognised under international law and defined by the Constitution as a fundamental value of the constitutional order of the Republic of Macedonia.

Finally the Court noted that since the contested provisions govern issues related to the interception of communications, as an exception from the constitutional guarantee for inviolability of letters and all other forms of communication, those provisions, but not the entire Law, should be the subject-matter of a law that is adopted by a 2/3 majority vote of the total number of members of parliament. It therefore found defects in the procedure of the adoption of the contested articles in addition to the material unconstitutionality of the contested articles, and annulled the disputed articles of the Law.

#### *Languages:*

Macedonian, English.



# Turkey

## Constitutional Court

### Important decisions

*Identification:* TUR-2010-3-005

**a)** Turkey / **b)** Constitutional Court / **c)** / **d)** 21.01.2010 / **e)** E.2008/102, K.2010/14 / **f)** Concrete Review of Law no. 4721 (Civil Code) / **g)** *Resmi Gazete* (Official Gazette), 22.10.2010, 27737 / **h)** CODICES (Turkish).

*Keywords of the systematic thesaurus:*

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

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

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

*Keywords of the alphabetical index:*

Divorce proceedings, death of a party.

*Headnotes:*

A provision that only recognised the right to continue in divorce proceedings to the successors of the deceased plaintiff without acknowledging the same right for the deceased defendant's successors was found to be contrary to the principle of equality and to constitute discrimination on the basis of civil status. It also interfered with the right to fair trial as it violated the principle of equality of arms.

*Summary:*

I. The Manavgat First Civil Court (in its capacity as a Family Court) asked the Constitutional Court to assess the compliance with the Constitution of Article 181.2 of Law no. 4721 (Civil Code). Under Article 181 of the Civil Code, divorced spouses cannot be heir to each other and the second paragraph stipulates that if a successor to a plaintiff who has died while divorce proceedings are pending continues with the case and proves the fault of the

defendant, the defendant who is at fault will lose his or her inheritance rights.

The applicant Court noted that only the successors of deceased plaintiffs had the right to continue with divorce proceedings; the same entitlement did not extend to the successors of deceased defendants. Yet plaintiff spouses can also be at fault, and in such cases, the successors of the deceased defendant have no opportunity to prove the plaintiff spouse's fault and he or she is heir to the deceased defendant. In the view of the applicant Court, this provision of the Civil Code is discriminatory in terms of the right to access to court and it contravenes Articles 10 and 36 of the Constitution.

II. The Constitutional Court noted the provision of Article 181.2 of the Civil Code which only recognises the right of successors of deceased plaintiffs to continue with divorce proceedings, so that the successors of deceased defendants cannot continue with the case and prove that the plaintiff was at fault. As a result, even if the plaintiff is at fault, he or she will benefit from inheritance rights. The Court found that although both the plaintiff and the defendant are in the same position, drawing a distinction between them in terms of the right to continue with divorce proceedings is discriminatory and in conflict with the principle of equality of arms. The court therefore decided unanimously to annul the relevant parts of Article 181.2 of the Civil Code, finding them to be in breach of Articles 10 and 36 of the Constitution.

*Languages:*

Turkish.



*Identification:* TUR-2010-3-006

**a)** Turkey / **b)** Constitutional Court / **c)** / **d)** 20.05.2010 / **e)** E.2009/34, K.2010/72 / **f)** Concrete Review of Law no. 2577 (The Law on Administrative Procedure) / **g)** *Resmi Gazete* (Official Gazette), 30.12.2010, 27801 / **h)** CODICES (Turkish).

*Keywords of the systematic thesaurus:*

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

5.2.2.13 Fundamental Rights – Equality – Criteria of distinction – **Differentiation *ratione temporis***.

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:*

Trial, reopening / European Court of Human Rights, judgments.

*Headnotes:*

A provision which recognised certain judgments of the European Court of Human Rights as a reason for reopening administrative court trials but which excluded other judgments from this opportunity in the absence of objective criteria was found to be in breach of the rule of law and discriminatory in terms of the right to access to court.

*Summary:*

I. The Diyarbakır First Administrative Court asked the Constitutional Court to assess the compliance with the Constitution of Provisional Article 5 of Law no. 2577 on Administrative Procedure.

In 2003 Article 53 of Law no. 2577 was amended and judgments of the European Court of Human Rights were recognised as reasons for reopening cases. Provisional Article 5 of Law no. 2577 regulates the entry into force of this provision, stating that Article 53.1.1 will apply to judgments of the European Court of Human Rights that were final when this law entered into force and to judgments related to the applications which were filed after it came into force. Motions to reopen cases related to judgments of the European Court which were final when this law entered into force should be filed within one year of the entry into force of this law.

This provision excluded certain judgments of the European Court of Human Rights from being reasons to reopen a case. These judgments became final before 19 July 2003 (the date the law came into force). Judgments related to applications filed after this date will constitute reasons to reopen a case but judgments relating to applications pending before the European Court at that date will not be a basis for motions to reopen cases.

The applicant court claimed that this provision is unconstitutional; it is contrary to the principle of the rule of law as it arbitrarily deprives some people of their right to request the reopening of cases. In the applicant court's view, the provision also contravenes

the principle of equality as it draws a distinction between certain people *ratione temporis* and not on the basis of objective criteria.

II. The Constitutional Court ruled that as Provisional Article 5 of Law no. 2577 excludes certain judgments of the European Court of Human Rights from being a reason to reopen cases in administrative courts without objective criteria being considered, it runs counter to the principle of the rule of law and is discriminatory in terms of the right of access to court. It therefore resolved unanimously to annul the contested provision, finding it to be contrary to Articles 2, 10 and 36 of the Constitution.

*Languages:*

Turkish.



# Ukraine

## Constitutional Court

---

### Important decisions

*Identification:* UKR-2010-3-009

**a)** Ukraine / **b)** Constitutional Court / **c)** / **d)** 09.09.2010 / **e)** 19-rp/2010 / **f)** Conformity with the Constitution of the provisions of the Law on Introducing Amendments to Some Legislative Acts Concerning Jurisdiction of Cases on Social Benefits / **g)** *Ophitsynyi Visnyk Ukrayiny* (Official Gazette), 72/2010 / **h)** CODICES (Ukrainian).

*Keywords of the systematic thesaurus:*

4.7.1.3 Institutions – Judicial bodies – Jurisdiction – **Conflicts of jurisdiction.**

4.7.8.1 Institutions – Judicial bodies – Ordinary courts – **Civil courts.**

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

*Keywords of the alphabetical index:*

Decision, administrative, judicial review / Protection, judicial, right.

*Headnotes:*

Concerns had been raised over the constitutional compliance of certain provisions of the Law on Introducing Amendments to some Legislative Acts Concerning Jurisdiction of Cases on Social Benefits no. 1691-VI, 18 February 2010, which related to the jurisdiction of the administrative courts. Under these provisions, local courts of general jurisdiction had started to hear legal disputes related to social benefits which had previously fallen within the jurisdiction of the administrative courts. In particular, questions had arisen over the principle of judicial specialisation and the effective protection of judicial rights.

*Summary:*

The Code of Administrative Proceedings (hereinafter, the “CAP”) provided that after its entry into force on 1 September 2005 any public legal disputes in which at least one of the parties exercised state authority

fell within the jurisdiction of the administrative courts (Articles 2.1.2, 3.1.1.2.7 of the CAP). According to Article 18.2 of the CAP, in the wording of the Law dated 6 July 2005, district administrative courts had jurisdiction over all administrative cases in which one of the parties was a body of state power, another state body, a body of the Autonomous Republic of Crimea or their officials and officers, with the exception of matters arising from their decisions, actions or omissions in cases on administrative offences. The district administrative courts also had jurisdiction over legal disputes related to social benefits if a respondent in the relevant case fell within one of the categories of bodies or officials mentioned above.

The Law dated 25 December 2008 introduced amendments to the CAP according to which on the grounds of Article 18.1.3 local courts of general jurisdiction began to consider disputes concerning social benefits in the course of administrative proceedings.

The Law on Introducing Amendments to Some Legislative Acts Concerning Jurisdiction of Cases on Social Benefits no. 1691-VI, 18 February 2010 (Law no. 1691) (Chapter I.2) removed Article 18.1.3 of the CAP and redrafted Article 15.1 of the Civil Procedural Code (hereinafter, the “CPC”). Item 2 of the latter article, provides that disputes concerning social benefits should be considered in the course of civil proceedings, irrespective of the status of the respondent (Chapter I.1.4).

The system of courts in Ukraine was established in conformity with the provisions of Articles 6, 124 and 125 of the Constitution and with the application of the principle of specialisation in order to provide the most effective mechanism of human rights and freedoms protection in relevant legal relations.

The Law on the Judiciary and Status of Judges envisages that judicial power is implemented by means of exercise of justice within the frameworks of relevant judicial procedures (Article 1.2); there are specialised courts (Articles 17.2.3, 18) acting within the system of courts of general jurisdiction (Article 3.1) which includes commercial and administrative courts (Articles 21.2.3, 26.3, 31.2). The main criteria of judicial specialisation are the types of legal relations under dispute, and the appropriate procedures for dealing with them. The procedural codes establish different judicial proceedings to deal with different legal relations.

On the basis of the constitutional provisions on judicial specialisation (Article 125.1) and the universal guarantee of the possibility of challenging in court the



decisions, actions or omission of bodies of state power, local government offices, officials and officers (Article 55.2), a special system of courts of administrative jurisdiction was established in Ukraine. The protection of individual rights, freedoms and interests in the sphere of public legal relations from violations on the part of subjects of authority is defined as a direct mission of the administrative jurisdiction (Article 2.1 of the CAP). The administrative jurisdiction as a specialised type of judicial activity became the mechanism which enhanced the possibility of exercising the right to judicial protection from unlawful decisions, actions or omissions by subjects of authority.

The division of jurisdictional authority among general and specialist courts is subject to the universal guarantee of the right to effective judicial protection. Thus any public legal disputes where at least one of the parties exercises state authority belong within the administrative jurisdiction and are subject to consideration by the administrative courts. (See Articles 3.1.2.7 and 17.1 of the CAP). Reference is also made to the jurisdiction of disputes concerning social benefits, where the claimant is an individual and the respondent a subject of authority.

The legislator is under a constitutional obligation to observe the constitutional principle of specialisation in the legislative process as regards the organisation and activities of courts. The changes to the CAP and the CPC, introduced by Law no. 1691, which exempted disputes on social benefits from the jurisdiction of courts of specialist administrative jurisdiction and transferred them to the jurisdiction of general courts (civil jurisdiction), are out of line with Article 125.1 of the Constitution.

The principle of officiality applies in administrative jurisdiction (unlike civil jurisdiction) and so the court plays an active role in the examination of all the facts in a case (Articles 11.4.5, 69.2, 71.5 of the CAP). If a subject of authority is the respondent in an administrative claim, it has to shoulder the burden of proving the lawfulness of its decision, action or omission (Article 71.2 of the CAP). Within the civil jurisdiction each party has to prove the facts to which it refers as grounds for its demands and objections (Articles 11.1, 60.1 of the CPC). The subject of authority must submit to court all available documents and materials which can be used as proof in a case; if he or she fails to do so, the court will apply for them. If the respondent does not fulfill this obligation without a valid reason, the court will consider the case on the grounds of the evidence available (Article 71.4.6 of the CAP). The civil procedural legislation does not envisage such an authority for the Court.

Article 19.2 of the CAP provides that administrative cases on appeal against legal acts of individual action, and the acts or omissions of subjects of authority concerning the interests of a particular person are considered by the administrative court of the applicant's choice, unless otherwise provided by the Code. In the civil jurisdiction, pursuant to Article 109 of the CPC, the court will consider appeals according to the place of residence or location of a respondent unless otherwise provided in Article 110 of the CPC.

The administrative jurisdiction allows the limits of the complaint to be exceeded if this is necessary for human rights protection, and it also allows several complaints by one applicant to be joined into one set of proceedings, which will be considered in the course of different jurisdictions, according to other laws (Articles 11.2, 21.2 of the CAP). This is inadmissible in the civil jurisdiction (Articles 11.1, 16 of the CPC).

Article 87.3 of the CAP differs from Article 79.3 of the CPC in that it does not envisage judicial expenses for information and technical provision of the consideration of a case, which have to be paid by applicants filing civil claims (Article 119.5 of the CPC).

In contrast to the civil jurisdiction, individuals claiming against subjects of authority in the administrative jurisdiction enjoy an advantage in terms of compensation of judicial expenses, and applicants can also seek assistance from administrative court staff in filing claims (Articles 94.1.5, 105.3 of the CAP).

The above changes to the CAP and the CPC violated the principle of judicial specialization and reduced the individual procedural rights and guarantees previously established by law. The mechanism of the judicial protection of rights also became less effective and accessible.

Under Article 22.3 of the Constitution the content and the scope of existing rights and freedoms should not be diminished when new laws are adopted or changes are made to those already in force. However, the amendments to the CAP and the CPC diminished the applicant's procedural rights in cases on social benefits which limited in turn limited the possibility of judicial protection of their rights in disputes with a subject of authority. This violated Articles 22.3 and 55.1 of the Fundamental Law.

#### *Languages:*

Ukrainian.



### *Identification:* UKR-2010-3-010

**a)** Ukraine / **b)** Constitutional Court / **c)** / **d)** 30.09.2010 / **e)** 20-rp/2010 / **f)** Conformity with the Constitution of the Law no. 2222-IV of 8 December 2004 on Introducing Amendments to the Constitution (case on observance of the procedure of introducing amendments the Constitution) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 72/2010 / **h)** CODICES (Ukrainian).

### *Keywords of the systematic thesaurus:*

3.4 General Principles – **Separation of powers.**  
 3.9 General Principles – **Rule of law.**  
 4.5.6.4 Institutions – Legislative bodies – Law-making procedure – **Right of amendment.**

### *Keywords of the alphabetical index:*

Parliament, authority / Constitutional Court, authority / Constitution, amendment.

### *Headnotes:*

Draft legislation introducing amendments to the Constitution had been passed by Parliament in the absence of an opinion from the Constitutional Court. Concerns were raised in these proceedings over the compliance of this legislation with the Constitution. Ukraine is a democratic state, based on the rule of law, where the Constitution has the highest legal value and any changes made to it by Parliament must be done within the limits and under the procedure specified within the Constitution.

### *Summary:*

Two hundred and fifty-two People's Deputies applied to the Constitutional Court for an assessment of the constitutional compliance of the Law on Introducing Amendments to the Constitution no. 2222-IV, 8 December 2004 (hereinafter, "Law no. 2222"). They argued in their petition that Law no. 2222 should be recognised as unconstitutional due to breaches in the procedure set out in the Constitution for its review and adoption. The draft Law on Introducing Amendments to the Constitution no. 4180, dated 19 September 2003 (hereinafter, "Draft law no. 4180") with amendments was reviewed and approved by Parliament as Law no. 2222 without the obligatory

opinion of the Constitutional Court on its conformity with the requirements of Articles 157 and 158 of the Constitution, as required by Article 159 of the Constitution.

Ukraine is a democratic law-based state, in which the principle of the rule of law is recognised and effective (Articles 1, 8.1 of the Constitution).

The Constitution has the highest legal force. Laws and other normative legal acts are adopted on the basis of the Constitution and must conform to it (Article 8.2 of the Constitution). The above requirements also apply to the introduction of amendments to the Constitution.

The principles of the division of state power into legislative, executive and judicial branches are enshrined within the Constitution, and these branches are obliged to act only on the grounds, within the limits of authority, and in the manner envisaged by the Constitution and the laws (Articles 6, 19.2 of the Constitution).

The sole body of legislative power in Ukraine is Parliament – the *Verkhovna Rada* (Article 75 of the Constitution). Article 85.1.1 of the Constitution stipulates that Parliament may only make changes to the Constitution within the limits and under the procedure specified in Chapter XIII of the Constitution.

In accordance with Article 159 of the Constitution, draft legislation on introducing amendments to the Constitution is considered by Parliament upon the availability of an opinion of the Constitutional Court as to compliance with the requirements of Articles 157 and 158 of the Constitution. The special procedure for consideration on draft legislation on introducing amendments to the Constitution provided by Article 159 of the Constitution is aimed at preventing amendments to the Basic Law which do not comply with the requirements of Articles 157 and 158 of the Constitution.

Under the Basic Law the availability of a relevant opinion of the Constitutional Court is an obligatory prerequisite for consideration of draft legislation on introducing amendments to the Constitution at plenary sessions of Parliament. Execution by the Constitutional Court of preventive control over compliance of such legislation with the requirements of Articles 157 and 158 of the Constitution, with all possible amendments introduced to it in the process of deliberations in plenary sessions of Parliament, is an essential stage of the constitutional procedure for making changes to the Constitution.

In deciding on the issues raised in the constitutional petition, the Constitutional Court began from the premise that it is not the content of the Law no. 2222 which is subject to constitutional control, but rather the procedure of its review and adoption, as established by the Constitution.

The Constitutional Court provided Opinion no. 3-v/2004 dated 10 December 2003 concerning the conformity of Draft law no. 4180 with the requirements of Articles 157 and 158 of the Constitution in a case on the introduction of amendments to various articles of the Constitution, including Articles 76, 78, 81, 82.

In the process of the finalisation of Draft law no. 4180 and its preliminary approval on 23 June 2004 by a parliamentary majority, the Draft law was amended, supplements were added, definitions were clarified and editorial changes made. The Constitutional Court provided Opinion no. 2-v/2004 on 12 October 2004 concerning Draft law no. 4180 as amended on 23 June 2004.

During further consideration of Draft law no. 4180, Parliament introduced more changes to it. However, it did not submit the amended Draft law no. 4180 to the Constitutional Court for the provision of an Opinion on its conformity with Articles 157 and 158 of the Constitution. Instead, it reviewed it and adopted it on 8 December 2004 as Law no. 2222.

Law no. 2222 amended the provisions of Articles 90.4, 106.1.12 of the Constitution. This was not the case with the version of Draft law no. 4180 considered by the Constitutional Court.

By comparison with Draft law no. 4180 the provisions of Articles 78.1, 78.2, 81.2.6, 81.6, 85.1.26, 90.4, 94.4, 106.1.14, 106.1.22, 116.9<sup>2</sup> and 120.1 of the Constitution were very different from those contained in Law no. 2222. From the amendments to the Constitution proposed by the Draft law no. 4180 the *Verkhovna Rada* excluded the provisions on supplementing Articles 116.9<sup>3</sup>, 118.4, 118.8, 118.9, 118.10, 120.2, 126.5.2, 148.2 of the Constitution.

Comparative analysis of Law no. 2222 and Draft law no. 4180 shows that the former contains editorial additions, corrections and clarifications, caused in part by the specified changes to the content and requirements of the rules of legislative techniques. For example, Articles 85.1.22, 122.1 of the Constitution were changed, and paragraph 1 of item 1, sub-item "a" of item 6, sub-item "a" of item 7, items 8, 10, 11 of the Section I of the Law no. 2222. Furthermore, the words "Chapter VI – The Cabinet of Ministers, other bodies of executive power" were excluded from item 1 of Section I Draft law no. 4180,

and the phrase in paragraph 9 "item 14 to be removed" was also excluded from sub-item "a" of item 6 of Section I of abovementioned Draft law.

Thus, on 8 December 2004 Parliament considered the Draft law no. 4180 with amendments to which the Constitutional Court had not provided its Opinion and adopted Law no. 2222, thus violating the requirements of Articles 19.2 and 159 of the Constitution.

Observance of the constitutional procedures of the consideration, adoption and enforcement of laws, including laws on introducing amendments to the Constitution, is one of the prerequisites of the legitimacy of the legislative process.

On 8 December 2004, Parliament, in one simultaneous vote, adopted Law no. 2222 together with the parliamentary resolution on "the preliminary approval of the Draft law on introducing amendments to the Constitution no. 2223-IV" and the "Law on Specific Features of Implementation of the Law on Presidential Elections during the repeat of a vote on 26 December 2004 no. 2221-IV".

The simultaneous adoption of independent legal acts, which have different subjects of regulation and procedures for their review and adoption set forth in Articles 91 and 155 of the Constitution, is evidence of violation by Parliament of Article 19.2 of the Constitution during adoption of Law no. 2222.

A law will lose its legal force, in whole or in part, if it is recognized as having lost its legal force by Parliament, the sole legislative body, or if it is found to be non-compliant with the Constitution by the Constitutional Court, the sole body of constitutional jurisdiction in Ukraine. The Law on Introducing Amendments to the Constitution no. 2222-IV of 8 December 2004 would lose its legal force from the date of the Constitutional Court's decision. The Constitutional Court also noted that as Law no. 2222 had been pronounced unconstitutional, in view of breaches in the procedure for its review and adoption, the effect of the norms of the previous wording of the Constitution, which were amended, supplemented and removed by Law no. 2222, would be restored.

Judges V.I. Shyshkin and P.B. Stetsiuk submitted a dissenting opinion.

#### *Languages:*

Ukrainian.



### Identification: UKR-2010-3-011

**a)** Ukraine / **b)** Constitutional Court / **c)** / **d)** 06.10.2010 / **e)** 21-rp/2010 / **f)** Conformity with the Constitution of the provisions of laws on the basic principles of prevention and counteracting corruption, on the liability of legal entities for corruption-related offences, on introducing amendments to certain legislation as to liability for corruption offences (case on corruption offences and enactment of anti-corruption legislation) / **g)** *Ophitsynyi Visnyk Ukrayiny* (Official Gazette), 80/2010 / **h)** CODICES (Ukrainian).

### Keywords of the systematic thesaurus:

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

4.6.4.4 Institutions – Executive bodies – Composition – **Status of members of executive bodies.**

4.7.4.1.6.1 Institutions – Judicial bodies – Organisation – Members – Status – **Incompatibilities.**

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

### Keywords of the alphabetical index:

Civil servant, employment, supplementary / Civil servant, assets, disclose, duty / Corruption prevention.

### Headnotes:

The case concerned the constitutional compliance of provisions relating to the prevention of people holding office or applying to hold office in the public sector from taking part in certain remunerated activities outside work and the labelling of such participation as corruption. Concerns were raised that these provisions could infringe the individual right to engage in literary and artistic endeavour and to dispose of the results of this activity.

Questions also arose over the conformity with the Constitution on the requirement that those holding office in the public sector or applying for office within it were subject to special examination as to their income and financial resources, as were persons connected with them. Concerns had arisen over the right to private life and family privacy.

### Summary:

Section VIII.1 “Final Provisions” of Law no. 1506-VI on the “Basic Principles of Prevention and Counteracting Corruption dated 11 June 2009 (hereinafter, “Law no. 1506”), Article 28 of Law no. 1507-VI on the Liability of Legal Entities for Corruption-Related Offences dated 11 June 2009 (hereinafter, “Law no. 1507”) and Section II of Law no. 1508-VI on Introducing Amendments to some Legislative Acts concerning Liability for Corruption Offences dated 11 June 2009 (hereinafter, “Law no. 1508”) envisage that these laws become effective from the date of publication and enactment, from 1 January 2010. The laws on Introducing Amendments to some Laws concerning Prevention and Counteracting Corruption no. 1787-VI dated 23 December 2009 (hereinafter, “Law no. 1787”) and no. 1962-VI dated 10 March 2010 (hereinafter, “Law no. 1962”) postponed the term of enactment of these laws in the first instance until 1 April 2010 and subsequently until 1 January 2011.

The Constitutional Court observed that the stages of legislative process are defined at constitutional level. In particular, they include the procedures for the submitting and considering of draft legislation and its adoption and coming into force.

Under Article 57.2, 57.3 of the Basic Law, laws and other normative legal acts that determine the rights and duties of citizens must be brought to the notice of the population by the procedure established by law. If this procedure is not followed, any legislation in this category is not effective.

The Constitutional Court took the view that Article 94.5 of the Constitution allows Parliament to determine that legislation becomes effective from the date of enactment, rather than ten days from the day of their official publication. Thus, laws or their separate provisions can be enacted after the day they became effective.

The Basic Law therefore envisages the order and terms of entry into force for laws and the enactment of their separate provisions, allowing the legislator to determine other dates for the enactment of a law, depending on various circumstances.

The differentiation between the point at which the disputed legislation became effective and the date of its enactment did not contravene the provisions of Articles 57 and 94.5 of the Constitution and could not be interpreted as a violation of the constitutional procedure of entry into force of the laws. The provisions of Section VIII.1 “Final Provisions” of Law no. 1506, Article 28 of Law no. 1507 and Section II of

Law no. 1508 amended by Laws nos. 1787 and 1962 are accordingly in conformity with the Constitution.

Article 4.1.2 of Law no. 1506 defines the offence of corruption as the performance of other remunerated work or entrepreneurial activities (except teaching, scholarly and creative activities, medical practice, coaching or refereeing work in sports that are performed outside working hours) by the individuals mentioned in Articles 2.1.1, 2.1.2, 2.1.3 of this Law. This category includes those who are authorised to execute the functions of the State or local government, or equivalent positions, as well as those in positions connected with the performance of organisational and regulatory or administrative duties. Article 212<sup>24</sup> of the Code on Administrative Offences establishes liability for the violation of restrictions related to performance of entrepreneurship and requirements as to compatibility.

The Constitutional Court began by noting the contents of Article 127.2 of the Constitution, which prevent professional judges from being members of political parties and trade unions, participating in any political activity or holding a representative mandate. These provisions also prevent them from occupying any other paid positions or performing any other remunerated work apart from scholarly research, teaching and creative activity.

To the extent that the limits of the participation of judges in scholarly research, teaching and creative activity is completely regulated by the Constitution, the law may not establish any restriction of the right to perform such activities, except in cases envisaged by the Constitution (Article 64 of the Fundamental Law).

The issue of the compatibility of the office of civil servant with other remunerated work of members of the Cabinet of Ministers, chief officers of central and local bodies of executive power and local government who are entitled to carry out scholarly research, teaching and creative activities outside their working hours (Article 120.1 of the Constitution) is regulated in another way at constitutional level. The provisions of Article 4.1.2 of Law no. 1506 regarding the persons mentioned above are in conformity with the Constitution and are considered by the Constitutional Court to be an exception to the general rule.

If the persons mentioned in Article 2.1.1, 2.1.2, 2.1.3 of Law no. 1506, including People's Deputies, carry out scholarly research, teaching, creative activities, medical research or sports coaching or refereeing during working hours, they are deemed to have committed an offence of corruption.

However, the Constitution guarantees citizens the freedom of literary, artistic, scientific and technical creativity (Article 54.1). Under Article 41.1 of the Basic Law, everyone has the right to dispose of the results of his or her intellectual and creative activity.

Under Article 9.1 of the Constitution, international treaties which are in force (and which Parliament has agreed are binding) are part of the national legislation. The Constitutional Court noted that the Civil Law Convention on Corruption of 1999, the Criminal Law Convention on Corruption of 1999 and the United Nations Convention against Corruption (UNCAC) of 2003, which Ukraine has ratified, directly relate corruption with the self-interested acts or omissions of officials in the exercise of their professional duties.

The above provisions render it impossible for the legislator to recognize as corruption the performance of scholarly or teaching work if it is proved to be the source of a reasonable amount of legal income and it is not connected with self-interested acts or omissions on the part of officials in the performance of their professional duties.

These particular features of an individual's intellectual activity are taken into consideration in the Law on Prevention of Corruption which does not impose administrative liability for persons authorised to execute the functions of the State for their performance of teaching, scholarly and creative work during working hours.

Under Article 22.3 of the Constitution the content and scope of existing rights and freedoms cannot be undermined by the adoption of new laws or changes to those already in force. Article 4.1.2 of Law no. 1506 prevents those persons mentioned in Article 2.1.1, 2.1.2 and 2.1.3 of this Law to perform activities that were sanctioned before the adoption of Law no. 1506, which contravenes the above constitutional norm.

In order to exercise more effective control of the working hours of the officials concerned, the legislator has the scope to introduce extra regulatory mechanisms regarding the performance of scholarly research and teaching activities outside their principal workplace. However, this should not be achieved by recognizing such activity and work as corruption, and establishing administrative liability simply because it is carried out outside working hours. Any restriction of human and citizens' rights should not only be legally substantiated but also socially justifiable and adequate. This must be taken into consideration.

Article 9 of Law no. 1506 envisages that candidates for positions related to the implementation of the functions of the State should undergo special examination, in particular with regard to information they have submitted personally. Questions should be asked about the candidate's criminal record, any findings against them of corruption, their income, financial resources and liabilities, (including income, resources and liabilities from abroad), his or her corporate rights, state of health, level of education, scientific degree and rank and professional qualifications.

The giving of information as to income and financial liabilities by those applying for office and those already *in situ* is envisaged by Article 13 of the Law on Civil Service and by Article 13 of the Law on Civil Service within Local Government". Restrictions which are in place due to the need for financial control over such individuals makes it easier to identify corruption offences. This explains their importance in terms of the selection of personnel and the defence of the national economy.

The procedures established by legislation provide for the formation of appropriate corps of personnel as candidates for positions which are related to the performance of the functions of the state or of local government. They also take into account the restrictions of the State or local government bodies, and the constitutional provisions of social responsibility for all, duties to society, and the right of all individuals to free development of his or her personality stipulated in Article 23 of the Constitution. They do not violate the constitutional norm which envisages the opportunity for collection, storage, use and dissemination of confidential information about persons in cases determined by law (Article 32.2 of the Constitution).

The provisions of Article 9.1 and 9.2 of Law no. 1506 as to the special examination of candidates for positions which are related to the performance of state or local government functions are constitutionally compliant.

Article 9.2.2 and 9.2.3 of Law no. 1506 envisage that, in addition to the candidates themselves, under Article 1.1.2, spouses, children, parents, brothers and sisters of the whole blood, grandmothers, grandfathers, adoptive parents, adopted children and other individuals to whom the conditions of permanent cohabitation and joint household apply under Article 2.1 of Law no. 1506, will also be subject to examination.

The list of connected persons, irrespective of their place of residence and joint household, and others who cohabit on a permanent basis and run a joint

household with the candidate, as defined in Article 1.1.2 of Law no. 1506, gives the state the opportunity, without valid reason, to interfere in a person's private life and family privacy and to obtain personal information in breach of the norm of the Basic Law mentioned above. It should be noted that "connected persons" are not candidates but are connected indirectly to the candidate or the person who already holds the position and reporting without consent on connected persons could result in the obtaining of invalid data, for which liability could arise under Article 164<sup>1</sup> of the Code on Administrative Offences.

The connected persons defined in Article 1.1.2 of Law no. 1506 cannot therefore be required to undergo a special examination, as envisaged by Article 9.2.2 and 9.2.3 of the above law, as this violates the provisions of Articles 32, 64.1 of the Constitution.

Judge V.I. Shyshkin submitted a dissenting opinion.

#### *Languages:*

Ukrainian.



#### *Identification: UKR-2010-3-012*

**a)** Ukraine / **b)** Constitutional Court / **c)** / **d)** 18.11.2010 / **e)** 3-v/2010 / **f)** Conformity of the Draft law on introducing amendments to the Constitution on holding regular elections of People's Deputies, the President, Members of the Parliament of the Autonomous Republic of Crimea, local councils and heads of villages, settlements and cities with Articles 157, 158 of the Constitution (case on introducing amendments to Articles 76, 77, 103, 136, 141 and Chapter XV "Transitional Provisions" of the Constitution) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 92/2010 / **h)** CODICES (Ukrainian).

#### *Keywords of the systematic thesaurus:*

4.4.4.3 Institutions – Head of State – Appointment – **Direct/indirect election.**  
 4.5.3.1 Institutions – Legislative bodies – Composition – **Election of members.**  
 4.8.3 Institutions – Federalism, regionalism and local self-government – **Municipalities.**

---

*Keywords of the alphabetical index:*

Head of State, terms, election / Parliament, terms, election / Election, local / Constitution, amendment / Election, parliamentary / Election, Head of State.

*Headnotes:*

The Constitutional Court examined draft legislation on the introduction of amendments to the Constitution as to the holding of national parliamentary elections, elections to the Parliament of the Autonomous Republic of Crimea, presidential elections and local council and municipal elections in terms of its compliance with the Constitution.

The Opinion of the Constitutional Court in this case is mandatory for execution, final and is not subject to appeal.

*Summary:*

Acting under the Resolution “on Including on the Agenda of the 7<sup>th</sup> Session of the *Verkhovna Rada* of the 6<sup>th</sup> Convocation of the Draft law on Introducing Amendments to the Constitution on Holding Regular Elections of People’s Deputies, the President, Deputies of the *Verkhovna Rada* of the Autonomous Republic of Crimea, Local Councils and Heads of Village, Settlement, City and its Submission to the Constitutional Court” no. 2606-VI, 19 October 2010, the *Verkhovna Rada* (Parliament) asked the Constitutional Court for an opinion as to the conformity of the Draft law on introducing amendments to the Constitution on holding regular elections to the national Parliament, the Parliament of the Autonomous Republic of Crimea, the Presidency, and local councils and municipalities (reg. no. 7265) with Articles 157 and 158 of the Constitution. There was a proposal to amend Articles 76.1, 77.1, 103.5 and 136.1, supplement Article 136 and 141 with new paragraphs, amend Article 141.1 and 141.2, and to supplement Chapter XV “Transitional Provisions” of the Constitution with items 15 and 16. The Constitutional Court emphasized that Parliament had not amended the above provisions during the term of its authority. The Draft Law did not, therefore, contravene Article 158 of the Constitution.

The Constitutional Court concluded that the changes outlined above which were proposed in the Draft Law were not geared towards the curtailing of independence or violation of territorial indivisibility. In that respect, the Draft Law did not contravene Article 157 of the Constitution.

None of the amendments listed below envisage the curtailment or restriction of human and citizens’ rights.

The Draft law proposes changes to Article 76.1 of the Constitution in the new wording. The amendments concern the term of authority of People’s Deputies. It is suggested that their term of office should be five as opposed to four years. The Constitutional Court gave an opinion as to draft legislation introducing amendments to the Constitution regarding a five-year term of office for Parliament (see Opinion no. 2-v/2003, 5 November 2003).

It also proposes changes to Article 77.1 of the Constitution, relating to the timescale for holding regular elections to Parliament. It is proposed that these should take place on the last Sunday of October of the fifth year of Parliament’s term of office instead of the last Sunday of March of the fourth year of its term of office.

Changes are envisaged under the Draft Law to Article 103.5 of the Constitution, regarding the timescale for holding regular elections of the President. It is proposed that these should take place on the last Sunday of March of the fifth year of his or her term of office, instead of the last Sunday of October.

Article 136.1 of the Constitution may also be altered. The amendments envisage the constitutional stipulation of a legal basis for the elections of Members of the Parliament of the Autonomous Republic of Crimea, a five-year term of office in terms of regular elections of its members, and stipulation of a provision to the effect that termination of the authority of the Parliament of the Autonomous Republic of Crimea will result in the termination of the authority of its members. The Constitutional Court provided opinions on draft legislation suggesting amendments to Article 136.1 of the Constitution regarding the establishment of a five-year term of authority for the Parliament of the Autonomous Republic of Crimea, legal foundations for the elections of Members of Parliament of the Autonomous Republic of Crimea (see Opinions no. 1-v/2008, 15 January 2008 and no. 2-v/2010, 17 June 2010).

A supplement was also proposed to Article 136 of the Constitution (after Article 136.1). The proposed new paragraph concerned the harmonisation between the timescale for regular elections to the Parliament of the Autonomous Republic of Crimea and the timescale for elections to other representative bodies. It was suggested that these elections be held on the last Sunday of October of the fifth year of their authority.

---

Changes are proposed under the Draft law to Article 141 of the Constitution in the new wording. These amendments establish the subjects of elections to district and oblast councils (respectively residents of district and oblast). It is also suggested that a five year term of office be established for villages, settlements, cities, districts and oblast councils to which deputies are elected on regular elections and the same five-year term of authority for heads of villages, settlements and cities elected in regular elections. A provision has also been suggested to the effect that termination of the authority of a local council will result in the termination of the authority of the deputies of that council. The Constitutional Court has already provided opinions on draft legislation proposing changes to the Constitution regarding the establishment of a five year term of authority for local councils to which deputies are elected in regular elections (see Opinion no. 2-v/2010, 17 June 2010) and a five year term of office for the heads of villages, settlements and cities (see Opinions no. 1-v/2008, 15 January 2008 and no. 2-v/2010, 17 June 2010).

Under the Draft law, a supplementary paragraph is to be added to Article 141 of the Constitution (after Article 141.2). It is suggested that the timescale for the holding of elections to villages, settlements, cities, districts, oblast councils into line with the timescale for the holding of regular elections to the national Parliament and to the Parliament of the Autonomous Republic of Crimea. It is proposed that these elections be held on the last Sunday of October of the fifth year of the term of office of the relevant council or the head of this representative body.

A supplement (items 15 and 16) is also suggested to Chapters XV "Transitional Provisions" of the Constitution. Under items 15 and 16, the next scheduled elections for Parliament will take place on the last Sunday of October of 2012 and those for the office of President will take place on the last Sunday of March of 2015.

The Constitutional Court noted that the right to elect and to be elected was implemented by citizens at the last parliamentary and presidential elections on condition that elections took place every five years. The dates of the next scheduled parliamentary and presidential elections set out in the Draft law will not lead to a reduction in the content and scope of citizens' electoral rights. The supplement of Chapter XV "Transitional Provisions" of the Constitution by items 15 and 16 as provided in the draft legislation will not result in the abolition or restriction of human and citizen's rights.

Judge V.I. Shyshkin submitted a dissenting opinion.

*Languages:*

Ukrainian.





# Inter-American Court of Human Rights

---

## Important decisions

*Identification:* IAC-2010-3-002

**a)** Organisation of American States / **b)** Inter-American Court of Human Rights / **c)** / **d)** 28.01.2009 / **e)** Series C 206 / **f)** Barreto Leiva v. Venezuela / **g)** / **h)** CODICES (English, Spanish).

*Keywords of the systematic thesaurus:*

2.1.1.4.11 Sources – Categories – Written rules – International instruments – **American Convention on Human Rights of 1969.**

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

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

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

5.3.13.25 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to be informed about the charges.**

5.3.13.26 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to have adequate time and facilities for the preparation of the case.**

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

5.3.13.28 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to examine witnesses.**

*Keywords of the alphabetical index:*

Detention, as a preventative measure.

*Headnotes:*

The State must notify the accused of the charges against him and the reasons and evidence therefore before he or she renders his or her first statement

before any public authority. This information must be rendered expressly and in a clear and integral manner that is sufficiently detailed so as to allow the accused to fully exercise his or her right to defence and prove his version of the facts. The State must not wait until a person is formally accused or deprived of liberty to provide him or her with the information necessary for the timely exercise of the right of defence.

The right to adequate time and means for the preparation of the defence includes the right to access the case record and to submit arguments to be considered in the analysis of the evidence. If the State intends to limit this right, it must respect the principle of legality, show the legitimate goal it intends to achieve, and demonstrate that the means to be used in order to achieve that goal are adequate, necessary, and strictly proportional.

An individual's right to defense arises as of the moment in which he or she is put under investigation. He or she must have access to legal representation at all times during that investigation, especially while rendering statements.

The right to legal representation cannot be satisfied by the body which will later file charges against an accused. It is unreasonable to give opposing functions to a single entity.

Article 8.1 ACHR enshrines the individual's right to a hearing by a competent court established by law. When a privilege of an accused provides special jurisdiction, there is not necessarily a conflict with the right to a competent tribunal if such privilege is expressly established and defined by the legislative branch and serves a legitimate purpose.

The law must regulate the joinder of related cases, establishing the Court that shall have jurisdiction over cases that are joined.

The aim of the right to appeal a judgment is to protect the right of defense by creating a remedy to prevent a flawed ruling from becoming final. States have some discretion in regulating the right of review, but they may not establish restrictions or requirements inimical to the very essence of the right to appeal a judgment. Laws regulating the joinder of cases may not produce the inadmissible result of depriving a person of the right to appeal a judgment issued against him.

The American Convention on Human Rights guarantees the right of every person to be tried within a reasonable time or to be released without prejudice to the continuation of proceedings. This right imposes temporal limits on the duration of pre-trial detention

and, consequently, on the State's power to protect the object of the proceedings by using this type of precautionary measure.

### *Summary:*

I. In 1993, Oscar Enrique Barreto Leiva, then Director General of the Department of Administration and Services of Venezuela, was summoned by the Supreme Court of Justice three times to testify in a criminal proceeding against the President of the Republic at the time, once as a witness, and twice as a co-defendant. Later, an arrest warrant was issued against him and he was sentenced on 30 May 1996, to one year and two months in prison for misappropriation of public funds. Due to the investigation's secrecy, Barreto Leiva was not notified of the charges against him before he was called to testify and was unable to be assisted by counsel of his choice during those interrogations. Moreover, he was preventively detained, exclusively on the basis of indications of criminal responsibility, for longer than the sentence finally imposed, and he was unable to appeal the judgment against him, as the highest court in the land had served as the Court of First Instance.

The Inter-American Commission on Human Rights (hereinafter, the "Commission") filed an application with the Court on 31 October 2008, requesting that the latter declare the State of Venezuela (hereinafter, the "State") responsible for the violation of Article 7 ACHR (Right to Personal Liberty), Article 8 ACHR (Right to a Fair Trial) and Article 25 ACHR (Right to Judicial Protection), in relation to the obligations established in Article 1.1 ACHR (Obligation to Respect Rights) and Article 2 ACHR (Domestic Legal Effects). The Commission also requested that the Court order reparations in favour of the victim.

The representative's submission of 1 January 2009, made no additional allegations against the State.

II. In its Judgment, the Court declared that the State had violated the right to prior notification under Article 8.2.b ACHR, in relation to Article 1.1 ACHR, for failing to officially notify Barreto Leiva that he was being investigated in relation to the case for which he was giving testimony; the right to adequate time and means to prepare a defence under Article 8.2.c ACHR, in relation to Articles 1.1 and 2 ACHR, because under Venezuelan law, facts learned from the investigations always remained secret until the person investigated was arrested, regardless of the particular circumstances of the case; and the right to be assisted by legal counsel of choice under Article 8.2.d ACHR, in relation to Article 1.1 ACHR, because the right to defence arises from the moment an investigation against the individual is ordered, and

this right cannot be satisfied by a counsel provided by the Public Prosecutor. Furthermore, the Court found that the State had violated Barreto Leiva's right to appeal a ruling under Article 8.2.h ACHR, in conjunction with Articles 1.1 and 2 ACHR, as he was convicted in a court of sole instance and had no possibility of appealing the judgment against him.

The Court also found that the State was responsible for violating the right to personal liberty and the prohibition against arbitrary detention established in Article 7.1 and 7.3 ACHR, in relation to Articles 1.1 and 2 ACHR, given that Barreto Leiva was preventively detained, in accordance with Venezuelan law, merely because of the existence of "founded indications of guilt." According to the Court, preventive detention may only be imposed when there are objective indications that the accused will try to elude justice or impede the proceedings against him. Additionally, the Court declared that the State had violated the right to personal liberty, the right to trial within a reasonable time, and the right to be presumed innocent under Articles 7.1, 7.5 and 8.2 ACHR, in relation to Article 1.1 ACHR, because the length of his preventive detention, which exceeded the sentence finally imposed, was unreasonable and disproportionate.

However, the Court also declared that the State did not violate the right to be tried by a competent court under Article 8.1 ACHR, as Venezuelan law reasonably established that Barreto Leiva's case should be heard by the Supreme Court given the connection of the charges to those against the President. Furthermore, neither the Commission nor the representative proved a violation of the right to an impartial tribunal recognised under Article 8.1 ACHR or of the right to call and examine witnesses at trial established in Article 8.2.f ACHR. Finally, the Court found no violation Article 25.1 ACHR, declaring that the facts used to allege a violation of that Article fell under the sphere of application of Article 8.2.h ACHR, which provides for a specific type of remedy that must be offered to every person accused of a crime.

Accordingly, the Court ordered the State to allow Barreto Leiva to appeal his sentence. It also ordered that the State provide him adequate reparations if he was found innocent or if the reviewing court found his sentence excessive. In addition, the Court ordered the State to adapt its domestic law so as to guarantee the right to appeal to all those accused of crimes, to publish the sentence in the official newspaper and another newspaper of national circulation, and to pay non-pecuniary damages and the victim's costs in this dispute.

*Languages:*

Spanish, English.



# Court of Justice of the European Union

## Important decisions

*Identification:* ECJ-2010-3-016

**a)** European Union / **b)** Court of First Instance / **c)** Second chamber / **d)** 10.02.2009 / **e)** T-388/03 / **f)** Deutsche Post AG and DHL International v. European Commission / **g)** *European Court Reports*, 2009, II-199 / **h)** CODICES (English, French).

*Keywords of the systematic thesaurus:*

1.2 Constitutional Justice – **Types of claim.**  
1.2.2 Constitutional Justice – Types of claim – **Claim by a private body or individual.**  
5.3.13 Fundamental Rights – Civil and political rights – **Procedural safeguards, rights of the defence and fair trial.**

*Keywords of the alphabetical index:*

State aid / Application for annulment, admissibility / Competitor / *Locus standi* / Interest justifying action.

*Headnotes:*

Where, without initiating the formal investigation procedure under Article 88.2 EC, the Commission finds, on the basis of Article 88.3 EC, that aid is compatible with the common market, the persons intended to benefit from those procedural guarantees may secure compliance therewith only if they are able to challenge that decision before the Community judicature.

For those reasons, an action for the annulment of such a decision brought by a person who is concerned within the meaning of Article 88.2 EC is admissible where he seeks, by instituting proceedings, to safeguard the procedural rights available to him under the latter provision.

On the other hand, if the applicant challenges the substance of the decision appraising the aid as such, the mere fact that it may be regarded as concerned within the meaning of Article 88.2 EC cannot suffice to render the action admissible. The applicant must

then demonstrate that it has a particular status within the meaning of Case 25/62 *Plaumann v. Commission* [1963]. That would apply in particular where the applicant's market position is substantially affected by the aid to which the decision at issue relates.

The mere fact that the decision in question may exercise an influence on the competitive relationships existing on the relevant market and that the undertakings concerned are in a competitive relationship with the beneficiary of that decision does not constitute a significant effect (see paragraphs 42, 44, 48).

### *Summary:*

This case concerned the much-discussed question of third parties' *locus standi* to contest the decisions of the European Commission on State aid.

The application brought before the Court of First Instance concerned a decision of the Commission which, at the stage of the preliminary examination procedure, had declared a grant compatible with the common market. The measure of assistance which had been notified to the Commission consisted in a scheme to increase the capital of *La Poste belge* by almost 300 million Euros, funded by the Belgian State. Two competitors of *La Poste*, operating in the specific sector of express parcels, asked to have the Commission's decision set aside. Before the Court, the Commission pleaded the inadmissibility of the application, contending that the applicants lacked both interest in bringing proceedings and standing to do so, in so far as they could not be regarded as individually concerned within the meaning of Article 230.4 EC.

Being competitors, the applicants qualified as interested within the meaning of Article 88.2 EC, so that their interest in bringing proceedings could be justified. Their standing in that regard was therefore at issue. Very didactically, the Court defined the groundwork of what is now an established precedent to the effect that a distinction should be drawn depending whether the third parties challenge the validity of the decision in substance or are bringing an appeal to assert the procedural rights secured by Article 88.2 EC. This provision requires the Commission to give notice to those concerned to make their submissions, but only at a later stage of the formal examination procedure, which it is at liberty to open or not to open. Thus, where the Commission decides not to raise objections at the conclusion of the preliminary phase, acknowledgement of a competitor's right to challenge the decision on compatibility has the purpose of enabling the competitors to secure compliance with the procedural safeguards attached to the formal examination procedure.

Should the third parties be challenging the validity of the decision in substance, for the application to be admissible the applicants must prove that the measure of assistance substantially affects their position on the market. Their interested position within the meaning of Article 88.2 EC, as competing enterprises, would not suffice. They must prove that they are individually concerned within the meaning of the *Plaumann* case-law (Judgment of 15 July 1963, 25/62), by substantiating the magnitude of the prejudice to their position on the market. In the instant case, however, the Court held that the applicants adduced no evidence capable of establishing that their competitive situation on the Belgian postal market was special. In the event of third parties bringing an application to assert the procedural rights secured by Article 88.2 EC, the Court, in order to acknowledge the applicants' *locus standi*, must verify that they actually intend to uphold their rights, presupposing that the applicants have expressly made a plea for that purpose. In the instant case, the Court noted that the applicants contended in their pleadings that it had not been possible to have the measures at issue examined properly during the preliminary phase, and that the procedural rights which they derived from Article 88.2 EC had been violated. The Court therefore declared the application admissible.

### *Supplementary information:*

This judgment is the subject of an appeal before the Court of Justice of the European Communities (pending case C-148/09 P).

### *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-2010-3-017

**a)** European Union / **b)** Court of Justice of the European Communities / **c)** Second chamber / **d)** 12.02.2009 / **e)** C-45/07 / **f)** Commission v. Greece / **g)** *European Court Reports*, I-701 / **h)** CODICES (English, French).

*Keywords of the systematic thesaurus:*

3.26.3 General Principles – Principles of Community law – **Genuine co-operation between the institutions and the member states.**

4.17.2 Institutions – European Union – **Distribution of powers between Community and member states.**

*Keywords of the alphabetical index:*

Transport, waterway, safety / International agreement / European Communities, exclusive competence.

*Headnotes:*

1. To the extent to which Community rules are promulgated for the attainment of the objectives of the Treaty, the Member States cannot, outside the framework of the Community institutions, assume obligations which might affect those rules or alter their scope. The provisions of Regulation no. 725/2004 on enhancing ship and port facility security, which has as its legal basis Article 80.2 EC, the second subparagraph of which refers to Article 71 EC, are Community rules promulgated for the attainment of the objectives of the Treaty.

In asking the International Maritime Organisation (hereinafter, "IMO") Maritime Safety Committee to examine the creation of check lists or other appropriate tools for assisting the Contracting States of the International Convention for the Safety of Life at Sea in monitoring whether ships and port facilities comply with the requirements of Chapter XI-2 of the Annex to that convention and the International Ship and Port Facility Security Code, a Member State submits to that committee a proposal which initiates a procedure which could lead to the adoption by the IMO of new rules. The adoption of such new rules would as a consequence have an effect on the regulation, the Community legislature having decided to incorporate in substance both of those international instruments into Community law.

In those circumstances, the Member State which sets in motion such a procedure takes an initiative likely to affect the provisions of the regulation, which is an infringement of the obligations under Articles 10 EC, 71 EC and 80.2 EC (see paragraphs 17-18, 21-23).

2. Any breach by the Commission of Article 10 EC cannot entitle a Member State to take initiatives likely to affect Community rules promulgated for the attainment of the objectives of the Treaty, in breach of that State's obligations, which arise under Articles 10 EC, 71 EC and 80.2 EC. Indeed, a

Member State may not unilaterally adopt, on its own authority, corrective or protective measures designed to obviate any breach by an institution of rules of Community law (see paragraph 26).

*Summary:*

This case concerned an application brought by the Commission against Greece, in order to obtain a finding that it had failed to fulfil its obligations under Articles 10, 71 and 80.2 EC by submitting on its own sole initiative to the International Maritime Organisation (IMO) a proposal concerning monitoring of the compliance of ships and port facilities with the requirements of the various international instruments on the safety of shipping, although the European Community in 2004 had adopted a Regulation enhancing ship and port facility security, Regulation no. 725/2004, incorporating these international instruments into Community law. The Commission submitted that the Community had thereby acquired exclusive external competence in the relevant area, depriving Member States of all power to act unilaterally.

In order to rule on this application, the Court referred to the case-law arising from AETR. According to that case-law, in so far as Community rules have been made to achieve the aims of the treaty, it is not permissible for Member States, acting outside the framework of the common institutions, to enter into undertakings that might affect those rules or their scope. In the instant case, the Court found that in so far as it contributed to the establishment of a common transport policy, the regulation did indeed help achieve one of the aims of the treaty. Thus, the Court held, the question was whether or not, in submitting the contested proposal to the IMO, Greece should be deemed to have made undertakings likely to affect the provisions of the Regulation. On the basis of the Advocate General's submissions, the Court held that Greece had assumed such an obligation in so far as its proposal before the IMO Maritime Safety Committee was apt to set in motion a process possibly leading to the adoption of new rules in the two international instruments which the Community Regulation was supposed to incorporate.

In its reasoning, the Court went on to refute one by one the various arguments put forward by Greece to justify the individual initiative which it had taken vis-à-vis the IMO. In particular, the Court ruled that the Commission's alleged infringement of Article 10 EC by refusing to place the contested proposal on the meeting agenda of the Maritime Safety Committee over which it presided – which would have allowed Greece's proposal to be brought up for discussion by the Member States and the Commission – did not

make it permissible for Greece to take unilateral initiatives liable to affect the Community rules laid down in order to achieve the aims of the treaty. It also dismissed the argument derived from the existence of a gentleman's agreement allegedly adopted by the EU Council under which Member States are permitted to submit proposals to the IMO individually. The Court held, in fact, that such an act must not affect the apportionment of powers between the Member States and the Community pursuant to the provisions of the EC Treaty. The Court then dismissed the argument invoking the Community's lack of status as a member of an international organisation, since it was well-established that this did not prevent it from exercising its external competence through the agency of the Member States acting jointly. Finally, it established the inapplicability in the instant case of Article 307.1 EC providing that Community law must not affect the application of the international agreements concluded by the Member States with third states prior to the adoption of the Treaty of Rome or to the date of their accession.

#### *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-2010-3-018

**a)** European Union / **b)** Court of Justice of the European Communities / **c)** Grand Chamber / **d)** 17.02.2009 / **e)** C-465/07 / **f)** Meki Elgafaji and Noor Elgafaji v. Staatssecretaris van Justitie / **g)** *European Court Reports*, 2009, I-921 / **h)** CODICES (English, French).

#### *Keywords of the systematic thesaurus:*

1.3.5.2.2 Constitutional Justice – Jurisdiction – The subject of review – Community law – **Secondary legislation.**

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

5.3.11 Fundamental Rights – Civil and political rights – **Right of asylum.**

#### *Keywords of the alphabetical index:*

Asylum, foreigner, subsidiary protection / Community law, interpretation / Interpretation, compatibility with the European Convention on Human Rights.

#### *Headnotes:*

1. The fundamental right guaranteed under Article 3 of the European Convention on Human Rights (hereinafter, “ECHR”) forms part of the general principles of Community law, observance of which is ensured by the Court. In addition, the case-law of the European Court of Human Rights is taken into consideration in interpreting the scope of that right in the Community legal order. However, it is Article 15.b of Directive 2004/83 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, which corresponds, in essence, to Article 3 ECHR.

By contrast, Article 15.c of that directive is a provision, the content of which is different from that of Article 3 ECHR, and the interpretation of which must, therefore, be carried out independently, although with due regard for fundamental rights as they are guaranteed under the European Convention on Human Rights (see paragraph 28).

2. Article 15.c of Directive 2004/83 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, in conjunction with Article 2.e thereof, must be interpreted as meaning that:

- the existence of a serious and individual threat to the life or person of an applicant for subsidiary protection is not subject to the condition that that applicant adduce evidence that he is specifically targeted by reason of factors particular to his personal circumstances;
- the existence of such a threat can exceptionally be considered to be established where the degree of indiscriminate violence characterising the armed conflict taking place – assessed by the competent national authorities before which an application for subsidiary protection is made, or by the courts of a Member State to which a decision refusing such an application is referred – reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on

account of his presence on the territory of that country or region, face a real risk of being subject to that threat.

That interpretation is fully compatible with the European Convention on Human Rights (ECHR), including the case-law of the European Court of Human Rights relating to Article 3 ECHR (see paragraphs 43-44, operative part).

### *Summary:*

The dispute in the main proceedings was between two Iraqi nationals and the Dutch Minister of Justice, concerning the latter's refusal of their application for a permit to reside temporarily in the Netherlands. The Iraqi couple relied on facts relating to their personal situation, such as the fact that the husband, a Shiite Muslim, had worked for a British firm, that his uncle, employed by the same firm, had been killed by militia, and that a letter threatening 'death to collaborators' had been fixed to the door of the couple's home. Netherlands law provides that a residence permit be granted to a foreigner "for whom return to his country of origin would constitute an exceptional hardship in the context of the overall situation there". However, considering that the applicants had not adequately proved the distinct reality of their personal situation regarding the likelihood of serious individual threats to which they would be exposed if they were returned to their country of origin, the Dutch Minister had refused to grant the permit.

The asylum seekers invoked Article 15.c of Directive no. 2004/83/EC concerning minimum standards in relation to the conditions which nationals of third countries or stateless persons must fulfil in order to claim status as refugees or persons who otherwise need international protection. Under this provision in conjunction with Article 2.e of the same Directive, persons eligible for subsidiary international protection are those who cannot be regarded as refugees but "face a real risk of suffering serious harm", constituted by "serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict". Article 15 furthermore concerns two other instances of eligibility for subsidiary protection: "death penalty or execution" (Article 15.a) and "torture or inhuman or degrading treatment or punishment of an applicant in the country of origin" (Article 15.b). The Dutch Minister responsible for the case considered that the eventualities mentioned by Article 15.c of the Directive and by Netherlands law, which were similar, required the same standard of proof as the one in Article 15.b which required a clear degree of individualisation of the threat invoked. The Dutch Court to which the asylum seekers applied at first

instance took the contrary view that the proof to be furnished in connection with the application of Article 15.c did not require the same degree of individualisation of the threat as did paragraph b of the same article, and set aside the orders issued by the Dutch Minister. The Court of appeal withheld judgment in order to request a preliminary ruling from the Court of Justice on the interpretation of Article 15.c of the Directive.

The Court replied firstly that Article 15.c was a provision whose substance differed from that of Article 3 ECHR, to which Article 15.b corresponded, and that it should therefore be interpreted independently but in a manner compatible with the European Convention on Human Rights. Secondly, the Court made a comparative examination of the three situations of serious harm referred to by Article 15.a, 15.b and 15.c of the Directive. It drew a distinction between these three categories of "serious harm": it found that the first two concerned a risk of individual threat, whereas the third, the one pleaded in the instant case by the asylum seekers, covered a more general risk of harm. This distinction prompted the Court to single out the case of harm referred to by Article 15.c from the first two cases: while the specificity of the risk of harm in the instances contemplated by Article 15.a and 15.b presupposed "a clear degree of individualisation", the same did not apply to the third type of harm constituted by "serious and individual threat to life or person". The Court in fact held that, this being so, where the degree of indiscriminate violence characterising the armed conflict taking place reached an exceptionally high level, the applicant's mere presence in the territory could be regarded as a real risk of subjection to the serious threat referred to in Article 15.c of the Directive.

### *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-2010-3-004

**a)** Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 01.06.2010 / **e)** 22978/05 / **f)** Gäfgen v. Germany / **g)** *Reports of Judgments and Decisions of the Court* / **h)** CODICES (English, French).

*Keywords of the systematic thesaurus:*

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

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

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

*Keywords of the alphabetical index:*

Torture, in police custody / Police custody, torture / Evidence, obtained unlawfully / Statement, made under coercion, use.

*Headnotes:*

Torture or inhuman treatment, or threats of the same, may not be used even in situations where there is a risk to the life of an individual.

Where evidence is obtained as a result of prohibited methods of investigations such as to constitute a breach of Article 3 ECHR, Article 6 ECHR will only be infringed if the evidence is relied on for a conviction.

Failure to exclude evidence obtained following a confession extracted by means of inhuman treatment does not constitute a breach of the right to a fair trial if that failure had no bearing on the conviction and sentence or on the overall fairness of the trial.

*Summary:*

I. In 2002 the applicant suffocated an eleven-year-old boy to death and hid his corpse near a pond. Meanwhile, he sought a ransom from the boy's parents and was arrested shortly after having collected the money. He was taken to a police station where he was questioned about the victim's whereabouts. The next day the deputy chief police officer ordered one of his subordinate officers to threaten the applicant with physical pain and, if necessary, to subject him to such pain in order to make him reveal the boy's location. Following these orders, the police officer threatened the applicant that he would be subjected to considerable pain by a person specially trained for such purposes. Some ten minutes later, for fear of being exposed to such treatment, the applicant disclosed where he had hid the victim's body. He was then accompanied by the police to the location, where they found the corpse and further evidence against the applicant, such as the tyre tracks of his car. In the subsequent criminal proceedings, a regional court decided that none of his confessions made during the investigation could be used as evidence since they had been obtained under duress contrary to Article 3 ECHR. At the trial, the applicant again confessed to murder. The court's findings were based on that confession and on other evidence, including evidence secured as a result of the statements extracted from the applicant during the investigation. The applicant was ultimately convicted and sentenced to life imprisonment and his subsequent appeals were dismissed, the Federal Constitutional Court having nonetheless acknowledged that extracting his confession during the investigation constituted a prohibited method of interrogation both under the domestic law and the Convention.

In 2004 the two police officers involved in threatening the applicant were convicted of coercion and incitement to coercion while on duty and were given suspended fines of EUR 60 for 60 days and EUR 90 for 120 days, respectively. In 2005 the applicant applied for legal aid in order to bring proceedings against the authorities for compensation for the trauma the investigative methods of the police had caused him. The courts initially dismissed his application, but their decisions were quashed by the Federal Constitutional Court in 2008. At the time of the European Court's judgment, the remitted proceedings were still pending before the regional court.

The applicant alleged that the treatment to which he had been subjected during police interrogation constituted torture. He further alleged that his right to a fair trial, comprising a right to defend himself effectively and a right not to incriminate himself, had



been violated in that evidence which had been obtained under duress had been admitted at his criminal trial. He relied on Article 3 ECHR and Article 6 ECHR.

II. The Court observed firstly that the national authorities had acknowledged the breach of the Convention both in the criminal proceedings against the applicant and in the subsequent conviction of the police officers. However, it was necessary to establish whether they had afforded the applicant appropriate and sufficient redress for the violation suffered. Although the criminal proceedings against the police officers, which had lasted some two years and three months, had been sufficiently prompt and expeditious, the officers had been sentenced to very modest and suspended fines since the domestic court took into account a number of mitigating circumstances, including the urgent need to save the victim's life. While the applicant's case could not be compared to other cases involving arbitrary acts of brutality by State agents, imposing almost token fines could not be considered an adequate response to a breach of Article 3 ECHR. Such punishment, which was manifestly disproportionate to a breach of one of the core rights of the Convention, did not have the necessary deterrent effect in order to prevent further violations of that right in future difficult situations. Moreover, even though both police officers had initially been transferred to posts which no longer involved direct association with the investigation of criminal offences, one of them had later been appointed chief of his section, which raised serious doubts as to whether the authorities' reaction adequately reflected the seriousness of a breach of Article 3 ECHR. Finally, as to the proceedings for compensation, the applicant's request for legal aid was still pending after over three years. Consequently, no hearing had been held and no judgment given on the merits of his claim. In such circumstances, the domestic courts' failure to decide the merits of the applicant's compensation claim without the requisite expedition brought into question the effectiveness of those proceedings. In conclusion, the Court held that the different measures taken by the domestic authorities had failed to comply fully with the requirement of redress as established by its case-law and that, consequently, the applicant could still claim to be the victim of a violation of his Convention right.

With regard to Article 3 ECHR, it was uncontested between the parties that the applicant was threatened by the police officer with intolerable pain by a person specially trained for such purposes if he refused to disclose the victim's whereabouts. Since the deputy chief officer had ordered his subordinates on several occasions to threaten the applicant or, if necessary,

to use force against him, his order could not be regarded as a spontaneous act, but as a premeditated and calculated one. The interrogation under the threat of ill-treatment had lasted for about ten minutes in an atmosphere of heightened tension and emotions when the officers believed that the victim's life could still be saved. The applicant was handcuffed and thus in a state of vulnerability, so the threat he had received must have caused him considerable fear, anguish and mental suffering. Despite the police officers' motives, the Court reiterated that torture and inhuman or degrading treatment could not be inflicted even in circumstances where the life of an individual was at risk. In conclusion, the method of interrogation to which the applicant had been subjected was found to be sufficiently serious to amount to inhuman treatment prohibited by Article 3 ECHR. There had therefore been a violation of that provision.

With regard to Article 6 ECHR, the use of evidence obtained by methods in breach of Article 3 ECHR raised serious issues regarding the fairness of criminal proceedings. The Court was therefore called upon to determine whether the proceedings against the applicant as a whole had been unfair because such evidence had been used. At the start of his trial, the applicant was informed that his earlier statements would not be used as evidence against him because it had been obtained by coercion. Nonetheless he confessed to the crime again during the trial, stressing that he was confessing freely out of remorse and in order to take responsibility for the crime he had committed. The Court had therefore no reason to assume that the applicant would not have confessed if the domestic courts had decided at the outset to exclude the disputed evidence. In the light of these considerations the Court concluded that, in the particular circumstances of the applicant's case, the failure of the domestic courts to exclude the evidence obtained following a confession extracted by means of inhuman treatment had not had a bearing on the applicant's conviction and sentence or on the overall fairness of his trial. There had therefore been no violation of Article 6 ECHR.

#### *Cross-references:*

- *Ireland v. the United Kingdom*, 18.01.1978, Series A, no. 25; *Special Bulletin Leading Cases ECHR* [ECH-1978-S-001];
- *Campbell and Cosans v. the United Kingdom*, 25.02.1982, Series A, no. 48; *Special Bulletin Leading Cases ECHR* [ECH-1982-S-001];
- *Eckle v. Germany*, 15.07.1982, Series A, no. 51;
- *Schenk v. Switzerland*, 12.07.1988, Series A, no. 140;

- *Windisch v. Austria*, 27.09.1990, Series A, no. 186;
- *Lüdi v. Switzerland*, 15.06.1992, Series A, no. 238; *Special Bulletin Leading Cases ECHR* [ECH-1992-S-004];
- *Tomasi v. France*, 27.08.1992, Series A, no. 241-A; *Special Bulletin Leading Cases ECHR* [ECH-1992-S-005];
- *Funke v. France*, 25.02.1993, Series A, no. 256-A; *Special Bulletin Leading Cases ECHR* [ECH-1993-S-001];
- *Klaas v. Germany*, 22.09.1993, Series A, no. 269; *Special Bulletin Leading Cases ECHR* [ECH-1993-S-006];
- *Ribitsch v. Austria*, 04.12.1995, Series A, no. 336; *Bulletin* 1995/3 [ECH-1995-3-023];
- *Chahal v. the United Kingdom*, 15.11.1996, *Reports of Judgments and Decisions* 1996-V; *Bulletin* 1996/3 [ECH-1996-3-015];
- *Saunders v. the United Kingdom*, 17.12.1996, *Reports* 1996-VI; *Bulletin* 1997/1 [ECH-1997-1-001];
- *Aksoy v. Turkey*, 18.12.1996, *Reports* 1996-VI; *Bulletin* 1996/3 [ECH-1996-3-017];
- *Selçuk and Asker v. Turkey*, 24.04.1998, *Reports* 1998-II;
- *Teixeira de Castro v. Portugal*, 09.06.1998, *Reports* 1998-IV;
- *Selmouni v. France* [GC], no. 25803/94, ECHR 1999-V; *Bulletin* 1999/2 [ECH-1999-2-008];
- *Dalban v. Romania* [GC], no. 28114/95, ECHR 1999-VI;
- *V. v. the United Kingdom* [GC], no. 24888/94, ECHR 1999-IX;
- *Labita v. Italy* [GC], no. 26772/95, ECHR 2000-IV; *Bulletin* 2000/1 [ECH-2000-1-002];
- *Khan v. the United Kingdom*, no. 35394/97, ECHR 2000-V;
- *Egmez v. Cyprus*, no. 30873/96, ECHR 2000-XII;
- *Heaney and McGuinness v. Ireland*, no. 34720/97, ECHR 2000-XII;
- *Keenan v. the United Kingdom*, no. 27229/95, ECHR 2001-III; *Bulletin* 2001/1 [ECH-2001-1-003];
- *Normann v. Denmark* (dec.), no. 44704/98, 14.06.2001;
- *P.G. and J.H. v. the United Kingdom*, no. 44787/98, ECHR 2001-IX;
- *Allan v. the United Kingdom*, no. 48539/99, ECHR 2002-IX;
- *İçöz v. Turkey* (dec.), no. 54919/00, 09.01.2003;
- *Jensen and Rasmussen v. Denmark* (dec.), no. 52620/99, 20.03.2003;
- *Hulki Güneş v. Turkey*, no. 28490/95, ECHR 2003-VII;
- *M.C. v. Bulgaria*, no. 39272/98, ECHR 2003-XII;
- *Krastanov v. Bulgaria*, no. 50222/99, 30.09.2004;
- *Abdülşamet Yaman v. Turkey*, no. 32446/96, 02.11.2004;
- *Öneryıldız v. Turkey* [GC], no. 48939/99, ECHR 2004-XII;
- *Siliadin v. France*, no. 73316/01, ECHR 2005-VII; *Bulletin* 2005/2 [ECH-2005-2-003];
- *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, ECHR 2005-VII;
- *Mikheyev v. Russia*, no. 77617/01, 26.01.2006;
- *Scordino v. Italy* (no. 1) [GC], no. 36813/97, ECHR 2006-V;
- *Örs and Others v. Turkey*, no. 46213/99, 20.06.2006;
- *Söylemez v. Turkey*, no. 46661/99, 21.09.2006;
- *Ramirez Sanchez v. France* [GC], no. 59450/00, ECHR 2006-IX;
- *Jalloh v. Germany* [GC], no. 54810/00, ECHR 2006-IX; *Bulletin* 2006/3 [ECH-2006-3-005];
- *Göçmen v. Turkey*, no. 72000/01, 17.10.2006;
- *Matko v. Slovenia*, no. 43393/98, 02.11.2006;
- *Jasar v. "the former Yugoslav Republic of Macedonia"*, no. 69908/01, 15.02.2007;
- *Heglas v. the Czech Republic*, no. 5935/02, 01.03.2007;
- *Harutyunyan v. Armenia*, no. 36549/03, ECHR 2007-VIII;
- *Nikolova and Velichkova v. Bulgaria*, no. 7888/03, 20.12.2007;
- *Saadi v. Italy* [GC], no. 37201/06, ECHR 2008; *Bulletin* 2008/2 [ECH-2008-2-003];
- *Ali and Ayşe Duran v. Turkey*, no. 42942/02, 08.04.2008;
- *Salduz v. Turkey* [GC], no. 36391/02, ECHR 2008; *Bulletin* 2009/1 [ECH-2009-1-002];
- *Dedovskiy and Others v. Russia*, no. 7178/03, 15.05.2008;
- *Çamdereli v. Turkey*, no. 28433/02, 17.07.2008;
- *Vladimir Romanov v. Russia*, no. 41461/02, 24.07.2008;
- *Levința v. Moldova*, no. 17332/03, 16.12.2008;
- *Yeter v. Turkey*, no. 33750/03, 13.01.2009;
- *Bykov v. Russia* [GC], no. 4378/02, ECHR 2009; *Bulletin* 2009/2 [ECH-2009-2-004].

#### Languages:

English, French.



*Identification:* ECH-2010-3-005

a) Council of Europe / b) European Court of Human Rights / c) Grand Chamber / d) 16.12.2010 / e) 25579/05 / f) A, B and C v. Ireland / g) *Reports of Judgments and Decisions of the Court* / h) CODICES (English, French).

*Keywords of the systematic thesaurus:*

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

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

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

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

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

*Keywords of the alphabetical index:*

Abortion, access / Law, accessibility / Morals, public / Constitutional court, review, appropriateness, statutory provision.

*Headnotes:*

While Article 8 ECHR cannot be interpreted as conferring a right to abortion, inability to obtain an abortion comes within the scope of the right to respect for private life. The prohibition of abortion occasions an interference with the right to respect for private life. However, regard being had to the right to lawfully travel abroad for an abortion and the availability of appropriate information and medical care, the prohibition of abortion for health and well-being reasons falls within the State's margin of appreciation.

Nevertheless, a failure to establish an implementing legislative or regulatory regime providing an accessible and effective procedure by which to determine the availability of an abortion will result in an unjustified interference with an individual's right to respect for private life.

*Summary:*

I. Abortion is prohibited under Irish criminal law by Sections 58 and 59 of the Offences Against the Person Act 1861. A referendum held in 1983 resulted in the adoption of Article 40.3.3 of the Irish Constitution (the Eighth Amendment) whereby the State acknowledged the right to life of the unborn and, with due regard to the equal right to life of the mother, guaranteed to respect this right in national laws. That provision was interpreted by the Supreme

Court in its seminal judgment in the *X* case in 1992 as meaning that abortion in Ireland was lawful if there was a real and substantial risk to the life of the mother which could only be avoided by termination of her pregnancy. The Supreme Court stated at the time that it found it regrettable that the legislature had not enacted legislation regulating that constitutionally guaranteed right. A further referendum in 1992 resulted in the Thirteenth and Fourteenth Amendments to the Constitution, which lifted a previously existing ban on travelling abroad for abortion and allowed information about lawfully available abortions abroad to be disseminated in Ireland.

All three applicants were resident in Ireland at the material time, had become pregnant unintentionally and had decided to have an abortion as they considered that their personal circumstances did not permit them to take their pregnancies to term. The first applicant was an unemployed single mother. Her four young children were in foster care and she feared that having another child would jeopardise her chances of regaining custody after sustained efforts on her part to overcome an alcohol-related problem. The second applicant did not wish to become a single parent. Although she had also received medical advice that she was at risk of an ectopic pregnancy, that risk had been discounted before she had the abortion. The third applicant, a cancer patient, was unable to find a doctor willing to advise whether her life would be at risk if she continued to term or how the foetus might have been affected by contra-indicated medical tests she had undergone before discovering she was pregnant. As a result of the restrictions in Ireland all three applicants were forced to seek an abortion in a private clinic in England in what they described as an unnecessarily expensive, complicated and traumatic procedure. The first applicant was forced to borrow money from a money lender, while the third applicant, despite being in the early stages of pregnancy, had to wait for eight weeks for a surgical abortion as she could not find a clinic willing to provide a medical abortion (drug-induced miscarriage) to a non-resident because of the need for follow-up. All three applicants experienced complications on their return to Ireland, but were afraid to seek medical advice there because of the restrictions on abortion.

In their applications to the Court, the first and second applicants complained that they were not entitled to abortion in Ireland as Irish law did not allow abortion for reasons of health and/or well-being, but solely when there was an established risk to the mother's life. The third applicant complained that, although she believed her pregnancy put her life at risk, there was no law or procedure through which she could have

established that and so obviate the risk of prosecution if she had an abortion in Ireland. The applicants relied in particular on Article 8 ECHR.

II. The Court held that while Article 8 ECHR could not be interpreted as conferring a right to abortion, the first and second applicants' inability to obtain an abortion in Ireland for reasons of health and/or well-being, and the third applicant's alleged inability to establish her qualification for a lawful abortion in Ireland, came within the scope of their right to respect for their private lives.

a. First and second applicants – Having regard to the broad concept of private life within the meaning of Article 8 ECHR, including the right to personal autonomy and to physical and psychological integrity, the prohibition of the termination, for reasons of health and/or well-being, of the first and second applicants' pregnancies amounted to an interference with their right to respect for their private lives. That interference was in accordance with the law and pursued the legitimate aim of the protection of the profound moral values of a majority of the Irish people as reflected in the 1983 referendum.

In view of the acute sensitivity of the moral and ethical issues raised, a broad margin of appreciation was, in principle, to be accorded to the Irish State in determining whether a fair balance had been struck between the protection accorded under Irish law to the right to life of the unborn and the conflicting rights of the first and second applicants to respect for their private lives. Although there was a consensus amongst a substantial majority of the Contracting States towards allowing abortion on broader grounds than those accorded under Irish law, that consensus did not decisively narrow the broad margin of appreciation of the State. Since there was no European consensus on the scientific and legal definition of the beginning of life and since the rights claimed on behalf of the foetus and those of the mother were inextricably interconnected, the margin of appreciation accorded to the State as regards how it protected the unborn necessarily translated into a margin of appreciation as to how it balanced the conflicting rights of the mother.

A choice had emerged from the lengthy, complex and sensitive debate in Ireland as regards the content of its abortion laws. While Irish law prohibited abortion in Ireland for health and well-being reasons, it allowed women the option of seeking an abortion abroad. Legislative measures had been adopted to ensure the provision of information and counselling about the options available, including abortion services abroad, and to ensure any necessary medical treatment both before and after an abortion. The importance of the

role of doctors in providing information and their obligation to provide all appropriate medical care, notably post-abortion, was emphasised in the Crisis Prevention Agency's work and documents and in professional medical guidelines. The first two applicants had not demonstrated that they had lacked relevant information or necessary medical care as regards their abortions.

Accordingly, regard being had to the right to lawfully travel abroad for an abortion with access to appropriate information and medical care in Ireland, the prohibition in Ireland of abortion for health and well-being reasons, based on the profound moral views of the Irish people, had not exceeded the State's margin of appreciation. The impugned prohibition had thus struck a fair balance between the first and second applicants' right to respect for their private lives and the rights invoked on behalf of the unborn. There had therefore been no violation in respect of first and second applicants.

b. The third applicant – The third applicant's complaint concerned the respondent State's alleged failure to introduce a procedure by which she could have established whether she qualified for a lawful abortion in Ireland on grounds of the risk to her life. She had a rare form of cancer and, on discovering she was pregnant, had feared for her life as she believed that her pregnancy increased the risk of her cancer returning and that she would not obtain treatment in Ireland while pregnant. The Court considered that the establishment of any such relevant risk to her life caused by her pregnancy clearly concerned fundamental values and essential aspects of her right to respect for her private life.

There were a number of concerns regarding the effectiveness of the only non-judicial means of determining such a risk – the ordinary medical consultation process – on which the Government had relied. The first of these was that the ground upon which a woman could seek a lawful abortion in Ireland – a real and substantial risk to life which could only be avoided by a termination of the pregnancy – was expressed in broad terms. No criteria or procedures had been laid down in Irish law governing how that risk was to be measured or determined. Nor was there any framework in place to resolve, in a legally binding way, differences of opinion between a woman and her doctor or between different doctors. Against this background of substantial uncertainty, it was evident that the criminal provisions of the 1861 Act would constitute a significant chilling factor for both women and doctors in the medical consultation process, with women risking conviction and doctors risking both conviction and disciplinary action.

As to the judicial procedures that had been proposed by the Government, a constitutional action to determine the third applicant's qualification for a lawful abortion in Ireland was not an effective means of protecting her right to respect for her private life. Constitutional courts were not the appropriate fora for the primary determination, which would largely be based on medical evidence, of whether a woman qualified for an abortion and it was inappropriate to require women to take on such complex constitutional proceedings when their underlying constitutional right to an abortion in the case of a qualifying risk to life was not disputable. Nor was it clear how an order requiring doctors to carry out an abortion would be enforced. As to the Government's submission that the third applicant could have made an application under the European Convention on Human Rights Act 2003 for a declaration of incompatibility of the relevant provisions of the 1861 Act and damages, such a declaration placed no legal obligation on the State to amend domestic law and could not form the basis of an obligatory award of monetary compensation.

Consequently, neither the medical consultation nor litigation options constituted effective and accessible procedures that would allow the third applicant to establish her right to a lawful abortion in Ireland. The uncertainty generated by the lack of legislative implementation of Article 40.3.3 of the Constitution and by the lack of effective and accessible procedures to establish a right to an abortion had resulted in a striking discordance between the theoretical right to a lawful abortion in Ireland and the reality of its practical implementation. No convincing explanation had been forthcoming for the failure to implement Article 40.3.3, despite recognition that further legal clarity was required. In sum, the authorities had failed to comply with their positive obligation to secure to the third applicant effective respect for her private life by reason of the absence of any implementing legislative or regulatory regime providing an accessible and effective procedure by which she could have established whether she qualified for a lawful abortion in Ireland. There had therefore been a violation in respect of the third applicant.

#### Cross-references:

- *Handyside v. the United Kingdom*, 07.12.1976, Series A, no. 24; *Special Bulletin Leading Cases ECHR* [ECH-1976-S-003];
- *Tyrer v. the United Kingdom*, 25.04.1978, Series A, no. 26; *Special Bulletin Leading Cases ECHR* [ECH-1978-S-002];
- *Marckx v. Belgium*, 13.06.1979, Series A, no. 31; *Special Bulletin Leading Cases ECHR* [ECH-1979-S-002];
- *Airey v. Ireland*, 09.10.1979, Series A, no. 32; *Special Bulletin Leading Cases ECHR* [ECH-1979-S-003];
- *Dudgeon v. the United Kingdom*, 22.10.1981, Series A, no. 45; *Special Bulletin Leading Cases ECHR* [ECH-1981-S-003];
- *Silver and Others v. the United Kingdom*, 25.03.1983, Series A, no. 61; *Special Bulletin Leading Cases ECHR* [ECH-1983-S-002];
- *X and Y v. the Netherlands*, 26.03.1985, Series A, no. 91;
- *Rees v. the United Kingdom*, 17.10.1986, Series A, no. 106;
- *Müller and Others v. Switzerland*, 24.05.1988, Series A, no. 133; *Special Bulletin Leading Cases ECHR* [ECH-1988-S-003];
- *Gaskin v. the United Kingdom*, 07.07.1989, Series A, no. 160;
- *Soering v. the United Kingdom*, 07.07.1989, Series A, no. 161; *Special Bulletin Leading Cases ECHR* [ECH-1989-S-003];
- *B. v. France*, 25.03.1992, Series A, no. 232-C; *Special Bulletin Leading Cases ECHR* [ECH-1992-S-001];
- *Keegan v. Ireland*, 26.05.1994, Series A, no. 290; *Bulletin* 1994/2 [ECH-1994-2-008];
- *Open Door and Dublin Well Woman v. Ireland*, 29.10.1992, Series A, no. 246-A; *Special Bulletin Leading Cases ECHR* [ECH-1992-S-006];
- *Laskey, Jaggard and Brown v. the United Kingdom*, 19.02.1997, *Reports of Judgments and Decisions* 1997-I; *Bulletin* 1997/1 [ECH-1997-1-005];
- *X., Y. and Z. v. the United Kingdom*, 22.04.1997, *Reports* 1997-II; *Bulletin* 1997/2 [ECH-1997-2-010];
- *Botta v. Italy*, 24.02.1998, *Reports* 1998-I;
- *McGinley and Egan v. the United Kingdom*, 09.06.1998, *Reports* 1998-III;
- *Frette v. France*, no. 36515/97, ECHR 2002-I;
- *Pretty v. the United Kingdom*, no. 2346/02, ECHR 2002-III; *Bulletin* 2002/1 [ECH-2002-1-006];
- *Nitecki v. Poland* (dec.), no. 65653/01, 21.03.2002;
- *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, ECHR 2002-VI; *Bulletin* 2002/3 [ECH-2002-3-008];
- *L. and V. v. Austria*, nos. 39392/98 and 39829/98, ECHR 2003-I;
- *Odièvre v. France* [GC], no. 42326/98, ECHR 2003-III;
- *Sentges v. the Netherlands* (dec.), no. 27677/02, 08.07.2003;
- *Glass v. the United Kingdom*, no. 61827/00, ECHR 2004-II;
- *Vo v. France* [GC], no. 53924/00, ECHR 2004-VIII;

- *Pentiacova and Others v. Moldova* (dec.), no. 14462/03, ECHR 2005-I;
- *Roche v. the United Kingdom* [GC], no. 32555/96, ECHR 2005-X;
- *Tysiāc v. Poland*, no. 5410/03, ECHR 2007-IV;
- *Evans v. the United Kingdom* [GC], no. 6339/05, ECHR 2007-IV; *Bulletin* 2007/1 [ECH-2007-1-002];
- *Burden v. the United Kingdom* [GC], no. 13378/05, 29.04.2008; *Bulletin* 2008/1 [ECH-2008-1-002];
- *Sejdić and Finci v. Bosnia and Herzegovina* [GC], nos. 27996/06 and 34836/06, 22.12.2009; *Bulletin* 2010/2 [ECH-2010-2-003];
- *S.H. and Others v. Austria*, no. 57813/00, 01.04.2010.

*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.

### **1 Constitutional Justice<sup>1</sup>**

#### **1.1 Constitutional jurisdiction<sup>2</sup>**

1.1.1	Statute and organisation	
1.1.1.1	Sources	
1.1.1.1.1	Constitution	
1.1.1.1.2	Institutional Acts	
1.1.1.1.3	Other legislation	
1.1.1.1.4	Rule issued by the executive	
1.1.1.1.5	Rule adopted by the Court <sup>3</sup>	
1.1.1.2	Independence .....	497
1.1.1.2.1	Statutory independence	
1.1.1.2.2	Administrative independence	
1.1.1.2.3	Financial independence	
1.1.2	Composition, recruitment and structure	
1.1.2.1	Necessary qualifications <sup>4</sup>	
1.1.2.2	Number of members	
1.1.2.3	Appointing authority	
1.1.2.4	Appointment of members <sup>5</sup>	
1.1.2.5	Appointment of the President <sup>6</sup>	
1.1.2.6	Functions of the President / Vice-President	
1.1.2.7	Subdivision into chambers or sections	
1.1.2.8	Relative position of members <sup>7</sup>	
1.1.2.9	Persons responsible for preparing cases for hearing <sup>8</sup>	
1.1.2.10	Staff <sup>9</sup>	
1.1.2.10.1	Functions of the Secretary General / Registrar	
1.1.2.10.2	Legal Advisers	
1.1.3	Status of the members of the Court .....	335
1.1.3.1	Term of office of Members	
1.1.3.2	Term of office of the President	
1.1.3.3	Privileges and immunities	
1.1.3.4	Professional incompatibilities	
1.1.3.5	Disciplinary measures	
1.1.3.6	Remuneration	
1.1.3.7	Non-disciplinary suspension of functions	
1.1.3.8	End of office	
1.1.3.9	Members having a particular status <sup>10</sup>	
1.1.3.10	Status of staff <sup>11</sup>	

<sup>1</sup> 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.

<sup>2</sup> Constitutional Court or equivalent body (constitutional tribunal or council, supreme court, etc.).

<sup>3</sup> For example, rules of procedure.

<sup>4</sup> For example, age, education, experience, seniority, moral character, citizenship.

<sup>5</sup> Including the conditions and manner of such appointment (election, nomination, etc.).

<sup>6</sup> Including the conditions and manner of such appointment (election, nomination, etc.).

<sup>7</sup> Vice-presidents, presidents of chambers or of sections, etc.

<sup>8</sup> For example, State Counsel, prosecutors, etc.

<sup>9</sup> (Deputy) Registrars, Secretaries General, legal advisers, assistants, researchers, etc.

<sup>10</sup> For example, assessors, office members.

<sup>11</sup> (Deputy) Registrars, Secretaries General, legal advisers, assistants, researchers, etc.

1.1.4	Relations with other institutions	
1.1.4.1	Head of State <sup>12</sup>	
1.1.4.2	Legislative bodies .....	124
1.1.4.3	Executive bodies	
1.1.4.4	Courts .....	367
1.2	<b>Types of claim</b> .....	<b>623</b>
1.2.1	Claim by a public body	
1.2.1.1	Head of State .....	466
1.2.1.2	Legislative bodies'	
1.2.1.3	Executive bodies .....	95, 161
1.2.1.4	Organs of federated or regional authorities	
1.2.1.5	Organs of sectoral decentralisation	
1.2.1.6	Local self-government body	
1.2.1.7	Public Prosecutor or Attorney-General	
1.2.1.8	Ombudsman	
1.2.1.9	Member states of the European Union	
1.2.1.10	Institutions of the European Union	
1.2.1.11	Religious authorities	
1.2.2	Claim by a private body or individual .....	<b>623</b>
1.2.2.1	Natural person .....	17, 202
1.2.2.2	Non-profit-making corporate body .....	17, 42
1.2.2.3	Profit-making corporate body	
1.2.2.4	Political parties	
1.2.2.5	Trade unions .....	124, <b>554</b>
1.2.3	Referral by a court <sup>13</sup>	
1.2.4	Initiation ex officio by the body of constitutional jurisdiction	
1.2.5	Obligatory review <sup>14</sup> .....	385
1.3	<b>Jurisdiction</b> .....	17, 119
1.3.1	Scope of review .....	367
1.3.1.1	Extension <sup>15</sup>	
1.3.2	Type of review	
1.3.2.1	Preliminary / <i>ex post facto</i> review .....	81, 385
1.3.2.2	Abstract / concrete review	
1.3.3	Advisory powers	
1.3.4	Types of litigation	
1.3.4.1	Litigation in respect of fundamental rights and freedoms	
1.3.4.2	Distribution of powers between State authorities <sup>16</sup> .....	161, <b>549</b>
1.3.4.3	Distribution of powers between central government and federal or regional entities <sup>17</sup> .....	370, <b>463, 470</b>
1.3.4.4	Powers of local authorities <sup>18</sup> .....	385
1.3.4.5	Electoral disputes <sup>19</sup>	
1.3.4.6	Litigation in respect of referendums and other instruments of direct democracy <sup>20</sup> .....	361, <b>484, 567</b>
1.3.4.6.1	Admissibility	
1.3.4.6.2	Other litigation	
1.3.4.7	Restrictive proceedings	
1.3.4.7.1	Banning of political parties	
1.3.4.7.2	Withdrawal of civil rights	

<sup>12</sup> Including questions on the interim exercise of the functions of the Head of State.

<sup>13</sup> Referrals of preliminary questions in particular.

<sup>14</sup> Enactment required by law to be reviewed by the Court.

<sup>15</sup> Review *ultra petita*.

<sup>16</sup> Horizontal distribution of powers.

<sup>17</sup> Vertical distribution of powers, particularly in respect of states of a federal or regionalised nature.

<sup>18</sup> Decentralised authorities (municipalities, provinces, etc.).

<sup>19</sup> For questions other than jurisdiction, see 4.9.

<sup>20</sup> Including other consultations. For questions other than jurisdiction, see 4.9.



	1.3.4.7.3	Removal from parliamentary office	
	1.3.4.7.4	Impeachment	
	1.3.4.8	Litigation in respect of jurisdictional conflict	
	1.3.4.9	Litigation in respect of the formal validity of enactments <sup>21</sup>	
	1.3.4.10	Litigation in respect of the constitutionality of enactments.....	124, 367
	1.3.4.10.1	Limits of the legislative competence	
	1.3.4.11	Litigation in respect of constitutional revision.....	<b>508</b>
	1.3.4.12	Conflict of laws <sup>22</sup>	
	1.3.4.13	Universally binding interpretation of laws.....	161
	1.3.4.14	Distribution of powers between Community and member states.....	<b>508</b>
	1.3.4.15	Distribution of powers between institutions of the Community	
1.3.5		The subject of review .....	<b>604</b>
	1.3.5.1	International treaties .....	264, <b>596</b>
	1.3.5.2	Community law .....	289
	1.3.5.2.1	Primary legislation	
	1.3.5.2.2	Secondary legislation .....	<b>626</b>
	1.3.5.3	Constitution <sup>23</sup>	
	1.3.5.4	Quasi-constitutional legislation <sup>24</sup> .....	370, <b>488</b>
	1.3.5.5	Laws and other rules having the force of law.....	<b>461, 462, 488</b>
	1.3.5.5.1	Laws and other rules in force before the entry into force of the Constitution	
	1.3.5.6	Decrees of the Head of State.....	<b>549</b>
	1.3.5.7	Quasi-legislative regulations	
	1.3.5.8	Rules issued by federal or regional entities .....	<b>505</b>
	1.3.5.9	Parliamentary rules	
	1.3.5.10	Rules issued by the executive	
	1.3.5.11	Acts issued by decentralised bodies	
	1.3.5.11.1	Territorial decentralisation <sup>25</sup>	
	1.3.5.11.2	Sectoral decentralisation <sup>26</sup>	
	1.3.5.12	Court decisions	
	1.3.5.13	Administrative acts	
	1.3.5.14	Government acts <sup>27</sup>	
	1.3.5.15	Failure to act or to pass legislation <sup>28</sup> .....	253, 402, <b>453, 454</b>
<b>1.4</b>		<b>Procedure</b>	
	1.4.1	General characteristics <sup>29</sup>	
	1.4.2	Summary procedure	
	1.4.3	Time-limits for instituting proceedings	
	1.4.3.1	Ordinary time-limit	
	1.4.3.2	Special time-limits	
	1.4.3.3	Leave to appeal out of time	
	1.4.4	Exhaustion of remedies.....	<b>604</b>
	1.4.5	Originating document	
	1.4.5.1	Decision to act <sup>30</sup>	
	1.4.5.2	Signature	
	1.4.5.3	Formal requirements	
	1.4.5.4	Annexes	

<sup>21</sup> 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).

<sup>22</sup> As understood in private international law.

<sup>23</sup> Including constitutional laws.

<sup>24</sup> For example, organic laws.

<sup>25</sup> Local authorities, municipalities, provinces, departments, etc.

<sup>26</sup> Or: functional decentralisation (public bodies exercising delegated powers).

<sup>27</sup> Political questions.

<sup>28</sup> Unconstitutionality by omission.

<sup>29</sup> Including language issues relating to procedure, deliberations, decisions, etc.

<sup>30</sup> For the withdrawal of proceedings, see also 1.4.10.4.

	1.4.5.5	Service	
1.4.6	Grounds		
	1.4.6.1	Time-limits	
	1.4.6.2	Form	
	1.4.6.3	<i>Ex-officio</i> grounds	
1.4.7	Documents lodged by the parties <sup>31</sup>		
	1.4.7.1	Time-limits	
	1.4.7.2	Decision to lodge the document	
	1.4.7.3	Signature	
	1.4.7.4	Formal requirements	
	1.4.7.5	Annexes	
	1.4.7.6	Service	
1.4.8	Preparation of the case for trial		
	1.4.8.1	Registration	
	1.4.8.2	Notifications and publication	
	1.4.8.3	Time-limits	
	1.4.8.4	Preliminary proceedings .....	290, <b>473</b>
	1.4.8.5	Opinions	
	1.4.8.6	Reports	
	1.4.8.7	Evidence	
		1.4.8.7.1	Inquiries into the facts by the Court
	1.4.8.8	Decision that preparation is complete	
1.4.9	Parties		
	1.4.9.1	<i>Locus standi</i> <sup>32</sup> .....	42
	1.4.9.2	Interest .....	17, 256, 257, <b>455</b>
	1.4.9.3	Representation	
		1.4.9.3.1	The Bar
		1.4.9.3.2	Legal representation other than the Bar
		1.4.9.3.3	Representation by persons other than lawyers or jurists
	1.4.9.4	Persons or entities authorised to intervene in proceedings .....	17
1.4.10	Interlocutory proceedings		
	1.4.10.1	Intervention	
	1.4.10.2	Plea of forgery	
	1.4.10.3	Resumption of proceedings after interruption	
	1.4.10.4	Discontinuance of proceedings <sup>33</sup>	
	1.4.10.5	Joinder of similar cases	
	1.4.10.6	Challenging of a judge	
		1.4.10.6.1	Automatic disqualification
		1.4.10.6.2	Challenge at the instance of a party
	1.4.10.7	Request for a preliminary ruling by the Court of Justice of the European Communities	
1.4.11	Hearing		
	1.4.11.1	Composition of the bench	
	1.4.11.2	Procedure	
	1.4.11.3	In public / in camera	
	1.4.11.4	Report	
	1.4.11.5	Opinion	
	1.4.11.6	Address by the parties	
1.4.12	Special procedures		
1.4.13	Re-opening of hearing		
1.4.14	Costs <sup>34</sup>		
	1.4.14.1	Waiver of court fees	
	1.4.14.2	Legal aid or assistance	
	1.4.14.3	Party costs	

<sup>31</sup> Pleadings, final submissions, notes, etc.

<sup>32</sup> May be used in combination with Chapter 1.2 Types of claim.

<sup>33</sup> For the withdrawal of the originating document, see also 1.4.5.

<sup>34</sup> Comprises court fees, postage costs, advance of expenses and lawyers' fees.

1.5	<b>Decisions</b>	
1.5.1	Deliberation	
1.5.1.1	Composition of the bench	
1.5.1.2	Chair	
1.5.1.3	Procedure	
1.5.1.3.1	Quorum	
1.5.1.3.2	Vote	
1.5.2	Reasoning	
1.5.3	Form	
1.5.4	Types	
1.5.4.1	Procedural decisions	
1.5.4.2	Opinion.....	161
1.5.4.3	Finding of constitutionality or unconstitutionality <sup>35</sup> .....	370, <b>461</b>
1.5.4.4	Annulment.....	370
1.5.4.4.1	Consequential annulment.....	<b>462</b>
1.5.4.5	Suspension	
1.5.4.6	Modification.....	367
1.5.4.7	Interim measures	
1.5.5	Individual opinions of members	
1.5.5.1	Concurring opinions	
1.5.5.2	Dissenting opinions	
1.5.6	Delivery and publication	
1.5.6.1	Delivery	
1.5.6.2	Time limit	
1.5.6.3	Publication	
1.5.6.3.1	Publication in the official journal/gazette	
1.5.6.3.2	Publication in an official collection	
1.5.6.3.3	Private publication	
1.5.6.4	Press	
1.6	<b>Effects</b>	
1.6.1	Scope	
1.6.2	Determination of effects by the Court.....	32
1.6.3	Effect erga omnes	
1.6.3.1	<i>Stare decisis</i> .....	255, 392, <b>465</b>
1.6.4	Effect inter partes	
1.6.5	Temporal effect	
1.6.5.1	Entry into force of decision	
1.6.5.2	Retrospective effect ( <i>ex tunc</i> )	
1.6.5.3	Limitation on retrospective effect	
1.6.5.4	<i>Ex nunc</i> effect .....	<b>468</b>
1.6.5.5	Postponement of temporal effect .....	290
1.6.6	Execution .....	361
1.6.6.1	Body responsible for supervising execution	
1.6.6.2	Penalty payment	
1.6.7	Influence on State organs	
1.6.8	Influence on everyday life	
1.6.9	Consequences for other cases	
1.6.9.1	Ongoing cases .....	290, 292, 367
1.6.9.2	Decided cases .....	193
2	<b>Sources</b>	
2.1	<b>Categories</b> <sup>36</sup>	
2.1.1	Written rules	
2.1.1.1	National rules	

<sup>35</sup> For questions of constitutionality dependent on a specified interpretation, use 2.3.2.

<sup>36</sup> Only for issues concerning applicability and not simple application.

	2.1.1.1.1	Constitution.....	572
	2.1.1.1.2	Quasi-constitutional enactments <sup>37</sup>	
2.1.1.2		National rules from other countries	
2.1.1.3		Community law .....	17, 21, 74, 405, <b>572</b>
2.1.1.4		International instruments.....	279, 402
	2.1.1.4.1	United Nations Charter of 1945 .....	122, 202
	2.1.1.4.2	Universal Declaration of Human Rights of 1948.....	<b>476</b>
	2.1.1.4.3	Geneva Conventions of 1949	
	2.1.1.4.4	European Convention on Human Rights of 1950 <sup>38</sup> .....	7, 147, 176, 191, 197, 260, 261, 314, 338, 362, 390, <b>453, 455, 458, 487, 626</b>
	2.1.1.4.5	Geneva Convention on the Status of Refugees of 1951 .....	18, 82
	2.1.1.4.6	European Social Charter of 1961 .....	<b>476</b>
	2.1.1.4.7	International Convention on the Elimination of all Forms of Racial Discrimination of 1965	
	2.1.1.4.8	International Covenant on Civil and Political Rights of 1966 .....	94, 261, <b>458, 561, 564</b>
	2.1.1.4.9	International Covenant on Economic, Social and Cultural Rights of 1966 .....	261, <b>476</b>
	2.1.1.4.10	Vienna Convention on the Law of Treaties of 1969	
	2.1.1.4.11	American Convention on Human Rights of 1969 .....	<b>563, 564, 621</b>
	2.1.1.4.12	Convention on the Elimination of all Forms of Discrimination against Women of 1979 .....	261
	2.1.1.4.13	African Charter on Human and Peoples' Rights of 1981	
	2.1.1.4.14	European Charter of Local Self-Government of 1985 .....	63
	2.1.1.4.15	Convention on the Rights of the Child of 1989.....	<b>454</b>
	2.1.1.4.16	Framework Convention for the Protection of National Minorities of 1995	
	2.1.1.4.17	Statute of the International Criminal Court of 1998	
	2.1.1.4.18	Charter of Fundamental Rights of the European Union of 2000 ....	<b>476, 570</b>
	2.1.1.4.19	International conventions regulating diplomatic and consular relations	
2.1.2		Unwritten rules	
	2.1.2.1	Constitutional custom	
	2.1.2.2	General principles of law	
	2.1.2.3	Natural law	
2.1.3		Case-law	
	2.1.3.1	Domestic case-law.....	118, 119, 191, 390
	2.1.3.2	International case-law	
	2.1.3.2.1	European Court of Human Rights .....	145, 150, 191, 255, 257, 314, 362, 390, <b>455</b>
	2.1.3.2.2	Court of Justice of the European Communities	
	2.1.3.2.3	Other international bodies	
	2.1.3.3	Foreign case-law	
2.2		<b>Hierarchy</b>	
	2.2.1	Hierarchy as between national and non-national sources .....	264
	2.2.1.1	Treaties and constitutions .....	95, 279, <b>563</b>
	2.2.1.2	Treaties and legislative acts.....	130, 202
	2.2.1.3	Treaties and other domestic legal instruments	
	2.2.1.4	European Convention on Human Rights and constitutions	
	2.2.1.5	European Convention on Human Rights and non-constitutional domestic legal instruments .....	122, 150
	2.2.1.6	Community law and domestic law.....	289
	2.2.1.6.1	Primary Community legislation and constitutions .....	<b>508, 572</b>
	2.2.1.6.2	Primary Community legislation and domestic non-constitutional legal instruments	

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.

	2.2.1.6.3	Secondary Community legislation and constitutions	
	2.2.1.6.4	Secondary Community legislation and domestic non-constitutional instruments	
2.2.2		Hierarchy as between national sources	
	2.2.2.1	Hierarchy emerging from the Constitution	42, 240
	2.2.2.1.1	Hierarchy attributed to rights and freedoms	130
	2.2.2.2	The Constitution and other sources of domestic law	370, 557
2.2.3		Hierarchy between sources of Community law	
2.3		<b>Techniques of review</b>	63, 169
	2.3.1	Concept of manifest error in assessing evidence or exercising discretion	
	2.3.2	Concept of constitutionality dependent on a specified interpretation <sup>39</sup>	394, 596, 598
	2.3.3	Intention of the author of the enactment under review	
	2.3.4	Interpretation by analogy	320
	2.3.5	Logical interpretation	
	2.3.6	Historical interpretation	318, 320
	2.3.7	Literal interpretation	47, 555
	2.3.8	Systematic interpretation	182
	2.3.9	Teleological interpretation	320
3		<b><u>General Principles</u></b>	
3.1		<b>Sovereignty</b>	95, 240, 311, 370, 508, 572, 596
3.2		<b>Republic/Monarchy</b>	95
3.3		<b>Democracy</b>	51, 179, 381, 545, 572
	3.3.1	Representative democracy	62, 550, 551
	3.3.2	Direct democracy	378
	3.3.3	Pluralist democracy <sup>40</sup>	287, 493
3.4		<b>Separation of powers</b>	30, 47, 80, 82, 104, 118, 165, 169, 253, 270, 316, 323, 329, 332, 470, 501, 538, 614
3.5		<b>Social State<sup>41</sup></b>	69, 345, 476, 482, 512
3.6		<b>Structure of the State<sup>42</sup></b>	370
	3.6.1	Unitary State	62, 95
	3.6.2	Regional State	
	3.6.3	Federal State	
3.7		<b>Relations between the State and bodies of a religious or ideological nature<sup>43</sup></b>	9, 94, 130, 282
3.8		<b>Territorial principles</b>	370
	3.8.1	Indivisibility of the territory	596
3.9		<b>Rule of law</b>	52, 106, 141, 165, 202, 270, 275, 311, 381, 476, 485, 497, 536, 610, 614
3.10		<b>Certainty of the law<sup>44</sup></b>	49, 77, 81, 98, 126, 141, 153, 164, 179, 247, 251, 299, 303, 310, 318, 405, 411, 449, 468, 485, 495, 500, 533, 566, 567
3.11		<b>Vested and/or acquired rights</b>	35, 533, 566

<sup>39</sup> Presumption of constitutionality, double construction rule.

<sup>40</sup> Including the principle of a multi-party system.

<sup>41</sup> Includes the principle of social justice.

<sup>42</sup> See also 4.8.

<sup>43</sup> Separation of Church and State, State subsidisation and recognition of churches, secular nature, etc.

<sup>44</sup> Including maintaining confidence and legitimate expectations.

3.12	<b>Clarity and precision of legal provisions</b> .....	20, 35, 47, 63, 94, 126, 145, 164, 320, 320, ..... 329, 356, 394, <b>449, 495, 546, 631</b>
3.13	<b>Legality</b> <sup>45</sup> .....	248, 320, 405, <b>536, 567</b>
3.14	<b><i>Nullum crimen, nulla poena sine lege</i></b> <sup>46</sup> .....	20, 99, 114, 329, 405, <b>546</b>
3.15	<b>Publication of laws</b>	
	3.15.1 Ignorance of the law is no excuse	
	3.15.2 Linguistic aspects	
3.16	<b>Proportionality</b> .....	5, 6, 16, 54, 60, 66, 82, 85, 99, 135, 145, 191, 198, ..... 249, 261, 275, 314, 318, 356, 373, 395, 405, <b>508, 530</b>
3.17	<b>Weighing of interests</b> .....	23, 59, 67, 72, 74, 85, 191, 267, 275, 341, 373, ..... 412, <b>468, 479, 480, 530, 598, 631</b>
3.18	<b>General interest</b> <sup>47</sup> .....	34, 56, 85, 104, 117, 143, 153, 191, <b>497, 530</b>
3.19	<b>Margin of appreciation</b> .....	9, 32, 34, 82, 318, <b>631</b>
3.20	<b>Reasonableness</b> .....	5, 82, 121, <b>548, 600</b>
3.21	<b>Equality</b> <sup>48</sup> .....	153, 313, <b>452, 583</b>
3.22	<b>Prohibition of arbitrariness</b> .....	387, <b>548</b>
3.23	<b>Equity</b> .....	249, <b>452</b>
3.24	<b>Loyalty to the State</b> <sup>49</sup>	
3.25	<b>Market economy</b> <sup>50</sup>	
3.26	<b>Principles of Community law</b>	
	3.26.1 Fundamental principles of the Common Market.....	196, 198, 199, 406
	3.26.2 Direct effect <sup>51</sup> .....	194
	3.26.3 Genuine co-operation between the institutions and the member states.....	193, 409, <b>624</b>
4	<b><u>Institutions</u></b>	
4.1	<b>Constituent assembly or equivalent body</b> <sup>52</sup>	
	4.1.1 Procedure.....	329
	4.1.2 Limitations on powers.....	137, 381
4.2	<b>State Symbols</b>	
	4.2.1 Flag	
	4.2.2 National holiday	
	4.2.3 National anthem	
	4.2.4 National emblem	
	4.2.5 Motto	
	4.2.6 Capital city	

<sup>45</sup> Principle according to which sub-statutory acts must be based on and in conformity with the law.

<sup>46</sup> Prohibition of punishment without proper legal base.

<sup>47</sup> Including compelling public interest.

<sup>48</sup> Only where not applied as a fundamental right (e.g. between state authorities, municipalities, etc.).

<sup>49</sup> Including questions of treason/high crimes.

<sup>50</sup> Including prohibition on monopolies.

<sup>51</sup> For the principle of primacy of Community law, see 2.2.1.6.

<sup>52</sup> Including the body responsible for revising or amending the Constitution.

4.3	<b>Languages</b>	
4.3.1	Official language(s) .....	91, 370, 374
4.3.2	National language(s)	
4.3.3	Regional language(s)	
4.3.4	Minority language(s)	
4.4	<b>Head of State</b>	
4.4.1	Vice-President / Regent	
4.4.2	Temporary replacement	
4.4.3	Powers	
4.4.3.1	Relations with legislative bodies <sup>53</sup> .....	94, 118, 323, 328, <b>549</b>
4.4.3.2	Relations with the executive bodies <sup>54</sup> .....	124, 161, 167, 184, 323
4.4.3.3	Relations with judicial bodies <sup>55</sup> .....	167, <b>464, 501</b>
4.4.3.4	Promulgation of laws	
4.4.3.5	International relations.....	124, 286
4.4.3.6	Powers with respect to the armed forces.....	184, 286
4.4.3.7	Mediating powers	
4.4.4	Appointment	
4.4.4.1	Necessary qualifications	
4.4.4.2	Incompatibilities	
4.4.4.3	Direct/indirect election.....	<b>618</b>
4.4.4.4	Hereditary succession	
4.4.5	Term of office	
4.4.5.1	Commencement of office	
4.4.5.2	Duration of office	
4.4.5.3	Incapacity	
4.4.5.4	End of office	
4.4.5.5	Limit on number of successive terms	
4.4.6	Status	
4.4.6.1	Liability	
4.4.6.1.1	Legal liability	
4.4.6.1.1.1	Immunity.....	188
4.4.6.1.1.2	Civil liability	
4.4.6.1.1.3	Criminal liability .....	117
4.4.6.1.2	Political responsibility .....	124
4.5	<b>Legislative bodies<sup>56</sup></b>	
4.5.1	Structure <sup>57</sup>	
4.5.2	Powers <sup>58</sup> .....	5, 30, 47, 80, 118
4.5.2.1	Competences with respect to international agreements .....	408, <b>508</b>
4.5.2.2	Powers of enquiry <sup>59</sup> .....	334
4.5.2.3	Delegation to another legislative body <sup>60</sup> .....	<b>449</b>
4.5.2.4	Negative incompetence <sup>61</sup>	
4.5.3	Composition .....	<b>509</b>
4.5.3.1	Election of members .....	<b>538, 618</b>
4.5.3.2	Appointment of members	
4.5.3.3	Term of office of the legislative body	
4.5.3.3.1	Duration	
4.5.3.4	Term of office of members	

<sup>53</sup> For example, presidential messages, requests for further debating of a law, right of legislative veto, dissolution.

<sup>54</sup> For example, nomination of members of the government, chairing of Cabinet sessions, countersigning.

<sup>55</sup> For example, the granting of pardons.

<sup>56</sup> For regional and local authorities, see chapter 4.8.

<sup>57</sup> Bicameral, monocameral, special competence of each assembly, etc.

<sup>58</sup> Including specialised powers of each legislative body and reserved powers of the legislature.

<sup>59</sup> In particular, commissions of enquiry.

<sup>60</sup> For delegation of powers to an executive body, see keyword 4.6.3.2.

<sup>61</sup> Obligation on the legislative body to use the full scope of its powers.

	4.5.3.4.1	Characteristics <sup>62</sup>	
	4.5.3.4.2	Duration	
	4.5.3.4.3	End .....	<b>489</b>
4.5.4	Organisation <sup>63</sup> .....		<b>562</b>
	4.5.4.1	Rules of procedure	
	4.5.4.2	President/Speaker .....	165
	4.5.4.3	Sessions <sup>64</sup>	
	4.5.4.4	Committees <sup>65</sup>	
4.5.5	Finances <sup>66</sup>		
4.5.6	Law-making procedure <sup>67</sup> .....		13, 14, 80, 364
	4.5.6.1	Right to initiate legislation .....	47, 98
	4.5.6.2	Quorum	
	4.5.6.3	Majority required	
	4.5.6.4	Right of amendment.....	47, <b>614</b>
	4.5.6.5	Relations between houses.....	364
4.5.7	Relations with the executive bodies.....		5, 334, <b>572</b>
	4.5.7.1	Questions to the government	
	4.5.7.2	Questions of confidence	
	4.5.7.3	Motion of censure	
4.5.8	Relations with judicial bodies .....		52, 316, 329, <b>465, 575</b>
4.5.9	Liability .....		188, 402
4.5.10	Political parties		
	4.5.10.1	Creation	
	4.5.10.2	Financing	
	4.5.10.3	Role	
	4.5.10.4	Prohibition.....	173
4.5.11	Status of members of legislative bodies <sup>68</sup> .....		5, 336, 408, 409, <b>550, 616</b>
<b>4.6</b>	<b>Executive bodies<sup>69</sup></b>		
	4.6.1	Hierarchy	
	4.6.2	Powers .....	5, 30, 32, 104, 121, 169, 328, <b>556</b>
	4.6.3	Application of laws	
	4.6.3.1	Autonomous rule-making powers <sup>70</sup> .....	80, 185
	4.6.3.2	Delegated rule-making powers .....	57, 130, <b>449, 509, 522</b>
	4.6.4	Composition	
	4.6.4.1	Appointment of members	
	4.6.4.2	Election of members .....	<b>463</b>
	4.6.4.3	End of office of members .....	<b>566</b>
	4.6.4.4	Status of members of executive bodies .....	<b>616</b>
	4.6.5	Organisation	
	4.6.6	Relations with judicial bodies .....	118
	4.6.7	Administrative decentralisation <sup>71</sup>	
	4.6.8	Sectoral decentralisation <sup>72</sup>	
	4.6.8.1	Universities .....	116, 239
	4.6.9	The civil service <sup>73</sup> .....	141, <b>557</b>

<sup>62</sup> Representative/imperative mandates.

<sup>63</sup> Presidency, bureau, sections, committees, etc.

<sup>64</sup> Including the convening, duration, publicity and agenda of sessions.

<sup>65</sup> Including their creation, composition and terms of reference.

<sup>66</sup> State budgetary contribution, other sources, etc.

<sup>67</sup> For the publication of laws, see 3.15.

<sup>68</sup> For example, incompatibilities arising during the term of office, parliamentary immunity, exemption from prosecution and others. For questions of eligibility, see 4.9.5.

<sup>69</sup> For local authorities, see 4.8.

<sup>70</sup> Derived directly from the constitution.

<sup>71</sup> See also 4.8.

<sup>72</sup> 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.

<sup>73</sup> Civil servants, administrators, etc.



4.6.9.1	Conditions of access	
4.6.9.2	Reasons for exclusion	
4.6.9.2.1	Lustration <sup>74</sup>	179
4.6.9.3	Remuneration	59, 341
4.6.9.4	Personal liability	
4.6.9.5	Trade union status	
4.6.10	Liability	
4.6.10.1	Legal liability	
4.6.10.1.1	Immunity	
4.6.10.1.2	Civil liability	29
4.6.10.1.3	Criminal liability	117
4.6.10.2	Political responsibility	124
4.7	<b>Judicial bodies<sup>75</sup></b>	
4.7.1	Jurisdiction	46, 329
4.7.1.1	Exclusive jurisdiction	147, <b>556</b>
4.7.1.2	Universal jurisdiction	
4.7.1.3	Conflicts of jurisdiction <sup>76</sup>	<b>461, 612</b>
4.7.2	Procedure	389
4.7.3	Decisions	
4.7.4	Organisation	
4.7.4.1	Members	
4.7.4.1.1	Qualifications	
4.7.4.1.2	Appointment	332, <b>501</b>
4.7.4.1.3	Election	<b>590</b>
4.7.4.1.4	Term of office	325
4.7.4.1.5	End of office	153, 325, <b>590</b>
4.7.4.1.6	Status	
4.7.4.1.6.1	Incompatibilities	332, <b>616</b>
4.7.4.1.6.2	Discipline	
4.7.4.1.6.3	Irremovability	
4.7.4.2	Officers of the Court	
4.7.4.3	Prosecutors / State counsel <sup>77</sup>	
4.7.4.3.1	Powers	143, 281
4.7.4.3.2	Appointment	
4.7.4.3.3	Election	
4.7.4.3.4	Term of office	
4.7.4.3.5	End of office	
4.7.4.3.6	Status	
4.7.4.4	Languages	374
4.7.4.5	Registry	
4.7.4.6	Budget	52, 316
4.7.5	Supreme Judicial Council or equivalent body <sup>78</sup>	370, 381, <b>590</b>
4.7.6	Relations with bodies of international jurisdiction	
4.7.7	Supreme court	242, 370
4.7.8	Ordinary courts	52, 324, <b>501</b>
4.7.8.1	Civil courts	389, <b>612</b>
4.7.8.2	Criminal courts	151
4.7.9	Administrative courts	147, 323, <b>612</b>
4.7.10	Financial courts <sup>79</sup>	
4.7.11	Military courts	98
4.7.12	Special courts	

<sup>74</sup> Practice aiming at removing from civil service persons formerly involved with a totalitarian regime.

<sup>75</sup> Other than the body delivering the decision summarised here.

<sup>76</sup> Positive and negative conflicts.

<sup>77</sup> Notwithstanding the question to which to branch of state power the prosecutor belongs.

<sup>78</sup> For example, Judicial Service Commission, *Haut Conseil de la Justice*, etc.

<sup>79</sup> Comprises the Court of Auditors in so far as it exercises judicial power.

4.7.13	Other courts	
4.7.14	Arbitration	
4.7.15	Legal assistance and representation of parties	
4.7.15.1	The Bar	25
4.7.15.1.1	Organisation	
4.7.15.1.2	Powers of ruling bodies	
4.7.15.1.3	Role of members of the Bar	
4.7.15.1.4	Status of members of the Bar	
4.7.15.1.5	Discipline	
4.7.15.2	Assistance other than by the Bar	499
4.7.15.2.1	Legal advisers	
4.7.15.2.2	Legal assistance bodies	
4.7.16	Liability	
4.7.16.1	Liability of the State	
4.7.16.2	Liability of judges	
4.8	<b>Federalism, regionalism and local self-government</b>	
4.8.1	Federal entities <sup>80</sup>	
4.8.2	Regions and provinces	
4.8.3	Municipalities <sup>81</sup>	63, 366, 553, 557, 599, 618
4.8.4	Basic principles	
4.8.4.1	Autonomy	40, 62, 63, 366, 370, 545, 553
4.8.4.2	Subsidiarity	34, 56
4.8.5	Definition of geographical boundaries	
4.8.6	Institutional aspects	
4.8.6.1	Deliberative assembly	553
4.8.6.1.1	Status of members	
4.8.6.2	Executive	107
4.8.6.3	Courts	
4.8.7	Budgetary and financial aspects	370
4.8.7.1	Finance	63, 470
4.8.7.2	Arrangements for distributing the financial resources of the State	63
4.8.7.3	Budget	63
4.8.7.4	Mutual support arrangements	
4.8.8	Distribution of powers	364
4.8.8.1	Principles and methods	63, 107, 257, 366, 370
4.8.8.2	Implementation	
4.8.8.2.1	Distribution <i>ratione materiae</i>	56, 257, 455
4.8.8.2.2	Distribution <i>ratione loci</i>	
4.8.8.2.3	Distribution <i>ratione temporis</i>	
4.8.8.2.4	Distribution <i>ratione personae</i>	
4.8.8.3	Supervision	553
4.8.8.4	Co-operation	
4.8.8.5	International relations	
4.8.8.5.1	Conclusion of treaties	
4.8.8.5.2	Participation in international organisations or their organs	370
4.9	<b>Elections and instruments of direct democracy<sup>82</sup></b>	
4.9.1	Competent body for the organisation and control of voting <sup>83</sup>	119, 359
4.9.2	Referenda and other instruments of direct democracy <sup>84</sup>	240, 361, 378, 567
4.9.2.1	Admissibility <sup>85</sup>	484, 545
4.9.2.2	Effects	

<sup>80</sup> See also 3.6.

<sup>81</sup> And other units of local self-government.

<sup>82</sup> See also keywords 5.3.41 and 5.2.1.4.

<sup>83</sup> Organs of control and supervision.

<sup>84</sup> Including other consultations.

<sup>85</sup> For questions of jurisdiction, see keyword 1.3.4.6.

4.9.3	Electoral system <sup>86</sup> .....	489, 492, 495
4.9.3.1	Method of voting <sup>87</sup> .....	489, 545, 551
4.9.4	Constituencies.....	62, 493, 509, 535
4.9.5	Eligibility <sup>88</sup> .....	26, 173, 463, 492
4.9.6	Representation of minorities .....	273, 589
4.9.7	Preliminary procedures .....	567
4.9.7.1	Electoral rolls	
4.9.7.2	Registration of parties and candidates <sup>89</sup> .....	120, 177, 273
4.9.7.3	Ballot papers <sup>90</sup>	
4.9.8	Electoral campaign and campaign material <sup>91</sup> .....	287, 455, 471, 542, 564
4.9.8.1	Campaign financing .....	489
4.9.8.2	Campaign expenses .....	392, 543
4.9.9	Voting procedures	
4.9.9.1	Polling stations	
4.9.9.2	Polling booths	
4.9.9.3	Voting <sup>92</sup>	
4.9.9.4	Identity checks on voters	
4.9.9.5	Record of persons having voted <sup>93</sup>	
4.9.9.6	Casting of votes <sup>94</sup>	
4.9.10	Minimum participation rate required	
4.9.11	Determination of votes	
4.9.11.1	Counting of votes	
4.9.11.2	Electoral reports	
4.9.12	Proclamation of results	
4.9.13	Post-electoral procedures .....	589
4.10	<b>Public finances</b> <sup>95</sup> .....	80, 334, 345
4.10.1	Principles.....	60, 63, 316
4.10.2	Budget.....	30, 63, 313, 316, 568
4.10.3	Accounts	
4.10.4	Currency	
4.10.5	Central bank.....	161, 334
4.10.6	Auditing bodies <sup>96</sup>	
4.10.7	Taxation .....	265, 462, 536, 578
4.10.7.1	Principles .....	77, 345, 536
4.10.8	Public assets <sup>97</sup>	
4.10.8.1	Privatisation .....	104, 118, 383
4.11	<b>Armed forces, police forces and secret services</b>	
4.11.1	Armed forces.....	184, 252, 329
4.11.2	Police forces.....	479, 480
4.11.3	Secret services.....	341
4.12	<b>Ombudsman</b> <sup>98</sup>	
4.12.1	Appointment	

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.

4.12.2	Guarantees of independence	
4.12.2.1	Term of office	
4.12.2.2	Incompatibilities	
4.12.2.3	Immunities	
4.12.2.4	Financial independence	
4.12.3	Powers	
4.12.4	Organisation	
4.12.5	Relations with the Head of State	
4.12.6	Relations with the legislature	
4.12.7	Relations with the executive	
4.12.8	Relations with auditing bodies <sup>99</sup>	
4.12.9	Relations with judicial bodies	
4.12.10	Relations with federal or regional authorities	370
4.13	<b>Independent administrative authorities<sup>100</sup></b>	
4.14	<b>Activities and duties assigned to the State by the Constitution<sup>101</sup></b>	56, 130, <b>599</b>
4.15	<b>Exercise of public functions by private bodies</b>	101, 130
4.16	<b>International relations</b>	32, 169, 202
4.16.1	Transfer of powers to international institutions	95, <b>572</b>
4.17	<b>European Union</b>	
4.17.1	Institutional structure	124
4.17.1.1	European Parliament	126, 408, 409
4.17.1.2	Council	
4.17.1.3	Commission	
4.17.1.4	Court of Justice of the European Communities <sup>102</sup>	
4.17.2	Distribution of powers between Community and member states	<b>572, 624</b>
4.17.3	Distribution of powers between institutions of the Community	
4.17.4	Legislative procedure	
4.18	<b>State of emergency and emergency powers<sup>103</sup></b>	
5	<b><u>Fundamental Rights<sup>104</sup></u></b>	
5.1	<b>General questions</b>	
5.1.1	Entitlement to rights	143
5.1.1.1	Nationals	
5.1.1.1.1	Nationals living abroad	96, 361, 390
5.1.1.2	Citizens of the European Union and non-citizens with similar status	198, 406, 415
5.1.1.3	Foreigners	199, 263, 266, 314, 361, <b>464, 506</b>
5.1.1.3.1	Refugees and applicants for refugee status	82
5.1.1.4	Natural persons	284, 408, <b>631</b>
5.1.1.4.1	Minors <sup>105</sup>	395
5.1.1.4.2	Incapacitated	<b>542</b>
5.1.1.4.3	Detainees	85, 92, <b>464, 467, 468, 548, 583, 585</b>
5.1.1.4.4	Military personnel	252, 341
5.1.1.5	Legal persons	392
5.1.1.5.1	Private law	78

<sup>99</sup> For example, Court of Auditors.

<sup>100</sup> The vesting of administrative competence in public law bodies situated outside the traditional administrative hierarchy. See also 4.6.8.

<sup>101</sup> *Staatszielbestimmungen*.

<sup>102</sup> Institutional aspects only: questions of procedure, jurisdiction, composition etc. are dealt with under the keywords of Chapter 1.

<sup>103</sup> Including state of war, martial law, declared natural disasters, etc.; for human rights aspects, see also keyword 5.1.4.1.

<sup>104</sup> Positive and negative aspects.

<sup>105</sup> For rights of the child, see 5.3.44.

	5.1.1.5.2	Public law .....	56, <b>553</b>
5.1.2		Horizontal effects .....	72
5.1.3		Positive obligation of the state .....	32, 69, 130, 207, 209, 290, 320, 345, <b>540</b>
5.1.4		Limits and restrictions <sup>106</sup> .....	92, 239, 249, 251, 255, 345, 383, 387, 402, ..... 412, <b>455, 546, 561, 563, 585</b>
	5.1.4.1	Non-derogable rights .....	
	5.1.4.2	General/special clause of limitation .....	151, <b>450</b>
	5.1.4.3	Subsequent review of limitation .....	
5.1.5		Emergency situations <sup>107</sup> .....	
5.2		<b>Equality</b> .....	16, 17, 18, 21, 79, 255, 261, 291, 320, 335, 336, 345, ..... 405, <b>499, 530, 542, 561, 562</b>
5.2.1		Scope of application .....	5, 103, 114
	5.2.1.1	Public burdens <sup>108</sup> .....	18, 289, 307, 345, <b>540</b>
	5.2.1.2	Employment .....	106
	5.2.1.2.1	In private law .....	108, 109, 110, 111, <b>575</b>
	5.2.1.2.2	In public law .....	9, 59, 194, 297, <b>558</b>
	5.2.1.3	Social security .....	11, 21, 59, 295, 313, 314, 341, 345, 376, <b>512, 605</b>
	5.2.1.4	Elections <sup>109</sup> .....	96, 126, 359, 416, <b>458, 463, 489, 535, 542, 589</b>
5.2.2		Criteria of distinction .....	38, 43, 111, 252, 253, 367
	5.2.2.1	Gender .....	59, 209, 297, 345, 399, <b>607</b>
	5.2.2.2	Race .....	<b>506</b>
	5.2.2.3	Ethnic origin .....	294, 416, <b>458, 506</b>
	5.2.2.4	Citizenship or nationality <sup>110</sup> .....	21, 196, 290, 314, 406, 415, <b>511, 605</b>
	5.2.2.5	Social origin .....	
	5.2.2.6	Religion .....	130
	5.2.2.7	Age .....	59, 106, 303, 345, 376, <b>454, 482</b>
	5.2.2.8	Physical or mental disability .....	<b>482</b>
	5.2.2.9	Political opinions or affiliation .....	256
	5.2.2.10	Language .....	374
	5.2.2.11	Sexual orientation .....	79, 139, 295, 307, <b>453</b>
	5.2.2.12	Civil status <sup>111</sup> .....	109, 110, 295, 307, <b>463, 610</b>
	5.2.2.13	Differentiation <i>ratione temporis</i> .....	108, 341, <b>476, 579, 583, 610</b>
5.2.3		Affirmative action .....	
5.3		<b>Civil and political rights</b> .....	
5.3.1		Right to dignity .....	23, 26, 66, 67, 69, 85, 86, 284, 354, 379, <b>487, 598</b>
5.3.2		Right to life .....	98, 114, 137, 151, 207, 209, 263, 292, 390, 399, <b>469</b>
5.3.3		Prohibition of torture and inhuman and degrading treatment .....	32, 66, 395, <b>487, 503, 628</b>
5.3.4		Right to physical and psychological integrity .....	23, 26, 82, 209, 268, 333, 399
	5.3.4.1	Scientific and medical treatment and experiments .....	
5.3.5		Individual liberty <sup>112</sup> .....	397, 399
	5.3.5.1	Deprivation of liberty .....	32, 66, 278, 395, <b>468, 598</b>
	5.3.5.1.1	Arrest <sup>113</sup> .....	7, 247, 268, 320, 330, 387
	5.3.5.1.2	Non-penal measures .....	368
	5.3.5.1.3	Detention pending trial .....	7, 85, 278, 349, <b>548, 587, 621</b>
	5.3.5.1.4	Conditional release .....	

<sup>106</sup> The criteria of the limitation of human rights (legality, legitimate purpose/general interest, proportionality) are indexed in Chapter 3.

<sup>107</sup> Includes questions of the suspension of rights. See also 4.18.

<sup>108</sup> Taxes and other duties towards the state.

<sup>109</sup> Universal and equal suffrage.

<sup>110</sup> 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).

<sup>111</sup> For example, discrimination between married and single persons.

<sup>112</sup> This keyword also covers "Personal liberty". It includes for example identity checking, personal search and administrative arrest.

<sup>113</sup> Detention by police.

5.3.5.2	Prohibition of forced or compulsory labour	
5.3.6	Freedom of movement <sup>114</sup>	198, 294, 359, 406
5.3.7	Right to emigrate	
5.3.8	Right to citizenship or nationality	318, 361, 397
5.3.9	Right of residence <sup>115</sup>	199, 361, <b>506</b>
5.3.10	Rights of domicile and establishment	294, <b>511</b>
5.3.11	Right of asylum	<b>503, 626</b>
5.3.12	Security of the person	32, 249, 397
5.3.13	Procedural safeguards, rights of the defence and fair trial	6, 7, 26, 46, 151, 172, 173, 181, 279, 389, <b>468, 504, 593, 623</b>
5.3.13.1	Scope	
5.3.13.1.1	Constitutional proceedings	
5.3.13.1.2	Civil proceedings	150, 271, 327, 333, <b>610</b>
5.3.13.1.3	Criminal proceedings	14, 27, 46, 85, 98, 115, 143, 278, 281, 330, <b>452, 464, 467, 469, 473, 479, 555, 621</b>
5.3.13.1.4	Litigious administrative proceedings	25, 113, 242, 252, 253, <b>543</b>
5.3.13.1.5	Non-litigious administrative proceedings	56
5.3.13.2	Effective remedy	56, 60, 154, 155, 194, 242, 268, 399, <b>473, 515, 590, 592, 621</b>
5.3.13.3	Access to courts <sup>116</sup>	14, 60, 86, 122, 143, 242, 248, 252, 253, 255, 286, 303, 380, 408, 412, <b>469, 471, 485, 512,</b> <b>513, 519, 603, 604, 610</b>
5.3.13.3.1	<i>Habeas corpus</i>	278, <b>503</b>
5.3.13.4	Double degree of jurisdiction <sup>117</sup>	16, 242, 264
5.3.13.5	Suspensive effect of appeal	28, 46
5.3.13.6	Right to a hearing	16, 49, 133, 202, 412, <b>553, 601</b>
5.3.13.7	Right to participate in the administration of justice <sup>118</sup>	133, <b>540</b>
5.3.13.8	Right of access to the file	23, 402
5.3.13.9	Public hearings	
5.3.13.10	Trial by jury	123, 151, <b>469</b>
5.3.13.11	Public judgments	54
5.3.13.12	Right to be informed about the decision	164, 181
5.3.13.13	Trial/decision within reasonable time	260, <b>457, 473, 586, 587</b>
5.3.13.14	Independence	197, 316, 332, 412, <b>499</b>
5.3.13.15	Impartiality <sup>119</sup>	197, 412, <b>597</b>
5.3.13.16	Prohibition of <i>reformatio in peius</i>	411
5.3.13.17	Rules of evidence	279, 327, 333, 362, <b>526, 628</b>
5.3.13.18	Reasoning	6, 118, 123, 155, 176, <b>457, 590, 597</b>
5.3.13.19	Equality of arms	49, 133, 159, 362, <b>499, 554, 555, 610</b>
5.3.13.20	Adversarial principle	133, 171
5.3.13.21	Languages	374
5.3.13.22	Presumption of innocence	28, 147, 167, 279, 356, 379
5.3.13.23	Right to remain silent	
5.3.13.23.1	Right not to incriminate oneself	51, <b>628</b>
5.3.13.23.2	Right not to testify against spouse/close family	
5.3.13.24	Right to be informed about the reasons of detention	
5.3.13.25	Right to be informed about the charges	23, 167, 330, 412, <b>621</b>
5.3.13.26	Right to have adequate time and facilities for the preparation of the case	<b>554, 621</b>
5.3.13.27	Right to counsel	<b>473, 479, 504, 585, 621</b>
5.3.13.27.1	Right to paid legal assistance	351
5.3.13.28	Right to examine witnesses	<b>621</b>
5.3.14	<i>Ne bis in idem</i>	243, 245, 257

<sup>114</sup> Including questions related to the granting of passports or other travel documents.

<sup>115</sup> May include questions of expulsion and extradition.

<sup>116</sup> 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.

<sup>117</sup> This keyword covers the right of appeal to a court.

<sup>118</sup> Including the right to be present at hearing.

<sup>119</sup> Including challenging of a judge.

5.3.15	Rights of victims of crime .....	115, 399, <b>469, 540, 555</b>
5.3.16	Principle of the application of the more lenient law .....	<b>543</b>
5.3.17	Right to compensation for damage caused by the State .....	268, 361, 402, <b>515</b>
5.3.18	Freedom of conscience <sup>120</sup> .....	130, 256
5.3.19	Freedom of opinion .....	67, 173, 302, 353
5.3.20	Freedom of worship .....	9, 94, 130, 338, <b>462</b>
5.3.21	Freedom of expression <sup>121</sup> .....	67, 72, 78, 86, 92, 101, 159, 267, 287, 291, 302, 338, 353, 392, 394, <b>455, 471, 513, 521, 564, 589</b>
5.3.22	Freedom of the written press .....	159, 267
5.3.23	Rights in respect of the audiovisual media and other means of mass communication .....	86, <b>455, 564, 592</b>
5.3.24	Right to information .....	54, <b>471, 581</b>
5.3.25	Right to administrative transparency	
5.3.25.1	Right of access to administrative documents .....	<b>581</b>
5.3.26	National service <sup>122</sup> .....	
5.3.27	Freedom of association .....	35, 291, <b>472</b>
5.3.28	Freedom of assembly .....	51, 94
5.3.29	Right to participate in public affairs .....	179, <b>562</b>
5.3.29.1	Right to participate in political activity .....	359, 416, <b>545</b>
5.3.30	Right of resistance	
5.3.31	Right to respect for one's honour and reputation .....	72, 86, 157, 159, 179, 302, <b>564</b>
5.3.32	Right to private life .....	86, 120, 147, 163, 257, 281, 333, <b>500, 585, 616, 631</b>
5.3.32.1	Protection of personal data .....	17, 415, <b>480, 506, 530, 607</b>
5.3.33	Right to family life <sup>123</sup> .....	6, 176, 191, 306, <b>524</b>
5.3.33.1	Descent .....	<b>453, 454, 506</b>
5.3.33.2	Succession	
5.3.34	Right to marriage .....	79, <b>560</b>
5.3.35	Inviolability of the home .....	113, 257, 281, 397, <b>480, 526, 556</b>
5.3.36	Inviolability of communications	
5.3.36.1	Correspondence .....	<b>585, 607</b>
5.3.36.2	Telephonic communications .....	74, 145, <b>607</b>
5.3.36.3	Electronic communications .....	145, <b>528, 607</b>
5.3.37	Right of petition .....	157, <b>593</b>
5.3.38	Non-retrospective effect of law .....	356, <b>566</b>
5.3.38.1	Criminal law .....	<b>571, 598</b>
5.3.38.2	Civil law .....	<b>560, 579, 583</b>
5.3.38.3	Social law .....	<b>476, 533</b>
5.3.38.4	Taxation law .....	57, 339, <b>536, 578</b>
5.3.39	Right to property <sup>124</sup> .....	18, 249, 251, 265, 282, 339, 383, 402, <b>457, 519, 530, 533, 560, 581</b>
5.3.39.1	Expropriation	
5.3.39.2	Nationalisation .....	275
5.3.39.3	Other limitations .....	34, 43, 93, 202, 257, 341, 345, <b>601</b>
5.3.39.4	Privatisation .....	43, 118, <b>466</b>
5.3.40	Linguistic freedom .....	374
5.3.41	Electoral rights .....	173, <b>455, 589</b>
5.3.41.1	Right to vote .....	62, 96, 255, 284, 287, <b>458, 489, 535, 561</b>
5.3.41.2	Right to stand for election .....	26, 62, 177, 255, 287, 416, <b>492, 542, 546, 551, 563</b>
5.3.41.3	Freedom of voting .....	126
5.3.41.4	Secret ballot	
5.3.41.5	Direct / indirect ballot .....	126
5.3.41.6	Frequency and regularity of elections .....	<b>538</b>
5.3.42	Rights in respect of taxation .....	57, 77, 113, 265, 307, 339, 345, <b>462, 465, 471, 558</b>

<sup>120</sup> Covers freedom of religion as an individual right. Its collective aspects are included under the keyword "Freedom of worship" below.

<sup>121</sup> This keyword also includes the right to freely communicate information.

<sup>122</sup> Militia, conscientious objection, etc.

<sup>123</sup> Aspects of the use of names are included either here or under "Right to private life".

<sup>124</sup> Including compensation issues.

5.3.43	Right to self fulfilment.....	79, 137
5.3.44	Rights of the child.....	16, 23, 130, 292, 306, 399, <b>453, 454</b>
5.3.45	Protection of minorities and persons belonging to minorities.....	130
5.4	<b>Economic, social and cultural rights</b>	
5.4.1	Freedom to teach	
5.4.2	Right to education .....	116
5.4.3	Right to work .....	6, 11, 59, 99, 141, 182, <b>450, 557</b>
5.4.4	Freedom to choose one's profession <sup>125</sup> .....	99, 299, 345, 402, <b>530</b>
5.4.5	Freedom to work for remuneration	
5.4.6	Commercial and industrial freedom .....	17, 34, 38, 78, 251, 287, 289, 320, 373, <b>521, 530, 581</b>
5.4.7	Consumer protection.....	78, 104
5.4.8	Freedom of contract.....	303
5.4.9	Right of access to the public service	
5.4.10	Right to strike	
5.4.11	Freedom of trade unions <sup>126</sup> .....	124, <b>472</b>
5.4.12	Right to intellectual property.....	380, <b>519</b>
5.4.13	Right to housing	
5.4.14	Right to social security .....	21, 153, 261, 314, 322, 324, 341, 345, <b>482</b>
5.4.15	Right to unemployment benefits.....	11, 135, <b>533</b>
5.4.16	Right to a pension .....	35, 153, 290, 322, 324, 341, 345, <b>511, 607</b>
5.4.17	Right to just and decent working conditions.....	<b>463</b>
5.4.18	Right to a sufficient standard of living .....	69, 341
5.4.19	Right to health .....	289, 292, 320, <b>463, 487, 600</b>
5.4.20	Right to culture	
5.4.21	Scientific freedom.....	239, <b>517, 530</b>
5.4.22	Artistic freedom	
5.5	<b>Collective rights</b>	
5.5.1	Right to the environment.....	13, <b>463, 468</b>
5.5.2	Right to development	
5.5.3	Right to peace	
5.5.4	Right to self-determination	
5.5.5	Rights of aboriginal peoples, ancestral rights .....	<b>469</b>

<sup>125</sup>

This keyword also covers "Freedom of work".

<sup>126</sup>

Includes rights of the individual with respect to trade unions, rights of trade unions and the right to conclude collective labour agreements.



## **Keywords of the alphabetical index \***

\* The précis presented in this Bulletin are indexed primarily according to the Systematic Thesaurus of constitutional law, which has been compiled by the Venice Commission and the liaison officers. Indexing according to the keywords in the alphabetical index is supplementary only and generally covers factual issues rather than the constitutional questions at stake.

Page numbers of the alphabetical index refer to the page showing the identification of the decision rather than the keyword itself.

	Pages		Pages
Abortion, access .....	<b>631</b>	Appeal, right.....	28, 154, 389, <b>512, 513</b>
Abortion, information session, prior, obligation .....	137	Appeal, right, other legal remedies .....	157
Abortion, number, containment, measures .....	137	Applicant, <i>locus standi</i> .....	286
Abortion, punishment, exception.....	114	Application for annulment, admissibility .....	<b>623</b>
Abortion, punishment, exclusion, conditions.....	137	Appointment, temporary.....	<b>501</b>
Abortion, responsibility.....	137	Arm, munition, use, control .....	329
Absconding, danger .....	320	Arm, possession, unlawful .....	329
Abuse, right.....	<b>548</b>	Arm, right to keep and bear .....	397
Accident, road traffic, compensation, limitation, adequacy .....	<b>600</b>	Armed Force, use, abroad .....	390
Acquittal, effects.....	278	Armed forces, discipline, judicial review .....	252
Act, <i>ultra vires</i> , European Union, Federal Constitutional Court review .....	303	Arms, right to bear, limitation .....	329
Act, application, general.....	<b>505</b>	Arrest and detention, safeguard.....	7
Act, application, specific.....	<b>505</b>	Arrest for vagrancy, not an offence.....	387
Action for medical damages.....	292	Arrest warrant, foreign .....	320
Administration of courts .....	<b>501</b>	Arrest, legal grounds.....	368
Administrative act, judicial review .....	<b>603</b>	Arrest, safeguards.....	368
Administrative act, nature .....	116	Arrest, warrant, offence, qualification, requirement.....	330
Administrative act, reasoning, reference to case-law, obligation .....	118	Art, owner, rights, limitation.....	380
Administrative authority, independence .....	<b>566</b>	Asbestos, production .....	<b>463</b>
Administrative authority, power.....	<b>556</b>	Assets, declaration.....	335, 336
Administrative courts, jurisdiction.....	323	Asylum, foreigner, subsidiary protection .....	<b>626</b>
Administrative decision, judicial review .....	<b>485</b>	Attachment.....	354
Administrative penalty .....	257	Attorney General, State Prosecutor .....	<b>497</b>
Administrative penalty fine, fixed amount .....	<b>543</b>	Authority, administrative, power, discretionary .....	118
Administrative procedure, fairness.....	<b>601</b>	Authority, notion .....	117
Administrative proceedings .....	25	Authority, territorial, autonomous, status, powers .....	370
Adoption, full, of an adult .....	110	Autonomy, statute, procedure and reform correct.....	370
Adoption, simple, homosexual partners, name change .....	<b>453</b>	Balance of power .....	<b>501</b>
Advertising, ban .....	78	Balancing of legally protected interests .....	<b>521</b>
Advertising, outdoor, prohibition .....	287	Benefit, right, abolition, restriction.....	11
Age, limit .....	99	Bias, judicial officer .....	<b>597</b>
Animal cruelty, depictions .....	394	Bias, judicial, risk .....	<b>597</b>
Animal welfare, state policy, aim.....	<b>522</b>	Bias, suspicion .....	<b>597</b>
Annexation .....	318	Bill, passing by both chambers of Parliament.....	364
Anonymity, right .....	86	Birth, injury .....	292
Anti-abortionist, protests, civil-court order to cease and desist.....	302	Border, dispute, settlement.....	<b>596</b>
Appeal, interest, linked to scope of legislation .....	17	Border, national, definition .....	<b>596</b>
Appeal, interest, several appellants .....	17	Boundary changes .....	<b>509</b>
Appeal, intervening party .....	17	Budget.....	322
Appeal, procedure.....	248	Budget, law, amendment .....	30
		Budget, parliamentary supervision.....	<b>568</b>
		Burden of proof .....	147

Cabinet of Ministers, powers .....	184	Community, right to be consulted .....	<b>601</b>
Campsite .....	294	Company, board, members .....	182
Case-law, development .....	<b>558</b>	Company, organisational power .....	182
Case-law, reversal .....	171	Company, pharmaceutical, right .....	34
Cassation appeal, imperfection, correction, right .....	242	Compatible interpretation .....	16
Cassation, admissibility, conditions .....	242	Compensation, access to private healthcare, adequacy .....	<b>600</b>
Cease and desist order, civil-law .....	72	Compensation, damage .....	<b>457</b>
Censorship .....	101	Compensation, damage, entitlement .....	361
Central bank, hearing of the governor .....	334	Compensation, discrimination, non European Union citizen .....	196
Challenging, judge .....	46	Compensation, limitation, justification .....	<b>600</b>
Charge, right to be informed about .....	167	Competence <i>ratione temporis</i> .....	207
Child born out of wedlock .....	306	Competence, legislative .....	328
Child, best interests .....	306	Competition .....	17
Child, capable of understanding, equal access to the courts, right to be heard .....	16	Competition, agreements, fine, amount .....	405
Child, recognition .....	<b>454</b>	Competitor .....	<b>623</b>
Child, right to be heard, double degree of jurisdiction .....	16	Complaint .....	<b>465</b>
Church, property, restitution .....	282	Complaint, constitutional, subsidiarity, substantive .....	<b>526</b>
Citizenship, continuity, principle .....	318	Concession .....	<b>604</b>
Citizenship, deprivation .....	318	Confiscation .....	147
Citizenship, dual .....	318	Constituency .....	62
Citizenship, privileges and immunities .....	397	Constituency, formation .....	<b>535</b>
Civil liability .....	29, 103	Constitution and treaty, similar provisions .....	18
Civil partnership, registered .....	295, 307	Constitution, amendment .....	240, 381, <b>614, 618</b>
Civil procedure, rule, application .....	<b>485</b>	Constitution, amendment, validity .....	329, 385
Civil proceedings, against 'X', procedure, absence .....	86	Constitution, amendments, proposal, constitutional review .....	385
Civil proceedings, duration, excessive .....	<b>586</b>	Constitution, federal and regional .....	<b>557</b>
Civil servant .....	322	Constitution, interpretation .....	47
Civil servant, assets, disclose, duty .....	<b>616</b>	Constitution, interpretation, jurisdiction .....	<b>488</b>
Civil servant, commitment .....	141	Constitution, new .....	<b>495</b>
Civil servant, dignity, rights .....	379	Constitutional act, definition .....	<b>488</b>
Civil servant, employment, contract .....	141	Constitutional Council, member, assets, declaration, refusal .....	335
Civil servant, employment, supplementary .....	<b>616</b>	Constitutional Council, member, loss of office .....	335
Civil servant, job security .....	141	Constitutional Court .....	119
Civil servant, recruitment .....	99	Constitutional Court, appeal, limits .....	367
Civil servant, rights and obligations .....	147, <b>557</b>	Constitutional Court, authority .....	<b>614</b>
Civil servant, status .....	117, <b>558</b>	Constitutional Court, decision, application .....	271
Civil service, ethics .....	379	Constitutional Court, decision, binding force .....	271
Civil service, multiple posts, incompatibility .....	147	Constitutional Court, decision, execution .....	271
Claim, factual, ambiguous .....	<b>521</b>	Constitutional Court, decision, execution, method .....	275
Code, civil procedure .....	389	Constitutional Court, interpretation, binding effect .....	271
Collective interest .....	117	Constitutional Court, jurisdiction, limits .....	<b>488, 492</b>
Collective labour agreement, freedom not to join .....	<b>575</b>	Constitutional Court, jurisprudence .....	275
Commercial freedom, restrictions .....	251	Constitutional court, review, appropriateness, statutory provision .....	<b>631</b>
Common law, principle, constitutionality .....	<b>600</b>	Constitutional Court, summary proceedings .....	21
Communication, eavesdropping, electronic .....	<b>607</b>	Constitutional law, quality .....	42
Communist regime .....	341	Constitutional protection, application .....	271
Community law, act implementing resolutions of the United Nations Security Council .....	202	Constitutional provision .....	381
Community law, application <i>ex officio</i> , by national Courts .....	411	Constitutional review .....	311
Community law, interpretation .....	<b>626</b>	Constitutional rights, violation .....	<b>480</b>
Community law, primacy .....	411	Constitutional traditions, common to the member states .....	405
Community law, principles, equal treatment .....	406	Constitutionality, question, admissibility .....	<b>488</b>
Community rights, principles .....	<b>601</b>	Constraint measure, public security .....	143
Community, autonomous .....	370		
Community, religious .....	94		

Consultation, public.....	<b>601</b>	Data, personal, treatment .....	155
Consultation, public, <i>per saltum</i> .....	<b>567</b>	Data, retention .....	74
Contract, award.....	<b>599</b>	Date, protection, discrimination of foreigners.....	415
Contract, employment, cessation.....	345	Death penalty.....	98
Contract, public law.....	<b>599</b>	Debate, political .....	287
Convicted person .....	248	Debt, imprisonment, prohibition .....	368
Convicted person, amnesty, right .....	167	Deceased.....	163
Convicted person, pardon, right to apply .....	167	Decency, evolving standards.....	395
Conviction .....	<b>468</b>	Decision of a political nature .....	<b>604</b>
Cooperation, good faith, institutions, member States.....	193	Decision, administrative, judicial review.....	<b>603, 612</b>
Copyright.....	<b>519</b>	Decision, judicial .....	150
Corruption prevention .....	<b>616</b>	Decision, judicial, evaluation.....	<b>597</b>
Council of Ministers, meetings, confidentiality .....	121	Decision, judicial, non-execution.....	165
Council of State, powers, legislative assembly .....	253	Decision, reasons .....	<b>597</b>
Counsel, officially assigned, powers .....	<b>473</b>	Declaration of unconstitutionality .....	367, <b>504</b>
Court fee, non-payment .....	181	Decree, legislative, review, constitutional .....	80
Court of Justice of the European Union, duty to refer a matter.....	<b>519</b>	Defamation, against public official .....	157
Court of Justice of the European Union, submission procedure, preliminary ruling .....	303	Defamation, criminal .....	<b>593</b>
Court, competence, exclusive.....	119	Defamation, through media.....	159
Court, deposit.....	<b>471</b>	Defence, right.....	25, 279
Court, independence.....	324	Demonstrations, regulation, use of speakers.....	<b>472</b>
Court, interim order .....	169	Descent, action challenging acknowledgement.....	108
Court, powers, delimitation .....	<b>538</b>	Descent, action disclaiming .....	108
Craft industry, organisation, property, protection .....	38	Descent, legitimate .....	108
Crime prevention, individual and general.....	<b>548</b>	Descent, natural.....	108
Crime prevention, public interest, proportionality .....	191	Descent, period within which action must be brought.....	108
Crime, against life, intentional.....	<b>469</b>	Detainee, rights.....	85, <b>487, 515</b>
Crime, fight, justification for register of foreigners .....	415	Detention for non-payment, validity .....	368
Crime, gravity .....	<b>467, 468</b>	Detention pending trial, hearing, accused, presence .....	85
Crime, qualification .....	330	Detention, as a preventative measure .....	<b>621</b>
Crime, report, access .....	<b>570</b>	Detention, duration.....	<b>598</b>
Criminal charge .....	260	Detention, humane.....	66
Criminal law .....	27	Detention, lawfulness.....	330, 387
Criminal law, retroactive.....	<b>598</b>	Detention, length.....	<b>587</b>
Criminal matter, legality, delegation of power to the King.....	20	Development planning, powers.....	366
Criminal matter, legality, European regulation .....	20	Difficulties, crisis, financial .....	316
Criminal matter, legality, principle .....	20	Diplomatic representatives.....	318
Criminal procedure.....	6	Directive, transposition.....	289
Criminal procedure, guarantees.....	14, 115	Disability.....	292
Criminal procedure, preparatory phase, guarantee .....	14	Disability, discrimination.....	<b>482</b>
Criminal procedure, preparatory phase, guarantees .....	330	Disabled person, benefit, right .....	<b>482</b>
Criminal proceedings .....	<b>452</b>	Disabled person, social assistance, entitlement, conditions .....	<b>482</b>
Criminal proceedings, custodial interrogation .....	<b>479</b>	Disabled prisoner, rights .....	<b>487</b>
Criminal proceedings, decision to bring .....	<b>497</b>	Disadvantage, historical.....	<b>599</b>
Criminal proceedings, guarantees .....	281	Disciplinary proceedings .....	243, 245
Criminal proceedings, simplified proceedings.....	<b>504</b>	Discrimination .....	261, 290, 313, 345, 416
Currency, denomination.....	<b>457</b>	Discrimination, gender .....	<b>607</b>
Damage incurred relying on legitimate expectations.....	303	Disproportionate means.....	368
Damage, compensation, loss, non-economic .....	103	Divorce proceedings, death of a party .....	<b>610</b>
Damage, irreparable .....	333	Divorce, custody .....	<b>579</b>
Damages, quantum.....	268	Divorce, property claim .....	<b>560</b>
		DNA test.....	<b>506</b>
		DNA, analysis .....	23
		DNA, testing, data, access.....	333
		<i>Dubio pro homine</i> , principle .....	<b>563</b>
		<i>Dubio pro libertate</i> , principle .....	<b>563</b>
		Due process.....	397
		Education, public.....	116

Education, public, religion, encouragement by the State .....	130	Electoral system .....	<b>489</b>
Education, student, termination of studies by University, legal nature .....	116	Electricity, privatisation .....	118
Effect of judgments, unconstitutionality, scope.....	255	Employee, labour, economic and social conditions .....	<b>575</b>
Election invalidity .....	<b>546</b>	Employment.....	<b>476</b>
Election, additional, constituency .....	<b>538</b>	Employment contract, fixed term .....	303
Election, campaign staff, number .....	<b>542</b>	Employment, dismissal.....	<b>575</b>
Election, campaign, defamation, facts, establishment .....	<b>564</b>	Employment, public-sector .....	141
Election, campaign, financing, by legal person, prohibition .....	392	Employment, working conditions .....	<b>575</b>
Election, campaign, media access .....	<b>489</b>	Enactment .....	311
Election, campaign, media, defamation.....	<b>564</b>	Energy sector .....	104
Election, campaign, restriction.....	287	Energy, prices, regulation.....	104
Election, candidacy, restriction .....	26, 177	Enterprise, freedom .....	287
Election, candidate .....	<b>545</b>	Enterprise, public, access to information.....	<b>581</b>
Election, candidate list, minimum signatures .....	273, <b>589</b>	Entrepreneur, market, equal position .....	34
Election, candidate, condition .....	416	Entrepreneur, status, equal .....	38
Election, candidate, disability .....	<b>542</b>	Environment, integrity, sustainable.....	<b>468</b>
Election, candidate, registration procedure .....	273	Environment, protection, powers, distribution.....	13
Election, candidate, requirement .....	<b>492</b>	Equality, comparability.....	18
Election, candidate, status, office-holder, relationship .....	<b>463</b>	Equality, comparison .....	16
Election, citizen, residing abroad.....	359	Equality, European citizens .....	21
Election, constituency, boundary .....	<b>493, 535</b>	European Communities, exclusive competence .....	<b>624</b>
Election, constituency, number.....	<b>458, 493</b>	European Council.....	124
Election, constituency, number of voters.....	<b>493</b>	European Court of Human Rights, judgments.....	<b>610</b>
Election, constituency, size .....	<b>493</b>	European Parliament, member, election .....	<b>551</b>
Election, constitutional requirements .....	<b>563</b>	European Union.....	310
Election, date, parliamentary decision .....	385	European Union act, <i>ultra vires</i> .....	303
Election, disqualification .....	177	European Union citizen, marriage, non EU citizen, right to residence.....	199
Election, electoral coalition .....	173	European Union citizenship, freedom of movement of persons.....	199
Election, electoral code .....	273	European Union, citizenship.....	196
Election, electoral commission .....	359	European Union, directive, direct effect.....	194
Election, electoral expenses, reimbursement.....	<b>489</b>	European Union, freedom of movement of persons, limitation, justification.....	198
Election, electoral list.....	<b>589</b>	European Union, Parliament, member, immunity .....	408, 409
Election, European Parliament .....	126	European Union, regulation, legal basis.....	202
Election, Head of State.....	<b>618</b>	European Union, Treaty of Lisbon.....	<b>572</b>
Election, ineligibility .....	26, 96, 177	Eviction .....	294
Election, ineligibility for election.....	416	Evidence, accounting, expertise.....	327
Election, list of candidates .....	273	Evidence, admissibility .....	333
Election, local .....	<b>618</b>	Evidence, new, consideration.....	362
Election, local, candidate .....	273, <b>492</b>	Evidence, obtained legally, admissible.....	<b>479</b>
Election, municipal.....	<b>458</b>	Evidence, obtained unlawfully .....	<b>628</b>
Election, municipality .....	273	Evidence, use, prohibition, effect, long-term .....	<b>526</b>
Election, non-resident voters .....	<b>489</b>	Evidence, witness statement, anonymous .....	<b>473</b>
Election, parliamentary .....	<b>618</b>	Examination, competitive.....	99
Election, preparatory procedure .....	273	Executive, powers to initiate legislation .....	328
Election, prisoner, vote, prohibition .....	<b>561</b>	Expectation, legitimate .....	103, <b>578</b>
Election, public nature .....	<b>589</b>	Expert, opinion.....	333, 362
Election, public official .....	<b>542</b>	Expulsion .....	176
Election, public official, voter, bribery .....	<b>543</b>	Extradition.....	6, 172, <b>464</b>
Election, sham .....	26	Extradition, criminal conduct, respect for human rights.....	263
Election, universal suffrage .....	96	Extradition, effect on family life.....	191
Election, voters' list.....	<b>545</b>	Extradition, legality of the request .....	266
Election, voting .....	126	Extradition, preconditions .....	66
Electoral candidature, list .....	<b>551</b>	Extradition, proceedings.....	66, <b>503</b>
Electoral commission, members.....	359	Extradition, safeguard.....	<b>503</b>
Electoral propaganda .....	<b>471</b>		

Extraterritorial effect.....	172	Hearing, right, scope.....	133
Failure to act.....	<b>599</b>	Home, concept.....	257
Family allowance, child, EU citizen.....	21	Home, inviolability.....	257, 281
Family allowance, conditions, lawful residence.....	21	Home, search.....	<b>526</b>
Family association.....	291	Home, unoccupied residential property.....	257
Family life, extradition, interference.....	191	Homosexuality, couple, marriage.....	139
Father, child born out of wedlock, parental custody.....	306	Homosexuality, couple, same-sex.....	79
Federal State, implied powers.....	257	Honour, state.....	<b>549</b>
File.....	<b>506</b>	House, search.....	281
Final and binding decision.....	<b>583</b>	Housing, procedure, privatisation.....	275
Finance Law, content.....	<b>568</b>	Housing, right.....	271
Financial control.....	249	Human diversity, indigenous groups, massacre.....	<b>469</b>
Fine, disciplinary, court, review.....	51	Human rights treaties, states.....	264
Firearm.....	27	Immigration, procedure.....	185
Firearm, right to keep and bear.....	397	Immigration, rule.....	185
Flat, privatisation.....	43	Immunity, Parliament, member, defence.....	409
Flat, purchase, sale.....	43	Immunity, Parliament, member, lifting, right to appeal.....	408
Foreign relations, constitutional review.....	32	Import, duty.....	169
Foreign relations, execution power.....	32	Imprisonment.....	92
Foreign worker, maximum quota.....	<b>450</b>	Imprisonment conditions.....	<b>468</b>
Foreigner living abroad.....	<b>450</b>	Imprisonment, disenfranchisement.....	<b>561</b>
Foreigner, expulsion.....	<b>503</b>	Imprisonment, electoral rights, suspension, transitional provision.....	255
Foreigner, register of foreigners, justification.....	415	Imprisonment, for debt, principle.....	368
Fraud, fight, investigation.....	<b>599</b>	Imprisonment, length.....	<b>598</b>
Free movement, persons, national rules, conflicts of laws, family name, determination.....	406	Income tax, evasion, investigation proceedings....	<b>526</b>
Freedom of association, scope.....	35	Income, minimum, coverage, benefits, claim, ascertainment.....	69
Freedom of contract.....	251	Income, minimum, in line with human dignity, fundamental right to guarantee.....	69
Freedom of enterprise.....	289	Independence, state.....	318
Freedom of entrepreneurship.....	251	Individual petition.....	171
Freedom of expression, collective.....	92	Information, access, denied.....	<b>570</b>
Freedom of expression, legal person.....	392	Information, classified, protection.....	279
Freedom, deprivation.....	387	Information, restriction.....	121, 122
Freedom, deprivation, measure.....	247, <b>587</b>	Information, right to seek, obtain and disseminate.....	353
Fuels, biofuels.....	256	Informational self-determination, right.....	<b>530</b>
Fundamental right, communication, control exercised by the Federal Constitutional Court.....	67	Injunction, preliminary, protection, effective.....	49
Fundamental right, national detained abroad, violation by national authorities.....	32	Insurance, compulsory.....	103
Fundamental right, protection, administrative proceedings.....	23	Insurance, vehicle, comprehensive.....	<b>540</b>
Gambling, internet.....	289	Integrity, physical, interference.....	92
Gender, difference, biological.....	345	Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women "Convention of Belém do Pará".....	399
General Framework Agreement (Dayton).....	416	Interception, invasion of privacy, personal data, secrecy of correspondence, storage.....	145
Genetic engineering.....	<b>530</b>	Interest justifying action.....	<b>623</b>
Genetically modified organisms, introduction into the environment.....	<b>530</b>	Interest, compensation, calculation.....	327
Genocide.....	<b>469</b>	Internal act.....	<b>603</b>
GM milk.....	<b>521</b>	International agreement.....	<b>624</b>
Good administration, principle.....	141	International agreement, constitutionality.....	<b>596</b>
Government purpose, legitimate.....	<b>600</b>	International agreement, direct applicability.....	95
Government, action, review of constitutionality.....	323	International law.....	286
Government, taxation, lease.....	265	International law, domestic law, relationship.....	169
Handgun, right to keep and bear.....	397	International obligation.....	169
Hatred, incitement against segments of the population, judgment, criminal law.....	67	Internet protocol address, information, request, no judicial order.....	<b>528</b>
Head of State.....	270	Internet, anonymity, right.....	86
Head of State, terms, election.....	<b>618</b>		
Health-care, reasonable, access.....	<b>600</b>		
Hearing, right, obligation to cover all arguments....	133		

- Interpretation, compatibility with the European Convention on Human Rights..... **626**  
 Investigation proceedings, fiscal criminal law..... **526**  
 Investigation, criminal, preliminary, time-limit, reasonable..... 260  
 Investigation, effective..... 207  
 Investigation, effective, requirement..... 399, **599**  
 Investigation, obligation..... **599**  
 Investigation, preliminary, criminal, mandatory ..... 115  
 Joint household..... **524**  
 Joint household, child born out of wedlock, child living separate from parent..... **524**  
 Journalist, sources, disclosure..... 267  
 Judge..... 325  
 Judge, appointment, conditions, fulfilment..... **590**  
 Judge, aptitude, requirement..... 332  
 Judge, impartiality..... **499**  
 Judge, impartiality, objective..... 151, 197  
 Judge, impartiality, perception..... **597**  
 Judge, independence..... 153, 324, **499**  
 Judge, interest..... **597**  
 Judge, qualifications..... 332  
 Judge, recusal..... **597**  
 Judge, retirement, age..... 325  
 Judge, salary, judicial independence..... 52  
 Judge, status..... 324  
 Judgment, execution, law..... 150  
 Judgment, final..... 164  
 Judgment, final, deprivation..... 181  
 Judgment, publication..... 54  
 Judgment, reason..... **597**  
 Judicial independence..... 54, 332  
 Judicial proceedings, pending, application..... **579**  
 Judicial protection..... **452**  
 Judicial restraint..... 169  
 Judicial review..... 381, **538**  
 Judicial review, minimal intrusion..... 169  
 Judicial review, standards..... 82  
 Judiciary, independence..... 316, **501**  
 Jurisdiction, territorial..... 390  
 Jury trial..... 26  
 Jury, reasoning, fair trial..... 123  
 Labour, contract..... **557**  
 Land, agricultural, lease..... 154  
 Land, ownership, right..... **601**  
 Land, right of use..... **601**  
 Language, official, used by the state authorities..... 91  
 Language, procedural document..... 374  
 Law, accessibility..... **631**  
 Law, amendment..... **555**  
 Law, application, incorrect..... **548**  
 Law, application, lacuna, unconstitutionality..... 253  
 Law, electoral, amend, requirement..... **495**  
 Law, enactment, deadline..... **495**  
 Law, entry into force..... 81  
 Law, foreseeability..... **500**  
 Law, inapplicability, retroactive, compensation..... 303  
 Law, normativeness..... 289  
 Law, organic, quality..... 42  
 Law, pre-constitutional, status..... 367  
 Law, quality..... 35  
 Law, retrospective, crimes against humanity, war crimes..... **571**  
 Law, unconstitutionality, declaration, competence..... 119  
 Lawful judge, right..... **519**  
 Lawyer..... 23, 25  
 Lawyer, professional secrecy..... **585**  
 Laying hens..... **522**  
 Leave, maternity, remuneration..... 261  
 Legal aid..... 351  
 Legal aid, equal access..... 351  
 Legal aid, free, right..... 351  
 Legal capacity, restricted..... 284  
 Legal capacity, state..... 318  
 Legal gap, court's role..... **453**  
 Legal institutional separation, principle..... **526**  
 Legislation, delegated..... **509**  
 Legislation, judicial..... 86  
 Legislative lacuna..... 253  
 Legislative omission..... 282  
 Legislative omission, partial..... 11  
 Legislative power, limitation..... **557**  
 Legislative procedure..... 249, 251, **449**  
 Legislator, omission..... 270  
 Legislature, appointment..... 253  
 Legislature, independence..... 253  
 Legitimate aim..... **512**  
 Legitimate expectation, protection, principle..... 282  
 Liability exclusion privilege, members, family..... **524**  
 Liability, non contractual, lawful act, exclusion..... 402  
 Liability, strict..... 29  
 Life, social, cultural and political, participation..... 69  
 Limitation, effect on investigation..... 115  
 Livestock husbandry..... **522**  
 Local government, finances..... 63  
 Local self-government..... 107  
 Local self-government, competence..... 40  
 Local self-government, legislative power..... 40, 364  
 Local self-government, property..... 34  
 Local self-government, right..... 62, 63  
*Locus standi*..... **623**  
 Lustration, delay..... 356  
 Lustration, law, holders of public office..... 179  
 Marginal control..... 18  
 Marriage..... 79  
 Marriage and family, protection..... **524**  
 Marriage, as a symbolic institution..... 139  
 Marriage, civil partnership, treatment, unequal..... 307  
 Marriage, civil partnership, unequal treatment..... 295  
 Marriage, couple, same-sex..... 139  
 Marriage, property, separation..... **560**  
 Marriage, separation of goods, divorce..... **560**  
 Mayor, election..... **492**  
 Mayor, manner of election..... **458**  
 Mayor, suspension..... **545**  
 Mayor, transitional period, powers..... **500**  
 Media..... **455**  
 Media, broadcasting, complaints..... **513**  
 Media, broadcasting, licence, granting..... **592**  
 Media, data, telecommunications traffic, security.... 74  
 Media, data, telecommunications traffic,

storage .....	74	Parliament, decision.....	<b>604</b>
Media, data, telecommunications, retrieval and use .....	74	Parliament, group, president, removal .....	<b>562</b>
Media, newspaper.....	267	Parliament, member, assets, declaration, refusal .....	336
Media, telecommunication service, providers, storage, duty .....	74	Parliament, member, attendance allowance.....	5
Medical treatment .....	376	Parliament, member, immunity .....	188
Medication, supply .....	34	Parliament, member, interest-free loan.....	5
Member of Parliament, mandate.....	<b>489</b>	Parliament, member, loss of mandate .....	336
Member of Parliament, position, abuse .....	<b>550</b>	Parliament, member, mandate.....	5
Merits, failure to decide .....	<b>485</b>	Parliament, member, pension scheme .....	5
Military, disciplinary penalty, judicial review .....	252	Parliament, member, principal monthly allowance, calculation .....	5
Military, discipline.....	252	Parliament, member, representation allowance.....	5
Military, equipment, fund.....	184	Parliament, member, secretariat.....	5
Military, personnel, staff regulations .....	252	Parliament, Standing Committee on Finance .....	334
Minimum wage .....	354	Parliament, terms, election .....	<b>618</b>
Minor, life imprisonment, without parole .....	395	Parliamentary assembly, right of action.....	253
Minors, interest .....	<b>579</b>	Parole, eligibility, detention period, minimum extension .....	<b>598</b>
Monetary policy.....	334	Parties to legal proceedings.....	<b>499</b>
Monopoly, characteristic .....	<b>466</b>	Passive smoking, protection .....	373
Morals, public.....	<b>631</b>	Passport, issuing, powers .....	185
Municipal council.....	107	Paternity.....	<b>454</b>
Municipal council, dissolution.....	<b>553</b>	Paternity, investigation.....	23
Municipality, election .....	<b>492</b>	Paternity, recognition .....	23
Name, registration, conflicting national rules .....	406	Paternity, right to know .....	23
National Security Council.....	279	Penalty.....	338
NATO .....	279	Penalty, collective .....	356
Natural gas regulation .....	<b>466</b>	Penalty, enforcement .....	171
Natural resources, exploitation .....	56	Penalty, equal treatment, different situations.....	111
Natural space, license.....	<b>468</b>	Pension, crystallisation .....	290
<i>Ne bis in idem</i> .....	243, 245	Pension, determination .....	345
Non-discrimination, principle.....	<b>511</b>	Pension, disability .....	314
Non-pecuniary damage, redress.....	<b>583</b>	Pension, fund .....	35
Normative act.....	<b>449, 572</b>	Pension, judge .....	316, 324
Notary, profession, exercise .....	106	Pension, judges, amount .....	153
Nuclear power, operator, contribution.....	18	Pension, occupational.....	59
Obligation to submit, preliminary ruling, Court of Justice of the European Union.....	303	Pension, principle of insurance.....	35
Occupation or profession, access, prerequisites, objective .....	299	Pension, principle of solidarity .....	35
Occupation, consequences.....	318	Pension, reduction .....	322, 341
Occupation, period.....	318	Pension, retirement.....	59
Occupational pensions.....	295	Pension, right.....	345
Official.....	322	Pension, scheme .....	35
Oil regulation.....	<b>466</b>	Pension, social security .....	35
Omission, legislative, partial .....	248	Pensioner, payment .....	322
Opinion, expression, legal assessment .....	67	Permit, residence .....	314
Opinion, extreme right-wing .....	67	Personal property, taxes .....	265
Order, final, Court's power to vary .....	367	Personality, right .....	163
Ordinance, procedure, hearing requirements .....	<b>522</b>	Personality, right, general .....	72
Overbreadth, substantial, criteria .....	394	Pharmacy, ownership .....	34
Ownership right, interference, taxation .....	18	Pharmacy, transfer.....	34
Ownership right, restriction .....	34, 287	Place receiving members of the public, regulations .....	320
Ownership, right, restriction .....	275	Place, public, use.....	353
Paid leave, right, limitation .....	<b>476</b>	Planning regulations .....	338
Pardon, legal nature.....	167	Police custody, torture .....	<b>628</b>
Parentage, right to know .....	333	Police, investigation, continuing.....	23
Parental custody, child born out of wedlock.....	306	Police, officer .....	<b>603</b>
Parents, rights and duties .....	<b>579</b>	Police, officer, social guarantee.....	59
Parliament.....	270	Policy decision, reviewability.....	169
Parliament, authority .....	<b>614</b>	Policy, financial .....	169

Policy, foreign .....	286	Property, value, reduced .....	275
Political activity, right to participate.....	<b>562</b>	Proportionality, burden of proof .....	82
Political offence, pardon .....	167	Proportionality, offence, penalty .....	<b>543</b>
Political parties .....	<b>551</b>	Protection, judicial, right .....	<b>612</b>
Political parties, advertising, prohibition .....	<b>455</b>	Public contract, tender, obligation .....	<b>599</b>
Political parties, funding.....	<b>471</b>	Public establishment, restrictions .....	373
Political party, leadership, right to access .....	<b>562</b>	Public health, protection .....	34
Political party, name .....	120	Public international law, minimum standards .....	66
Political party, programme .....	173	Public officer, incompatibility .....	<b>546</b>
Political question, review .....	318	Public official, election .....	<b>546</b>
Politician, reputation .....	120	Public order .....	289, 294
Power, horizontal apportionment, independence ....	30	Public policy reason.....	339
Powers, transfer .....	<b>508</b>	Public Prosecutor .....	278
Precedent, judicial, digression, criteria .....	392	Public prosecutor, powers .....	281
Pregnancy, termination, protest.....	302	Public service .....	29
Preliminary investigation, duration.....	<b>473</b>	Punishment, community consensus, justification ..	395
Preliminary ruling, effects .....	193	Punishment, cruel and unusual .....	395
President of the Republic .....	<b>501</b>	Punishment, penal, adequate.....	98
President of the Republic, activities.....	323	Punishment, terms.....	114
President, immunity .....	188	Punishment, unbearable kind.....	66
President, pardon .....	167	Reasonable apprehension, test.....	<b>597</b>
President, powers .....	<b>549</b>	Redundancy payment.....	<b>536</b>
President, powers, limits, parliamentary regime ....	161	Referendum, conditions.....	<b>484</b>
President, status, dignity and efficiency .....	188	Referendum, constitutional, right to request.....	240
Pre-trial, procedure .....	281	Referendum, consultative, organisation, conditions .....	378
Prison, sentence, execution .....	28	Referendum, legislative .....	<b>484</b>
Prison, sentence, life, harsh .....	66	Referendum, national .....	<b>484</b>
Prison, sentence, without any prospect of regaining freedom.....	66	Referendum, restriction .....	361
Prisoner .....	92	Referendum, wording .....	<b>484</b>
Prisoner, correspondence, censorship .....	<b>585</b>	Refugee, expulsion.....	82
Prisoner, treatment .....	26	Region, legislative procedure .....	364
Prisoner, treatment, inadequate conditions .....	<b>487</b>	Region, power, political status.....	370
Privacy interest, information obtained from digital recording ammeter .....	<b>480</b>	Register, land .....	93
Privacy, data base .....	17	Regulating authority.....	289
Privacy, medical data .....	17	Reinstatement, norm .....	<b>462</b>
Privatisation, equal treatment, employees.....	297	Release, conditional .....	<b>548</b>
Privatisation, procedure, state-owned housing.....	383	Religion.....	338
Procedural autonomy, national .....	411	Religion, church and State, peaceful co-existence .....	94
Procedural document, official language, use.....	374	Religion, religious activity, freedom .....	282
Procedural fairness, principle .....	<b>554, 555, 601</b>	Religion, religious community.....	9
Procedural provisions, relevance .....	<b>504</b>	Religion, religious worship, protection .....	94
Procedure, civil .....	150	Religion, state.....	9
Procedure, criminal.....	151	Religious freedom, interference, practices .....	256
Proceedings <i>in absentia</i> .....	172	Remand in custody.....	278, 349
Proceedings, criminal .....	164	Remedy, adequate, determined by the court .....	268
Proceedings, defect, remedy.....	<b>554</b>	Remedy, appropriate .....	32
Proceedings, defective .....	<b>555</b>	Remedy, violation, constitutional right .....	361
Proceedings, fee.....	60	Remission of sentence, loss.....	<b>467</b>
Propaganda, prohibition .....	<b>472</b>	Remuneration .....	322
Property right, communal .....	<b>601</b>	Remuneration, equal .....	261
Property, private and municipal .....	43	Remuneration, judge .....	316
Property, private, right .....	275	Repatriation, request, refusal .....	32
Property, protection .....	275	Reprographic levy.....	<b>519</b>
Property, public, use for advertising .....	353	<i>Res judicata</i> , review of administrative decision, obligation .....	193
Property, real .....	77	Rescue services, private companies .....	299
Property, right to dispose of.....	184	Rescue services, system change .....	299
Property, seizure .....	268	Residence permit.....	176, 359
Property, socially owned, equal treatment.....	271	Residence, discrimination.....	361
Property, transfer.....	34		



Residence, EU citizen, spouse .....	199	Special territories, protection .....	<b>468</b>
Residence, permanent, registration .....	361	Staff member, transfer .....	<b>603</b>
Residence, registration .....	96	<i>Stare decisis</i> , application, criteria .....	392
Resource, financial, adequate .....	316	<i>Stare decisis</i> , nature .....	392
Resource, natural, protection .....	<b>530</b>	State aid .....	<b>623</b>
Respect for the dead .....	163	State award .....	<b>549</b>
Retroactive effect, genuine and false .....	<b>533</b>	State employee .....	322
Retroactive legislation .....	<b>536</b>	State legislation .....	<b>465</b>
Retrospective effect .....	<b>476</b>	State power .....	323
Right of action .....	286	State, continuity .....	318
Right of appeal .....	<b>504</b>	State, duty, protection of life and safety .....	<b>540</b>
Right of personality, general, encroachment .....	302	Statement, damaging to business .....	<b>521</b>
Right to a proper living .....	354	Statement, made under coercion, use .....	<b>628</b>
Right to acceptable housing .....	257	Statute of limitation .....	164
Right to appeal, constitutional states .....	264	Statute, unconstitutionality .....	<b>461</b>
Right to counsel, purpose .....	<b>479</b>	Statute-barred .....	<b>571</b>
Right to effective judicial protection .....	194	Student .....	313
Right to make a statement .....	<b>540</b>	Student, right, termination .....	116
Right to personal liberty .....	247	Subsidiarity .....	<b>508</b>
Right to private life, interference .....	23	Subsidy, agriculture .....	310
Right to property .....	251	Summary proceedings, constitutionality .....	<b>504</b>
Right to return to civil service .....	297	Supreme Court, admissibility, decision, incompetence .....	329
Right to vote .....	284	Supreme Court, decision, binding nature .....	117, 118
Right, constitutional, protection, form, choice .....	137	Supreme judicial council .....	381
Right, essence, guarantee .....	35	Survivor's pension .....	295
Right, limitation .....	<b>512</b>	Survivor's pension, conditions .....	<b>607</b>
Right, protection .....	<b>593</b>	Suspect, fundamental rights .....	14
Rights, protection, equal .....	209	Suspensive effect .....	278
Salary, judge .....	316	Tax authority, powers .....	77, 113
Sale between spouses, prohibition .....	109	"Tax CD" from Liechtenstein .....	<b>526</b>
Sanction, administrative .....	51	Tax Debt .....	<b>471</b>
Search and seizure, installation of digital recording ammeter which measures electricity consumption .....	<b>480</b>	Tax inspection, account review, duration .....	113
Search warrant, judicial .....	<b>556</b>	Tax inspection, duration, limit .....	113
Search warrant, validity .....	267, <b>556</b>	Tax law, amendments .....	57
Search, criminal proceedings, suspicion, reasonable .....	<b>526</b>	Tax law, inheritance tax, gift tax .....	307
Search, strip search, incident to arrest .....	268	Tax, complaint .....	<b>578</b>
Search, warrant .....	<b>556</b>	Tax, exemption .....	<b>558</b>
Secret investigation .....	23	Tax, exemption, competence .....	328
Security, financial, judge .....	316	Tax, immunity, church .....	<b>462</b>
Sentence, commuting .....	<b>598</b>	Tax, imposition .....	<b>462</b>
Sentence, life imprisonment .....	<b>598</b>	Tax, personal income .....	<b>558</b>
Sentence, proportionality .....	98	Tax, property .....	77
Sentence, reduction, application, conditions .....	<b>598</b>	Tax, punitive .....	<b>536</b>
Sentence, serving .....	<b>468</b>	Taxation .....	<b>536</b>
Sentencing, increase .....	27	Taxation, principle of lawfulness .....	18
Sickness insurance, benefit .....	376	Taxation, tax on unoccupied residential properties .....	257
Simplified revision .....	<b>508</b>	Tenancy, right .....	271
Smoking room .....	373	Tender, public, conditions .....	<b>599</b>
Smoking, area .....	320	Term of office .....	324
Smoking, ban .....	320	Term of office, extension .....	325
Social guarantee, judge .....	316	Term, meaningless, specific meaning resulting from context .....	<b>521</b>
Social security .....	153	Terrorism .....	151, 173, <b>464</b>
Social security, board .....	35	Terrorism, assets, freeze, procedure, guarantees .....	412
Social security, family allowance .....	<b>605</b>	Terrorism, fight .....	249, <b>464</b>
Social security, right, contribution .....	35	Terrorism, fight, fundamental rights, protection, weighing .....	412
Social security, treaty .....	<b>605</b>	Terrorism, fight, means, choice .....	85
Social welfare authority, recourse .....	<b>524</b>		
Solidarity, principle .....	316		

---

Terrorism, financing.....	202
Terrorism, restrictive measures .....	202
Terrorism, suspect, fair hearing.....	412
Time limit, element of right .....	113, 271
Time limit, national procedural autonomy .....	193
Tobacco, trade.....	<b>461</b>
Toll, payment, waiver.....	<b>470</b>
Torture, in police custody .....	<b>628</b>
Town planning, powers.....	366
Trade, regulation .....	169
Transport, passengers, public .....	29
Transport, waterway, safety .....	<b>624</b>
Travellers.....	294
Treaty of Lisbon.....	<b>508</b>
Treaty, domestic law, effect.....	<b>572</b>
Treaty, European Communities.....	311
Treaty, international, direct applicability .....	<b>605</b>
Treaty, ratification .....	<b>563</b>
Trial, reopening.....	<b>610</b>
True facts, publication .....	72
Unemployment, assistance, abolishing .....	<b>533</b>
Unemployment, benefit, application, deadline, failure to meet.....	135
Unemployment, benefit, equality .....	11
Unemployment, benefit, exclusion, proportionality .....	135
United Nations, Security Council, resolution, implementation by the EU .....	202
Universities, constitution.....	<b>517</b>
Universities, management bodies .....	<b>517</b>
Universities, organisation .....	<b>517</b>
University bodies, relation <i>inter se</i> .....	<b>517</b>
University, autonomy .....	116, 239
<i>Vacatio legis</i> .....	126
Value, constitutional, objective .....	137
Venice Commission, Venice Forum .....	368
Victim, equal treatment.....	<b>555</b>
Victim, traffic accident.....	<b>540</b>
Violence, domestic .....	209
Violence, gender-based.....	399
Vote, prohibition.....	255
War veterans .....	290, <b>511</b>
Weapon, licence .....	155
Witness, hearing.....	362
Women, violence, against, prevention.....	399
Worker, public, private, difference .....	<b>558</b>
Workers, health, protection.....	<b>463</b>
World Trade Organisation .....	169
World Trade Organisation, agreements, effects in European Community, judicial review, exclusion .....	402
Young persons, protection.....	169

---



**Sales agents for publications of the Council of Europe**  
**Agents de vente des publications du Conseil de l'Europe**

**BELGIUM/BELGIQUE**

La Librairie Européenne  
The European Bookshop  
Rue de l'Orme, 1  
BE-1040 BRUXELLES  
Tel: 32 (0)2 231 0435  
Fax: 32 (0)2 735 0860  
E-mail: [order@libeurop.be](mailto:order@libeurop.be)  
<http://www.libeurop.be>

Jean De Lannoy / DL Services  
Avenue du Roi 202 Koningslaan  
BE-1190 BRUXELLES  
Tel: 32 (0) 2 538 4308  
Fax: 32 (0) 2 538 0841  
E-mail: [jean.de.lannoy@dl-servi.com](mailto:jean.de.lannoy@dl-servi.com)  
<http://www.jean-de-lannoy.be>

**BOSNIA AND HERZEGOVINA/  
BOSNIE-HERZÉGOVINE**

Robert's Plus d.o.o  
Marka Marulića 2/v  
BA-71000, SARAJEVO  
Tel/Fax: 387 33 640 818  
E-mail: [robertsplus@bih.net.ba](mailto:robertsplus@bih.net.ba)

**CANADA**

Renouf Publishing Co. Ltd.  
1-5369 Canotek Road  
CA-OTTAWA, Ontario, K1J 9J3  
Tel: 1 613 745 2665  
Fax: 1 613 745 7660  
Toll-Free Tel: (866) 767-6766  
E-mail: [order\\_dept@renoufbooks.com](mailto:order_dept@renoufbooks.com)  
<http://www.renoufbooks.com>

**CROATIA/CROATIE**

Robert's Plus d.o.o  
Marasovičeva 67  
HR-21000, SPLIT  
Tel: 385 21 315 800 ,801, 802, 803  
Fax: 385 21 315 804  
E-mail: [robertsplus@robertsplus.hr](mailto:robertsplus@robertsplus.hr)

**CZECH REPUBLIC/RÉPUBLIQUE  
TCHÈQUE**

Suweco CZ s.r.o  
Klecakova 347  
CZ – 18021 PRAHA 9  
Tél: 420 2 424 59 204  
Fax: 420 2 848 21 646  
E-mail: [import@suweco.cz](mailto:import@suweco.cz)  
<http://www.suweco.cz>

**DENMARK/DANEMARK**

GAD, Vimmelskaftet 32  
DK-1161 KØBENHAVN K  
Tel.: +45 77 66 60 00  
Fax: +45 77 66 60 01  
E-mail: [gad@gad.dk](mailto:gad@gad.dk)  
<http://www.gad.dk>

**FINLAND/FINLANDE**

Akateeminen Kirjakauppa  
Keskuskatu 1  
PO Box 128  
FI-00100 HELSINKI  
Tel.: 358 (0) 9 121 4430  
Fax: 358 (0) 9 121 4242  
E-mail : [akatilais@akateeminen.com](mailto:akatilais@akateeminen.com)  
<http://www.akateeminen.com>

**FRANCE**

La Documentation française  
(diffusion/distribution France entière)  
124, rue Henri Barbusse  
FR-93308 AUBERVILLIERS CEDEX  
Tel.: 33 (0)1 40 15 70 00  
Fax: 33 (0)1 40 15 68 00  
E-mail: [commande@ladocumentationfrancaise.fr](mailto:commande@ladocumentationfrancaise.fr)  
<http://www.ladocumentationfrancaise.fr>

Librairie Kléber  
1 rue des Francs Bourgeois  
FR-67000 STRASBOURG  
Tel: 33 (0) 3 88 15 78 88  
Fax: 33 (0)3 88 15 78 80  
E-mail: [librairie-kleber@coe.int](mailto:librairie-kleber@coe.int)  
<http://www.librairie-kleber.com>

**GERMANY/ALLEMAGNE  
AUSTRIA/AUTRICHE**

UNO Verlag GmbH  
August-Bebel-Allee 6  
DE-53175 BONN  
Tel.: (49) (0) 2 28 94 90 20  
Fax: (49) (0) 2 28 94 90 222  
E-mail: [bestellung@uno-verlag.de](mailto:bestellung@uno-verlag.de)  
<http://www.uno-verlag.de>

**GREECE/GRÈCE**

Librairie Kauffmann s.a.  
Stadiou 28  
GR-10564 ATHINAI  
Tel.: (30) 210 32 55 321  
Fax: (30) 210 32 30 320  
E-mail: [ord@otenet.gr](mailto:ord@otenet.gr)  
<http://www.kauffmann.gr>

**HUNGARY/HONGRIE**

Euro Info Service  
Pannónia u. 58, PF. 1039  
HU-1136 BUDAPEST  
Tel.: 36 1 329 2170  
Fax: 36 1 349 2053  
E-mail: [euroinfo@euroinfo.hu](mailto:euroinfo@euroinfo.hu)  
<http://www.euroinfo.hu>

**ITALY/ITALIE**

Licosa SpA  
Via Duca di Calabria 1/1  
IT-50125 FIRENZE  
Tel.: (39) 0556 483215  
Fax: (39) 0556 41257  
E-mail: [licosa@licosa.com](mailto:licosa@licosa.com)  
<http://www.licosa.com>

**NORWAY/NORVÈGE**

Akademika,  
PO Box 84, Blindern  
NO-0314 OSLO  
Tel.: 47 2 218 8100  
Fax: 47 2 218 8103  
E-mail: [support@akademika.no](mailto:support@akademika.no)  
<http://www.akademika.no>

**POLAND/POLOGNE**

Ars Polona JSC  
25 Obroncow Street  
PL-03-933 WARSZAWA  
Tel.: 48 (0) 22 509 86 00  
Fax: 48 (0) 22 509 86 10  
E-mail: [arspolona@arspolona.com.pl](mailto:arspolona@arspolona.com.pl)  
<http://www.arspolona.com.pl>

**PORTUGAL**

Livraria Portugal  
(Dias & Andrade, Lda.)  
Rua do Carmo, 70  
PT-1200-094 LISBOA  
Tel.: 351 21 347 42 82 / 85  
Fax: 351 21 347 02 64  
E-mail: [info@livrariaportugal.pt](mailto:info@livrariaportugal.pt)  
<http://www.livrariaportugal.pt>

**RUSSIAN FEDERATION /  
FÉDÉRATION DE RUSSIE**

Ves Mir, 17b. Butlerova ul.  
RU – 101000 MOSCOW  
Tel: +7 495 739 0971  
Fax: +7 495 739 0971  
E-mail: [orders@vesmirbooks.ru](mailto:orders@vesmirbooks.ru)  
<http://www.vesmirbooks.ru>

**SPAIN/ESPAGNE**

Díaz de Santos Barcelona  
C/ Balmes, 417-419  
ES-08022 BARCELONA  
Tel.: 34 93 212 86 47  
Fax: 34 93 211 49 91  
E-mail: [david@diazdesantos.es](mailto:david@diazdesantos.es)  
<http://www.diazdesantos.es>

Díaz de Santos Madrid  
C/ Albasanz, 2  
ES-28037 MADRID  
Tel.: 34 91 743 4890  
Fax: 34 91 743 4023  
E-mail: [jpinilla@diazdesantos.es](mailto:jpinilla@diazdesantos.es)  
<http://www.diazdesantos.es>

**SWITZERLAND/SUISSE**

Plantis Sàrl  
16 chemin des pins  
CH-1273 ARZIER  
Tel.: 41 22 366 51 77  
Fax: 41 22 366 51 78  
E-mail: [info@planetis.ch](mailto:info@planetis.ch)

**UNITED KINGDOM/ROYAUME-UNI**

The Stationery Office Ltd.  
PO Box 29  
GB-NORWICH NR3 1GN  
Tel.: 44 (0) 870 600 55 22  
Fax: 44 (0) 870 600 55 33  
E-mail: [book.enquiries@tso.co.uk](mailto:book.enquiries@tso.co.uk)  
<http://www.tsoshop.co.uk>

**UNITED STATES and CANADA/  
ÉTATS-UNIS et CANADA**

Manhattan Publishing Company  
468 Albany Post Road  
US-CROTON-ON-HUDSON,  
NY 10520  
Tel.: 1 914 271 5194  
Fax: 1 914 271 5856  
E-mail: [info@manhattanpublishing.com](mailto:info@manhattanpublishing.com)  
<http://www.manhattanpublishing.com>

**Council of Europe Publishing/Éditions du Conseil de l'Europe**

FR-67075 Strasbourg Cedex  
Tel.: (33) 03 88 41 25 81 – Fax: (33) 03 88 41 39 10 – E-mail: [publishing@coe.int](mailto:publishing@coe.int) – Website: <http://book.coe.int>



