

# THE BULLETIN

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

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

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*The 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

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

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

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There was no relevant constitutional case-law during the reference period 1 May 2011 – 31 August 2011 for the following countries:

Denmark, Japan, Kazakhstan, Norway and Switzerland.

## Armenia

### Constitutional Court

#### Statistical data

1 May 2011 – 31 August 2011

- 84 applications have been filed, including:
  - 19 applications, filed by the President
  - 65 applications, filed by individuals
- 24 cases have been admitted for review, including:
  - 19 applications, concerning the compliance of obligations stipulated in international treaties with the Constitution (including applications filed before the relevant period)
  - 1 case on the basis of an application, filed by the Government
  - 4 cases on the basis of 4 individual complaints, concerning the constitutionality of certain provisions of laws
- 27 cases heard and 27 decisions delivered (including decisions on applications filed before the relevant period – 6 cases admitted for review initiated on 6 individual complaints have been combined as they concerned to the same issue), including:
  - 21 decisions concerning the compliance of obligations stipulated in international treaties with the Constitution (including decisions on applications filed before the relevant period)
  - 5 decisions on cases initiated on 10 individual complaints (including decisions on applications filed before the relevant period)
  - 1 decision on application, filed by the Defender of Human Rights

#### Important decisions

*Identification:* ARM-2011-2-002

**a)** Armenia / **b)** Constitutional Court / **c)** / **d)** 12.07.2011 / **e)** DCC-983 / **f)** On the conformity with the Constitution of Article 55.4 of the Criminal Code / **g)** *Tegekagir* (Official Gazette) / **h)**.

*Keywords of the systematic thesaurus:*

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

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

*Keywords of the alphabetical index:*

Crime victims / Confiscation of a property.

*Headnotes:*

As a corollary of the State's positive obligation to protect private property against others' illegal acts, the State is required to provide for an effective mechanism to compensate damage caused to victims by the commission of a crime.

*Summary:*

The applicants contended that the mechanism for the confiscation of property obtained through the commission of a crime, set forth in Article 55.4 of the Criminal Code, is not compatible with the Constitution as it neglects the legal interests of crime victims and does not provide a guarantee for the compensation of victims' damage as regards the confiscated property obtained through the commission of the crime.

The Constitutional Court considered the issue within the context of the state's positive obligation to protect private property against others' illegal acts, as well as the international obligations of the Republic of Armenia. Within that context, the Constitutional Court noted that the principle of inviolability of property not only supposes the owner's right to demand others not to violate his/her right to property, but also presumes the State's obligation to protect that property from others' illegal acts. In the context of this obligation the State is obliged to guarantee an effective mechanism for the protection of the property rights of the victims of crime and restoration of their damage.

At the hearing, the Constitutional Court emphasised the necessity to delineate the constitutional-legal content of both mechanisms: "the confiscation of property"; and

“the confiscation of property obtained through the commission of a crime”. Following systematic analysis of the legislation the Constitutional Court emphasised that these mechanisms differ fundamentally in that each institution has a different nature, purpose and objectives.

The “confiscation of property” is a type of alternative punishment, the application of which is within the discretion of the court. Where the “confiscation of property” is imposed as a punishment, the object of the confiscation is the property legally owned by the convicted person. By contrast, the “confiscation of the property obtained through the commission of a crime” is a mandatory measure and is applied irrespective of the court’s discretion, and its object is property that has been obtained as a result of a crime: as a rule that property belongs to the victims of the crime. The purpose of the first mechanism is to restrict the defendant’s right to property, as a punishment, whereas the second mechanism aims to return the property obtained illegally and to restore the violated proprietary rights of victims. Taking into consideration these differences, the Constitutional Court stated that it is inadmissible to identify the mechanism of confiscation of property with the mechanism of confiscation of the property obtained through the commission of a crime; otherwise, the measure of confiscation illegally restricts the victim’s right to property. The Constitutional Court also noted that the parallel application of these two mechanisms may not lead to legal collision or to priority of their application as they have different objects.

Within the State’s positive obligations and the State’s international obligations the Constitutional Court highlighted the necessity to ascertain whether the legislation stipulates any guarantee for the compensation of damages caused to victims by crime while enforcing the measure of confiscation of property obtained through the commission of a crime. Analysis of the legislation confirmed the existence of such guarantees: in particular such guarantees are set forth in Articles 119, 61, 59 of the Code of Criminal Procedure. However, the application of these guarantees in the law-enforcement practice has been prevented because of the absence of any condition in the challenged article concerning the recovery of the violated proprietary rights of victims in accordance with the said guarantees.

The Constitutional Court declared the challenged provision of Article 55.4 of the Criminal Code, in the interpretation given to it in the law-enforcement practice, unconstitutional and null and void, as it does not guarantee protection of the proprietary interests and property rights of victims of crime in the process

provided for the confiscation of property obtained through the commission of a crime.

*Languages:*

Armenian.



# Austria

## Constitutional Court

### Important decisions

*Identification:* AUT-2011-2-002

a) Austria / b) Constitutional Court / c) / d) 28.06.2011 / e) B 254/11 / f) / g) / h) www.icl-journal.com; CODICES (German).

*Keywords of the systematic thesaurus:*

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

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

2.2.1.6.4 Sources – Hierarchy – Hierarchy as between national and non-national sources – Community law and domestic law – **Secondary Community legislation and domestic non-constitutional instruments.**

3.26.2 General Principles – Principles of Community law – **Direct effect.**

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

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

*Keywords of the alphabetical index:*

Lawful judge / Jurisdiction, competence, *ultra vires*.

*Headnotes:*

In environmental impact assessment proceedings for federal roads and high-speed railroads the right to access a court may also be satisfied by the limited review of the Administrative Court. However, the right to a lawful judge is violated, *inter alia*, when an authority makes use of a competence that, according to the law, it does not possess.

*Summary:*

I. On 13 March 2008, the petitioner, *Galleria di Base del Brennero – Brenner Basistunnel BBT SE*, requested for an environmental impact assessment and authorisation for the construction of the Austrian section of the so-called *Brenner base tunnel* at the Ministry of Transport. After successfully completing the environmental impact assessment and preliminary proceedings, the Minister of Transport granted authorisation for the project on 15 April 2009 and held that no ordinary legal remedy was permissible against this decision, yet a complaint may be brought before the Administrative Court and/or the Constitutional Court.

The complaints against this decision to the Administrative Court, *inter alia*, by the co-intervening party, an environmental organisation, were dismissed as inadmissible for failure to exhaust the necessary legal remedies. The Administrative Court held that contrary to the national provisions for proceedings for federal roads and high-speed railroads, a right to appeal to the “*Umweltsenat*” (Environmental Tribunal) against the decision of the Minister of Transport stems from the EU-law requisite of effective legal protection before a court, as laid down in Article 10a Environmental Impact Assessment (hereinafter, the “EIA”) Directive. According to the Administrative Court, it runs contrary to the wording, system and objective of Article 10a EIA-Directive if the reviewing court does not have full jurisdiction. Thus, in light of Articles 6 and 13 ECHR, Article 47 Charter of Fundamental Rights and the constitutional traditions common to the Member States, the Administrative Court’s own limited capacity to review the facts of the case cannot fulfill the requisite of effective legal protection. Therefore, the national provisions excluding the competence of the “*Umweltsenat*” for proceedings for federal roads and high-speed railroads must be left unapplied.

Following this decision of the Administrative Court, the above-mentioned environmental organisation filed a request for reinstatement regarding failure to file a timely appeal combined with an appeal against the initial decision of the Minister of Transport. The reinstatement was granted by decision of the Minister of 28 January 2011, which is subject of the complaint at hand by the petitioner, *Galleria di Base del Brennero – Brenner Basistunnel BBT SE*, before the Constitutional Court.

In its complaint, the petitioner alleges a violation of the principle of equality before the law and the right to a lawful judge. The petitioner claims arbitrariness and violation of the principle of protection of legitimate expectations, as it could not have been foreseen that

an appeal to the “*Umweltsenat*” was possible and legally required. According to the petitioner, neither Articles 6 or 13 ECHR, nor Article 47 Charter of Fundamental Rights or Article 10a EIA-Directive contain an obligation for the Member States to establish a possibility to appeal to a body with full jurisdiction. Even assuming that the Administrative Court did not fulfill the prerequisites for effective legal protection, the petitioner puts forth that the principle of primacy of EU-law does not permit random additions to national law. The Administrative Court should have extended its own capacity to review the ruling contested by a partial non-application of the Administrative Court Act 1985 (hereinafter, “VwGG”), which is a non-constitutional regulation, rather than creating a competence of the “*Umweltsenat*” by disregarding constitutional standards. The alleged violation of the right to a lawful judge is based on the argument that, because the proposed interpretation precludes an appeal to the “*Umweltsenat*”, the Minister of Transport was not competent to decide on the reinstatement. Thereby, the Minister made use of a competency not conferred upon her by law, thus violating the right to a lawful judge.

II. The Constitutional Court reiterates that the right to a lawful judge is violated, *inter alia*, when an authority makes use of a competence that, according to the law, it does not possess. The Court considers this to apply to the case at hand because the Minister of Transport had left national rules on jurisdiction unapplied, even if no conflict with EU-law existed. Moreover, the Minister was only bound by the decision of the Administrative Court insofar as it concerned its lack of jurisdiction, but not with regards to the establishment of the competence of the “*Umweltsenat*”. The Minister erred in presuming that the possibility of an appeal to the “*Umweltsenat*” is necessary and that the Administrative Court does not fulfill the requirements of a tribunal according to Article 6 ECHR. According to Article 41.1 VwGG, the Administrative Court reviews the decision “on the grounds of the facts assumed by the responding authority”. However, the Administrative Court is only bound to these facts insofar as they have been obtained in proceedings free of substantial errors, and it may review the authorities’ evaluation of evidence in a manner akin to judicial proceedings. European Court of Human Rights case-law considers the limited review of the Administrative Court to be sufficient when a civil right is concerned, and the decision of the authority in the case at hand is dependent on compliance with stipulated legal requirements, which the Administrative Court is competent to review (see, among others, ECHR, *Zumtobel v. Austria*, 21 September 1993, Series A, no. 268-A, p. 10, Article 32). Because the right to effective legal protection pursuant to Article 47

Charter of Fundamental Rights is to be interpreted in accordance with Article 6 ECHR, the Administrative Court also fulfills the EU-law requirements for a tribunal. This is further supported by earlier jurisdiction of the ECJ according to which EU-law does “not require the Member States to establish a procedure for judicial review [...] empowering the competent national courts and tribunals to substitute their assessments of the facts [...] for the assessment made by the national authorities” (Case C-120/97 *Upjohn* [1999] ECR I-00223 Article 37). Also the Administrative Court itself has been qualified as a Court to provide effective legal protection according to EU-law (Case C-462/99 *Connect Austria* [2003] ECR I-05197 Article 39 *et seq.*).

Assuming the limited review of the Administrative Court conflicts with the requisite of effective legal protection, the Court finds that Article 10a EIA-Directive would not be directly applicable (Case C-115/09 12.05.2011 *Bund für Umwelt und Naturschutz* Articles 55 and 56). Even when “implementing Union law”, the Administrative Court should observe the federal constitution and choose the solution which least interferes with the decisions and valuations of the national legislator. Thus, a non-application of constitutional standards would have only been possible if the requirements of EU-law could not have been met in any other way.

In view of this, the Minister of Transport would have been obliged to dismiss as inadmissible the co-intervening party’s request for reinstatement. However, because she has granted reinstatement, she made use of a competence not conferred upon her by law. The Constitutional Court, therefore, set aside the reinstatement decision for violation of the right to a lawful judge.

*Languages:*

German.





# Belarus

## Constitutional Court

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### Important decisions

*Identification:* BLR-2011-2-002

**a)** Belarus / **b)** Constitutional Court / **c)** / **d)** 06.05.2011 / **e)** D-582/2011 / **f)** On the conformity of the Law of the Republic of Belarus on Copyright and Neighbouring Rights to the Constitution of the Republic of Belarus / **g)** *Vesnik Kanstytucyjnaha Suda Respubliki* (Official Digest), no. 2/2011 / **h)** CODICES (English, Belarusian, Russian).

*Keywords of the systematic thesaurus:*

3.9 General Principles – **Rule of law.**  
 3.10 General Principles – **Certainty of the law.**  
 5.1.4.2 Fundamental Rights – General questions – Limits and restrictions – **General/special clause of limitation.**  
 5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts.**  
 5.4.12 Fundamental Rights – Economic, social and cultural rights – **Right to intellectual property.**  
 5.4.21 Fundamental Rights – Economic, social and cultural rights – **Scientific freedom.**  
 5.4.22 Fundamental Rights – Economic, social and cultural rights – **Artistic freedom.**

*Keywords of the alphabetical index:*

Intellectual property, right / Copyright / Creativity, intellectual freedom / Scientific freedom.

*Headnotes:*

The Law on Copyright and Neighbouring Rights develops constitutional rules such as the freedom of artistic and scientific creativity (Article 51.2 of the Constitution) and the protection by law of the results of creative activity which appear as intellectual property (Article 51.3 of the Constitution). Restrictions imposed on copyright holders are intended to achieve important constitutional objectives.

*Summary:*

In the exercise of obligatory preliminary review the Constitutional Court examined the Law on Copyright and Neighbouring Rights (hereinafter, the “Law”). The Court recognised that the aim of the Law is to develop constitutional rules such as the freedom of artistic and scientific creativity (Article 51.2 of the Constitution), the protection by law of the results of creative activity which appear as intellectual property (Article 51.3 of the Constitution) and others. There are provisions similar to the said constitutional rules in the Universal Declaration of Human Rights (Article 27) and the International Covenant on Economic, Social and Cultural Rights (Article 15), which provide for the freedom of creative activity and everyone’s right to the protection of his moral and material interests resulting from creative activity.

Chapter 4 of the Law imposes restrictions on these rights, by providing for the exploitation of works and matters protected by copyright and neighbouring rights without the consent of their authors or other rightholders, including the reproduction of a lawfully disclosed work *ad litem*, the reproduction of works for the blind and visually impaired, the use of works for educational and research purposes in the media, and the use of works by libraries and archives.

As regards Chapter 4 of the Law, the Constitutional Court pointed out that on the basis of Article 23 of the Constitution, which permits the restriction of personal rights and freedoms only in the instances specified by law, in the interests of national security, public order, protection of the morals and health of the population as well as rights and freedoms of other persons, these restrictions are legally permissible as they are provided by law; and they are socially justified given that they are intended to achieve important constitutional objectives related to public order and to ensure the rights and freedoms of other persons in cultural life, and given that they do not distort the essence of the exclusive rights of authors and other rightholders.

Article 48 of the Law specifies the decision-making procedure by an authorised state body on state accreditation or the refusal of state accreditation, and its early termination in relation to organisations for the collective administration of economic rights. The right to appeal against these decisions before the courts is provided only if state accreditation is refused, although its early termination may also present the violation of the rights of organisations for the collective administration of economic rights.

According to the Constitutional Court, in cases concerning the early termination of state accreditation organisations for the collective administration of economic rights should be guaranteed the judicial protection of their rights and legitimate interests as established by law.

The Constitutional Court recognised the Law to be in conformity with the Constitution.

#### *Languages:*

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



#### *Identification:* BLR-2011-2-003

**a)** Belarus / **b)** Constitutional Court / **c)** / **d)** 07.07.2011 / **e)** D-619/2011 / **f)** On the conformity of the Law of the Republic of Belarus on Arbitration Courts to the Constitution of the Republic of Belarus / **g)** *Vesnik Kanstytucyjnaha Suda Respubliki Belarus* (Official Digest), no. 3/2011 / **h)** CODICES (English, Belarusian, Russian).

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

3.9 General Principles – **Rule of law**.  
 3.10 General Principles – **Certainty of the law**.  
 4.7.14 Institutions – Judicial bodies – **Arbitration**.  
 5.1.4.2 Fundamental Rights – General questions – Limits and restrictions – **General/special clause of limitation**.  
 5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts**.

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

Arbitration, court, decision, enforcement / Arbitration, procedure, fundamental rights and freedoms, guarantees / Restriction.

#### *Headnotes:*

The constitutional rules on the right to judicial protection, enshrined in Article 60 of the Constitution, are implemented in the Law on Arbitration Courts. The restrictions concerning the establishment of permanent arbitration courts by state authorities and

bodies of local self-government are designed to achieve important constitutional objectives.

#### *Summary:*

In the exercise of obligatory preliminary review the Constitutional Court examined the Law on Arbitration Courts (hereinafter, the “Law”). The Court recognised that the provisions which ensure essential procedural rights of parties to arbitration (Articles 15, 30, 32, 46 and 49 of the Law) are aimed at implementing the principle of a fair trial, which within the meaning of Article 60 of the Constitution applies either to proceedings in a state court or in arbitration. The Constitutional Court noted that such an approach is consistent with the provisions of international legal instruments and with the application of such provisions in practice; in particular, the International Covenant on Civil and Political Rights (Article 14.1) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 6.1).

The Constitutional Court was of the view that the restrictions imposed by the legislator concerning the establishment of permanent arbitration courts by state authorities and local self-governments (Article 3.2 of the Law) are designed to avoid the direct or indirect use of powers (public powers) conferred on these bodies. The restrictions reflect the private-law nature of arbitration and safeguard the respect for the principle of independence of arbitrators while resolving disputes.

The Constitutional Court noted the fact that in determining the competence of the arbitration courts it is essential to proceed from the contractual nature of arbitration, which is utilised solely in civil law relations. Because of their specific legal nature such relations are characterised as relations of equitable property owners. Such relations are based on the principle of voluntariness in cases, where the owners dispose of the rights belonging to them. The ability to resolve civil disputes through arbitration is based on the provisions of Articles 13, 22, 44 of the Constitution and is enshrined in civil law.

The concept and form of an arbitration agreement, stipulated in Article 9 of the Law, corresponds to the principle of voluntariness and means that arbitration is based on the agreement of the parties to the dispute and their freedom to regulate their mutual relations at their discretion. At the same time, the Constitutional Court noted that the conclusion of the arbitration agreement between the parties does not preclude either party from exercising the constitutional right to judicial protection in the ordinary courts or economic courts under the procedure established by existing legislation, in particular in

cases where the arbitration memorandum is terminated by agreement between the parties or by a court decision.

The right to judicial protection, enshrined in Article 60 of the Constitution, involves concrete guarantees for an efficient restoration of rights through the administration of justice that meets the fairness requirements which have been developed in Article 46 of the Law.

Article 46 of the Law establishes that the arbitral award may be appealed by a party to the case under the procedure provided respectively by civil procedural or economic procedural legislation. The grounds of appealing and setting aside the arbitral award (Articles 47 and 48 of the Law) as well as the consequences of the latter are designed to give effect to the constitutional right to judicial protection, involving not only the right to bring an appeal to the courts, but also the ability to obtain a concrete judicial remedy in the form of the restoration of violated rights and freedoms in accordance with the rules, laid down in legislation, specifying the court and procedure under which a particular decision should be subject to appeal.

The Constitutional Court emphasised that the right to arbitration of a civil law dispute does not mean that the subjects of the arbitration agreement have the discretion to choose the rules of relevant proceedings and the procedure by which the arbitral award is to be executed – the rules and procedure shall be determined by law (Article 18). In addition, the Court held that the ability of the state court to set aside the arbitral award on the grounds specified in Article 47 of the Law may not be regarded as violating the constitutional rights to judicial protection of the parties to the arbitration agreement. Setting aside the arbitral award does not prevent the participants from initiating a subsequent appeal for the protection of violated rights or legitimate interests before the arbitration court or before the ordinary or economic court within their jurisdiction.

The Constitutional Court recognised the Law to be in conformity with the Constitution.

#### *Languages:*

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



## Belgium Constitutional Court

### Important decisions

*Identification:* BEL-2011-2-006

**a)** Belgium / **b)** Constitutional Court / **c)** / **d)** 31.05.2011 / **e)** 96/2011 / **f)** / **g)** *Moniteur belge* (Official Gazette), 12.08.2011 / **h)** CODICES (French, Dutch, German).

*Keywords of the systematic thesaurus:*

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

5.1.3 Fundamental Rights – General questions – **Positive obligation of the state.**

5.2 Fundamental Rights – **Equality.**

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

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

*Keywords of the alphabetical index:*

Child, born in wedlock, presumption / Descent, legal presumption / Descent, interest of the child / Paternity, right of contestation, child / Private life, balance between rights and interests / Family, family tranquility.

*Headnotes:*

When formulating regulations that involve public authorities' interference in private life, the legislature has a margin of discretion to ensure that the competing interests of the individual and of society as a whole are fairly balanced.

The margin of legislative discretion is not unlimited, however. Whether a legislative rule is compatible with the right to respect for private life depends on whether the legislature has fairly balanced all the rights and interests at issue. To achieve this, it is not enough for the legislature to strike a balance between the competing interests of the individual and of society as a whole: it must also balance the contradictory interests of the persons concerned, otherwise the measure it adopts is liable to be disproportionate to the legitimate aims pursued. This

balance of interests must guarantee that biological and social realities prevail over any legal presumption that clashes with the established facts and the wishes of the persons concerned, without actually benefiting anyone.

### Summary:

An adult child lodged an action with Nivelles Court of First Instance, challenging his legal descent from a man to whom his mother had been married at the time of his birth but from whom she separated, shortly before obtaining a divorce. The father-child relationship does not give rise to enjoyment of a specific civil status. Such enjoyment is established by facts indicating the descent relationship. Genetic analysis showed that a different man is the appellant's biological father. Pursuant to Article 318.2 of the Civil Code, an action to disprove paternity has to be submitted within one year from the time the child discovers that his mother's husband is not his father. In the instant case, the action was submitted over eight years later. The appellant contended before the court that Article 318.2 was contrary to the Constitution and the European Convention on Human Rights. He compared his situation to that of a child whose mother is not married at the time of conception or childbirth and who has forty-eight years to submit an action to establish paternity.

Nivelles Court of First Instance posed two preliminary questions to the Constitutional Court concerning the violation of Articles 10, 11 and 22 of the Constitution, and Articles 8 and 14 ECHR. The first question was whether Article 318.2 of the Civil Code made it impossible for the appellant to challenge his legally established descent. The second question was whether the same Article combined with Article 330 of the Civil Code discriminated against persons born in and out of wedlock, specifically when true descent is established subsequently.

First of all, the Court analysed the *travaux préparatoires* of the Law to determine the legislative intent of Articles 318 and 331ter of the Civil Code.

Drawing on the reasoning of the judgment and the contents of the case-file, the Court noted that the case was a very specific one, namely a presumption of paternity on the part of the mother's husband, which corresponded to neither the biological nor the socio-affective truth. It confined its consideration of the case to the length of the proceedings concerning the action to disprove paternity.

Combining the two questions, the Court went on to explain that it had to consider whether, in light of the period laid down in Article 318.2 of the Civil Code,

this article infringed, in a discriminatory manner, on the right to respect for the private life (Article 22 of the Constitution and Article 8 ECHR) of a child who, in the absence of actual enjoyment of status, wishes to challenge the presumption of paternity established in respect of his mother's husband.

The Court highlights the close link between Article 22 of the Constitution and Article 8 ECHR, drawing on case-law of the European Court of Human Rights, especially the Kroon, Shofman, Mizzi, Paulik and Phinikaridou judgments.

These provisions are undoubtedly applicable to regulations that challenge a presumption of paternity. The Court further specifies that the right to private family life is geared primarily to protect individuals against interference in their private and family lives. Neither Article 22.1 of the Constitution nor Article 8 ECHR excludes a public authority from interfering in the exercise of this right, but they do require that such interference be set out in a sufficiently detailed legislative provision, correspond to a vital social need and be proportionate to the legitimate goal pursued. The provisions also generate the positive obligation on the public authority to take measures to ensure effective respect for private and family life, extending to the sphere of interpersonal relations.

The Court further agrees that family tranquility and the legal security of family links, as well as the interest of the child, constitute legitimate aims that the legislature can take into account to prevent unlimited recourse to paternity challenges.

Nevertheless, as applied to the case before the Court – where a child can no longer challenge the presumption of paternity on the part of his mother's husband after the age of 22 or after the year following his discovery of the fact that his mother's husband is not his father – the provision at issue cannot be justified by the desire to protect family tranquility, given the non-existence of any family links. It therefore infringes, in a discriminatory manner, this child's right to respect for his private life.

The operative part of the Court's judgment concludes that there has been a violation of Articles 10, 11 and 22 of the Constitution, taken in conjunction with Articles 8 and 14 ECHR, in the case referred to the Court.

### Languages:

French, Dutch, German.



*Identification:* BEL-2011-2-007

**a)** Belgium / **b)** Constitutional Court / **c)** / **d)** 30.06.2011 / **e)** 116/2011 / **f)** / **g)** *Moniteur belge* (Official Gazette), 11.08.2011 / **h)** CODICES (French, Dutch, German).

*Keywords of the systematic thesaurus:*

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

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

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

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

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

5.2.2.1 Fundamental Rights – Equality – Criteria of distinction – **Gender.**

*Keywords of the alphabetical index:*

Review of constitutionality, European law, combination / Discrimination, sex, life insurance, transitional measures / Equality between men and women / European law, life insurance directive, transitional measures / Cancellation, *ex tunc*, retaining effects.

*Headnotes:*

The possibility of authorising (temporally unlimited) gender differences for setting premiums and benefits in life insurance policies, where gender is a decisive factor in risk evaluation based on relevant and precise actuarial and statistical data, is contrary to the fundamental principle of gender equality.

After the European Union Court of Justice declared the invalidity of a provision in a European directive, further to a preliminary question put on this subject by the Constitutional Court, the latter repealed the Law transposing this rule of European law, while retaining the effects of the Law for a limited period.

*Summary:*

The non-profit association *Test-Achats*, a consumers' association, submitted to the Court an application to repeal the Law of 21 December 2007 amending the Law of 10 May 2007 to combat discrimination between women and men, in the insurance field.

This Law transposes European Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in access to goods and services and the supply of goods and services.

Although the Directive prohibits using gender as a criterion to calculate different premiums and benefits for life insurance policies contracted after 21 December 2007, the Member States may, under Article 5.2 of the Directive, “decide before 21 December 2007 to permit proportionate differences in individuals' premiums and benefits where the use of sex is a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data”.

In its Judgment no. 103/2009 of 18 June 2009, the Court posed a preliminary question to the Court of Justice of the European Union on the compatibility of this provision of the Directive with Article 6.2 of the Treaty on the European Union, and in particular with the principle of equality and non-discrimination secured by this provision.

In its judgment of 1 March 2011 in case C-236/09, the Court of Justice declared Article 5.2 of the aforementioned Directive invalid, with effect from 21 December 2012. The Court held, on one hand, that the Directive was discriminatory by not specifying how long the differences could last; on the other hand, that Member States had to be granted an “appropriate transitional period”.

In reviewing the Law transposing the Directive in the light of constitutional rules on equality, non-discrimination and gender equality (Articles 10, 11 and 11bis of the Constitution), the Constitutional Court ruled that where the criterion in question was based on the person's gender, regard must be given to Articles 10, 11 and 11bis.1 of the Constitution and the international provisions binding on Belgium that have a similar scope to these constitutional provisions because the safeguards set out in the said international provisions constitute an indissociable set of safeguards contained in the aforementioned constitutional provisions. As such, these provisions require the legislature to take particular care when establishing differential treatment based on gender. Such a criterion is only admissible if it is justified by and relevant to a legitimate goal.

The Court adds that review is stricter where the fundamental principle of gender equality is at issue.

In view of the reasons set out by the Court of Justice in its 1 March 2011 judgment, the Constitutional Court decided that the differential treatment could not be reasonably justified and that the Law complained of should therefore be repealed. Moreover, the Court decided, in view of the transitional period posited by the Court of Justice, to retain the effects of the repealed legislative provisions until 21 December 2012.

#### *Languages:*

French, Dutch, German.



#### *Identification:* BEL-2011-2-008

**a)** Belgium / **b)** Constitutional Court / **c)** / **d)** 07.07.2011 / **e)** 125/2011 / **f)** / **g)** *Moniteur belge* (Official Gazette) / **h)** CODICES (French, Dutch, German).

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

- 1.6.2 Constitutional Justice – Effects – **Determination of effects by the court.**
- 1.6.3 Constitutional Justice – Effects – **Effect erga omnes.**
- 1.6.4 Constitutional Justice – Effects – **Effect inter partes.**
- 1.6.5.5 Constitutional Justice – Effects – Temporal effect – **Postponement of temporal effect.**
- 1.6.9 Constitutional Justice – Effects – **Consequences for other cases.**
- 5.2.2 Fundamental Rights – Equality – **Criteria of distinction.**

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

Worker / Employee / Differential remuneration, inequality, gradual removal / Judgment on preliminary question, effect, retaining effects.

#### *Headnotes:*

When cases are referred to the Court, it must strike a fair balance between the interest of remedying any

situation contrary to the Constitution and the concern, after a certain lapse of time, of not jeopardising the existing situations and expectations that have been created. Despite the declaratory nature of any finding of unconstitutionality in a preliminary judgment, the principles of certainty of the law and legitimate confidence can thus justify restricting any retroactive effect stemming from such a finding.

Retaining the effects must be considered as an exception to the declaratory nature of judgments given in preliminary proceedings. Before deciding to retain the effects of such a judgment, the Court must find that the advantage accruing from the effect of the unqualified finding of unconstitutionality is disproportionate to the disruption it would cause to the legal system.

#### *Summary:*

The Constitutional Court was once again invited to examine a preliminary question on various provisions of the Law on employment contracts establishing differential treatment for workers and employees based on the length of notice. Since 1993, it ruled that differentiating between workers and employees based on whether their work was categorised mainly as manual or intellectual was a criterion difficult to justify objectively and reasonably [BEL-1993-2-026]. The Court considers that this is still the case today, indeed even more so. In 1993, it agreed that the legislature was gradually eliminating this inequality. The process had already been initiated and would continue in successive stages. Now the Court considers whether the time available to the legislature to remedy a situation, deemed unconstitutional, is limited.

The legislature aimed to gradually harmonise worker and employee status, rather than suddenly abolishing the distinction between these occupational categories especially because standards may change under the collective bargaining process. This approach may no longer be justified. Eighteen years after the Court found that the relevant criterion for distinction could no longer be deemed relevant, retaining certain differences in treatment, such as those adduced before the Court, for much longer would only perpetuate a blatantly unconstitutional situation.

The Court goes on to compare the authority of a preliminary judgment, finding the authority of a rescissory judgment unconstitutional. The latter removes the unconstitutional provision from the legal system *ab initio*, something which a preliminary judgment does not do under the terms of Article 28 of the Special Law of 6 January 1989 on the Constitutional Court. Yet the Court notes that a preliminary

judgment has an effect that transcends the proceedings pending before the judge who posed the preliminary question. It therefore considers that it must analyse the extent to which the impact of its decision must be moderated to avoid hampering the gradual harmonisation of the statuses of workers and employees, as authorised under its previous judgments.

The Court then points out that when a preliminary question has been posed, the Special Law of 6 January 1989 does not empower it through a general provision to determine which of the effects of the unconstitutional provision must be considered as definitive or provisionally retained for a period it determines, as it can do when ruling on an application for a judicial review. Nevertheless, the Court opines that in light of principles of legal uncertainty and legitimate confidences, it may be justified in certain, limited cases that the retroactive effect can derive from such a finding. To this end, the Court draws on the *Marckx* judgment of 13 June 1979 of the European Court of Human Rights, which itself refers to the *Defrenne* judgment of 8 April 1976 of the Court of Justice of the European Union.

The Court does, however, explain that retaining the effects must be considered an exception to the declaratory nature of the judgment given in preliminary proceedings. Before deciding to retain the effects of such a judgment, it must ascertain that the advantage stemming from the effect of the unqualified finding of unconstitutionality is disproportionate to the disruption it would cause to the legal system.

In the instant case, the Court considers that an unqualified finding of unconstitutionality would, in many pending and future cases, lead to considerable legal uncertainty, and might cause serious financial difficulties for a large number of employers. It could also hamper the harmonisation efforts that the Court has urged the legislature to conduct.

The Court therefore decided to maintain the effect of the provisions at issue until 8 July 2013 at the latest.

#### *Cross-references:*

- See *Bulletin* 1993/2 [BEL-1993-2-026].

#### *Languages:*

French, Dutch, German.



#### *Identification:* BEL-2011-2-009

**a)** Belgium / **b)** Constitutional Court / **c)** / **d)** 27.07.2011 / **e)** 139/2011 / **f)** / **g)** *Moniteur belge* (Official Gazette) / **h)** CODICES (French, Dutch, German).

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

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

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

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

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

Evidence, obtained illegally, evidential value / Control of identity, illegality, evidential value / Body search, illegality, evidential value / Evidence, exclusion.

#### *Headnotes:*

It is not contrary to the Convention that illegally obtained evidence in criminal matters can withstand being deemed null and void unless under certain circumstances, e.g., where its use infringes the right to a fair hearing.

#### *Summary:*

An individual prosecuted for possession of and trading in drugs contends before the criminal court that the findings on which the prosecution is based result from an illegal identity control and an illegal body search.

According to Court of Cassation case-law, the fact of evidence having been obtained illegally does not necessarily result in the evidence having to be discarded. According to this case-law, there are three cases when such evidence must not be examined:

1. where the evidence has been obtained in breach of the formalities prescribed on pain of nullity;
2. where the irregularity committed has undermined the credibility of the evidence itself; and

3. where the use of such evidence is incompatible with a fair hearing.

The criminal court posed a preliminary question to the Court regarding legislative provisions on police controls and body searches (Articles 28 and 34 of the Law of 5 August 1992 on the operation of police services). That is, whether these provisions are compatible with the constitutional rule that no one can be prosecuted except in cases provided for by law, and in the form prescribed by law. (Article 12 of the Constitution), and with the right to respect for private life (Article 22 of the Constitution), interpreted as meaning that identity controls and body searches failing to meet the conditions of these provisions do not necessarily result in the nullity of the evidence obtained?

In its reply, the Court first of all refers to the case-law of the European Court of Human Rights. This Court has already ruled several times that Article 6 ECHR does not regulate the admissibility of a piece of evidence as such, and that it is primarily incumbent on domestic law to establish such rules.

Nevertheless, it emerges from the case-law of the European Court of Human Rights that the use in proceedings of illegally obtained evidence may, under certain circumstances, violate the right to a fair hearing, as secured under Article 6.1 ECHR. In appraising a possible violation of this right, it is necessary to consider the proceedings as a whole, including the manner in which the evidence was obtained, which also involves examining the alleged illegal obtaining of the evidence. Also, in the case of violation of another right safeguarded by the European Convention on Human Rights, regard must be given to the authenticity and quality of the evidence, as well as its importance for the case in hand, and to the question whether the rights of the defence have been respected in the sense that the person in question must be able to challenge the authenticity and quality of the evidence (the Court refers to various judgments of the European Court).

Most of these judgments concerned evidence obtained in breach of Article 8 ECHR. The Constitutional Court inferred, first of all, that the European Court of Human Rights has ruled that Articles 6 and 8 ECHR do not set out rules on the admissibility of evidence in a given case; and secondly, that the use of evidence obtained in breach of Article 8 ECHR does not necessarily lead to a violation of the right to a fair hearing as safeguarded by Article 6.1 ECHR. As such, the fact that a piece of evidence obtained in breach of a legal provision intended to guarantee the right to respect for private life is not automatically null and void, may also mean that it does not inherently

violate the right to respect for private life safeguarded by Article 8 ECHR.

The Court observes that the scope of the constitutional right to protection of private life (Article 22 of the Constitution) is the same as that of Article 8 ECHR.

It is unnecessary in the instant case to consider whether the police service's failure to respect the conditions that the provisions at issue attach to identity controls and body searches might be deemed incompatible with the right to respect for private life as secured by Article 22 of the Constitution. It is sufficient to note that this Article does not *per se* require evidence obtained in breach of the right which it guarantees to be considered null and void under all circumstances.

The Court draws the same conclusion regarding Article 12 of the Constitution, and decides that the preliminary question must be answered in the negative.

*Languages:*

French, Dutch, German.





# Bosnia and Herzegovina Constitutional Court

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## Important decisions

*Identification:* BIH-2011-2-003

**a)** Bosnia and Herzegovina / **b)** Constitutional Court / **c)** Plenary / **d)** 28.05.2011 / **e)** AP 1080/08 / **f)** / **g)** / **h)** CODICES (Bosnian, English).

*Keywords of the systematic thesaurus:*

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

*Keywords of the alphabetical index:*

Competition, unfair / Logo / Trademark.

*Headnotes:*

The right to a fair trial under Article II.3.e of the Constitution and Article 6.1 ECHR is not violated when the court provides clear and consistent reasons to support its decision regarding the right to a logo under the Law on Industrial Property and unfair competition of the Law on Trade.

*Summary:*

I. The complaint alleges that the appellant's right to a logo as one of the industrial property rights has been violated. The Basic Court agreed that "MERHAMET" Humanitarian Association of Bosniac Citizens of the Brcko District of Bosnia and Herzegovina (hereinafter, the "defendant") had violated the appellant's right to a logo and engaged in unfair competition by unauthorised use not only of the name "MERHAMET" for its association but also of the figurative part of the appellant's logo in legal transactions. The Appellate Court, however, reversed the Basic Court's ruling.

The appellant holds that his right to a fair proceedings has been violated by the fact that the Appellate Court erroneously interpreted that the "identity of the name (logo) on the whole does not exist to create confusion in the activity of the parties in rendering services and objectively excludes the possibility of confusion

because the provision of Article 86 of the Law on Industrial Property prescribes the prohibition to use not only an identical logo but also a similar one".

II. In this case, the Constitutional Court (hereinafter, the "Court") considers whether the Appellate Court provided clear and comprehensible reasons why the defendant had not violated the appellant's right to a logo, specifically whether the defendant had not committed the act of unfair competition.

The Court affirms the Appellate Court's decision, finding that its reasoning was not arbitrary for several reasons. First, the Court noted that the defendant had recorded with a competent body to protect the logo containing the name "MERHAMET"; second, the defendant's use of the remaining figurative part of the logo is similar but not the same; third, the appellant and the defendant are registered with different registration bodies; and fourth, the defendant also uses other constituent additions in its name "Humanitarian Association of Bosniac Citizens of the Brcko District of Bosnia and Herzegovina", which does not indicate the possibility of creating confusion in the market.

In any case, given that both the appellant and the defendant are registered as associations performing humanitarian work, and that the main function of the logo is to enable the buyers to identify the product (whether goods or services), the Court considers the possibility whether the defendant caused damage to the appellant by using the figurative denotation similar but not identical and the name "MERHAMET", i.e. for the defendant to violate the appellant's right to a more favourable position in the market.

In support of the aforementioned, the Court refers to Article 3.2 of the Law on Industrial Property, which stipulates that material rights of an industrial proprietor comprise his/her exclusive right on economic exploitation. Concerning the Basic Court's ruling that the defendant has committed an act of unfair competition, the Court also finds that the reasoning of the Appellate Court is clear and well-argued. Namely, the provisions of the Law on Trade, specifically provisions of Articles 47 and 48 prescribe that unfair competition is activity of a trader which is contrary to fair business practice by which damage will be done to other merchants, other legal persons and consumers, i.e. that unfair competition is also unauthorised use of other's name, firm, brand, sign or other external characteristic, if this creates or could create confusion in the market. Since both the appellant and the defendant are registered as associations performing humanitarian work, not business companies whose business is trade, they may not enjoy protection in terms of the Law on Trade.

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The Court may not state that the decision of the Appellate Court violates the appellant's constitutional rights but on the contrary, it contains the answers to the essential question as to why the defendant has not violated the appellant's right to a logo and committed the act of unfair competition. The Court points out that by comparing the registered logo with the denotation used by the defendant on its memorandum, it would exceed the scope of its jurisdiction, particularly because the appellant does not indicate any unfairness of proceedings in its procedural part but only finds the violation of the right to a fair trial in erroneous interpretation of the provisions of the Law on Industrial Property.

III. The Court finds that the challenged judgment has not violated the appellant's right to a fair trial.

#### *Languages:*

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



## Bulgaria Constitutional Court

### Statistical data

1 May 2011 – 31 August 2011

Number of decisions: 6

### Important decisions

*Identification:* BUL-2011-2-002

**a)** Bulgaria / **b)** Constitutional Court / **c)** / **d)** 16.05.2011 / **e)** 03/11 / **f)** / **g)** *Darzhaven vestnik* (Official Gazette), 30, 20.05.2011 / **h)**.

*Keywords of the systematic thesaurus:*

4.5.4.1 Institutions – Legislative bodies – Organisation – **Rules of procedure.**

4.5.7.2 Institutions – Legislative bodies – Relations with the executive bodies – **Questions of confidence.**

4.5.7.3 Institutions – Legislative bodies – Relations with the executive bodies – **Motion of censure.**

*Keywords of the alphabetical index:*

Parliament, controlling function / Parliament, procedure, motion of censure / Parliament, procedure, vote of confidence.

*Headnotes:*

Under the parliamentary system established in Bulgaria by the Constitution, the motion of censure is a means employed in principle by the opposition (a motion of censure may be tabled by one-fifth of the members of parliament) for exercising parliamentary control and calling the government to account. In modern parliamentarianism, the government's political responsibility is not reduced to a possible termination of its powers when it no longer enjoys the support of the majority within the legislature. By tabling a motion of censure, the opposition can also draw public attention to major problems in government policy. The aim is to cause society to

adopt political attitudes and judgments by provoking discussion of the ruling majority's decisions. In this sense, the tabling of motions of censure is a common parliamentary practice to which the opposition may have recourse even when the Council of Ministers enjoys the support of a solid majority. The debate on a motion of censure enables political minorities in democratic states to exercise what is known as the "right of opposition" and constitutes an effective instrument for exercising parliamentary control.

Article 98 of the Regulations governing the Organisation and Activity of the National Assembly (ROANA) creates an unacceptable confusion between two different constitutional concepts – the vote of confidence (Article 89 of the Constitution) and the motion of censure (Article 112 of the Constitution). These are two different procedures, each serving a specific purpose and having its own rationale. They are initiated by different people, require different majorities and, under the Constitution, entail different legal consequences even though the grounds on which they are based are the same.

### *Summary:*

I. Opposition members applied to the Constitutional Court for a finding of unconstitutionality of a provision of ROANA which, they argued, limited the possibilities for exercising parliamentary control and calling the government to account. The applicants alleged in particular that the impugned provision violated the Constitution by giving the impression that a motion of censure and a vote of confidence had the same legal effects.

II. In its decision the Constitutional Court said that the Constitution included various protection mechanisms and safeguards for the Council of Ministers with the aim of protecting the constitutional system from political destabilisation and impediments to the functioning of the executive resulting from abuse by the opposition of its right to table motions of censure. The motion of censure provided for in Article 89 of the Constitution falls into this category. Under this constitutional provision, a motion of censure requires an absolute majority for its adoption, which means that over half the members of parliament must have voted in its favour. The most reliable safeguard in this area is the rule against tabling a motion of censure on the same grounds in the six months following the rejection of a first motion of censure. In other words, if a motion of censure tabled by the opposition against the government's general policy or against the Prime Minister is rejected, no motion of censure may be tabled in the six months following its rejection, unless the Council of Ministers is alleged to have violated the Constitution.

The vote of confidence is a separate constitutional procedure which plays its own legal and political role. It presents a similarity with the procedure for tabling motions of censure: the constitutional grounds on which the two procedures are based are the same (general government policy, the general programme or a specific case). However, this similarity is no reason for saying that the two procedures are identical. The legislator introduced the vote of confidence in the government's interests. Its purpose is to bolster and reaffirm parliament's confidence in the government's policy if the parliamentary majority has misgivings about it or if there are social tensions or a restructuring of political space is in progress. A vote of confidence can also be requested where there is a need for significant departures from the government's original programme and priorities and in other circumstances requiring shared political responsibility for important decisions on matters relating to governance. A motion of censure tabled by the opposition is a means of forcing the government to resign by calling it to account or, at least, trying to force it to change its policy. A vote of confidence requested by the government is an effective means of protection the aim of which is to increase the political stability of the executive and at the same time show that the parliamentary majority is determined to continue the government's policy.

Legally, the motion of censure and the vote of confidence are similar in that their purpose is to "verify", by a ballot of the members, whether the Council of Ministers enjoys the parliament's confidence and whether there is a political majority in the legislature which is ready to support the executive, in this case the government. In both cases, however, the Constitution requires the government to resign if it loses the parliament's confidence.

The Constitution does not prescribe a six-month protection period for the government when it wins a vote of confidence in parliament. This conclusion is based on the spirit and principles of the parliamentary system established by Article 1.1 of the Constitution. For this reason the text of Article 98 of the ROANA is inconsistent with the principle of the rule of law (Article 4.1 of the Constitution) and the principle of supremacy of the Constitution (Article 5.1 of the Constitution).

The provision of the ROANA stating that, in the event of a positive vote of confidence, where the vote was requested by the government, members of parliament may not table a motion of censure on the same grounds for a period of six months after the vote of confidence, constitutes an unjustified restriction of the rights of the minority. It prevents the parliamentary opposition from exercising one of its main functions

deriving from the parliamentary system established by the Constitution. It also opens up a possibility for the government to abuse its right to request a vote of confidence in order to prevent the parliamentary opposition from tabling any motions of censure at all.

In practice, Article 98 of the ROANA enables the government to seek the confidence of parliament every six months and to receive each time a positive vote of confidence from the parliamentary majority while preventing the opposition from initiating the process for calling the government to account. The provisions in Article 89 of the Constitution concerning motions of censure would therefore be devoid of purpose. Under the current version of Article 98 of the ROANA, the parliamentary opposition can be deliberately deprived of any possibility of initiating a discussion and a motion of censure against the government. The result of this could be a “dictatorship of the majority” and undermining of the political pluralism on which political life in Bulgaria is based (Article 11.1 of the Constitution).

The Constitutional Court considers that Article 98 of the ROANA alters the fundamental characteristics of two separate procedures – the motion of censure and the vote of confidence in the government – in an unacceptable manner and infringes the constitutional principle of balance between the legislature and the executive. The impugned provision is declared unconstitutional.

#### Languages:

Bulgarian.



## Canada Supreme Court

### Important decisions

*Identification:* CAN-2011-2-002

**a)** Canada / **b)** Supreme Court / **c)** / **d)** 29.04.2011 / **e)** 32968 / **f)** Ontario (Attorney General) v. Fraser / **g)** *Canada Supreme Court Reports* (Official Digest), [2011] 2 S.C.R. 3 / **h)** <http://scc.lexum.org/en/index.html>; [2011] 331 *Dominion Law Reports* (4th) 64; 415 *National Reporter* 200; 275 *Ontario Appeal Cases* 205; [2011] S.C.J. no. 20 (*Quicklaw*); CODICES (English, French).

*Keywords of the systematic thesaurus:*

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

5.2.1.2.1 Fundamental Rights – Equality – Scope of application – Employment – **In private law**.

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:*

Collective bargaining, protection, scope / Discrimination, farm workers / Supreme Court, reversing recent precedent, high threshold.

*Headnotes:*

Most Canadian provinces have brought the farming sector under their general labour relations laws, with some exceptions and restrictions. However, except for a very short period of time, Ontario has always excluded farms and farm workers from the application of its Labour Relations Act. In *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391, the Court concluded that Section 2.d of the Canadian Charter of Rights and Freedoms protects collective bargaining and obliges parties to bargain in good faith. The Ontario legislature is not required to provide a particular form of collective bargaining rights to agricultural workers, in order to secure the effective

exercise of their right of association. The affirmation of the right to collective bargaining is not an affirmation of a particular type of collective bargaining, such as the Wagner model which is dominant in Canada. What Section 2.d protects is the right to associate to achieve collective goals. Laws or government action that substantially interfere with the ability to achieve collective goals have the effect of limiting freedom of association, by making it pointless. It is in this derivative sense that Section 2.d protects a right to collective bargaining. Legislatures are not constitutionally required, in all cases and for all industries, to enact laws that set up a uniform model of labour relations.

### Summary:

I. In 2002, the Ontario legislature enacted the Agricultural Employees Protection Act, 2002 (hereinafter, the "Act") which excluded farm workers from the Labour Relations Act, but crafted a separate labour relations regime for farm workers. The Act was a response to *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016, in which the Court found that the previous legislative scheme infringed the constitutional guarantee of freedom of association. The Act grants farm workers the rights to form and join an employees' association, to participate in its activities, to assemble, to make representations to their employers through their association on their terms and conditions of employment, and the right to be protected against interference, coercion and discrimination in the exercise of their rights. The employer must give an association the opportunity to make representations respecting terms and conditions of employment, and it must listen to those representations or read them. The Act tasks a tribunal with hearing and deciding disputes about the application of the Act. A constitutional challenge was mounted on the basis the Act infringed farm workers' rights under Sections 2.d and 15 of the Charter by failing to provide effective protection for the right to organise and bargain collectively and by excluding farm workers from the protections accorded to workers in other sectors. The Ontario Superior Court dismissed the application. The Court of Appeal allowed the appeal and declared the Act to be constitutionally invalid.

II. The Supreme Court of Canada, in a majority decision, allowed the appeal and dismissed the action.

A majority of five judges held that the decision in *Health Services* follows directly from the principles enunciated in *Dunmore*. The principles within these two cases represent good law, should not be overruled and provide resolution in this appeal. The arguments

advanced in favour of overturning *Health Services* do not meet the high threshold for reversing a precedent of the Court as it is grounded in precedent, consistent with Canadian values, consistent with Canada's international commitments and consistent with this Court's purposive and generous interpretation of other Charter guarantees. It is premature to argue that the holding in *Health Services*, rendered four years ago, is unworkable in practice.

In this case, farm workers in Ontario are entitled to meaningful processes by which they can pursue workplace goals. The right of an employees' association to make representations to the employer and have its views considered in good faith is a derivative right under Section 2.d of the Charter, necessary to meaningful exercise of the right to free association. The Act provides a process that satisfies this constitutional requirement. Under the Act, the right of employees' associations to make representations to their employers is set out in Section 5. The Act does not expressly refer to a requirement that the employer consider employee representations in good faith; however, by implication, it includes such a requirement. Furthermore, the Act provides a tribunal for the resolution of disputes. Section 11 specifically empowers the Tribunal to make a determination that there has been a contravention of the Act, and to grant an order or remedy with respect to that contravention. The Tribunal may be expected to interpret its powers, in accordance with its mandate, purposively, in an effective and meaningful way.

The Section 15 discrimination claim is dismissed. It is clear that the regime established by the Act does not provide all the protections that the Labour Relations Act extends to many other workers. However, on the record, it has not been established that this regime utilises unfair stereotypes or perpetuates existing prejudice and disadvantage. Until the regime is tested, it cannot be known whether it inappropriately disadvantages farm workers. The claim is premature.

III. Two judges held that Section 2.d of the Charter does not protect a right to collective bargaining nor does it impose a duty to bargain in good faith. *Health Services* was therefore not correctly decided and it should be overruled. Thus, the impugned Act does not violate Section 2.d. The text, context and purpose of the Act clearly demonstrates that the legislature intentionally opted not to include a duty on employers to engage in collective bargaining with employee associations. As for the issues under Section 15 of the Charter, the two judges concluded that the category of agricultural worker does not rise to the level of an immutable personal characteristic of the sort that would merit protection against discrimination.

IV. One judge held that the holding in *Health Services* does not have the broad scope being attributed to it by the majority in the case at bar and, in particular, does not extend to imposing a duty on employers to bargain in good faith. Freedom of association does not entail a more expansive protection than the legislative framework mandated by *Dunmore* for agricultural workers. The Act complies with this Court's conclusion in *Dunmore* and it complies with Section 2.d of the Charter. The judge is also of the view that employment status is not regarded as an analogous ground of discrimination for the purposes of Section 15 of the Charter.

V. In a dissenting opinion, one judge concluded that the Act violates Section 2.d of the Charter because it does not protect, and was never intended to protect, collective bargaining rights. This infringement cannot be justified under Section 1 of the Charter.

#### Cross-references:

- *Health Services: Bulletin* 2007/2 [CAN-2007-2-002];
- *Dunmore: Bulletin* 2001/3 [CAN-2001-3-004].

#### Languages:

English, French (translation by the Court).



#### Identification: CAN-2011-2-003

**a)** Canada / **b)** Supreme Court / **c)** / **d)** 21.07.2011 / **e)** 33340 / **f)** Alberta (Aboriginal Affairs and Northern Development) v. Cunningham / **g)** *Canada Supreme Court Reports* (Official Digest), [2011] 2 S.C.R. 670 / **h)** <http://scc.lexum.org/en/index.html>; [2011] S.C.J. no. 37 (*Quicklaw*); CODICES (English, French).

#### Keywords of the systematic thesaurus:

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

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

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

#### Keywords of the alphabetical index:

Ameliorative program, distinction, disadvantaged group.

#### Headnotes:

The legislation providing that voluntary registration as a status Indian precludes membership in a Métis settlement is not unconstitutional and does not violate the guarantee of equality found in Section 15 of the Canadian Charter of Rights and Freedoms. Although the legislation makes a distinction pursuant to Section 15.1 of the Charter, this distinction is saved by Section 15.2 of the Charter which permits inequalities associated with ameliorative programs aimed at helping a disadvantaged group.

#### Summary:

I. The claimants were formal members of a Métis community in the province of Alberta which was established and administered under the terms of the Metis Settlements Act (hereinafter, the “MSA”), enacted as a result of negotiations between the Alberta government and the Métis centered on establishing settlement lands for Métis communities, extending self government to those communities, and ensuring the protection and enhancement of Métis culture and identity. The claimants opted to register as status Indians in order to obtain medical benefits under the Indian Act. However, the MSA provides that voluntary registration under the Indian Act precludes membership in a Métis settlement. Accordingly, the claimants’ membership in the Métis settlement was revoked. The claimants sought a declaration that the denial of membership was unconstitutional due to violations of the Charter guarantees of equality, freedom of association and liberty. The chambers judge dismissed these claims. The Court of Appeal allowed the appeal, finding that these provisions were inconsistent with the equality guarantee under Section 15 of the Charter. The Supreme Court allowed the appeal and affirmed the judgment of the chambers judge dismissing the claims.

II. The MSA is an ameliorative program protected by Section 15.2 of the Charter. This provision permits governments to assist one group without being paralyzed by the necessity to assist all, and to tailor programs in a way that will enhance the benefits they confer while ensuring that the protection that Section 15.2 provides against the charge of discrimination is not abused for purposes unrelated to an ameliorative program’s object and the goal of substantive equality. Ameliorative programs, by their nature, confer benefits on one group that are not

conferred on others. These distinctions are generally protected if they serve or advance the object of the program, thus promoting substantive equality, even where the included and excluded groups share a similar history of disadvantage and marginalisation.

Where the government relies on Section 15.2, the first question is whether the law makes an adverse distinction against the claimant group on the basis of one of the grounds set out in Section 15.1 or an analogous ground. If so, the next question is whether the distinction is saved by Section 15.2. The government must show, on the evidence, that the program is a genuinely ameliorative program directed at improving the situation of a group that is in need of ameliorative assistance in order to enhance substantive equality, that there is a correlation between the program and the disadvantage suffered by the target group, and that rational means are being used to pursue the ameliorative goal. If these conditions are met, Section 15.2 protects all distinctions drawn on enumerated or analogous grounds that serve and are necessary to the ameliorative purpose, to the extent justified by the object of the ameliorative program.

In this case, and assuming that the distinction between the Métis and status Indians in the MSA is a distinction on an enumerated or analogous ground, the MSA program is a genuinely ameliorative program. Unlike many ameliorative programs, its object is not the direct conferral of benefits on individuals within a particular group, but the enhancement and preservation of the identity, culture and self governance of the Métis through the establishment of a Métis land base. The correlation between the program and the disadvantage suffered by the target group, one of the three aboriginal peoples of Canada recognised in Section 35 of the Constitution, is manifest.

As excluding Métis who are also status Indians from formal membership in Métis settlements serves or advances the object of the ameliorative program, Section 15.2 protects the MSA against the charge of discrimination. The Métis have a right to their own culture and drawing distinctions on this basis reflects the Constitution and serves the legitimate expectations of the Métis people. The exclusion corresponds to the historic and social distinction between the Métis and Indians and respects the role of the Métis in defining themselves as a people. Moreover, achieving the object of the program would be more difficult without the distinction. The fact that some people may identify as both Métis and Indian does not negate the general correspondence underlying the distinction between the two groups.

The record does not provide an adequate basis to assess the claimants' argument based on freedom of association, namely Section 2.d of the Charter. The claim based on liberty, namely Section 7 of the Charter, also fails. There is no need to decide whether place of residence is protected by Section 7 because any impact on liberty was not shown before the chambers judge to be contrary to the principles of fundamental justice. Requiring Aboriginal adults who might otherwise meet the definition of both Indian and Métis to choose whether they wish to fall under the Indian Act or the MSA is not grossly disproportionate to the interest of Alberta in securing a land base for the Métis.

#### *Languages:*

English, French (translation by the Court).



# Chile

## Constitutional Court

### Important decisions

*Identification:* CHI-2011-2-001

**a)** Chile / **b)** Constitutional Court / **c)** / **d)** 06.08.2010 / **e)** 1710-2010 / **f)** / **g)** Official Journal, 09.08.2010 / **h)** CODICES (Spanish).

*Keywords of the systematic thesaurus:*

3.20 General Principles – **Reasonableness.**

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

5.2.2.1 Fundamental Rights – Equality – Criteria of distinction – **Gender.**

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

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

*Keywords of the alphabetical index:*

Declaration of unconstitutionality / Authority, administrative, power, discretionary / Health insurance / Social Security.

*Headnotes:*

Article 38ter of Law no. 18.933, known as the “Health Care Institutions Law”, regulates the factors table that health care institutions introduce in each individual private health care insurance contract. According to the factors table, the health plan’s premium varies depending on the affiliate’s age and sex. However, the part that allows the Health Care Agency to determine the structure that the factors table must obey had to be revoked.

*Summary:*

The doctrine developed in the Constitutional Tribunal’s decision contains three fundamental aspects.

Initially, the Constitutional Tribunal established certain patterns that the factors table must accomplish to be legitimate.

The factors table, in the first place, must be proportionate to the affiliate’s income; for this reason, it cannot produce an imbalance between the charge of the contribution and the protection of the right to the health care; it cannot cause an exponential and confiscatory readjustment of the affiliate’s income; it cannot render it impossible for the affiliate to pay an increase in the premium caused by its application; and it cannot oblige the beneficiaries to leave the system.

Secondly, the relation that the table establishes among the different factors must have a reasonable basis; there can be no abuse of the discretion afforded to the health care institutions to establish the factors of each table; there must be suitable limits, necessary and proportional and, therefore, reasonable.

In the third place, the mechanism must allow the affiliate’s intervention, allowing the affiliate to do more than simply accept or decline whatever the health care institution offers; the law itself must establish the conditions for determination of the premium and the establishment of such conditions cannot be dispersed among the different actors (such as the Health Care Agency or the private health care institution).

Finally, the table cannot produce unequal treatments or consider factors that are inherent to the human condition.

The second component of this doctrine is the way the Constitutional Tribunal has characterised the health care contract. The Tribunal stated that the Constitution has defined some variables of this contract in Article 19.9 of the Constitution, such as: the possibility given to the health care institutions to finance health care actions; the contributor’s choice between the public or private health care system; the obligatory contribution; and the government’s control over health care actions. Moreover, the Constitutional Tribunal stated that the health care contract is one of successive or continuous fulfilment, of public order and covers aspects of social security, which make it different from a typical private law insurance contract.

The third component of this doctrine is that the essential content of social security includes the principles of solidarity, universality, equality and sufficiency and unity or uniformity, especially if considered alongside the right to health care (Article 19.9 of the Constitution) and the right to social security (Article 19.18 of the Constitution), both as



social rights and “optimisation commands”, the latter being the term used by the jurist and legal philosopher Robert Alexy to describe legal principles which can be fulfilled to different degrees (as opposed to rules, which must be completely fulfilled).

### *Languages:*

Spanish.



### *Identification:* CHI-2011-2-002

**a)** Chile / **b)** Constitutional Court / **c)** / **d)** 20.07.2011 / **e)** 2025-2011 / **f)** / **g)** / **h)** CODICES (Spanish).

### *Keywords of the systematic thesaurus:*

1.3.4.10.1 Constitutional Justice – Jurisdiction – Types of litigation – Litigation in respect of the constitutionality of enactments – **Limits of the legislative competence.**

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

### *Keywords of the alphabetical index:*

Exclusive law-making initiative / Postnatal Subsidy / Social Security.

### *Headnotes:*

According to the Constitution, the social aids and expenditures proposed by the President on a draft bill can only be accepted, diminished or rejected by Parliament, but can never be raised.

### *Summary:*

The current Chilean legislation guarantees 12 weeks maternity leave, with a subsidy over salaries up to 66 U.F. (*Unidad de Fomento*, a reference currency approximately equivalent to US\$46, which varies each day according to monthly inflation). Utilising his legislative initiative, the President of the Republic initiated a draft bill in which, among other things, a new social benefit is established, consisting of a second period of maternity leave of another 12 weeks, followed by the concession of a new subsidy

up to 30 U.F. However, the 30 U.F. limit was the subject of several objections during the general discussion of the draft bill in Congress. Once the initiative had achieved the general approval of Congress, during the discussion of specific topics in the Senate it was decided that the Article which contained the 30 U.F. limit should be put to a separate vote. Although the Congress was unable to increase the monetary amount of the proposed new subsidy directly, the amount of the new subsidy proposed (30 U.F.) was rejected; accordingly, due to the supplementary application of the general rule, this rejection led to an increase in the proposed subsidy, from 30 U.F. to 66 U.F. i.e. the same monetary amount as the existing subsidy.

The President of the Republic argued that a separate vote by the Senate on a Law that contains matters of the President's exclusive initiative constitutes a violation of the Constitution. Therefore, he contended that the Law contains a defect in its origin and is unconstitutional for raising public spending without presidential support. In its decision, the Court noted that the evolution of control over public expenditure is based on developments that, over the twentieth century, progressively defined the exclusive initiative of the highest authority of the Executive Power as regards financial administration, public spending and the regulation of matters related to the social security system. The Court asserted that the rationale for this evolution is the need to establish a coherent system of expenditure that allows the President to implement the financing policies considered appropriate to carry out his government agenda, in harmony with his position as head of state and as highest chief of the public administration and his responsibility for management of the public finances, according to the provisions of the Constitution.

The Court also stated that the power under analysis is not restricted to the mere presentation of the draft bill, but extends to the whole legislative procedure. Article 65 of the Constitution only allows Congress to “accept, diminish or reject” the benefits and expenses proposed by the Head of State, which means Parliament is forbidden to raise them during the law's elaboration process. In this case, when the Senate rejected a part of the new Article 197bis of the Labour Code, it altered the project presented by the President, introducing a benefits raise to public functionaries as well as to private sector workers and modifying social security system rules, consequently violating the constitutional prohibition precluding such a benefits raise.

The Court considered it evident that during the legislative procedure every draft bill can be modified for a suggestion, proposition or indication placed

either by a parliamentarian or by the President. Nonetheless, it is also unquestionable that the modifications that are contrary to the Constitution are forbidden and these are those that drift away from the main and fundamental ideas of the project and all those that violate the Constitution for any other reason, whether it is formal, jurisdictional or substantive.

*Languages:*

Spanish.



## Croatia Constitutional Court

### Important decisions

*Identification:* CRO-2011-2-004

**a)** Croatia / **b)** Constitutional Court / **c)** / **d)** 23.03.2011 / **e)** U-I-957/2007, U-I-2290/2009 / **f)** / **g)** *Narodne novine* (Official Gazette), 37/11 / **h)** CODICES (Croatian, English).

*Keywords of the systematic thesaurus:*

3.9 General Principles – **Rule of law.**  
 3.16 General Principles – **Proportionality.**  
 3.17 General Principles – **Weighing of interests.**  
 5.3.31 Fundamental rights – Civil and political rights – **Right to respect for one’s honour and reputation.**  
 5.3.32.1 Fundamental Rights – Civil and political rights – Right to private life – **Protection of personal data.**

*Keywords of the alphabetical index:*

Organic law, adoption, vote / Organic law, definition / Convicted person, pardon, decision, publication.

*Headnotes:*

Legislation bearing the hallmark of an absolutist autocracy not subject to any kind of supervision is not permissible in a democratic society. The Pardon Act is not an organic law. Certain of its provisions require that decisions of the President of the Republic granting pardons to convicted persons are to be published in the Official Gazette of the Republic of Croatia. This should be perceived as a way of ensuring the necessary level of public insight into pardons granted by the Head of State in a democratic society.

Under this provision, decisions granting pardons to convicted persons must be published, but not those refusing pardon. The present practice of publishing decisions giving data on convicted persons who have submitted unsuccessful applications for pardon exceeds the acceptable limits under constitutional law of the usage and processing of data on convicted persons.

*Summary:*

The Constitutional Court rejected a proposal for the constitutional review of the procedure for passing the Pardon Act (hereinafter, the "Act") and a proposal to review the constitutionality of Article 12.3 of the Act, finding them both ill-founded.

The first applicant argued that the Act was an organic law, and that under Article 82.2 of the Constitution, a majority vote of all the representatives in the Croatian Parliament was required for its enactment.

The other applicant contended that Article 12.3 of the Act violated the right to protection of dignity, honour and reputation and the right to privacy of data guaranteed in Articles 35 and 37 of the Constitution.

As to whether the Act was an organic law, the Constitutional Court found that the Act, by its legal nature, fell under the regulations for the implementation of the constitutionally defined authority of the President of the Republic to grant pardons. There was no basis for claiming that it regulated particular or several constitutionally guaranteed personal and political human rights and freedoms, or the organisation, jurisdiction and operation of government bodies.

The Constitutional Court held that the Act was not an organic law and that it was passed in accordance with Article 82.1 of the Constitution, i.e., by majority vote at a parliamentary session at which the majority of the total number of representatives was present.

With regard to the alleged breaches of Article 12.3 of the Act, the Constitutional Court noted that under this provision, all decisions granting pardon must be published. Consequently, the personal data of pardoned convicted persons, such as name, surname, year and place of birth, type of criminal offence and original sentence, which forms part of a criminal record and would normally be confidential, becomes publicly available.

The point has been made that public accessibility of data on persons pardoned by the President of the Republic under the challenged provision is a vehicle for making the President's activities in that field available to the public, rather than a way of exposing the perpetrators of criminal offences to public scrutiny.

In the Constitutional Court's view, the aim behind Article 12.3 was legitimate. The publication of decisions granting pardons not only provides insight into the number of persons pardoned, but also into the seriousness of the criminal offences for which pardons have

been granted, allowing the public to form opinions regarding the President's work in this constitutional and legal field in an adequate manner.

However, to the extent that publication gives the public access to the type of data on convicted persons that would normally be protected, Article 12.3 of the Act interferes with the rights of such persons to the confidentiality of their personal data.

Therefore, the question arises as to whether such interference in the rights of convicted persons who have been pardoned is proportional to the legitimate aim the disputed legal measure seeks to achieve.

The Constitutional Court reiterated its view that public insight into the work of the President of the Republic regarding the granting of pardons to convicted persons necessary in a democratic society. It found that consent by the convicted person to conduct of a procedure which might result in his or her pardon, in circumstances where the effects of the procedure are clear, predictable and certain, sets the limits up to which encroachment on the rights of convicted persons must be found proportional to the aim that Article 12.3 seeks to achieve.

The Constitutional Court accordingly found Article 12.3 of the Act to be in conformity with the requirements of Article 16 taken with Articles 35 and 37 of the Constitution.

However, it pointed out that Article 12.3 stipulates publication of decisions granting pardon but not the publication of decisions rejecting the application of a convicted person for a pardon. Therefore, the legitimate aim in Article 12.3 of the Act can only be achieved by publishing decisions where pardon is granted and the interference the provision causes with constitutional rights can only be found proportional to the aim it seeks to achieve within the group of convicted persons who have been granted pardon.

In a separate opinion, Judge Krapac, who voted against the ruling, expressed the view that the Croatian Parliament, when passing the Act, encroached upon the constitutional prerogative of the President of the Republic, thus violating the constitutional principle of the separation of powers.

*Languages:*

Croatian, English.



*Identification:* CRO-2011-2-005

**a)** Croatia / **b)** Constitutional Court / **c)** / **d)** 06.04.2011 / **e)** U-I-3843/2007 / **f)** / **g)** *Narodne novine* (Official Gazette), 48/11 / **h)** CODICES (Croatian, English).

*Keywords of the systematic thesaurus:*

3.9 General Principles – **Rule of law.**  
 3.12 General Principles – **Clarity and precision of legal provisions.**  
 3.22 General Principles – **Prohibition of arbitrariness.**  
 5.3.39.3 Fundamental Rights – Civil and political rights – Right to property – **Other limitations.**

*Keywords of the alphabetical index:*

Prisoner, money, right to receive / Prisoner, treatment.

*Headnotes:*

The legislation contained no guidance whatsoever to assist a prison warden in deciding whether it would be reasonable to authorise a particular inmate to receive money from a person outside his or her family or to send money to such a person. This could give rise to potential for arbitrary behaviour on the part of the administrative authority (the prison warden in this case), which is unacceptable in a democratic society based on the rule of law.

*Summary:*

The Constitutional Court accepted (in part) a proposal from a prison inmate for a review of the constitutionality of Article 127.1 of the Execution of Prison Sentences Act (hereinafter, the “Act”). It repealed the first sentence, which read “on approval of the warden.” It did not, however, accept that part of the applicant’s proposal relating to the second sentence of the same article of the Act.

In its review of the grounds for the proposal, it took note of Articles 3, 14 and 16 of the Constitution, Article 14 ECHR and Article 1 Protocol 12.

The Act regulates the execution of prison sentences. Article 127 of the Act regulates the manner in which inmates send, receive and spend money, and make payments and conduct other transactions.

The Constitutional Court began by examining the first sentence of Article 127.1. It stipulates that prison inmates are entitled to send and receive money to and from family members, via the penitentiary or prison, and to and from other persons upon the approval of the warden.

The applicant argued that this provision discriminated against inmates without a family. Such inmates were dependent on the warden’s decision in terms of the exercise of their right to send and receive money, but this did not apply to inmates with family.

The Constitutional Court found that the aim Article 127.1 sought to achieve was undoubtedly legitimate; it was aimed at preventing unlawful activities by inmates within the prison system, in the first instance amongst themselves.

The measure did not, in the Constitutional Court’s opinion, discriminate against those inmates who did not have family by comparison with those who did.

Inmates without family could not, of course, be in a situation of receiving money from family members or sending it to them, in fact or in law. Such inmates were in a different position, in a legal situation that could not be compared with that of inmates with family, who were, both in fact and in law, in a situation where they could send money to family members or receive it from them.

However, the part of the first sentence of Article 127.1 of the Act which provides that inmates may, upon the warden’s approval, send money to or receive it from other persons (apart from family members) applied to all inmates equally, irrespective of whether they had family. Since all the inmates were in the same legal position as this rule applied to them, irrespective of whether they had family, the Constitutional Court found that there was no basis to the applicant’s contention that inmates with no family suffered discrimination.

However, it noted that the warden had legal authority to approve the right of inmates to receive money from or send it to persons outside the family. This statutory power on the part of the warden was not expanded upon in the Act or in the Ordinance on Disposing with Money. It found this to be a case of “legalised arbitrariness” rather than discretionary assessment. No guidance was given in the legislation to assist wardens in assessing whether it would be reasonable to allow a particular inmate to receive money from someone outside the family or to send it to them.

This could pave the way for arbitrary behaviour on the part of an administrative authority (the prison warden

in this case), which is unacceptable in a democratic society based on the rule of law.

The Constitutional Court therefore held that the part of the first sentence of Article 127.1 of the Act, which reads: "on the approval of the warden" contravenes the requirements placed on statutes by the principle of the rule of law (Article 3 of the Constitution).

It then proceeded to examine the second sentence of Article 127.1, the conformity of which with the Constitution the applicant had also disputed. This stipulates that the monthly sum of money inmates may send and receive is to be established in the Ordinance.

The applicant had put forward the view that this provision restricted the right of all citizens to freely dispose of money because it prevented them from sending money to persons serving prison sentences; inmates were not allowed to receive it and the money would be returned to the sender with a note endorsed 'refuses receipt'.

The Constitutional Court found the applicant's claims to be ill-founded; the conditions and requirements of life inside prison are by the nature of things different from those outside it. The special features of prison life dictate that the community and all its members must respect the regulations in public law to which inmates' lives are subject.

The legal rule preventing citizens from freely sending inmates unlimited quantities of money cannot from any constitutional perspective be perceived as a restriction on their right to dispose freely of their own property. Similarly, this legal rule cannot be viewed from the inmates' perspective as a restriction on their right to receive unlimited quantities of money from citizens who have not been deprived of freedom.

The Constitutional Court reiterated that this is a special regulation under public law within the prison system from which specific objective rules of behaviour result, which are compulsory for all. It did not, therefore, accept the applicant's arguments that the second sentence of Article 127.1 of the Act contravened Articles 3, 14 and 16 of the Constitution.

#### Cross-references:

- ECHR, *Oršuš and Others v. Croatia* (Application no. 15766/03), Judgment of 17.03.2010;

- ECHR, *Abdulaziz, Cabales and Balkandali v. The United Kingdom* (Application no. 9214/80, 9473/81 and 9474/81), Judgment of 28.05.1985, *Special Bulletin Leading Cases ECHR* [ECH-1985-S-002];
- ECHR, *Unal Tekeli v. Turkey* (Application no. 29865/96), Judgment of 16.11.2004;
- ECHR, *Beian v. Romania*, (Application no. 30658/05), Judgment of 06.12.2007;
- Judgment of the Federal Constitutional Court of Germany no. 1 BvR 370/07, 27.02.2008, *Bulletin* 2008/1 [GER-2008-1-006].

#### Languages:

Croatian, English.



#### Identification: CRO-2011-2-006

a) Croatia / b) Constitutional Court / c) / d) 30.06.2011 / e) U-III-2026/2010 / f) / g) *Narodne novine* (Official Gazette), 88/11 / 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.**

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

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

#### Keywords of the alphabetical index:

Proceedings, criminal, conduct / Media, state officials, statements.

#### Headnotes:

Where statements were made by high-ranking state officials at the beginning of criminal proceedings and again when they were under way, which made direct reference to the accused and which undoubtedly had a bearing on decisions made as to their culpability and influenced the impartiality of the authorities

conducting the proceedings, this was in breach of the right to a fair trial and the guarantee of the presumption of innocence.

### Summary:

I. The applicant alleged that the media in Croatia had carried out a “public lynching” of him during criminal proceedings, triggered by statements by several important and high-ranking representatives of the government and state. He argued that Article 6.2 ECHR had been breached.

The applicant’s attorney delivered many documents to the Constitutional Court regarding this allegation, including a large number of press cuttings referring to what was known as the “M” affair and specifically to the applicant of the constitutional complaint. They represent a composite part of the Constitutional Court’s file.

II. The Constitutional Court noted that the statements to which the applicant referred were made by certain high-ranking State officials and published in the media. It found that these statements could represent grounds for the Constitutional Court to examine the alleged violation of the constitutional guarantee of the presumption of the applicant’s innocence within the meaning of Article 28 of the Constitution.

The Constitutional Court found it necessary to recall the statement of reasons of the *Peša v. Croatia*, Judgment of 8 April 2010 (application no. 40523/08), in which the European Court of Human Rights found that there had been a violation of the applicant’s right to the presumption of innocence, i.e. a breach of Article 6.2 ECHR. The Constitutional Court noted that these were criminal proceedings in the same case as the one that was the subject of these constitutional proceedings, publicly known as the “M.” affair.

The Constitutional Court held that the findings cited in Articles 138-150 of *Peša v. Croatia* could be applied to the case. It found that the applicant’s right to a fair trial in this case had been undermined, because the quoted statements of the high-ranking state officials made direct reference to him and undoubtedly indicated his guilt in the proceedings which had at that time just begun, and also in the further course of the criminal proceedings.

The Constitutional Court noted that, in the quoted statements, taken in their usual context, the state officials influenced the authorities conducting the applicant’s criminal proceedings. His right to be presumed innocent under Article 28 of the Constitution and Article 6.2 ECHR was accordingly violated.

### Cross-references:

- ECHR, *Peša v. Croatia* (Application no. 40523/08), Judgment of 08.04. 2010.

### Languages:

Croatian, English.



### Identification: CRO-2011-2-007

a) Croatia / b) Constitutional Court / c) / d) 06.07.2011 / e) U-I-295/2006, U-I-4516/2007 / f) / g) *Narodne novine* (Official Gazette), 82/11 / h) CODICES (Croatian, English).

### Keywords of the systematic thesaurus:

1.6.2 Constitutional Justice – Effects – **Determination of effects by the court.**  
 2.1.1.4.2 Sources – Categories – Written rules – International instruments – **Universal Declaration of Human Rights of 1948.**  
 2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950.**  
 2.1.1.4.8 Sources – Categories – Written rules – International instruments – **International Covenant on Civil and Political Rights of 1966.**  
 3.9 General Principles – **Rule of law.**  
 3.16 General Principles – **Proportionality.**  
 3.18 General Principles – **General interest.**  
 5.3.28 Fundamental Rights – Civil and political rights – **Freedom of assembly.**

### Keywords of the alphabetical index:

Freedom of assembly, restrictions / Public assembly, place, designation.

### Headnotes:

Where the legislator decides to pass separate legislation restricting public assembly, specific requirements must be complied with, in terms of its content. In particular, three principles deriving from general constitutional values must be respected; a positive presumption in favour of holding public

assemblies, a positive obligation on the part of the state to protect the right to freedom of public assembly, and the principle of proportionality in restricting the right to freedom of public assembly.

### Summary:

I. Proceedings were commenced at the Constitutional Court to review the constitutionality of Article 1.3 and 1.4 of the Public Assembly (Amendments and Revisions) Act (hereinafter, the "Amendments to the Act"), when it became apparent that the part of the Act which referred to the premises of the Croatian Parliament, Government and Constitutional Court, would lose its force with effect from 15 July 2012.

The applicants challenged the constitutionality of Article 1.3 and 1.4 this being the statutory ban on holding peaceful assemblies or public protests in places within one hundred metres of the location of premises where the Croatian Parliament, the President of the Republic, the Government and the Constitutional Court have their seats or hold sessions, as well as the extension of the ban to groups of less than twenty persons (i.e. any group of persons, regardless of their number, if they have gathered in an organised fashion to publicly express and promote political, social and national beliefs).

II. The Constitutional Court examined the applicants' arguments against the background of Articles 42 and 38.1 and 38.2 taken with part of Article 1.1 and Articles 3, 14 and 16 of the Constitution, together with Article 11 ECHR, Article 21 of the International Covenant on the Civil and Political Rights and Article 20.1 of the Universal Declaration on Human Rights.

These particular constitutional proceedings were not concerned with the constitutional compliance of the general legal framework of the Public Assembly Act (hereinafter, the "Act"). The subject of the review was limited to two specific provisions of the Act providing for exemptions from the general legal rules for the exercise of the right of citizens to freedom of public assembly, namely the prohibition on holding public assemblies, defined within the meaning of Article 4.1 of the Act, within one hundred metres from the premises where Parliament, the President of the Republic, Government and the Constitutional Court had seats or held sessions. Groups of less than twenty persons were also banned from carrying out such activities in these locations, and so the ban extended to any groups, regardless of number, who were gathered in an organised manner to publicly express and promote political, social and national beliefs.

This resulted in a ban on the exercise of the right to freedom of assembly in these areas, which in practice resulted in the abolition of the right. However, viewed in the context of the legal regulation of the right to freedom of public assembly as a whole, and in view of the specific territorial definition, the ban was found to be an isolated case of territorial limitation of the right.

The Constitutional Court found that an individual protest (a protest by a single person) was not the subject of regulation of the Act, as it was covered by rules set out in other relevant legislation, which are mainly implemented by the police authorities within their remit of maintaining public order and public safety.

It also found that that part of Article 1.3 of the Amendments to the Act which vetoed public assemblies within the meaning of Article 4.1 of the Act within one hundred metres of the buildings in which the Parliament, the President of the Republic, Government and the Constitutional Court held sessions did not comply with Article 42 of the Constitution, because, in relation to any *a priori* unknown concrete location and object, it cancelled the essence of the constitutional right to the freedom of public assembly for no acceptable reason under constitutional law.

The legal ban on public assembly within the meaning of Article 4.1 of the Act in the area within one hundred metres of buildings accommodating the President of the Republic had no legitimate aim or reasonable and objective justification. It therefore constituted *prima facie* violation of the right to freedom of public assembly guaranteed in Article 42 of the Constitution.

However, according to the Constitutional Court, the legal ban on public assembly within the meaning of Article 4.1 of the Act in the area within one hundred metres of the buildings accommodating the Parliament, Government and the Constitutional Court (St. Mark's Square in Zagreb) did have a legitimate aim. The area was highly inappropriate for holding public assemblies, which indicated the proportionality of the disputed legal ban. Nonetheless, the ban was not "necessary in a democratic society" as there was no "pressing social need" for its existence within the meaning of Article 11.2 ECHR. This was so because in this area, public events are permitted which require special security measures (Article 4.2 of the Act) as well as other forms of gatherings aimed at realising economic, religious, cultural, humanitarian, sports, entertainment and other interests (Article 4.3 of the Act). If public assemblies are singled out for prohibition which are aimed at publicly expressing political, social and national beliefs and interests,

these beliefs and objectives become grounds for discrimination with no objective and reasonable justification, which is in breach of Articles 3 and 14 of the Constitution.

In view of the unique quality of the area where the buildings of the Croatian Parliament, Government and the Constitutional Court are located (St. Mark's Square in Zagreb), the Constitutional Court found it reasonable to give the legislator a wider margin of appreciation in regulating the prerequisites for holding all forms of public gatherings in this location. This view did not, in the Constitutional Court's opinion, breach the legal principle adopted by the European Court, which emphasised in *Christian Democratic People's Party v. Moldova* (no. 2) (2010) that in determining whether a necessity within the meaning of Article 11.2 ECHR exists, Contracting States have only a limited margin of appreciation, which goes hand in hand with rigorous European supervision (§ 24.). The Constitutional Court observed that in these particular proceedings, the specific and unique circumstances of the specific case allowed for the "limited margin of appreciation" to be wider, going hand in hand with rigorous national and European supervision.

The legal prerequisites for holding public assemblies in proximity to the premises of the Croatian Parliament, the Government and the Constitutional Court could legitimately be more rigorous than those applying to public assemblies in other places. Provided those restrictions satisfied the limits of proportionality and necessity, they could relate to time, location of fences and barriers, and to the manner of holding assemblies (including the number of participants).

The Constitutional Court noted that the above statements only related to peaceful public assemblies; only they enjoyed constitutional protection. The nature of a particular assembly is assessed on a case by case basis in a legal process, along with evaluation of its acceptability from the perspective of Article 16 of the Constitution, and from the aspect of national security and all other security aspects, including protection from terrorism, but also from the aspect of the potential for violation of the rights and freedoms of others and for damage to the most valuable cultural and historical heritage in the historic quarters of Zagreb. These police powers regularly include giving relevant orders and setting out conditions depending on the circumstances of each but also the judicial supervision of the final decision.

In view of the time needed to evaluate the situation, to prepare a proposal for a regulatory measure in line with the legal views in this decision and the duration

of the legislative procedure for amending the Act, the Constitutional Court postponed the loss of legal force of Article 1.2 and 1.3 of the Amendments to the Act until 15 July 2012. In calculating the duration of the postponement period the Constitutional Court took account of the period during which Parliament would not be holding sessions, due to the forthcoming parliamentary elections.

#### Cross-references:

- Decision no. U-I-241/1998 of 31.03.1999, *Bulletin* 1999/1 [CRO-1999-1-004];
- Decision no. U-II-242/1998 of 14.04.1999;
- Decision no. U-I-3307/2005, U-I-3309/2005, U-I-3346/2005, U-I-3359/2005 of 23.11.2005, *Bulletin* 2005/3 [CRO-2005-3-011];
- ECHR, *Rassemblement jurassien and Unite jurassienne v. Switzerland* (Application no. 8191/78), Decision of 10.10.1979;
- ECHR, *Christians against Racism and Fascism v. The United Kingdom* (Application no. 8440/78), Decision of 16.07.1980;
- ECHR, *Pendragon v. The United Kingdom* (Application no. 31416/96), Decision of 19.10.1998;
- ECHR, *Rai, Allmond and "Negotiate Now" v. The United Kingdom* (Application no. 25522/94), Decision of 06.04.1995;
- ECHR, *Éva Molnár v. Hungary* (Application no. 10346/05), Judgment of 07.10.2008;
- ECHR, *Patyi and Others v. Hungary* (Application no. 5529/05), Judgment of 07.10.2008;
- ECHR, *Nurettin Aldemir and Others v. Turkey* (Application nos. 32124/02, 32126/02, 32129/02, 32132/02, 32133/02, 32137/02 and 32138/02), Judgment of 18.12.2007;
- ECHR, *Association of Citizens Radko & Paunkovski v. The Former Yugoslav Republic of Macedonia* (Application no. 74651/01), Judgment of 15.01.2009, *Reports of Judgments and Decisions* 2009;
- ECHR, *Stankov and The United Macedonian Organisation Ilinden v. Bulgaria* (Application nos. 29221/95, 29225/95), Judgment of 02.10.2001, *Reports of Judgments and Decisions* 2001-IX;
- ECHR, *Bączkowski and Others v. Poland* (Application no. 1543/06), Judgment of 03.05.2007;
- ECHR, *Plattform "Arzte für das Leben" v. Austria* (Application no. 10126/82), Judgment of 21.06.1988;
- ECHR, *Christian Democratic People's Party v. Moldova* (no. 2), (Application no. 25196/04), Judgment of 02.02.2010;
- ECHR, *Makhmudov v. Russia* (Application no. 35082/04), Judgment of 26.07.2007;



- ECHR, *Ashughyan v. Armenia* (Application no. 33268/03), Judgment of 17.07.2008;
- ECHR, *Balçık and Others v. Turkey* (Application no. 25/02), Judgment of 29.11.2007;
- ECHR, *Oya Ataman v. Turkey* (Application no. 74552/01), Judgment of 05.12.2006;
- ECHR, *Incal v. Turkey* (Application no. 22678/93), Judgment of 09.06.1998.

### Languages:

Croatian, English.



**Identification:** CRO-2011-2-008

**a)** Croatia / **b)** Constitutional Court / **c)** / **d)** 29.07.2011 / **e)** U-I-120/2011 *et al* / **f)** / **g)** *Narodne novine* (Official Gazette), 93/11 / **h)** CODICES (Croatian, English).

### Keywords of the systematic thesaurus:

- 1.6.2 Constitutional Justice – Effects – **Determination of effects by the court.**
- 3.3.3 General Principles – Democracy – **Pluralist democracy.**
- 3.9 General Principles – **Rule of law.**
- 3.16 General Principles – **Proportionality.**
- 4.9.3 Institutions – Elections and instruments of direct democracy – **Electoral system.**
- 4.9.6 Institutions – Elections and instruments of direct democracy – **Representation of minorities.**

### Keywords of the alphabetical index:

Election, parliamentary / Minority, representation, additional vote.

### Headnotes:

The objective of all the positive measures for national minorities in electoral proceedings is to ensure their representation in the Croatian Parliament, so as to integrate them into national political life. This does not include their usage for other purposes, for example, to obtain a larger number of parliamentary seats in order to guarantee certain positions in Parliament and executive bodies.

### Summary:

The Constitutional Court initiated proceedings to review the conformity with the Constitution of Articles 1, 5, 6, 7, 8, 9 and 10 of the Election of Representatives to the Croatian Parliament (Amendments) Act (hereinafter, the “Amendments to the Act”). It repealed them and ordered that pending regulation of the issues in the repealed articles, the relevant rules from the Election of Representatives to the Croatian Parliament Act (hereinafter, the “Act”) that were previously in force would apply.

The applicants challenged the constitutionality of Articles 1, 5, 6, 9 and 10 of the Amendments. One applicant disputed the Amendments as a whole.

In its review of the applicants’ proposals, the Constitutional Court found Article 1, parts of Article 3, Articles 14, 15, 16, 45.1, 70, 71 and 74.1 of the Constitution, together with Articles 4.2, 4.3 and 21 of the Framework Convention for the Protection of National Minorities of the Council of Europe to be of relevance.

At issue here were the provisions of the Amendments to the Act regulating electoral procedures for voters/members of national minorities in elections for representatives to the Croatian Parliament.

Under the Amendments, voters belonging to national minorities making up less than 1.5 % of the national population enjoyed special voting rights in parliamentary elections (Article 1). National minorities which, on the date of entry into force of the Constitutional Act on Amendments to the Constitutional Act on the Rights of National Minorities, made up more than 1.5% of the national population were guaranteed at least three parliamentary seats for members of that national minority (Article 5). National minorities representing less than 1.5 % of the population could elect five national minority representatives in a special constituency consisting of the entire national territory (Article 6). Political parties and voters from the Serb national minority nominated lists of candidates in all ten constituencies with the same candidates (Article 9). If the candidates from the Serb national minority did not win three seats in Parliament in the elections, parliamentary seats up to the number guaranteed were determined on the grounds of the total number of votes won by each list of candidates in all constituencies (Article 10).

The Constitutional Court found an intrinsic link between Articles 1, 5, 6, 9 and 10 of the Amendments to the Act and Article 1 of the Constitutional Act on Amendments to the Constitutional Act on the Rights of National Minorities (“the Amendments to the

Constitutional Act”), which the Constitutional Court repealed on the grounds of unconstitutionality in Decision no. U-I-3597/2010 *et al*, of 29 July 2011 (see decision, *Bulletin* 2011/2 [CRO-2011-2-009]). The reasons for which it found Article 1.2 and 1.3 of the Amendments to the Constitutional Act to contravene the Constitution also applied to the finding that Articles 1, 5, 6, 9 and 10 of the Amendments to the Act contravened the Constitution.

The Constitutional Court found the electoral rules in Articles 9 and 10 of the Amendments to the Act to be out of line with constitutional law as they were not grounded on the precepts of proportional representation that underpin the general electoral system and directly contravened the values of political pluralism.

Articles 9 and 10 of the Amendments to the Act elaborated the legal framework of Article 1.2 of the Amendments to the Constitutional Act in relation to the rules of electoral procedure for the exercise of the right to vote of members of the Serb national minority.

Under Article 9 of the Amendments to the Act, the political parties and voters of the Serb national minority nominated “their” lists of candidates in all the general constituencies, as did all other authorised nominators. However, the political parties and voters of the Serb minority nominated the same candidates on their lists of candidates in all ten general constituencies. The Constitutional Court identified a clear lack of proportionality in this statutory measure, and found it to be a legalised favouring of one group of voters, impinging excessively on the equality of suffrage within the general electoral system.

In terms of Article 10 of the Amendments to the Act the Constitutional Court did not find it necessary to qualify the type of electoral system regulated by the distribution of votes in the article under dispute but noted that it could not be qualified as “proportional”.

In the Constitutional Court’s opinion, for the purposes of this constitutional review, it sufficed to find that the distribution of votes to parliamentary seats guaranteed and reserved in advance, the votes being given to the Serb minority lists of candidates by Croatian citizens (not only members of that minority), deviated considerably from the effect of the proportional electoral system on which the elections in the ten general constituencies were founded under positive law.

The Constitutional Court concluded that the mechanisms in Article 10 of the Amendments to the Act were not acceptable in the national constitutional order. They not only deviated from the legal standards inherent in the system of proportional

representation, but also failed to comply with the values of political pluralism on which a democratic society is based. These mechanisms could not be considered positive measures for the integration of the Serb national minority in national political life; rather they constituted impermissible favouritism in the electoral process.

The applicants did not dispute the constitutionality of Articles 7 and 8 of the Amendments to the Act, and the Constitutional Court did not find them to be in breach of the Constitution. However, Articles 7 and 8 provided for a more limited circle of people empowered to nominate candidates for national minority representatives and their deputies than did the former provisions of the Act (Article 18.1). Specifically, they did not give associations of national minorities the right to nominate candidates for the representation of national minorities. Having decided that pending the resolution of the issues in the repealed articles of the Amendments the relevant rules from the Act would apply, the Constitutional Court resolved to allow associations of national minorities to nominate candidates for the representation of national minorities and their deputies, in the special 12<sup>th</sup> constituency, in accordance with the rules in force before the entry into force of the Amendments to the Act.

The Constitutional Court ruled that these electoral rules for minorities would not apply at the forthcoming elections. The repealed articles of the Amendments would lose their legal force on the date this decision was published in the “*Narodne novine*”. Pending regulation of the issues in the repealed articles, the rules from the provisions of the Act that were formerly in force would apply.

#### Cross-references:

- Decision no. U-I-3597/2010 *et al* of 29.07.2011, *Bulletin* 2011/2 [CRO-2011-2-009];
- ECHR, *Young, James and Webster v. The United Kingdom* (Application nos. 7601/76 and 7806/77), Judgment of 13.08.1981, *Special Bulletin Leading Cases ECHR* [[ECH-1981-S-002].

#### Languages:

Croatian, English.



# Czech Republic

## Constitutional Court

### Statistical data

1 May 2011 – 30 September 2011

- Judgments of the Plenary Court: 8
- Judgments of panels: 53
- Other decisions of the Plenary Court: 4
- Other decisions of panels: 1 037
- Other procedural decisions: 35
- Total: 1 137

### Important decisions

*Identification:* CZE-2011-2-005

**a)** Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 04.05.2011 / **e)** Pl. ÚS 59/10 / **f)** Election to the Municipal Council of the municipality of Hřensko in 2010 and the issue of deliberate “re-registration” of voters’ permanent residence / **g)** <http://nalus.usoud.cz> / **h)** CODICES (Czech).

*Keywords of the systematic thesaurus:*

1.3.4.5 Constitutional Justice – Jurisdiction – Types of litigation – **Electoral disputes**.

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

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

5.3.41.3 Fundamental Rights – Civil and political rights – Electoral rights – **Freedom of voting**.

*Keywords of the alphabetical index:*

Voters, permanent residence / Constituency, number of voters / Small municipalities / Electoral rules, breach.

*Headnotes:*

When assessing the validity of elections, courts must examine the purpose behind changes to voters’ permanent residence, from a formal and a material perspective, as such changes could be significant

enough to affect the election results. Attention must be paid during such an assessment to any potential circumvention of electoral law and potential effects on the outcome of elections, such as the registration of residence in a property owned by one of the candidates.

*Summary:*

Upon the petition of the applicant, the Civic Democratic Party, the Plenum of the Constitutional Court, by a Judgment issued on 4 May 2011, set aside the order of the Regional Court in Ústí nad Labem issued on 16 November 2010, file no. 15A 116/2010-44, due to its inconsistency with Article 36.1 of the Charter and Article 6.1 ECHR.

The applicant had asked the Regional Court to declare the elections to the Municipal Council of the municipality of Hřensko null and void, explaining in its petition that in the period immediately prior to the elections (i.e. between 1 October and 15 October 2010), sixty-seven new inhabitants over the age of eighteen had registered permanent residence in the municipality, amounting to a third of the original number of inhabitants. The applicant alleged that increasing the number of voters had a substantial impact on the election outcome and the composition of the Municipal Council. The Regional Court dismissed the petition ruling, *inter alia*, that even voters who had registered permanent residence in the municipality just before the election were entitled to exercise their active right to vote and registration for permanent residence did not constitute an act amounting to a violation of the Elections Act (Act no. 491/2001 Coll., on elections to municipal councils). The applicant claimed in its constitutional complaint breaches of the right to free competition of political parties, the right to participate in the administration of public affairs, the right to self-government, and the right to due process.

In its deliberations, the Constitutional Court placed particular reliance on Article 5 of the Constitution (free competition of political forces respecting fundamental democratic principles), Article 21 of the Charter (the provisions governing the right to vote), Article 22 of the Charter (protection of free competition of political forces in a democratic society), Part III, Article 25 of the International Covenant on Civil and Political Rights, Article 3 Protocol to the European Convention on Human Rights, relevant provisions of the Elections Act, as well as its own case-law, the case law of the European Court of Human Rights, and the Code of Good Practice in Electoral Matters of the Venice Commission.

The Constitutional Court relied on its Judgment file no. Pl. ÚS 73/04, emphasising the importance of

elections in a democratic society and the resulting presumption of their constitutionality and lawfulness. The above judgment and subsequent case law implies that the nullity of elections may only result from a serious violation of the Elections Act which raises questions over the outcome of the election and reasonable doubt as to whether the election and its outcome may be considered as a manifestation of voters' true wishes.

Other than the registration of permanent residence in a municipality, there are no other specific conditions under Czech law in relation to residence with which voters are required to comply. Nonetheless, in considering the applicant's petition seeking a declaration of election nullity, account had to be taken of whether registering the permanent residence of more persons immediately before the local election (and at an address connected with the ownership rights of particular candidates) had a real impact on the election result achieved by the political party nominating these candidates and whether the established fact amounted to a breach of the constitutional principles of a democratic election. The Constitutional Court noted that any potential "unfair practices" may (depending on their severity) detract from the integrity of the election and thus democracy itself. It was therefore necessary to examine the impact of particular acts which might affect the limitations of the equality of the right to vote or the final election outcome (cf. Articles 5 and 102.1 of the Constitution and Articles 21.1, 21.3, 21.4 and 22 of the Charter).

There is a constant line of authority from the Constitutional Court which treats permanent residence as registration data rather than factual data. However, an assessment was needed in this particular case as to whether registration of permanent residence was a calculated action motivated by the establishment of the active right to vote in the municipality of Hřensko, which would be inconsistent with the policy and objective of the provisions of Section 10 of the Population Register act. Under Section 10 of the Population Register act, the right to choose a permanent residence is a subjective public right enforceable in the administrative judicial system. It must nonetheless be emphasised that it is not a separate fundamental right guaranteed by the Constitution, but a right derived from the right to freedom of movement and residence guaranteed by Article 14 of the Charter.

The Regional Court should therefore give proper consideration to the purpose of changes to permanent residence which may be significant enough to influence the electoral outcome. It should also consider the existence (or otherwise) of the

causal connection between the contested changes to permanent residence before the election and the challenged election outcome in terms of any potential circumvention of the Elections Act.

In the decision under dispute, the Regional Court had only reviewed the validity of the election from the perspective of the Population Register Act. Therefore, in the Constitutional Court's opinion, it had failed to assess its lawfulness and validity from the perspective of the impact of changes to permanent residence concerning a certain number of inhabitants immediately prior to the election on the election process as a whole. This amounted to an infringement of the applicant's right to due process under Article 36.1 of the Charter and Article 6.1 ECHR. The Constitutional Court quashed the Decision without pre-judging the ruling of the regional court in separate proceedings concerning the legitimacy of the election in question.

#### *Languages:*

Czech.



#### *Identification: CZE-2011-2-006*

**a)** Czech Republic / **b)** Constitutional Court / **c)** Second Chamber / **d)** 02.06.2011 / **e)** II. ÚS 3647/10 / **f)** Respecting Protection of Privacy – Correspondence of Persons in Custody / **g)** <http://nalus.usoud.cz> / **h)** CODICES (Czech).

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

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

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

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

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

Correspondence, prisoner / Detention / Movement, Neo-Nazi, promotion.

*Headnotes:*

The fact that somebody detained in custody has exercised their right to engage in correspondence with other persons (guaranteed both at constitutional level within the right to inviolability of the person and of privacy pursuant to Article 7.1 of the Charter of Fundamental Rights and Freedoms and at the level of national law pursuant to Paragraph 13 of Law no. 293/1993 Coll., on custody and incarceration) does not, in the absence of other facts, amount to sufficient grounds to extend that person's custody or to reject his or her written vow.

*Summary:*

At the applicant's request, the second panel of the Constitutional Court set aside, by Judgment dated 2 June 2011, the resolution of the Municipal Court in Prague, file no. 6 To 333/2010 dated 15 June 2010. The Court deemed the resolution contrary to Article 3.3 in connection with Articles 7.1 and 8.2 of the Charter.

Criminal proceedings were instigated against the applicant for the criminal offence of support and promotion of the neo-nazi movement and she was taken into custody. In June 2010, the Circuit Court resolved to accept a written vow by the applicant, to establish supervision by a probation officer and to release her from custody. Following a complaint by the state prosecutor, the Municipal Court overturned the Circuit Court's decision and the applicant remained in custody.

In the reasoning behind its decision, the Municipal Court noted that, should the applicant be released, there was a danger she would re-offend, as she was engaged in written correspondence with a large number of people actively involved in right-wing extremism. The applicant alleged that the court had failed to accept her written vows solely on the basis that she had engaged in correspondence.

The right to privacy of persons whose freedom has been lawfully restricted may only be limited to the extent of the objective pursued by the actual restriction of their freedom (see Judgment File no. II ÚS 2379/08). The wording of the provisions in Paragraph 13 of the Law on custody and incarceration reflects the above, in that on the one hand it expressly allows the sending and receiving of correspondence, and on the other it allows for the inspection of the correspondence of persons in custody. The exercise of fundamental rights and freedoms may not result in harm suffered by a person under Article 3.3 of the Charter.

In this particular case, the sole reason provided by the general court to support the potential danger that the applicant would repeatedly commit the offence in respect of which criminal proceedings were initiated was that she was engaged in correspondence with persons active in the sphere of right-wing extremism. The Court failed to address the manner in which the content of the correspondence might have been undesirable.

The Constitutional Court could not consider engagement in correspondence as being substantial *per se* when assessing the continuation of custody.

The establishment and maintenance of relationships with others is governed by the right to inviolability of the person and of privacy pursuant to Article 7.1 of the Charter and may only be restricted for persons in custody by the nature of the custody and the objective pursued by the criminal proceedings. The Constitutional Court accordingly upheld the complaint as the general court had breached the applicant's rights conferred by Article 3.3 in conjunction with Articles 7.1 and 8.2 of the Charter.

Justice Dagmar Lastovecká dissented both in terms of the reasoning and sentence of the decision, noting that the Municipal Court did not accept the applicant's written vows (in lieu of incarceration) only due to reasonable concerns that she would continue to commit the criminal offence in respect of which criminal proceedings had been initiated. According to the dissenting judge, the fact that the applicant had engaged in correspondence with other persons active in the sphere of right-wing extremism was not the sole basis for continuing with her incarceration. She therefore found that the right to inviolability of the person and of privacy was not violated.

*Languages:*

Czech.

*Identification: CZE-2011-2-007*

**a)** Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 28.06.2011 / **e)** Pl. ÚS 17/10 / **f)** Reducing public prosecutors' salaries / **g)** *Sbírka zákonů* (Official Gazette), no. 232/2011; *Sbírka nálezů a*

*usnesení* (Collection of decisions and judgments of the Constitutional Court); <http://nalus.usoud.cz> / **h**) CODICES (Czech).

*Keywords of the systematic thesaurus:*

4.6.6 Institutions – Executive bodies – **Relations with judicial bodies.**

4.7.4.3.1 Institutions – Judicial bodies – Organisation – Prosecutors / State counsel – **Powers.**

4.7.4.3.6 Institutions – Judicial bodies – Organisation – Prosecutors / State counsel – **Status.**

5.2 Fundamental Rights – **Equality.**

*Keywords of the alphabetical index:*

Public prosecutor, salary / Public official, salary / Judicial independence.

*Headnotes:*

The reduction of the salaries of public prosecutors is not unconstitutional *per se*; the activity of the public prosecution service and its position in the system of separation of powers calls for independence that is not comparable to the independence guaranteed by the Constitution to judges or the judicial system.

*Summary:*

By a judgment issued on 28 June 2011, the Plenum of the Constitutional Court dismissed the petition of the District Court in Prague 5 seeking to set aside Section 3.9 of Act no. 201/1997 Coll., on salaries and some other requirements concerning public prosecutors, and on the modification and amendment of Act no. 143/1992 Coll., on salaries and remuneration for standby duty within the budget and some other organisations and authorities, as amended. The Constitutional Court dismissed the remainder of the petition as clearly unfounded.

The constitutional complaint had arisen in connection with proceedings held at that court in which the plaintiff (a public prosecutor) had filed an action directed against the Czech Republic seeking the payment of an amount corresponding to the salary that had been paid to him and the salary that would have been paid to him if the above Act had not been amended by means of Act no. 418/2009 Coll. The applicant contended that the unlawful regulation in question resulted in an encroachment on the independence of public prosecutors and infringement of the right to fair compensation for work, or discrimination against public prosecutors.

The Constitutional Court focused on the applicant's argument that the position of public prosecutors and that of judges is comparable. In the Constitutional Court's view, the position of public prosecutors (public prosecution service) differs from that of judges (courts): public prosecution is systematically included in the executive power, whereas the very essence of the Act on the public prosecutor's office does not provide evidence on the independent character of public prosecutors corresponding to judicial independence.

Furthermore, the Constitutional Court noted that both the Constitution and the Act on the public prosecutor's office, as well as the principle of equality of parties to the proceedings and due process, require independent discharge of the office of public prosecutor within the public prosecutor's office system, which, acting as a special and independent authority *sui generis*, performs tasks defined by the Constitution and the Act and granted exclusively to it. Regarding the discharge of the office of the public prosecutor, the guarantee of independence cannot be perceived as identical to the performance of judicial power. It was not, therefore, possible to conclude that such independence would be threatened by means of interference with public prosecutors' salaries, contrary to the earlier conclusion in the case of judges. Furthermore, the disputed salary restriction was not drastic enough to result in an unconstitutional factual or deliberate hindrance to the tasks entrusted by the Constitution and the Act to the public prosecutor's office.

Regarding the assertion of breach of the right to fair compensation for work under Article 28 of the Charter, the Constitutional Court noted the limitations the principle of proportionality impose on the rights at the legislator's disposal. In order to satisfy the constitutionality test, the legal regulation must follow a legitimate aim and it must be done in a way that may be perceived as a reasonable means to achieve such an aim. In the case of economic and social rights, a legal regulation that would completely negate the given rights would be declared unconstitutional. The present case does not, however, amount to arbitrariness on the part of the legislator, as the intention of the political representation has clearly been to reduce the expenses of the national budget in a number of areas, including a large group of public servants.

With regard to the assertion that public prosecutors had been singled out on an irrational and arbitrary basis as a group whose salaries were to be cut, the Constitutional Court held that Act no. 418/2009 Coll. imposed similar salary cuts on a number of other public officials.

The Constitutional Court did not therefore find that the legislator in this instance had exceeded the limits of rational decision-making to such an extent that public prosecutors would become disadvantaged as a professional group in terms of salary. Their resulting salary level did not amount to an unreasonable equalisation of the salary conditions of various groups of public servants, and the principle of equality was not therefore violated, given the fact that the rationally different position of public prosecutors (compared to other groups of public servants) is associated with a higher salary level. The present case did not lend itself to the notion of constitutional inequality (unequal protection of the law). The Constitutional Court did express concerns that the adoption of non-conceptual steps would reduce the pay gap between public prosecutors and other public sector employees to such an extent that it would threaten the stability of the function of the public prosecutor's office, establishing a conflict with the state's duties and obligations and certain international documents. Nonetheless, the argument of non-accessory inequality was not applicable to this case.

A dissenting opinion to the judgment and its reasoning was submitted by Judges Pavel Holländer, Vlasta Formánková, Vladimír Kůrka, Jan Musil, Eliška Wagnerová, Pavel Rychetský, and Vojen Güttler. With the exception of Judge Vojen Güttler, the dissenting Judges all stated that despite the existence of differences between both professions, the functions of a judge and public prosecutor share the requirement of impartiality, and the stability of the function would be threatened by reduction of the salary (guaranteed moreover by law). According to these Judges, the withdrawal of part of the public prosecutors' salaries showed arbitrariness on the part of the legislator, in breach of the proportionality principle, and (as stated by Judges Pavel Holländer, Eliška Wagnerová, Vladimír Kůrka, and Jan Musil), the principle of non-accessory equality. In his dissenting opinion, Judge Vojen Güttler drew attention to the inadequacy of the measure, stressing that the actual intention of the contested reductions in public prosecutors' salaries was to send a message to the public by legislative power, rather than to reduce public spending (which was after all negligible).

#### *Languages:*

Czech.



#### *Identification:* CZE-2011-2-008

**a)** Czech Republic / **b)** Constitutional Court / **c)** Second Chamber / **d)** 28.06.2011 / **e)** II. ÚS 1518/10 / **f)** Liability of the state for damage incurred as a result of a breach of European law / **g)** <http://nalus.usoud.cz> / **h)** CODICES (Czech).

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

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

3.22 General Principles – **Prohibition of arbitrariness.**

4.17.2 Institutions – European Union – **Distribution of powers between Community and member states.**

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

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

EU law, implementation / Francovich principle.

#### *Headnotes:*

The separation from the national system of liability for damage incurred as a result of a breach of EU law is acceptable from a constitutional perspective. However, the Supreme Court, whose remit is the unification of the interpretation of law, should have dealt with the applicant's request for compensation for damage allegedly suffered as a result of a breach of EU law by the authorities of the Czech Republic. Where it fails to do so, it perpetrates a state of arbitrariness and acts inconsistently with Article 36 of the Charter of Fundamental Rights and Freedoms.

#### *Summary:*

In response to the applicant's petition, the second panel of the Constitutional Court issued a judgment on 28 June 2010 which overturned the decision of the Supreme Court issued on 24 February 2010, file no. 5 Cdo 3556/2007-151, due to its inconsistency with Article 36.1 of the Charter.

The applicant sought damages against the State incurred as a result of maladministration on the part of the Ministry of Health, as a consequence of which a non-state healthcare facility, where the applicant worked as a certified midwife, had been excluded from the health insurance system. The First Instance Court dismissed her action and the municipal court dismissed her subsequent appeal. The Court of

Appeal held that the pronounced result was not based on official procedure and could not therefore establish the State's liability for the damage incurred; it did not conclude that the case in point required any interpretation of European Union law. The Supreme Court dismissed the applicant's extraordinary appeal as inadmissible, not considering publishing the result of a conciliation process (i.e. the procedure of the Ministry which was objected to) as an official procedure. It held that the question of whether Article IV of Directive no. 80/155/EEC placed member states under an obligation to include midwives in the public health insurance system was not substantially material to the decision concerning the claim for damages.

The Constitutional Court noted that the question of liability for damage incurred as a result of a breach of European law and liability for damage incurred in connection with an incorrect official procedure should not be confused, but that it was not possible to conclude the matter simply by stating the difference between both concepts of liability. The general courts (and the Supreme Court in particular) are under a duty to interpret the Act on the liability of the State and to define its relation to the system of liability within European Union law. When carrying out this interpretation, courts must not adopt an arbitrary approach; "arbitrary" in this context also implies the absence of proper explanation as to how and why the solution chosen complies with EU law objectives.

The Constitutional Court held that from a constitutional perspective, it was possible to accept the separation of the system of liability for damage incurred as a result of a breach of EU law from the intra-state system. Nevertheless, the Supreme Court should have dealt with the line of reasoning behind the applicant's claim for damages she had allegedly suffered as a result of a breach of EU law by the authorities of the Czech Republic.

The Constitutional Court set aside the Supreme Court's decision on the basis that it had breached the applicant's right to due process under Article 36.1 of the Charter.

#### *Languages:*

Czech.



#### *Identification: CZE-2011-2-009*

**a)** Czech Republic / **b)** Constitutional Court / **c) / d)** 13.07.2011 / **e)** III. ÚS 3363/10 / **f)** Unconstitutionality of a preliminary injunction pursuant to which a minor is placed in a psychiatric institution after refusing contact with a non-resident parent / **g)** <http://nalus.usoud.cz> / **h)** CODICES (Czech).

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

2.1.1.4.15 Sources – Categories – Written rules – International instruments – **Convention on the Rights of the Child of 1989.**  
3.16 General Principles – **Proportionality.**  
5.3.33 Fundamental Rights – Civil and political rights – **Right to family life.**  
5.3.44 Fundamental Rights – Civil and political rights – **Rights of the child.**

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

Parental right, limitation / Authority, parental.

#### *Headnotes:*

Removing minors from their existing family setting represents not only interference with the right to private and family life, but also interference with the right to privacy regardless of the nature and quality of the minors' original family background. This is all the more applicable when a minor who has the requisite psychological and mental maturity to be able to explain the reasons behind his or her attitude, expressly disagrees with being removed from the family environment.

Placing a healthy minor in a psychiatric institution solely on the grounds of his or her refusal of contact with a non-resident parent does not follow the best interests of the child and represents a breach of his or her right to parental care and upbringing.

#### *Summary:*

The third panel of the Constitutional Court, by a judgment dated 13 July 2011, overturned the decision of the Regional Court in Ostrava, branch in Olomouc, file no. 70 Co 405/2010-979 dated 30 August 2010, as requested by the applicant (A.D) in her constitutional complaint. The above decision was partially overturned, in that part 1 of the decision issued by the District Court in Šumperk file no. 40 P 177/2000-885 dated 30 June 2010 was overturned on the basis that the stipulation "the petition submitted by the mother seeking to have the preliminary measure ordered by the decision of the Regional Court in



Ostrava, branch Olomouc dated 9 September 2009, file no. 70 Co 426/2009-75 as amended by an amending resolution decision dated 2 November 2009, file no. 70 Co 426/2009-85 ordering the mother to place her minor child in a psychiatric institution in Opava is dismissed” was contrary to Articles 10.2, 32.4 and 36.1 of the Charter of Fundamental Rights and Freedoms, Article 8 ECHR and Article 3 on the Convention on the Rights of the Child.

In the course of the proceedings dated 27 June 2009 on visiting and contact between the applicant’s minor son and his father, the District Court dismissed an application seeking a preliminary order to place the minor in the Psychiatric institution in Opava. The Court also stayed proceedings on placement of the minor into institutional custody as the minor’s guardian *ad litem* (the city council) withdrew its application.

In a resolution dated 29 September 2009, the Regional Court overturned the above decision and set aside a preliminary measure which had placed the applicant under an obligation to hand the minor child over to the psychiatric institution in Opava. It stated that in the interim period the circumstances of the parties to the proceedings (the minor’s parents) needed adjustment, and that the “negative and antagonising influence of the mother on the minor disturbing the minor’s mental development mainly in relation to his relationship with his father” required restriction.

The applicant complied with the Regional Court’s resolution and placed her minor son in the psychiatric institution on 25 January 2010. In a resolution dated 30 June 2010, the District Court discharged the Regional Court’s measure, having found that the minor’s six month stay in the institution failed to achieve the objective pursued by the Court.

The Regional Court overturned the District Court’s decision as it had not identified any grounds to return the minor to the mother’s custody.

The applicant suggested that the Regional Court erred at law in the verification and assessment of the evidence and statements put forward by the parties (i.e. it had only taken the father’s statement into consideration, omitting evidence she had put forward as well as the minor’s statement). She assumed that the Regional Court’s decision was non-reviewable. She also contended that the minor was not heard during the proceedings before general courts and his placement in a psychiatric institution did not further his best interests.

The Constitutional Court concentrated its assessment on whether, in this particular case, the conditions justifying the preliminary measure were met. It noted that a preliminary measure issued in partial proceedings on institutional care could not stand upon conclusion of such proceedings. As the proceedings were stayed (by the District Court resolution of 28 July 2009), the preliminary measure should not have subsequently been ordered. As the fundamental procedural facts for the preliminary measure were not satisfied, its issuance (or “renewal”) by the District Court represented a fundamental fault resulting in a breach of the principles of due process set out in Article 36.1 of the Charter of Fundamental Rights and Freedoms.

The Constitutional Court proceeded to examine the proportionality of the preliminary measure (placing the minor in a psychiatric institution) and the extent of interference with the family life both of the applicant and the minor. The Constitutional Court noted that the removal of a minor from his existing family environment represented not only interference with his private and family life but also with his right to privacy. Such a conclusion is all the more applicable when a child who has sufficient psychological and mental maturity to be able to explain the underlying reasons for his attitude expressly disagrees with being removed from the family environment. It held that the family environment represents a child’s area of freedom and privacy. Any other environment (such as an institutional facility, where the regime does not allow for the exercise of freedom), cannot be deemed to represent an area of privacy and freedom for the child.

The Constitutional Court acknowledged that the measure placing the applicant under an obligation to put the minor in a psychiatric institution pursued a legitimate objective, but found that this type of environment did not appear to be commensurate with the child’s interests. General Courts are obliged to consider the best interests of the child when ruling in family matters. They had paid insufficient regard to the question of whether the environment of a psychiatric institution represented a suitable environment for a healthy child and not verifying whether the minor could not instead have been placed temporarily in the care of another appropriate facility.

The Constitutional Court found that the general courts breached the rights of both the minor and the applicant to have the interests of the child taken into account when deciding on matters relating to a minor pursuant to Article 3.1 of the Convention on the Rights of the Child. They also violated the right to parental upbringing and care pursuant to Article 32.4 of the Charter as well as the applicant’s right to due process under Article 36.1 of the Charter.

The Constitutional Court also noted in this regard that in the course of proceedings before the general courts the right of the minor to be heard and to self-expression granted by Article 12 of the Convention on the Rights of the Child and by Article 3 of the European Convention on the Exercise of Children's Rights was breached. Although the above right is conferred upon minors and not upon their parents, in the instant case the breach of the above rights of the minor resulted in encroachment on the applicant's rights to due process under Article 36.1 of the Charter of Fundamental Rights and Freedoms.

*Languages:*

Czech.



## Finland

### Supreme Administrative Court

#### Important decisions

*Identification:* FIN-2011-2-001

**a)** Finland / **b)** Supreme Administrative Court / **c)** Third Chamber / **d)** 09.03.2011 / **e)** 588 / **f)** / **g)** Yearbook of the Court, 2011:22 / **h)**.

*Keywords of the systematic thesaurus:*

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

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

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

*Keywords of the alphabetical index:*

Roma, equality / Roma, discrimination, harassment / Media, television, programme, expression, freedom, interests, balance.

*Headnotes:*

When assessing if the broadcast of a television programme had violated the prohibition against discrimination and harassment laid down in the Non-Discrimination Act, regard was to be had to the protection of freedom of speech guaranteed under Section 12.1 of the Constitution and Article 10 ECHR.

*Summary:*

I. Petitioners A and B asked the Discrimination Board to investigate the discrimination offence inherent in the programme series *Manne-TV/Romano-TV*, produced by the Finnish Broadcasting Company YLE, and either to prohibit the company from repeating its conduct, discriminatory against the Roma people, or to prohibit the harassment contained in the programme.

The Discrimination Board rejected the petition and the Helsinki Administrative Court dismissed the appeal lodged against the Board's decision.

II. The Supreme Administrative Court upheld the outcome of the Administrative Court's decision. In the reasoning of its decision, the Supreme Administrative Court found the matter to involve a decision issued by the Discrimination Board as a result of a petition submitted by A and B. On the basis of the appeal lodged by the two, the Supreme Administrative Court was to determine whether the Finnish Broadcasting Company YLE had violated the prohibition against discrimination referred to in Section 6.1 of the Non-Discrimination Act through the deliberate or *de facto* infringement of the dignity and integrity of a person or group of people by the creation of an intimidating, hostile, degrading, humiliating or offensive environment (harassment) in the manner referred to in Subsection 2.3 of the said section.

The Supreme Administrative Court found that the prohibition against harassment laid down in the Non-Discrimination Act applies not only to individuals, but also to groups of persons, as indicated by the wording of the said provision. The Court of Justice of the European Union in its Judgment in case C-54/07, *Firma Feryn*, of 10 July 2008 (ECR 2008, I-5187, paragraph 25) has stated that the existence of direct discrimination within the meaning of the Racial Equality Directive is not dependant on the identification of an applicant who claims to have been a victim. In Finland, the Roma people constitute a group of persons, identifiable in respect of their traditional culture, for whom there is a "presumption of discrimination" within the meaning of the Non-Discrimination Act.

When assessing whether the prohibition against discrimination and harassment has been violated, regard must be had to the protection of freedom of speech guaranteed under the Constitution and the European Convention on Human Rights. The legislative history of the Non-Discrimination Act contains the remark that the provision is not intended to circumscribe the basic rights of freedom of expression and publicity enshrined in Section 12 of the Constitution.

The Supreme Administrative Court found that the scope of the protection of freedom of expression and the threshold for interference therewith shall be assessed as a whole in the context in which the freedom of expression is exercised. The freedom of expression guaranteed under Section 12 of the Constitution entails the right to express, disseminate and receive information, opinions and other communications without prior prevention by anyone. As stated in the legislative history of the Constitution, the freedom of expression guaranteed by the Constitution is of a considerably wide scope and its main purpose is to ensure the key conditions for a democratic

society: the freedom to hold opinions, to open public debate, to free development and diversity of mass communications, and the right to direct public criticism against the exercise of public power.

The freedom of expression guaranteed by the Constitution applies to the various forms which expression may take, and thus also concerns, besides programming *per se*, the various forms of artistic expression.

The European Court of Human Rights in its case-law has also held that the freedom of expression extends not only to the press, but also to the audio-visual sector. Although the exercise of the freedom of expression may in such an instance not infringe e.g. the reputation or rights of another, these being protected under Article 10.2 ECHR, the sharing of information and ideas imparted in the public interest nonetheless constitutes an essential element of the freedom of expression. The general public, for its part, has the right to receive such information and ideas. Journalistic freedom also covers possible recourse to a degree of excess, exaggeration, or even provocation (Judgment issued by the Grand Chamber of the European Court of Human Rights on 22 October 2007 in the case of *Lindon, Otchakovsky-Laurens & July v. France*, paragraph 62).

The freedom of expression guaranteed under the European Convention on Human Rights encompasses also the freedom of artistic expression, which entails the right to take part in all kinds of exchanges of cultural, political and social information and ideas. Article 10 ECHR protects not only the substance of the information and ideas communicated by artistic means, but also the form in which these are expressed (Judgment of 29 March 2005 in the case of *Alinak v. Turkey*, paragraphs 42 and 43).

Protection is afforded in the case-law of the European Court of Human Rights to satire as a form of artistic expression. The exaggeration and distortion of reality inherent to satire seek to provoke people into action. Any interference with the right to exercise the freedom of expression in the form of satire shall, according to the Court's case-law, be examined with particular care (Judgment of 25 January 2007 in the case of *Vereinigung Bildender Künstler v. Austria*, paragraph 33 and Judgment of 20 October 2009 in the case of *Alves da Silva v. Portugal*, paragraph 27).

A programme series intended to be humorous and containing satirical elements enjoys, as a form of artistic expression, the protection of freedom of expression guaranteed under both the Constitution and the European Convention on Human Rights. The sketches in the programme series use caricatures of

Roma characters to highlight the stereotypical bias against Roma people held by the mainstream population. The programme series presents such bias as neither allegation nor fact, nor is the manner of presentation hostile *per se*.

In its case-law (e.g. the case of *Giniewski v. France*, 31 January 2006, paragraph 43, *Reports of Judgments and Decisions* 2006-I; *Lindon, Otchakovsky-Laurens & July v. France*, paragraph 45; and *Aguilera Jiminez et al. v. Spain*, paragraph 22), the European Court of Human Rights has stated that freedom of expression under Article 10 ECHR is applicable to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, and to those that offend, shock or disturb, if only a portion of the population (*Vereinigung Bildender Künstler v. Austria*, paragraph 26). According to the Court, this is justified in the interests of the demands of pluralism, tolerance and broadmindedness, without which there is no democratic society.

Exercise of the freedom of expression guaranteed by the European Convention on Human Rights carries with it both duties and responsibilities, amongst them an obligation to avoid, as far as possible, expressions that are gratuitously offensive to others and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs (*Giniewski v. France*, paragraph 43).

Based on information submitted in the case, the bias held by the mainstream population, as conveyed in the programme series by the sketches and the caricatured Roma characters appearing therein, was capable of offending some of the Roma population. The appellants also submitted information to verify that during the airing of the programme series, some Roma persons were made subject to ridicule and verbal abuse.

The possibility that the airing of the programme series contributed to the arising of the isolated offensive situations described by the appellants cannot be ruled out. Some of the sketches in the series may have been perceived as demeaning or humiliating, and they may have caused resentment among some in the Roma community. Ramifications of this kind are most unfortunate for the individuals concerned.

However, some Roma people also viewed favourably the debate launched by the programme series. The series in fact gave rise to brisk debate in the press and on television on the weaker economic and social standing of the Roma people when compared to the mainstream population. The programme series contains no hostility against the Roma people, nor does it contain exaggeration or provocation, resorting

to which would not be permissible within the boundaries of the freedom of broadcasting a television programme intended to be humorous. The programme series furthermore is not documentary by nature, nor could it be mistaken as such. The caricatured Roma characters and sketches in the series were not depictions of reality, and it was therefore not necessary to include in a programme series of this kind, containing satirical elements, any balancing element to bring up e.g. issues typically associated with the mainstream population.

On the above grounds, the Finnish Broadcasting Company YLE was found not to have violated the prohibition against discrimination and harassment.

III. Decision by vote, 4-1. The dissenting Justice held that the prohibition against discrimination and harassment had been violated. This Justice would have overturned the decisions of the Administrative Court and Discrimination Board and remitted the matter to the Board for re-consideration.

#### *Languages:*

Finnish (the title also in Swedish).



#### *Identification:* FIN-2011-2-002

**a)** Finland / **b)** Supreme Administrative Court / **c)** Third Chamber / **d)** 13.04.2011 / **e)** 1025 / **f)** / **g)** Yearbook of the Court, 2011:39 / **h)** *Lakimies*, 2011, 788.

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

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

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

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

Candidate, office, appointment, civil servant / Conflict of an Act with the Constitution, appeal, prohibition.

*Headnotes:*

A decision of the Government concerning appointment to office did not, in the manners referred to in Article 6 ECHR, concern the rights and obligations of the unsuccessful candidate. An opportunity to bring the matter before a court through an ordinary appeal was not safeguarded under national law.

The State Officials Act included a provision prohibiting appeal against decisions concerning appointments to office. This provision was not in evident conflict with the Constitution in the manner referred to in Section 106 of the Constitution.

*Summary:*

I. The Government appointed person A to the office of the Environment Counsellor in the Environmental Permits Office. According to the relevant instructions for appeal, the decision was non-appealable pursuant to Section 59 of the State Officials Act. Person B, who had also applied for the position, lodged an appeal against the Government decision with the Supreme Administrative Court and asked that his appeal be heard because based on Section 106 of the Constitution, the prohibition of appeal referred to in Section 59 of the State Officials Act could not be applied as it was in evident conflict with Section 21 of the Constitution (protection under the law).

II. The Supreme Administrative Court ruled the appeal inadmissible. In the reasoning of its decision, the Court firstly quoted the national legislation applicable to the matter and thereafter considered the relevance of the European Convention on Human Rights *vis-à-vis* the prohibition of appeal.

Regard shall be had to the case-law of the European Court of Human Rights upon application of the European Convention on Human Rights. According to this Convention, the right to a fair trial safeguarded for everyone within the scope of application of Article 6 ECHR (in matters concerning "civil rights and obligations") entails a fundamental right to bring a matter to a court for consideration either through an appeal or by other means.

Regard to the case-law involving Article 6 ECHR shall also be had upon interpretation of Section 21 of the Constitution. This behoves an examination of whether a decision on appointment to office involves a right within the scope of application of Article 6 ECHR. If this is the case, then that right also comes within the scope of application of Section 21 of the Constitution, as the said provision applies to all matters within the scope of the protection afforded under Article 6

ECHR, whereas exclusion of the disputed matter from the scope of application of Article 6 ECHR does not necessarily exclude the matter from the scope of application of Section 21 of the Constitution, its scope of application being wider in some respects.

In this case, regard as concerns the scope of application of the European Convention on Human Rights shall in particular be had to the judgment issued in the case of *Vilho Eskelinen et al. v. Finland* (19 April 2007). The said judgment is a ruling of the Grand Chamber expressly concerning the conditions for application of Article 6 ECHR to matters involving public officials. It has particular precedent value also in light of the fact that the ruling was intended to determine generally valid criteria for resolving when a dispute involving public service law comes within the scope of application of Article 6 ECHR, earlier case-law (*inter alia*, the case of *Pellegrin v. France*, 8 December 1999, *Bulletin* 1999/3 [ECH-1999-3-009]) having been deemed to be unsatisfactory.

In its ruling, the Court of Human Rights accepted that Article 6 ECHR may not necessarily be applicable to all disputes involving public service law, as the State may have an interest in controlling access to a court when it comes to certain categories of staff. It is primarily for the Contracting States to identify expressly those areas of public service involving the exercise of the discretionary powers intrinsic to State sovereignty where the interests of the individual must give way. The Court exerts its supervisory role subject to the principle of subsidiarity verifying that the dispute is indeed such as to justify the application of the exception to the guarantees of Article 6 ECHR, which as a rule also apply to public service relationships. Unlike held in the *Pellegrin* case, the crucial criterion in assessing the applicability of Article 6 ECHR was not solely whether the civil servant participates in the exercise of public power.

Based on the aforementioned case, it may be concluded that a dispute involving public service law falls outside the scope of application of Article 6 ECHR when two conditions are met. Firstly, the national law must exclude access to a court for the civil servant in question. Secondly, the exclusion must be justified in light of the nature of the dispute or the matter.

The Supreme Administrative Court found that the prohibition of appeal under Section 59 of the State Officials Act is unequivocal and cannot be excluded through a 'rights-oriented' interpretation of the law. The case thus involved an examination of whether safeguarding the right of appeal was required under Section 21 of the Constitution, when interpreted in light of Article 6 ECHR, and whether application of the

prohibition of appeal was in evident conflict with the Constitution in the manner referred to in Section 106 of the Constitution.

The first condition imposed in the *Eskelinen* case for exclusion of the matter from the scope of application of Article 6 ECHR is met in that under national law, the right of an applicant for office to bring his case to a court of law is withheld owing to the aforementioned prohibition of appeal. What remains to be resolved is thus whether there is acceptable justification for the prohibition of appeal.

The traditional justification for the prohibition of appeal has been held to be that no one has a subjective right to be appointed to office, this not being in conflict with the fact that in Section 125 of the Constitution, the general grounds for appointment are defined in a manner which encroaches upon the discretion of the party making the appointment. Above all, the said grounds mean that no one failing to satisfy these conditions or the supplementary qualifications shall be appointed to office. However, if this nonetheless occurs, a person injured by such unlawful appointment has access to an extraordinary appeal, pursuant to which the decision to appoint may be annulled by the Supreme Administrative Court. The appointment of a person, who does not meet the qualifications provided, is unlawful and can be annulled. However, no applicant who satisfies the general grounds for appointment and other qualifications has an actual right to be appointed, as the party making the decision has considerable discretion in the matter.

Access to protection under the law, however, has been deemed to an increasing degree to demand the right of appeal also in matters of a more discretionary nature. Consequently, the Constitutional Law Committee of Parliament in its statement (PeVL 51/2010 vp) on the Government Bill on amending the State Officials Act (HE 181/2010 vp), issued in autumn 2010, held that the discretion associated with appointment decisions does not make them by nature different from other administrative decisions to such a degree that the right of appeal could not be extended to these. The said Bill proposes, in the manners described below, to retain the prohibition of appeal only in respect of appointments to office. The Constitutional Law Committee proposed that the Administration Committee consider the extension of the right of appeal to apply to appointments to office and public service relationships, but accepted that such a Bill could be considered in enactment procedure for ordinary Acts. This being the case, the Committee did not find the lack of appeal in matters of appointment to office to be unconstitutional.

According to the said Government Bill, decisions on appointments to office would in future represent the most important exception from the new main rule, under which appeal could be lodged with a court of law also against decisions involving legislation governing State officials. Even before the proposed legislative amendment, case-law has evolved in a direction generally to exclude prohibition of appeal in connection with decisions concerning the rights and obligations of public officials already in office wholly regardless of whether the said official participates in the exercise of public power and to what extent. Accordingly, the Supreme Administrative Court, in reliance on Section 106 of the Constitution, found the existing-law provision on prohibition of appeal to be contrary to Section 21 of the Constitution and did not apply the provision in a case involving the transfer of a public official already in office to other duties without the said official's consent, which consent was required under law (Supreme Administrative Court decision KHO 2008:25).

As justification for keeping decisions on appointments to office subject to the prohibition of appeal, the Government Bill (HE 181/2010 vp) makes reference not only to the fact that no one can be deemed to have a subjective right to be appointed to office, but also to the problems arising to the efficiency of administration, were appointments to office made subject to ordinary appeal. A further justification is given of the uncertainty arising to applicants from possible legal proceedings, such uncertainty among other things being capable of hampering the State's opportunities of hiring the best possible staff. It was moreover held in the Government Bill that considering the existing legal remedies, access to ordinary appeal would not markedly enhance protection under the law. In this respect, reference was made *inter alia* to the aforementioned extraordinary appeal as well as the fact that decisions on appointment to office taken by the Government, which the case at hand involves, are subject to the advance supervision of legality carried out by the Chancellor of Justice who reviews all Government proposals for appointments to office. Proceedings under the Act on Equality between Women and Men and the Non-Discrimination Act are furthermore available to an applicant wishing to invoke procedure contrary to these Acts in appointments to office.

Although the aforementioned Government Bill 181/2010 vp lapsed because time did not permit its consideration before the parliamentary elections scheduled for April 2011, the Bill for its part indicates that objective justification of the kind required by the European Court of Human Rights may be presented for the prohibition of appeal in matters involving appointments to State office. Considering also that

the aforementioned other legal remedies besides regular appeal provide legal protection inasmuch as the appointment decision involves not only the relevant discretion, but also obvious questions of legality, the exclusion of matters involving appointment to State office from ordinary appeal is not in violation of Article 6 ECHR, nor do any further-ranging demands in this respect arise from EU law. The rules are furthermore not in evident conflict with the Constitution.

*Languages:*

Finnish, Swedish and two sámi languages.



## France

### Constitutional Council

#### Important decisions

*Identification:* FRA-2011-2-011

**a)** France / **b)** Constitutional Council / **c)** / **d)** 11.06.2010 / **e)** 2010-6/7 QPC / **f)** Stéphane A and others (Article L.7 of the Electoral Code) / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 12.06.2010, 10849 / **h)** CODICES (French).

*Keywords of the systematic thesaurus:*

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

4.9.7.1 Institutions – Elections and instruments of direct democracy – Preliminary procedures – **Electoral rolls.**

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

*Keywords of the alphabetical index:*

Penalty, necessity / Penalty, individualisation.

*Headnotes:*

The provision of the Electoral Code requiring the removal from the electoral rolls of persons vested with public authority, entrusted with a public service function or holding public elected office where they commit certain offences is contrary to the Constitution in that it is *ipso jure* attached to various criminal convictions without the court which orders these measures being required to make an express pronouncement on them, or being able to modify their duration. Consequently, this ancillary penalty, both automatic and incapable of individualisation, is contrary to the principle of the individualisation of penalties.

*Summary:*

The Electoral Code provides for five years' disqualification from entry in the electoral rolls (hence ineligibility) for persons convicted of certain offences

punishable under the Penal Code or for the serious offence of failing to report any of these offences.

According to the appellants, these provisions infringed the principles of necessity and individualisation of penalties guaranteed by Article 8 of the Declaration of the Rights of Man and the Citizen of 1789.

The Council applied Article 8 of the Declaration and held that the principle of individualisation of penalties deriving from it presupposed that the penalty involving disqualification from entry in an electoral roll and the resultant unfitness to discharge a public elected office could be applied only if the court had expressly ordered it, taking account of the circumstances specific to each case.

Now, the disqualification from entry in the electoral roll imposed by the impugned provision is chiefly intended to punish certain acts more severely where they are committed by persons holding public elected office, and entails unfitness to hold a public elected office for a term equal to five years.

The Council observed that this penalty denying the exercise of the right to vote was *ipso jure* attached to various criminal convictions without the court ordering these measures being required to pronounce it expressly, despite the punitive character of this penalty. Nor could it modify the duration thereof, even though this disqualification could be lifted fully or partially, even immediately, from the person concerned under certain conditions; this possibility could not in itself ensure fulfilment of the requirements deriving from the principle of the individualisation of penalties. Consequently, the impugned provision was declared unconstitutional.

#### *Cross-references:*

- Decision of the Constitutional Council no. 99-410 DC, 15.03.1999, New Caledonia Institutional Act;
- State Council, 01.07.2005, MM. Ousty and Gravier;
- Court of Cassation, 18.12.2003, no. 3-60315.

#### *Languages:*

French.



#### *Identification: FRA-2011-2-012*

**a)** France / **b)** Constitutional Council / **c)** / **d)** 06.10.2010 / **e)** 2010-39 QPC / **f)** Mrs Isabelle D. and Isabelle B. (Adoption by an unmarried couple) / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 07.10.2010, 18154 / **h)** CODICES (French, German, English, Spanish).

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

5.2.2.12 Fundamental Rights – Equality – Criteria of distinction – **Civil status**.  
5.3.32 Fundamental Rights – Civil and political rights – **Right to private life**.

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

Parental authority / Couple, same-sex / Parentage / Adoption.

#### *Headnotes:*

The Constitutional Council, seized of a Priority Constitutionality Question on the basis of Article 61-1 of the Constitution, recalled that it must not supplant the legislator in assessing the difference in treatment (justified by the child's interest) between married and unmarried couples regarding the establishment of adoptive parentage for underage children and the inferences that are to be drawn from it concerning the specific situation of children raised by two persons of the same sex. Moreover, the right to lead a normal family life does not presuppose that the relationship between a child and the person cohabiting with its father or mother creates an entitlement to have a relationship of adoptive parentage established. Article 365 of the Civil Code is therefore consistent with the Constitution.

#### *Summary:*

The Constitutional Council ruled on a referral made by the Court of Cassation on 9 July 2010 concerning the constitutionality of Article 365 of the Civil Code and certain constitutionally guaranteed rights.

This Article lays down the rules regarding the transfer of parental authority over an underage child in the event of simple adoption: the adopter is alone vested with parental authority concurrently with his/her spouse, unless he/she is the spouse of the adoptee's father or mother, who retains sole exercise thereof, subject to a joint declaration with the adopter.



The Council gave its opinion on the constitutionality of Article 365 of the Civil Code regarding its effect of prohibiting in principle the adoption of the partner's or the cohabitee's underage child, thereby establishing a difference with married couples.

The Court of Cassation held, as it had consistently done since 2007, that where the natural mother or father wished to continue bringing up the child, the transfer of the rights of parental authority which would result from adoption by the natural parent's cohabitee or partner was contrary to the child's interests and thus prevented the pronouncement of such an adoption.

The appellants challenged the constitutionality of Article 365 of the Civil Code in that, in depriving the underage child of the possibility of being adopted by the partner or cohabitee of its parent, it thereby denied it the recognition of a pre-existing social bond of parentage and thus infringed the right to a normal family life and the principle of equality before the law.

The Council considered Article 365 of the Civil Code, as interpreted by the Court of Cassation, to be in accordance with the Constitution.

Indeed, it did not violate the right to lead a normal family life, which did not presuppose the right to have a relationship of adoptive parentage established.

Moreover, the Constitutional Council recalled that the principle of equality, Article 6 of the Declaration of the Rights of Man and the Citizen of 1789, did not preclude the legislator from dealing with different situations in different ways, or waiving equality for reasons of public interest provided that the resultant difference in treatment was directly related to the objective of the law establishing it; the Council also recalled that, by upholding this construction of the rule, the legislator had considered that the difference in the situation of married and unmarried couples was capable of justifying, in the child's interests, a difference in treatment regarding the establishment of adoptive parentage in respect of underage children.

Furthermore, it was not for the Council to substitute its own assessment for the legislator's on such an issue, particularly regarding the inferences to be drawn, in the matter of parentage and parental authority, from the special situation of a child brought up by two persons of the same sex.

#### Cross-references:

- Court of Cassation, 1<sup>st</sup> civil division, 20.02.2007, Judgment no. 6-15647.

#### Languages:

French.



#### Identification: FRA-2011-2-013

**a)** France / **b)** Constitutional Council / **c)** / **d)** 06.10.2010 / **e)** 2010-45 QPC / **f)** M. Mathieu P. (Internet domain names) / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 07.10.2010, 18156 / **h)** CODICES (French, German, English).

#### Keywords of the systematic thesaurus:

1.6.5.5 Constitutional Justice – Effects – Temporal effect – **Postponement of temporal effect**.  
 3.10 General Principles – **Certainty of the law**.  
 4.5.2.4 Institutions – Legislative bodies – Powers – **Negative incompetence**.  
 5.4.6 Fundamental Rights – Economic, social and cultural rights – **Commercial and industrial freedom**.

#### Keywords of the alphabetical index:

Domain name / Registration office / Registrar / *Registraire*.

#### Headnotes:

The management of Internet domain names is entrusted to registration bodies duly authorised by Article 45 of the Postal and Electronic Communications Code. This provision, deferring to a decree of the *Conseil d'État* to make the arrangements for its implementation, does not adequately define the conditions of its operation. The legislator lays down no guarantee of respect for the principles of safeguarding the freedom of enterprise and the freedom of communication. The repeal of this provision on the ground of unconstitutionality was deferred to enable the legislator to establish a new legislative framework for the assignment of domain names.

*Summary:*

In an application to set aside an order identifying the registration office for domain names as “.fr”, a Priority Constitutionality Question was raised regarding Article 45 of the Postal and Electronic Communications Code on the assignment of domain names.

In the appellant's opinion, this provision allowed undue latitude to the administrative authority and the bodies designated by it in the assignment of domain names, disregarding the extent of the legislator's competence.

In the context of Priority Constitutionality Questions, only those legislative provisions liable to infringe the rights and freedoms secured by the Constitution can be reviewed. The Constitutional Council therefore recalled that the legislator's disregard for its own competence can only be pleaded in such a question where a right or freedom secured by the Constitution is affected. The Council held that, by not establishing an adequate legislative framework, the legislator did not establish any guarantee that the administrative authority and the aforesaid bodies would respect the freedom of enterprise and the freedom of communication enshrined in Article 11 of the Declaration of the Rights of Man of 1789. This provision was therefore consistent with the Constitution.

For the sake of legal certainty, the Council deferred in time the effects of its repeal to 1 July 2011 to enable the legislator to remedy the lack of competence found, specifying the effects of its decision on the regulatory acts issued on the basis of this unconstitutional provision.

*Languages:*

French.

*Identification:* FRA-2011-2-014

**a)** France / **b)** Constitutional Council / **c)** / **d)** 07.10.2010 / **e)** 2010-613 DC / **f)** Act prohibiting concealment of the face in public places / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 12.10.2010, 18345 / **h)** CODICES (French, German, English).

*Keywords of the systematic thesaurus:*

5.2.2.1 Fundamental Rights – Equality – Criteria of distinction – **Gender**.

5.2.2.6 Fundamental Rights – Equality – Criteria of distinction – **Religion**.

5.3.19 Fundamental Rights – Civil and political rights – **Freedom of opinion**.

*Keywords of the alphabetical index:*

Concealment of the face / Public place / Public order, protection.

*Headnotes:*

Prohibiting concealment of the face in public places cannot, without unduly trenching upon Article 10 of the 1789 Declaration, restrict the exercise of religious freedom in places of worship open to the public.

*Summary:*

On 7 October 2010 the President of the National Assembly and the President of the Senate referred the bill prohibiting concealment of the face in public places to the Constitutional Council. The bill prohibited the wearing in public places of dress intended to conceal the face, except in accordance with authorisations by regulation or in the context of sporting or artistic pursuits or cultural events.

First, Article 4 of the Declaration of the Rights of Man and the Citizen provides that the exercise of natural human rights can be circumscribed only by law, and Article 5 of the same Declaration provides that the law prohibits any action detrimental to society; moreover, Article 10 protects freedom of opinion, even of a religious kind, with due respect for public order.

Finally, the 1946 preamble guarantees women equal rights to those of men, and women who mask their faces, willingly or not, find themselves in a situation of exclusion and inferiority which is manifestly incompatible with the constitutional principles of liberty and equality.

The legislator has had to cope with the evolution of mores and the appearance of practices, hitherto sporadic and exceptional, of concealing one's face in public. Accordingly, it is forbidden to conceal one's face in public places, provided that religious freedom is not restricted in places of worship open to the public.

Given that the legislator thereby strikes a balance between protection of the constitutionally guaranteed fundamental rights and preservation of public order by limiting a previously exceptional practice, the preservation of public order and protection of constitutionally guaranteed rights are not reconciled in a manifestly disproportionate manner.

However, the Constitutional Council delivered a decision affirming the conformity of the law with the Constitution subject to the reservation presented in the headnotes.

#### *Cross-references:*

- 29.09.2004, Reading of 08.10.2004, no. 269077, 269704 – French Union for National Cohesion.

#### *Languages:*

French.



#### *Identification: FRA-2011-2-015*

**a)** France / **b)** Constitutional Council / **c)** / **d)** 04.11.2010 / **e)** 2010-614 DC / **f)** Act authorising the approval of the agreement between France and Romania on co-operation for the protection of isolated Romanian minors in French territory / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 06.11.2010, 19825 / **h)** CODICES (French).

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

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

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

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

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

Minor, foreign, remedy, right / Foreigner, underage, remedy, right.

#### *Headnotes:*

The Act authorising the approval of an agreement establishing a procedure to escort an isolated minor back to Romania at the request of the Romanian authorities is contrary to Article 16 of the Declaration of the Rights of Man and the Citizen of 1789 in that neither domestic law nor the impugned Act contemplates the possibility for the minor or an interested person to avail of an effective remedy before the courts to the decision taken by the prosecution.

#### *Summary:*

Upon a request for its opinion by 60 members of parliament, the Council made its pronouncement on the Act authorising the approval of the agreement between the Government of the French Republic and the Government of Romania on co-operation for the protection of isolated Romanian minors in the territory of the French Republic and their return to their country of origin, as well as on combating criminal networks for the exploitation of minors.

In its decision of 4 November 2010, the Council declared the Act unconstitutional having regard to Article 16 of the Declaration of the Rights of Man and the Citizen (“A society in which the observance of the law is not assured, nor the separation of powers defined, has no Constitution at all.”).

Indeed, the Act under review did not permit the decision on a minor’s return to be challenged where it was taken by the prosecution following a request by Romania, and thus infringed the right of the minor or of any interested person to avail themselves of an effective remedy in court.

#### *Cross-references:*

- Decision of the Constitutional Council no. 71-44 DC of 16.07.1971, Freedom of association;
- State Council, 27.06.2008, no. 290750, Union of Families in Europe.

#### *Languages:*

French.



*Identification: FRA-2011-2-016*

**a)** France / **b)** Constitutional Council / **c)** / **d)** 26.11.2010 / **e)** 2010-71 QPC / **f)** Ms Danièle S. (Hospitalisation without consent) / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 2010, 21119 / **h)** CODICES (French, German, Spanish).

*Keywords of the systematic thesaurus:*

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

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

3.16 General Principles – **Proportionality.**

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

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

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

5.3.5.1.2 Fundamental Rights – Civil and political rights – Individual liberty – Deprivation of liberty – **Non-penal measures.**

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:*

Mental disorder, treatment, consent, forced hospitalisation / Medical treatment, private clinic.

*Headnotes:*

The procedural arrangements which attend the hospitalisation, at the request of a third party, of persons suffering from mental disorders ensure that the procedure is only applied in cases where it is necessary and proportionate. While Article 66 of the Constitution stipulates that all deprivation of liberty is to be placed under the control of the judicial authority, it does not require that any custodial measure be referred to it beforehand.

However, the Council recalled that individual freedom cannot be deemed protected unless the court acts as promptly as possible. It considered that, by providing for the possibility of maintaining hospitalisation without consent beyond a fortnight without the intervention of a court of a judicial nature, the legislator infringed the rights guaranteed in Article 66 of the Constitution.

Finally, since a custodial measure is at issue, the right to an effective remedy in court is complied with

provided that the ordinary court is required to rule promptly on the application for immediate release.

*Summary:*

The Council of State referred to the Constitutional Council a Priority Constitutionality Question transmitted on 24 September 2010, concerning on the one hand the lack of any guarantee of the conditions under which a person can be admitted to a private clinic at the request of a third party, then kept hospitalised without his/her consent, and on the other hand the inadequacy of the recognised rights of persons hospitalised in this way and the unconstitutionality of the Public Health Code's provisions on the forced hospitalisation procedure.

The Council divided its decision into three parts.

First, for procedural reasons the Council declined to rule on the constitutionality of provisions on the forced hospitalisation procedure, considering that it had no jurisdiction to challenge the decision by which the Council of State or the Court of Cassation had determined the applicability or otherwise of a provision to the dispute (Article 23-5 of the order of 7 November 1958). It thus declined to rule on any question not referred by the Court of Cassation or the Council of State.

Concerning the conditions of hospitalisation at a third party's request, the Council drew a distinction between the conditions of admission and the retention of a person admitted without his or her consent.

It is for the legislator to ensure that a balance is struck between protection of the health of persons suffering from mental disorders, and prevention of breaches of public order, with the exercise of the constitutionally guaranteed freedoms. The impugned provisions lay down and surround with procedural safeguards the conditions for the hospitalisation without consent, at a third party's request, of persons suffering from mental disorders rendering their consent impossible, whose state of health demands immediate care accompanied by constant surveillance. By establishing in these terms the basic conditions and the proper procedural safeguards to ensure that hospitalisation without consent at a third party's request is only carried out in cases where it is appropriate, necessary and proportionate to the patient's state of health, the legislator did not disregard its obligations and consequently the aforesaid provisions comply with the Constitution. Furthermore, Article 66 of the Constitution, while stipulating referral to the judicial authority as regards deprivation of liberty, does not stipulate prior referral.

The Council then pointed out that no constitutional rule or principle requires that persons suffering from mental disorders, hospitalised without their consent, are to be entrusted to public clinics, since approved private clinics are subject to the same obligations and checks as public clinics in this regard. Thus the complaint of inadequate guarantees surrounding private clinics was inadmissible.

As regards the continuance of hospitalisation, Article L. 337 of the Public Health Code provides that, beyond the first fortnight, hospitalisation can be maintained for medical and therapeutic reasons, thereby placing conditions on the person's deprivation of liberty. However, in providing that the person can be kept for over a fortnight without effective access to the ordinary court, the provisions in question are contrary to the requirements that follow from Article 66 of the Constitution, with the effect that individual freedom cannot be deemed protected unless the court acts as promptly as possible.

The right to dignity and the other constitutionally guaranteed rights.

The provisions under review lay down the obligation, chiefly on the basis of the criminal offences defined in that connection, for members of health professions and administrative and judicial authorities in the performance of their functions to ensure that the dignity of hospitalised persons is respected.

The legislator took the view that a person suffering from a mental disorder that precluded his or her consent, and whose state of health demanded constant surveillance in a hospital setting, compromised the safety of persons or seriously interfered with public order, could not object to the medical care that the disorder required. The safeguards surrounding hospitalisation without consent at all events allowed the person's opinion of his or her treatment to be taken into consideration. The legislator thus struck a balance between the protection of health and the protection of public order on the one hand, and personal freedom on the other, protected by Article 2 of the 1789 Declaration.

Article 16 of the 1789 Declaration guarantees the right to an effective judicial remedy; the Council considered the impugned provisions to be in conformity with this guarantee, but expressed the reservation that the ordinary court should be required to rule promptly on the application for immediate release having regard to the possible need to gather additional pieces of information on the hospitalised person's state of health.

Lastly, the Constitutional Council held that the immediate repeal of the provision declared unconstitutional would be contrary to the requirements of protecting health and preventing disturbances to public order and would have manifestly exaggerated consequences. It postponed to 1 August 2011 the date of repeal to enable the legislator to remedy the unconstitutionality.

#### *Languages:*

French.



#### *Identification: FRA-2011-2-017*

**a)** France / **b)** Constitutional Council / **c)** / **d)** 17.12.2010 / **e)** 2010-79 QPC / **f)** Mr Kamel D. (Transposition of a directive) / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 19.12.2010, 22373 / **h)** CODICES (French, German, English).

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

1.3.5.2.2 Constitutional Justice – Jurisdiction – The subject of review – Community law – **Secondary legislation.**

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

Constitutional identity / Community law, directive, constitutional review.

#### *Headnotes:*

The provisions of Article L. 712-2 of the Code governing the entry and residence of foreigners and the right of asylum draw the necessary inferences from Directive 2004/83/EC of 29 April 2004. As the directive does not affect any rule or any principle inherent in the constitutional identity of France, the Constitutional Council need not examine the question raised.

*Summary:*

The Council of State referred to the Constitutional Council a Priority Constitutionality Question raised by Mr Kamel D. concerning the conformity of Article L. 712-2 of the Code governing the entry and residence of foreigners and the right of asylum to the rights and freedoms guaranteed by the Constitution.

This provision sets limits to the right to subsidiary protection in cases where there are serious reasons to believe that a person has committed a crime against peace, a war crime or a crime against humanity, or that a person's activity in the territory poses a threat to public order, public safety or state security.

The appellant raised the question of the inconsistency of these provisions with the principle of human dignity and Article 66-1 of the Constitution which provides that no-one shall be sentenced to death.

The Constitutional Council founded its decision on the provisions of Article 88-1 of the Constitution formalising the participation of France in the European Union. The impugned provisions transposing those of the European directive of 29 April 2004 did not affect any rule or any principle inherent in the constitutional identity of France, and so the Constitutional Council considered that there was no need for it to examine the question raised; only the Court of Justice of the European Union (CJEU) had jurisdiction to verify the directive's compliance with the fundamental rights secured by Article 6 of the Treaty on European Union.

*Cross-references:*

- Decision of the Constitutional Council no. 2004-496 DC, 10.06.2004, Act to promote confidence in the digital economy.

*Languages:*

French.

*Identification:* FRA-2011-2-018

**a)** France / **b)** Constitutional Council / **c)** / **d)** 28.01.2011 / **e)** 2010-92 QPC / **f)** Ms Corinne C. and others (Prohibition of marriage between persons of the same sex) / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 29.01.2011, 1894 / **h)** CODICES (French, German, English).

*Keywords of the systematic thesaurus:*

- 5.2.2.11 Fundamental Rights – Equality – Criteria of distinction – **Sexual orientation.**
- 5.2.2.12 Fundamental Rights – Equality – Criteria of distinction – **Civil status.**
- 5.3.33 Fundamental Rights – Civil and political rights – **Right to family life.**
- 5.3.34 Fundamental Rights – Civil and political rights – **Right to marriage.**

*Keywords of the alphabetical index:*

Marriage, couple, same-sex.

*Headnotes:*

The right to lead a normal family life does not presuppose that same-sex couples may marry.

It is not for the Constitutional Council to replace the legislator's assessment with its own as regards the accommodation of a difference in situation between same-sex and male-female couples leading to a difference in treatment as to the rules of family law.

*Summary:*

On 16 November 2010 the Court of Cassation referred to the Constitutional Council, under the terms laid down in Article 61-1 of the Constitution, a Priority Constitutionality Question raised by Ms Corine C. and Sophie H. The question concerned the conformity of Articles 75 and 144 of the Civil Code to the rights and freedoms guaranteed by the Constitution. The question is founded on the fact that these provisions reserve the right to marry to a couple consisting of a man and a woman.

Two associations (“SOS *homophobie*” and “*Association des parents et futurs parents gays et lesbiens*”) had been joined to the proceedings in support of the appellants' contention.

It was submitted that Articles 75 and 144 of the Civil Code infringed:

Article 66 of the Constitution in that the impugned provisions did not allow the ordinary court to authorise a same-sex marriage;

- the freedom to marry;
- the right to lead a normal family life;
- equality before the law.

Firstly, Article 66 of the Constitution prohibits arbitrary detention and is therefore not applicable to marriage.

Secondly, the freedom to marry does not prevent the legislator from defining the conditions for being able to marry, provided that these conditions are not contrary to other constitutional requirements, namely, the right to lead a normal family life and to the principle of equality.

The Constitutional Council recalled that the right to lead a normal family life followed from the Preamble to the 1946 Constitution. However, this right did not presuppose that same-sex couples could marry. These couples were free to cohabit or to conclude a civil solidarity pact (PACS).

Regarding the principle of equality, the Council considered that, in upholding the principle of marriage being the union of a man and a woman, the legislator had exercised its power in the belief that the difference in situation between same-sex couples and male-female couples could warrant a difference in treatment as to the rules of family law. It was not for the Constitutional Council to replace the legislator's assessment with its own regarding the allowance to be made in this matter for this difference in situation.

The Constitutional Council considered the impugned provisions of the Civil Code to be in accordance with the Constitution.

#### *Cross-references:*

- Decision no.2010-39 QPC of 06.10.2010, Ms Isabelle D. and Isabelle B. [Adoption in an unmarried couple], Official Gazette of 07.10.2010, 18154. (@ 51) [Conformity].

#### *Languages:*

French.



#### *Identification: FRA-2011-2-019*

**a)** France / **b)** Constitutional Council / **c)** / **d)** 09.06.2011 / **e)** 2011-135/140 QPC / **f)** Mr Abdellatif B. and another [Forced hospitalisation] / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 10.06.2011, 9892 / **h)** CODICES (French).

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

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

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

5.3.5.1.2 Fundamental Rights – Civil and political rights – Individual liberty – Deprivation of liberty – **Non-penal measures.**

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:*

Hospitalisation, forced / Mental disorder / Detention arbitrary / Public order.

#### *Headnotes:*

Forced hospitalisation is only possible if the mental disorder of the person concerned necessitates care and compromises the safety of persons or seriously interferes with public order. Such grounds may justify the application of a custodial measure. A custodial measure need not necessarily be taken by the judicial authority.

Article L. 3213-1 of the Public Health Code (hereinafter, "CSP") is contrary to the Constitution in that it provides for no review of the hospitalised person's situation where the hospital doctor does not confirm the expediency of the measure. In the absence of such a guarantee, there is no assurance that forced hospitalisation is confined to cases in which it is appropriate, necessary and proportionate to the patient's condition, as well as with regard to the safety of persons or the preservation of public order.

Article L. 3213-4 is contrary to the requirements of Article 66 of the Constitution which provides that "No one may be arbitrarily detained. The judiciary, as

guardian of individual liberty, enforces this principle under the conditions stipulated by legislation", in so far as it allows forced hospitalisation to be maintained beyond a fortnight without the intervention of a court of the judiciary.

### Summary:

On 7 April 2011 the Council of State, on the terms laid down in Article 61-1 of the Constitution, referred to the Constitutional Council a Priority Constitutionality Question (QPC) put by Mr Abdellatif B. The question concerned the conformity of Articles L. 3213-1 and L. 3213-4 of the CSP, which established the rules governing forced hospitalisation of persons suffering from mental disorders, to the rights and freedoms guaranteed by the Constitution.

On 8 April 2011 the Court of Cassation also referred to it, on the same terms, a Priority Constitutionality Question raised by Mr Jean-Louis C, concerning the conformity of Article L. 3213-4 of the CSP to the rights and freedoms secured by the Constitution.

Article L. 3213-1 of the CSP relates to the conditions of forced hospitalisation. Article L. 3213-4 of the CSP relates to the maintenance of forced hospitalisation. Following on from its decision no. 2010-71 QPC of 26 November 2010 on hospitalisation without consent, the Constitutional Council, ruling on both QPCs in a single decision, held that these two articles were unconstitutional.

Concerning the conditions of forced hospitalisation laid down in Article L. 3213-1, the Constitutional Council firstly reiterated its case-law relating to hospitalisation without consent. Forced hospitalisation is not possible unless the mental disorder of the person concerned requires care and compromises the safety of persons or seriously interferes with public order. Such grounds could justify the application of a custodial measure. Moreover, this decision to impose hospitalisation was taken by the Prefect in the light of a comprehensive medical certificate. Also in that jurisprudence, the Constitutional Council had already held that a custodial measure need not necessarily be taken by the judicial authority.

Conversely, the Constitutional Council found that unlike the position in hospitalisation without consent, if the medical certificate made out within twenty-four hours following admission did not confirm that the person concerned must receive in-patient care, Article L. 3213-1 did not provide for any review of the hospitalised person's situation in such a manner as to certify that the forced hospitalisation was necessary. The Constitutional Council held that, in the absence

of such a guarantee, this provision did not ensure that forced hospitalisation was confined to the cases in which it was appropriate, necessary and proportionate to the patient's condition, as well as with regard to the safety of persons or the preservation of public order. Consequently, it declared Article L. 3213-1 of the CSP unconstitutional in its entirety.

Article L. 3213-4, on the other hand, allowed forced hospitalisation to be maintained beyond a fortnight without the intervention of a court of the judiciary. This provision was contrary to the requirements of Article 66 of the Constitution. The Constitutional Council considered it unconstitutional pursuant to the similar censure delivered by decision no. 2010-71 QPC of 26 November 2010 regarding the maintenance beyond fifteen days of hospitalisation without consent.

The Constitutional Council fixed 1 August 2011 as the date on which the declaration of unconstitutionality regarding Articles L. 3213-1 and L. 3213-4 was to take effect. This is the effective date for the declaration of unconstitutionality already delivered regarding the provisions on hospitalisation without consent.

### Cross-references:

- Decision no. 2010-71 QPC of 26.11.2010, Ms Danielle S. [Hospitalisation without consent], Official Gazette of 27.11.2010, p. 21119. (@ 42) [Partial non-conformity with deferred and reserved effect].

### Languages:

French.



### Identification: FRA-2011-2-020

**a)** France / **b)** Constitutional Council / **c)** / **d)** 10.11.2011 / **e)** 2011-192 QPC / **f)** Mrs Ekaterina D., née B. and others (official secrecy) / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 11.11.2011, 19005 / **h)** CODICES (French, English).



*Keywords of the systematic thesaurus:*

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

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

*Keywords of the alphabetical index:*

Official secret / National defence, secret, information / National defence, secret, place / Search.

*Headnotes:*

The rules relating to information classified “national defence secret” are constitutional: parliament has reconciled the applicable constitutional requirements in a balanced manner.

The rules relating to places classified “national defence secret” are unconstitutional. The Constitutional Council noted that such classification results in a specific geographical area being placed outside the courts’ powers of investigation. It makes the exercise of those powers of investigation subject to an administrative decision. It means that all the evidence, of whatever kind, present in that place is inaccessible to them until such authorisation is given. It is therefore unconstitutional.

*Summary:*

On 6 September 2011 a priority question of constitutionality raised by Mrs Ekaterina B. and others was referred to the Constitutional Council by the Court of Cassation under the terms of Article 61-1 of the Constitution. The question concerned the conformity of Articles 413-9 to 413-12 of the Criminal Code, L. 2311-1 to L. 2312-8 of the Defence Code and 56-4 of the Code of Criminal Procedure with the rights and freedoms guaranteed by the Constitution.

These provisions relating to national defence secrets have a dual purpose. They lay down the rules governing both information classified “national defence secret” and places classified “national defence secret”. The Constitutional Council held the first set of rules to be constitutional but censured the second set of rules as being unconstitutional.

In undertaking this review, the Constitutional Council reiterated the applicable constitutional standards.

First, Article 16 of the 1789 Declaration of the Rights of Man and of the Citizen lays down the principle of the

separation of powers; Article 5 of the Constitution provides that the President of the Republic is the guarantor of national independence and territorial integrity; Article 20 of the Constitution provides that “the government shall determine and conduct national policy”. The principle of the separation of powers applies in respect of the President of the Republic and the government. National defence secrecy plays a part in safeguarding the fundamental national interests reaffirmed in the Charter of the Environment, which include national independence and territorial integrity.

Secondly, Article 16 of the 1789 Declaration implies respect for the specific nature of judicial functions, on which neither parliament nor the government may encroach, as well as the right to an effective judicial remedy and the right to a fair trial. Furthermore, searching for the perpetrators of offences constitutes an objective of constitutional standing.

When parliament enacts legislation, it comes within this constitutional framework. Both the principle of the separation of powers and the existence of other constitutional standards require it to reconcile in a balanced manner the right to an effective judicial remedy, the right to a fair trial, the search for the perpetrators of offences and the constitutional requirements inherent in the safeguarding of fundamental national interests.

The rules relating to information classified “national defence secret” are constitutional.

First, the Criminal Code and the National Defence Code specify the information which may be classified “national defence secret”. They punish violations of that secrecy. They organise the procedure for declassifying and disclosing information classified by the competent administrative authority. This procedure brings into play the Consultative Commission on National Defence Secrecy, which is an “independent administrative authority”. Its opinion must be sought on any declassification request and the tenor of that opinion is made public.

In view of the guarantees of independence enjoyed by that commission and the conditions and procedure for declassifying and disclosing classified information, the Constitutional Council held that parliament had reconciled the applicable constitutional standards in a balanced manner. It therefore held the relevant provisions of the Criminal Code and the Defence Code to be constitutional.

Secondly, the Code of Criminal Procedure lays down the rules governing the conduct of searches in places precisely identified as containing material covered by national defence secrecy and in places which are found

to contain such material. Such searches are not subject to any prior authorisation. Parliament surrounded this procedure with guarantees to ensure that the applicable constitutional standards are reconciled in a balanced manner. These provisions of the Code of Criminal Procedure are therefore also constitutional.

The rules relating to places classified “national defence secret” are unconstitutional.

Article 413-9-1 of the Criminal Code authorises the classification of places to which, owing to the installations located there or the activities carried out there, access cannot be allowed without divulging a national defence secret. Article 56-4.III of the Code of Criminal Procedure makes the conduct of a search in a classified place subject to a decision on temporary declassification of the place. After an application for temporary declassification submitted by a judge and an opinion from the Chair of the Consultative Commission on National Defence Secrecy, the competent administrative authority is free to decide whether to authorise the search or not.

The Constitutional Council noted that the classification of a place results in a specific geographical area being placed outside the courts’ powers of investigation. It makes the exercise of those powers subject to an administrative decision. It means that all evidence, of whatever kind, present in the place is inaccessible to the courts until such authorisation is given. It is therefore unconstitutional.

To enable the government to draw the necessary inferences from this finding, the Constitutional Council postponed the declaration of unconstitutionality to 1 December 2011.

#### *Languages:*

French.



#### *Identification:* FRA-2011-2-021

**a)** France / **b)** Constitutional Council / **c)** / **d)** 18.11.2011 / **e)** 2011-191/194/195/196/197 QPC / **f)** Mrs Elise A. and others (Police custody II) / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 19.11.2011, 19480 / **h)** CODICES (French, German, English).

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

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

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

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

5.3.13.24 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to be informed about the reasons of detention.**

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.**

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

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

Police custody / Free questioning.

#### *Headnotes:*

Respect for the rights of the defence demands that, where, prior to or during the questioning of a person, good reasons emerge for suspecting that the person has committed or attempted to commit an offence for which he or she could be placed in police custody, he or she may only be questioned or continue to be questioned freely by investigators if he or she has been informed of the nature and date of the alleged offence and of his or her right to leave the premises of the police or gendarmerie at any time.

Where police custody is concerned, the Constitutional Council draws a distinction between the rights of the defence and the balancing of the rights of the parties to proceedings, both guaranteed by Article 16 of the 1789 Declaration of the Rights of Man and of the Citizen:

- The rights of the defence must be respected. In the instant case, the rules of criminal procedure relating to legal assistance during police custody are not inconsistent with the rights of the defence.
- The purpose of these rules is not to permit discussion of the lawfulness of investigative steps or of the merits of the evidence gathered by the investigators (which will, if appropriate, be

discussed later during the pre-trial or trial proceedings). Neither is their purpose to permit discussion of the merits of the decision to take the person into police custody, which, by law, may not exceed a period of 24 hours, renewable once. Consequently, the claims based on the argument that these provisions create an imbalance in the rights of the parties and violate the adversarial principle are inoperative.

### Summary:

On 23 August and 9 September 2011, five priority constitutional questions were referred to the Constitutional Council by the Council of State under the terms of Article 61-1 of the Constitution. These questions concerned the conformity of Articles 62, 63-3-1, paragraph 3, 63-4, paragraph 2 and 63-4-1 to 63-4-5 of the Code of Criminal Procedure (hereinafter, the "CCP"), introduced by the Law of 14 April 2011 on police custody, with the rights and freedoms guaranteed by the Constitution.

These provisions have a dual purpose. First, following the Constitutional Council's decision of 30 July 2010 censuring several articles of the CCP relating to police custody, the Law of 14 April 2011 was designed to rectify that unconstitutionality. This resulted in the introduction of Articles 63-3-1, 63-4 and 63-4-1 to 63-4-5 into the CCP. Secondly, under Article 62 of the CCP, where good reasons emerge for suspecting that a person has committed or attempted to commit an offence, that person may be questioned by investigators outside the police custody regime provided he or she is not kept at their disposal under coercion. This provision permits what is sometimes referred to as "free questioning" (*audition libre*).

The Constitutional Council held the articles relating to police custody to be constitutional and entered a reservation in respect of Article 62 on free questioning to ensure its conformity with the Constitution.

The impugned provisions of the CCP relating to police custody are constitutional.

The applicants argued that these provisions of the CCP restricted legal assistance for persons in police custody. They criticised in particular the fact that the lawyer assisting a person in police custody can only consult certain documents, including the police custody record, and not the whole file.

The Constitutional Council outlined the nature of police custody, which is a coercive measure necessary for certain police operations. As stated by the Constitutional Court in its decision of 30 July 2010, the changes in criminal procedure which have increased

the importance of the police investigation stage in assembling the evidence on the basis of which an accused is tried must be accompanied by appropriate guarantees circumscribing the use and conduct of police custody and protecting the rights of the defence. But the purpose of the impugned provisions of the CCP is not to permit discussion of the lawfulness of investigative steps or of the merits of the evidence gathered by the investigators. These steps and this evidence will, if appropriate, be discussed later during the pre-trial or trial proceedings. Neither is their purpose to permit discussion of the merits of the decision to take the person into police custody, which, by law, may not exceed a period of twenty-four hours, renewable once. Consequently, the applicants' claims based on the argument that the impugned provisions relating to police custody failed to ensure a balance between the parties' rights and to respect the adversarial nature of this stage of criminal proceedings were rejected as being inoperative.

The Constitutional Council also held that the impugned provisions of the CCP relating to interviews of persons in police custody by their lawyer reconcile in a balanced manner the right of such persons to legal assistance and the objective of searching for the perpetrators of offences. The same applies to the provisions relating to the possible postponement of such interviews.

A reservation is entered in respect of Article 62 of the CCP relating to "free questioning" to ensure its conformity with the Constitution.

The second paragraph of Article 62 permits "free questioning" of a person outside the police custody regime, i.e. without the person being kept at the investigators' disposal under coercion. Since the person consents freely to be questioned, the constitutional requirement relating to the effective assistance of a lawyer does not apply.

The Constitutional Council held, however, that respect for the rights of the defence demands that, where, prior to or during the questioning of a person, good reasons emerge for suspecting that he or she has committed or attempted to commit an offence for which he or she could be placed in police custody, he or she may only be questioned or continue to be questioned freely by the investigators if he or she has been informed of the nature and date of the alleged offence and of his or her right to leave the premises of the police or gendarmerie at any time. Subject to this reservation applicable to questioning conducted after publication of this decision, the Constitutional Council held that the provisions of the second paragraph of Article 62 of the CCP did not violate the rights of the defence.

*Cross-references:*

- Decision no.2010-14/22 QPC, 30.07.2010, Mr Daniel W. and others [Police custody], published in the Official Gazette, 31.07.2010, 14198.

*Languages:*

French.



## Germany

### Federal Constitutional Court

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#### Important decisions

*Identification:* GER-2011-2-011

**a)** Germany / **b)** Federal Constitutional Court / **c)** Second Chamber of the First Panel / **d)** 20.04.2011 / **e)** 1 BvR 1811/08, 1 BvR 1897/08 / **f)** / **g)** / **h)** *Sozialrecht in Deutschland und Europa* 2011, 337; CODICES (German).

*Keywords of the systematic thesaurus:*

5.2.2.13 Fundamental Rights – Equality – Criteria of distinction – **Differentiation *ratione temporis***.  
5.3.33 Fundamental Rights – Civil and political rights – **Right to family life**.

*Keywords of the alphabetical index:*

Fixed date arrangement / Provisions, transitional / Child-raising benefit / Parental benefit / Marriage and the family, state, protection, duty.

*Headnotes:*

The fixed date arrangement in terms of the granting of parental benefit does not breach Article 3.1 of the Basic Law (general principle of equality) or Article 6.1 of the Basic Law (the state's obligation to protect marriage and the family).

*Summary:*

I. The Federal Child-Raising Benefit Act (hereinafter, the "Act"), which was applicable until 31 December 2006, allowed, latterly, for the grant of a child-raising benefit of € 300 per month until the child reached the age of 24 months. Income limits were stipulated, excluding higher income parents from entitlement to this benefit. However, the Federal Parental Benefit Act, which came into force on 1 January 2007, grants a parental benefit until the child has reached the age of 12 or 14 months. Its amount is in line with the average income over the last twelve months of the beneficiary parent and ranges from at least € 300 to a maximum of € 1,800 per month. The new Act therefore improves the situation of parents on higher

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incomes, who did not previously have access to the child-raising benefit. However, the shorter drawing period under the new legislation results in a worsening of circumstances particularly for parents on low incomes or with no income. Under the fixed date arrangement contained in § 27.1 of the Act, only parents whose child was born or adopted after 31 December 2006 are entitled to parental benefit. The provisions on child-raising benefit continue to apply to children born or adopted before that date.

The applicants, both of whose children were born shortly before the fixed date, were not entitled to child-raising benefit, as their spouses' incomes are too high. They considered the fixed date arrangement to be unconstitutional, in particular because the legislature did not introduce a transitional arrangement granting them entitlement to parental benefit.

II. The First Chamber of the First Panel of the Federal Constitutional Court did not accept the constitutional complaints for adjudication since the prerequisites for their admittance did not apply and, in particular, the applicants' constitutional rights had not been violated. Its decisions were based on the following considerations:

The fixed date arrangement, which distinguishes between parents whose children were born from 1 January 2007 onwards and those with children born before that date, does not violate the general principle of equality (Article 3.1 of the Basic Law). The legislature is free to introduce fixed date arrangements on the basis of objective considerations, despite the fact that any fixed date unavoidably entails certain hardships. A starting point had to be determined for the change in system from child-raising benefit to parental benefit introduced by the legislature. The time-related and objective link between the statutory right to a benefit and the birth of a child is legitimate in objective terms. The date of the birth as a rule coincides with the start of the ability to live and to be raised, and with the need to provide care for a child.

The unequal treatment brought about by the fixed date arrangement is also not in breach of the principle of equality in conjunction with the obligation incumbent on the state to protect marriage and the family (Article 6.1 of the Basic Law). This guarantees parents' freedom to take their own decisions as to the manner in which the family lives together and on the form of child-care. It also obliges the state to facilitate and promote child-care in the form selected by the parents. Whether the parents of a child born prior to 1 January 2007 are affected to their disadvantage in terms of this freedom by the fixed date arrangement is immaterial here. Their unequal treatment also meets heightened requirements as to justification.

Firstly, the fixed date arrangement does not leave parents whose child was born prior to 1 January 2007 fully unprotected since the regulations on child-raising benefit continue to apply in this respect. The latter comply as such with the prerequisites of Article 6.1 of the Basic Law, even if the applicants have no entitlement under them because of the income limits.

Secondly, it was permissible for the legislature to refrain from adopting a transitional arrangement with regard to the anticipated additional administrative effort. For instance, because it is drawn for longer, the application of the previous regulations on child-raising benefit may be advantageous in individual cases in comparison with the application of the parental benefit regulations. In the interest of protecting legitimate expectations, a transitional arrangement might therefore have required the benefit system which was more advantageous in individual cases to be identified and applied. The avoidance of the considerable administrative effort which this would entail constitutes adequate justification for the fixed date regulation. This particularly applies since parents whose children were born before 1 January 2007 do not suffer a disadvantage in comparison to the previous law because of this, but may receive child-raising benefit in accordance with this very law.

There is also no unconstitutional unequal treatment between biological parents and adoptive parents. It is objectively justified in the case of adopted children not to take as a basis the time of birth, but the time when the family commences living together.

#### *Languages:*

German.



#### *Identification: GER-2011-2-012*

**a)** Germany / **b)** Federal Constitutional Court / **c)** Third Chamber of the First Panel / **d)** 28.04.2011 / **e)** 1 BvR 1409/10 / **f)** / **g)** / **h)** *Zeitschrift für das gesamte Familienrecht* 2011, 1134; *Zeitschrift für Tarifrecht* 2011, 434; *Streit* 2011, 78; *Arbeit und Arbeitsrecht* 2011, 857; CODICES (German).

*Keywords of the systematic thesaurus:*

5.2.2.1 Fundamental Rights – Equality – Criteria of distinction – **Gender**.

*Keywords of the alphabetical index:*

Pension provision, supplementary, occupational / Leave, maternity.

*Headnotes:*

It is unconstitutional for maternity protection times not to be taken into account in terms of supplementary occupational pension provision.

*Summary:*

I. The *Versorgungsanstalt des Bundes und der Länder* (hereinafter, the “VBL”) is a supplementary pension facility for public-sector employees, operating retirement, incapacity and surviving dependants’ pension schemes for participating employers via private-law insurance. It supplements pensions from statutory pensions insurance. The Rules (*Satzung*) of the VBL give further definition of the system. Under the law applicable until 31 December 2001, only employees who could comply with a waiting period of 60 so-called contribution months had an entitlement to occupational retirement benefits or an insurance-based pension. A contribution month was defined as a calendar month during which the employer paid a contribution for at least one day of recurrent remuneration to which a mandatory supplementary pension scheme applied (i.e. the employee had received a taxable wage as defined in the VBL’s Rules). Because maternity benefit is paid tax-free, under the old law no contributions were paid by the employer for maternity protection times. Periods of maternity protection were not, therefore, taken into consideration when calculating the waiting period. By contrast, pursuant to a special counting rule within the Rules, all sickness periods during which an employee received statutory continued wage payment or additional sickness benefit pursuant to the regulations of the public service under collective labour agreements were counted as contribution times.

As a public-sector employee, the applicant was insured with the VBL via her employer, and in 1988 was in maternity protection which is prescribed by law for approximately three months. The VBL denied her any entitlement to an occupational pension on the grounds that she had only accrued a total of 59 contribution months, and had not therefore completed the waiting period. The point was made that her maternity protection period could not be counted as

being allowable towards the contribution. The applicant then commenced proceedings seeking an order that the VBL should take the maternity protection times into consideration but these were unsuccessful before the Local Court and on appeal on points of fact and law before the Regional Court.

II. The Federal Constitutional Court found the judgments challenged in the constitutional complaint to be in breach of the ban on discrimination on grounds of gender under sentence 1 of Article 3.3 of the Basic Law. The judgment of the Regional Court was overturned and the case sent back there for a new ruling.

The decision was based on the following considerations:

The VBL is an institute under public law, fulfilling a public function. Its Rules are accordingly bound to adhere to the fundamental right to equality. Failure to count maternity protection times as contribution months for supplementary VBL pensions, as regulated in the Rules, entrenches the unequal treatment of mothers in two senses. Firstly, women with maternity protection times are treated unequally by comparison with male employees, whose career patterns, as public-sector employees are not interrupted by the maternity protection periods which are mandatorily prescribed by law. Secondly, there is unequal treatment of women in maternity protection vis-à-vis those male and female insured parties who receive sickness benefit and an additional sickness benefit from their employers. Since employers continue to pay contributions in periods of continued wage payment, as well as when additional sickness benefit is drawn, sickness periods are counted as fully allowable months towards the contributions when calculating the supplementary pension. There is no such arrangement in terms of maternity protection.

This unequal treatment takes place on grounds of gender. It is not justified by any imperative reasons. By exempting employers from making contributions towards maternity protection periods, the legislature is pursuing the constitutionally-prescribed objective of *de facto* equality. Employers are to be denied the incentive to refrain from employing women of child-bearing age, but arrangements such as that contained in the VBL’s Rules, which place mothers at a disadvantage, cannot be allowed. The latitude granted to the legislature, and to the VBL, when distributing the burdens of maternity protection, does not justify discriminating against mothers through the back door. There are also no other recognisable factual reasons which might justify placing mothers at a disadvantage.

The breach of the ban on discrimination on grounds of gender resulted in the applicant being unable to require that her maternity protection times be counted towards the waiting period in terms of the VBL supplementary occupational pensions. Equal treatment of insured parties who claimed maternity protection during their insurance periods, and of those for whom contributions were paid by their employers during sickness periods, can only be achieved retroactively by the maternity protection times being considered as contribution times.

### Languages:

German.



### Identification: GER-2011-2-013

**a)** Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 04.05.2011 / **e)** 2 BvR 2365/09, 740/10, 2333/08, 1152/10, 571/10 / **f)** / **g)** *Entscheidungen des Bundesverfassungsgerichts* (Official Digest), 128, 326 / **h)** *Neue Juristische Wochenschrift* 2011, 1931; *Europäische Grundrechte-Zeitschrift* 2011, 297; *Neue Zeitschrift für Strafrecht* 2011, 450; *Der Strafverteidiger* 2011, 470; *Recht und Psychiatrie* 2011, 177; CODICES (German).

### Keywords of the systematic thesaurus:

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

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:

Detention, preventive / Detention, preventive, retrospective / Detention, preventive, extension / Basic Law, interpretation, international law.

### Headnotes:

1. Decisions of the European Court of Human Rights containing new aspects on the interpretation of the Basic Law are equivalent to legally relevant changes

which may lead to the final and non-appealable effect of a Federal Constitutional Court decision being transcended.

2.a. It is true that in national law the European Convention on Human Rights is subordinate to the Basic Law. However, the provisions of the Basic Law are to be interpreted in a manner that is open to international law. At the level of constitutional law, the text of the Convention and the case-law of the European Court of Human Rights serve as interpretation aids to determine the contents and scope of fundamental rights and of rule-of-law principles of the Basic Law.

2.b. An interpretation that is open to international law does not require the statements of the Basic Law to be schematically parallel to those of the European Convention on Human Rights.

2.c. Limits to an interpretation that is open to international law follow from the Basic Law. Taking account of the European Convention on Human Rights may not result in the restriction of the protection of fundamental rights under the Basic Law; this is also excluded by the European Convention on Human Rights itself under Article 53 ECHR. This obstacle to the reception of law may become of particular relevance in multi-polar fundamental rights relationships, in which an increase of liberty for one subject of a fundamental right means a decrease of liberty for the other. The possibilities of interpretation in a manner open to international law end where it no longer appears justifiable according to the recognised methods of interpretation of statutes and of the constitution.

3.a. Preventive detention (*Sicherheitsverwahrung*) constitutes a serious encroachment upon the right to liberty (sentence 2 of Article 2.2 of the Basic Law), which can only be justified in compliance with a strict review of proportionality and if the decisions on which it is based and the implementation of its execution satisfy strict requirements. In this connection, the principles of Article 7.1 ECHR must also be taken into account.

3.b. Preventive detention is only justifiable if, when enacting legislation introducing it, the legislature takes due note of the specific nature of the encroachment that it constitutes and takes care to avoid further burdens extending beyond the unavoidable deprivation of “external” liberty. This must be achieved by implementation of the sentence orientated towards liberty and aimed at therapy; making the purely preventive character of the measure clear both to the detainee undergoing preventive detention and to the general public. The deprivation of liberty must be

designed in such a way – at a marked distance from the execution of a custodial sentence (“distance requirement”) – that the prospect of regaining freedom visibly determines the practice of confinement.

3.c. The constitutional distance requirement is binding on all powers of the state and is directed initially at the legislature, which has a duty to develop an overall concept of preventive detention in line with this requirement and to enshrine it within the law. The central importance of this concept for the realisation of the detainee’s fundamental right to liberty means that the legislation must have “regulatory density”, leaving no significant questions to be decided by the executive or the judiciary, and governing their actions in all material areas.

3.d. The distance requirement must be designed in compliance with particular minimum constitutional requirements.

4. Retrospective extension of preventive detention beyond the former ten-year maximum period and the retrospective imposition of preventive detention constitute serious encroachments on the reliance of the persons affected; in view of the serious encroachment on the fundamental right to liberty involved (sentence 2 of Article 2.2 of the Basic Law), this is constitutionally permissible only in compliance with a strict review of proportionality and to protect the highest constitutional interests. The weight of the affected concerns regarding the protection of legitimate expectations is reinforced by the principles of the European Convention on Human Rights in Articles 5.1 and 7.1 ECHR.

### *Summary:*

Two of the four constitutional complaints relate to the continuation of preventive detention after the expiry of the former ten-year maximum period.

Article 1 of the Act to Combat Sexual Offences and Other Dangerous Criminal Offences, which entered into force in 1998, repealed the ten-year maximum period provided before that in the German Criminal Code (hereinafter, the “Code”) for committal to preventive detention. At the same time, the provision introduced a duty to review preventive detention once it had been served for ten years. Under § 67d.3 of the Code, the court competent for the execution of sentences would declare the measure terminated after ten years. This would only apply in the absence of any risk that the detainee, as a result of a propensity, will commit serious criminal offences resulting in serious mental or physical injury for his or her victims. According to § 2.6 of the Code, the revised statute would apply to all cases where preventive detention had already been ordered but had not been terminated

at the point in time of its entry into force. The removal of the maximum period also affected those detainees who committed their original offences and were sentenced at a time when the ten-year maximum period of preventive detention still applied.

In a judgment of 2009, the European Court of Human Rights granted the individual application of a detainee who had been committed to preventive detention for more than ten years due to offences he had committed before the revised statute had entered into force. The Court held that the continuation of preventive detention violated the right to liberty under Article 5.1 ECHR as well as the ban on retrospective law under Article 7 ECHR because retrospective extension constituted an additional penalty which was imposed retrospectively on the detainee under a statute that only entered into force after he had committed his offence.

In May and October 2009 respectively, the two applicants had each been in preventive detention for ten years. They would have had to be released under the old law. The respective chambers for the execution of sentences ordered preventive detention to be continued, on the basis of the revised statute. Legal remedies lodged against the orders were unsuccessful.

The other two constitutional complaints relate to retrospective orders of preventive detention.

The Act to Introduce Retrospective Preventive Detention entered into force in 2004. It allowed, through its new § 66.b, the retrospective committal of offenders to preventive detention (following final and non-appealable conviction). In 2008, the Act to Introduce Retrospective Preventive Detention on Convictions under the Criminal Law Relating to Juvenile Offenders entered into force, making it possible, by amending § 7.2 of the Juvenile Court Act, for preventive detention to be retrospectively ordered for offenders who had received final and non-appealable sentences under the criminal law relating to juvenile offenders.

The Regional Court issued a committal order against one of the applicants shortly before he had completely served his sentence and retrospectively ordered his committal to preventive detention due to his high level of dangerousness, under § 7.2 of the Juvenile Court Act.

The Regional Court retrospectively ordered the second applicant’s committal to preventive detention after the execution of a prison sentence pursuant to § 66.b.2 of the Act.

Legal remedies lodged against these orders were unsuccessful.



All provisions of the Criminal Code and of the Juvenile Court Act on the imposition and duration of preventive detention are incompatible with the right to liberty of the detainees under sentence 2 of Article 2.2 in conjunction with Article 104.1 of the Basic Law because they do not satisfy the prerequisites of the constitutional “distance requirement”.

Furthermore, the challenged provisions on the retrospective extension of preventive detention beyond the former ten-year maximum period and on the retrospective imposition of preventive detention in criminal law relating to adult and to juvenile offenders infringe the rule-of-law precept of the protection of legitimate expectations under sentence 2 of Article 2.2 in conjunction with Article 20.3 of the Basic Law.

The Federal Constitutional Court ordered the continued applicability of the provisions that were declared unconstitutional until the entry into force of a new legislation, until 31 May 2013 at the latest. It made the following transitional arrangements:

1. In cases where preventive detention continues beyond the former ten-year maximum period, and in cases of retrospective preventive detention, committal to preventive detention or its continuation may only be imposed if a high risk of the most serious offences of violence or sexual offences can be inferred from specific circumstances in the person or conduct of the detainee and where the detainee suffers from a mental disorder within the meaning of § 1.1 no. 1 of the Therapeutic Committal Act. The courts with responsibility for the execution of sentences must immediately review whether these prerequisites for continued preventive detention exist. If this is not the case, they are to order the release of the detainees affected until 31 December 2011 at the latest.

2. During the transitional period, the other provisions on the imposition and duration of preventive detention may only be applied in compliance with a strict review of proportionality; the proportionality requirement will usually only be satisfied if there is a risk that the person concerned may go on to commit serious offences of violence or sexual offences.

The rulings challenged by the constitutional complaints were reversed and referred back to the non-constitutional courts for a new decision.

The finality and non-appealability of the Federal Constitutional Court’s decision of 5 February 2004, which declared the removal of the ten-year maximum period for preventive detention that had applied previously and the application of the new legislation to the so-called old cases constitutional, does not constitute a procedural bar to the admissibility of the

constitutional complaints. This is because the decisions of the European Court of Human Rights which, like the above-mentioned judgment of 17 December 2007, contain new aspects on the interpretation of the Basic Law are equivalent to legally relevant changes which may lead to the final and non-appealable effect of a Federal Constitutional Court decision being transcended.

In national level, the European Convention on Human Rights is subordinate to the Basic Law. However, the provisions of the Basic Law are to be interpreted in a manner that is open to international law (*völkerrechtsfreundlich*). At the level of constitutional law, the text of the Convention and the case-law of the European Court of Human Rights function as interpretation aids to determine the contents and scope of fundamental rights and rule-of-law principles of the Basic Law. An interpretation that is open to international law requires a reception of the provisions of the European Convention on Human Rights where this is methodically justifiable and compatible with the terms of reference of the Basic Law.

Preventive detention constitutes a serious encroachment upon the right to liberty, and can only be justified in compliance with a strict review of proportionality and if the decisions on which it is based and the organisation of its execution satisfy strict requirements. The existing provisions do not satisfy the (minimum) constitutional requirements pertaining to the implementation of preventive detention.

Due to the fundamentally different constitutional objectives and legal bases of prison sentences and preventive detention, the deprivation of liberty brought about by preventive detention must remain at a marked distance from the execution of a prison sentence (the “distance requirement” (*Abstandsgebot*)). While a prison sentence serves the retribution of culpably committed offences, the deprivation of liberty of a detainee under preventive detention solely pursues the objective of preventing future offences. It is exclusively based on a prognosis of dangerousness and in the interest of the general public’s safety as it were imposes a special sacrifice on the person affected.

The constitutional distance requirement is directed initially at the legislature, which is under a duty to develop an overall concept of preventive detention in line with this requirement and to enshrine it in law. Preventive detention may only be ordered and executed as the *ultima ratio*. Where therapeutic treatment is needed, it must begin at a sufficiently early stage of the prison sentence and be sufficiently intensive that, where possible, it will be terminated before the end of the sentence. A comprehensive review of possible treatments must take place, at the start of the preventive detention at the latest. The

detainee must receive intensive therapeutic treatment conducted by qualified personnel, so as to open up a realistic prospect of release. Detainees must be accommodated separately from the prison regime in special buildings or wards with sufficient staffing levels which satisfy the therapeutic requirements and where family and social contacts are possible. Provision must be made for relaxation of the execution of the sentence and for preparations for release. The detainee must be granted an effectively enforceable legal claim to the implementation of the necessary measures to reduce his or her dangerousness. Continuation of preventive detention is to be judicially reviewed at least once a year.

The present provisions on preventive detention and its actual execution were found not to meet these requirements.

The provisions relating to the retrospective extension of preventive detention beyond the former ten-year maximum period and the retrospective imposition of preventive detention were found to infringe the rule-of-law requirement of the protection of legitimate expectations under sentence 2 of Article 2.2 in conjunction with Article 20.3 of the Basic Law.

They were found to entail a serious encroachment on the reliance of the group of persons affected that preventive detention would end after ten years or not be imposed at all.

Because of the serious encroachment on the right to liberty which preventive detention entails, concerns regarding the protection of legitimate expectations carry particular weight under constitutional law, further increased by the principles of the European Convention on Human Rights. According to the principle of Article 7.1 ECHR, the result of insufficient distance of the execution of preventive detention from that of prison sentences is that the weight of the reliance of the persons affected approaches an absolute protection of legitimate expectations. Furthermore, the provisions of Article 5 ECHR are to be taken into account with regard to detainees committed to preventive detention. From this perspective, justification of the deprivation of liberty in cases where preventive detention has been extended or imposed retrospectively virtually only ever becomes relevant subject to the requirements of an unsound mind within the meaning of sentence 2 of Article 5.1.e ECHR. The statutory provisions must provide for the diagnosis of a true and persistent mental disorder as an express element of the offence. Furthermore, for deprivation of liberty to be deemed justified, the detention of the person concerned must take account of the fact that the detainee is detained by reason of a mental disorder.

In view of the principles outlined above, and the substantial encroachment upon the reliance of the detainees in preventive detention whose fundamental right to liberty is affected, the legitimate legislative purpose of the challenged provisions (to protect the general public against dangerous offenders) is largely outweighed by the constitutionally protected reliance of the group of persons affected. A deprivation of liberty through preventive detention which is ordered or extended retrospectively can only be regarded as proportionate if the required distance from punishment is observed, if a high risk of the most serious offences of violence or sexual offences can be inferred from specific circumstances in the person or conduct of the detainee and if the requirements of sentence 2 of Article 5.1 ECHR are satisfied. The provisions under dispute were found not to meet these requirements.

To avoid a "legal vacuum", the Federal Constitutional Court did not declare the unconstitutional provisions void. It held that they should continue in force for a particular period of time. Otherwise further preventive detention would lack legal basis, and all those committed to it would have to be released immediately, which would cause almost insoluble problems for the courts, the administration and the police.

#### *Cross-references:*

- Decision of the Federal Constitutional Court of 05.02.2004, *Bulletin* 2004/1 [GER-2004-1-001];
- Decision of the European Court of Human Rights of 17.12.2009 (Application no. 19359/04).

#### *Languages:*

German, English version and English press release on the Court's website.



#### *Identification:* GER-2011-2-014

**a)** Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 21.06.2011 / **e)** 1 BvR 2035/07 / **f)** / **g)** to be published in the Federal Constitutional Court's Official Digest / **h)** *Zeitschrift für das gesamte Familienrecht* 2011, 1367; CODICES (German).

*Keywords of the systematic thesaurus:*

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

*Keywords of the alphabetical index:*

Education, higher, finance, repayment / Medicine, study.

*Headnotes:*

1. Depending on the regulatory object and on the criteria of distinction, the general principle of equality results in different limits for the legislature; these limits may range, with progressive transition, from relaxed commitments confined to the ban on arbitrariness to strict requirements as to proportionality.

2. Sentence 1 of § 18b.3 of the Federal Training Assistance Act is incompatible with Article 3.1 of the Basic Law to the extent that provisions relating to a minimum period of study on the one hand and to the maximum period of assistance on the other hand make it objectively impossible for students to achieve a large partial release from repayment of their training assistance loans.

*Summary:*

I. Under the Federal Training Assistance Act (hereinafter, the “Act”), means-tested finance for university studies is provided for a maximum period of assistance; half the financing is provided as an interest-free loan. § 18b of the Act allows for a partial release from repayment after successful graduation. A partial release dependent on the duration of studies, as opposed to a “performance-related” one, may also be granted. According to the version of § 18b.3 of the Act that applies to the instant case, students are released from the repayment of DM 5,000 of the loan if they successfully complete their studies four months before the expiry of the maximum period of assistance (a large partial release). If studies are only completed two months early, the amount of release is DM 2,000 (small partial release).

Since the 1970s, the regulations governing the medical profession have provided for a minimum study period of six years. The standard period of study for a medicine course is six years and three months. Since 1986, the maximum period of assistance for a medicine course had been thirteen semesters, but it was calculated according to the standard period of study for all courses of study in the new federal *Länder* (states) after German unification

from 1 January 1991. This made it impossible for medical students in the new *Länder* to achieve a large partial release. They had to graduate in a minimum period of twelve semesters and were therefore unable to complete their studies four months before the end of the maximum period of assistance. The shorter maximum period of assistance also applied to students of medicine who had commenced their studies in the old *Länder* from 1993 onwards. However, students who had completed their fourth subject-related semester in the old *Länder* by 1 October 1994 were able to achieve a large partial release. The old maximum period of assistance of thirteen semesters still applied to them, under a transitional arrangement.

The applicant began his studies of medicine in the new federal *Länder* in 1991/1992. He completed them successfully in the first month after the end of the 12th semester. He received training assistance under the Act. The Federal Office of Administration, taking the maximum period of assistance of six years and three months as a basis, fixed the end of this period at December 1997. It awarded him a small partial release, as he had only completed his studies two months before the end of the maximum period of assistance. The actions he brought before the administrative courts were unsuccessful.

II. The Federal Constitutional Court found sentence 1 of § 18b.3 of the Act, in its version relevant in the instant case as well as in subsequent versions, to be incompatible with the general principle of equality (Article 3.1 of the Basic Law) to the extent that provisions relating to a minimum period of study on the one hand and to the maximum period of assistance on the other hand make it objectively impossible for students to achieve a large partial release. Courts and administrative authorities must now cease to apply the provision. The legislature was ordered to pass, by 31 December 2011, a new regulation taking due account of equality for all students affected whose administrative procedures or judicial proceedings concerning the granting of a large partial release have yet to achieve administrative finality or to become *res judicata*. The Senate rescinded the decisions the administrative courts had taken, refusing the large partial release, as they breached the applicant’s fundamental right. It remitted the matter to the administrative court of first instance for a fresh ruling.

The applicant’s fundamental right to equal treatment was violated by sentence 1 of § 18b.3 of the Act in conjunction with the relevant provisions on the maximum period of assistance on the one hand and on the minimum period of study on the other, and also by the resulting denial of a large partial release. As a student of medicine in the new *Länder*, it was objectively impossible for him from the outset to be granted a large partial release.

He had been treated unequally in comparison with students of medicine who took up their studies in 1992/1993 or earlier in the old *Länder* and completed their fourth subject-related semester by the summer semester 1994. The maximum period of assistance that applied to them was thirteen semesters, enabling them to achieve a large partial release if they completed their studies before the expiry of the second month after the end of the minimum period of study. There had also been unequal treatment with regard to students of other courses in which no minimum period of study existed or where the minimum period of study and the maximum period of assistance had been calculated in such a way as to allow for graduation four months before the end of the maximum period of assistance.

Such unequal treatment is not justified. The legislature does enjoy latitude in granting benefits, but, particularly with regard to the handling of German unification, may also pass regulations that involve hardships. There was, however, no apparent reason to justify denying medical students in the new *Länder* the benefit of a large partial release from the outset while this was still available on a transitional basis after unification to medical students in the old *Länder*. The rationale behind providing incentives for graduating as soon as possible applies to medical students in the new and in the old *Länder* alike.

The legislature's power to make typifying and generalising arrangements when regulating mass phenomena does not vindicate the unequal treatment described above. If insufficient account is taken of statutory minimum periods of study and their relation to the maximum period of assistance, entire courses of study could be excluded, as well as large numbers of students, from the possibility of a large partial release. This situation could be avoided, without unreasonable effort, by harmonising the arrangements on partial release, maximum period of assistance and minimum period of study. The sole cause for the exclusion is a structural error of legal concept.

Discrimination by comparison with students on other courses is not justified by other substantive reasons. The fact that the course of medicine has the longest maximum period of assistance of all university courses is due to the extent of the studies and to the minimum study period, which is determined by domestic and European law. There is no sound substantive reason for denying students a large partial release because they opted for an extensive course of study. Instead, from the perspective of those receiving training assistance, an even greater need arises for a large partial release where the periods of study and assistance are long because

there will usually be a higher amount of loan to be repaid than for shorter courses.

The violation of the fundamental right to equal treatment does not just affect medical students in the new *Länder*. It also exists with regard to students of medicine in the old *Länder* from the summer semester 1993 onwards, by comparison to courses of study which are able to satisfy the requirements of the large partial release in accordance with the minimum periods of study and maximum periods of assistance that apply to them. A similar violation of equality also affects other study courses that prescribe minimum periods of study and to which a maximum period of assistance applies that is less than four months longer than the minimum period of study. The new legislation to be passed by the legislature must cover all administrative procedures or judicial proceedings regarding the granting of a large partial release which have yet to reach administrative finality or have yet to become *res judicata* and which concern study courses in which it was impossible from the outset to satisfy the requirements of sentence 1 of § 18b.3 of the Act due to diverging legal provisions on minimum periods of study and on maximum period of assistance.

#### *Languages:*

German; Press release in English on the Court's website.



# Hungary

## Constitutional Court

### Statistical data

1 January 2011 – 30 April 2011

Total number of decisions: 115

- Decisions by the Plenary Court published in the Official Gazette: 19
- Decisions in chambers published in the Official Gazette: 5
- Other decisions by the Plenary Court: 34
- Other decisions in chambers: 8
- Number of other procedural orders: 49

### Important decisions

*Identification:* HUN-2011-2-003

**a)** Hungary / **b)** Constitutional Court / **c)** / **d)** 18.02.2011 / **e)** 8/2011 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 2011/14 / **h)** CODICES (Hungarian).

*Keywords of the systematic thesaurus:*

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

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

5.4.9 Fundamental Rights – Economic, social and cultural rights – **Right of access to the public service.**

*Keywords of the alphabetical index:*

Government officials, dismissal, reason / Protection, dismissal, unjustified.

*Headnotes:*

A law that allowed employers in the public administration to dismiss government officials without providing a reason for the dismissal was unconstitutional.

*Summary:*

I. In summer 2010 the governing two-thirds majority of Parliament adopted the Act on Government Officials which made it possible to dismiss government officials without the employer providing a reason for the dismissal. The then president returned the law to Parliament for reconsideration, arguing that the legislation conflicted with EU law. After the Act had been passed for the second time with the same content, several trade unions and civil rights non-governmental organisations (NGOs) challenged it before the Constitutional Court.

II. First, the Constitutional Court analysed the main characteristics of the government officials' legal status. It held that government officials hold public offices; their legal status is governed by the law and not by private contracts. Their appointment and dismissal are based upon administrative decisions. Therefore the legal framework should be clear as regards decisions on the appointment and dismissal of a government official.

The Court took into account Article 30 of the Charter of Fundamental Rights of the EU which states: "Every worker has the right to protection against unjustified dismissal, in accordance with Union Law and national laws and practices." In accordance with that Article, the Labour Code ensures protection in the event of unjustified dismissal.

The Court did not question that the need to increase the efficiency, performance and standard of public administration may justify measures to make the dismissal of government officials less difficult. However, the Court held that the legislature should develop rules that create a balance between the government's objectives and the protection of government officials' constitutional rights. Accordingly, the Court found that the possibility of firing a government official without giving a reason whatsoever limits disproportionately the constitutional right ensured by Article 70.6 of the Constitution to hold a public office. In addition, the lack of normative rules concerning the Government official's dismissal made it impossible for ordinary court judges to decide on the legality of a dismissal.

Therefore the Constitutional Court annulled the legislation with effect from 31 May 2011. The reason for the *pro futuro* annulment was that, by annulling the challenged provision *ex nunc*, it would have been impossible for the governmental officials to resign pending the enactment by Parliament of new provisions on resignation and dismissal.

*Supplementary information:*

Under the new Act, adopted by parliament on 23 May 2011, civil servants cannot be fired in the future without an explanation, but loss of trust and unworthiness can be accepted as reasons for dismissal. According to the new provisions, the employer must give an explanation and must prove that the reasons for dismissal are realistic and lawful. The law outlines the possible reasons for dismissal. These include: staff cuts if the position becomes redundant as a result of reorganisation; where the employee reaches retirement age; and where the activity that the job involves is discontinued. The Act provides that dismissal is mandatory if the person becomes unworthy of holding the position, if they do not properly fulfil tasks and if the employer loses trust in the employee.

Chief Justice Paczolay, Justice Bihari and Justice Stumpf attached concurring opinions to the judgment.

*Languages:*

Hungarian.

*Identification:* HUN-2011-2-004

a) Hungary / b) Constitutional Court / c) / d) 07.04.2011 / e) 29/2011 / f) / g) *Magyar Közlöny* (Official Gazette), 2011/37 / h) CODICES (Hungarian).

*Keywords of the systematic thesaurus:*

3.10 General Principles – **Certainty of the law**.  
5.3.13.2 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Effective remedy**.  
5.4.9 Fundamental Rights – Economic, social and cultural rights – **Right of access to the public service**.

*Keywords of the alphabetical index:*

Civil servant, dismissal, reason / Protection, dismissal, unjustified.

*Headnotes:*

Civil servants, defined as those working for state institutions and institutions of local government, cannot be fired without the provision of a reason for the dismissal.

*Summary:*

I. In December 2010 the governing two-thirds majority of Parliament amended the Act on Civil Servants so as to make it possible to dismiss civil servants without the employer providing a reason for the dismissal. After the amendment had been passed, several trade unions and civil rights non-governmental organisations (NGOs) challenged it before the Constitutional Court.

II. The Constitutional Court, by referring to its earlier decision concerning the dismissal of government officials, held that the legal framework for appointing and dismissing civil servants should be clearly regulated by the Act.

The Court did not question that the need to increase the efficiency, performance and standard of public administration may justify measures to make the dismissal of civil servants less difficult. However, the Court held that the legislature should develop rules that create a balance between the government's objectives and the protection of civil servants' constitutional rights.

The Court found that the possibility of firing a civil servant without the provision of any reason whatsoever limits disproportionately the constitutional right to take public office, ensured by Article 70.6 of the Constitution. According to the Court's reasoning, the Act should ensure protection for civil servants in the event of an unjustified dismissal. The lack of normative rules concerning the dismissal of a civil servant makes it impossible for ordinary court judges to decide on the legality of a dismissal, which violates the right to seek a legal remedy. Therefore the Constitutional Court annulled the legislation *ex nunc*.

*Cross-references:*

- Decision 8/2011.

*Languages:*

Hungarian.



*Identification:* HUN-2011-2-005

**a)** Hungary / **b)** Constitutional Court / **c)** / **d)** 10.05.2011 / **e)** 37/2011 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 2011/49 / **h)** CODICES (Hungarian).

*Keywords of the systematic thesaurus:*

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

3.13 General Principles – **Legality.**

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

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

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

*Keywords of the alphabetical index:*

Tax, punitive / Legislation, retroactive / Competence, restricted, Constitutional Court.

*Headnotes:*

On the basis of its competence to protect human dignity, the Constitutional Court reviewed the constitutionality of a tax provision. The Court argued that the retroactive effect of the 98 per cent tax was an affront to human dignity.

*Summary:*

The Constitutional Court had already annulled the 98 per cent tax in October 2010. In its Decision 184/2010 the Court found the tax unconstitutional on the basis that it taxed payments received according to former statutory regulations and on the basis that it was confiscatory.

After this Court decision a constitutional amendment (Article 40/I.2) was adopted allowing any income from public funds to be taxed retroactively for a maximum of five years. In a parallel move, Parliament passed a constitutional amendment which prohibited the Constitutional Court from reviewing financial laws, unless such laws affect the right to life and dignity, the protection of personal data, freedom of conscience and rights concerning Hungarian citizenship.

Parliament also adopted Act CXXIV of 2010 according to which, with effect from 2005, public sector employees must pay extra taxes (i.e. 98 per cent) on severance payments which exceed the HUF 3.5 million threshold. There is a cap for managers of state-owned enterprises, companies owned by local governments and senior officials in the public sector, including municipalities.

The Constitutional Court annulled again the retroactive effect of the 98 per cent tax. The decision was based on the Court's competence to protect human dignity. The Court argued that the retroactive effect of the tax was an affront to this right, since it attempted to tax gains on which tax had already been lawfully paid. Under the decision, the tax office cannot collect tax under the new 98 per cent tax rules for income earned in 2005-2010 and any tax already collected under this category must be refunded.

Due to the wording of the law, the decision also pertains to payments effected in 2010, even if such payments did not fall within the 'retroactive' category.

Justice László Kiss and Justice Miklós Lévy attached concurring opinions to the decision.

*Supplementary information:*

Two days after delivering the decision, Parliament approved a new law under which a 98 per cent tax can be levied on severance payments made after 1 January 2010.

*Cross-references:*

- *Bulletin* 2010/3 [HUN-2010-3-009].

*Languages:*

Hungarian.



# Israel

## Supreme Court

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### Important decisions

*Identification:* ISR-2011-2-004

**a)** Israel / **b)** Supreme Court (Court of Appeals) / **c)** Panel / **d)** 12.10.2010 / **e)** AdminApp 5493/06 / **f)** Peled v. Israeli Prison Service / **g)** to be published in the Official Digest / **h)**.

*Keywords of the systematic thesaurus:*

3.16 General Principles – **Proportionality**.  
 3.17 General Principles – **Weighing of interests**.  
 5.1.1.4.3 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Detainees**.  
 5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression**.

*Keywords of the alphabetical index:*

Pornography / Prison, order, maintenance.

*Headnotes:*

An order, issued by the Prison Service, banning prisoners from receiving and possessing pornographic material was in line with constitutional requirements; pornographic material resides at the very edge of the right to freedom of expression, and the scope of protection granted to the right to consume it is limited by comparison to that granted to political or artistic free speech, especially when the right is exercised in a special and unique environment such as a prison.

*Summary:*

I. Israeli Prison Service order number 04.50.00 (hereinafter, the “order”) prohibited inmates from holding and receiving pornographic material in prison. The question the court had to address was whether the order impinged on the right of prisoners to freedom of expression.

The applicant, Emanuel Peled, had been sentenced to imprisonment for several felonies including extortion and fraud relating to enabling and operating

an erotic telephone calls business. He argued that the ban on pornographic material in prison was an unconstitutional infringement of his rights to human dignity and free speech. He petitioned a trial court in Tel-Aviv-Yafo on this ground but his petition was denied. Permission to appeal the decision was granted.

According to the applicant, freedom of speech encompasses the right to consume and receive pornographic information. Restrictions on the right to consume pornographic material should accordingly only be allowed where it can be proved, to a “high probability level” of certainty that allowing such material in prison could result in real damage to a legitimate state interest. The applicant argued that the respondent, the Israeli Prison Service, held no such proof. The respondent countered that the ban on pornographic material was essential for the maintenance of order, discipline and security in prison, considering overcrowding in prisons, the level of tension prevailing inside prisons, and religious and cultural diversity amidst inmates. It also argued that watching pornographic movies would exacerbate the already tense environment in prison and could even raise sexual activity amongst inmates, making rape and other violent sexual offenses more common. In the respondent’s opinion, the order reflected a reasonable and proportionate balance between the right of prisoners to read books and magazines at their leisure and the respondent’s duty to maintain the safety and well-being of inmates and prison staff alike.

II. In the Supreme Court’s opinion, delivered by President D. Beinisch, it was stated that although expression of a pornographic nature is protected under free speech, the level of protection granted to it must reflect its low social value, along with the fact that it is not part of the “core” protected speech. President Beinisch noted that pornographic expressions mostly entail impingement on the right of women to human dignity. Thus, pornography that stimulates violent and degrading sexual activities, with the main purpose of satisfying sexual urges, cannot be said to be a contributory factor to the exploration of truth or at the basis of a democratic society. It is also hard to argue that consumption of pornography can enrich and enlighten human beings, broaden their horizons, or contribute to their spiritual growth; these are not goals which the creators of pornography seem to wish to achieve. The court emphasised that the process of creating pornography usually brings about, as a by-product, a profound breach of the human dignity of both women and children and an exploitation of society’s weakest layers, for the sole economic benefit of its producers and others involved in this industry.

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The Supreme Court therefore found that the scope of protection granted to pornographic expression is more limited than that granted to political and artistic expression. It noted that higher standards of proof were only applied in past rulings with respect to speech and expression of a political nature, which enjoys the most comprehensive and extensive scope of protection. The court further held that the prison order banning inmates from receiving and possessing pornographic material in prison met the requirements of the limitation clause set out in Basic Law: Human Dignity and Liberty. Relying mainly on the low social value of pornography and on the special nature of conditions in prisons, the Court found the order to be proportionate. It noted that while case-by-case analysis is generally preferable to an outright ban, in the current circumstances, obliging prison staff to perform such an examination would place a tremendous burden on the respondent. Striking a balance between the various rights and interest concerned, the Court found denying inmates the opportunity to hold pornographic materials in prison to be proportionate to the benefit arising from the maintenance of order, discipline and security in prison and its effective management.

#### *Languages:*

Hebrew.



#### *Identification:* ISR-2011-2-005

**a)** Israel / **b)** Supreme Court (High Court of Justice) / **c)** Panel / **d)** 20.12.2010 / **e)** HCJ 6824/07 / **f)** Manaa v. Israel Tax Authority / **g)** to be published in the Official Digest / **h)**.

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

3.13 General Principles – **Legality**.  
 4.6.2 Institutions – Executive bodies – **Powers**.  
 5.3.39 Fundamental Rights – Civil and political rights – **Right to property**.  
 5.3.42 Fundamental Rights – Civil and political rights – **Rights in respect of taxation**.

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

Property, protection, procedure / Tax, collection, method.

#### *Headnotes:*

A question had arisen over the authority of the tax and national insurance authorities to collect tax and social security debts by holding debtors at road blocks positioned by police forces for police operational purposes, and confiscating the cars of debtors reluctant to pay back their debt immediately.

These actions were found to infringe the constitutional rights of debtors and to be unlawful, as the administrative agency had not been granted explicit authority by law to pursue them, and was therefore acting in contravention of the basic principle of administrative law, under which it can only act within the parameters of the authority granted to it by law.

#### *Summary:*

I. The petition targeted a practice by the Israeli Tax Authority and the National Insurance Institute of Israel of holding debtors at road blocks positioned by police forces for police operational purposes and confiscating the cars of those debtors who were unwilling to repay their debts immediately.

II. The Supreme Court, in an opinion delivered by Justice U. Vogelman joined by President D. Beinisch and Justice H. Meltzer, ruled in the petitioners' favour. The Court noted the well-known, fundamental principle of administrative law that an administrative authority may only act in accordance with the authority given to it by law. If an administrative agency acts in a manner that violates constitutional rights, it must demonstrate an explicit provision of law enacted by the legislative branch authorising it to act in such a manner. Where constitutional rights are at stake, the administrative authority may not rely on a general provision of law authorising it to take certain actions which can be interpreted to authorise the action in question. Instead, it must show primary legislation authorising it to act as it wishes in a clear, explicit and elaborated manner. The Court noted the further justification given to this requirement by the enactment of Basic Law: Human Dignity and Liberty, which stipulates that there is to be no violation of rights under the Basic Law except by legislation under the conditions set out in the basic law, or by regulation enacted by virtue of express authorisation in such law.

The Court held that in order to discern whether such authorisation exists in a specific case, the Court will interpret the provision in question and strike a balance between the different purposes of the said provision; the relative importance of the right in question; the extent of the violation; and other relevant circumstances and conditions.

In this particular case, the Court held that the Tax Collection Ordinance (hereinafter, the “ordinance”), from which the respondents claimed to derive authority for their actions, could not be the source of authority for the action in question. It actually authorised the respondents to confiscate debtors’ property within their dwellings. The Court conceded that the language of the ordinance allowed for two interpretations – one allowing the confiscation in question and the other limiting the agency’s authority to confiscation at a person’s dwellings. However, it found that other factors, primarily the purpose of the ordinance, led to the conclusion that a narrower interpretation should be applied. It held that the ordinance aims to strike a balance between the important purposes of enabling the effective collection of taxes and maintaining the rule of law, and that of protecting human rights, including the right to human dignity, freedom of movement, due process, access to courts and privacy. The Court noted that one cannot deduce the authority to confiscate cars in police road blocks merely from the respondents’ authority to confiscate debtors’ property in their dwellings. When the respondents confiscate cars by means of police road blocks, those whose cars are being seized are exposed to the public gaze and have limited courses of action available to choose from, by comparison to those of which they could avail themselves within the protection of their own homes. Consequently, the scope of the debtor’s violation of rights is extensive and fundamentally different from the one caused to the debtor by seizing his property in his dwelling. The Court therefore held that the authority to confiscate property in a debtor’s own dwelling did not extend to an express authority to confiscate cars in police road blocks, emphasising that where an administrative act has such a profound and negative impact on human rights, the requirement of explicit authorisation should be interpreted more strictly.

The Court held that the provisions in the ordinance could not be interpreted to award the respondents with a general unlimited authority to collect taxes by any means necessary. In order for the collection of taxes by use of police road blocks to be permissible, there must be explicit authority contained in primary legislation enacted by Parliament. Such legislation must, of course, be subject to judicial review.

### *Languages:*

Hebrew.



### *Identification: ISR-2011-2-006*

**a)** Israel / **b)** Supreme Court (High Court of Justice) / **c)** Extended Panel / **d)** 07.04.2011 / **e)** HCJ 4908/10 / **f)** Bar-On v. Israel Knesset / **g)** / **h)**.

### *Keywords of the systematic thesaurus:*

1.3.5.3 Constitutional Justice – Jurisdiction – The subject of review – **Constitution**.  
3.4 General Principles – **Separation of powers**.

### *Keywords of the alphabetical index:*

Constitutionality, review / Constitution, amendment / State budget.

### *Headnotes:*

The generally accepted test in Israel to identify Basic Laws, which constitute part of the future Constitution of the State, is a test that is essentially formal in nature. In other words, a Basic Law will be deemed to be such if its title includes the words “Basic Law” and does not include the year of its enactment.

The enactment of a temporary constitutional arrangement detracts from the status of the Basic Laws. The use of a temporary order is likely to be deemed, in certain cases that would be examined on their own merits, as an “abuse” of the heading “Basic Law.” However, in the absence of a Basic Law: Legislation, which outlines the manner in which Basic Laws are to be enacted, amended and modified, it is not appropriate to rule that a Basic Law in the form of a temporary provision is inherently null and void.

There are basic principles underlying Israel’s existence as a society and a State that cannot be changed. An impairment of those principles will give rise to grave questions of authority, including doubts about whether this would constitute a change in the Constitution or the establishment of a new Constitution. Yet, considering that Israel’s Constitution is not yet complete, there is doubt as to the applicability, or the scope of the

applicability of the doctrine of the unconstitutional constitutional amendment in Israel.

### Summary:

I. In this case, the Court addressed the constitutionality of the Basic Law: The State Budget (Special Provisions) (Temporary Order) (hereinafter, the "Basic Law"), which specified that the state budget for the years 2010-2011 would be a two-year budget. This Basic Law intended to amend Section 3 of the Basic Law: The State Economy, which specifies that the state budget will be determined each year.

II. The Court ruled that the Basic Law was constitutional and that, given the existing legal system in the State of Israel, it was not appropriate to intervene therein.

The Court addressed the question of whether it was possible to expropriate a constitutional principle that is anchored in the Basic Laws in a temporary order that would be applied exclusively during the term in office of the present Government. In order to answer this question, the Court initially examined whether the Basic Law was a Basic Law for all intents and purposes. It did so in light of the fact that the Law in question was enacted by way of a temporary order, which applied to the state budget for the years 2010-2011 only. In response to this question, the Court ruled, first, that the generally accepted test in Israel for the identification of Basic Laws, which constitute part of the future Constitution of the state, is a test that is essentially formal in nature. In other words, a Basic Law will be deemed to be such if its title includes the words "Basic Law" and does not include the year of its enactment. However, the Court left, for future study, the possibility that a more complex test for the identification of Basic Laws would be applied in the future and that, within such a test, the content of the piece of legislation and its suitability for serving as part of the Constitution of the state would also be examined.

Second, regarding the question of whether it was possible to enact a Basic Law by way of a temporary order, the Supreme Court ruled that the enactment of a temporary constitutional arrangement detracts from the status of the Basic Laws and that it would be best to use this tool sparingly, if at all. The Court ruled that the use of a temporary order is likely to be deemed, in certain cases that would be examined on their own merits, as an "abuse" of the heading "Basic Law." However, the Court pointed out that, in the absence of a Basic Law: Legislation, which outlines the manner in which Basic Laws are to be enacted, amended and modified, it is not appropriate to rule

that a Basic Law in the form of a temporary provision is inherently null and void.

The Supreme Court criticised the ease with which Basic Laws in Israel can be amended. The Court pointed out that, along with entrenching the constitutional concept and the supremacy of the Basic Laws in Israel, the fact that there is no unique procedure for adopting or amending Basic Laws detracts from their status as part of the emerging Constitution of the state. In this context, the Court pointed out the need for enacting a Basic Law: Legislation and called for the completion of the constitutional endeavour.

The Supreme Court also rejected the argument that it is appropriate to invalidate the Basic Law, reasoning that it changes the balance of forces between the Knesset and the Government in the budget approval process, in a manner that impairs a pivotal principle of democracy in Israel. This argument, the court noted, brings up the doctrine of the unconstitutional constitutional amendment and raises the possibility for the Court to repeal a Basic Law because it impairs basic principles of our legal system. The Court pointed out that this doctrine has been extensively discussed in foreign legal systems and has also been mentioned in a number of *obiter dicta* in the case law handed down by the Israel Supreme Court, but has not yet been used in Israel. The Court ruled that there are, indeed, basic principles that cannot be changed, which underlie our existence as a society and a state, and that impairment of those principles will give rise to grave questions of authority, including doubts about whether this would constitute a change in the Constitution or the establishment of a new Constitution. In this case, however, and without deciding on the question of the applicability, or the scope of the applicability, of the doctrine of the unconstitutional constitutional amendment in Israel, the harm caused to the Knesset as the result of the shift to a two-year budget does not constitute an impairment of the supreme principles of our legal system in such a way as to justify the repeal of the Basic Law by virtue of that doctrine. The Court pointed out that, considering that Israel's constitution is not yet complete, there is doubt as to the applicability, or the scope of the applicability, of this doctrine in Israel.

The judgment was handed down by a bench of seven judges headed by Supreme Court President D. Beinisch.

### Languages:

Hebrew.



*Identification:* ISR-2011-2-007

**a)** Israel / **b)** Supreme Court (High Court of Justice) / **c)** Panel / **d)** 13.04.2011 / **e)** HCJ 11437/05 / **f)** Kav LaOved v. Ministry of Interior / **g)** / **h)**.

*Keywords of the systematic thesaurus:*

- 3.16 General Principles – **Proportionality.**
- 3.17 General Principles – **Weighing of interests.**
- 3.20 General Principles – **Reasonableness.**
- 5.2.2.4 Fundamental Rights – Equality – Criteria of Distinction – **Citizenship or nationality.**
- 5.3.1 Fundamental Rights – Civil and political rights – **Right to dignity.**
- 5.3.33 Fundamental Rights – Civil and political rights – **Right to family life.**
- 5.3.39 Fundamental Rights – Civil and political rights – **Right to property.**
- 5.4.3 Fundamental Rights – Economic, social and cultural rights – **Right to work.**

*Keywords of the alphabetical index:*

Foreign workers, rights / Pregnant women, migration policy.

*Headnotes:*

According to the “Treatment of a pregnant foreign worker and of a foreign worker who gave birth in Israel” procedure, which is discussed in the petition, a female foreign worker who is in Israel under a work permit, who gave birth to a child, may remain in Israel for three months after the birth but at the end of that period, she must leave Israel with her child, even if the period of her employment according to the original permit has not yet expired. The worker may return to Israel within two years, for the purpose of completing the period of her employment according to the permit, provided that she arrives alone without the child.

*Summary:*

I. The petition focuses on the “Treatment of a pregnant foreign worker and of a foreign worker who gave birth in Israel” procedure that was promulgated by the competent authority in the Ministry of Interior. The procedure deals with a female foreign worker who is in Israel under a work permit and who gave

birth to a child in Israel. According to the procedure, such a worker may remain in Israel for three months after the birth, and at the end of that period, must leave Israel with her child, even if the period of her employment according to the original permit has not yet come to an end. The worker may return to Israel within two years, for the purpose of completing the period of her employment according to the permit, provided that she arrives alone without the child. A humanitarian exception enables an extension of the time in Israel, in special cases.

The Petitioners, a number of non-profit organisations that are actively involved in promoting human rights, filed this Petition and sought to nullify the procedure. The essence of their argument was that the procedure severely violates the foreign worker’s constitutional right to parenthood and to family life, as well as her legitimate economic interest in completing the period of her employment in Israel according to her work permit.

The state argued that there is no flaw in the procedure; its provisions are in line with the state’s general policy on work migration, which was intended to reduce, as far as possible, the utilisation of foreign workers in Israel’s economy, and thereby prevent the serious implications of the phenomenon of foreign workers for Israel’s society and economy. According to the state’s position, nullifying the procedure is likely to lead to a situation whereby foreign workers who gave birth in Israel would remain in Israel unlawfully even after the expiry of their work permit, and after the child has adjusted to living in Israel over a period of years, and would settle in Israel unlawfully in contravention of the existing policy. The State emphasised the difficulties of enforcement in this area.

II. A panel consisting of Justices Procaccia, Rubinstein and Joubran examined the legality and reasonableness of the procedure according to the principles of administrative and constitutional law. At the end of the process, the panel reached a unanimous conclusion that the petition should be allowed and that the cancellation of the procedure should be ordered.

The decision was based on the question of whether the procedure in question withstands the tests of proportionality and reasonableness in administrative law. In particular, the question was whether making the foreign worker choose between leaving Israel with her child before the expiration of the permit – thereby exercising her right to parenthood and family life while waiving her economic expectations related to the completion of the term of her employment in Israel – and, alternatively, fulfilling her economic expectations, provided that she returns to Israel alone – withstands the test of Israeli administrative law.

The Court's conclusion was that imposing this choice on the foreign worker does not withstand the test of the rules of reasonableness and proportionality in the exercise of administrative discretion under the principles of law. According to those rules, the action of the administrative authority must withstand the test of the requisite balance between the various considerations that underlie its action. What is required is a balance between, and the attribution of a relative weight to, the strength of the harm done to the foreign worker, which is embodied in the provisions of the procedure, and the weight of the public authority's policy on foreign workers.

Regarding the foreign worker, the procedure seriously violates her constitutional right to parenthood and to family life and her economic-proprietorial expectations. The Court clarified that once a person enters the state and dwells therein, even if he or she is not a citizen or a resident of the state, the umbrella of human rights under the Basic Law: Human Dignity and Liberty applies to him/her, and his/her right to the protection of his/her life, body, human dignity and property is protected. Included in the right to human dignity is the protection of the right to parenthood and to family life. The right to property protects the economic expectations of completion of a period of work pursuant to a permit. Making the foreign worker choose whether to exercise her right to family life and parenthood and to leave Israel with her child, or, to realise her economic expectations by continuing to work, but to have to separate from her child, is not consistent with the constitutional principles of human rights. On the one hand, it violates the right to family life and parenthood as a supreme right, which is included in the right to human dignity, and on the other hand, it is not consistent with the protection of economic-proprietorial expectations, as part of the right to property in its broad meaning. The violation of human rights entailed in the provisions of the procedure is one of considerable strength.

In opposition to this violation stands the policy of the public authority, which seeks to limit, as far as possible, the entry of foreign workers into Israel, and to ensure, by effective means, that they leave Israel and are prevented from settling here, in order to encourage local production and employment and prevent the creation of serious social and economic problems in varied areas. Allowing a foreign worker to remain in Israel with her child creates a special problem in this regard.

In balancing the conflicting values, which is inspired by the limitations clause in the Basic Law: Human Dignity and Liberty, the Court has found that the cruxes of the procedure do not withstand the tests of proportionality and reasonableness, which require the

existence of proper proportion between the strength of the violation of the human right on the one hand, and the importance of the public policy, on the other. The Court has ruled that the exercise of the human right to parenthood and family life as cause for expelling a person from Israel is a means that is much more harmful than other means that can be utilised to achieve the purpose of the state policy. The Court has found that the benefit produced by the procedure for exercising the Authority's policy is significantly less than the violation of the human right that it embodies. It has ruled that the provisions of the procedure are not consistent with basic concepts of constitutional law in Israel with regard to human rights, and accordingly, those provisions must be nullified.

The Court has therefore decided to allow the petition and to transform the order *nisi* into an absolute order.

The procedure was nullified, meaning that a foreign worker is no longer obligated to leave Israel with her child before the expiration of the work permit that she holds. Finally, the Court ruled that the competent authority is entitled to formulate a new procedure, which would ensure the promotion of the government's policy regarding foreign workers, with no unreasonable or disproportional violation of the foreign worker's basic rights.

#### *Languages:*

Hebrew.



# Latvia

## Constitutional Court

### Important decisions

*Identification:* LAT-2011-2-003

**a)** Latvia / **b)** Constitutional Court / **c)** / **d)** 11.01.2011 / **e)** 2010-40-03 / **f)** On the compliance of the first sentence of Section 40 of March 2007 Cabinet of Ministers Regulation no. 173 “Procedures for the Acquisition of Driver Qualification, Procedures for the Acquisition and Renewal of the Right to Drive a Vehicle and Procedures for Issues, Alterations and Renewals of Driving Licences” with Article 64 of the Constitution of the Republic of Latvia / **g)** *Latvijas Vestnesis* (Official Gazette), no. 7(4405), 13.01.2011 / **h)** CODICES (Latvian, English).

*Keywords of the systematic thesaurus:*

1.3.4.9 Constitutional Justice – Jurisdiction – Types of litigation – **Litigation in respect of the formal validity of enactments.**  
 2.3.3 Sources – Techniques of review – **Intention of the author of the enactment under review.**  
 3.4 General Principles – **Separation of powers.**  
 3.13 General Principles – **Legality.**  
 4.5.2.3 Institutions – Legislative bodies – Powers – **Delegation to another legislative body.**  
 4.6.2 Institutions – Executive bodies – **Powers.**

*Keywords of the alphabetical index:*

Vehicle, right to drive / Road traffic, offence / Driving licence, renewal / *Ultra vires.*

*Headnotes:*

The requirement for the legislator to regulate all issues of the State is difficult to implement in a complex modern society. Deviations from it are possible, in order to ensure effective implementation of state power. An efficient state of affairs is achieved when the legislator, during the legislative process, regulates the most important issues, but elaboration of more detailed legal norms is delegated to the Cabinet of Ministers or another State organ.

The stipulation that the law must contain direct authority to issue provisions, as well as the principal guidelines for elaboration of the provisions, stems from the requirement that it should be the legislator who takes decisions over the most important issues of social life.

The Cabinet of Ministers does not have authority to issue provisions concerning matters which fall within the legislator’s scope of competence; regulation of such substantial and important social and public issues should be carried out by the legislator itself. Having assessed the significance of an issue under consideration and its position in terms of fundamental rights, the legislator must decide on the extent to which legal regulation is needed.

Legal norms, which are the means by which the legislator authorises the Cabinet of Ministers to regulate the procedures for the exercise of fundamental human rights established in the Constitution or to establish restrictions on the exercise of rights, should be clear and precise. It is not permissible for fundamental rights to be restricted by reference to an unclear or ambiguous authorisation from the legislator. In cases of doubt over the legislator’s authorisation, the Cabinet of Ministers must avoid restricting them as far as possible.

Authorisation by the legislator cannot result in a situation developing where the balance between the legislative and the executive power might lean to the side of the executive power and jeopardise the principle of separation of powers and the essence of a democratic state regime.

Authorisation by the legislator is to be understood by the executive power not only as a particular and brief legal norm, but also as the essence and the purpose of the law.

*Summary:*

I. The Administrative Case Department of the Senate of the Supreme Court submitted an application regarding a norm which placed a person who had been deprived of a driving licence for one year or more under an obligation to pass a theoretical and driving examination in order to regain their licence.

It was suggested in the application that this norm was adopted in breach of the authorisation included in the Road Traffic Law; specifically, the legislator had not authorised the Cabinet of Ministers to place people under an obligation to pass an examination in order to recover their driving licences.

II. The Constitutional Court observed that authority granted by the legislator to the executive power must not be understood simply as one particular brief legal norm; authority stems from the essence and purpose of the law.

It held that somebody who has committed substantial road traffic offences and who has been deprived of their driving licence as a result cannot be perceived as a qualified driver of a vehicle. He or she will need to demonstrate their qualification by passing the relevant examination again. The legislator defined the purpose of the Road Traffic Law sufficiently clearly; elaboration of the procedure for obtaining the qualification of a driver was passed to the Cabinet of Ministers. By adopting the contested norm, the Cabinet of Ministers acted within the limits of authority granted to it. The norm is therefore in conformity with the Constitution.

#### Cross-references:

Previous decisions of the Constitutional Court:

- Judgment 03-05(99) of 01.10.1999; *Bulletin* 1999/3 [LAT-1999-3-004];
- Judgment 04-07(99) of 24.03.2000; *Bulletin* 2000/1 [LAT-2000-1-001];
- Judgment 2000-07-0409 of 03.04.2001; *Bulletin* 2001/1 [LAT-2001-1-002];
- Judgment 2001-06-03 of 22.02.2002; *Bulletin* 2002/1 [LAT-2002-1-002];
- Judgment 2004-25-03 of 22.04.2005;
- Judgment 2005-03-0306 of 21.11.2005; *Bulletin* 2005/3 [LAT-2005-3-007];
- Judgment 2006-05-01 of 16.10.2006; *Bulletin* 2006/3 [LAT-2006-3-004];
- Judgment 2007-04-03 of 09.10.2007;
- Judgment 2008-01-03 of 23.09.2008;
- Judgment 2009-43-01 of 21.12.2009; *Bulletin* 2009/3 [LAT-2009-3-005];
- Judgment 2010-44-01 of 21.12.2010.

Court of Justice of the European Union:

- Judgment C-321/07 of 19.02.2009, paragraph 90.

#### Languages:

Latvian, English (translation by the Court).



#### Identification: LAT-2011-2-004

**a)** Latvia / **b)** Constitutional Court / **c) / d)** 17.02.2011 / **e)** 2010-20-0106 / **f)** On the compliance of Paragraph 1 of the Transitional Provisions of the Law on State Pensions (the part regulating accrued work, length of service periods and equivalence for non-citizens of Latvia in terms of the length of the period of insurance) with Article 14 ECHR in conjunction with Article 1 Protocol 1 thereof and Article 91 of the Constitution of the Republic of Latvia / **g)** *Latvijas Vestnesis* (Official Gazette), no. 29(4427), 22.02.2011 / **h)** CODICES (Latvian, English).

#### Keywords of the systematic thesaurus:

- 3.16 General Principles – **Proportionality**.
- 3.21 General Principles – **Equality**.
- 5.1.1.1 Fundamental Rights – General questions – Entitlement to rights – **Nationals**.
- 5.2.1.3 Fundamental Rights – Equality – Scope of application – **Social security**.
- 5.2.2.4 Fundamental Rights – Equality – Criteria of distinction – **Citizenship or nationality**.
- 5.4.14 Fundamental Rights – Economic, social and cultural rights – **Right to social security**.
- 5.4.16 Fundamental Rights – Economic, social and cultural rights – **Right to a pension**.

#### Keywords of the alphabetical index:

Citizen, rights and guarantees / Pension, amount / Insurance, social / Pension, length of service, calculation / State, successor, liability for obligations of former state / Independence, state, restoration.

#### Headnotes:

A state which manages to restore its statehood, when its independence has been unlawfully discontinued, is entitled to recognise itself, based on the doctrine of state continuity, as a state having undergone an unlawful dissolution.

Under the principle *ex iniuria jus non oritur*, states and parts of them can be annexed to the territory of other states on a voluntary basis and by observing the procedures established in international and national law.

Acts of illegally established public authorities of the other State in the field of public law are not binding on a state that has re-established its independence.

Having restored its independence on the basis of the doctrine of continuity, a state is entitled to take its own decisions where necessary on issues arising

from the existence of the state under its constitutional regime and legal rules.

The application of absolute prohibition of discrimination in relation to social rights may have significant financial consequences.

The fact that a person is denied the possibility of enjoying certain social rights does not constitute infringement of fundamental rights. Infringement is caused where no reasonable grounds exist for such a breach of rights.

A state that has been occupied as the result of aggression by another state is not under a duty to guarantee social security for persons who have travelled to its territory from the occupant state as a result of immigration policy, particularly in light of the duty not to recognise and justify breaches of international law.

### Summary:

I. One of the provisions of the Law on State Pensions sets out a list of work and equivalent periods accrued in the former territory of the USSR which are to be made equivalent to the length of period of insurance. It therefore has a bearing on pension calculations. For Latvian non-citizens, by comparison to Latvian citizens, the list of these periods is considerably shorter. Only education and periods of repression are provided for as equivalents to the length of period of insurance. The applicants contended that differing regulatory frameworks for the calculation of period of insurance for citizens and non-citizens were discriminatory.

II. The Constitutional Court found that in this case citizens and non-citizens of the Republic of Latvia had received different treatment. It went on to assess whether the difference in treatment, in terms of calculating old age pensions, was justifiable and whether there were objective and reasonable grounds for it, taking note as well of international rights and the doctrine of state continuity in its assessment of proportionality.

The Constitutional Court indicated that, under the state continuity doctrine, Latvia had not inherited the rights and duties of the USSR. It did not, therefore, need to assume another state's obligations (i.e. by guaranteeing an old age pension for a service period accrued outside Latvian territory).

Latvia has entered into various agreements aimed at ensuring mutual recognition of length of service with several states, including Lithuania, Estonia, the

Russian Federation, Belarus and Ukraine. The issue of the inclusion of service periods accumulated outside Latvian territory within the period of insurance could be resolved by concluding bilateral agreements regarding co-operation in the social field or dealt with in accordance with legal acts of the European Union.

The Constitutional Court therefore recognised the norm as compliant with Article 91 of the Constitution and Article 14 ECHR in conjunction with Article 1 Protocol 1 thereof.

### Cross-references:

Previous decisions of the Constitutional Court:

- Judgment 2001-02-0106 of 26.06.2001; *Bulletin* 2001/2 [LAT-2001-2-003];
- Judgment 2001-11-0106 of 25.02.2002; *Bulletin* 2002/1 [LAT-2002-1-003];
- Judgment 2004-15-0106 of 07.03.2005; *Bulletin* 2005/1 [LAT-2005-1-004];
- Judgment 2004-18-0106 of 13.05.2005; *Bulletin* 2005/2 [LAT-2005-2-005];
- Judgment 2005-19-01 of 22.12.2005;
- Judgment 2007-10-0102 of 29.11.2007; *Bulletin* 2008/2 [LAT-2008-2-001];
- Judgment 2009-43-01 of 21.12.2009; *Bulletin* 2009/3 [LAT-2009-3-005].

European Court of Human Rights:

- *Gaygusuz v. Austria*, Judgment of 16.09.1996, paragraph 42, *Bulletin* 1996/3 [ECH-1996-3-012];
- *Jasinskij and Others v. Lithuania*, Decision of 09.09.1998;
- *Jankovic v. Croatia*, Decision of 12.10.2000;
- *Kuna v. Germany*, Decision of 10.04.2001;
- *Hadzic v. Croatia*, Decision of 13.09.2001;
- *L.B. v. Austria*, Decision of 18.04.2002;
- *Saarinen v. Finland*, Decision of 28.01.2003;
- *Koua Poirrez v. France*, Judgment of 30.11.2003;
- *Kjartan Asmundsson v. Iceland*, Judgment of 12.10.2004, paragraph 39;
- *Zdanoka v. Latvia*, Judgment of 16.03.2006, paragraph 112, *Bulletin* 2006/1 [ECH-2006-1-003];
- *Epstein and others v. Belgium*, Decision of 08.01.2008;
- *Kireev v. Moldova and Russia*, Decision of 01.07.2008;
- *Kovacic and Others v. Slovenia*, Judgment of 03.10.2008, paragraph 256;
- *Carson and Others v. the United Kingdom*, Decision of 04.11.2008, paragraph 73;



- *Andrejeva v. Latvia*, Judgment of 18.02.2009, paragraphs 83, 87, 89, 90;
- *Si Amer v. France*, Judgment of 29.10.2009;
- *Zubczewski v. Sweden*, Decision of 12.01.2010;-  
*Carson and Others v. the United Kingdom*, Judgment of 16.03.2010, paragraph 88;
- *Tarkoev and Others v. Estonia*, Judgment of 04.11.2010, paragraph 53.

*Languages:*

Latvian, English (translation by the Court).



## Liechtenstein State Council

### Important decisions

*Identification:* LIE-2011-2-001

**a)** Liechtenstein / **b)** State Council / **c)** / **d)** 20.12.2012 / **e)** StGH 2010/88 / **f)** / **g)** / **h)** CODICES (German).

*Keywords of the systematic thesaurus:*

2.1.1.2 Sources – Categories – Written rules – **National rules from other countries.**

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

3.3 General Principles – **Democracy.**

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

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

3.16 General Principles – **Proportionality.**

5.3.19 Fundamental Rights – Civil and political rights – **Freedom of opinion.**

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

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

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

*Keywords of the alphabetical index:*

Racism / Offence, essential elements.

*Headnotes:*

Article 283.1.7 of the Penal Code (StGB), under which a criminal penalty applies to participation as a member in an association which promotes or incites racial discrimination, complies with the principle of the lawfulness of penalties set out in Article 33.2 of the Constitution (LV). Many concepts used to define the essential elements of these offences are somewhat vague. While the rule providing for the criminalisation of racism is subject to the principle of the lawfulness of penalties, it does not necessarily have to satisfy

the publicity element to comply with the principle. A racist opinion is not in itself liable to a criminal penalty. For the latter to apply, such an opinion must be expressed through the participation of the individual concerned in a corresponding association. Effective criminal law measures to combat manifestations of racial discrimination demand relatively broad criminalisation.

Freedom of expression, association and assembly are closely linked and safeguard the freedom to communicate and to form political opinions. They are not just public freedoms but also constitute an inviolable basis for the proper functioning of democracy.

As racial discrimination poses a particular threat to public order, it is fundamentally justified for broad criminal penalties to be applied to all manifestations of it as soon as they occur. Article 283.1.7 of the Penal Code (StGB) goes beyond the Swiss model and transposes Article 4.b of the International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965. Unlike in Switzerland, introducing the offence in Article 283.1.7 of the Penal Code (StGB) was in the public interest. It is not disproportionate and the very essence of fundamental freedoms is not undermined. Article 283.1.7 of the Penal Code (StGB) does not therefore infringe freedom of association or assembly, or indeed freedom of expression.

### *Summary:*

The applicant had been convicted of racial discrimination under Article 283.1.7 of the Penal Code (StGB) and had lodged a constitutional appeal against the higher court ruling confirming the conviction. As during the investigation proceedings, he alleged, *inter alia*, that the fact that the element constituting the offence was mere participation as a member in an association promoting or inciting racial discrimination breached the principle of the lawfulness of penalties, as well as freedom of association and assembly. The State Council subsequently considered the constitutionality of the provision and found it to be constitutional, in spite of the divergence from the Swiss model, under which no clear criminal provision applies in the case of membership of associations promoting racial discrimination. The State Council also observed that the case-law of the European Court of Human Rights holds that freedom of expression is not infringed by the introduction of measures to combat discriminatory language and that it is improper to rely on that fundamental freedom in such circumstances. For these reasons, the State Council dismissed the appeal.

### *Languages:*

German.



# Lithuania

## Constitutional Court

### Important decisions

*Identification:* LTU-2011-2-005

**a)** Lithuania / **b)** Constitutional Court / **c)** / **d)** 11.05.2011 / **e)** 136/2010-17/2011-18/2011-19/2011 / **f)** On elections to municipal councils / **g)** *Valstybės Žinios* (Official Gazette), 58-2771, 14.05.2011 / **h)** CODICES (English, Lithuanian).

*Keywords of the systematic thesaurus:*

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

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

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

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

*Keywords of the alphabetical index:*

Councils, municipalities / Election / Candidates, list / Political parties / Mandates, distribution / Threshold, election.

*Headnotes:*

Members of territorial communities – permanent residents of administrative units of the territory of the Republic of Lithuania – should have an opportunity to be elected to the councils of the respective municipalities. Even without the support of any political party, they should be included as candidates for members of municipal councils in some non-political-party list. For joint lists of self-nominated candidates, the minimum number of votes they must receive to participate in the distribution of mandates should be the same as the joint lists of candidates of parties.

*Summary:*

I. The petitioner requested the Constitutional Court to investigate provisions concerning the elections to municipal councils and the funding of political parties and political campaigns during the elections.

II. In reviewing the provisions on municipal elections, the Court emphasised that by holding elections to municipal councils solely under the proportional system of elections:

1. an exceptional right to nominate candidates for members of municipal councils is established only for one collective subject (i.e., a political party); and

2. individual persons (i.e., permanent residents of the municipality) who meet certain legal requirements, may nominate themselves as candidates for members of the municipal council and compete in multi-member electoral constituencies with lists of candidates.

The Court noted that the legislator has the authority to only use the proportional system for elections to municipal councils. Regarding elections in multi-member electoral constituencies, the legislator may not establish regulations that would make individual persons in the lists of candidates nominated by political parties (or other collective subjects) compete with other individual persons not in the lists of candidates. This would distort the essence of the proportional electoral system and violate the principle of equal suffrage.

In regulating municipal council elections, the legislator possesses broad discretion to choose methods to decide election results of an elective representative institution, distribute mandates and determine election thresholds for candidate participation in the distribution of mandates after receiving a certain number of votes set by law.

Yet the legislator's discretion is not absolute. The threshold set by the legislator to elect a representative institution must not be so high as to create preconditions that fail to reflect the interests of different voters. This would violate their right to participate in decisions affecting self-government by democratically electing representatives. Fundamental differences of election participants should not be overlooked such that applying the same election threshold for essentially different subjects implementing the passive electoral right should be considered as well as different election threshold for essentially analogous subjects implementing the passive electoral right.

Regarding nominations, joint lists of self-nominated candidates are closer to the list of candidates formed by one party than to the joint list of candidates of parties, which is formed by several parties that combine their lists of candidates. Nevertheless, in establishing the election threshold, joint lists of self-nominated candidates, which join together self-nominated persons, are equated with joint lists of candidates of parties, which are formed by parties that join their lists of candidates despite the essentially different subjects. This regulation disregards the principle of equal suffrage.

Because the law has yet to provide an election threshold of votes for self-nominated candidates to qualify for participation in the distribution of mandates, the legislator may set an election threshold at a certain amount of votes casted by voters, which would be determined after calculating the election votes. Once the number of votes casted by voters, which determines the granting of a mandate to self-nominated candidates, is established and the mandates are distributed to self-nominated candidates, this number would be rated as an election threshold for self-nominated candidates.

Mandates are given to the lists of candidates participating in the distribution of mandates. It should not matter that the amount of this quota for candidates on the lists of candidates is determined by votes received by the lists of candidates that have overcome the election threshold and by votes received by all the self-nominated candidates, which create preconditions for distributing the remaining mandates to the lists of candidates disproportionately to the number of votes received by them.

III. This decision had no dissenting opinions.

#### *Languages:*

Lithuanian, English (translation by the Court).



*Identification:* LTU-2011-2-006

**a)** Lithuania / **b)** Constitutional Court / **c)** / **d)** 09.06.2011 / **e)** 12/2008-45/2009 / **f)** On provision of the real property register information for advocates / **g)** / **h)** CODICES (English, Lithuanian).

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

1.5.6 Constitutional Justice – Decisions – **Delivery and publication.**

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

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

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

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

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

Real property / Advocates / Personal data, protection / Defence, right / Information, right / Property, right / Constitutional Court, decision, publication, postponement.

#### *Headnotes:*

Pre-conditions preventing an advocate from accessing information stored in the Real Property Register for the purpose of providing a person legal assistance violate Constitutional norms that secure a person's right to defence and right to have an advocate. The pre-conditions also violate the proportionality imperative arising from the constitutional principle of a state under the rule of law, whereby the rights of a person should not be limited more than necessary to meet constitutionally grounded objectives.

#### *Summary:*

I. Initiated by the Vilnius Regional Administrative Court, the petitioner requested the Constitutional Court to examine the constitutionality of national provisions on the Real Property Register, which categorise recipients of the data into classes. Advocates have been attributed to the second class, which has become particularly problematic for advocates to carry out their profession because information regarding a natural person's property is provided only for first-class recipients of the data.

II. The Constitutional Court emphasised that the constitutional right to judicial defence and the right to have an advocate oblige the legislator to enact appropriate regulations to enable advocates to perform their professional activity and render effective legal assistance.

By ensuring a person's right to judicial defence, advocates may refer to information held by state and municipal institutions, *inter alia* information that can neither be accessed by the person whom the advocate is representing nor by the advocate who representing the person. As such, the legislator must establish *inter alia* regulation to address this problem, which is necessary to protect the right of the person to have an advocate as one of the conditions for effective implementation of the right to judicial defence.

The constitutional right to an advocate also requires a legislator to establish regulations that speak to an advocate's corresponding duties as well, *inter alia* the duty of confidentiality, which obliges the advocate to safeguard information necessary for rendering legal assistance that was entrusted to him. The duty of confidentiality compels the advocate to not disclose such information and not to use it for purposes contrary to law. The legislator should also impose liability for an advocate's breach of confidentiality.

The Court acknowledged limitations imposed on advocates that prevented them from receiving copies of documents in which the Real Property Register registered immovable items and property rights to these items. From the Constitution, a duty arises to the legislator to establish laws on documents and information held by state and municipal institutions, while securing the inviolability of private life of a human being and other values protected by the Constitution. Thus, the legislator must enact laws on provision of information stored in the Real Property Register, so that while providing one with the information stored in this register the inviolability of the private life of a human being and other values protected by the Constitution would be secured.

The Constitutional Court postponed the publication of this decision to allow time for the legislator to prevent the legal vacuum in the state's legal system.

III. This decision had no dissenting opinions.

#### *Languages:*

Lithuanian, English (translation by the Court).



#### *Identification:* LTU-2011-2-007

**a)** Lithuania / **b)** Constitutional Court / **c)** / **d)** 21.06.2011 / **e)** 10/2009 / **f)** On places where gaming is organised / **g)** *Valstybės Žinios* (Official Gazette), 76-3672, 21.06.2011 / **h)** CODICES (English, Lithuanian).

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

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

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

Gaming / Appropriate location / Mass gathering / Casino / Organise, permission / Prohibition.

#### *Headnotes:*

A regulation that does not explicitly prohibit the organisation of gaming at mass gatherings, religious institutions, and educational establishments and their surroundings does not necessarily allow these places to organise gaming activities if other regulations have dealt with the issue.

#### *Summary:*

I. The petitioner, a group of Members of the parliament (Seimas), requested the Constitutional Court to determine whether a regulation that expressly lists locations where gaming facilities are prohibited conforms with the Constitution. The petitioner specifically inquired whether locations not expressly excluded in the list such as places of mass gatherings, religious institutions, educational establishments and surroundings are exempted from places unfit for gaming facilities.

II. The Constitutional Court held that the challenged regulation prescribes that other prohibitions and restrictions on the organisation of gaming laid down in this and other laws may also be applied to the organisation of gaming. The Court also emphasised the existence of other laws that address prohibitions on the organisation of gaming in places of mass gatherings, in houses of prayer and their surroundings, and in the vicinity of education establishments.

When the Control Commission decides whether to permit the establishment of a bookmaking point, a gaming machine, bingo hall, or a gaming house (or casino) or when the municipal council decides whether to allow the establishment of a gaming house, they should consider requirements stemming from the said laws.

The Constitutional Court held that there is no constitutional ground to maintain that the challenged regulation must expressly prohibit the organisation of gaming in places of mass gatherings, in houses of prayer and their vicinity, as well as in the vicinity of education establishments. Consequently, to the extent specified by the petitioner, the regulation does not contain any legislative omission such that a legal gap exists prohibited by the Constitution.

III. This decision had no dissenting opinions.

*Languages:*

Lithuanian, English (translation by the Court).



## Luxembourg Constitutional Court

### Important decisions

*Identification:* LUX-2011-2-001

**a)** Luxembourg / **b)** Constitutional Court / **c)** / **d)** 20.05.2011 / **e)** 00067 / **f)** Case X v. Y / **g)** *Mémorial, Recueil de législation* (Official Gazette), A, no. 114, 01.06.2011 / **h)** CODICES (French).

*Keywords of the systematic thesaurus:*

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

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.**

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

*Keywords of the alphabetical index:*

Penal Code / Cassation, damages, claimant / Appeal, admissibility.

*Headnotes:*

Article 412 of the Code of Criminal Investigation forbids claimants to seek damages in criminal proceedings to appeal an acquittal, unless the decision penalised them more heavily at civil law than the acquitted party had requested. The reason is that it restricts victims' access to higher review of legality according to the criminal or civil nature of the court before which their action in damages is brought. In this respect, Article 412 of the Code of Criminal Investigation is not contrary to Article 10bis.1 of the Constitution, which enshrines the equality of Luxembourgers before the law.

At the same time, the same provision is contrary to Article 10bis.1 of the Constitution in that it makes the admissibility of an extraordinary appeal on points of law dependent on the status of the party to the action.

*Summary:*

"The Court of Appeal, in deciding on a correctional appeal, acquitted A, B and C of various charges laid against them by the claimant D and declared that it lacked jurisdiction to determine the claim for damages by D.

After D appealed this judgment on points of law, both the defendants before the Court of Cassation and the prosecution pleaded the inadmissibility of the appeal, in accordance with Article 412 of the Code of Criminal Investigation, which provides that "in no event may the party claiming damages contest the annulment of a decision of acquittal; however, if the decision has penalised it more heavily at civil law than the acquitted party requested, the relevant clause of the decision may be set aside at the claimant's request".

As such, the Court of Cassation posed the following preliminary questions to the Constitutional Court:

"To the extent that it forbids the party claiming damages to appeal against a decision of acquittal unless the decision penalised it more heavily at civil law than was requested by the acquitted party, is Article 412 of the Code of Criminal Investigation:

- contrary to Article 10bis.1 of the Constitution in restricting the victim's access to higher review of legality according to the criminal or civil nature of the court before which its action in damages is brought?
- contrary to Article 10bis.1 of the Constitution in making the admissibility of an extraordinary appeal on points of law dependent on the status of the party to the action?"

Responding to the first question, the Constitutional Court held that an inequality contrary to Article 10bis.1 of the Constitution was only conceivable in circumstances where two or more categories of persons were each subject to different legal rules in relation to a given situation. It is not the case where the same person had the choice of complying with two different sets of rules that generate different rights and obligations for him or her. The Court stipulated that victims of an offence had the free choice of bringing their action for redress of the consequential damage either before the criminal court, incidental to the prosecution, or as the main action before the civil court. The separate rights and obligations deriving from the free choice of either procedural avenue for obtaining satisfaction do not give rise to inequality before the law.

As to the second question, the Constitutional Court held that the application of the constitutional rule of equality presupposed that the categories of persons between whom discrimination was alleged were in a comparable situation regarding the impugned measure. As to the preliminary question, the criterion of comparability was the treatment meted out to the different parties in criminal proceedings in so far as they relied on identical or similar rights. The Court stated that the status of a claimant for damages in criminal proceedings was comparable to the status of a defendant, with regard to the civil claim, in so far as the former acted in the capacity of an entitled party for an entitlement allegedly owed by the latter. Hence, both parties were united in the same procedural relationship where the civil claim was concerned.

The Court accepted that the legislator, without infringing the constitutional principle of equality, could subject certain categories of persons to different legal rules, on condition that the disparity between them was objective, rationally justified, adequate and proportionate to its purpose.

It held that according to the statutes in force and the construction placed on them by the courts, a defendant who, besides a criminal penalty, had been ordered to make civil reparation could appeal on points of law not only the criminal sanction but also the civil penalty. As a result, one of the parties to the proceedings had at its disposal, for the same contestation, a means of appeal not available to the other. The Court also determined that the standing of the civil action, as incidental to the prosecution, was not sufficient to rationally justify this disparity. One reason is that Article 412 of the Code of Criminal Investigation made its own provision allowing the civil claimant, admittedly under exceptional conditions, to bring an appeal on points of law against an unfavourable civil judgment even though the defendant had been acquitted. Another reason is that Article 202 of the Code of Criminal Investigation enabled the civil claimant to appeal a criminal judgment in respect of the civil interests, even though the accused had been acquitted.

The Court concluded that the restriction of the right to appeal on points of law against an unfavourable civil judgment solely to the person convicted in the criminal proceedings, without the civil claimant having the same right in respect of the civil interests, was not rationally justified, adequate and proportionate to its purpose. Hence, the aforesaid provision was contrary to Article 10bis.1 of the Constitution, stipulating the equality of Luxembourgers before the law.

*Languages:*

French.



## Moldova

### Constitutional Court

#### Important decisions

*Identification:* MDA-2011-2-001

**a)** Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 31.05.2011 / **e)** 11 / **f)** Constitutionality review of the phrase “with keeping the average wage (for employees paid piecework or per unit of time) from Article 111.1 of the Labour Code in the wording of Law no. 168 dated 9 July 2010 “For amending and supplementing the Labour Code of the Republic of Moldova” / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, Russian).

*Keywords of the systematic thesaurus:*

2.1.1.1.1 Sources – Categories – Written rules – National rules – **Constitution.**  
 2.2.1 Sources – Hierarchy – **Hierarchy as between national and non-national sources.**  
 3.12 General Principles – **Clarity and precision of legal provisions.**  
 3.21 General Principles – **Equality.**  
 5.4.3 Fundamental Rights – Economic, social and cultural rights – **Right to work.**

*Keywords of the alphabetical index:*

Employment law / Social assistance / Insurance, social, state.

*Headnotes:*

Article 43 of the Constitution recognises the right of all citizens to work, a right that embraces free choice of employment, equitable and satisfactory work conditions, safety nets against unemployment, and labour protection. The right to work falls into the category of economic rights essential to ensuring the right to equitable remuneration and right to a decent standard of living, as established in Article 47 of the Constitution. The right to equitable remuneration provides a worker and his/her family health and welfare services, including food, clothing, housing, medical care, and other social benefits. Thus, by working, a person is not only guaranteed a decent



standard of living but also social services that protects him/her in the event of unemployment, sickness, disability, or old age.

### Summary:

I. On 9 July 2010, the Parliament adopted Law no. 168 “For amending and supplementing the Labour Code of the Republic of Moldova” (hereinafter, “Law no. 168”). Law no. 168 reworded parts of Article 111.1 of the Labour Code, which now reads, “In the Republic of Moldova, holiday non-working days with keeping the average wage (for employees who are paid piecework or per unit of time) are . . . .”

The complaint alleged that the language of the phrase “with keeping the average wage (for employees who are paid piecework or per unit of time)” of the Labour Code contravenes Articles 4.2 , 43 and 54 of the Constitution; Articles 23 and 24 of the Universal Declaration of Human Rights; and Article 7.d of the International Covenant on Economic, Social and Cultural Rights.

II. After reviewing the constitutionality of Article 111.1 of the Labour Code, the Constitutional Court (hereinafter, the “Court”) resolved three legal issues:

1. observance of the right to work as guaranteed by Article 43 of the Constitution;
2. observance of the principle of equality in rights of persons, in terms of equal rights for employees, regardless of the type of employment contract concluded with the employer (with tariff salary or function, piecework or per unit of time), a principle stated in Article 16 of the Constitution; and
3. observance of the principle of preeminence of international treaties norms over national norms guaranteed by Article 4 of the Constitution.

The Court underscored that the range of social guarantees arising under the right to work reflects the significance of this right for any person able to work. When a person exercises the right, the Court recognises that Articles 43 and 47 of the Constitution secure his/her right to equal access to opportunities and benefits.

In emphasising that a worker’s right to equitable remuneration and right to a decent standard of living shall not be violated or circumvented on non-working days, the Court made clear that holiday non-working days constitute “paid holidays” under Article 43.2 of the Constitution. The Court added that legislators may certainly extend protective work measures. Because holiday non-working days are important to a

person’s spirituality and culture, the Court articulated that he/she shall be fairly compensated, in accordance with Articles 43.1, 43.2 and 47.1 of the Constitution.

The previous wording of the norm obliged employers to maintain the average wage for holiday non-working days. Employers strictly interpreted this norm and only applied it to employees who secured labour contracts for a salary tariff. For employees paid for piecework or per unit of time and could not work on holiday non-working days (even if they wished), the employer did not pay them the average salary for the respective days. Thus, employees hired for a tariff salary had an advantage over employees paid piecework or per unit of time.

The Court noted that Article 111.1 of the Labour Code, both in the previous wording as well as in the current one, should not and does not exclude remuneration of tariff salary employees on holiday non-working days. Their salary should be kept irrespective of the number of holiday non-working days during the worked month.

The Court disagreed with the applicant’s argument that Law no. 168 had compromised the right of a particular category of employees, namely those who were compensated for piecework or per unit of time. However, these employees were risking a disadvantage until the adoption of the Law no. 168 created by the legal rule, which established holiday non-working days. The Court determined that the amendment eliminated the inequity, establishing equal rights among tariff employees and those paid on piecework or time unit and ensuring that the norm conforms with Article 16 of the Constitution.

The Court concluded that the phrase “the average salary (for employees who are paid piecework or per time unit)” complies with the provisions stated in Articles 16, 43.1, 43.2 and 47.1 of the Constitution, ensuring equitable and satisfactory working conditions and compulsory payment of average wage required on holiday non-working days for all the categories of employees, both for those receiving salary and for those who are paid piecework or per unit of time.

Regarding the priority of international treaties on human rights referred to in the complaint, the Court determined that the constitutional review of the challenged expression can only occur when the Constitution or national laws do not enshrine the principles and guarantees stated in international treaties where international treaties grant litigants broader rights than the Constitution. Articles 23 and 24 of the Universal Declaration of Human Rights,

Article 7.d of the International Covenant on Economic, Social and Cultural Rights and Article 2 of the European Social Charter (revised) do not provide broader rights and guarantees for employees than Articles 43 and 47 of the Constitution. Therefore, the phrase “with keeping the average wage (for employees who are paid piecework or per unit of time) from Article 111.1 of the Labour Code does not violate international treaties invoked in the complaint and consequently corresponds to Article 4 of the Constitution.

For efficiency, the Court addressed the Parliament regarding the implication of the language in Article 111.1 of the Labour Code. The Court noted that confusion may emerge regarding the previous and current version of Article 111.1 of the Labour Code. While the earlier version was interpreted narrowly to remunerate employees or those paid piecework or per unit of time, the current wording may be interpreted to the average wage for holiday non-working days are paid only to these categories of employees.

#### *Supplementary information:*

Address of the Constitutional Court to the Parliament of the Republic of Moldova.

#### *Languages:*

Romanian, Russian.



#### *Identification:* MDA-2011-2-002

**a)** Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 07.06.2011 / **e)** 12 / **f)** Constitutionality review of Article 22.1.p of Law no. 544-XIII of 20 July 1995 “Concerning the status of judges” in the wording of the Law no.152 of 8 July 2010 “For amending and supplementing some legislative acts” / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, Russian).

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

4.7.16.2 Institutions – Judicial bodies – Liability – **Liability of judges.**

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

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

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

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

Judge, independent / Judge, impartial / Judge, disciplinary liability / Judge, immunity.

#### *Headnotes:*

Article 116.1 of the Constitution states that “judges are independent, impartial and irremovable under the law.” The sanctioning of judges shall be carried out pursuant to Article 116.5 of the Constitution. Moreover, Article 123.1 of the Constitution provides that the Superior Council of Magistrates shall ensure the appointment, transfer, removal from office, upgrading and imposing of the disciplinary sentences against judges.

The Law on the Status of Judges stipulates that each judge is obliged to resolve disputes honestly and impartially, applying law based on evidence without subjection to any pressures, external influence or intimidation. Failure to fulfill his/her obligation would render a judge liable for culpable and wrongful acts.

#### *Summary:*

I. The Supreme Court of Justice’s decision on the constitutionality of Article 22.1.p of the Law on the Status of Judges serves as ground for examining the case. Article 22.1.p stipulates that a judge commits a disciplinary offense when his/her opinion is found by European Court of Human Rights to be in violation of fundamental human rights and freedoms.

The complaint alleges that the challenged norm violates constitutional principles of independence, impartiality and immovability of a sitting judge. Additionally, the Supreme Court of Justice also decided that a judge neither commits a disciplinary offense nor subject to judicial error if the judge were to criticise the court; instead, appropriate remedies should be established to address a judge’s act of criticizing the court. In this case, the Supreme Court of Justice had authored the complaint; hence, the application did not reflect its opinion.

The Court noted that the Constitution upholds a person's right to an independent and impartial judicial process. This right is not only fundamental but also an effective and complete judicial protection that can be achieved only under conditions of a real independent judiciary, which is exercised by the court judge himself /herself.

In administering justice in a state governed by the rule of law, Article 116.1 of the Constitution ensures that a judge shall enjoy independence and impartiality. The judge is shielded from immovability provided that he/she carries out his/her professional obligations and observes ethical codes of conduct. A judge may be disciplined if he/she violates these precepts. Article 116.6 of the Constitution, Article 15.6 of the Law on the Status of Judges, and Article 15.1 of the Code of Ethics for Judges provide that failure of the judge to fulfil his /her duties attracts liability foreseen by the law.

Bringing a case to the European Court of Human Rights (is a claim against the state. The European Court of Human Rights intervenes when the protection of human rights and freedoms has not been ensured as foreseen by the European Convention on Human Rights or in situations where errors committed by national courts could imply violation of rights and freedoms stated in the European Convention on Human Rights. According to the principle of subsidiarity, the European Court cannot substitute national courts. The European Court of Human Rights supports that interpretation of a national law is the primary task of national courts, but the interpretation should not contradict the observance of fundamental human rights.

By its decisions, the European Court of Human Rights attests that the European Convention on Human Rights has been violated through a miscarriage of justice, which occurred when national courts failed to identify or address the relevant issues. The European Court of Human Rights' rulings on complaints against the Republic of Moldova, once adopted, take on the authority of *res judicata* and are final and binding.

According to the meaning of the contested legal norm, condemnation of the Republic of Moldova through the decision of the European Court of Human Rights implies disciplinary liability of judges. The Court emphasised that judges shall enjoy immunity in the exercise of justice. Such immunity would be undermined if a decision to cancel or modify a judge's court decision becomes a determining reason to sanction the judge and render him /her liable for an opinion that was expressed during his/her administration of justice and through an issuance of a decision.

As such, a judge's guilt of criminal abuse should not be determined by the final verdict of a case that goes up to the European Court of Human Rights.

Thus, judges cannot be constrained to exercise their powers under the threat of sanction, as that may influence their ultimate decision. In exercising their duties, the judges must possess unhampered freedom to resolve cases impartially in accordance with the law and their own assessment of the facts. According to principle of international law, any miscarriage of justice must be found and fixed as a priority by effective remedy.

The Court emphasised that the disputed legal provision is mandatory in nature and presumes disciplinary liability of a judge or a panel of judges if the European Court of Human Rights later finds that a court decision violates a person's rights and fundamental freedoms. In light of evolutionary and dynamic approach to the European Convention on Human Rights by the European Court of Human Rights, "automatic" accountability of judges is inadmissible in such cases without demonstrating the objective and subjective sides of the disciplinary breach. The Parliament stipulated the assumption of disciplinary liability of judges without providing the mechanism and limits to the application, thus violating the principle of accessibility of the legislative act, which allows discretionary application of this norm by the Superior Council of Magistracy.

The Court concluded that disciplinary accountability of judges based on a European Court of Human Rights' decision, which condemns the Republic Moldova as a state without evidence that the law was violated by a judge deliberately or through gross negligence, constitutes an inadmissible interference in the implementation of the principles of independence, impartiality and immovability of the judge. The contested provision from Article 22.1.p of the Law on the Status of Judges is contrary to Articles 6, 114 and 116.1 of the Constitution.

#### *Languages:*

Romanian, Russian.



*Identification:* MDA-2011-2-003

**a)** Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 14.06.2011 / **e)** 13 / **f)** Constitutionality review of Article IV of the Law no. 186 dated 15 July 2010 on amending and supplementing certain acts / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, Russian).

*Keywords of the systematic thesaurus:*

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

5.4.18 Fundamental Rights – Economic, social and cultural rights – **Right to a sufficient standard of living.**

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

*Keywords of the alphabetical index:*

Veterans / Social assistance / Medical care / Public expenditure.

*Headnotes:*

Article 47 of the Constitution establishes that the State shall take positive action to ensure that every person has a decent standard of living adequate for his/her good health and welfare, including food, clothing, shelter, medical care as well as basic social services. The Constitution provides that a citizen can invoke the right to insurance in the event of unemployment, disease, disability, widowhood, old age, and other cases when he/she loses the means of subsistence due to certain circumstances beyond his/her control.

According to Article 72.3.j of the Constitution, the general regime on social protection is regulated by organic law. The State's fundamental obligation is to guarantee the right of every person to health care, assistance and social protection, which is regulated through national legislation.

*Summary:*

The Constitutional Court examined the complaint lodged by the Parliamentary Advocate (Ombudsman) Tudor Lazar regarding the constitutionality of Article IV of the Law no. 186 dated 15 July 2010 on amending and supplementing certain acts (hereinafter, "Law no. 186").

Law no. 186 replaced the text "for employed veterans including in the budget sphere will be borne by the

enterprise, institution or organisation with any type of property, and for retired veterans pensioners, unemployed, unemployed invalids – from the state budget" with the new text "for retired veterans, jobless persons receiving unemployment benefits, unemployed invalids shall be borne by the state budget." This change impacts Articles 14.7, 15.8 and 16.5 of the Law on Veterans.

The applicant alleged that the practices are discriminatory and inconsistent with Articles 16, 47 and 54.1 of the Constitution. Article IV of Law no. 186 distinguishes veterans in employees or unemployed, including those from the budgetary sphere not benefiting from provision of medical facilities in accordance with the volume foreseen by the unique program and basic insurance medicines for diseases specified in the law.

The Court examined the provisions of Article IV of the Law no. 186 in light of constitutional and legal provisions on the exercise of human rights, freedoms and duties in the field of health care, assistance and social protection, public expenditure and legal system of taxation. The Court underscored that citizens of the Republic of Moldova shall enjoy the rights and freedoms enshrined in the Constitution and other laws having the obligations provided for therein. Respect for and protection of the human person is the foremost duty of the state. All citizens are equal before the law and public authorities, regardless of race, nationality, ethnic origin, language, religion, sex, opinion, political choice, personal property or social origin, as provided in Articles 15 and 16 of the Constitution.

Article 47 of the Constitution establishes that the State is obliged to take action to ensure that every person has a decent standard of living adequate for his/her good health and welfare, including food, clothing, shelter, medical care, as well as needed social services. The Constitution provides that a citizen has the right to insurance in the case of unemployment, disease, disability, widowhood, old age, other cases of loss of means of subsistence due to certain circumstances beyond one's control. According to Article 72.3.j of the Constitution, the general regime on social protection is regulated by organic law.

The Court mentioned that any stipulation referring to the allocation of state budget expenditures for compulsory health insurance of medical benefits should conform with constitutional provisions and those of special legislation pertaining to health care and mandatory health insurance.

The Court determined that the amendments to Articles 14.7, 15.8, 16.5 of the Law on veterans conformed with the Constitution, and legislation in the field of health care and mandatory health insurance.

The Court disagreed with the author of the complaint that veterans' right to basic medical assistance and insurance with specific drugs was restricted by Law no. 186 through the unique program and priority state programs because the right of everyone to health care including veterans is guaranteed by the Constitution and national legislation.

Changes made by the Law no. 186 in Articles 14.7, 15.8 and 16.5 of the Law on Veterans that entail payment of mandatory insurance premiums by employed veterans, as required by Article 17 of Law no. 1585, are paid by the employer and employee and do not affect the constitutional right of employed veterans for assistance, including medical and social protection.

The Court disagreed with the complaint that the suppression by Law no. 186 of a legally acquired right or the provisions' effects of Article IV from the Law no. 186, had led insured persons to put on equal terms in accordance with Article 16 of the Constitution and the principles of organisation and operation of compulsory health insurance system.

The Court determined that the application of the Articles in Law no. 186 was not contrary to Articles 16, 47 and 54.1 of the Constitution.

#### *Languages:*

Romanian, Russian.



## Montenegro Constitutional Court

### Important decisions

*Identification:* MNE-2011-2-001

**a)** Montenegro / **b)** Constitutional Court / **c)** / **d)** 08.12.2011 / **e)** Už-III no. 439/10 / **f)** / **g)** "Službeni list Crne Gore" broj:6/12 (Official Gazette of Montenegro), no. 6/12 / **h)** CODICES (Montenegrin, English).

*Keywords of the systematic thesaurus:*

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

*Keywords of the alphabetical index:*

Judge, participation in previous proceedings.

*Headnotes:*

A situation where, in the same proceedings, a judge has participated in the adjudication of the complaint and in subsequent review proceedings could cast doubt over his or her impartiality and that of the Court, giving rise to potential for a breach of the right to a fair trial.

*Summary:*

I. In the case at issue, Judge B.F. was a member of the Court panel that handed down Judgment Rev. IP no. 74/10 dated 22 September 2010 and then, as a judge of the Appellate Court, sat on the panel of that Court which ruled in the second instance. In the same legal matter, Judge B.F. participated in the ruling of the Appellate Court Pž. no. 274/07 dated 1 July 2008 after the defendant, HTP "Budvanska Rivijera", filed a complaint challenging the ruling of the Commercial Court in Podgorica P.no. 638/05 dated 15 February 2007. The applicant could not have requested the exemption of the judge as he only found out the composition of the judicial review panel when he was served with the ruling of the Supreme Court.

The applicant submitted a constitutional complaint against the decisions of the Commercial Court in Podgorica, the Appellate Court and the Supreme Court on the grounds of violation of the right to a fair trial.

The applicant noted that the judge, in his capacity as a member of the Appellate Court panel, took part in the earlier adjudications overturning the rulings of the Commercial Court and referring them to the First Instance Court for repeat adjudication, and suggested that a violation of the right to a fair trial had taken place, from the perspective of impartiality, in view of the fact that, in the process of judicial review of the case, the adjudicating judge took part in the adjudication of the Appellate Court.

There is a consistent case-law by the Constitutional Court to the effect that the existence of impartiality for the purposes of Article 6.1 ECHR must be determined according to a subjective test where regard must be given to a specific judge's personal convictions and behaviour (i.e. whether he or she held any personal prejudice or bias in a given case) and according to an objective test, where assessment is undertaken as to whether the tribunal itself and its composition offered sufficient guarantees to exclude any legitimate doubts over its impartiality.

The applicant did not question the subjective impartiality of the Court; the Constitutional Court should not consider this aspect. The applicant was, however, challenging the judge's impartiality from an objective standpoint, as the judge was a member of the panel that decided about the review and of the panel that ruled in the proceedings following the complaint. The applicant contended that the judge could adopt the same stance in the proceedings that led to the repeal of the First Instance Court ruling and in the proceedings where the case was returned for re-adjudication and could therefore have influence over the panel that presided over the review proceedings.

II. Assessment is necessary, in carrying out the objective test, as to whether, aside from the judge's conduct, ascertainable facts exist to cast doubt over his impartiality. In this connection, the Constitutional Court noted that Article 69 of the Law on Civil Obligations stipulates the reasons for exemption of judges. Under Article 69.4, a judge cannot adjudicate a case in which he or she has been involved at a lower instance or in some other judicial capacity. The legislator was seeking, through the enactment of this provision, to eliminate all reasonable doubt over the impartiality of the Court. The Constitutional Court maintained that the provisions of Article 69 should not be understood as pertaining to the "Court" as an

institution; rather, it pertains to higher or lower instances trying cases on their merits at various procedural stages. Any other interpretation would be contrary to the objective and purpose of Article 69.

The Constitutional Court therefore found that a situation where, in the same proceedings, a judge has participated in the adjudication of the complaint and in subsequent review proceedings could cast doubt over his or her impartiality and that of the Court, giving rise to potential for a breach of the right to a fair trial. It stressed that the existence of procedures for ensuring the impartiality of the Court is a relevant factor which must be taken into account.

Having established a violation of the right to a fair trial (as a result of a breach of the principle of impartiality of the Court), the Constitutional Court did not proceed to examine the arguments the applicant had put forward regarding breaches of other constitutional rights indicated within the complaint.

It accordingly upheld the constitutional complaint, repealed the ruling of the Supreme Court and returned the case to the Supreme Court for repeat adjudication.

#### *Cross-references:*

#### European Court of Human Rights:

- *Mežnarić v. Croatia*, 15.07.2005, Application no. 71615/01, paragraphs 27, 29 and 31;
- *Fey v. Austria*, 24.02.1993, Series A, no. 225, paragraph 27;
- *De Cubber v. Belgium*, 26.10.1984, Application no. 9186/80, Series A, no. 86, paragraph 26;
- *Oberschlick v. Austria*, 23.05.1991, Application no. 11662/85, Series A, no. 204.

#### *Languages:*

Montenegrin, English.



# Netherlands

## Council of State

### Important decisions

*Identification:* NED-2011-2-002

**a)** Netherlands / **b)** Council of State / **c)** General Chamber / **d)** 22.06.2011 / **e)** 201011803/1/H2 / **f)** Europese Klokkenluiderspartij v. the Electoral Council / **g)** *Landelijk Jurisprudentienummer*: LJN:BK BQ8870 / **h)** CODICES (Dutch).

*Keywords of the systematic thesaurus:*

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

5.2.1.4 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:*

Elections, deposit.

*Headnotes:*

Refusal by the electoral council to return a deposit paid with regard to the submission of a list of candidates for the European Parliament elections did not constitute discrimination and did not amount to a violation of the right to stand for election.

*Summary:*

I. The European Whistleblower Party (*Europese Klokkenluiderspartij*; hereinafter, the “EKP”) applied to the Electoral Council for restitution of a deposit paid with regard to the submission of a list of candidates for the European Parliament elections. The Electoral Council rejected the application. The EKP lodged objections, which were turned down by the Electoral Council. On appeal to the District Court, that court quashed the Electoral Council’s decision, but upheld its legal effects. The EKP appealed to the Administrative Jurisdiction Division of the Council of State. The applicant claimed *inter alia* that its rights under the

International Covenant on Civil and Political Rights and the European Convention on Human Rights had been violated. The Administrative Jurisdiction Division of the Council of State ruled as follows.

II. Under the Elections Act in force at the time the challenged decision was taken, if the election concerned the House of Representatives, a deposit of EUR 11,250 must be paid to the State for each group of lists, each set of identical lists not forming part of a group and each separate list (Article H 12.1). This payment obligation did not apply to a list of candidates of a political grouping if its name appeared at the top of a list of candidates to which one or more seats were allocated at the previous election to the House of Representatives (Article H 12.2). After the result of the election had been determined by the central electoral committee, the deposit would be returned to the person who paid it, unless the total number of votes cast for the group of lists, the set of identical lists not forming part of a group or the separate list was lower than 75 % of the electoral quota. In that case the deposit would be forfeited to the State (Article H 12.5). Members of the European Parliament were elected by application *mutatis mutandis* of these provisions (Article Y 2).

The Administrative Jurisdiction Division of the Council of State held *inter alia* that the EKP had not been discriminated against, neither under Article 26 of the International Covenant on Civil and Political Rights, nor under Article 14 in conjunction with Article 1 Protocol 12 ECHR. There were objective and reasonable grounds for unequal treatment, as it had been the legislator’s intention to restrict to a certain degree the number of candidate lists, in order to provide for a clear overview for electors, with regard to the use of ballot papers and voting machines.

The Administrative Jurisdiction Division of the Council of State further held that there had been no violation of Article 3 Protocol 1 ECHR, as the right to stand for election was not absolute. The legislator had not limited this right in its essence; the limitation served an objective and legitimate aim, following from the parliamentary history of the Elections Act, and was not disproportionate.

*Cross-references:*

- European Court of Human Rights, 28.03.2006, *Sukhovetsky v. Ukraine*, Application no. 13716/02, *Reports of Judgments and Decisions* 2006-VI;
- Administrative Jurisdiction Division of the Council of State, 16.02.2011, no. 201007265/1/H2.

*Languages:*

Dutch.

*Identification:* NED-2011-2-003

**a)** Netherlands / **b)** Council of State / **c)** General Chamber / **d)** 29.06.2011 / **e)** 200803357/1/H3-A / **f)** Josemans v. the Mayor of Maastricht / **g)** *Landelijk Jurisprudentienummer*: LJN: BQ9684 / **h)** CODICES (Dutch).

*Keywords of the systematic thesaurus:*

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

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

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

*Keywords of the alphabetical index:*

Drugs, possession, prohibition, enforcement / Discrimination, indirect.

*Headnotes:*

(Indirect) unequal treatment on the ground of nationality was justified; Article 3 of the Opium Act was of an absolute nature and did not allow for additional regulation by lower (municipal) law.

*Summary:*

I. Josemans ran a coffee-shop in Maastricht, an establishment in which ‘soft’ drugs, non-alcoholic beverages and food were sold and consumed. The coffee-shop fell within the scope of the policy of tolerance applied by the Netherlands with regard to the marketing of cannabis. The sale of cannabis, although illegal, did not give rise to criminal proceedings if it took place in a recognised coffee-shop and if a certain number of conditions were complied with. Following two reports attesting that persons who were not resident in the Netherlands had been admitted to Joseman’s coffee-shop contrary to the law (see below) the Mayor of Maastricht (hereinafter, the “Mayor”) closed the coffee-shop.

Josemans lodged an objection against his decision. As that objection was dismissed by the Mayor, Josemans brought an action before the District Court. The District Court annulled that decision and revoked the original decision. According to that court, the applicable law constituted indirect discrimination on grounds of nationality, which was contrary to Article 1 of the Constitution. By contrast, it held that there was no infringement of European Union law. Both Josemans and the Mayor appealed against that judgment to the Administrative Jurisdiction Division of the Council of State. In its judgment of 8 April 2009 the Administrative Jurisdiction Division of the Council of State requested the Court of Justice of the European Union (hereinafter, the “Court of Justice”) for a preliminary ruling. By judgment of 16 December 2010 the Court of Justice gave a preliminary ruling. In its judgment of 29 June 2011 the Administrative Jurisdiction Division of the Council of State ruled as follows.

II. Pursuant to Article 1 of the Constitution all persons in the Netherlands are treated equally in equal circumstances. Discrimination on the grounds of religion, belief, political opinion, race or sex or on any other ground whatsoever is not permitted. Pursuant to Article 3 of the Opium Act it is illegal to:

- a. bring into or outside the territory of the Netherlands;
- b. grow, prepare, treat, process, sell, supply, provide or transport;
- c. possess; or
- d. manufacture a drug as referred to *inter alia* in List II accompanying that Act.

The municipal bye-law (*Algemene Plaatselijke Verordening*; hereinafter, also the “APV”) of Maastricht stipulated that the proprietor of an establishment in the sense of the APV was forbidden to admit persons other than residents to the establishment or to permit them to remain in or at the establishment (hereinafter, the “resident-criterion”). The term ‘establishment’ was defined as a space to which the public had access and where food and/or non-alcoholic beverages are provided commercially, whether or not by means of vending machines, for consumption on the premises. Under the municipal bye-law, ‘residents’ meant persons who have their actual place of residence in the Netherlands. On the basis of the APV, the Mayor may specify that the said rule did not apply to one or more types of establishment referred to in that ordinance throughout the municipality or in one or more parts of the municipality designated therein. By decision of 13 July 2006, the Mayor exempted, throughout the municipality of Maastricht, certain categories of establishment from the obligation to refuse access to



non-residents, namely all the establishments with the exception of coffee-shops, tearooms and the like, by whatever designation they might be known. Pursuant to the APV, the Mayor may declare an establishment closed for a specified or unspecified period if the proprietor of the establishment acts contrary to provisions of the APV here mentioned.

The Administrative Jurisdiction Division of the Council of State held that the residence criterion served the maintenance of public order and that less sweeping measures would not be adequate for that purpose. It followed that the maintenance of public order constituted a legitimate interest which, in principle, justified (indirect) unequal treatment on the ground of nationality under Article 1 of the Constitution.

The Administrative Jurisdiction Division of the Council of State further held that the APV-provision establishing the residence criterion, in combination with the Mayor's abovementioned decision of 13 July 2006, was non-binding, since the prohibition under Article 3 (opening words and under b of the Opium Act was of an absolute nature, which did not allow for additional regulation by lower (municipal) law.

#### *Cross-references:*

- Court of Justice of the European Union, 16.12.2010, no. C-137/09;
- Administrative Jurisdiction Division of the Council of State, 08.04.2009, no. 200803357/1;
- Administrative Jurisdiction Division of the Council of State, 13.07.2011, no. 201009884/1/H3, see *Bulletin* 2011/2 [NED-2011-2-004].

#### *Languages:*

Dutch.



#### *Identification:* NED-2011-2-004

**a)** Netherlands / **b)** Council of State / **c)** General Chamber / **d)** 13.07.2011 / **e)** 201009884/1/H3 / **f)** X (a citizen) and others v. the Mayor of Amsterdam / **g)** *Landelijk Jurisprudentienummer*: LJN: BR1425 / **h)** CODICES (Dutch).

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

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

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

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

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

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

Drugs, punishment, enforcement.

#### *Headnotes:*

A municipal bye-law duplicating an Act of Parliament was held to be non-binding.

#### *Summary:*

I. The applicants had applied to the Chairman of the district council of Amsterdam (hereinafter, the "Chairman") to designate a children's playground as an area where a prohibition of 'soft drugs' would be imposed. The Chairman turned down their application. The applicants lodged a note of objection to the Mayor of Amsterdam, who dismissed their objections. They then launched proceedings in an administrative court. The District Court upheld the Mayor's decision. The applicants appealed to the Administrative Jurisdiction Division of the Council of State.

II. On appeal the Administrative Jurisdiction Division of the Council of State quashed the District Court's decision, revoked the Chairman's primary decision and rejected the original request made by the applicants on other grounds. The Administrative Jurisdiction Division of the Council of State ruled that the municipal bye-law concerned, which declared possession or the use of 'soft drugs' to be a punishable offence, was non-binding, since stocking forbidden drugs (listed in an attachment to the Opium Act) had already been prohibited pursuant to Article 3 of the Opium Act and was punishable under Article 11. For reason that the municipal bye-law duplicated the Act of Parliament, it was held to be non-binding.

#### *Supplementary information:*

The Netherlands applies a policy of tolerance with regard to the sale and consumption of cannabis. That policy is based on a distinction between 'hard' drugs, which present an unacceptable risk to health, and

'soft' drugs, which although deemed to be 'risky' do not give rise to the same concerns.

*Cross-references:*

- Administrative Jurisdiction Division of the Council of State, 29.06.2011, no. 200803357/1/H3-A, see *Bulletin* 2011/2 [NED-2011-2-003].

*Languages:*

Dutch.



*Identification:* NED-2011-2-005

**a)** Netherlands / **b)** Council of State / **c)** General Chamber / **d)** 13.07.2011 / **e)** 201011441/1/H3 / **f)** The priest of the parish of St Margarita Maria Alacoque v. the Mayor and Aldermen of Tilburg / **g)** *Landelijk Jurisprudentienummer*: LJN: BN1135, *Jurisprudentie Bestuursrecht* 2010, 215, *Gemeentestem* 2010, 77 / **h)** CODICES (Dutch).

*Keywords of the systematic thesaurus:*

3.7 General Principles – **Relations between the State and bodies of a religious or ideological nature.**  
 5.1.4 Fundamental Rights – General questions – **Limits and restrictions.**  
 5.3.20 Fundamental Rights – Civil and political rights – **Freedom of worship.**

*Keywords of the alphabetical index:*

Church / Regulation, noise level.

*Headnotes:*

Regulation of the ringing of church bells did not amount to a limitation of the right to freedom of religion.

*Summary:*

I. The parish priest rang the bells of his church for Holy Mass every day at 7.15 a.m. According to the Mayor and Aldermen, this amounted to a breach of the noise emission standards set by the general municipal bye-laws (*Algemene Plaatselijke Verordening*; hereinafter, the "APV") of Tilburg. They therefore issued an administrative order. The parish priest objected. The District Court upheld the decision. On appeal to the Administrative Jurisdiction Division of the Council of State, the parish priest relied *inter alia* on Article 6 of the Constitution.

II. The Administrative Jurisdiction Division of the Council of State held that the applicable provision of the APV was binding as it was in conformity with the law. The municipal council's power to set standards for noise emissions was based on Article 10.2 of the Public Assemblies Act. Reasonable interpretation of Article 6 of the Constitution leads the Division to the conclusion that the provision in the Public Assemblies Act did not provide for a basis to restrict the constitutional right to profess freely one's religion, but only to prevent excesses with regard to either the duration or noise level of the bell ringing. Regulation of both the duration and noise level of the bell ringing, which left room for ringing the bells with less noise or during a period further away from the night's rest of the population, must be held not to amount to a limitation of the right to freedom of religion.

*Cross-references:*

- Administrative Jurisdiction Division of the Council of State, 14.07.2010, no. 200906181/1/H1, see *Bulletin* 2010/2 [NED-2010-2-004].

*Languages:*

Dutch.



*Identification:* NED-2011-2-006

**a)** Netherlands / **b)** Council of State / **c)** Aliens Chamber / **d)** 15.07.2011 / **e)** 201101530/1/V2 / **f)** X (an alien) v. the Minister for Immigration and Asylum Policy / **g)** *Landelijk Jurisprudentienummer*: LJN: BR3850 / **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:*

Aliens, residence permit, rejection.

*Headnotes:*

Article 47.1 of the Charter of Fundamental Rights of the European Union does not preclude rules of procedure (time limits) under national law.

*Summary:*

I. The applicant, who was an alien, had applied for a temporary residence permit. The Minister for Immigration and Asylum Policy (hereinafter, the “Minister”) rejected his application. The applicant applied for a provisional ruling. The District Court declared his appeal inadmissible. The applicant then lodged an appeal with the Administrative Jurisdiction Division of the Council of State.

II. The Administrative Jurisdiction Division of the Council of State held that procedural requirements under national law had not been met: the applicant’s notice of appeal had not been received before the end of the time limit. Insofar as the applicant argued that upholding the time limit in his case would amount to a breach of his right to an effective remedy under Article 47.1 of the Charter of Fundamental Rights of the European Union (hereinafter, the “Charter”), the Administrative Jurisdiction Division of the Council of State ruled as follows.

According to Article 6.1 of the Treaty on European Union (hereinafter, the “Treaty”) the European Union recognises that the rights, freedoms and principles set out in the Charter have the same legal value as the Treaties. This provision, as amended by the Treaty of Lisbon, entered into force on 1 December 2009. The Charter was therefore legally binding, as the Minister decided to reject the applicant’s application on 1 December 2010.

According to Article 51.1 of the Charter, the Charter applies to the Member States only when implementing Union law. Since the Minister had based his rejection on Council Regulation (EC) no. 343/2003, the decision was held to be within the scope of the Charter.

Under Article 6.3 of the Treaty and Article 52.7 of the Charter the rights, freedoms and principles of the Charter are to be interpreted *inter alia* with due regard to the explanations referred to in the Charter, that set out the sources of those provisions. It followed from the explanations that Article 47.1 of the Charter is based on Article 13 ECHR. In Union law the protection is more extensive as compared to Article 13 ECHR insofar it guarantees the right to an effective remedy before a court. Having regard to the case-law of the European Court of Human Rights, the Administrative Jurisdiction Division of the Council of State held that Article 47.1 of the Charter does not preclude rules of procedure (time limits) under national law.

*Cross-references:*

- Administrative Jurisdiction Division of the Council of State, 01.12.2010, no. 201000882/1/H3, see *Bulletin* 2010/3 [NED-2010-3-005].

*Languages:*

Dutch.

*Identification:* NED-2011-2-007

**a)** Netherlands / **b)** Council of State / **c)** General Chamber / **d)** 20.07.2011 / **e)** 201008269/1/H2 / **f)** X (a citizen) v. the Legal Aid Council / **g)** *Landelijk Jurisprudentienummer*. LJN: BR2315 / **h)** CODICES (Dutch).

*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:*

Company, private / Insurance, liability / Risk, business.

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**Headnotes:**

Rejection of an application for legal aid in the face of bankruptcy does not constitute a violation of the right to access to court under Article 6 ECHR.

**Summary:**

I. The applicant, a director of a private company with limited liability (hereinafter, the “company”), had rented a property (business space). A third party used the property as a cannabis nursery. The owner claimed damages from the applicant. The local court held for the owner. In order to be able to lodge an appeal, the applicant applied for legal aid. The Legal Aid Council (hereinafter, the “Council”) rejected his application. The applicant objected to the decision. The Council dismissed his objections. When the applicant lodged an appeal with the District Court, that court held in favour of the Council. The applicant appealed to the Administrative Jurisdiction Division of the Council of State, arguing *inter alia* that Article 6 ECHR had been violated: he contended that rejection of his application for legal aid was disproportionate since he could not afford legal assistance in order to appeal the local court’s judgment, whereas paying damages would result in the company’s liquidation and the applicant’s bankruptcy.

II. The Administrative Jurisdiction Division of the Council of State held that rejection of the application for legal aid was not disproportionate, since directors’ involvement in legal procedures in their private capacity was within the scope of the concept of ‘regular business risk’. It was common practice for directors of legal entities to take out liability insurance. The applicant had not put forward exceptional circumstances.

**Cross-references:**

- European Court of Human Rights, 19.06.2001, *Kreuz v. Poland*, Application no. 28249/95, *Reports of Judgments and Decisions* 2001-VI;
- European Court of Human Rights, 07.05.2002, *McVicar v. United Kingdom*, Application no. 46311/99, *Reports of Judgments and Decisions* 2002-III;
- European Court of Human Rights, 15.02.2005, *Steel and Morris v. United Kingdom*, Application no. 68416/01;
- European Court of Human Rights, 23.03.2010, *M.A.K. and R.K. v. United Kingdom*, Application nos. 45901/05 and 40146/06.

**Languages:**

Dutch.



# Poland

## Constitutional Tribunal

### Statistical data

1 May 2011 – 31 August 2011

Number of decisions taken:

Judgments (decisions on the merits): 24

- Rulings:
  - in 11 judgments the Tribunal found some or all of the challenged provisions to be contrary to the Constitution (or other act of higher rank)
  - in 13 judgments the Tribunal did not find the challenged provisions to be contrary to the Constitution (or other act of higher rank)
- Initiators of proceedings:
  - 1 judgment was issued upon the request of the President of the Republic – preliminary review procedure
  - 5 judgments were issued upon the request of the Commissioner for Citizens' Rights (i.e. Ombudsman)
  - 3 judgments were issued upon the request of a group of MPs
  - 1 judgment was issued upon the request of the National Chamber of Notaries
  - 1 judgment was issued upon the request of a municipal/communal council
  - 1 judgment was issued upon the request of a cooperative
  - 8 judgments were issued upon the request of courts – the question of legal procedure
  - 4 judgments were issued upon the request of private individuals (physical or natural persons) – the constitutional complaint procedure
- Other:
  - 5 judgments were issued by the Tribunal in plenary session
  - 9 judgments were issued with dissenting opinions

### Important decisions

*Identification:* POL-2011-2-003

**a)** Poland / **b)** Constitutional Tribunal / **c)** / **d)** 08.06.2011 / **e)** K 3/09 / **f)** / **g)** *Dziennik Ustaw* (Journal of Laws), 2011, no. 129, item 748; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2011, no. 5A, item 39 / **h)** CODICES (Polish).

*Keywords of the systematic thesaurus:*

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

3.13 General Principles – **Legality.**

4.5.2.4 Institutions – Legislative bodies – Powers – **Negative incompetence.**

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

4.6.6 Institutions – Executive bodies – **Relations with judicial bodies.**

4.7.13 Institutions – Judicial bodies – **Other courts.**

5.2.2.6 Fundamental Rights – Equality – Criteria of distinction – **Religion.**

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

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

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

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

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:*

Church, Property, Committee / Church, State, separation / Church, rights equality.

*Headnotes:*

The principle of impartiality does not mean that public authorities should eliminate all religious and ideological elements from public life. Impartiality has been understood in legal doctrine as favourable to religion, permitting public authorities to positively engage in wide-ranging actions to secure citizens'

right to freedom of conscience and religion so they can satisfy their religious needs. Actions carried out by public authorities should be objective and characterised by equal treatment of religious associations.

The principle of equality of rights of churches and religious associations does not imply that religious associations are accorded identical treatment. Rather, it means that religious associations shall enjoy the freedom to perform religious functions. Article 25.3 of the Constitution provides that the autonomy and mutual independence of all religious associations shall be respected.

Where differences exist between churches and other religious associations, they should not be treated similarly. Their differences may stem from the number of believers and the degree of establishment of particular denominations in the history of the State. Public authorities shall establish a legal framework that secures the principle of equality of rights of churches and other religious associations in light of characteristics particular to churches and other religious organisations.

Under Article 25 of the Constitution, regulations on the institutional standing of churches and religious associations shall be ranked as a systemic principle. Article 25.4 of the Constitution stipulates that the relations between the Republic of Poland and the Roman Catholic Church shall be determined by international treaty concluded with the Holy See, and by statute. Accordingly, other provisions of the Constitution should be interpreted in a way to guarantee these regulations a maximum possibility of realisation.

### *Summary:*

I. A group of Members of Parliament (hereinafter, the "MPs") has challenged the constitutionality of several provisions of the Act of 17 May 1989 on relations between the State and the Roman Catholic Church (hereinafter, the "Act"), including provisions on the founding, functioning and competences of the "Committee on Church Property" (hereinafter, the "Committee").

The application alleged that the proceedings before the Committee were secretive, and its decisions not only lacked democratic consent but also any recourse to an appeal. The decisions of the Committee could limit the property rights of units of territorial self-administration as well as property belonging to the State Treasury. The application also raised doubts about the independence and impartiality of the Committee, whose members were appointed by the

Minister of Home Affairs and the Secretary of the Conference of the Episcopate of Poland and enjoyed no term of office.

The Committee was dissolved by the Act of 16 December 2010, an amendment that repealed Articles 62 and 63.8 of the Act, and had entered into force before the Tribunal issued a judgment in this case.

Several norms governing the Committee that the applicant had challenged included the Committee's administration of justice. The applicant asserted that norms concerning the Committee's decision-making process and the finality of its rulings were purportedly inconsistent with Articles 45.1 and 175.1 of the Constitution.

Next, the applicant challenged that norms concerning limitation on property allegedly infringed upon Articles 64 and 165 of the Constitution, which prohibit actions that deprive units of territorial self-government of their ownership and property rights.

Finally, the applicant claimed that Article 63.9 of the Act was apparently inconsistent with Article 92 of the Constitution, since this norm was passed under the Constitution of 22 July 1952 and no longer applied to the current constitutional requirements of a sub-statutory act.

II. Before issuing a ruling on the merits, the Tribunal had to resolve several procedural problems. Because three MPs had just become members of the European Parliament and several MPs died in a plane crash, the number of living MPs supporting the application had fallen below the required minimum (50). The President of the Tribunal summoned the remaining applicants to supplement this deficiency, so the proceedings could continue. During the hearings, two judges of the Tribunal were challenged at the instance of the applicants. Both applications were dismissed.

Because a significant part of the challenged norms was already repealed in the Act of 16 December 2010 and had entered into force before this judgment was issued, the Tribunal recognised that a judgment on those norms was not necessary for protecting constitutional freedoms and rights (Article 39.3 of the Constitutional Tribunal Act). The proceedings relating to those norms were discontinued.

As a result, the Tribunal only reviewed the constitutionality of Articles 63.9 and 70a.1-2 of the Act. The Tribunal declared that Article 63.9 of the Act was inconsistent with Article 92.1 of the Constitution. However, it found that Article 70a.1-2 of the Act was

consistent with Article 25.2 of the Constitution. Moreover, the Tribunal made a reservation that the repeal of Article 63.9 of the Act failed to meet the requirements to reopen the proceedings specified in Article 190.4 of the Constitution.

Nevertheless, the ruling included several important statements on the relations between churches or religious associations and the State, as indicated in the headnotes section above.

The Tribunal issued this judgment *en banc*. Three dissenting opinions were raised.

### Cross-references:

#### Decisions of the Constitutional Tribunal:

- Resolution W 11/91 of 24.06.1992, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1992, item 18;
- Decision K 2/93 of 17.08.1993, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1993, item 30;
- Decision K 20/97 of 12.11.1997, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1997, no. 3-4, item 57;
- Judgment K 40/97 of 24.03.1997, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1997, no. 2, item 12; *Bulletin* 1998/1 [POL-1998-1-006];
- Judgment U 19/97 of 25.05.1998, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1998, no. 4, item 47; *Bulletin* 1998/2 [POL-1998-2-011];
- Judgment K 12/99 of 26.10.1999, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1999, no. 6, item 120; *Bulletin* 1999/3 [POL-1999-3-027];
- Judgment K 34/99 of 28.06.2000, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2000, no. 5, item 142; *Bulletin* 2000/2 [POL-2000-2-018];
- Decision K 31/00 of 05.12.2001, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2001, no. 8, item 269;
- Decision K 42/01 of 20.03.2002, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2002, no. 2A, item 21;
- Judgment P 1/01 of 29.05.2002, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2002, no. 3A, item 36; *Bulletin* 2002/2 [POL-2002-2-017];
- Judgment K 13/02 of 02.04.2003, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2003, no. 4A, item 28;
- Judgment P 21/01 of 06.05.2003, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2003, no. 5A, item 37;
- Decision SK 33/02 of 13.11.2003, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2003, no. 8A, item 92;
- Judgment K 50/02 of 26.04.2004, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2004, no. 4A, item 32;
- Judgment SK 7/04 of 26.10.2004, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2004, no. 9A, item 95;
- Judgment SK 25/02 of 08.11.2005, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2005, no. 10A, item 112;
- Decision U 3/07 of 21.11.2007, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2007, no. 10A, item 146;
- Judgment K 28/08 of 31.03.2009, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2009, no. 3A, item 28;
- Judgment K 55/07 of 14.12.2009, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2009, no. 11A, item 167;
- Judgment K 15/09 of 11.02.2010, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2010, no. 2A, item 11;
- Judgment P 15/10 of 09.03.2011, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2011, no. 2A, item 9;
- Judgment K 35/08 of 16.03.2011, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2011, no. 2A, item 11.

### Languages:

Polish.



### Identification: POL-2011-2-004

**a)** Poland / **b)** Constitutional Tribunal / **c)** / **d)** 14.06.2011 / **e)** Kp 1/11 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2011, no. 57, item 577; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2011, no. 5A, item 41 / **h)** CODICES (Polish).

*Keywords of the systematic thesaurus:*

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

3.22 General Principles – **Prohibition of arbitrariness.**

4.6.9 Institutions – Executive bodies – **The civil service.**

4.6.9.2 Institutions – Executive bodies – The civil service – **Reasons for exclusion.**

4.6.9.3 Institutions – Executive bodies – The civil service – **Remuneration.**

4.10 Institutions – **Public finances.**

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

*Keywords of the alphabetical index:*

Civil service, employment, rationalisation.

*Headnotes:*

A drastic legislation that involves employment reduction in the well-established structure of the corps of civil servants lacks the proper statutory criteria for dismissing civil servants. The Tribunal's judgment settles the inconsistency arising under this legislative mechanism with the principle of confidence of citizens in the State and in the law enacted by the State, resulting from Article 2 of the Constitution.

A saving scheme in response to, *inter alia*, the threat of transgressing the constitutional threshold of the ratio of the state public debt to the GDP (Article 216.5 of the Constitution), cannot completely ignore the legal status and function of civil servants in public administration.

*Summary:*

I. In an abstract and preventive review, the President of the Republic of Poland challenged the constitutionality of the Act on optimising employment levels in state budget entities and in certain other entities of the public finance sector in the years 2011-2013 (hereinafter, the "Act").

The Act, after its entry into force, would create a special mechanism of layoffs and remuneration lowering within the corps of civil servants, including nominated civil servants.

The Act specified a date when it would enter into force; however, the case was heard after the date had passed.

The provisions of the Act challenged by the President included, *inter alia*, special layoffs mechanism ("employment rationalisation"). The application indicated that the provision, which would impact the employment of nominated civil servants, was inconsistent with Article 2 of the Constitution, particularly the principle of protection of acquired rights. The Act allegedly conflicted with Article 153.1 of the Constitution; this time, the inconsistency not only concerned nominated civil servants, but also other members of the corps of the civil servants.

II. The Constitutional Tribunal recognises that maintaining a budgetary equilibrium is a constitutional value such that preventing excessive deficit may sometimes justify compromising the legal status of civil servants. Specific provisions guaranteeing the stability of their employment should not mean that they are exempted from bearing the brunt of the State budget reduction.

Even the higher-level norm of control stated in Article 153 of the Constitution should above all serve the common good and secure the right of citizens to a well-functioning administration. Securing the individual interest of civil servants could only derive from values of public good.

Nevertheless, in the context of the present case, the challenged provisions of the Act were declared inconsistent with both Article 2 and Article 153 of the Constitution. The reasons for this are twofold. On one hand, although the Act sets out a 10% minimum reduction of personnel jobs, it lacked specific criteria for the projected layoffs, leaving full discretion to executives of the organisational units. Moreover, while the Act would only apply during the years 2011-2013, it did not provide any measures how to maintain the reduced employment level after that period. Finally, since the money saved would be used to remunerate the remaining civil servants, the Act clearly did not serve the purpose of lowering the State's budget deficit.

On the other hand, the legislator did not substantiate why layoffs in the corps of civil servants, constituting only about 5% of personnel employed in public administration, would achieve the goals of the Act. Also, the legislator did not consider whether the "employment rationalisation" should even apply to officers who work outside of the corps of civil servants in the first hand.

Despite the legislature's independent legal basis to introduce solutions to balance the budget, the Act to optimise employment levels through projected layoffs is nevertheless inconsistent with Article 153.1 of the Constitution. Since the norms declared



unconstitutional were inextricably linked to the whole Act, the President of the Republic refused to sign the Act under Article 122.4 of the Constitution.

The Tribunal issued this judgment *en banc*. One dissenting opinion was raised.

#### Cross-references:

##### Decisions of the Constitutional Tribunal:

- Ruling K 14/91 of 11.02.1992, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1992, item 7; *Special Bulletin Leading Cases 1* [POL-1992-S-001];
- Resolution W 1/95 of 05.09.1995, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1995, item 43; *Bulletin* 1995/3 [POL-1995-3-011];
- Ruling P 1/95 of 11.09.1995, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1995, item 26;
- Ruling K 23/95 of 20.11.1995, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1995, item 33;
- Ruling K 29/95 of 23.04.1996, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1996, item 10; *Bulletin* 1996/1 [POL-1996-1-007];
- Judgment K 22/96 of 17.12.1997, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1997, no. 5-6, item 71; *Bulletin* 1998/1 [POL-1998-1-001];
- Judgment K 10/97 of 08.04.1998, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1998, no. 3, item 29;
- Judgment K 3/98 of 24.06.1998, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1998, no. 4, item 52; *Bulletin* 1998/2 [POL-1998-2-014];
- Judgment P 4/98 of 16.06.1999, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1999, no. 5, item 98; *Bulletin* 1999/2 [POL-1999-2-022];
- Judgment K 5/99 of 22.06.1999, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1999, no. 5, item 100;
- Judgment K 30/98 of 23.06.1999, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1999, no. 5, item 101; *Bulletin* 1999/2 [POL-1999-2-023];
- Judgment K 27/00 of 07.02.2001, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2001, no. 2, item 29;
- Judgment K 27/01 of 03.10.2001, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2001, no. 7, item 209;
- Judgment SK 16/01 of 22.10.2001, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2001, no. 7, item 214;
- Judgment P 7/00 of 06.03.2002, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2002, no. 2A, item 17; *Bulletin* 2002/3 [POL-2002-3-021];
- Judgment SK 20/00 of 07.05.2002, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2002, no. 3A, item 29;
- Judgment K 34/01 of 25.11.2002, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2002, no. 6A, item 84;
- Judgment K 52/02 of 16.06.2003, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2003, no. 6A, item 54;
- Judgment K 22/04 of 22.03.2005, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2005, no. 3A, item 27;
- Judgment K 39/07 of 28.11.2007, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2007, no. 10A, item 129; *Bulletin* 2008/1 [POL-2008-1-005];
- Judgment Kp 2/09 of 13.05.2009, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2009, no. 5A, item 66;
- Judgment Kp 4/08 of 16.07.2009, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2009, no. 7A, item 112;
- Judgment Kp 3/09 of 28.10.2009, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2009, no. 9A, item 138; *Bulletin* 2010/1 [POL-2010-1-002];
- Judgment Kp 8/09 of 03.12.2009, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2009, no. 11A, item 164;
- Judgment Kp 6/09 of 20.01.2010, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2010, no. 1A, item 3.

#### Languages:

Polish.



# Portugal

## Constitutional Court

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### Important decisions

*Identification:* POR-2011-2-009

**a)** Portugal / **b)** Constitutional Court / **c)** Third Chamber / **d)** 07.06.2011 / **e)** 278/11 / **f)** / **g)** *Diário da República* (Official Gazette), 137 (Series II), 19.07.2011, 30035 / **h)** CODICES (Portuguese).

*Keywords of the systematic thesaurus:*

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

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

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

*Keywords of the alphabetical index:*

Sanction, administrative sanction, judicial review.

*Headnotes:*

The exercise by the Public Administration of the power to impose sanctions does not violate the constitutionally-established principle of the separation of powers, provided that the exercise can be the object of jurisdictional control, even if this occurs after the imposition of the administrative sanction.

*Summary:*

I. The applicant, a business involved in industrial extraction and the transformation of natural stone, alleged that norms in a legal act which laid down the regime governing the prevention and control of polluting atmospheric emissions, with a view to protecting air quality, were unconstitutional. It argued that there was a violation of the principle of the separation of powers, of the guarantees of a defence in proceedings involving administrative offences, and of the principles of equality, proportionality, justice, impartiality and good faith, by which the Administration is bound to abide in the exercise of its functions. According to the applicant, this violation had occurred because the executive law in question combined

powers to bring proceedings for administrative offences, investigate the facts in them and decide to impose fines for the commission of unlawful acts. These powers were all vested in the same entity – the Inspectorate-General of the Environment (hereinafter, the “IGA”). The IGA was also one of the beneficiaries of the fines.

The Constitutional Court emphasised that the constitutional provisions regarding the guarantees pertaining to both citizens and legal persons in criminal proceedings apply unequivocally not only to Penal Law, but also to other branches of the Public Law that possess a punitive nature.

When enacting the Law Governing Administrative Offences, the legislator drew a distinction between the administrative phase, the purpose of which is to assess whether an unlawful act has been committed, and the jurisdictional phase, designed to ensure jurisdictional control of the decision as to whether to impose sanctions.

The existence of a sanction for an administrative offence is intended to ensure both general and specific prevention of the commission of illegal acts. It is aimed at situations where the legal injury would not be significant enough to warrant their criminalisation. For this reason, the legislator entrusted the Public Administration with powers to examine such acts, and to impose sanctions in the event of an infraction. This represents the exercise of the administrative function of executing normative commands adopted by organs with the competence to monitor and pursue the public interest.

Because there is no encroachment on the essential core of the jurisdictional function, there is no violation of the principle of the separation of powers. Under the Constitution, courts are charged with defending citizens’ legally protected rights and interests, repressing breaches of democratic legality and resolving conflicts, but this does not preclude the grant of powers to administrative entities to impose sanctions, provided the sanctions are not criminal and do not entail any deprivation of personal freedom. These limits also apply to other proceedings for administrative offences, and decisions by the Inspectorate-General of the Environment to impose sanctions may be challenged before the courts. The present appeal on the grounds of alleged unconstitutionality in fact resulted from a jurisdictional process in which the applicant was able to submit the administrative decision to impose a fine to jurisdictional control.

With regard to the fact that the administrative entity which imposes the fine benefits (albeit partially) from the resulting funds, the Constitutional Court considered that there may have been a violation of principles and norms with an infra-constitutional source, potentially resulting in the invalidity of the administrative decision to impose the sanction.

The purpose of sanctions for administrative offences is to prevent new infractions and to motivate persons and other entities subject to administration to comply with the law. Fines cannot be used as a means of funding the Public Administration itself; this would represent a misuse of power. Had the applicant demonstrated before the courts *a quo* that the administrative decision to penalise it had been taken in breach of the duties of impartiality and with a view to pursuing a public interest other than that sought by the law, it could have prevented the administrative decision from taking effect by invoking the grounds outlined above.

The Constitutional Court observed that in this particular case, the legislative option with regard to the destination of the funds from the fines had to be assessed against a balancing of various conflicting interests. The Constitution requires the Public Administration to ensure both respect for the principles of equality, proportionality, justice, impartiality and good faith and the right of accused persons to be heard and to a defence in administrative-offence proceedings. However, the Constitution also guarantees the fundamental right of all citizens to a healthy and ecologically balanced environment. Part of the funds from fines paid by those who jeopardise or damage that environment can justifiably revert to an administrative entity tasked with preventing and preserving that environmental quality, subject to the requirement that decisions to impose sanctions are designed solely to pursue the public interest in maintaining a healthy environment, not simply to provide revenue for that entity.

#### *Cross-references:*

- Ruling no. 161/90 (22.05.1990).

#### *Languages:*

Portuguese.



#### *Identification:* POR-2011-2-010

**a)** Portugal / **b)** Constitutional Court / **c)** First Chamber / **d)** 07.06.2011 / **e)** 281/11 / **f)** / **g)** *Diário da República* (Official Gazette), no. 228 (Series II), 28.11.2011, 46689 / **h)** CODICES (Portuguese).

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

4.7.4.1.6.1 Institutions – Judicial bodies – Organisation – Members – Status – **Incompatibilities.**

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

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

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

Contradictory rulings, procedure / Judges, panel, composition.

#### *Headnotes:*

An interpretation of a norm contained in legislation governing the Administrative and Fiscal Courts to the effect that the composition of the Court that hears appeals on the grounds of contradictory rulings can include judges who intervened in the ruling against which the appeal is being brought, or in the ruling on which the appeal is based, is not unconstitutional. Judicial impartiality is assessed on the basis of any functions the judge previously exercised in the same case; in the absence of other factors, even the entire history of the prior interventions by specific judges in that case is not sufficient to prove the existence of justified reasons to suspect partiality on the part of those judges.

#### *Summary:*

The applicant alleged that a breach of the principle of impartiality and of the right to fair process had occurred because of an intervention by certain judges in a decision forming the object of the ruling against which an appeal had been lodged. These judges formed part of the Plenary of the Court which heard the appeal. Four of the judges who made up the Court which handed down the ruling against which that appeal was brought were also members of the Court which found that the pre-conditions for the admissibility of the appeal on the grounds of contradictory rulings were not met. The ruling which was appealed to the Constitutional Court stated that the coincidence between the two compositions did

not make the four judges in question parties to the question that was decided by the Plenary, nor did it restrict the impartiality they were bound to observe in their consideration of and verdict on the case.

The Constitutional Court recalled that the right to fair process implies that the principle of fairness must be paramount, to ensure that the way in which the legislator shapes the respective procedure is itself fair, and that the material principles of justice will be at the forefront at all times during the procedure.

The guarantee of judicial impartiality is a corollary of the right to fair process, encompassing the right for a case to be judged by an impartial court. Everyone is entitled to expect that judicial organs will be composed of judges who are independent and impartial and who can offer parties a guarantee of neutrality.

The guarantee of judicial impartiality leads to the imposition of a regime governing disqualifications. Jurisprudence from the European Court of Human Rights has confirmed and emphasised that the guarantee of fair process pre-supposes and requires this guarantee of an impartial court, with a subjective dimension which takes account of the personal convictions of a given judge on a given occasion, and an objective dimension which seeks to ensure that each judge offers guarantees that are sufficient to exclude any legitimate doubt as to his or her impartiality and to determine whether he or she is in a position to hand judgment down freely, thus excluding any suggestion of partiality. The theory of appearances plays an important role, in the sense that where there is legitimate reason to doubt a judge's impartiality, he or she must be excluded. The decisive element in this assessment is the existence or otherwise of an objectively justified fear of partiality. The judge's objective impartiality is assessed in the light of the functions that he/she has exercised, and not in the light of his or her attitude or convictions.

In the present case, the doubts which the applicant raised over the impartiality of four of the seven judges who heard the appeal on the grounds of contradictory rulings were based on the fact that they had previously intervened in the same case – i.e. that they had participated in the earlier decision.

Supporting its position with jurisprudence from the European Court of Human Rights, the Constitutional Court distinguished between two hypotheses: a situation in which the same judge successively exercises different jurisdictional functions in the same case; and one in which, as the result of an appeal, he or she successively exercises the same jurisdictional functions. The first situation represents the accumula-

tion of functions linked to the prosecution, the fact-finding phase and the trial, or of consultative and jurisdictional functions. The European Court of Human Rights has condemned the successive exercise of consultative and jurisdictional functions. The European Court of Human Rights considers that the simple accumulation of functions is not enough to automatically entail a breach of the right to fair process; an assessment must be carried out of the effective role a judge plays in his or her interventions, in order to determine whether the interested party's fears are objectively justified.

The Constitutional Court said that it shared the view expressed by the European Court of Human Rights, and that it considered that a judge must act with independence and impartiality when adjudicating matters and his or her judgment must appear to the public to be objective and impartial. Importance must therefore be attached to the content of the decisions he or she has handed down.

In the present case, the first of the successive interventions of the four judges addressed the substance of the case, while the second occurred as part of an appeal on the grounds of contradictory rulings – an extraordinary appeal directed at an object other than that of the original decision.

When a judge who decided at first instance intervenes in a subsequent appeal, the principle of impartiality is at stake along with the *raison d'être* of the challenge – if the decision at first instance and that on the challenge against it were to be given by the same judge, then the existence of the appeal itself and the right to appeal would be undermined.

However, the situation before the Court in the present appeal on the grounds of unconstitutionality was different. Jurisprudential standardisation rulings possess a function of providing guidance to other courts on how they should interpret the legal question of whether there is a divergence in the jurisprudence. Such rulings are sought in the interests of the unity of the law; they have no effective influence on the decision in the case in point.

The appeal on the grounds of contradictory rulings is a specific procedural format. At this stage, the aim of the appeal is not to analyse the essence of the case, but to determine whether 'opposition' exists – i.e. whether, with regard to the same legal grounds and in the absence of any substantial change in the legal regulations, the Court handed down an opposite solution to that adopted in an earlier ruling issued by the same jurisdiction.

This format is aimed at resolving conflicting situations arising from different rulings by senior courts concerning the same fundamental question of law, in order to ensure that substantially identical situations are treated in the same way. As the aim is to resolve jurisprudential conflicts between senior courts, it is essential that a substantial number of judges participate in the judgment, so that it is a true representation of the understanding of the majority of the judges comprising the Court.

In the case in point, the judges' first and second interventions had addressed different questions. The Constitutional Court was therefore of the view that there were no reasonable grounds to hold that the second intervention would have been prejudiced by a prior opinion formed during the first one. The types of intervention that judges are called on to undertake mean that the successive exercise in the same proceedings of functions in the judgment of the essence of the case on the one hand, and in the appeal on the grounds of contradictory rulings on the other, is not incompatible.

The applicant also pointed out a potentially unconstitutional situation, in that the same judge simultaneously intervened as deputy judge and president of the Court, with the consequence that the president could have had the competence to intervene as one of the judges who judged the case. The Constitutional Court held that the powers of president of the Court and deputy judge are not incompatible. This is the rule in benches composed of several judges, where one of them assumes the powers of president whilst retaining his or her functions as judge in the case. The functions entrusted by the law to the same judge in cases in which the president is substituted by a deputy judge are those of directing discussions on the one hand, and voting on the other. In the case under consideration, the decision was unanimous, and the deputy judge was not required to give a president's casting vote in order to produce a majority and thus enable the Court to issue a ruling.

#### Languages:

Portuguese.



#### Identification: POR-2011-2-011

a) Portugal / b) Constitutional Court / c) First Chamber / d) 07.06.2011 / e) 284/11 / f) / g) *Diário da República* (Official Gazette), 137 (Series II), 19.07.2011, 30041 / h) CODICES (Portuguese).

#### Keywords of the systematic thesaurus:

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

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

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

#### Keywords of the alphabetical index:

Dismissal, wrongful, compensation / Remuneration.

#### Headnotes:

The constitutionally enshrined right to access to the law and the courts precludes the legislator from creating excessive, materially unjustified difficulties that would hinder the exercise of the right itself.

Where a Labour Code norm is interpreted to the effect that the legislator had opted to guarantee payment of the salaries of workers until the Court decision declaring their dismissal unlawful became *in rem judicatam*, an employer cannot argue that the legislator has restricted its rights of access to law and the courts and to appeal.

#### Summary:

1. At issue in these proceedings was a Labour Code norm which had been interpreted as meaning that in the event of unlawful dismissal, workers electing to receive compensation calculated on the basis of the length of time they have worked for the employer rather than reinstatement in their position retain the right to receive their pay until the final decision becomes *in rem judicatam*. This right to continued remuneration does not cease on the date they make that choice.

The applicant, an employer, argued that the interpretation outlined above violated an employer's fundamental right of access to the law, particularly with regard to the rights to bring suit and to fair process. It pointed out that the obligation to pay a salary until transit *in rem judicatam* could last for a

considerable time, for reasons which are not within the employer's control but caused by the lengthy duration of court proceedings. This, according to the applicant, represented limitation on its right of access to the law. The obligation is imposed in pursuance of the implementation of the fundamental right of workers to job security and the prohibition on dismissal without just cause.

In the applicant's view, the question of unconstitutionality should not be put in terms of a conflict between rights, but rather in terms of the inherent limits on the fundamental right to job security, which does not encompass payment of a salary after termination of the labour contract.

II. The Constitutional Court considered that the applicant's view was based on the theory that the labour contract ends on the date of the handing down of the First Instance Court's decision, a theory it considered to be manifestly unfounded.

The Constitutional Court identified a conflict between two fundamental rights – the right of access to the law, and the right to job security. An assessment was needed as to whether, when it weighed up both interests, the legislator exceeded the limits of its freedom to shape the law and disproportionately sacrificed the employer's right of access to justice in favour of the worker's right to job security.

It noted that the norm under constitutional review is an expression of the right to work, the corollary to which implies the right not to be deprived of work. This precept seeks to establish guarantees in relation to job security, which is primarily rendered effective by the prohibition on dismissal without just cause.

The regime created by the challenged norm results from the understanding that the nullity of an action dismissing a worker without just cause implies that he or she is entitled to retain and remain in his or her job and to be reinstated to it, and, therefore, to receive the remuneration of which he or she was deprived by the improper dismissal.

From the worker's perspective, the amounts represented by the obligation to continue to pay salary are a means of subsistence; this is due to the fact that the amount of any unemployment benefit the worker receives is deducted from the compensation he or she is awarded and the employer must pay it directly to the Social Security Service.

The guarantee of payment of salary until the decision becomes *in rem judicatam* is intended to avoid a vacuum arising, where certain interests are not

protected during the time between the decisions of the various court instances.

Since workers' salaries are meant to supply them with a means of subsistence, the need to protect their interest in continued payment is sufficient justification for the legislator's choice.

The Court said that the employer's continued payment of salary pending the First Instance Court decision was not at issue. The applicant was challenging the constitutional compliance of an interpretation to the effect that workers should continue to be remunerated, even if they opt for compensation based on length of service, until the decision becomes *in rem judicatam* (which would include the duration of any appeal by the employer against a first or second instance decision declaring the dismissal unlawful). The applicant contended that the state of affairs outlined above was in breach of the employer's right of access to appeal against the first instance decision declaring the dismissal unlawful.

The Constitutional Court clarified that in addition to the rights to bring suit and to fair process, the right of access to the courts includes the right to appeal. An employer's access to an appeal is not restricted by the fact that it can be ordered to continue to pay a worker until the first instance decision becomes *in rem judicatam*. Such payment only falls due if the Appeal Court does not uphold the employer's position and upholds the First Instance Court decision to declare the dismissal unlawful, in which case continued remuneration is a consequence of the unlawfulness of the dismissal. If the Appeal Court decides to uphold the employer's arguments, its final material position will not suffer as a result of lodging the appeal. The Court accepted that an employer might be dissuaded from bringing an appeal by the uncertainty of the outcome and the possibility that an unfavourable decision might harm its material position. However, the notional losses an employer might incur are not directly derived from the exercise of the right to appeal, but from the delay in securing a final decision, an element which the interested party must weigh up when it comes to freely exercise its rights and freely choose between the options available. In the new Code of Procedure in the Labour Courts the legislator created a mechanism designed to obviate the loss suffered by employers, by making the state jointly liable for any payments. Under this provision, a court which declares a dismissal unlawful must include in its first instance decision an order to the effect that once twelve months have passed since the worker lodged a form opposing his or her dismissal, and the parties have yet to be notified of the first instance decision, the relevant competent social security entity must pay the worker's salary.

The Constitutional Court accordingly held that the employer's right to appeal was not constrained, as the applicant had suggested. The solution adopted by the legislator might arguably involve a restriction on the right of access to justice, but it should still be perceived as constitutional, not only because the norm is intended to protect other constitutionally enshrined rights (the rights to job security and to work), but also because under the regime which then governed the prohibition of unlawful dismissal, such restriction was necessary in order to safeguard those rights. The opposite solution would leave the worker unprotected, as he or she would be deprived of an income if the employer decided to appeal against the first instance decision. If this solution resulted in the employer being prejudiced by a fact for which it is not responsible (excessive duration of the judicial process), the same could be said of the worker in the opposite solution. By opting to protect the weaker party in the labour relationship (a solution also legitimised by the jurisprudence of the European Court of Human Rights), the legislator did not exceed the margin within which it is entitled to weigh up the various interests at stake.

#### Cross-references:

- Rulings nos. 207/09 (29.04.2009), 502/96 (20.03.1996), European Court of Human Rights, *Martinez v. Spain*, decision of 04.09.1989, Application no. 13012/87.

#### Languages:

Portuguese.



#### Identification: POR-2011-2-012

a) Portugal / b) Constitutional Court / c) First Chamber / d) 07.06.2011 / e) 285/11 / f) / g) / h) CODICES (Portuguese).

#### Keywords of the systematic thesaurus:

3.10 General Principles – **Certainty of the law.**  
 5.2.2.13 Fundamental Rights – Equality – Criteria of distinction – **Differentiation *ratione temporis*.**  
 5.3.38 Fundamental Rights – Civil and political rights – **Non-retrospective effect of law.**

#### Keywords of the alphabetical index:

Law, transitional / Legitimate expectation / Paternity, investigation.

#### Headnotes:

The application of certain norms to pre-existing legal situations cannot be included in the “authentically retroactive” category. They can only be included in the retrospective or “un-authentically retroactive” category. A transitional law norm that requires the application of a new regime governing the lapse of paternity investigation actions to cases that were pending on the date on which the new regime came into force is not unconstitutional. Authentic retroactivity would only arise if the norm imposed the new time limit to lawsuits that had already become *in rem judicatam*. The fact that the situations to which the new law was supposed to apply were not yet consolidated reduces the weight of the interests regarding legal certainty and the protection of the trust which citizens are entitled to place in the legal system.

#### Summary:

I. The Coimbra Court of Appeal found a transitional-law norm stipulating that a new time limit for bringing paternity investigation actions applied to pending cases was unconstitutional, and declined to apply it. The Public Prosecutors' Office is obliged to appeal against decisions in which courts refuse to apply norms on the grounds that they are unconstitutional, and therefore lodged the present appeal before the Constitutional Court, despite the fact that the Office itself agreed with the decision against which it was appealing and agreed that the Court should hold the norm unconstitutional.

The question of constitutionality in this case was whether the imposition of the new time limit to cases that were pending on the date of entry into force of the new deadlines for the lapse of paternity investigation actions violated the “protection of trust” aspect of the principle of legal certainty.

II. The Constitutional Court noted that there was substantial constitutional jurisprudence on this aspect of the principle of legal certainty which itself forms part of the principle of a democratic state based on the rule of law.

The Court *a quo* had taken the view that the norm was unconstitutional because it was in breach of the principle of legal certainty, in that it was a retroactive norm that thwarted citizens' legitimate expectations.

However, the Constitutional Court questioned whether the norm should have been described as authentically retroactive. It stressed the importance of distinguishing between cases of authentic retroactivity and cases where a norm is meant to have effect in the future, but ends up affecting legal situations, rights or relationships that have arisen in the past but still exist. Although the paternity investigation action at issue here had already been brought and was pending on the date the new norm came into force, the hypothetical right of the party seeking the investigation to know his father's identity was not yet consolidated, and this would only be the case when the decision that it was correct to register the paternity became *in rem judicatam*.

The Constitutional Court also recalled its own earlier jurisprudence, to the effect that only retroactivity that is intolerable because it affects citizens' legitimately grounded rights and expectations in an inadmissible, arbitrary manner can be said to violate the principle of the protection of trust. In its view, there is no right to the "non-frustration" of legal expectations, or that the same legal regime will continue to govern lasting legal relations or complex facts that have already partly, but not completely, come about. Retroactive norms are permissible if there is an appropriate balance between the solidity of and justification for the expectations of private individuals on the one hand and the legislator's freedom to shape legislation on the other. A norm that innovates is only unlawful if it is not dictated by the need to protect prevailing interests; if such interests do exist, one must conclude that it is indeed unlawful. In assessing whether this condition for a norm to be legitimate is met, one must consider the worth and objective dignity of protecting the trust which a private individual had in the inalterability of a legislative framework that favoured him or her, the relative weight of the interests of the various private individuals concerned and the extent to which those interests are affected, and the freedom to shape legislation which a democratic legislator must enjoy. The fact that in Ruling no. 23/06 of 10 January 2006 the Constitutional Court declared with generally binding force that a time limit of two years counting from the investigating party's coming of age for the right to investigate paternity, after which the right would lapse, was unconstitutional is not enough to create an expectation on the part of private individuals that paternity and maternity investigation actions would cease to be subject to any time limits whatsoever. In that Ruling, the issue was not whether the Constitution requires it to be possible to determine the biological reality of one's filiation for an unlimited period of time, but rather the concrete time limit of two years following the investigating party's coming of age or emancipation. The Court did not consider the possibility of any other limit in that Ruling.

In this case, the issue was the immediate imposition of new time limits on lawsuits that were already pending. The Constitutional Court considered that this was a legislative option which was legitimate and justified in the light of the need to safeguard the principle of equality. Under this provision, all pending cases would be treated alike, and investigating parties who brought their suits before the new law came into force would not be privileged.

#### *Supplementary information:*

The Ruling was the object of a concurring and a dissenting opinion. According to the author of the concurring opinion, the present question was not resolved by the earlier Constitutional Court decision as to the unconstitutionality of a specific time limit after which paternity investigation actions would lapse. The author of the dissenting opinion, who is the President of the Court, continued to support the grounds for the Court's decision in Ruling no. 164/11, in which it held the norm to be unconstitutional.

#### *Cross-references:*

See Rulings nos. 23/06 (10.01.2006) and 164/11 (24.03.2011). The latter ruling was included in the case-law selection from the first four months of 2011 that was sent to the Venice Commission. In that case a different chamber of the Constitutional Court held the norm addressed in the present Ruling to be unconstitutional, taking the view that although norms setting time limits for bringing court actions do not impinge on any constitutional norm or principle, to the extent that they simply reflect legitimate choices by the legislator as to the various means by which the different values enshrined in the Constitution can be pursued, other issues arise when what is at stake is the setting of time limits for bringing paternity investigation actions. In Ruling no. 164/11 the Court noted that in such cases, questions arise as to the effects of time limits on the bringing of paternity investigation actions on subjective legal positions to which the Constitution affords its protection (i.e. the respective positions of those investigating and those subject to paternity, such as the alleged father's right to the protection of his privacy). In such cases the primary factor in assessing the constitutionality of retroactive application is the right to personal identity.

#### *Languages:*

Portuguese.





*Identification:* POR-2011-2-013

**a)** Portugal / **b)** Constitutional Court / **c)** Second Chamber / **d)** 12.07.2011 / **e)** 359/11 / **f)** / **g)** *Diário da República* (Official Gazette), 190 (Series II), 03.10.2011, 39323 / **h)** CODICES (Portuguese).

*Keywords of the systematic thesaurus:*

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

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

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

*Keywords of the alphabetical index:*

Evidence, exclusion, disqualification.

*Headnotes:*

The Code of Criminal Procedure should not be interpreted in such a way as to rule out altogether the making of declarations at criminal trial hearings by injured parties who are civil parties to the proceedings and who are disqualified by psychological anomalies. Such an interpretation is unconstitutional. The fact that somebody who suffers from a psychological anomaly and is the victim of a crime has also been the object of a judicial order depriving him or her of the capacity to exercise civil rights, including the right to bear witness (known as ‘interdiction’), cannot serve as grounds for depriving that person of rights to intervene in criminal proceedings. The purpose of such an order is to protect people whose physical or psychological anomalies render them incapable of managing themselves or their property. To prohibit somebody in this situation from intervening in judicial proceedings where they are the injured party would further reduce their protection, which would be paradoxical in that they would have been subjected to this regime by a court decision with the precise objective of ensuring their protection. The limitation on giving evidence resulting from the norm before the Court was disproportionate, as it unjustifiably sacrificed both the right to give evidence and the right to proceedings.

*Summary:*

I. A guardian representing a citizen who was deprived of the capacity to exercise rights due to a psychological anomaly made his ward a civil party in criminal proceedings brought by the Public Prosecutors’ Office, in which the ward was the victim. The accused was found not guilty of the crime at first instance, and the civil party appealed to the Lisbon Court of Appeal. The latter declined to apply the Code of Criminal Procedure norm regarding the incompetence to make statements of persons who have been disqualified due to psychological anomalies, on the basis that it was unconstitutional. It ordered that the first-instance hearing be reopened in order to hear the civil party’s declarations. Although the Public Prosecutors’ Office itself supported the view that the norm was unconstitutional, it lodged the present appeal before the Constitutional Court, as it is obliged to do whenever a court refuses to apply a norm on the grounds of its unconstitutionality. The object of the present appeal was thus the matter of the prohibition of evidence in criminal proceedings, and specifically of declarations made by an injured party who is a civil party to the case, but is disqualified due to a psychological anomaly.

The absolute ban in Portuguese law that prohibits disqualified or ‘interdicted’ persons from making statements and bearing witness dates from 1929 and has always attracted criticism. The prohibition on the making of statements by disqualified persons was introduced to protect the parties and the administration of justice, but no account was taken of whether somebody’s specific type or degree of mental illness actually precluded them from making statements.

The Portuguese criminal procedural system gives victims a significant role in the exercise of criminal justice, offering them the chance to intervene actively in the proceedings, although they must become civil parties to the proceedings in order to be considered as a true procedural subject. Injured parties have both the right and the duty to make declarations on the object of the proceedings. Although such declarations are not made under oath, they are subject to a duty of truth, the breach of which incurs criminal liability, and the judge is free to decide whether to lend them credence.

The option to make use of civil sentences, under which a person is deprived of the capacity to exercise rights, including that of bearing witness, as the standard for their disqualification on the grounds of psychological anomaly, was intended to achieve greater certainty regarding the category of person deemed incapable of making declarations in criminal proceedings, and to prevent judges from making this decision on a case-by-

case basis. The system retains a level of discretion in the determination of the mental aptitude of any person who is not actually disqualified (or 'interdicted') from making declarations. The rationale behind this system is that a judicial declaration of 'interdiction' (a generalised deprivation of the capacity to exercise rights) reflects a view that the person concerned is incapable of helping in any way to clarify whether the facts before the Court are true.

In Portuguese law, 'interdiction' seeks to protect those persons who suffer from disabilities of a kind which means that they do not meet the legal standard for normality – a position that justifies a special protection. In the case of 'interdiction' the limitations on the capacity to enjoy and exercise rights are more substantial when the measure is due to a psychological anomaly than when there are other reasons for it. The disqualified person's incapacity is set by law and does not vary from one 'interdiction' decision to another; in principle it is fixed and partial 'interdictions' are not possible. However, the duration of incapacity due to 'interdiction' is not necessarily unlimited, in that whilst the causes that lead to its imposition are permanent, they are not necessarily incurable. The law thus admits the possibility that an 'interdiction' may end, but subjects it to a judicial decision, in the same way as an official declaration of a person's incapacity can only be made by judicial decision. The incapacity of persons who are disqualified due to a psychological anomaly to provide for their personal interests serves as the final requisite when the Court determines the need to impose an 'interdiction' order. This is a legal assessment, not a medical one; a person's incapacity to manage themselves and their property will be gauged against a weighing up of their need for protection on the one hand and the obligation to respect the concrete subject's freedom on the other. Thus, the degree of incapacity of a person who may become the object of the 'interdiction' order is assessed in strictly individual terms.

Given that incapacity must be measured with regard to multiple aspects of the person's life, and the fact that the decision to 'interdict' has fixed effects set out in law, the final decision must necessarily be an overall one.

In the decision currently under appeal, the Lisbon Court of Appeal considered that the interpretation in question violated the principle of equality because it led to a discriminatory treatment of persons disqualified due to a psychological anomaly.

The scope of the protection afforded by the principle of equality encompasses the dimension of the prohibition on discrimination. Any differentiation

between the ways in which citizens are treated that are made on a purely subjective basis is unlawful.

With regard to citizens who suffer from physical or mental disabilities, the Constitution enshrines a specific duty of equality. It stipulates that they cannot be deprived of the possession or exercise of the rights that are attributed to citizens in general, save when their disability deprives them of the capacity required for the rights in question. Any restriction on the rights of citizens with disabilities is therefore subject to control based on the principle of proportionality.

II. The Constitutional Court held that because the norm under challenge imposed an outright ban on injured parties who had been made civil parties to criminal proceedings but were subject to interdiction from making declarations at trial hearings, it created a stereotype of somebody disqualified due to a psychological anomaly', giving rise to the assumption that they would never be able to recount the facts which had led to their becoming victims.

This prohibition not only resulted in unequal treatment compared to that afforded to citizens who do not suffer from any psychological anomaly, but also compared to the treatment afforded to citizens who do suffer from such a disability but have not been disqualified by a judicial sentence.

The Court also found that the norm not only violated the principle of equality, but was also in breach of the right to fair process. The latter precludes the legislator from creating obstacles which make it difficult to exercise or which arbitrarily or disproportionately prejudice the right of access to the courts and to effective jurisdictional protection.

The Constitutional Court therefore held the norm before it, when interpreted in the manner described above, to be unconstitutional.

#### *Supplementary information:*

The Court further supported the solution it adopted in the Ruling by referring to the fact that Portugal is bound by the Convention on the Rights of Persons with Disabilities (New York, 2007, ratified by Portugal in 2009).

#### *Languages:*

Portuguese.



# Romania

## Constitutional Court

### Important decisions

*Identification:* ROM-2011-2-001

**a)** Romania / **b)** Constitutional Court / **c)** / **d)** 17.06.2011 / **e)** 799/2011 / **f)** Decision on the draft law for the revision of the Constitution / **g)** *Monitorul Oficial al României* (Official Gazette), 400/23.06.2011 / **h)** CODICES (Romanian).

*Keywords of the systematic thesaurus:*

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

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

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

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

4.4.3 Institutions – Head of State – **Powers.**

4.5.1 Institutions – Legislative bodies – **Structure.**

4.7.5 Institutions – Judicial bodies – **Supreme Judicial Council or equivalent body.**

4.7.16.2 Institutions – Judicial bodies – Liability – **Liability of judges.**

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

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

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

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

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

*Keywords of the alphabetical index:*

Constitution, revision / Protection, supervision by the Constitutional Court / Police custody, length / Judicial error / Parliament, immunity / Parliament, unicameral.

*Headnotes:*

Police custody of up to 48 hours is justified to ensure the effectiveness of the measure.

The deletion of the second part of Article 44.8 of the Constitution, which establishes the presumption of lawful acquisition of property, is unconstitutional because its effect is to remove a guarantee of the right to property.

The constitutional principle of the independence of justice cannot be interpreted as exempting those who apply it from liability for judicial errors committed, in view of the consequences of those errors for citizens seeking justice and for the Romanian state.

The adoption of a unicameral parliament and the limitation of the number of members of parliament to 300 are not inconsistent with any of the limits to revision of the Constitution provided for in Article 152 thereof, but represent exclusively a political choice.

The President's power to confer decorations and honorary titles also implies the power to withdraw them.

The well-established constitutional maxim that “judges are independent and subject only to the law” represents the constitutional guarantee of the “non-submission” of judges to any other authority, persons or interests, inside or outside the judicial system, and their “submission” to the law only, so that any mechanisms of subordination or control which might affect them are precluded and may not affect their independence.

The creation, by means of infra-constitutional legislation, of new categories of administrative acts exempt from judicial supervision is contrary to the constitutional principle enshrined in Article 1.5 on the supremacy of the Constitution, as well as to the principle laid down in Article 21 on free access to justice and, implicitly, to Article 152.2, which prohibits the revision of constitutional provisions where the effect would be to deprive citizens of fundamental rights and freedoms.

The appointment of the 6 representatives of civil society by the parliament and by the President of Romania as representative of the executive represents interference by the other constitutional powers in the activities of the judiciary, calling into question the role of the Supreme Council of the Judiciary as guarantor of the independence of justice.

### Summary:

I. In accordance with Article 146.a of the Constitution, the Constitutional Court automatically assumed jurisdiction in respect of a government bill concerning a revision of the Constitution.

The most significant changes concerned the following aspects: the taking of supplementary measures to protect the identity of national minorities; an increase in the length of police custody from 24 to 48 hours; removal of the provision under which the acquisition of property is presumed lawful; establishment of the liability of judges for judicial errors committed; the adoption of a unicameral parliament; the abolition of parliamentary immunity; establishment of the right of the President of Romania to withdraw previously awarded decorations and honorary titles; the placing of an obligation on the Prime Minister to consult the President before making proposals for the dismissal or appointment of members of the government; establishment of the binding nature of the Constitutional Court's decision in the procedure for suspending the President of Romania from office; the placing of limits on the government's possibility of committing its responsibility on the adoption of a bill; establishment of an obligation for judges to obey only the Constitution and to comply with the decisions of the Constitutional Court; exemption of administrative acts concerning fiscal and budgetary policy from judicial supervision; and an increase in the number of representatives of civil society in the structure of the Supreme Council of the Judiciary.

II. Having examined the draft law on the revision of the Constitution, the Constitutional Court found that some of the proposed amendments were unconstitutional.

The right to identity – Article 6 of the Constitution. The draft law places an obligation on public authorities to consult organisations of citizens belonging to national minorities on decisions relating to the preservation, development and expression of their ethnic, cultural, linguistic and religious identity, and an obligation on the state to recognise and guarantee the right of this category of persons to the preservation, development and expression of their identity as provided for in paragraph 1 of that article, this being one of the means of guaranteeing the right established by the Constitution.

This amendment does not mention any of the limits to revision provided for in Article 152.1 and 152.2 of the Constitution. If these rules were to be retained, to ensure that decisions taken by organisations of citizens belonging to national minorities on the preservation, development and expression of their

ethnic, cultural, linguistic and religious identity are not contrary to the principles of equality and non-discrimination towards other Romanian citizens, an obligation should be placed on those organisations to consult the public authorities in writing on the decisions they plan to take.

This proposed amendment is therefore constitutional.

Individual freedom – amendment to Article 23.3 of the Constitution – extension of the maximum period of police custody from 24 to 48 hours. The proposed amendment is designed to meet the obligation placed on the state to ensure a proper balance between the interest in defending the individual's fundamental rights and the interest in defending the rule of law, while taking account of the problems which the current length of police custody has created in practice for the work of the prosecution service, with direct consequences for the protection of society's general interests and the rule of law. Police custody of up to 48 hours is therefore justified to ensure the effectiveness of the measure.

This proposed amendment is therefore constitutional.

The right to private property – Article 44 of the Constitution. The proposed amendment concerns the deletion of the second part of Article 44.8 of the Constitution, which provides that “[t]he legality of acquisition shall be presumed”. The Court notes that it has given rulings on other occasions on initiatives to revise the same constitutional provision pursuing substantially the same aim: to remove from the Constitution the presumption of the lawful acquisition of property. For example, in decision no. 85 of 3 September 1996 published in the Official Gazette (*Monitorul Oficial*) of Romania, Part I, no. 211 of 6 September 1996, the Court gave a ruling on an initiative to revise the Constitution, which proposed replacing the text establishing this presumption with the following text: “Property whose lawful acquisition cannot be proved shall be confiscated. On this occasion the Court held that the presumption of the lawful acquisition of property was one of the constitutional safeguards of the right to property, in accordance with Article 41.1 of the Constitution [now Article 44.1], under which the right to property is guaranteed. This presumption is also based on the general principle that any juridical act is deemed lawful unless proved otherwise, which creates an obligation to prove that a person's property was acquired unlawfully. While noting that this proposed amendment reversed the burden of proof regarding the lawfulness of the acquisition of property, so that a person's assets were presumed to have been acquired unlawfully unless proved otherwise by their owner, that legal certainty as to the right of ownership

of the assets constituting a person's property was indissolubly linked to the presumption of lawful acquisition and that the removal of this presumption meant removing a constitutional guarantee of the right to property, the Court held that the proposed amendment was unconstitutional. Without the presumption of lawful acquisition, a property owner would be exposed to constant uncertainty because, whenever the unlawful acquisition of that property was alleged, the burden of proof would not fall upon the person making that allegation, but upon the owner of the property.

Pursuant to Article 152.2 of the Constitution, under which no revision shall be made which results in the suppression of citizens' fundamental rights and freedoms, or of the safeguards thereof, the Court finds that the deletion of the second part of Article 44.8 of the Constitution, providing that "[t]he legality of acquisition shall be presumed", is unconstitutional because its effect is to remove a guarantee of the right to property.

The right of a person prejudiced by a public authority – Article 52 of the Constitution. It is noted that, by removing the terms "bad faith" and "serious negligence", which constitute detailed conditions of the liability of judges, the proposed amendment brings into line the two sentences of the same paragraph of Article 52 concerning respectively the liability of the state and the liability of judges for judicial errors committed, so that the conditions of liability may then be laid down by law. The amendment therefore draws a distinction between a constitutional principle – the material liability of the state and judges for judicial errors, and infra-constitutional rules – the conditions under which such liability may be incurred. There is no reference to the limits to revision of the Constitution because the constitutional principle of the independence of justice cannot be interpreted as exempting those who apply it from liability for judicial errors, in view of the consequences of those errors both for citizens seeking justice and for the Romanian state.

This proposed amendment is constitutional.

The role and structure of parliament – Article 61 of the Constitution. The proposed amendment concerns the adoption of a unicameral parliament and the limitation of the number of members of parliament to 300. First of all, the Court notes that the proposed amendment to this effect is consistent with the result of the national referendum of 22 November 2009 initiated by the President of Romania, which was confirmed by the Constitutional Court in its decision no. 37 of 26 November 2009. This amendment is not inconsistent with any of the limits to revision provided

for in Article 152 of the Constitution, but represents exclusively a political choice which will be analysed by the parties to the constitutional revision procedure.

This proposed amendment is therefore constitutional.

Parliamentary immunity – Article 72 of the Constitution. The constitutional rules on parliamentary immunity are justified by the need to protect the mandate of parliamentarians as a guarantee of the exercise of their constitutional powers and, at the same time, a condition for the proper functioning of the law-based state. While noting that the draft law for the revision of the Constitution removes the procedural immunity which protects parliamentarians from unreasonable or vexatious criminal proceedings, thus rendering parliamentary immunity devoid of substance, the Court finds the proposed amendment unconstitutional because it leads to the removal of a safeguard of a fundamental right of persons holding public office and thus violates the limits to revision as provided for in Article 152.2 of the Constitution.

Appointment of the government – Article 85.2 of the Constitution. Through the addition of the requirement that the Prime Minister must consult the President before proposing the dismissal or appointment of members of the government, the solution advocated by the Constitutional Court is incorporated into this constitutional provision.

The proposed amendment is therefore constitutional.

Other powers (conferring decorations and honorary titles) – Article 94.a of the Constitution. In its new form the text empowers the President to withdraw decorations and honorary titles previously awarded to certain persons. Although the Constitution did not expressly confer on the President, in addition to the power to award decorations and honorary titles, the power to withdraw them, the Constitutional Court finds that the former implies the latter, and that the fact of withdrawing decorations derives from the constitutional power to award them.

This proposed amendment is therefore constitutional.

Suspension from office – Article 95 of the Constitution. The proposed amendment gives binding force to the Constitutional Court's opinion and provides for its legal effects. A favourable opinion from the Court is needed to continue the suspension procedure. If the opinion is unfavourable, the suspension procedure is discontinued. If the opinion is favourable, it is impossible to see how it could be binding on parliament, which is required to take a decision by a majority of its members' votes. Furthermore, in such a situation, the Constitutional

Court's opinion would lead directly to the holding of a referendum, parliament's role being confined to initiating the suspension procedure. In the light of these observations, it is proposed that the word "binding" be deleted from the Article as it is sufficient to make express provision for the extinctive effect of a negative opinion from the Constitutional Court.

Commitment of legal responsibility by the government – Article 114 of the Constitution. A quantitative limitation of the government's possibility of resorting to this procedure during a session of parliament precludes any possible misuse by the government of the constitutional right to commit its responsibility before parliament, and the legislature, for its part, can exercise its full power as conferred by Article 61.1 of the Constitution.

The Court recommends expanding the provision in Article 114.1 of the Constitution in order to limit the subject-matter on which the government can commit its responsibility to: a programme, a general policy declaration or a draft law regulating social relations in a specific field in a unitary manner.

This proposed amendment is constitutional.

The administration of justice – Article 124 of the Constitution. The Court considers that the proposed addition to Article 124.3 of the Constitution is unnecessary because the obligation placed on judges to obey the Constitution and comply with the decisions of the Constitutional Court is already enshrined in the Constitution. Furthermore, the well-established constitutional maxim that "judges are independent and subject only to the law" represents the constitutional guarantee of the "non-submission" of judges to any other authority, persons or interests, inside or outside the judicial system, and their "submission" to the law only, so that any mechanisms of subordination or control which might concern them are precluded and may not affect their independence.

Courts of law – Article 126.6 of the Constitution. The purpose of the proposed amendment is to make an addition to paragraph 6 excluding the government's fiscal and budgetary policies from judicial supervision of administrative acts. An interpretation allowing the ordinary legislature to add to the Constitution, by means of infra-constitutional legislation, a new category of constitutional acts exempt from judicial supervision is contrary to the constitutional principle of supremacy of the Constitution enshrined in Article 1.5, to the principle of free access to justice in Article 21 and, indirectly, to Article 152.2, which prohibits any revision of constitutional provisions resulting in the suppression of citizens' fundamental rights and freedoms.

The Court notes that the proposed amendment is unconstitutional.

The Supreme Council of the Judiciary – Article 133 of the Constitution. The main amendment concerns paragraph 2 on the structure of the Supreme Council of the Judiciary: the total number of members is still 19, but the number of representatives of civil society increases (from 2 to 6) and the number of members having the status of judge or prosecutor decreases correspondingly (from 14 to 10). By virtue of its powers, the composition of the Supreme Council of the Judiciary must reflect the specific nature of its activity, the judicial status of its members, inherent in the name of this supreme representative body, and their direct knowledge of the implications of judicial activity being of decisive importance for the decisions taken by the Council. The appointment of the 6 civil society representatives by the parliament and the President as representative of the executive represents interference by the other constitutional powers in the activity of the judiciary, calling into question the role of the Supreme Council of the Judiciary as guarantor of the independence of justice.

The Court notes that the proposed amendment is unconstitutional.

#### *Languages:*

Romanian.



# Russia

## Constitutional Court

### Important decisions

*Identification:* RUS-2011-2-003

**a)** Russia / **b)** Constitutional Court / **c)** / **d)** 26.05.2011 / **e)** 10 / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 08.06.2011 / **h)** CODICES (Russian).

*Keywords of the systematic thesaurus:*

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

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

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

*Keywords of the alphabetical index:*

Arbitration, court / Immovable property / Immovable property rights, state registration.

*Headnotes:*

The right to apply to a court of arbitration is a universal means of settling civil-law disputes. It is based on the principles of freedom of contract and autonomy of will in civil law.

The public nature of a dispute depends not on the parties and the nature of the property but on the specific character of the legal relationship.

*Summary:*

I. The Supreme Court of Arbitration of the Russian Federation held that there was uncertainty as to the division of jurisdiction between courts of law and commercial arbitration courts and applied to the Constitutional Court.

The applicant argues that commercial arbitration courts are not state legal bodies and therefore are not entitled to give rulings on the seizure of immovable property.

II. The impugned provisions create legal uncertainty for the courts and the parties regarding the division of

jurisdiction between courts of law and courts of arbitration owing to the presence of a public element in disputes concerning immovable property, namely the requirement to register on the land register.

The rights of the defence are an essential safeguard for all rights and freedoms. The Constitution guarantees to all the right to defend their rights and freedoms by all means not prohibited by law. The right to apply to a court of arbitration is a universal means of settling civil-law disputes. It is based on the principles of freedom of contract and autonomy of will in civil law.

The public interest is upheld by means of the legislative provisions on the arbitration process. The Constitutional Court held that the public nature of a dispute depends not on the parties and the nature of the property but on the specific character of the legal relationship.

State registration of immovable property rights is not an element in the dispute. It does not change the nature of the legal relationship and does not affect the civil-law content. Neither does it place restrictions on autonomy of will and the right of ownership.

For this reason, the registration requirement must not be seen as a circumstance preventing courts of arbitration from hearing this type of case.

The decision of a court of arbitration is a precondition for obtaining an enforceable title. That decision does not entail a transfer of ownership.

Furthermore, the Court of arbitration is not entitled to give rulings on the rights and obligations of third parties who are not parties to an arbitration agreement.

For this reason, the provisions in question are not unconstitutional.

*Languages:*

Russian.



*Identification:* RUS-2011-2-004

**a)** Russia / **b)** Constitutional Court / **c)** / **d)** 09.06.2011 / **e)** 12 / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 22.06.2011 / **h)** CODICES (Russian).

*Keywords of the systematic thesaurus:*

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

4.7.4.1.6 Institutions – Judicial bodies – Organisation – Members – **Status.**

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

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.**

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

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

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

*Keywords of the alphabetical index:*

Tribunal established by law / Judge, suspect, surveillance, secret measures / Court, territorial jurisdiction.

*Headnotes:*

The President of the Supreme Court or the Vice-President of the Court determines the court with jurisdiction to decide on the authorisation of secret measures against a judge.

*Summary:*

I. The Court of one of the subjects of the Federation authorised secret measures against a judge coming under another subject of the Federation. The measures involved limiting the right to secrecy of correspondence and telephone conversations and the right to inviolability of his home and office and of his official and private means of transport.

Authorisation was sought from a court in another subject of the Federation because consideration of the request on the spot might have caused the investigation to fail, given the confidential nature of the information.

After the secret measures had been implemented, the competent body instituted criminal proceedings against the judge.

The applicant considers that the Law on the Status of Judges allows cases to be heard by all equivalent courts irrespective of territorial jurisdiction. This would violate

the constitutional right of defence and in particular the right to have one's case heard by a court having jurisdiction over the matter in accordance with law.

The applicant considers that the provisions in question are unconstitutional.

II. The constitutional rights of the individual such as the right to inviolability of private life and to secrecy of correspondence, telephone conversations and postal, telegraphic and other communications are protected by the Constitution. These rights may be restricted by decision of a court.

The rights of the defence are guaranteed by the Constitution and by international treaties. The right of access to court provides for territorial jurisdiction of the court as defined by law. In other words, the case must be brought before the court of the place where the offence was committed. The transfer of a criminal case without just cause and due process is prohibited. However, the law provides for one exception.

Anyone whose case is to be heard in judicial proceedings has the right to have his case brought before a court established by law.

The specific nature of a secret investigation presupposes secret measures. In particular, it is essential to ensure that the suspect is not informed of the secret activities.

If there is a risk that a request to a particular court for authorisation to conduct a secret investigation might remove or jeopardise the secrecy of the activities concerned, the matter may be decided by another court. The European Court of Human Rights has noted that these measures do not limit judicial scrutiny of secret activities before the start of the preliminary investigation.

The President of the Supreme Court or the Vice-President of the Court determines the court with jurisdiction to decide on the authorisation of a secret investigation against a judge if this is necessary to maintain secrecy. The bodies responsible for carrying out the secret measures do not have the right to determine the court themselves. Consequently, the impugned provision does not violate the rights of the defence guaranteed by the Constitution.

Parliament has the right to regulate the question of territorial jurisdiction in the light of the Constitution and this judgment.

*Languages:*

Russian.





*Identification:* RUS-2011-2-005

**a)** Russia / **b)** Constitutional Court / **c)** / **d)** 30.06.2011 / **e)** 14 / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 13.07.2011 / **h)** CODICES (Russian).

*Keywords of the systematic thesaurus:*

4.6.9.4 Institutions – Executive bodies – The civil service – **Personal liability.**

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

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:*

Public official, freedom of expression.

*Headnotes:*

Public officials have the right to give the public their opinion on matters of public interest. They may inform the public about illegal acts and violations of the law committed by a state body or by public officials.

Their opinions must be reasoned and based on real facts, must be in pursuit of the public interest and must not be intended to offend or be motivated by other personal goals.

*Summary:*

I. The applicants are public officials who have been dismissed from their posts.

The applicants consider that the impugned provisions are inconsistent with the Constitution, which guarantees freedom of speech, the right to disseminate information and equality of citizens irrespective of their occupational status.

They claim that their assessments and views on the activity of state bodies do not adversely affect the foundations of the constitutional order, the rights and legal interests of others and the guarantees concerning the defence and security of the state to

such an extent that it is necessary to limit rights and freedoms by means of a federal law. For this reason, they argue, the provisions in question are discriminatory.

II. The Court holds that public office constitutes a specific occupational category. The rules prohibiting public officials from expressing public judgments and assessments going beyond their professional competence are designed to maintain political stability.

However, the limits must not be excessive.

The Constitution guarantees to everyone the right freely to seek, receive, pass on, produce and disseminate information by any legal means. This right offers citizens the opportunity to express their opinions and beliefs.

The Court has held that public officials may express their opinions publicly. Their opinions must be reasoned and based on real facts, in pursuit of the public interest, and must not be intended to offend or be motivated by other personal goals.

Furthermore, public officials must be able to defend their rights by applying either to a special commission responsible for hearing professional disputes or to a court.

In specific cases, the public interest in receiving information may prevail over the duty of public officials to observe confidentiality.

Consideration must be given to the content of the statement, its social significance, the damage it might cause to state and public interests and how any damage caused compares with the damage averted.

The Court considers it acceptable for public officials to inform the public about illegal acts and violations of the law committed by a state body or public officials.

The decisions taken in respect of the applicants must be reviewed.

*Languages:*

Russian.



# Serbia

## Constitutional Court

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### Important decisions

*Identification:* SRB-2011-2-010

**a)** Serbia / **b)** Constitutional Court / **c)** / **d)** 20.04.2011 / **e)** IUz-1575/2010 / **f)** / **g)** / **h)** CODICES (English, Serbian).

*Keywords of the systematic thesaurus:*

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

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

*Keywords of the alphabetical index:*

Nuclear power plant, prohibiting the building / Limitation, free entrepreneurship, free competition.

*Headnotes:*

Restriction of the utilisation of nuclear power is organised and provided for the purpose of protecting the environment against possible nuclear incidents, which is a constitutional obligation of the Republic of Serbia.

*Summary:*

An initiative was filed with the Constitutional Court for assessing the constitutionality of the Law Prohibiting the Building of Nuclear Power Plants in the Federal Republic of Yugoslavia (hereinafter, the “Law”). The initiative contended that the Law is not compliant with Article 83 of the Constitution on the basis that the Law limits free entrepreneurship because “one of the three prevailing sources of power has been outlawed” and on the basis that the Law limits free competition in the field of power engineering and contributes to monopolistic behaviour by public companies in the field of power engineering, thereby breaching the provisions of Article 84 of the Constitution.

The Law prescribes that: the building of nuclear power plants, plants for the production of nuclear fuel

and plants for the processing of spent nuclear fuel for nuclear power plants shall be prohibited. The prohibition relates to the passing of investment decisions, elaboration of investment programs and technical documentation (Article 1). The provisions of Article 1 of the Law do not relate to scientific research and research development works, mining and geological exploration works, geological and seismic research and the education of personnel (Article 2).

Relevant to the assessment of the constitutionality of the Law are the following provisions of the Constitution which set forth: that everyone shall have the right to a healthy environment and the right to timely and full information about the state of the environment, as well as that everyone, and especially the Republic and autonomous provinces, shall be accountable for the protection of the environment and shall be obliged to preserve and improve the environment (Article 74); that entrepreneurship is permitted and that it may be restricted by the Law for the purpose of protecting people’s health, the environment and natural goods and security (Article 83); that the Republic of Serbia organises and provides for the system of protection and improvement of the environment, the production, trade and transport of arms, poisonous, inflammable, explosive, radioactive and other hazardous substances (Article 97.9); and that all laws and other general acts must be in compliance with the Constitution (Article 194.3).

Starting from the above, and especially from the text of Article 74 of the Constitution, the Court found that the Law had been enacted in order to protect the environment against nuclear risk and the hazardous effects of ionizing radiation that could arise from the operation of nuclear power plants or from the production, utilisation and storage of radioactive nuclear material. At the same time, the legislator has not prohibited scientific research in the field of nuclear sciences or follow-up of developmental technologies in this area and the education of highly skilled personnel.

The Court held that the allegations of the plaintiff, who submitted the initiative, that the Law violates the constitutional principle of freedom of entrepreneurship referred to in Article 83 of the Constitution are without basis given that according to this constitutional norm the legislator is authorised to restrict the freedom of entrepreneurship by its regulation in a situation when it is necessary to protect public health and the environment and to provide for the security of the Republic of Serbia, which was precisely done by enactment of the Law. The Court also held that the Law does not affect freedom of competition by the creation or abuse of a monopolistic or dominant position in the market. The Court concluded that

restriction of the utilisation of nuclear power is organised and provided for the purpose of protecting the environment against possible nuclear incidents, which is a constitutional obligation of the Republic of Serbia.

As the Court did not find the ground for instituting a procedure in connection with the filed initiative to be valid, it did not accept the initiative in accordance with the provision of Article 53.3 of the Law on the Constitutional Court.

#### *Languages:*

English, Serbian.



#### *Identification: SRB-2011-2-011*

**a)** Serbia / **b)** Constitutional Court / **c)** / **d)** 05.05.2011 / **e)** IUz-231/2009 / **f)** / **g)** *Službeni glasnik Republike Srbije* (Official Gazette), 41/2011 / **h)** CODICES (English, Serbian).

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

4.6.2 Institutions – Executive bodies – **Powers.**  
 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:*

Division of powers / Freedom of media.

#### *Headnotes:*

The manner of exercising the rights and freedoms guaranteed by the Constitution may be prescribed by law only.

#### *Summary:*

The Constitutional Court on 22 July 2010 decided that certain provisions of the Law Amending the Law on Public Information (hereinafter, the “Law”) are not compliant with the Constitution and ratified international treaties and the Ruling instituting the procedure

for assessing the constitutionality of the provisions of Article 2 of the Law in the part of Article 14b.2 that was added after Article 14 of the Law, as well as of Article 7 of the Law.

The said provisions authorise the competent minister to more specifically regulate the manner of keeping a Public Media Register and prescribe the time interval in which the minister shall enact this regulation as well as the time intervals in which the founders of public media shall file applications for entry of a public medium in the Public Media Register. The plaintiffs claimed that the legislator had “ceded to the executive power body to regulate in a non-public manner and according to its own discretion the manner of keeping the Public Media Register”, thereby making entry in the Register “subject to indirect approval”. In this way, the contested provisions are primarily not compliant with the guarantee of freedom of the media referred to in Article 50.1 of the Constitution.

The Constitutional Court held the following:

Pursuant to Article 97.10 of the Constitution it is within the competence of the Republic of Serbia to organise and provide for the system in the domain of public information and that, accordingly, it was within its competence to organise and provide for by enacting the Law on Public Information the manner of exercising the freedom of the media guaranteed by the Constitution.

The Constitutional Court held in its decision that the prescribed entry of a public media in the Register does not, *per se*, violate the freedoms guaranteed by the Constitution or the principles of the Constitution, as the contested Law does not stipulate that entry in the Register is a constitutive element of establishment of a public medium which, indirectly, would give it the character of approval. Also, the Court held that the provision which stipulates that the Public Media Register shall be kept by an organisation competent for keeping Company Registers is not incompatible with the Constitution, as the determination of which body or organisation will be competent for keeping certain public records relates to the objectives of a concrete legal solution the assessment of which is not within jurisdiction of the Constitutional Court.

In relation to the provision of Article 14b.2 of the Law, the Constitutional Court indicated that granting powers by law to a minister to specify in detail by his/her by-law the specific matters stipulated by the law is not open to legal or constitutional challenge. The reason is that a minister, in conformance with the Law on State Administration or a ministry as part of the executive power, is authorised to enact

legislation; however, only within the limits of the competence of the executive power to enact by-laws. The executive power's position in this regard stems from the constitutional principle of the separation of powers and, accordingly, from the constitutional position of the National Assembly which holds legislative power. As Article 123.3 of the Constitution stipulates that the Government, as holder of the executive power in the Republic, enacts regulations and other general acts for the purpose of law enforcement, and as Article 136.1 of the Constitution provides that the state administration is bound by the Constitution and law, it means, in the Constitutional Court's view, that state administration authorities may also enact regulations from the scope of their competence in order to prescribe in greater detail the matters already regulated by law, for the purpose of their enforcement. In accordance with the above, the envisaged authorisation of a minister to prescribe in greater detail the manner of keeping a Public Media Register is not, *per se*, open to challenge, or not open to challenge if the manner of keeping the Register is prescribed by the Law itself, which primarily means that the law has stipulated the rules of procedure for entry in the Register.

However, the contested Law concerning the Public Media Register does not contain any provisions prescribing the procedure of entry in the Public Media Register or prescribing the manner in which the Register is to be kept. Accordingly, the Constitutional Court held that the authority granted to the line minister to prescribe in greater detail specific matters contained in the law by his/her general act (provision) for the purpose of law enforcement essentially goes beyond the framework of the constitutional competence of the executive power. Rather, it is the authority for independent regulation both of the manner of keeping the Public Media Register and of the procedure for entry in the Register.

The Constitutional Court held that the matters comprising the regulation of the manner of keeping the Register directly relate to the exercise of the guaranteed freedom of the media referred to in Article 50.1 of the Constitution, because the manner in which these matters are regulated essentially depends on the exercise of the constitutional guarantee that newspapers and other forms of public information may be established freely, without permission. In view of the fact that, in conformity with the provision of Article 18.2 of the Constitution, the manner of exercising guaranteed rights and freedoms may be prescribed by law only, the Constitutional Court held that the contested provision of the Law is not compliant with Article 18.2 of the Constitution.

As the contents of the provisions of Article 7 of the contested Law are legally and logically correlated with the provision of the newly added Article 14b.2 of the Law on Public Information, the Constitutional Court found that these provisions are also not compliant with the Constitution.

*Languages:*

English, Serbian.



# Slovakia

## Constitutional Court

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### Important decisions

*Identification:* SVK-2011-2-002

**a)** Slovakia / **b)** Constitutional Court / **c)** Senate / **d)** 16.02.2010 / **e)** II. ÚS 348/09 / **f)** / **g)** *Zbierka náleзов a uznesení Ústavného súdu Slovenskej republiky* (Official Digest), 10/2010; www.concourt.sk / **h)** CODICES (Slovak).

*Keywords of the systematic thesaurus:*

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

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

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

*Keywords of the alphabetical index:*

Chilling effect / Just satisfaction.

*Headnotes:*

A general court may not vitiate the (possible) legality of an assembly, which was originally banned by a local authority, by the fact that it does not review that ban in the three-day period required by the Law on Assembly.

If there is an assembly for a unique event and the notifier submits notification to the municipality in good time and the municipality also decides in time, then a decision of the regional court concerning the legality of the event after the event takes place has radically lower, almost hollow meaning. In itself, even a late decision may have some legal significance but it cannot fulfil the principle of the presumption of legality of an assembly.

*Summary:*

In 2009, the applicant as an organiser notified a local council in Bratislava of a public assembly there in

support of human rights in China. The mayor of the municipality banned the holding of that assembly.

The applicant challenged this decision and sought judicial review at the regional (administrative) court in Bratislava on 15 June 2009. Two days later he asked for an interim measure to suspend the decision banning the assembly. The interim measure was rejected. The first hearing of the regional court was held on 25 June 2009. The regional court issued its decision at its second hearing held on 14 July 2009 and quashed the decision of the municipality as breaching the law.

According to Section 11.3 of the Law on Assembly, a regional court must decide on an appeal against the decision of a municipality within three days, but in this case the regional court decided after 29 days.

The applicant argued that the regional court had violated the right to peaceful assembly, the right to fair trial and the right to have his case tried without unreasonable delay, because it decided on the legality of the assembly too late, after the event had taken place. If the regional court had decided in time, the purpose of the assembly would have been fulfilled.

The regional court argued that because it had to respect the constitutional principles of a public hearing, of proceedings without unreasonable delay and of reasoned, non-arbitrary decision-making, it could not decide within the three-day period as required by the Law on Assembly.

The Constitutional Court initially stressed the importance of freedom of assembly for the development of an open society, its links with the freedom of association and the freedom of expression.

The Constitutional Court stated that although the applicant finally took part in the assembly, the regional court had interfered with his right to assembly, because the principle of the presumption of legality of an assembly is implied in the freedom of assembly as such and the applicant took part in the assembly in a state of uncertainty as to its legality. Therefore the regional court had interfered with the freedom of assembly.

If there is uncertainty as to whether holding an assembly is legal, this could have a chilling effect on potential participants. In general, some people might be discouraged from participating in the assembly, for example because of safety reasons.

Interference must be lawful. Although the regional court claimed that procedural rights had to be fulfilled, the Constitutional Court stated that the three-day period must be respected. The Constitutional Court continued that in this case the classical argument of *lex specialis* and the constitutional argument overlap.

The Constitutional Court stated that, if there is an assembly for a unique event and the notifier submits notification to the municipality in good time and the municipality also decides in time, then a decision of the regional court concerning the legality of the event after the event takes place has radically lower, almost hollow meaning. In itself, even a late decision may have some legal significance, but it cannot fulfil the principle of the presumption of legality of an assembly.

Finally the Constitutional Court stated that because the regional court had not decided within the three-day period set in the Law, the interference with the freedom of assembly had not been lawful.

The Constitutional Court argued that the violation of the Law (i.e. unlawful interference with the freedom of assembly) caused by the regional court fell outside the usual limitation of limited freedoms. There is no room for balancing the procedural rights preferred by the regional court on the one side and the freedom of assembly on the other side, because this balancing was already carried out by the legislator in adopting the three-day period. Accordingly, the instant case did not concern the lawfulness of the interference under Article 28.2 of the Constitution, which permits interference with the freedom of assembly where the freedom has to be balanced against other rights and public interests; rather, the case concerned a direct interference with the freedom of assembly as guaranteed in Article 28.1 of the Constitution. Timely decision-making in this type of case is a direct component of substantive freedom, namely, the freedom of assembly.

The Constitutional Court added that the regional court must use all legal means to decide within the three-day period.

The Constitutional Court also remarked that many historical milestones in Slovak and Czechoslovak history have been closely related with the freedom of assembly. So from this point of view it is very important to protect the freedom of assembly. The Constitutional Court also referred to the Guidelines on Freedom of Peaceful Assembly issued by the Organisation for Security and Co-operation in Europe (OSCE).

The applicant claimed just satisfaction of one euro. Although the European Court of Human Rights usually rejects such a claim, arguing that the declaration of violation is enough, the Constitutional Court awarded this sum. According to the Constitutional Court this sum of symbolic nature represents the applicant's interest in the protection of human rights and should not be considered as a kind of disrespect toward the regional court.

#### *Cross-references:*

##### European Court of Human Rights:

- *Bączkowski and others v. Poland*, Application no. 1543/06, Judgment of 03.05.2007;
- *Fortum corporation v. Finland*, Application no. 32559/96, Judgment of 15.07.2003, paragraphs 47-49;
- *Papastavrou and others v. Greece*, Application no. 46372/99, Judgment (Just satisfaction), 18.11.2004, paragraphs 18-20;
- *Katsoulis and others v. Greece*, Application no. 66742/01, Judgment (Just satisfaction), 24.11.2005, paragraphs 23-25.

##### Court of Justice of the European Union:

- C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge v. Republic of Austria*, § 69.

##### Supreme Administrative Court of the Czech Republic:

- Judgment no. 5 As 26/2007-86, 04.09.2007.

#### *Languages:*

Slovak.



## Slovenia

### Constitutional Court

#### Statistical data

1 January 2011 – 30 April 2011

In this period, the Constitutional Court held 19 sessions – 14 plenary and 5 in panels: 1 each in the civil and criminal panel and 3 in the administrative panel. It received 86 new requests and petitions for the review of constitutionality/legality (U-I cases) and 506 constitutional complaints (Up cases). It also received 2 cases for the review of admissibility of a referendum.

In the same period, the Constitutional Court decided on 109 cases in the field of the protection of constitutionality and legality, and 425 cases in the field of the protection of human rights and fundamental freedoms, as well as 2 cases of review of admissibility of a referendum.

#### Statistical data

1 May 2011 – 30 August 2011

In this period, the Constitutional Court held 16 sessions – 8 plenary and 8 in panels: 2 each in the civil and criminal panel and 4 in the administrative panel. It received 84 new requests and petitions for the review of constitutionality/legality (U-I cases) and 493 constitutional complaints (Up cases).

In the same period, the Constitutional Court decided 99 cases in the field of the protection of constitutionality and legality, and 432 cases in the field of the protection of human rights and fundamental freedoms.

Decisions are published in the Official Gazette of the Republic of Slovenia, whereas orders of the Constitutional Court are not generally published in an official bulletin, but are notified to the participants in the proceedings.

However, judgments and decisions are published and submitted to users:

- In an official annual collection (Slovene full text versions, including dissenting/concurring opinions, and English abstracts);
- In the *Pravna Praksa* (Legal Practice Journal) (Slovene abstracts of decisions issued in the field of the protection of constitutionality and legality, with the full-text version of dissenting/concurring opinions);
- On the Constitutional Court website (full text in Slovene, English abstracts and a selection of full texts): <http://www.us-rs.si>;
- In the IUS-INFO legal information system on the Internet, full text in Slovene, available through <http://www.ius-software.si>;
- In the CODICES database of the Venice Commission (a selection of cases in English and Slovene).

#### Important decisions

*Identification:* SLO-2011-2-001

**a)** Slovenia / **b)** Constitutional Court / **c)** / **d)** 03.02.2011 / **e)** U-I-178/10 / **f)** / **g)** *Uradni list RS* (Official Gazette), 12/2011 / **h)** *Pravna praksa*, Ljubljana, Slovenia (abstract); CODICES (Slovenian, English).

*Keywords of the systematic thesaurus:*

- 2.1.1.3 Sources – Categories – Written rules – **Community law**.
- 3.5 General Principles – **Social State**.
- 3.9 General Principles – **Rule of law**.
- 3.13 General Principles – **Legality**.
- 3.16 General Principles – **Proportionality**.
- 3.19 General Principles – **Margin of appreciation**.
- 3.26.3 General Principles – Principles of Community law – **Genuine co-operation between the institutions and the member states**.
- 4.5.2 Institutions – Legislative bodies – **Powers**.
- 4.6.2 Institutions – Executive bodies – **Powers**.
- 4.10.2 Institutions – Public finances – **Budget**.

*Keywords of the alphabetical index:*

Public finances, administration / Budget, control.

*Headnotes:*

Constitutional review of issues concerning the single currency is of necessity reserved. From a constitutional law perspective, the decisive issue is not the permissibility of state borrowing but its limits. State liabilities must be specified in terms of amount, either in explicit terms or as a percentage of a specific amount. This follows from the principle of a social state, which requires that at any given point (including future generations which will bear the burden of present borrowing), the state must ensure a social minimum that comprises not only minimum subsistence but ensures opportunities for the fostering of human interactions and for participation in social, cultural, and political affairs. This is an upper limit that, despite the absence of explicit constitutional provision on a borrowing ceiling, the legislature may not disregard. Equally, it must not encumber the state with so much debt that it would jeopardise the social state.

*Summary:*

The Act on Guarantees of the Republic of Slovenia for the Purpose of Maintaining Financial Stability in the Euro Area (hereinafter, the "AGMFSEA") was adopted due to the participation of the Republic of Slovenia in a special company. As it concerns the single currency, coordination among participating Member States of the euro area is necessary, which is also in keeping with the principle of sincere co-operation among Member States (Article 4.3 of the Treaty on European Union), mutual respect and the provision of mutual assistance in fulfilling the tasks and objectives that the European Union pursues. It therefore follows that in cases such as the case in point, regarding the inter-dependence of the Member States and their economies, concerted action among euro area Member States is required even though the conduct of the Member States is based on their national competences. As the long-term economic impacts and their consequences on the stability of money cannot be evaluated based on a single intervention, but must be monitored on an ongoing basis, and since it is impossible to predict with certainty market reactions and the way matters will unfold, those responsible for such monitoring need to be given sufficiently wide discretion. As a consequence, constitutional review of such issues is of necessity reserved.

Article 149 of the Constitution does not create explicit authority for the state to borrow; it merely permits borrowing in principle. From a constitutional law perspective, therefore, the decisive issue is not the permissibility of borrowing, but its limits. With regard to the terms used in Article 149 of the Constitution, it is not possible to draw on their civil-law definitions. They need to be given independent meaning and defined as a constitutional law category based on the intention of those who drafted the Constitution and taking into account the nature of state borrowings and guarantees. The guarantees for loans need to be defined as any category of security or guarantee under which the state assumes the risk of potential liability for third parties, thus affecting the scope of borrowing (public debt) and, by extension, the amount of state assets. The fundamental difference between loans and guarantees in the sense of Article 149 of the Constitution is that loans create a direct and unconditional liability to repay the funds, whereas guarantees create a conditional liability incumbent upon the state which is realised only in the event of a third party reneging on its liability.

Article 149 of the Constitution is a procedural provision which requires a special legislative decision under which the financial burden is actually or potentially transferred to the future, while at the same time providing for the fundamental power of the National Assembly to decide on state revenue and expenditure, taking into account the fundamental human rights and freedoms of present and future generations, as well as the principles of a state governed by the rule of law and a social state, and in addition also the special disclosure of state borrowings and guarantees in accordance with the principles of democracy and a state governed by the rule of law. It does not follow from the linguistic meaning of Article 149 of the Constitution that it determines substantive material limitations or conditions to which state borrowings and guarantees might be bound; this does not, however, mean that an act on the basis of which a state guarantee is assumed may be devoid of substance or that the National Assembly may give the Government unlimited power to assume state guarantees or to borrow.

The constitutional requirement for the adoption of a law on the basis of which the state may borrow needs to be understood as a requirement that future obligations be precise or at least determinable. Determinability requires that it is possible to infer, from facts defined in the law, what the future liabilities of the state will be and what purpose is realised by the borrowing; in any event, liabilities must be specified in terms of amount, either in explicit terms or as a percentage of a specific amount (for example, the total budget).



The decision on participation in the European Financial Stabilisation Mechanism (hereinafter, the "EFSF") and hence the decision on assuming the guarantee was adopted by the National Assembly by an act that precisely defines what kind of guarantee is being granted, in what amount, to whom, and for what purpose. The range of movement that the Government has is thus clearly and precisely defined. The EUR 2.073 billion ceiling on the liability of the Republic of Slovenia applies to any potential liabilities the Republic may incur in connection with its participation in the EFSF. Therefore, the AGMFSEA is not inconsistent with Article 149 of the Constitution. Since a loan guarantee is a conditional obligation (its enforcement is a future uncertain fact), it does not have immediate direct financial consequences. It is for this reason that in every budget, payments for enforced guarantees are budgeted only in the amount corresponding to the expected enforcement of guarantees or securities in the budget period.

#### *Languages:*

Slovenian, English (translation by the Court).



#### *Identification:* SLO-2011-2-002

**a)** Slovenia / **b)** Constitutional Court / **c)** / **d)** 24.03.2011 / **e)** U-I-271/08 / **f)** / **g)** *Uradni list RS* (Official Gazette), 26/2011 / **h)** *Pravna praksa*, Ljubljana, Slovenia (abstract); CODICES (Slovenian, English).

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

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

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.**

5.3.13.28 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to examine witnesses.**

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

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

Police, investigation, withholding / Witness, examination, right of defence.

#### *Headnotes:*

The non-disclosure of information related to police work pursues constitutionally admissible aims, such as state security, the protection of individuals from interferences with their life or person, and the protection of the tactics and methods of police work. Interference with the defendant's right to a defence is permissible, in order to achieve these aims. The duty to maintain the confidentiality of sources and undercover agents, and withholding such from the defence, is an appropriate measure for achieving the constitutionally admissible aim. Such measures, are, however, only necessary and proportionate if serious danger to the life or person of the witness exists or there are other substantial reasons in the public interest, while at the same time the possibility of examining such a witness upon applying protective measures is ensured. Courts are charged with ensuring the fairness of proceedings against defendants. It is incumbent on them to apply the measure which is shown to be the least burdensome in terms of interference with the defendant's right to a defence.

#### *Summary:*

Under the Police Act, the disclosure of certain information necessary for the defence in criminal proceedings depends on a decision made at the discretion of the Minister of the Interior. This provision is inconsistent with the defendant's right to judicial protection determined in the first paragraph of Article 23 of the Constitution, which guarantees everyone the right to have a decision over charges brought against them made by an independent and impartial court, not by the executive branch of power. The non-disclosure of information related to police work pursues constitutionally admissible aims, such as state security, the protection of individuals from interference with their life or person, and the protection of the tactics and methods of police work.

In order to achieve these aims, interference is admissible with the defendant's right to a defence determined in Article 29 of the Constitution, which takes into account the equality of arms in criminal proceedings and ensures that prosecuting authorities disclose to the defence the evidence for the benefit of or against the defendant in their possession. The duty to maintain the confidentiality of sources and

undercover agents and withholding such from the defence is an appropriate measure to achieve the constitutionally admissible aim.

However, such a measure is only necessary and proportionate if serious danger to the life or person of the witness exists or there are other substantial reasons in the public interest, while at the same time the possibility of examining such a witness upon applying protective measures is ensured. It is the duty of state authorities who ensure the efficiency of prosecution to assess the threats that would follow from the disclosure of confidential information. Courts are charged with ensuring the fairness of proceedings against defendants, and it is incumbent on them to apply the measure which is shown to be the least burdensome in terms of interference with the defendant's right to a defence.

A delicate balance needs to be struck, between the interests of public order and individual personal safety, and the right to a defence. Whether it can be shown, upon appropriate weighing, that such disclosure is well-founded, depends on the circumstances of the individual case, taking into consideration significant elements such as the criminal offence with which the defendant is charged, possible manners of defence and the importance of testimony. This may only be reviewed in individual cases by an independent and impartial tribunal. Therefore, the statutory regulation which reserved such a decision for the Minister of the Interior is not only inconsistent with the right to judicial protection, but also interferes with the defendant's right to a defence in an inadmissible manner.

#### *Languages:*

Slovenian, English (translation by the Court).



## South Africa Constitutional Court

### Important decisions

*Identification:* RSA-2011-2-007

**a)** South Africa / **b)** Constitutional Court / **c)** / **d)** 07.06.2011 / **e)** CCT 90/10; [2011] ZACC 19 / **f)** Minister for Safety and Security v. Van der Merwe and Others / **g)** [www.constitutionalcourt.org.za/Archimages/16797.pdf](http://www.constitutionalcourt.org.za/Archimages/16797.pdf) / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

1.6.7 Constitutional Justice – Effects – **Influence on State organs.**

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

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

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

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

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

*Keywords of the alphabetical index:*

Entry and search / House, search / Search and seizure, limits / Search warrant, specification / Search warrant, validity / Search, house / Search, warrant, wording / Seizure, warrant, wording / Search, warrant, offence, specification / Seizure, warrant, offence, specification.

*Headnotes:*

For a search and seizure warrant to be valid under the Criminal Procedure Act 51 of 1977 (hereinafter, the “CPA”), the offence to which it relates must be stipulated.

*Summary:*

I. The tax authorities suspected financial irregularities and criminal activities on the part of Van der Merwe, the respondent, and his companies.

Three search and seizure warrants were issued under Section 21 of the CPA. Neither the warrants nor annexures specified the offences to which they related or the nature of the investigations.

The main issue was whether South African law demanded that search and seizure warrants stipulate the criminal offences to which they relate.

II. In a unanimous judgment, the Constitutional Court (Court) found that the core issue was whether the warrant – without specifying the offence – was intelligible. In other words, would it make clear both the police's understanding of their authority in carrying out their duties and the searched person's understanding of the reasons for the invasion of his/her privacy.

The Court held that a searched person should enjoy the same constitutional protection in relation to a search and seizure warrant under the CPA as under the National Prosecuting Authority Act (hereinafter, the "NPA"), where previous case law had determined that a warrant required the offence to be stipulated. The Court saw no material difference.

A search and seizure warrant cannot be reasonably intelligible if the empowering legislation and the offence are not stated. The warrant, it held, should enable the person on whom it is carried out to know why his/her rights have to be interfered with in the manner it authorises.

The Court's order determined that the invalidity of the search and seizure warrants operated retrospectively but limited to the warrants in this case. In other words, no general order was issued invalidating all defective warrants – each warrant would have to be challenged in separate litigation.

#### *Supplementary information:*

Legal norms referred to:

- Criminal Procedure Act 51 of 1977;
- National Prosecuting Authority Act 32 of 1998;
- Sections 10, 14 of the Constitution of the Republic of South Africa, 1996.

#### *Cross-references:*

- *Thint (Pty) Ltd v. National Director of Public Prosecutions and Others; Zuma and Another v. National Director of Public Prosecutions and Others*, *Bulletin* 2008/2 [RSA-2008-2-010];

- *Magajane v. Chairperson, North West Gambling Board and Others*, *Bulletin* 2006/2 [RSA-2006-2-005].

#### *Languages:*

English.



#### *Identification: RSA-2011-2-008*

**a)** South Africa / **b)** Constitutional Court / **c)** / **d)** 09.06.2011 / **e)** CCT 70/10; [2011] ZACC 20 / **f)** Arnold Michael Stainbank v. South African Apartheid Museum at Freedom Park and Another / **g)** [www.constitutionalcourt.org.za/Archimages/16805.pdf](http://www.constitutionalcourt.org.za/Archimages/16805.pdf) / **h)** CODICES (English).

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

4.7.2 Institutions – Judicial bodies – **Procedure**.  
5.3.13.15 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Impartiality**.

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

Bias, judge / Bias, suspicion / Cost, recovery, principle / Cost, award / Costs, court, discretion / Judge, bias, apprehension / Judge, impartiality, conditions.

#### *Headnotes:*

Discourteous conduct by a judge, while undesirable, fell short of dislodging the presumption of judicial impartiality.

While costs are within the discretion of the court, that discretion must be judicially exercised and a punitive award will be set aside where there are misdirection's in the reasoning.

#### *Summary:*

I. The applicant sought to set aside an order of the High Court on the basis of bias or a reasonable apprehension of bias. He alleged that bias was established by the manner in which the judge

conducted the proceedings, the judge's remarks that his attorney was lying, and the punitive costs order. Recusal was refused during the proceedings.

II. The Constitutional Court considered the bias challenge and the costs order.

In a unanimous judgment by Khampepe J, the Court held that the judge's conduct, while discourteous and unacceptable, fell short of establishing a reasonable apprehension of bias. The test for recusal for bias is whether a reasonable, objective, and informed person would on the correct facts reasonably apprehend that a judge has not or will not bring an impartial mind to the adjudication. There is a presumption that judges are impartial. This is not easily displaced. While this case came close to satisfying the test, it fell short of dislodging the presumption of impartiality.

On costs, the Constitutional Court held that the High Court misdirected itself in two respects: first, by considering that the application for recusal was an attempt to bully the judge, which was not justified by the record; second, by taking into account that the attorney provided legal representation to an applicant who had previous costs orders outstanding against him, which was wholly within the attorney's oath of practice and could not be held against him. The Court held that costs are within the discretion of the judge, but that discretion must be judicially exercised. Egregious conduct by a lawyer is an objective assessment that lies within the discretion of the court in determining costs. In this case, the attorney's conduct justified an award of costs from the attorney's own pocket. However, there was insufficient improper conduct ascribed to the applicant himself to justify a punitive costs order against him.

#### *Supplementary information:*

Legal norms referred to:

- Trade Marks Act 194 of 1993;
- Section 167.3.b of the Constitution of the Republic of South Africa, 1996.

#### *Cross-references:*

- *President of the Republic of South Africa and Others v. South African Rugby Football Union and Others* 1998 (21), *Constitutional Court of South Africa*; 1999 (2) *South African Law Report* 14; 1999 (2) *Butterworths Constitutional Law Reports* 175;
- *S v. Basson*, *Bulletin* 2005/2 [RSA-2005-2-008];

- *South African Commercial Catering and Allied Workers Union and Others v. Irvin & Johnson Ltd (Seafoods Division Fish Processing)*, *Bulletin* 2000/2 [RSA-2000-2-008];
- *Ferreira v. Levin NO and Others; Vryenhoek and Others v. Powell NO and Others*, *Bulletin* 1995/3 [RSA-1995-3-010].

#### *Languages:*

English.



#### *Identification: RSA-2011-2-009*

**a)** South Africa / **b)** Constitutional Court / **c)** / **d)** 09.06.2011 / **e)** CCT 89/11; [2011] ZACC 21 / **f)** South African Police Service v. Police and Prisons Civil Rights Union and Another / **g)** [www.constitutionalcourt.org.za/Archimages/16803.pdf](http://www.constitutionalcourt.org.za/Archimages/16803.pdf) / **h)** CODICES (English).

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

5.4.10 Fundamental Rights – Economic, social and cultural rights – **Right to strike**.

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

Constitution, interpretation, by way of legislation / Employee, labour, conditions, economic and social / Employee, police force / Employer, rights / Labour law, interpretation / Police, laws regulating police / Police, right to strike / Strike, essential service.

#### *Headnotes:*

Employees of the South African Police Service (SAPS), employed under the Public Service Act 103 of 1994 (hereinafter, the "PSA"), who are not members of the police force, do not carry out an essential service as defined in Section 213 read with Section 65.1.d.i and 71.10 of the Labour Relations Act 66 of 1995 (hereinafter, the "LRA"). Non-member employees are therefore not prohibited from striking.

#### *Summary:*

I. The question was whether personnel employed within the police force, but who were not members of

the force, also enjoyed only a limited right to strike. The answer given was no. The fundamental right to strike is contained in Section 23.2.c of the Constitution. Legislation limits this right in that those who carry out an essential service are not permitted to strike. The LRA defines essential service as “the South African Police Service”. The question was whether both “member” and “non-member” employees of the SAPS carried out an essential service.

The Labour Appeal Court held that non-member employees of the SAPS employed under the PSA were not prohibited from striking.

II. In an application for leave to appeal, the Constitutional Court unanimously held, per Nkabinde J, that the term essential service must be interpreted restrictively so as to give effect to the constitutionally entrenched fundamental right to strike. The Court held that regard must be had to the wording of the LRA as well as the SAPS Act 68 of 1995 which distinguished between non-member and member employees in terms of the roles and responsibilities carried out within the SAPS. The Court held that non-member employees did not carry out an essential service, while member employees did.

The Court dismissed the appeal and upheld the decision of the Labour Appeal Court.

#### *Supplementary information:*

Legal norms referred to:

- Section 23.2.c of the Constitution of the Republic of South Africa, 1996;
- Labour Relations Act 66 of 1995;
- South African Police Service Act 68 of 1995;
- Public Service Act 103 of 1994.

#### *Cross-references:*

- *NEHAWU v. University of Cape Town and Others*, *Bulletin* 2002/3 [RSA-2002-3-019];
- *Khumalo and Other v. Holomisa*, *Bulletin* 2002/2 [RSA-2002-2-012].

#### *Languages:*

English.



#### *Identification: RSA-2011-2-010*

a) South Africa / b) Constitutional Court / c) / d) 14.06.2011 / e) CCT 109/10; [2011] ZACC 22 / f) The State and Another v. Acting Regional Magistrate, Boksburg and Another / g) [www.constitutional.court.org.za/Archimages/16820.pdf](http://www.constitutional.court.org.za/Archimages/16820.pdf) / h) CODICES (English).

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

3.10 General Principles – **Certainty of the law.**  
 3.12 General Principles – **Clarity and precision of legal provisions.**  
 3.14 General Principles – **Nullum crimen, nulla poena sine lege.**  
 5.3.38.1 Fundamental Rights – Civil and political rights – Non-retrospective effect of law – **Criminal law.**

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

Law, retrospective application, intention, indication / Law, retrospective application, exclusion, presumption.

#### *Headnotes:*

At common law, it is presumed that a statute does not operate retrospectively, unless a contrary intention is indicated, either expressly or by clear implication. Statutory provisions must be interpreted in accordance with this presumption, as well as with their plain meaning and purpose.

#### *Summary:*

I. The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the Act) came into force in December 2007. The Act repealed the common law crime of rape and created a broader statutory crime of rape. Section 69 contains transitional provisions which expressly keep the common law in force for the purposes of any investigation, prosecution or other criminal proceedings instituted in relation to conduct committed before the Act came into force that would have constituted one of the now repealed common law crimes.

The accused was charged in July 2009 with committing common law rape in September 2005. The alleged rape was reported only in February 2009. The accused objected to the charge on the basis that:

- a. the common law crime of rape no longer existed at the time he was charged; and

- b. he could not be charged with the new, broader, statutory crime of rape under the *nullum crimen sine lege principle*, embodied in Section 35.3.l of the Constitution. This clause prohibits convictions for acts that were not offences at the time they were committed.

On appeal, the High Court in effect found that the objection was good. It held that this was because there was a material flaw in the wording of Section 69 of the Act. This precluded the prosecution of certain sexual offences committed before the Act came into force, which violated the rights to freedom and security of persons and children's rights. The High Court therefore declared Section 69 unconstitutional and ordered the severance of certain words from it to remedy the defect.

II. In the confirmation proceedings, the Constitutional Court, per Acting Justice Mthiyane, unanimously reversed these findings. The Court held that Section 69 of the Act could preclude the prosecution and punishment of common law rape only if it repealed that crime retrospectively. According to the common law presumption against retrospectivity, a statute is presumed not to operate retrospectively unless a contrary intention is indicated, either expressly or by clear implication. Section 69 makes no express mention of crimes committed before the Act came into force and therefore does not apply to those crimes. The purpose of the Act, made manifest in its long title, preamble and objects, is to criminalise all forms of sexual abuse and exploitation, and to maximise the protection of complainants. The Court therefore found it impossible to interpret Section 69 to render any sexual offences incapable of prosecution. The High Court's order of constitutional invalidity was thus not confirmed, since Section 69 did not preclude the investigation, prosecution or punishment of the common law crime of rape committed before the commencement of the Act, even when the charge was laid after the statute came into operation.

#### *Supplementary information:*

Legal norms referred to:

- Sections 12, 28.1.d and 35.3.l and 172.2.a of the Constitution of the Republic of South Africa, 1996;
- Sections 2, 3, 68 and 69 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

#### *Cross-references:*

- *Veldman v. Director of Public Prosecutions (Witwatersrand Local Division)*, *Bulletin* 2005/3 [RSA-2005-3-015];
- *Du Toit v. Minister of Safety and Security*, *Bulletin* 2009/2 [RSA-2009-2-011];
- *Minister of Health and Another v. New Clicks South Africa (Pty) Ltd and Others*, *Bulletin* 2005/3 [RSA-2005-3-009];
- *National Director of Public Prosecutions v. Carolus and Others* 2000 (1) *South African Law Reports* 1127 (Supreme Court of Appeal).

#### *Languages:*

English.



#### *Identification: RSA-2011-2-011*

**a)** South Africa / **b)** Constitutional Court / **c)** / **d)** 29.07.2011 / **e)** CCT 53/11, 54/11, 62/11; [2011] ZACC 23 / **f)** Justice Alliance of South Africa v. President of the Republic of South Africa and Others, Freedom Under Law v. President of South Africa and Others, Centre for Applied Legal Studies and Another v. President of Republic of South Africa and Others / **g)** [www.constitutionalcourt.org.za/Archimages/16803.pdf](http://www.constitutionalcourt.org.za/Archimages/16803.pdf) / **h)** CODICES (English).

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

- 1.1.1.1 Constitutional Justice – Constitutional jurisdiction – Statute and organisation – Sources – **Constitution.**
- 1.1.2.4 Constitutional Justice – Constitutional jurisdiction – Composition, recruitment and structure – **Appointment of members.**
- 1.1.3.1 Constitutional Justice – Constitutional jurisdiction – Status of the members of the court – **Term of office of Members.**
- 1.1.3.8 Constitutional Justice – Constitutional jurisdiction – Status of the members of the court – **End of office.**
- 1.1.3.9 Constitutional Justice – Constitutional jurisdiction – Status of the members of the court – **Members having a particular status.**
- 3.4 General Principles – **Separation of powers.**
- 3.9 General Principles – **Rule of law.**

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

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

Constitution, interpretation, by way of legislation / Constitutional Court, judge, independence / Decision, administrative, discretionary / Judge, independence, safeguards / Judge, retirement, obligatory / Judge, tenure, permanent, exception / Judge, tenure, provisional / Constitutional Court, judge, term of office, extension.

##### *Headnotes:*

A law authorising extension of the tenure of a Constitutional Court judge, or any category of Constitutional Court judges, where the Constitution itself does not expressly permit the extension, is invalid. Any law seeking to amend judicial tenure must comply with the provisions of the Constitution and cannot distinguish between judges of the Constitutional Court on the basis of irrelevant characteristics.

##### *Summary:*

I. Section 176.1 of the Constitution of South Africa provides that “[a] Constitutional Court judge holds office for a non-renewable term of office of 12 years, or until attaining the age of 70, whichever comes first, except where an Act of Parliament extends the term of office of a Constitutional Court judge”. The fixed tenure of “a Constitutional Court judge” is therefore subject to extension by legislation.

Three civil society organisations (applicants) acting in their own and the public interest, and seeking direct access to the Constitutional Court (Court), challenged the constitutionality of Section 8.a of the Judges Remuneration and Conditions of Employment Act, 74 of 2001 (Act). The Act authorised the President to extend the term of office of the Chief Justice.

The Court interpreted the provision against the background of the constitutional imperatives of the rule of law, the separation of powers and judicial independence.

In addition to determining whether Section 8.a was valid in conferring power on the President to extend the Chief Justice’s term, the government parties requested the Court to rule on whether Section 176.1 of the Constitution permits a differentiation between Constitutional Court judges – that is, whether the Chief Justice could be singled out for extension.

II. The Court found that the power of extension in Section 176.1 of the Constitution must, so far as possible be construed to minimise the risk that its exercise could be seen as impairing the attribute of impartiality and the public confidence that goes with it.

The Court found that Section 8.a, in permitting the President to extend the Chief Justice’s term, usurped the power the Constitution allocated to Parliament alone. This amounted to an impermissible delegation of power. Section 8.a and the President’s extension were therefore struck down.

The Court held further that the Chief Justice is the first amongst equals (*primus inter pares*), but in the discharge of the Court’s judicial functions he is no different from the other judges. Therefore, there is no relevant distinction between the Chief Justice and other judges of the Constitutional Court. Whereas it is permissible for a lawmaker to distinguish between judges on the basis of an ‘indifferent criterion’ such as age or judicial experience, the Constitution does not permit an individual judge or category of judges to be singled out on the basis of irrelevant individual characteristics or features. Singling out the Chief Justice, alone amongst the members of the Court, is thus incompatible with Section 176.1 of the Constitution.

Legal certainty was required and suspension of the Court’s order was not warranted. The Court therefore declared Section 8.a and the President’s conduct in terms of this section to be unconstitutional and invalid.

##### *Supplementary information:*

Legal norms referred to:

- Sections 165 and 176.1 of the Constitution of South Africa, 1996;
- Section 8.a of the Judges Remuneration and Conditions of Employment Act 74 of 2001.

##### *Cross-references:*

- *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996/26, *Bulletin* 1996/3 [RSA-1996-3-016];
- *South African Association of Personal Injury Lawyers v. Heath and Others* 2000/27, *Bulletin* 2000/3 [RSA-2000-3-017];
- *De Lange v. Smuts NO and Others*, 1997/26, *Bulletin* 1998/2 [RSA-1998-2-004];

- *Affordable Medicines Trust and Others v. Minister of Health and Others* 2004/27, *Bulletin* 2005/1 [RSA-2005-1-002];
- *Mistry v. Interim Medical and Dental Council of South Africa* 1997/13, *Bulletin* 1998/2 [RSA-1998-2-006].

#### Languages:

English.



#### Identification: RSA-2011-2-012

a) South Africa / b) Constitutional Court / c) / d) 10.08.2011 / e) CCT 112/10; [2011] ZACC 24 / f) Naidoo and Others v. National Director of Public Prosecutions and Another / g) [www.constitutional.court.org.za/Archimages/17231.pdf](http://www.constitutional.court.org.za/Archimages/17231.pdf) / h) CODICES (English).

#### Keywords of the systematic thesaurus:

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

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

#### Keywords of the alphabetical index:

Asset, freezing / Asset, private property / Forfeiture, property, used for crime / Property, private, use in crime, forfeiture, access for living expenses.

#### Headnotes:

The Prevention of Organised Crime Act, 121 of 1998, makes provision for an accused defendant to access his restrained assets for reasonable legal and living expenses, but this does not extend to assets held by a third party that have been restrained as an affected gift from the defendant.

#### Summary:

I. Section 26 of the Prevention of Organised Crime Act, 121 of 1998 (hereinafter, the “POCA”) enables the National Director of Public Prosecutions to apply

to court to have the proceeds of criminal activity restrained, including proceeds which have been given to a third party as a gift. An exception to this restraint, in Section 26.6 of POCA, allows the accused to draw on the forfeited assets for his or her reasonable legal and living expenses.

II. The issue before the Constitutional Court was whether Section 26.1 and 26.6 of POCA can be interpreted to mean that an accused can have access for this purpose to a third party’s property that has been restrained as an affected gift in terms of Section 12 of POCA or whether the exception relates only to the accused person’s property.

In dismissing an appeal from the Supreme Court of Appeal, the Court unanimously held, per Cameron J, that while POCA creates a mechanism through which an unconvicted accused may access restrained assets held by him or her for reasonable legal and living expenses, the express terms of the provision allow for this only on limited terms. First, access to the assets is granted only for the legal expenses of “a person against whom the restraint order” is made. Second, it is conditional on full disclosure. Third, the person must not be able to meet the expenses concerned out of his or her unrestrained property. Given these conditions, the Court found that it is not plausible that access be given to property held by a person other than the person against whom the restraint order has been made.

#### Supplementary information:

Legal norms referred to:

- Sections 165 and 176.1 of the Constitution, 1996;
- Section 26.1, 26.2 and 26.6 of the Prevention of Organised Crime Act 121 of 1998.

#### Cross-references:

- *National Director of Public Prosecutions and Another v. Mohamed NO and Others* 2002/44, *Bulletin* 2003/1 [RSA-2003-1-004].

#### Languages:

English.





*Identification: RSA-2011-2-013*

a) South Africa / b) Constitutional Court / c) / d) 11.08.2011 / e) CCT 94/10; [2011] ZACC 25 / f) Premier: Limpopo Province v. Speaker of the Limpopo Provincial Legislature and Others / g) www.constitutionalcourt.org.za/Archimages/17245.pdf / h) CODICES (English).

*Keywords of the systematic thesaurus:*

1.2.1.6 Constitutional Justice – Types of claim – Claim by a public body – **Local self-government body.**

1.3.4.10.1 Constitutional Justice – Jurisdiction – Types of litigation – Litigation in respect of the constitutionality of enactments – **Limits of the legislative competence.**

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

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

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

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

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

*Keywords of the alphabetical index:*

Competence, legislative, limits / Constitutional Court, jurisdiction, exclusive / Control, financial / Decentralisation, limits / Law, objective pursued / Legislative act, judicial review / Legislative power / Legislative power, limitation / Legislation powers, concurrent / Legislative procedure, province / Power, provincial, scope / Province, legislative competence.

*Headnotes:*

Provincial legislatures do not have authority to pass legislation dealing with their own financial management. Their financial management does not fall within a functional area over which they have been given legislative authority by the Constitution, and the Constitution does not otherwise envisage that authority. Nor has authority to pass legislation of this sort been expressly conferred by national legislation.

*Summary:*

I. The applicant, the Premier of the Limpopo Province (hereinafter, the “Premier”), challenged the legislative competence of the Limpopo Provincial Legislature (hereinafter, the “Provincial Legislature”) to pass the Financial Management of the Limpopo Provincial Legislature Act, 2009 (hereinafter, the “Bill”). The

Premier referred the Bill to the Constitutional Court (hereinafter, the “Court”) for adjudication in terms of Section 121 of the Constitution, which confers exclusive jurisdiction upon the Court to consider reservations by a Premier as to the constitutionality of provincial legislation. (There is a parallel provision for parliamentary Bills.)

The question was whether provincial legislatures have competence to pass legislation dealing with their own financial management.

The legislative authority of the provinces is governed by Section 104 of the Constitution. There are three main sources for provincial legislative authority under Section 104. First, Sections 104.1.b.i and 104.1.b.ii provide that provincial legislatures have competence with respect to certain functional areas enumerated in Schedules 4 and 5 to the Constitution. Second, Section 104.1.b.iii provides that provincial legislatures also have competence with respect to matters “expressly assigned to the provinces by national legislation”. Finally, Section 104.1.b.iv provides that provincial legislatures also have competence with respect to matters for which the Constitution “envisages the enactment of provincial legislation”.

The Premier contended that the Provincial Legislature was not empowered to pass the Bill under any of the provisions of Section 104 of the Constitution. The Speaker of the National Assembly, the Chairperson of the National Council of Provinces and the Minister for Finance agreed with the Premier. The Speaker of the Limpopo Provincial Legislature accepted that the financial management of provincial legislatures is a matter that falls outside of the functional areas in Schedules 4 and 5 to the Constitution. The Speaker contended, however, that Section 3 of the Financial Management of Parliament Act 10 of 2009 (hereinafter, the “FMPA”), read with Schedule 1 to the Act, expressly assigned to provincial legislatures the power to pass legislation dealing with their own financial management. It also sought to rely on the provisions of Section 104.1.b.iv, contending that Sections 195, 215 and 216 of the Constitution “envisage” the enactment of provincial legislation.

II. Writing for the majority, Ngcobo CJ concluded that the Premier’s reservations as to the competence of the Limpopo Provincial Legislature were correct. Ngcobo CJ emphasised that a defining feature of South Africa’s constitutional scheme is that the legislative powers of the provinces are enumerated and clearly defined, while those of Parliament are not. Contrasting the plenary power of Parliament with the limited powers given to provincial legislatures, Ngcobo CJ held that provincial legislatures clearly do not enjoy the power to pass legislation dealing with

their own financial management under Schedules 4 or 5 to the Constitution, nor were they expressly assigned the power by the FMPA. Ngcobo CJ further held that none of Sections 195, 215 or 216 of the Constitution “envisage” the passage of the legislation. The Court therefore held the Bill unconstitutional.

III. In a dissenting judgment, Yacoob J, joined by Cameron J, upheld the constitutionality of the Bill. The dissent found that Sections 195, 215 and 216 of the Constitution “envisage” the passage of provincial legislation concerning the management of the provincial legislatures’ very own assets, and that the Provincial Legislature was therefore competent to pass the Bill. Yacoob J found, in any event, that accepting that the executive (or any other entity) should prepare the financial statements of a provincial legislature would breach the separation of powers and imperil practicality.

#### *Supplementary information:*

Legal norms referred to:

- Financial Management of the Limpopo Provincial Legislature Bill, 2009;
- Financial Management of Parliament Act 10 of 2009;
- Public Finance Management Act 1 of 1999;
- Sections 41, 44, 104, 116, 121, 167, 195, 215 and 216, and Schedules 4 and 5 of the Constitution of the Republic of South Africa, 1996.

#### *Cross-references:*

- *Ex parte the President of the Republic of South Africa In Re: Constitutionality of the Liquor Bill*, *Bulletin* 1999/3 [RSA-1999-3-009];
- *In re Constitutionality of the Mpumalanga Petitions Bill*, 2000 [2001 (10) Constitutional Court of South Africa; 2001 (1) 447 (CC) *South Africa Law Reports*; 2001 (11) 1126 (CC) *Butterworths Constitutional Law Reports*].

#### *Languages:*

English.



#### *Identification: RSA-2011-2-014*

**a)** South Africa / **b)** Constitutional Court / **c)** / **d)** 16.08.2011 / **e)** CCT 95/10; [2011] ZACC 26 / **f)** *Falk and Another v. National Director of Public Prosecutions* / **g)** [www.constitutionalcourt.org.za/Archimages/17325.pdf](http://www.constitutionalcourt.org.za/Archimages/17325.pdf) / **h)** CODICES (English).

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

3.22 General Principles – **Prohibition of arbitrariness**.  
5.3.39.3 Fundamental Rights – Civil and political rights – Right to property – **Other limitations**.

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

Asset, freezing, order, limitation to vary / Confiscation, assets, penalty / Confiscation, property / Confiscation, property, preventive measure / Co-operation, judicial, international / Crime, organised, special measure / Criminal matters, mutual assistance between states / Criminal procedure, civil action / Criminal proceedings, effects in another state / Effect, extra-territorial / Enforcement, international request / International law, comity of nations, principle / Judgment, foreign country, recognition / Judicial assistance, international, conditions / Judicial assistance, international, criminal matters / Order, ancillary, proximity to original order / Property, private, prohibition to dispose of / Seizure, asset.

#### *Headnotes:*

There is no arbitrary deprivation of property when a domestic court, seeking to give effect to a foreign restraint order issued against a defendant in foreign criminal proceedings, interdicts the defendant from dealing with assets held locally while the criminal matter in the foreign jurisdiction is on appeal. The statutes governing the registration of foreign restraint orders and the issuing of interdictory orders must be interpreted to promote international co-operation in combating organised crime.

#### *Summary:*

I. The main applicant was a German national with holdings in South Africa. He sought to have the registration in South Africa of a German restraint order, issued in criminal proceedings against him in Germany, set aside. He also sought to set aside an ancillary order issued by a South African court interdicting him from dealing with his assets in South Africa pending the outcome of the proceedings in Germany.

The German trial court decided not to grant a confiscation order against the applicant in Germany, but the prosecution lodged an appeal against this decision.

II. The issue before the Constitutional Court was whether the continued restraint of the defendant's assets in South Africa, pending the outcome of appeal proceedings in Germany, resulted in an arbitrary deprivation of his property under Section 25.1 of the Constitution. This required interpretation of the International Co-operation in Criminal Matters Act 75 of 1996 (hereinafter, the "ICCMA") in relation to the Prevention of Organised Crime Act 121 of 1998 (hereinafter, the "POCA").

In a unanimous judgment, per Van der Westhuizen J, the Constitutional Court upheld the registration of the German restraint order. The Court held that the registration of the foreign restraint order in South Africa took place under ICCMA, and could therefore be set aside only under ICCMA. ICCMA provided a specified time period within which the applicant could approach the South African court that registers a foreign order to set aside its registration. The defendant had failed to do this. The registration could moreover not be set aside under Section 26.1.d of ICCMA because it was not shown that this would be in the interests of justice. This was because there was a real possibility that the applicant would dissipate the restrained assets (which he himself acknowledged), and the proceedings in Germany had not yet been concluded.

The Court also upheld the ancillary interdicts the South African court issued. These were properly made under Section 26.8 of POCA, and served to render the registration of the German order more effective. While Section 26.8 of POCA requires that ancillary orders be made "at the same time" as the main order to which they relate, this is practically impossible, given that the original order is made in another country. An interpretation that disallows ancillary orders after a Section 26.1 order has been made is too narrow and renders the provision practically meaningless, especially when regard is had to the interaction between POCA and ICCMA. A court granting a Section 26.1 order under POCA is therefore empowered to grant ancillary relief at the same time, but may also do so at a later stage. The South African ancillary order could be rescinded only under Section 26.10.a of POCA, whose requirements were not met.

The Court held that this interpretation promotes international co-operation in combating organised crime and does not offend the constitutional protection of property.

### Supplementary information:

Legal norms referred to:

- Prevention of Organised Crime Act 121 of 1998;
- International Co-operation in Criminal Matters Act 75 of 1996;
- Sections 25.1 and 39.2 of the Constitution of the Republic of South Africa, 1996.

### Cross-references:

- *S v. Shaik and Others*, *Bulletin* 2008/2 [RSA-2008-2-006];
- *Mohunram and Another v. National Director of Public Prosecutions and Another (Law Review Project as Amicus Curiae)*, *Bulletin* 2007/1 [RSA-2007-1-003];
- *Fraser v. ABSA Bank Ltd (National Director of Public Prosecutions as Amicus Curiae)* 2006 (24) Constitutional Court of South Africa; 2007 (3) *South African Law Reports* 484; 2007 (3) *Butterworths Constitutional Law Reports*;
- *Prophet v. National Director of Public Prosecutions*, *Bulletin* 2006/3 [RSA-2006-3-013];
- *Phillips and Others v. National Director of Public Prosecutions*, *Bulletin* 2005/3 [RSA-2005-3-011];
- *National Director of Public Prosecutions and Another v. Mohamed NO and Others*, *Bulletin* 2003/1 [RSA-2003-1-004].

### Languages:

English.



### Identification: RSA-2011-2-015

a) South Africa / b) Constitutional Court / c) / d) 23.08.2011 / e) CCT 40/08; [2011] ZACC 27 / f) Moutse Demarcation Forum and Others v. President of the Republic of South Africa and Others / g) [www.constitutionalcourt.org.za/Archimages/17473.pdf](http://www.constitutionalcourt.org.za/Archimages/17473.pdf) / h) CODICES (English).

### Keywords of the systematic thesaurus:

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

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

5.3.29 Fundamental Rights – Civil and political rights – **Right to participate in public affairs.**

*Keywords of the alphabetical index:*

Administrative procedure, fairness / Law, public consultation, mandatory / Legislative process, right to public consultation / Municipality, boundary, change / Procedural unconstitutionality.

*Headnotes:*

Legislation altering municipality boundaries will not be set aside where it is rationally connected to a legitimate government purpose and where public consultation has taken place. Public consultation may take whatever form the legislature chooses, and will be reasonable as long as interested parties are given adequate opportunity to prepare and to participate meaningfully in a manner that may influence legislative decisions.

*Summary:*

I. The applicants represented the community of Moutse. They brought an application for direct access challenging part of the Constitution Twelfth Amendment Act of 2005 and the Cross-Boundary Municipalities Laws Repeal and Related Matters Act 23 of 2005. They contended these were inconsistent with the Constitution and invalid insofar as they authorised the relocation of areas known as Moutse 1 and Moutse 3 from the province of Mpumalanga to the province of Limpopo. Moutse 1 and Moutse 3 were part of the Greater Sekhukhune Municipality. Before the enactment of the impugned laws the Greater Sekhukhune Municipality straddled the two provinces.

The constitutional challenge was based on two grounds. First, that the laws were irrational and perpetuated apartheid-era boundaries. Second, that the Mpumalanga provincial legislature failed adequately to facilitate public involvement in the process leading up to its decision to support the Amendment Bill.

II. The Court held that there was a rational connection between the impugned provisions and the legitimate government purpose sought to be achieved. The government did not deliberately intend to perpetuate apartheid-era boundaries but rather sought to abolish cross-boundary municipalities and transform them into economically viable and sustainable municipalities.

The fact that the impugned boundary coincided with a boundary drawn by the apartheid government did not, in and of itself, render the laws inconsistent with the Constitution.

The evidence placed before the Court was not sufficient to show that the public involvement afforded to the Moutse community was inadequate, bearing in mind that the provincial legislature has the discretion to choose the method of public consultation.

The Court dismissed the application to declare the impugned laws unconstitutional. However, the respondents were ordered to pay costs arising from various postponements.

*Supplementary information:*

Legal norms referred to:

- Part 1 of Schedule 1 to the interim Constitution Act 200 of 1993;
- Sections 124.2 and 124.3.a of the interim Constitution Act 200 of 1993;
- Sections 167.4.d, 167.6.a and 118 of the Constitution of the Republic of South Africa, 1996;
- Constitution Twelfth Amendment Act of 2005;
- Cross-Boundary Municipalities Laws Repeal and Related Matters Act 23 of 2005;
- Local Government: Cross-Boundary Municipalities Act 29 of 2000.

*Cross-references:*

- *Matatiele Municipality and Others v. President of the Republic of South Africa and Others* (1), *Bulletin* 2006/2 [RSA-2006-2-004];
- *Matatiele Municipality and Others v. President of the Republic of South Africa and Others* (2), *Bulletin* 2006/3 [RSA-2006-3-010];
- *Merafong Demarcation Forum and Others v. President of the Republic of South Africa and Others*, *Bulletin* 2008/2 [RSA-2008-2-009];
- *Poverty Alleviation Network and Others v. President of the Republic of South Africa and Others* [2010] ZACC 5; 2010 (6) *Butterworths Constitutional Law Reports* (CC);
- *Zondi v. MEC for Traditional and Local Government Affairs and Others* [2004] ZACC 19; 2005 (3) *South African Law Reports* (CC); 2005 (4) *Butterworths Constitutional Law Reports* (CC);
- *Van der Merwe v. Road Accident Fund and Another (Women's Legal Centre Trust as Amicus Curiae)*, *Bulletin* 2006/1 [RSA-2006-1-001].

*Languages:*

English.



## Spain

### Constitutional Court

#### Important decisions

*Identification:* ESP-2011-2-005

**a)** Spain / **b)** Constitutional Court / **c)** First Chamber / **d)** 28.02.2011 / **e)** 15/2011 / **f)** Antonio Larumbe Domingo / **g)** *Boletín oficial del Estado* (Official Gazette), 75, 29.03.2011; [www.boe.es/boe/dias/2011/03/29/pdfs/BOE-A-2011-5701.pdf](http://www.boe.es/boe/dias/2011/03/29/pdfs/BOE-A-2011-5701.pdf); [www.tribunalconstitucional.es/es/jurisprudencia/Paginas/Sentencia.aspx?cod=9856](http://www.tribunalconstitucional.es/es/jurisprudencia/Paginas/Sentencia.aspx?cod=9856) / **h)** CODICES (Spanish).

*Keywords of the systematic thesaurus:*

5.1.1.4.3 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Detainees**.  
 5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts**.  
 5.3.36.1 Fundamental Rights – Civil and political rights – Inviolability of communications – **Correspondence**.

*Keywords of the alphabetical index:*

Prisoner, correspondence.

*Headnotes:*

The prison administration is not entitled to monitor the communications of convicted persons with the courts and has no authority under the Constitution or other national legislation to restrict the right of inmates to communicate with the courts. In particular, inmates must not be placed under an obligation to state the issue of any specific communication.

*Summary:*

I. The General Penitentiary Act allows inmates to appeal to the Penitentiary Surveillance Courts against decisions by the prison administration. They may transmit their appeals through the prison authorities, which should deal with the applications without imposing any restriction.

The authorities of “*La Moraleja*” prison in Palencia (Autonomous Community of Castile y León) passed a new internal regulation covering the communication of inmates with prison authorities, including the Penitentiary Surveillance Courts. The new regulation stipulated that letters should be sent in a sealed envelope with an attached document indicating the issue of the communication.

An application which an inmate tried to send to the Penitentiary Surveillance Court was rejected by the prison authorities for failure to comply with the new rules. The inmate appealed against this decision, arguing that it infringed his right to respect for correspondence. Both the Penitentiary Surveillance Court and the Provincial Court rejected his appeal.

II. The Constitutional Court began by recalling the jurisprudence of the European Court of Human Rights about the universal right to respect for correspondence, recognised in Article 8.1 ECHR. According to this case-law (*inter alia*, *Golder v. United Kingdom*, Plenary Judgment, 21 February 1975), impeding someone from even initiating correspondence constitutes the most far-reaching form of ‘interference’ (Article 8.2 ECHR) with the exercise of the ‘right to respect for correspondence’; it is inconceivable that that should fall outside the scope of Article 8 ECHR while mere supervision indisputably falls within it.

Although Article 18.3 of the Constitution only declares a fundamental right to secrecy of communications (“the secrecy of communications is guaranteed, particularly of postal, telegraphic and telephonic communications, except in the event of a court order to the contrary”), with no express reference to freedom of correspondence, the Constitutional Court has interpreted this Article in the same way (Judgment STC no. 114/1984, 29 November 1984).

The content of the right to respect for correspondence of prison inmates is not only fixed by Article 18.3 of the Constitution. Another provision of the Constitution (the second sentence of Article 25.2 of the Constitution) deals with the rights of convicts (“any person sentenced to prison shall enjoy during imprisonment the fundamental rights contained in this Chapter except those expressly limited by the terms of the sentence, the purpose of the punishment and the penal law”). Combined reading of both dispositions leads to the conclusion that any restriction on the right of convicted persons to respect for their correspondence should be done within the constitutional framework.

The Constitutional Court concluded that the right to respect for correspondence had been infringed, as the restriction of the inmate’s communications was

not provided for by the General Penitentiary Act. This Act excludes any restriction in the processing of the appeals of convicted persons.

#### Cross-references:

- European Court of Human Rights, Plenary Judgment *Golder v. United Kingdom*, 21.02.1975, *Special Bulletin Leading Cases – ECHR* [ECH-1975-S-001], Vol. 18, Series A of the Publications of the Court.

#### Languages:

Spanish.



#### Identification: ESP-2011-2-006

**a)** Spain / **b)** Constitutional Court / **c)** First Chamber / **d)** 13.03.2011 / **e)** 26/2011 / **f)** / **g)** *Boletín oficial del Estado* (Official Gazette), 86, 11.04.2011; [www.boe.es/boe/dias/2011/04/11/pdfs/BOE-A-2011-6541.pdf](http://www.boe.es/boe/dias/2011/04/11/pdfs/BOE-A-2011-6541.pdf); [www.tribunalconstitucional.es/es/jurisprudencia/Paginas/Sentencia.aspx?cod=10086](http://www.tribunalconstitucional.es/es/jurisprudencia/Paginas/Sentencia.aspx?cod=10086) / **h)** CODICES (Spanish).

#### Keywords of the systematic thesaurus:

3.17 General Principles – **Weighing of interests.**  
 5.2.2 Fundamental Rights – Equality – **Criteria of distinction.**  
 5.3.33 Fundamental Rights – Civil and political rights – **Right to family life.**

#### Keywords of the alphabetical index:

Family, young / Family responsibilities / Working hours, change, request.

#### Headnotes:

The refusal by a public administrative authority of a request by a male employee to work night shifts, without taking into account his family responsibilities, amounts to discrimination on the grounds of family circumstances. In refusing the request, the authority in question failed to strike a balance between the need to achieve a fair division of family

responsibilities and the organisational difficulties that might have arisen in the workplace, had the request been granted.

### Summary:

I. A request by the applicant, a male employee of the Department of Education of the Autonomous Community of Castile y León, to work night shifts during the school year 2007-2008, to allow him to have time to take care of his two young children, was rejected by the Administration. He challenged the administrative decision before the courts, unsuccessfully, and then appealed to the Constitutional Court, arguing that both the administrative and the judicial resolutions violated his right to equality as they amounted to gender discrimination and a denial of the fundamental right to an effective judicial remedy.

II. The First Chamber of the Constitutional Court of Spain found that the applicant's fundamental right to an effective remedy had not been breached. However, he had suffered discrimination on the grounds of family circumstances rather than on the grounds of gender.

The Court ruled that the administrative and judicial resolutions did not respect the applicant's right to equality. In particular, they had failed to take proper account of the fact that the refusal of his request could not be considered to be "a measure eliminating or reducing existing inequalities in society within the meaning of Article 2.4 of Directive no. 76/207, nor as a measure seeking to achieve substantive as opposed to formal equality by reducing the real inequalities that can arise in society and thus, in accordance with Article 157.4 TFEU, to prevent or compensate for disadvantages in the professional careers of the relevant persons" (Paragraph 38 of the Judgment of the Second Chamber of the Court of Justice of the European Union in the case C-104/09, *Roca Álvarez v. Sesa Start España*, ETT S.A., 30 September 2010, quoted in Paragraph 5 of the Judgment pronounced by the Constitutional Court of Spain).

The First Chamber of the Constitutional Court also held that the refusal did not take into consideration the minimal consequences that the assignment of the night shift could have on the normal functioning of the education centre where the applicant worked.

Finally, the Court stated that the refusal to allow the applicant to work night shifts, without analysing the extent to which he needed to be allowed to do so, in order to participate in the care of his young children through a balanced sharing of family responsibilities, or the organisational difficulties that might arise in his

workplace, if the request was granted, led to the conclusion that the applicant's fundamental right not to suffer discrimination due to personal or family circumstances had not been adequately protected (Articles 14 and 39.3 of the Constitution). Article 39.3 of the Constitution establishes parental responsibility for the assistance of their children while they are under age and in cases of necessity.

### Cross-references:

- Court of Justice of the European Union, Second Chamber, Case C-104/09, *Roca Álvarez v. Sesa Start España*, ETT S.A., 30.09.2010.

### Languages:

Spanish.



### Identification: ESP-2011-2-007

**a)** Spain / **b)** Constitutional Court / **c)** Full Court / **d)** 16.03.2011 / **e)** 30/2011 / **f)** "Cuenca hidrográfica del Guadalquivir" (Guadalquivir river basin) / **g)** *Boletín oficial del Estado* (Official Gazette); [www.boe.es/boe/dias/2011/04/11/pdfs/BOE-A-2011-6545.pdf](http://www.boe.es/boe/dias/2011/04/11/pdfs/BOE-A-2011-6545.pdf); [www.tribunalconstitucional.es/es/jurisprudencia/Paginas/Sentencia.aspx?cod=10090](http://www.tribunalconstitucional.es/es/jurisprudencia/Paginas/Sentencia.aspx?cod=10090) / **h)** CODICES (Spanish).

### 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.**  
 3.6.3 General Principles – Structure of the State – **Federal State.**  
 4.8.1 Institutions – Federalism, regionalism and local self-government – **Federal entities.**  
 4.8.8.2.1 Institutions – Federalism, regionalism and local self-government – Distribution of powers – Implementation – **Distribution *ratione materiae*.**  
 4.8.8.3 Institutions – Federalism, regionalism and local self-government – Distribution of powers – **Supervision.**

### Keywords of the alphabetical index:

Resource, natural, water.

*Headnotes:*

Water management should be carried out within the framework of the natural catchment area. The definition of the principles, which must govern water management, falls within the jurisdiction of the State. Statutes of Autonomy contain a constitutional right to establish a new model of water management.

*Summary:*

I. The Government of the Autonomous Community of Extremadura brought an action of unconstitutionality in regard to several provisions of the new Statute of Autonomy for Andalusia (hereinafter, the “new Statute”) approved by the Organic Law no. 2/2007, of 19 March 2007. Article 51 of the new Statute granted exclusive jurisdiction to the Government of this region over the waters of the Guadalquivir river basin which run exclusively through Andalusian territory. According to the applicant, Andalusia did not have sole jurisdiction over the Guadalquivir river basin (which comprises territories belonging to the Autonomous Communities of Murcia, Castile-La Mancha and Extremadura itself) and the new provisions purporting to establish that jurisdiction were invalid.

Any other conclusion would, in the applicant’s view, result in a breach of the right of the central State under Article 149.1.22 of the Constitution to legislate for and manage water resources when the basin of a river passes through more than one Autonomous Community.

II. The Constitutional Court noted that with regard to the challenged provision (Article 51 of the new Statute), assessment was needed from a material perspective of the compliance of its content with the Constitution, and, from a formal perspective, as to whether such a rule could be set out in a Statute of Autonomy. The Court declared Article 51 of the new Statute unconstitutional and void from both perspectives.

From the material perspective, the Court noted the departure of Article 51 of the new Statute from the constitutional jurisprudence which recognises State jurisdiction over waters of river basins that flow through different Autonomous Communities (known as supra-communitarian river basins) and that it ignores the importance of the concept of river basins and the axis of water policy. Although this concept was not established in the Constitution, it was enshrined firstly in the Water Act passed by Parliament on August 1985, the constitutionality of which was upheld by the Plenary Judgment of the Constitutional Court no. 227/1988, 29 November 1988. In that decision the Court ruled that the concept

of unity of a “river basin” was suitable for the compliance of the guiding principle of rational use of natural resources, enshrined in Article 45 of the Constitution.

Therefore, the Court, in its Plenary Judgment no. 30/2011, concluded that the contested Article of the new Statute ran counter to the principle of unity which underlies the policy of water management and threatened the sustainable management of this natural resource.

From a formal perspective, the Court assessed whether the new Statute could establish a new criterion for the distribution of powers on water management; a different criterion from the territorial one established by both the constituent and the legislative powers. The Constitutional Court emphasised that the regulation exceeded the limits of the constitutional role of the statutes under Articles 148 and 149 of the Constitution and severely undermined the proper functions attributed to State authorities by the Constitution. However, it rejected the interpretation of the provision proposed by the state attorney, which would have brought it into alignment with the Constitution, but which could not be accepted as it would involve re-writing the provision against its obvious meaning.

Both the Parliament and the Government of Andalusia had questioned the legitimacy of the Government of Extremadura (the applicant) to bring an action of unconstitutionality against the new Statute, as the action was brought purely in defence of the interests of a third party (the State). The Constitutional Court upheld the applicant’s legitimacy not only because there is always an objective interest in overhauling the legal system, but also because the applicant had taken issue with the challenged provision of the new Statute in defence of its own sphere of autonomy, in this case the possibility of participating in the joint management of the Guadalquivir river basin.

*Cross-references:*

- Constitutional Court of Spain, Plenary Judgment no. 31/2010, 28.06.2010, New Statute of Autonomy for Catalonia;
- Constitutional Court of Spain, Plenary Judgment no. 32/2011, 17.03.2011, Duero river basin;
- Constitutional Court of Spain, Plenary Judgment no. 110/2011, 22.06.2011, Provisions on water management of the new Statute of Autonomy for Aragón.



*Languages:*

Spanish.

*Identification:* ESP-2011-2-008

**a)** Spain / **b)** Constitutional Court / **c)** Second Chamber / **d)** 28.03.2011 / **e)** 34/2011 / **f)** Dolores Vallejo Marchal / **g)** *Boletín oficial del Estado* (Official Gazette); [www.boe.es/boe/dias/2011/04/28/pdfs/boe-A-2011-7623.pdf](http://www.boe.es/boe/dias/2011/04/28/pdfs/boe-A-2011-7623.pdf); [www.tribunalconstitucional.es/es/jurisprudencia/Paginas/Sentencia.aspx?cod=10094](http://www.tribunalconstitucional.es/es/jurisprudencia/Paginas/Sentencia.aspx?cod=10094) / **h)** CODICES (Spanish).

*Keywords of the systematic thesaurus:*

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

5.2.2.6 Fundamental Rights – Equality – Criteria of distinction – **Religion.**

5.3.18 Fundamental Rights – Civil and political rights – **Freedom of conscience.**

*Keywords of the alphabetical index:*

Bar associations / Neutrality, religious.

*Headnotes:*

The proclamation of the Blessed Virgin Mary “in the mystery of her immaculate conception” as Patron of a Bar Association is an essentially passive symbol that cannot be deemed to represent a restriction on religious freedom. Neither does it violate the principle of the religious neutrality of professional associations.

*Summary:*

I. Article 2.3 of the Rules of the Bar Association of Seville establishes that, although the Bar Association of Seville is a non-denominational entity, in honour of a historical tradition it has as its Patron the Blessed Virgin Mary in the mystery of her Immaculate Conception.

A lawyer belonging to the Seville Bar Association appealed against Article 2.3, contending that it was contrary to religious freedom and violated the

principle of religious neutrality of public entities. The administrative courts dismissed the appeal, as did the Second Chamber of the Constitutional Court of Spain, ruling that this provision did not encroach on the above freedom and principle.

II. The Constitutional Court recalled its jurisprudence on religious freedom, as guaranteed by Article 16 of the Constitution. This line of authority shows an objective and a subjective aspect to religious freedom. Objectively, religious freedom entails a twofold requirement: the neutrality of public authorities and the maintenance of co-operative relationships between the various religions. Viewed as a subjective right, religious freedom has two dimensions: an internal one, which guarantees that everyone enjoys “a space of intellectual self-determination” in terms of “the religious phenomenon”, and an external one, which empowers every person to act in accordance with their beliefs.

The first aspect of religious freedom analysed by the Constitutional Court in this case was the principle of neutrality, to which the Bar Association of Seville, as a public law entity, is constitutionally bound. The provision under challenge did not, in the Constitutional Court’s view, violate this principle, as professional associations may adopt their own symbols. Recalling the Judgment of the Grand Chamber of the European Court of Human Rights in *Lautsi and others v. Italy*, 18 March 2011, the Second Chamber of the Constitutional Court noted that when a religion has been historically predominant in a territory, its imagery acquires a secular symbolic value, which is the case with what are known as patron saints. It also found that the applicant’s subjective perception was not sufficient to assess whether the religious meaning of a symbol was sufficiently powerful to breach the principle of religious neutrality and to allow the conclusion that the professional association was supporting a particular faith and encouraging proselytising practices.

No encroachment had occurred in this case on the objective aspect of religious freedom. The decision under dispute was taken “in honour of a historical tradition”, as the provision clearly states. This mention of the historical origins of the tradition was sufficient to allow for a conclusion that the provision did not infringe the principle of neutrality as the professional association was not lending support to any religion. The subjective dimension of the freedom of religion was not breached; no real and effective damage had occurred to the applicant’s rights. The applicant was not compelled to participate in any religious celebration.

The Second Chamber of the Constitutional Court also ruled that, under the democratic principle, the establishment of the symbols of identity of a professional association could only be decided on by members of the association.

#### Cross-references:

- European Court of Human Rights, *Lautsi and others v. Italy*, Application no. 30814/06, 18.03.2011, *Reports of Judgments and Decisions* 2011.

#### Languages:

Spanish.



#### Identification: ESP-2011-2-009

**a)** Spain / **b)** Constitutional Court / **c)** Second Chamber / **d)** 28.03.2011 / **e)** 37/2011 / **f)** Right to give informed consent / **g)** *Boletín oficial del Estado* (Official Gazette), 101, 28.04.2011; [www.boe.es/boe/dias/2011/04/28/pdfs/BOE-A-2011-7626.pdf](http://www.boe.es/boe/dias/2011/04/28/pdfs/BOE-A-2011-7626.pdf); [www.tribunalconstitucional.es/es/jurisprudencia/Paginas/Sentencia.aspx?cod=10097](http://www.tribunalconstitucional.es/es/jurisprudencia/Paginas/Sentencia.aspx?cod=10097) / **h)** CODICES (Spanish).

#### Keywords of the systematic thesaurus:

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

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.**

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

#### Keywords of the alphabetical index:

Medical treatment, authorisation, urgency.

#### Headnotes:

The fundamental right to physical integrity includes the power to prevent any non-consensual intervention to the body. It is a right to self-determination, giving the patient the right to decide freely on therapeutic measures and treatments which can affect his or her integrity, to select from different options and to agree to or to refuse the procedure. Deprivation of information amounts to a restriction of the right to consent to or refuse a particular medical intervention that is inherent in the fundamental right to physical and moral integrity.

#### Summary:

I. A patient suffering from cardiac problems had surgery without being informed of the potential risks the procedure carried. His informed consent was never requested. As a result of the surgery, he suffered abiopathy (i.e. loss of vitality) in his right hand. His physicians had not given him any information as to the risks and benefits of the treatment because he had undergone a similar surgical procedure eleven years previously. They claimed that urgent surgical intervention was needed as his life was in serious danger.

The patient launched proceedings alleging medical malpractice; treatment had been carried out which fell below the standards accepted within the medical community. After the courts rejected his lawsuit, he appealed to the Constitutional Court.

II. The Second Chamber of the Constitutional Court upheld the appeal because the medical treatment was carried out without the patient having been warned of the potential risks. The medical treatment had breached the patient's right to physical integrity and the courts had failed to repair the damage caused to this fundamental right.

Attention was drawn in the judgment to the case-law of the Constitutional Court (Judgments nos. 120/1990, 27 June 1990, and 137/1990, 19 July 1990), to the effect that the right to physical integrity (guaranteed by Article 15 of the Constitution) is infringed when somebody is subjected to medical treatment against their will. Coercive medical assistance therefore breaches the fundamental right to physical integrity, unless it has constitutional justification.

The medical treatment at issue here was not coercive but was applied without obtaining the patient's informed consent. The Second Chamber of the Constitutional Court found that although informed consent is not mentioned in Article 15 of the

Constitution, it is closely connected with the right to physical integrity. It cited in support of its finding Article 3.2 of the Charter of Fundamental Rights of the European Union, which includes among the contents of the right to respect for everyone's physical and mental integrity "the free and informed consent of the person concerned, according to the procedures laid down by law". It also noted a line of authority from the European Court of Human Rights, emphasising the importance of informed consent as a way of protection of the universal right to respect for private life, guaranteed by Article 8.1 ECHR, it cited the Judgment in *Pretty v. the United Kingdom*, 29 April 2002, paragraph 63 of the Judgment, where the Court ruled that "in the sphere of medical treatment, the refusal to accept a particular treatment might, inevitably, lead to a fatal outcome, yet the imposition of medical treatment, without the consent of a mentally competent adult patient, would interfere with a person's physical integrity in a manner capable of engaging the rights protected under Article 8.1 ECHR".

The Constitutional Court ruled that the provision of information prior to giving informed consent could be considered as a procedure or mechanism to ensure the effectiveness of the patient's self-determination and, therefore, of the fundamental rights that may be affected by medical intervention, in particular the right to physical and moral integrity, reaching a constitutional relevance that determines that its omission or defective performance can damage the fundamental right itself.

The medical assistance received in this case was not in accordance with the patient's right to give informed consent and breached his fundamental right to physical integrity. The fact that previous surgery had taken place more than ten years before did not justify dispensing with his consent; omitting this requirement on the basis that the patient's life was in grave danger did not comply with the regulation of informed consent under Spanish law, as the patient could have refused the treatment.

#### Cross-references:

- Constitutional Court of Spain, Plenary Judgment no. 120/1990, 27.06.1990, Hunger strike of convicted terrorists;
- Constitutional Court of Spain, Plenary Judgment no. 137/1990, 19.07.1990, Hunger strike of convicted terrorists;
- European Court of Human Rights, *Pretty v. the United Kingdom*, 29.04.2002, Informed consent and universal right to respect for private life, *Bulletin* 2002/1 [ECH-2002-1-006]; *Reports of Judgements and Decisions* 2002-III;

- European Court of Human Rights, *Codarcea v. Romania*, 02.06.2009, Informed consent and universal right to respect for private life, Application no. 31675/04.

#### Languages:

Spanish.



#### Identification: ESP-2011-2-010

**a)** Spain / **b)** Constitutional Court / **c)** Full Court / **d)** 05.05.2011 / **e)** 62/2011 / **f)** Bildu / **g)** *Boletín oficial del Estado* (Official Gazette); [www.boe.es/diario\\_boe/txt.php?id=BOE-A-2011-9135](http://www.boe.es/diario_boe/txt.php?id=BOE-A-2011-9135); [www.tribunalconstitucional.es/es/jurisprudencia/Paginas/Sentencia.aspx?cod=10128](http://www.tribunalconstitucional.es/es/jurisprudencia/Paginas/Sentencia.aspx?cod=10128) / **h)** CODICES (Spanish).

#### Keywords of the systematic thesaurus:

- 1.2.2.4 Constitutional Justice – Types of claim – Claim by a private body or individual – **Political parties.**
- 1.3.4.5 Constitutional Justice – Jurisdiction – Types of litigation – **Electoral disputes.**
- 1.3.4.7.1 Constitutional Justice – Jurisdiction – Types of litigation – Restrictive proceedings – **Banning of political parties.**
- 4.9.5 Institutions – Elections and instruments of direct democracy – **Eligibility.**
- 5.3.29 Fundamental Rights – Civil and political rights – **Right to participate in public affairs.**
- 5.3.41.2 Fundamental Rights – Civil and political rights – Electoral rights – **Right to stand for election.**

#### Keywords of the alphabetical index:

Political party, ban / Political party, right to participate in elections.

#### Headnotes:

Banning the participation of an electoral coalition without first having proved that its slates were the result of a plan to continue the activity of a banned political party violated the fundamental right to run for election. In order to prove that a slate, or a group of slates, continues the activity of a banned political

party it is necessary to prove both the existence of a scheme to circumvent the judgment outlawing the party and the participation of the candidates in that scheme.

### Summary:

I. The Special Chamber of the Supreme Court of Spain nullified the proclamation of all nominations submitted by the electoral coalition "Bildu" to participate in the local and provincial elections of May 2011. "Bildu" attempted to run for election in the local administration of the Basque Country and Navarra and also in the Parliament of the Autonomous Community of Navarra. In its Judgment, the Supreme Court ruled that "Bildu" continued the unlawful activity of "Batasuna", a political party which was banned in 2003 by a judgment of the same Special Chamber of the Supreme Court. This decision was later ratified by the Constitutional Court and by the European Court of Human Rights. "Bildu" appealed against the decision arguing that there was no evidence to conclude that the nullified electoral slates tried to continue the activity of "Batasuna". It claimed that the Special's Chamber's resolution had violated its right to run for elective posts.

II. The Constitutional Court assessed as a whole the evidence on which the Special Chamber's resolution was based, taking its own case-law into consideration. It noted Organic Law no. 3/2011, which introduced different measures to achieve *ex post* monitoring of the activities of parliamentarians and city councillors-elect. Since its approval, it has been incumbent on the judiciary to achieve solid *ex ante* control and more rigorous assessment of the evidence used to nullify the activity of a political group.

It therefore held that the Special Chamber of the Supreme Court had mistaken in its judgment the ideology professed by the "Basque left nationalists" for the violent means used to promote it. It concluded that in this case the violent nature of the means used by "Basque left nationalists" had not been proved.

It also held that there was insufficient information in the evidence (consisting mainly of police reports and media news) to form objective proof of the existence of a scheme by "Bildu" to circumvent the ban. Regarding subjective proof of the candidates' participation in such a scheme, the Constitutional Court ruled that it was unacceptable to transform the impossibility of proving their participation in proof of that participation, as the Special Chamber's judgment had done.

The evidence handled by the Special Chamber of the Supreme Court was clearly insufficient to conclude that the nullified slates were part of a scheme to circumvent the ban, that they had been manipulated by ETA or that they were the successors of "Batasuna". Consequently, it did not analyse the condemnation of terrorism carried out by "Bildu". However, this rejection of violence could not, in the Court's view, be interpreted as responding to a plan of cooperation with the terrorist organisation, as two of the political parties forming the electoral coalition ("*Euzko Alkartasuna*" and "*Alternatiba*"), were clearly opposed to terrorism.

The Constitutional Court upheld the appeal and declared the coalition's right to run for elective posts in local and regional elections.

### Cross-references:

- Constitutional Court of Spain, First Chamber, Judgment no. 85/2003, 08.05.2003, Fraudster scheme to continue the activity of an outlawed political party ("Batasuna") proved;
- Constitutional Court of Spain, Second Chamber, Judgment no. 126/2009, 21.05.2009, Fraudster scheme to continue the activity of an outlawed political party ("Batasuna") not proved;
- Constitutional Court of Spain, Plenary Judgment no. 48/2003, 12.03.2003, Political parties Organic Law;
- European Court of Human Rights, *Herri Batasuna and Batasuna v. Spain*, 30.06.2009, *Reports of Judgments and Decisions* 2009;
- European Court of Human Rights, *Eusko Abertzale Ekintza - ANV v. Spain*, 07.12.2010.

### Languages:

Spanish.



# “The former Yugoslav Republic of Macedonia” Constitutional Court

## Important decisions

*Identification:* MKD-2011-2-003

a) “The former Yugoslav Republic of Macedonia” / b) Constitutional Court / c) / d) 18.05.2011 / e) U.br.61/2011 / f) / g) / h) CODICES (Macedonian, English).

*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**.

*Keywords of the alphabetical index:*

Constituency, boundaries, voters, number.

*Headnotes:*

The maximum admissible departure (from minus 5% to plus 5%) in an electoral constituency from the average number of voters in the state’s electoral constituencies is in accordance with the constitutional principles of the citizens’ equal right to vote and the right of citizens to participate in the performance of public functions.

*Summary:*

I. The Party for New Democracy (*Democracija e Re*) asked the Court to examine the constitutionality of Articles 4.3 and 175 of the Electoral Code.

According to Article 4.3 of the Electoral Code, the number of voters in electoral constituencies may differ from minus 5% to plus 5% at the most, which is calculated in reference to the average number of voters in the constituencies, with the exception of the electoral districts serving diplomatic and consular offices in Europe and Africa, in North and South America and Australia and Asia.

Article 175 of the Electoral Code provides that the Republic of Macedonia is divided into six constituencies and sets out the territory of the municipalities and the polling stations for each constituency.

The applicant claimed that this provision violated the constitutional principles of equality, especially the equal voting rights of citizens and their right to participate in the performance of public offices, as well as the principle of corresponding and equitable representation of ethnic communities. The applicant illustrated this with the following example: currently the number of voters in Constituency no. 6 is 327 479 voters, which is +7.3% of the average number of voters in a constituency, and thus exceeds the maximum departure allowed by Article 4.3 of the Electoral Code. The difference in the number of voters, in particular in Constituency no. 6 and Constituency no. 3, could result in a difference in the number of seats won in an election, which in effect would represent a depreciation and devaluation of the equal weight and value of the votes cast in an election.

II. The Court began its analysis by examining Articles 9.2, 22 and 23 of the Constitution and the corresponding provisions of the Electoral Code, in particular those defining the electoral model and the number of voters in constituencies.

The Court noted that the equal right to vote is an expression of the principle of the equality of citizens before the law, and it is exercised through the integrity of the electoral system. However, this equality may not be understood with mathematical precision given the different factors as determined and defined, but it must be approximately equal, so that the Electoral Code itself, in the contested Article 4.3, determines the maximum allowed departure.

The Court referred to item 2.2 of the Venice Commission’s “Code of Good Practice in Electoral Matters” (CDL-AD (2002)023rev), which concerns “Equal voting power”. The Explanatory Report states in respect of item 2.2: “Equality in voting power, where the elections are not being held in one single constituency, requires constituency boundaries to be drawn in such a way that seats in the lower chambers representing the people are distributed equally among the constituencies, in accordance with a specific apportionment criterion, e.g. the number of residents in the constituency, the number of resident nationals (including minors), the number of registered electors, or possibly the number of people actually voting. An appropriate combination of these criteria is conceivable. The same rules apply to regional and local elections.”

The Explanatory Report goes on to state: "When this principle is not complied with, we are confronted with what is known as electoral geometry, in the form either of "active electoral geometry", namely a distribution of seats causing inequalities in representation as soon as it is applied, or of "passive electoral geometry", arising from protracted retention of an unaltered territorial distribution of seats and constituencies." The Explanatory Report states that the maximum permissible departure from the allocation norm that is accepted depends from case to case, "although it should seldom exceed 10% and never 15%, except in really exceptional circumstances."

The Court affirmed these stances and found that the departure from minus 5% to plus 5% defined in the contested Article 4.3 of the Electoral Code is not contrary to the constitutional principles of the equal voting rights of citizens and their right to take part in the performance of public offices, particularly if one takes into consideration the fact that the determined difference is within the reasonableness limits of social, objective and European standards for the principle of proportionate representation as a whole.

In connection with the applicant's statements that the defined constituencies differed in the total number of voters, the Court found that there cannot be a real mathematical equality. This is so because this category is liable to change or variation given the fact that in a given time period a certain number of voters pass away and a certain number of voters gain the right to vote, or due to migration changes. Therefore, what is necessary is a regular update of the List of Voters, which is made by the competent institutions at specified intervals.

The Court dismissed the application for review of Article 175 of the Code, since in the meantime the Assembly of the Republic of Macedonia had amended Article 175 of the Electoral Code so as to address the problem set out in the application.

#### *Languages:*

Macedonian.



#### *Identification: MKD-2011-2-004*

a) "The former Yugoslav Republic of Macedonia" / b) Constitutional Court / c) / d) 22.06.2011 / e) U.br.173/2010 / f) / g) / h) CODICES (Macedonian, English).

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

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

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

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

Contract, employment, cessation / Unemployment, benefit, exclusion.

#### *Headnotes:*

Failure to confer the status of an unemployed person on a person whose employment has ceased upon his/her will and depriving him/her of temporary unemployment rights is contrary to the Constitution.

#### *Summary:*

I. Two non-governmental organisations (NGOs) from the capital city, Skopje, asked the Court to review the constitutionality of Article 53.1.6 of the Law on Employment and Insurance in Case of Unemployment. Under this Article, an unemployed person is defined as a person who has had his/her employment terminated against his/her will.

The petitioners claimed that the disputed Article of the Law was not in accordance with Articles 8.1.1.8, 9, 32, 34, 35, 51 and 54 of the Constitution, since it discriminated against the workers by making an unjustified distinction between them depending on the ground for termination of their employment. In this way the category of workers whose employment had terminated of their own volition or who had rejected an employment offer were not included in the records of the State Bureau for Employment and thus had been deprived of their temporary unemployment rights. The petitioners further claimed that employment is not a life-long given legal relationship in which the worker is tied and which cannot be terminated.

II. The Court, on an analysis of Articles 8.1.1.11, 9 and 32.1 of the Constitution, found the petitioners' submissions to have merit. The Court noted that the employment relationship is a voluntary relationship

between the employer and the worker based on contract, in which the worker joins the organisational process of work with the employer for a salary and other incomes. The employment contract as a two-party relationship may be cancelled upon mutual agreement, according to the conditions and manner defined in the Law, cancelled by the employer under the conditions and manner envisaged in the Law, and it may be cancelled by the worker again under the conditions and in a manner defined by law. Given that, where the working relationship is cancelled upon mutual agreement or upon the will of the employer, the worker gains the status of an unemployed person and is registered in the Employment Agency, the question was raised as to what the aim of the legislator was in giving, on the one hand, the right to the worker to cancel the employment contract upon his/her own will, and on the other hand the exercise of this right to be an obstacle for him/her to gain the status of an unemployed person and to be deprived of temporary unemployment benefits.

The Court found that both persons who cannot offer their labour on the market owing to not being registered in the Agency and employers who are unable to find out that there are persons who may be interested in finding a job suffer adverse consequences due to the contested provision. More specifically, the Court found that the contested provision indirectly restricts the right to movement, the fluctuation of the workforce and restricts the labour market.

Hence the Court found that the provision of Article 53.1.6 of the Law on Employment and Insurance in Case of Unemployment was not in accordance with the provisions of the Constitution and repealed the contested Article.

#### *Languages:*

Macedonian.



## Turkey Constitutional Court

### Important decisions

*Identification:* TUR-2011-2-004

**a)** Turkey / **b)** Constitutional Court / **c)** / **d)** 17.03.2011 / **e)** E.2009/47, K.2011/51 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 12.07.2011, 27992 / **h)** CODICES (Turkish).

*Keywords of the systematic thesaurus:*

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

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

5.3.40 Fundamental Rights – Civil and political rights – **Linguistic freedom**.

*Keywords of the alphabetical index:*

Name, surname / Discrimination, justification.

*Headnotes:*

Prohibiting the adoption of names of foreign races and nations as a surname is not contrary to the right to equality.

*Summary:*

I. Midyat Civil Court requested the Constitutional Court to assess the compliance with the Constitution of the phrase “... the names of foreign races and nations...” in Article 3 of the Law on Surnames (hereinafter, the “Law”). Article 3 of the Law prohibits, *inter alia*, taking the names of foreign races and nations as a surname. The Law on surnames also stipulates that surnames must be in Turkish. The applicant Court contended that the said provision in Article 3 of the Law is interpreted very widely by the Supreme Court to preclude the adoption of any surname which is not Turkish and, therefore, it is discriminatory and contrary to the principle of equality.

II. The Constitutional Court ruled that the right to a surname is a fundamental right and is related to the free development of personality. Taking a surname is also a legal obligation for Turkish citizens. Citizens can choose any word as a surname unless it is immoral, disgusting or funny. But the words chosen as surnames must be in Turkish. The function of a surname is to identify a person and his/her family. In order to realise that function it must be identifiable by anyone. The state may interfere with the adoption of surnames to protect the unity of the nation. The Court also indicated that the prohibition is applied all the Turkish citizens without discrimination. Therefore, the Court decided that the contested provision is not contrary to the right to equality guaranteed by Article 10 of the Constitution and rejected the claim of unconstitutionality. Judges Mr Kılıç, Mr Paksüt, Mrs Kantarcıoğlu, Mr Oto, Mr Yıldırım, Mr Dursun, Mr Akıncı and Mr Tercan submitted dissenting opinions.

#### *Languages:*

Turkish.



#### *Identification:* TUR-2011-2-005

**a)** Turkey / **b)** Constitutional Court / **c)** / **d)** 17.03.2011 / **e)** E.2009/58, K.2011/52 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 23.07.2011, 28003 / **h)** CODICES (Turkish).

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

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

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

Property right, restriction / Property, acquisition / Property, deprivation.

#### *Headnotes:*

The acquisition of ownership of a registered property through use of that property, where the owner of the property died twenty years ago, deprives the heirs of the registered owner of their right to property and is contrary to the Constitution.

#### *Summary:*

I. Ankara Eleventh Civil Court requested the Constitutional Court to assess the compliance with the Constitution of the phrase “(the owner of which)...died twenty years ago...” in Article 713.2 of the Civil Code. Article 713 of the Civil Code regulates the acquisition of ownership of immovable property through the lapse of time. According to the contested provision a person can acquire ownership of a registered property if he uses it for twenty years continuously as if he is the owner of it, on the condition that, *inter alia*, the registered owner died twenty years ago.

The applicant Court argued that this provision deprives the heirs of the registered owner of their property in an unjustified way and that it is contrary to the Constitution. The Court contended that it is commonly the case that heirs who live in big cities or abroad neglect to register property in rural areas they acquire through succession and generally their relatives use or cultivate their land. After twenty years of use these relatives may claim the ownership of property and they succeed because of the contested provision. Therefore, the Court claimed that the contested provision violates the right to property of heirs.

II. The Constitutional Court recalled that Article 35 of the Constitution guarantees the rights of property and succession. The Court ruled that the right to property protects the owner’s dominance over things and it thereby provides to the owner a private sphere which is immune to the interference of the state. On the other hand, the right to property guarantees the fruits of labour and provides opportunities to the owner to plan his own activities. So there is a close relationship between the right to property and the right to human freedom. The Court also indicated that the right to succession is a natural extension of the right to property. The register of title of deeds guarantees the permanence of the right to property. Even if the registered owner had died twenty years ago, it can be understood that the owner’s heirs acquired the property. Therefore, the Court decided that the contested provision deprives the heirs of their property in an unjustified way and it is contrary to the Article 35 of the Constitution. The Court annulled the contested provision unanimously.

#### *Languages:*

Turkish.





*Identification:* TUR-2011-2-006

**a)** Turkey / **b)** Constitutional Court / **c)** / **d)** 28.04.2011 / **e)** E. 2009/59, K.2011/69 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 12.07.2011, 27992 / **h)** CODICES (Turkish).

*Keywords of the systematic thesaurus:*

3.16 General Principles – **Proportionality**.  
5.4.2 Fundamental Rights – Economic, social and cultural rights – **Right to education**.

*Keywords of the alphabetical index:*

Education, higher, access / Proportionality / Right to education / Right, essence, breach.

*Headnotes:*

Prohibiting those expelled from a higher education institution from enrolment in a higher education institution is a disproportionate sanction and violates the essence of the right to education.

*Summary:*

I. The Ninth Administrative Court of Ankara requested the Constitutional Court to assess the compliance with the Constitution of Article 54.g of Law no. 2547 on Higher Education. It stipulates that “Those who are expelled from higher education institutions for disciplinary reasons cannot be accepted to any higher education institution again”.

The applicant court claimed that this provision creates an absolute ban for those who are expelled from a higher education institution for disciplinary reasons to attend any university. The Court contended that an absolute ban constitutes a disproportionate interference with the right to education and imposes a sanction which is unnecessary in a democratic society. Therefore, the Court argued that it violates the right to education and is accordingly unconstitutional.

II. The Constitutional Court ruled that Article 42 of the Constitution guarantees a right to education and, according to Article 13 of the Constitution, restrictions on fundamental rights cannot infringe upon the essence of the right and cannot be in conflict with the principle of proportionality. The contested provision

imposes a permanent ban on enrolment at any kind of university if someone is expelled from a university as a disciplinary measure. The Court ruled that such an absolute ban violates the essence of the right to education and imposes a disproportionate sanction. As a result the Court decided to annul the contested provision of Article 54 of Law no. 2547 on Higher Education unanimously.

*Languages:*

Turkish.



# Ukraine

## Constitutional Court

### Important decisions

*Identification:* UKR-2011-2-004

**a)** Ukraine / **b)** Constitutional Court / **c)** / **d)** 31.05.2011 / **e)** 4-rp/2011 / **f)** Official interpretation of the provisions of Article 376.1 in conjunction with Articles 151, 152, 153 of the Civil Procedural Code / **g)** *Ophitsiynyi Visnyk Ukrainy* (Official Gazette), 43/2011 / **h)** CODICES (Ukrainian).

*Keywords of the systematic thesaurus:*

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

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

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

*Keywords of the alphabetical index:*

Dwelling place, entry, compulsory / Claim, execution.

*Headnotes:*

When a court ruling arising from the securing of a claim is being executed, the issue of compulsory entry into a debtor's dwelling place or other property shall be resolved by a court at the location of the dwelling place upon the petition of a state enforcement officer.

*Summary:*

I. Citizen Siniuhina Iryna Ivanivna asked the Constitutional Court for an official interpretation of the provisions of Article 376.1 in conjunction with Articles 151, 152, 153 of the Civil Procedural Code (hereinafter, the "Code"), regarding a court's ability to deal with a petition by a state enforcement officer on compulsory entry into a dwelling place in order to execute a court ruling arising from the securing of a claim. An official interpretation of these provisions had become necessary because of their inconsistent

application by the courts of general jurisdiction. In one case, the court upheld the state officer's petition. In another case, however, the court declined to do so, on the basis that the above legal norm concerned the enforcement of a court decision, which marked the end of consideration of a case.

II. The Constitutional Court began by stressing that the universal guarantee of inviolability of the home is not only the constitutional legal obligation of the state, but also represents the observance of the international legal obligations undertaken by Ukraine under the provisions of the Universal Declaration of Human Rights of 1948, the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, and the International Covenant on Civil and Political Rights of 1966. Article 30.1 and 30.2 of the Constitution bestow a universal right to inviolability of the home; it is only permissible to enter a person's home or other property and to examine or search it pursuant to a substantiated court decision. This constitutional guarantee does not apply to cases where the public interest requires lawful restriction of human rights, such as the protection of the rights and legal interests of other members of society. Restriction of a person's right to inviolability of the home is recognised as legitimate encroachment by the state in human rights in order to ensure public welfare.

Human and citizens' rights and freedoms are protected by the courts, which are obliged to protect the universal right to a fair trial and respect for other rights and freedoms guaranteed by the Constitution and laws (Article 55.1 of the Fundamental Law, Article 2 of the Law on Judiciary and Status of Judges). In particular, every person is entitled to apply to court for protection of his or her violated, unrecognised or disputed rights, freedoms or interests pursuant to the procedure set out in the Code (Article 3.1 of the Code). Judicial consideration of a case ends with the adoption of a court decision which is mandatory for execution throughout the entire territory (Article 124.5 of the Constitution, Article 208.3 of the Code).

The procedural laws envisage the institution of securing a claim, in order to ensure that court decisions can be executed. In civil proceedings, the securing of a claim is allowed before the filing of a complaint, in order to prevent violation of the intellectual right, and at every stage of consideration of a case where failure to take measures could impede or render impossible the execution of the court decision (Article 151.3 and 151.4 of the Code).

Under the provisions of Article 153.9 of the Code, rulings on the securing of claims are executed straightaway, in the order established for the execution of court decisions. Court decisions are stated in the form of rulings or decisions (Article 208.1 of the Code), and such decisions are set out in Chapter VI of the Code (procedural issues related to the execution of court decisions in civil cases and cases and decisions by other bodies or officials). Thus, the mechanism for ensuring the execution of court decisions which is stipulated in Article 376.1 of the Code, namely decisions by a court upon the petition of a state enforcement officer regarding compulsory entry into a debtor's dwelling place or other property also applies to cases of execution of court rulings on the securing of a claim. Issues of compulsory entry into a dwelling place are therefore only decided by the adoption of a substantiated court ruling, in observance of the principle of the rule of law.

The Constitutional Court also noted that under Article 368.2 of the Code, Article 17.2.1 and 17.2.2 of the Law on Execution Proceedings, execution documentation consists of execution letters, which are issued by courts upon each court decision which enters into force, and court rulings in civil and other cases. Under these provisions, execution proceedings are initiated both in order to execute the court decision, marking the end of consideration of a case, and in order to execute a ruling on securing a claim. The parties to execution proceedings are the plaintiff and the debtor. In this context, a plaintiff is a natural or legal person who has been issued with an execution document for his or her benefit or interest, and a debtor is a natural or legal person defined by the execution document (Article 8.1 and 8.2 of the Law on Execution Procedure). The parties obtain the status of plaintiff or debtor after initiation of execution proceedings both in the case of execution of a court decision marking the end of judicial consideration of a case, and in cases of execution of a court ruling on the securing a claim.

### *Languages:*

Ukrainian.



### *Identification: UKR-2011-2-005*

**a)** Ukraine / **b)** Constitutional Court / **c)** / **d)** 16.06.2011 / **e)** 5-rp/2011 / **f)** On the constitutional compliance of various provisions of the Code of Administrative Proceedings, and the Laws on the High Council of Justice and on Introducing Amendments to Several Legal Acts on Preventing Abuse of the Right to Appeal / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 50/2011 / **h)** CODICES (Ukrainian).

### *Keywords of the systematic thesaurus:*

4.4.3 Institutions – Head of State – **Powers**.  
 4.5.2 Institutions – Legislative bodies – **Powers**.  
 4.7.4.1.6 Institutions – Judicial bodies – Organisation – Members – **Status**.  
 4.7.5 Institutions – Judicial bodies – **Supreme Judicial Council or equivalent body**.  
 4.7.16.2 Institutions – Judicial bodies – Liability – **Liability of judges**.  
 5.3.13 Fundamental Rights – Civil and political rights – **Procedural safeguards, rights of the defence and fair trial**.

### *Keywords of the alphabetical index:*

Administrative claim, securing of / Judge, independence, immunity.

### *Headnotes:*

The right to secure an administrative claim may be restricted, if this is in the interests of other parties to proceedings and society as a whole, due to the specific nature of the legal relations falling within the remit of the administrative courts. This also applies to Parliament and to the President. Such a restriction does not represent a restriction on the right to judicial protection.

Where a judge is absent from a session of the High Council of Justice where his or her disciplinary case is being heard, the case may be heard in his or her absence and this does not represent encroachment on the guarantees of judicial independence or inviolability.

### *Summary:*

1. A question had arisen over the constitutional compliance of Article 117.5.1 of the Code of Administrative Proceedings, on the prevention of securing a claim by means of suspending the acts of Parliament and those of the President or the establishment of a prohibition on their committing certain acts.

Questions had also arisen over the Law on the High Council of Justice no. 22/98-VR dated 15 January 1998 with amendments, in particular Article 24.1 (concerning the eligibility of sessions of the High Council of Justice), Article 32.3 (which identifies actions that constitute a breach of oath by a judge), Article 46.6 (whereby repeated absence by a judge at sessions of the High Council of Justice, who is appealing against the decision of the High Qualifications Commission of Judges on bringing him to disciplinary responsibility represents grounds for considering the case in his or her absence).

There was also a question over paragraph 3.4 of Section I of the Law on Introducing Amendments to Several Legal Acts on Preventing Abuse of the Right to Appeal no. 2181-VI dated 13 May 2010. This provides a new reading of Article 30 of the Law on the High Council of Justice which does not contain the second paragraph, under which a member of the High Council of Justice, who has raised the issue before the High Council of Justice of the dismissal of a judge, does not participate in voting when relevant decisions are adopted.

II. Under the Fundamental Law the judiciary is defined exclusively by laws (Article 92.1.14) that are adopted by Parliament, the sole body of the legislative power (Articles 75, 85.1.3, 91).

The institute of securing a claim falls within the remit of the judiciary, contributing to the execution of court decisions and guaranteeing the implementation of the constitutional right to judicial protection stipulated by Article 55 of the Constitution.

The Constitutional Court observed that the right to secure an administrative claim may be restricted, due to the specific characteristics of public and legal relations which are under the jurisdiction of administrative courts. The regulation of the grounds and the procedure of securing a claim is not only executed in the interests of the applicant, but also in the interests of others, such as parties to judicial proceedings, society, and the state as a whole, in accordance with the criteria of proportionality.

The Parliament and the President are in the category of parties to judicial proceedings in the sphere of public and legal relations regulated by the disputed provisions of the Code of Administrative Proceedings (hereinafter, the "Code"). The adoption of acts and the execution of actions by them are determined by their constitutional status and the authorities stipulated by the Constitution. The prohibition on securing an administrative claim by means of suspending acts of the Parliament and of the President and the establishment of the prohibition of their performance

of certain actions are related to the importance of their activities, the presumption of constitutionality of acts adopted and actions performed by them and are motivated by the fact that the use of such means to secure an applicant's interests may lead to the violation of rights of indefinite circle of persons. The fact that a court cannot deploy the means of securing a claim in certain cases does not represent a limitation of the constitutional right of citizens to judicial protection.

The Constitutional Court was of the opinion that when Parliament enacted, through the Code, the institution of securing an appeal as an element of judicial proceedings and cases where securing a claim is prohibited, it established the legal certainty and predictability of the activities of the Parliament and the President, and thus the stability of regulation of social relations in the state, including the issue of acts within their authorities on the basis of and pursuant to the Constitution (Articles 6, 19, 85, 106 of the Fundamental Law).

The powers and basis of the formation of the High Council of Justice are set out in the Constitution, (Article 131) along with its organisation and operating procedures. The eligibility of its sessions and the decision-making process are regulated by the Law on the High Council of Justice no. 22/98-VR dated 15 January 1998 (Law no. 22) and the Rules of Procedure of the High Council of Justice (Article 2 of Law no. 22).

The requirements as to the eligibility of sessions of the High Council of Justice are directed towards the realisation of the High Council's authorities by means of adoption of decisions in accordance with Article 24.4 of Law no. 22. One such requirement, established by the legislator, is the number of participants of the session required for adopting decisions. The majority from the constitutional composition of the High Council of Justice should be present at the session.

Under the Fundamental Law, a judge is dismissed from office by the body that elected or appointed him or her. The forwarding of submissions on the dismissal of judges from office falls within the remit of the High Council of Justice (Articles 126.5.5 and 131.1.1). The procedure and grounds for forwarding submissions on the dismissal of judge from office for breaking the oath were defined by Parliament in Article 105 of the Law on the Judiciary and the Status of Judges and Article 32 of Law no. 22.

The responsibilities of judges who hold administrative positions that are connected with procedural acts are determined by the law. The execution of such responsibilities is directly connected with and an

integral part of the implementation of the judiciary. The administrative position in question is the office of the Chairman and Deputy Chairman of the court. Judges are appointed to this office from amongst the judges of this court who swore the oath when they were appointed to office for the first time (Articles 20.1, 20.2 and 55.1 of the Law on the Judiciary and the Status of Judges). If a judge holding such a position fails to carry out responsibilities connected with procedural acts, this is a breach of oath on his or her part.

In the Constitutional Court's view, the provisions of Article 46.6 of Law no. 22 whereby the repeated absence of a judge at sessions of the High Council of Justice who is appealing against a decision of the High Qualifications Commission of Judges over a disciplinary matter represents grounds for considering the case in his or her absence do not impinge on the guarantees of judicial inviolability and independence.

Under Article 46.6 of Law no. 22, if the judge fails to participate in the High Council of Justice for valid reasons, he or she can provide written explanations on the issues raised which should be attached to the case materials and voiced at the session.

The Constitutional Court noted the High Council of Justice's status as a collective independent body. The law provides for equal rights and responsibilities to all members of the High Council of Justice (regardless of the order in which they were appointed or joined *ex-officio*), including the right to participate in the session and to vote in person on the basis of the materials of the case under consideration at this session, and their own beliefs.

If members of the High Council of Justice are removed from the vote during the execution of their constitutional powers, (except in cases of substantiated withdrawal envisaged by Law no. 22), this leads to a restriction of their rights and the violation of the balance of quota formation of the High Council and the principles of its activity.

III. Judges V.D. Bryntsev, V.I. Shyshkin, V.M. Kampo, D.D. Lylak submitted dissenting opinions.

#### *Languages:*

Ukrainian.



#### *Identification: UKR-2011-2-006*

**a)** Ukraine / **b)** Constitutional Court / **c)** / **d)** 16.06.2011 / **e)** 6-rp/2011 / **f)** Official interpretation of several provisions of item 1.1 and 1.2 of the Law on Introducing Amendments to the Law on Perpetuation of the Victory in the Great Patriotic War of 1941-1945 concerning the order of the official use of the copy of the Victory Flag / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 50/2011 / **h)** CODICES (Ukrainian).

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

3.1 General Principles – **Sovereignty**.  
4.2.1 Institutions – State Symbols – **Flag**.  
4.2.2 Institutions – State Symbols – **National holiday**.

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

Symbols, state / Flag, state.

#### *Headnotes:*

An exhaustive list of the state symbols is to be found in the Fundamental Law, and the provisions of the Law on Perpetuation of Victory in the Great Patriotic War of 1941-1945 dated 20 April 2000 no. 1684-III as amended by the Law on Introducing Amendments to the Law on Perpetuation of Victory in the Great Patriotic War of 1941-1945 concerning the order of the official use of the copy of the Victory Flag dated 21 April 2011 no. 3298-VI should be interpreted in this way.

#### *Summary:*

I. Citizen Kostenko Yurii Ivanovych asked the Constitutional Court for an official interpretation of several provisions of item 1.1 and 1.2 of the Law on Introducing Amendments to the Law on Perpetuation of Victory in the Great Patriotic War of 1941-1945 concerning the order of the official use of the copy of the Victory Flag dated 21 April 2011 no. 3298-VI (hereinafter, "Law no. 3298") in conjunction with the provisions of Articles 1, 3, 8, 11, 15, 17, 18, 20, 29, 34, 37, 41, 65 of the Constitution.

II. State symbols are inseparably associated by their content with state sovereignty (paragraph 1 of item 3 of the motivation section of the Decision of the Constitutional Court dated 15 January 2003 no. 1-rp/2003). They prove the existence of the state and its sovereignty and are aimed at strengthening its authority, especially during solemn events and official ceremonies. The State establishes the order of use of state symbols and appropriate systems for their legal protection, and thus respect for them.

The state symbols, namely, the State flag, the State coat of arms and the State anthem, are listed in Article 20.1 of the Constitution. Under Article 92.2.4 of the Constitution, the procedure for their use and protection is established exclusively by law. Respect for the state symbols is the duty of citizens (Article 65.1 of the Fundamental Law).

Under Article 1.4 of the Law on Perpetuation of Victory in the Great Patriotic War of 1941-1945" dated 20 April 2000 no. 1684-III (Law no. 1684), celebrations in honour of Victory Day in the capital, the city-hero of Kyiv, other cities and settlements are conducted with the use of symbols of the Great Patriotic War of 1941-1945.

Article 1.5 of Law no. 1684 defines the Victory flag as a symbol of victory of the Soviet people and their army and fleet over Germany during the Great Patriotic War of 1941-1945. Reference is not made to it as a state symbol.

The Constitutional Court therefore found that the Fundamental Law contains the exhaustive list of the state symbols.

Article 20.6 of the Constitution stipulates that the description of the state symbols and the procedure for their use must be established by legislation adopted by no less than two-thirds of the constitutional composition of the Parliament. Paragraph 4 of item 1.2 of Law no. 3298, which introduces amendments to Article 2 of Law no. 1684, envisages that the main forms of perpetuation of the Victory are "the official hoist of the Victory Flag on buildings (flagstuffs) near the State Flag on the Victory Day". These provisions of Law no. 3298 establish the order of use on the Victory Day of the state symbol– the State Flag near the copy of a Victory Flag which is not the state symbol. Law no. 3298 was passed in a plenary session of the Parliament on 21 April 2011 by the number of votes amounting to less than two-thirds of the constitutional composition of the Parliament (*Verkhovna Rada*).

Under Article 152.1 of the Constitution, laws and other legal acts are declared unconstitutional, in whole or in part, by decision of the Constitutional Court in the event that they do not conform to the Constitution, or if there has been a violation of the procedure established by the Constitution for their review, adoption or their entry into force.

The procedure for the adoption of Law no. 3298 prescribed by the Fundamental Law was violated, in terms of the establishment of the order of use of the state symbol, namely the State Flag. The provisions

of Article 2.6 of Law no. 3298 therefore contravene the Constitution.

III. Judges V.D. Bryntsev, V.M. Kampo, M.A. Markush submitted dissenting opinions.

#### *Languages:*

Ukrainian.



#### *Identification: UKR-2011-2-007*

**a)** Ukraine / **b)** Constitutional Court / **c)** / **d)** 21.06.2011 / **e)** 7-rp/2011 / **f)** On the conformity with the Constitution of several provisions of the Law on the Judiciary and the Status of Judges and the Law on the High Council of Justice (case concerning the authorities of state bodies in the sphere of the judiciary) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 50/2011 / **h)** CODICES (Ukrainian).

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

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

4.4.3 Institutions – Head of State – **Powers.**

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

4.7.4.1 Institutions – Judicial bodies – Organisation – **Members.**

4.7.5 Institutions – Judicial bodies – **Supreme Judicial Council or equivalent body.**

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

Judge, appointment, lifetime.

#### *Headnotes:*

The powers of Parliament to elect and dismiss judges are not encroached upon by legislative provisions governing the judiciary and the status of judges which relate to the order of voting.

#### *Summary*

I. The conformity with the Constitution was questioned of certain provisions of the Law on the Judiciary and

the Status of Judges no. 2453-VI dated 7 July 2010, namely:

- Article 19.1 concerning the President's right to abolish courts of general jurisdiction;
- Article 19.4 on the authority of the State Judicial Administration to determine the number of judges in the court;
- Article 79.6, to the effect that if a candidate who is elected to judicial office for a life term fails to receive the number of votes established by this Law, Parliament will hold a new vote;
- Article 80.1, on the President's right to transfer a judge elected for life to another court of the same level and same specialisation;
- Article 111.5, providing for a repeat vote in case of failure to receive the number of votes of the People's Deputies provided by this Law, regarding the dismissal from office of a judge elected for a life term, and
- Articles 70.10, 77.2, 77.3, 89.1, 89.2, 89.3, 89.4, 89.6, 97.5 of the Law on the Judiciary and the Status of Judges no. 2453-VI dated 7 July 2010, Articles 27.1.6<sup>1</sup>, 27.1.6<sup>2</sup>, 29<sup>2</sup> of the Law on the High Council of Justice no. 22/98 – VR dated 15 January 1998 (in the wording of the Law on the Judiciary and the Status of Judges no. 2453-VI dated 7 July 2010) on the High Council of Justice's authority to review and overturn decisions of the High Qualification Commission of Judges regarding the establishment of the results of qualification examination of a candidate for a judge, refusal to recommend a candidate for election to judicial office for a life term and to bring judges to disciplinary responsibility.

Under Article 79.6 of the Law on the Judiciary and the Status of Judges no. 2453-VI dated 7 July 2010 (hereinafter, the "Law no. 2453"), where a candidate who is elected to judicial office for a lifetime fails to receive a majority of votes from the constitutional composition of Parliament, a new vote is held. Under Article 111.5 of this Law, dealing with the dismissal of judges from lifetime office, a repeat vote will be held.

II. The disputed provisions of Law no. 2453 do not infringe the provisions of Articles 91, 126.5, 128.1 of the Constitution, which envisage that Parliament adopts laws, resolutions and other acts by a majority of its constitutional composition, and determine the grounds for dismissal of a judge from the office by the body that elected or appointed him or her, along with the procedure for electing judges for life-term office. These constitutional provisions relate to the process of the implementation by Parliament of its power to elect and dismiss judges. Articles 79.6 and 111.5 of Law no. 2453 only provide for the order of

voting on these issues. The provisions of Law no. 2453 do not, therefore, limit the powers of Parliament to elect and dismiss judges, since under the Constitution the final decision on these issues is adopted by Parliament through voting.

Article 19.1 of Law no. 2453 gives the President the right to abolish courts of general jurisdiction upon the submission of the Minister of Justice on the basis of proposals by the chairman of the relevant high specialised court.

The Constitutional Court noted that the President, as Head of State and guarantor of the observance of the Constitution, and human and citizens' rights and freedoms, has certain authorities in terms of the judiciary.

Under Article 106.1.23 of the Constitution, the Head of State establishes courts under the procedure established by law. Analysis of the provisions of the Fundamental Law, including those referred to by the applicants, leads to the conclusion that the right to abolish courts is part of the authority implemented by the President during the realisation of his functions regarding the establishment of courts by way of the creation of a system of courts, which did not exist before, reorganisation of the existing structures and merging and eliminating some of them. The process of the liquidation of courts is an integral part of the process of their establishment.

Pursuant to Article 19.4 of Law no. 2453, the number of judges in the court is determined by the State Judicial Administration upon the submission of the Minister of Justice on the basis of the proposals of the chairman of the relevant high specialised court.

The issue of the number of judges in the court upon submission of the chairman of the relevant high specialised court falls within the remit of the State Judicial Administration and in line with its status and competence, as it is accountable to the independent body of judicial self-government and, pursuant to Law no. 2453, and ensures organisational support of the activities of judicial bodies, in particular by researching the practice of organisation of the courts' activities and developing and submitting proposals for its improvement.

Article 80.1 of Law no. 2453 stipulates that the transfer of judges elected for a life term from one court to another court of the same level and same specialisation is made by the President upon the written request of the judge.

The Constitution regulates the issue of the appointment of judges to office for the first time

(Article 128), election for a life term (Articles 85.1.27, 128.1) and dismissal (Article 126.5). The procedure for transferring a judge from one court to another is not regulated at constitutional level. Thus, according to Article 92.1.14 of the Constitution, it should be determined exclusively by law.

The quoted constitutional principles on the conferring of authority on judges in accordance with decisions by the Head of State and a single legislative body (Parliament) would indicate that all professional judges obtain national status in order to execute their powers. All previous conclusions on this issue are also adopted by the High Qualification Commission of Judges and the High Council of Justice, as there are no restrictions regarding the status of professional judges, brought about by the administrative and territorial system.

Under Article 131.1.3 of the Constitution, the authorities of the High Council of Justice include the consideration of complaints about decisions on disciplinary responsibility of judges of courts of appeal and local courts. This authority was developed in Article 89.1, 89.2, 89.3, 89.4 and 89.6 of Law no. 2453 and relevant amendments to the Law on the High Council of Justice no. 22/98-VR dated 15 January 1998 (Law no. 22), which standardised the mechanism of appeal by judges of local courts and courts of appeal to the High Council of Justice against decisions by the High Qualification Commission of Judges on bringing them to disciplinary liability. The above authority of the High Council of Justice therefore derives from its constitutional status.

Under Article 131.1 of the Constitution, the High Council of Justice submits proposals on the appointment of judges or their dismissal from the office. Article 1.2 of Law no. 22 envisages that the High Council of Justice is a collective independent body responsible for the formation of a highly professional corps of judges able to exercise justice on a qualified, honest and impartial professional basis.

The Constitutional Court accordingly viewed the granting to the High Council of Justice of the authority to review complaints from those standing for judicial office about the results of the qualification examination and from judges on decisions by the High Qualification Commission of Judges refusing to recommend a candidate for election as standardisation of the procedure within the competence of this body at the legislative level.

It considered that the powers of the High Council of Justice over the consideration of complaints on refusal to recommend a candidate for election for life are derived from its constitutional status (Article 131.1.1 of the Fundamental Law).

III. Judge V.D. Bryntsev submitted a dissenting opinion.

#### *Languages:*

Ukrainian.



#### *Identification: UKR-2011-2-008*

**a)** Ukraine / **b)** Constitutional Court / **c)** / **d)** 12.07.2011 / **e)** 8-rp/2011 / **f)** Concerning conformity with the Constitution of certain provisions of the Law on the Judiciary and Status of Judges / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 6/2011 / **h)** CODICES (Ukrainian).

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

4.7.4.1.6 Institutions – Judicial bodies – Organisation – Members – **Status**.  
4.7.4.1.6.1 Institutions – Judicial bodies – Organisation – Members – Status – **Incompatibilities**.

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

Court, independence / Judge, independence, immunity.

#### *Headnotes:*

Courts must be free from unlawful influence in the administration of justice, and judges must be free from any form of influence, pressure or interference in the performance of their duties. The relevant constitutional provisions must be understood in this way.

Constitutional Court judges who have stepped down from that office may take office as Supreme Court judges and are not subject to the requirement of having served fifteen years in judicial office.

#### *Summary:*

I. Fifty-four People's Deputies asked the Constitutional Court to recognise as unconstitutional separate provisions of the Law on the Judiciary and Status of Judges dated 7 July 2010 no. 2453-VI (hereinafter, the "Law").



According to Article 6.1 of the Law, courts must be free, when administering justice, from any unlawful influence. Under Article 47.1, judges must be free in their activities from any unlawful influence, pressure and interference. The applicants expressed concern that these provisions allowed interference, influence or pressure on the judiciary, in contravention of Articles 6, 8.2, 126.1, 126.2, 129.1 of the Constitution.

II. The Constitutional Court began by noting that safeguards of the independence of courts and independence and immunity of judges as bearers of the judicial power are set out in Articles 6, 126, 129 of the Constitution, according to which state power in Ukraine is exercised on the principles of its division into legislative, executive and judicial power; in the administration of justice, judges are independent and subject only to the law; influencing judges in any way is prohibited; judicial independence and immunity are guaranteed by the Constitution and the laws.

In item 2 of its Decision dated 1 December 2004 no. 19-rp/2004, a case concerning the independence of judges, the Constitutional Court took the view that the provisions of Article 126.2 of the Constitution, which prohibit the influencing of judges "in any manner", are to be understood as ensuring the independence of judges in the administration of justice and outlawing any actions, in any form, by state bodies, institutions and organizations, local government authorities, their officials and officers, individuals and legal persons, which may prevent judges from executing their professional duties or which may force them to adopt an unlawful decision.

The fact that Article 126.2 of the Constitution is not literally reflected in Articles 6.1 and 47.1 of the Law does not contravene the above provision of the Constitution, in which the legislator combined all possible ways of influence on judges by using the phrase "in any manner" which fully complies with the legal position of the Constitutional Court described above. Articles 6.1 and 47.1 simply concretise the forms of unacceptable influence on court in the administration of justice. The specified wording of the constitutional principle of independence of courts and judges in the Law does not diminish its sense since the norm is applied in connection with the provisions of Article 126.2 of the Constitution, taking account of the supremacy of the constitutional norms and principle of their direct effect.

The applicants had suggested that Articles 6.1 and 47.1, regarding the independence of judges from unlawful influence, might allow for the possibility of exerting legitimate influence. The Constitutional Court concluded that this argument was unfounded; Article 126.2 of the Constitution prohibits the influencing

of judges in any manner. It found that Articles 6.1 and 47.1 of the Law did not contravene the Constitution.

Under Article 39.2 of the Law, any person who has a record of serving as a judge no less than fifteen years or is a judge of the Constitutional Court may become a judge of the Supreme Court.

In the Constitutional Court's opinion, the qualification criteria defined by the Law complied with Article 127.5 of the Constitution according to which additional requirements for certain categories of judges in terms of professional experience, age and professional level are established by law.

The Constitutional Court took note of the legal position it had adopted in its Decision dated 5 April 2011 no. 3-rp/2011, a case on the term of service for taking office as judge in courts of appeal, higher specialised courts and the Supreme Court, to the effect that the establishment of additional qualification requirements relating to term of service for certain categories of judges does not deprive anyone who meets the requirements of access to the office of judge at courts of appeal, higher specialised courts and the Supreme Court. Such a regulation is in conformity with the provisions of Articles 21, 22, 24 of the Constitution (paragraph 6 item 4 of the motivation part).

Systematic analysis of the norms mentioned above shows that Article 39.2 of the Law does not envisage compatibility of offices of judges of the Constitutional Court at the Supreme Court, but expands the list of the grounds which give the right to hold judicial office in the highest judicial body in the system of courts of general jurisdiction. Under this provision, if the nominee for this position is a judge of the Constitutional Court who has terminated his or her authority in the court of the constitutional jurisdiction, he or she does not have to fulfil a requirement of a fifteen-year term of service as a judge in order to take office as a Supreme Court judge. This provision does not contravene Articles 127.2 and 149 of the Fundamental Law concerning the incompatibility of the office of a judge with other paid positions; the norm may not be interpreted in such a way as to allow a candidate to hold office simultaneously as a judge of the Supreme Court and the Constitutional Court.

Article 39.2 of the Law is accordingly in conformity with the Constitution.

*Languages:*

Ukrainian.



*Identification:* UKR-2011-2-009

**a)** Ukraine / **b)** Constitutional Court / **c)** / **d)** 12.07.2011 / **e)** 9-rp/2011 / **f)** The conformity with the Constitution of some provisions of the Law on the Judiciary and Status of Judges, the Criminal Procedural Code, the Commercial Procedural Code, the Civil Procedural Code, the Code of Administrative Proceedings (concerning the instance principle in the system of courts of general jurisdiction) / **g)** *Ophitsiynyi Visnyk Ukrainy* (Official Gazette), 6/2011 / **h)** CODICES (Ukrainian).

*Keywords of the systematic thesaurus:*

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

4.7.4 Institutions – Judicial bodies – **Organisation.**

*Keywords of the alphabetical index:*

Court, general jurisdiction / Court, instance.

*Headnotes:*

A question had arisen over the constitutional compliance of certain legislative provisions regarding the construction of the system of courts of general jurisdiction and the determination of localisation, territorial jurisdiction and status of court, and recognition of the instance principle within the Fundamental Law.

*Summary:*

I. Fifty-four People's Deputies and the Supreme Court asked the Constitutional Court to pronounce unconstitutional certain provisions of the Law on the Judiciary and Status of Judges dated 7 July 2010 no. 2453-VI (hereinafter, the "Law"), the Criminal Procedural Code, the Commercial Procedural Code, the Civil Procedural Code and the Code of Administrative Proceedings.

Under Articles 17.1 and 19.2 of the Law, which provisions are disputed, the system of courts of general jurisdiction is based on the principles of territory, specialisation and instance, the same principles also defining localisation, territorial jurisdiction and the court status. The applicants contended that the system of the judiciary established by the Law does not conform to the organisational legal principles of its construction as defined by the

Constitution, as the Fundamental Law does not envisage the instance principle.

II. The Constitutional Court noted in this context Article 125.1 of the Constitution, pursuant to which the national system of courts of general jurisdiction is formed in accordance with the territorial principle and the principle of specialisation.

In its Decision no. 20-rp/2003 dated 11 December 2003 (a case on the Court of Cassation), the Constitutional Court adopted the position that the construction of the system of courts of general jurisdiction is harmonised with the stages of jurisdiction and relevant forms of proceedings (particularly in appeal and cassation instances).

In that context, the Constitutional Court emphasised that the instance principle should be understood as an arrangement of the judicial system ensuring the right of higher instance courts to review decisions of lower instance courts.

Analysis of the provisions of Articles 125.2, 125.3, 125.4, 129.3.8 and 129.4 of the Constitution would indicate that it envisages not only the principles of territory and specialisation, but also the instance principle, in terms of the construction of the system of courts of general jurisdiction.

Parliament, by establishing this principle in the Law, acted on the grounds, within the limits of authority and in the manner envisaged by the Constitution and laws.

Articles 17.1 and 19.2 of the Law do not, therefore, contravene the provisions of Articles 8.2 and 125.1 of the Constitution.

*Languages:*

Ukrainian.



# United States of America Supreme Court

## Important decisions

*Identification:* USA-2011-2-003

**a)** United States of America / **b)** Supreme Court / **c)** / **d)** 23.06.2011 / **e)** 09-10876 / **f)** Bullcoming v. New Mexico / **g)** 131 *Supreme Court Reporter* 2705 (2011) / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

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

5.3.13.28 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to examine witnesses**.

*Keywords of the alphabetical index:*

Laboratory, analyst, testimony / Witness, cross-examination / Evidence, admissibility / Testimony, forensic.

*Headnotes:*

Accused persons in criminal proceedings have a constitutional right to be confronted with the witnesses against them.

A forensic laboratory report is testimonial evidence – a statement made in order to prove a fact at trial – for purposes of the constitutional right of an accused in a criminal prosecution to be confronted with the witnesses against her or him; therefore, absent a stipulation, the prosecution may not introduce such a report without offering a live witness competent to testify as to the truth of the statements in the report.

A statement will be testimonial, and therefore within the scope of the constitutional right of accused persons in criminal proceedings to be confronted with the witnesses against them, if it has the primary purpose of establishing or proving past events potentially relevant to later criminal prosecution; on the other hand, business and public records created not for this purpose are not testimonial.

If a statement made outside of court is testimonial in nature, it may be introduced at trial only if the witness who made the statement is unavailable and the accused has had a prior opportunity to confront that witness.

*Summary:*

I. Donald Bullcoming was convicted of the crime of driving while intoxicated in a criminal proceeding in a court of the state of New Mexico. During his trial, a laboratory report of his blood alcohol level was submitted by the prosecution and admitted into the evidentiary record. At the trial, a forensic analyst from the state laboratory testified about the testing device that had been employed and about the laboratory's testing procedures. This analyst was not the analyst who prepared the report.

Bullcoming appealed his conviction, claiming that the absence from the trial of the analyst who prepared the report violated his right under the Sixth Amendment to the U.S. Constitution to be confronted with the witnesses against him. The Sixth Amendment, which is made applicable to the States via the Fourteenth Amendment to the U.S. Constitution, states in its Confrontation Clause that "In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him." In making this appeal, Bullcoming cited the 2009 decision of the U.S. Supreme Court in *Melendez-Diaz v. Massachusetts*, in which the Court ruled that a forensic laboratory report, created specifically to serve as evidence in a criminal proceeding, fell within the scope of the Confrontation Clause. Therefore, the Court ruled in *Melendez-Diaz*, the prosecution may not absent a stipulation introduce such a report without offering a live witness to testify (and thereby be available for cross-examination) as to the truth of the report's statements.

In its decision on Bullcoming's appeal, the New Mexico Supreme Court ruled that the laboratory report fell within the scope of the Confrontation Clause, but that the report's admission into evidence did not violate the Clause because:

1. the analyst who had prepared the report had simply transcribed machine-generated test results; and
2. the analyst who testified at trial qualified as an expert witness with respect to the testing machine and the state laboratory's procedures.

The New Mexico Supreme Court affirmed Bullcoming's conviction.

II. The U.S. Supreme Court accepted review, and reversed the decision of the New Mexico Supreme Court. The Court ruled that the analyst who prepared the laboratory report had signed a certification regarding the report, and that under the *Melendez-Diaz* the report itself qualified as “testimonial” evidence – a statement made in order to prove a fact at trial. Accordingly, the Confrontation Clause requires that a testimonial statement made outside of court may not be introduced against the accused at trial unless the witness who made the statement is unavailable and the accused has had a prior opportunity to confront that witness. A statement will be testimonial, and therefore within the scope of the Confrontation Clause, if it has the primary purpose of establishing or proving past events potentially relevant to later criminal prosecution; on the other hand, business and public records created not for this purpose, but instead for the purpose of administering an entity’s affairs, are not testimonial.

The Court also rejected the New Mexico Supreme Court’s reasons for denying Bullcoming’s appeal. It said that the analyst’s report was more than simply a machine-generated number, citing facts such as the report’s statement that the analyst received the blood sample in question intact with the seal unbroken, and that the numbers of the forensic report and the sample number matched. The Court said that such representations, relating to past events and human actions not revealed in machine-produced data, are amenable to cross-examination. As to the status of the analyst who testified, the Court noted that his testimony could not convey what the reporting analyst knew or observed about any of the events he certified, nor expose any lapses or inaccuracies on the reporting analyst’s part.

In reversing the decision of the New Mexico Supreme Court, the Court noted that it had not addressed a question that the New Mexico court also had not addressed: whether the Confrontation Clause error in this case was harmless. The U.S. Supreme Court noted in its opinion that nothing in its decision would stand in the way of a harmless-error inquiry in the New Mexico courts.

III. The Court’s judgment was adopted by a 5-4 vote. Justice Sotomayor wrote a separate opinion, concurring in part. The opinion of the four dissenting Justices was filed by Justice Kennedy. As he did in his dissenting opinion in the *Melendez-Diaz* decision, Justice Kennedy argued that scientific evidence should be treated differently from statements such as those by witnesses to a crime, and that the Court’s decision would as a practical matter subject both State and Federal laboratory analysts to a “crushing burden” of having to testify in numerous proceedings.

#### Cross-references:

- *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009), *Bulletin* 2009/2 [USA-2009-2-005].

#### Languages:

English.



#### Identification: USA-2011-2-004

**a)** United States of America / **b)** Supreme Court / **c)** / **d)** 27.06.2011 / **e)** 08-1448 / **f)** *Brown v. Entertainment Merchants Association et al.* / **g)** 131 *Supreme Court Reporter* 2729 (2011) / **h)** CODICES (English).

#### Keywords of the systematic thesaurus:

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

#### Keywords of the alphabetical index:

Restriction, overinclusive / Strict scrutiny analysis / Restriction, underinclusive / Videogame, violent content.

#### Headnotes:

Video games qualify for constitutional protection of speech: they communicate ideas through familiar literary devices and through features distinctive to the medium.

Although the constitutional protection of free speech exists principally to protect discourse on public matters, it also extends to entertainment; it is difficult to distinguish politics from entertainment, and dangerous to try.

Under the Constitution, esthetic and moral judgments about art and literature are for the individual to make, not for the government to decree, even with the mandate or approval of a majority.

Whatever the challenges of applying the Constitution to ever-advancing technology, the basic principles of freedom of speech do not vary when a new and different medium for communication appears.

A restriction on the content of protected speech will be constitutionally invalid unless its proponent can demonstrate that it is justified by a compelling government interest and is narrowly drawn to serve that interest.

As a general matter, the government lacks power to restrict expression because of its content, although historically the Constitution has permitted prevention and punishment of content in a few well-defined and narrowly limited categories such as obscenity, incitement, and fighting words.

Speech about violence is not part of the obscenity category that is outside constitutional protection.

The obscenity exception to constitutionally-protected content does not cover whatever a legislature finds shocking, but only certain depictions of sexual conduct.

The First Amendment does not permit creation of new categories of unprotected speech simply as the result of a balancing test that weighs the value of a particular category of speech against its social costs and then punishes that category of speech if it fails the test; instead, only if persuasive evidence exists that a novel restriction on content is part of a long (if heretofore unrecognised) tradition of proscription, may a legislature revise the constitutional principle that the benefits of its restrictions on government outweigh the costs.

Crudely violent video games, even if not of any recognisable value to society, are as much entitled to the protection of free speech as the best of literature and a restriction upon them must survive a strict scrutiny test that requires that the restriction be justified by a compelling government interest and be narrowly drawn to serve that interest.

Minors are entitled to a significant measure of constitutional protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them.

### *Summary:*

I. A law of the State of California, enacted in 2005, prohibited the sale or rental of violent video games to minors (people under the age of 18). The law defined the types of video games falling within its scope by referring to their content: for example, video games in

which the “range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being”. Violation of the law was punishable by a civil fine of up to one thousand U.S. dollars.

A group of plaintiffs, representing the video-game and software industries, challenged the constitutionality of the law in federal court. They claimed that the law violated the First Amendment to the U.S. Constitution, which states in relevant part that “Congress shall make no law...abridging the freedom of speech...” The First Amendment is made applicable to the states by means of the Due Process Clause in the Fourteenth Amendment to the U.S. Constitution. The U.S. District Court ruled that the law violated the First Amendment and issued a permanent injunction against its enforcement. The Court of Appeals affirmed that decision.

II. The U.S. Supreme Court agreed to review the Court of Appeals decision, and affirmed it. In so doing, the Court concluded that video games are a form of speech that is protected by the First Amendment. Like books, plays, and movies, they communicate ideas through familiar literary devices and features distinctive to the medium. In arriving at this conclusion, the Court rejected the argument that the violent content of some video games qualified as obscenity, a category that is outside the First Amendment’s protection. Obscenity, according to the Court, does not include whatever type of content a legislature finds shocking, but instead only certain depictions of sexual conduct. The Court also rejected California’s invitation to recognise a new category of speech – violent content directed at children – which, like the existing categories of obscenity, incitement to violence, and “fighting words”, do not qualify for First Amendment protection. In this regard, the Court stated that the existing categories had a long historical basis, and that in contrast the First Amendment does not permit creation of new categories of unprotected speech simply as the result of a balancing test that weighs the value of a particular category of speech against its social costs.

Because video games are protected speech, the Court stated that strict scrutiny analysis must be applied to any governmental restrictions applied to them. Under strict scrutiny, the proponent of a restriction must show that it is justified by a compelling government interest and is narrowly drawn to serve that interest. The California law, the Court concluded, could not survive this stringent test. The Court concluded that psychological studies, upon which California relied, did not prove that exposure to violent video games causes minors to act aggressively. The Court also pointed out that a

voluntary rating system adopted by the video-game industry accomplished the law's goals to a large extent. In addition, the Court concluded that the law was underinclusive because it did not seek to restrict other media which contain violent content, and overinclusive because not all children who were prohibited from purchasing violent video games had parents who disapproved of their doing so.

III. The Court's judgment was adopted by a 7-2 vote. Justice Alito, joined by Chief Justice Roberts, authored a separate concurring opinion that argued for invalidation of the law on the grounds of vagueness, and Justices Thomas and Breyer wrote separate dissenting opinions.

#### *Languages:*

English.



#### *Identification:* USA-2011-2-005

**a)** United States of America / **b)** Supreme Court / **c)** / **d)** 27.06.2011 / **e)** 10-76 / **f)** Goodyear Dunlop Tires Operations v. Brown / **g)** 131 *Supreme Court Reporter* 2846 (2011) / **h)** CODICES (English).

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

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

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

Jurisdiction, due process / Jurisdiction, personal / Justice, substantial / Stream of commerce, doctrine.

#### *Headnotes:*

A court's assertion of jurisdiction exposes a defendant to the state's coercive power, and therefore is subject to review for compatibility with constitutional due process protections.

Constitutional due process protections require that a judicial forum's assertion of jurisdiction over a person

located outside the forum must comply with traditional notions of fair play and substantial justice.

A court may exercise personal jurisdiction over an out-of-state defendant if the defendant has certain minimum contacts with the forum such that the lawsuit does not offend traditional notions of fair play and substantial justice.

Unless an out-of-state corporation's activity in the forum state is continuous and systematic and gives rise to the particular cause of action, or the commission of single or occasional acts within the forum state make a corporation answerable with respect to those particular acts, the mere fact that consumers made purchases of the corporation's products in the forum state is not in itself sufficient to warrant the state's assertion of jurisdiction.

#### *Summary:*

I. The parents of two 13-year old boys who died in a bus accident in France filed a lawsuit for wrongful death in state court in the state of North Carolina, alleging that a tire on the bus was defective. The complaint alleged negligence in the design, construction, testing, and inspection of the tire, which was manufactured in Turkey. It named as defendants the parent tire manufacturing corporation (Goodyear USA, incorporated in the State of Ohio) and three of its subsidiaries, incorporated in France, Luxembourg, and Turkey. The subsidiaries manufactured tires primarily for sale in European and Asian markets, although a small percentage were distributed in North Carolina by other Goodyear USA affiliates.

The defendant subsidiaries asked the North Carolina trial court to dismiss the complaint against them for lack of personal jurisdiction. The trial court denied this motion, and the Court of Appeals of North Carolina affirmed that decision.

II. The U.S. Supreme Court accepted review, and reversed the judgment of the North Carolina Court of Appeals on the grounds that North Carolina's assertion of personal jurisdiction was not consistent with the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. The Fourteenth Amendment states in relevant part that no State shall "deprive any person of life, liberty, or property, without due process of law."

Under the U.S. Supreme Court's due process jurisprudence, which is grounded in the Court's 1945 decision in *International Shoe Company v. Washington*, a State may assert jurisdiction over an out-of-state defendant if the defendant has certain minimum contacts with the State such that the lawsuit

does not offend “traditional notions of fair play and substantial justice.” Since the *International Shoe* decision, the Court has classified cases involving out-of-state corporate defendants into assertions of “general” (or all-purpose) and “specific” (or case-specific) jurisdiction. General jurisdiction encompasses situations where a corporation’s operations within a state are so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities. Specific jurisdiction, on the other hand, entails circumstances where a corporation’s in-state activity is continuous and systematic and gives rise to the particular cause of action, or where the commission of single or occasional acts within the State make a corporation answerable with respect to those acts. In general, assertions of general jurisdiction have been recognised much more rarely than those of specific jurisdiction. According to the Court’s opinion, the Court has determined that the requirements for general jurisdiction were satisfied in only two decisions after *International Shoe: Perkins v. Benguet Consolidated Mining Company* and *Helicopteros Nacionales de Colombia, S.A. v. Hall*.

In the instant case, the subsidiaries had not engaged in conduct that would form a basis for the assertion of specific jurisdiction. After analysis of North Carolina’s basis for the assertion of general jurisdiction, grounded in the argument that the subsidiaries had placed their tires in the “stream of commerce”, the Court concluded that North Carolina could not serve as a forum in which the Fourteenth Amendment would permit subjecting the subsidiaries to general jurisdiction. The Court concluded that the subsidiaries’ “attenuated connections” to North Carolina fell far short of the continuous and systematic contacts necessary to allow adjudication of claims unrelated to anything that connected them to the State.

The Court’s judgment was adopted unanimously in a 9-0 vote.

#### Cross-references:

- *International Shoe Company v. Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945);
- *Perkins v. Benguet Consolidated Mining Company*, 342 U.S. 437, 72 S. Ct. 413, 96 L. Ed. 485 (1952);
- *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984).

#### Languages:

English.



#### Identification: USA-2011-2-006

**a)** United States of America / **b)** Supreme Court / **c)** / **d)** 27.06.2011 / **e)** 10-238 and 10/239 / **f)** Arizona Free Enterprise Club’s Freedom Club PAC, *et al. v. Bennett* / **g)** 131 *Supreme Court Reporter* 2806 (2011) / **h)** CODICES (English).

#### Keywords of the systematic thesaurus:

2.3 Sources – **Techniques of review.**  
 3.18 General Principles – **General interest.**  
 4.9.8.2 Institutions – Elections and instruments of direct democracy – Electoral campaign and campaign material – **Campaign expenses.**  
 5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression.**

#### Keywords of the alphabetical index:

Election campaign, financing, public / Election, campaign for public office, financing, private / Strict scrutiny analysis.

#### Headnotes:

The expenditure of funds for political campaign communications is speech protected by constitutional freedom of speech guarantees.

A governmental regulation that burdens political speech will be constitutionally invalid under strict scrutiny analysis unless its proponent can demonstrate that it is justified by a compelling government interest and is narrowly drawn to achieve that interest.

Governmental systems that provide matching funds for the campaigns of publicly-financed candidates will be constitutionally invalid if they inhibit robust and wide-open political debate without sufficient justification.

Government does not have a compelling interest in levelling electoral opportunities among candidates for public office.

Independent expenditures in political campaigns do not give rise to corruption or the appearance of corruption because such expenditures are not coordinated with particular candidates.

*Summary:*

I. A 1998 law of the State of Arizona, the Arizona Citizens Clean Election Act (hereinafter, "ACCEA"), established a system of public financing for the funding of election campaigns of candidates for state offices. Candidates who chose to participate received initial grants of public funds to conduct their campaigns, so long as they agreed to accept certain restrictions and obligations. Such a candidate also would be eligible for additional matching public funds if the expenditures of a competing privately-financed candidate, combined with the expenditures of independent groups supporting that candidate or opposing the publicly-financed candidate, exceeded the publicly-financed candidate's initial grant. In such circumstances, a publicly-financed candidate would receive approximately one dollar for every dollar raised or spent by the privately-financed opponent and approximately one dollar for every dollar spent by an independent group supporting the privately-financed candidate.

A group of plaintiffs, comprised of past and future Arizona state office candidates and two independent expenditure groups that spend money supporting and opposing Arizona candidates, challenged the constitutionality of the law's matching funds provisions in federal court. They claimed that those provisions violated their rights under the First Amendment to the U.S. Constitution, which states in relevant part that "Congress shall make no law...abridging the freedom of speech...", by penalising their speech and burdening their ability to exercise fully their rights. The First Amendment is made applicable to the states by means of the Due Process Clause in the Fourteenth Amendment to the U.S. Constitution. The U.S. District Court ruled in the plaintiffs' favour and issued a permanent injunction against their enforcement. The Court of Appeals reversed that decision, ruling that the matching funds provisions imposed only a minimal burden and that Arizona's interest in reducing political corruption justified the imposition of that burden.

II. The U.S. Supreme Court agreed to review the Court of Appeals decision, and reversed it. The Court concluded that the matching funds provisions in the ACCEA substantially burdened political speech and were not sufficiently justified by a compelling state interest to survive strict scrutiny analysis under the First Amendment. According to the Court, political campaign expenditures are a form of expression protected under the First Amendment, and speech uttered during a campaign for political office lies at the core of First Amendment protections. Although the ACCEA provisions in question did not directly limit campaign expenditures of candidates and independent groups, the Court determined that they placed a heavy burden on candidates and independent groups by forcing them

to choose between engaging in unfettered speech or limiting their expenditures in order to avoid giving their opponents fund-raising advantages. In this regard, the Court concluded that its approach was largely controlled by the logic of the Court's 2008 decision in *Davis v. Federal Election Commission*. In the *Davis* decision, the Court invalidated under the First Amendment a federal law that increased the limit on campaign contributions for candidates whose opponents had spent more of their personal funds on their campaigns than a specific spending cap. In both the law at issue in *Davis* and the ACCEA, the Court observed, the challenged provisions imposed an impermissible penalty on candidates who sought to exercise robustly their First Amendment rights.

Having determined that the ACCEA provisions substantially burdened political speech, the Court then concluded that the law could not survive strict First Amendment scrutiny because it was not sufficiently justified by a compelling governmental interest. Under strict scrutiny analysis, which a court must apply when a governmental act burdens political speech, the restriction will be upheld only if the government proves that it furthers a compelling interest and is narrowly tailored to achieve that interest. In this regard, the Court stated, as it also has done in past decisions, that the government does not have a justifiable compelling interest in "levelling the playing field" in the area of campaign funding. The levelling of electoral opportunities, the Court noted, would entail the making and implementation of governmental judgments about the strengths that should be permitted to contribute to the outcome of an election. Such activity, the Court concluded, would be dangerous and cannot justify burdening protected speech. The Court also rejected another purported justification for the ACCEA provisions – the prevention of corruption – by pointing out that the provisions included candidates' expenditures of their own funds, and also the fact that independent groups' expenditures are not coordinated with particular candidates.

The Court's opinion pointed out that governments as a general matter may engage in public financing of election campaigns and in doing so may advance significant governmental interests. However, any such public financing system must be pursued in a manner that is consistent with the First Amendment.

III. The Court's judgment was adopted by a 5-4 vote. The views of the four dissenting Justices were set forth in an opinion filed by Justice Kagan.

The case of *McComish v. Bennett* (no. 10-239) was consolidated with *Arizona Free Enterprise Club's Freedom Club PAC, et al. v. Bennett* because both presented challenges to the same Arizona legislation.



*Cross-references:*

- *Davis v. Federal Election Commission*, 554 U.S. 724, 128 S. Ct. 2759, 171 L. Ed. 2d 737 (2008).

*Languages:*

English.

*Identification: USA-2011-2-007*

**a)** United States of America / **b)** Supreme Court / **c)** / **d)** 27.06.2011 / **e)** 09-1343 / **f)** J. McIntyre Machinery, Ltd. v. Brown / **g)** 131 *Supreme Court Reporter* 2780 (2011) / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

1.5.5.1 Constitutional Justice – Decisions – Individual opinions of members – **Concurring opinions**.  
 4.7.1 Institutions – Judicial bodies – **Jurisdiction**.  
 5.3.13.1.2 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Civil proceedings**.

*Keywords of the alphabetical index:*

Jurisdiction, due process / Jurisdiction, personal / Justice, substantial / Concurring opinion, plurality, controlling precedent / Stream of commerce, doctrine.

*Headnotes:*

A court's assertion of jurisdiction exposes a defendant to the state's coercive power, and therefore is subject to review for compatibility with constitutional due process protections.

Constitutional due process protections require that a judicial forum's assertion of jurisdiction over a person located outside the forum must comply with traditional notions of fair play and substantial justice.

A court may exercise personal jurisdiction over an out-of-state defendant if the defendant has certain minimum contacts with the forum such that the lawsuit does not offend traditional notions of fair play and substantial justice.

*Summary:*

I. In a products liability lawsuit, plaintiff Robert Nicaastro filed a complaint in state court in the State of New Jersey against J. McIntyre Machinery, Ltd., a manufacturer incorporated in the United Kingdom. Nicaastro had seriously injured his hand while using a machine manufactured in the United Kingdom by J. McIntyre.

In the New Jersey trial court, J. McIntyre sought dismissal of the complaint on the grounds of a lack of personal jurisdiction. The trial court granted this motion, but the Appellate Division of the State of New Jersey reversed the trial court decision. The Supreme Court of New Jersey affirmed the Appellate Division's decision.

II. The U.S. Supreme Court accepted review, and reversed the judgment of the New Jersey Supreme Court on the grounds that New Jersey's assertion of personal jurisdiction was not consistent with the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. The Fourteenth Amendment states in relevant part that no State shall "deprive any person of life, liberty, or property, without due process of law."

Under the U.S. Supreme Court's due process jurisprudence, which is grounded in the Court's 1945 decision in *International Shoe Company v. Washington*, a State may assert jurisdiction over an out-of-state defendant if the defendant has certain minimum contacts with the State such that the lawsuit does not offend "traditional notions of fair play and substantial justice." In the New Jersey Supreme Court's decision in the instant case, that court determined in part that New Jersey could exercise jurisdiction pursuant to the "stream of commerce" doctrine of jurisdiction, under which jurisdiction over a foreign manufacturer is permissible under constitutional due process if the manufacturer knows or reasonably should know that its products are distributed through a nationwide distribution system that might lead to those products being sold in any one of the fifty states. The "stream of commerce" doctrine was articulated by the U.S. Supreme Court in its 1987 decision in *Asahi Metal Industry Company v. Superior Court of California, Solano County*. Applying the stream of commerce test, the New Jersey Supreme Court in the instant case concluded that J. McIntyre was subject to personal jurisdiction in New Jersey even though it never had advertised in, sent products to, or in any relevant sense targeted New Jersey.

III. Although the U.S. Supreme Court ruled that the New Jersey Supreme Court decision must be reversed, the Court's decision was rendered without a majority (five-Justice) opinion because of differences among the Justices as to the grounds for the Court's decision.

Instead, the Court issued a plurality opinion that announced the Court's judgment and also a separate concurring opinion (authored by Justice Breyer). While the Court's plurality opinion viewed the *Asahi* decision as imprecise and in need of clarification, Justice Breyer's concurring opinion stated that the case could be resolved by strict adherence to the Court's precedents (including *Asahi*) and a determination that the New Jersey Supreme Court simply had erred in its application of those precedents to the facts. Under the Court's practice, in such circumstances the narrowest concurring opinion – here, Justice Breyer's – operates as the controlling precedent.

Justice Kennedy announced the judgment of the Court and filed the plurality opinion, in which Chief Justice Roberts and Justices Scalia and Thomas joined. Justice Breyer filed the separate concurring opinion, in which Justice Alito joined. Justice Ginsburg filed a dissenting opinion, in which Justices Sotomayor and Kagan joined.

#### Cross-references:

- *International Shoe Company v. Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945);
- *Asahi Metal Industry Company v. Superior Court of California, Solano County*, 480 U.S. 102, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987).

#### Languages:

English.



## Inter-American Court of Human Rights

### Important decisions

*Identification:* IAC-2011-2-001

**a)** Organisation of American States / **b)** Inter-American Court of Human Rights / **c)** / **d)** 30.08.2010 / **e)** Series C 215 / **f)** Fernandez Ortega et al. v. Mexico / **g)** / **h)** CODICES (English, Spanish).

*Keywords of the systematic thesaurus:*

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

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

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

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

*Keywords of the alphabetical index:*

Integrity, physical, right / Investigation, effective, requirement / Obligation, positive, State / Treatment or punishment, cruel and unusual / Torture / Truth, right to know.

*Headnotes:*

Violence against women is a manifestation of the historically unequal power relations between women and men that pervades every sector of society and strikes at its very foundation. Rape is a paradigmatic form of violence against women, and its consequences go far beyond affecting the direct victim.

As with torture, rape may have the objective of intimidating, degrading, humiliating, punishing, or controlling the victim. The objective and subjective elements that classify an act as torture relate to the severity of the suffering and to the intent to commit and the purpose of the act.

The concept of “private life” includes sexual life and the right to establish and develop relationships. Rape is an intrusion into a person’s sexual life, and annuls one’s right to decide freely with whom to have intimate relations, causing the victim to lose total control over these most personal and intimate decisions, and over his or her basic bodily functions.

The entrance of State agents into a person’s residence without documented legal authorisation to do so and without consent constitutes an arbitrary and abusive interference into the family residence and a violation of the right to privacy.

Conduct that entails human rights violations, such as rape, cannot be tried under the military justice system, even if committed by military personnel.

In cases of violence against women, the general obligations established in the American Convention on Human Rights are complemented and enhanced by the specific obligations arising for States parties under the Convention on the Prevention, Punishment and Eradication of Violence Against Women (“*Convention of Belém do Pará*”). Article 7.b of this latter Convention specifically obliges States parties to apply due diligence to prevent, punish, and eradicate violence against women, taking into account the State’s obligation to eliminate it and to ensure that victims trust State institutions established for their protection.

Among other requirements, in the course of a criminal investigation for rape:

- i. the victim’s statement should be taken in a safe, private, and comfortable environment;
- ii. the victim’s statement should be recorded so as to limit the need for repetition;
- iii. the victim should be provided with medical and psychological treatment under a protocol for such attention aimed at reducing the consequences of the rape;
- iv. an immediate medical and psychological examination should be carried out by trained personnel of the sex preferred by the victim, if possible, and the victim should be informed that she can be accompanied by a trusted person;
- v. an immediate examination of the scene of the crime must be carried out and investigative measures should be coordinated and documented; evidence should be handled with care and in such a way that guarantees its chain of custody, and must include sufficient samples and all possible tests to determine the perpetrator of the act; and
- vi. the victim must have access to free legal assistance at all stages of proceedings.

The right to access to justice without discrimination includes the right of rape victims to be able to file complaints and obtain information in their own languages.

Rape necessarily entails severe suffering for victims, who face complex consequences of a psychological and social nature.

Rape is an offense that generally takes place in the absence of persons other than the victim and the aggressor. Thus, the victim’s testimony becomes fundamental. It is not unusual that retellings of traumatic acts of this nature be imprecise.

### Summary:

I. The events in this case occurred in a context of violence by law enforcement and military personnel against women. In March 2002, Inés Fernández Ortega, of the Me’paa indigenous community, was at home with her children when a group of approximately eleven soldiers approached her house. Three of them entered and requested information on her husband. When she did not respond, one of the soldiers raped her while the other two watched. Ms Fernández Ortega’s children ran to their grandparents’ house just before the rape. Once Ms Fernández Ortega denounced these events, a preliminary investigation was initiated before a civilian criminal court, but the case was transferred to the military courts when it was established that military personnel could have been involved. Ms Fernández Ortega attempted to challenge this transfer, but was unsuccessful. The investigations remain at a preliminary stage.

The Inter-American Commission on Human Rights filed an application against the State of Mexico in May 2009 alleging violations of Article 5 ACHR (Right to Personal Integrity), Article 8 ACHR (Right to Judicial Guarantees) and Article 25 ACHR (Right to Judicial Protection), in relation to the general obligation to respect and ensure human rights established in Article 1.1 thereof, to the detriment of Ms Fernández Ortega and several members of her family. In addition, the Commission alleged the violation of Article 11 ACHR (Right to Honour and Dignity), in relation to Article 1.1 thereof, and of Article 7 of the Convention of Belém do Pará, to the detriment of Ms Fernández Ortega. Last, the Commission alleged that the State had failed to comply with its obligations under Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture (“Convention Against Torture”).

The representatives generally agreed with the Commission, but also alleged the State's failure to comply with the obligation established in Article 2 ACHR (Domestic Legal Effects) to adopt domestic legislative measures, as well as the violation of Articles 16 ACHR (Freedom of Association) and Article 24 ACHR (Equal Protection under the law).

The State acknowledged its responsibility for the violation of Articles 8.1 and 25 ACHR.

II. In its judgment, the Court found that the State violated Articles 5.2, 11.1 and 11.2 ACHR, in relation to Article 1.1 thereof, Articles 1, 2 and 6 of the Convention Against Torture, and Article 7.a of the Convention of Belém do Pará to the detriment of Ms Fernández Ortega because the acts of the military personnel were carried out intentionally, caused her severe suffering, and had the purpose of punishing her for her failure to provide information; because the rape affected essential aspects of her private life, was an intrusion into her sexual life, and nullified her right to decide freely with whom to have intimate relations, causing her to lose control over this most personal and intimate of decisions and over her basic bodily functions; and because this was gender-based violence. The Court also found that the State violated Article 5.1 ACHR, in relation to Article 1.1 thereof, to the detriment of Ms Fernández Ortega, due to the suffering arising from the treatment she received from authorities while filing a claim and the feelings of deep fear and powerlessness she felt due to the military presence and inability to obtain justice; and to the detriment of her next of kin, due to the fear and frustrations suffered an account of the rape and unsuccessful attempts at obtaining justice, and to the resulting affectations to their family relations.

Furthermore, the Court found that the State violated Article 11.2 ACHR to the detriment of Ms Fernández Ortega and her nuclear family because soldiers entered their home without documented legal authorisation to do so and without consent.

Additionally, the Court found that the State had violated the rights established in Articles 8.1 and 25.1 ACHR to the detriment of Ms Fernández Ortega because it initiated investigations into her rape under the military jurisdiction, which should never decide upon the human rights of a civilian. Because the assignment of the case was based on a legal provision that did not limit military jurisdiction to crimes strictly related to military functions, the Court also found a related violation to Article 2 ACHR.

Moreover, the Court declared that the State violated Article 25.1 ACHR because the *amparo* (constitutional) recourse Ms Fernández Ortega filed in order

to contest the military jurisdiction were ineffective in guaranteeing her rights to the truth and to justice. It also declared that the State violated Articles 8.1 and 25 ACHR and that it did not comply with its obligations under Article 7.b of the Convention of Belém do Pará because a prosecutorial official initially refused to receive Ms Fernández Ortega's complaint, requiring another official to ensure that the first fulfilled his legal obligations; her declaration was not taken under minimum conditions of care and privacy; she was forced to repeat her declaration several times despite the revictimisation this could induce; there were undue delays in the taking of evidence at the scene of the crime; medical evidence obtained from the victim was mishandled; the State did not endeavour to take other forms of evidence; there were undue delays in the processing of her case; she did not receive adequate psychological and medical attention; and medical and prosecuting authorities did not use an action protocol for this type of case. In addition, the State failed to comply with the obligation to guarantee, without discrimination, the right to access to justice because Ms Fernández Ortega was not able to file a complaint and receive information in her indigenous language, but was forced to ask someone she knew to serve as an interpreter.

However, the Court did not find a violation of Article 16 ACHR, as the representatives' allegations were based on facts that were not alleged in the Commission's application. Nor did it find a violation of Article 24 ACHR, as this provision prohibits unequal protection sanctioned in domestic law.

Accordingly, the Court ordered the State to pay damages and costs; carry out investigations and, if applicable, initiate criminal proceedings under the ordinary court system; examine the conduct of the prosecutorial official that initially refused to take Ms Fernández Ortega's complaint; amend the Military Code of Justice; create an effective remedy for the purpose of challenging the military jurisdiction; carry out a public act of acknowledgement of international responsibility; publicise the Judgment with Ms Fernández Ortega's consent; provide medical and psychological care to the victims; continue with the creation of a standardised action protocol for the investigation of sexual abuse; continue implementing permanent training programs on the diligent investigation of cases of sexual abuse that include an ethnicity perspective; implement an obligatory human rights training program for the armed forces; and provide educational scholarships to Ms Fernández Ortega's children.

Additionally, in order to allow Ms Fernández Ortega to reincorporate herself into her community, the State

was ordered to provide the resources necessary for the women of the Me'paa indigenous community of Barranca Tecoani to be able to establish a women's centre in which educational activities are held on human and women's rights. Finally, because Barranca Tecoani does not have a middle school, thirty girls from that community must currently work as domestic servants without pay, for up to twelve hours a day, in order to be able to live and study in *Ayutla de los Libres*, which has a middle school but is located far from their homes. Therefore, the Court ordered the State to adopt measures so that the girls of the community of Barranca Tecoani that currently carry out their middle school studies in the city of *Ayutla de los Libres* are provided with housing and a proper diet, in order for them to continue receiving an education at the institutions they attend. The Court also indicated that this measure could be complied with through the establishment of a middle school in Barranca Tecoani.

III. *Ad Hoc* Judge Alejandro Carlos Espinosa rendered a concurring opinion.

#### *Cross-references:*

- *Rosendo Cantú et al. v. Mexico*, Series C 216, 31.08.2010.

#### *Languages:*

Spanish, English.



## European Court of Human Rights

### Important decisions

*Identification:* ECH-2011-2-001

**a)** Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 07.07.2011 / **e)** 23459/03 / **f)** *Bayatyan v. Armenia* / **g)** *Reports of Judgments and Decisions* / **h)** CODICES (English, French).

*Keywords of the systematic thesaurus:*

5.3.18 Fundamental Rights – Civil and political rights – **Freedom of conscience.**

*Keywords of the alphabetical index:*

Conscientious objection / Army, military service, compulsory nature / Civilian service.

*Headnotes:*

Opposition to military service motivated by a serious and insurmountable conflict between the obligation to serve in the army and an individual's conscience or deeply and genuinely held religious or other beliefs constitutes a conviction or belief of sufficient cogency, seriousness, cohesion and importance to attract the guarantees of Article 9 ECHR.

A system which imposes on citizens an obligation which has potentially serious implications – in particular criminal sanctions – for conscientious objectors while failing to allow any conscience-based exceptions and penalising those who refuse to perform military service fails to strike a fair balance between the interests of society as a whole and those of the individual.

*Summary:*

The applicant, a Jehovah's Witness who had been declared fit for military service, informed the authorities that he refused to serve in the military on conscientious grounds but was ready to carry out alternative civil service. When summoned to commence his military

service in May 2001 he failed to report for duty and temporarily left his home for fear of being forcibly taken to the military. He was charged with draft evasion and in 2002 was sentenced to two and a half years' imprisonment. He was released on parole after serving about ten and a half months of his sentence. At the material time in Armenia there was no law offering alternative civil service for conscientious objectors.

The applicant alleged, *inter alia*, that his conviction for refusal to serve in the army had violated his right to freedom of thought, conscience and religion under Article 9 ECHR.

This was the first case in which the Court had examined the issue of the applicability of Article 9 ECHR to conscientious objectors. Previously, the European Commission of Human Rights had in a series of decisions refused to apply that provision to such persons, on the grounds that, since Article 4.3.b ECHR excluded from the notion of forced labour "any service of a military character or, in cases of conscientious objectors, in countries where they are recognised, service exacted instead of compulsory military service", the choice whether or not to recognise conscientious objectors had been left to the Contracting Parties. The question was therefore excluded from the scope of Article 9 ECHR, which could not be read as guaranteeing freedom from prosecution for refusing to serve in the army. However, that interpretation of Article 9 ECHR was a reflection of ideas that prevailed at that time. Since then, important developments had taken place both on the international level and in the domestic legal systems of Council of Europe member States. By the time of the alleged interference with the applicant's Article 9 ECHR rights in 2002-2003, there was virtually a consensus among the member States, the overwhelming majority of which had already recognised the right to conscientious objection. After the applicant's release from prison, Armenia had recognised that right also. The United Nations Human Rights Committee considered that the right to conscientious objection could be derived from Article 18 of the International Covenant on Civil and Political Rights and Article 9 of the Charter of Fundamental Rights of the European Union explicitly stated that the right to conscientious objection was recognised in accordance with the national law governing its exercise. Moreover, the Parliamentary Assembly of the Council of Europe and the Committee of Ministers had on several occasions called on the member States which had not yet done so to recognise the right to conscientious objection and this had eventually become a pre-condition for admission of new member States into the Organisation. In the light of the foregoing and of the "living instrument" doctrine, a shift in the interpretation of

Article 9 ECHR was necessary and foreseeable and that provision could no longer be interpreted in conjunction with Article 4.3.b ECHR. In any event, it transpired from the travaux préparatoires on Article 4 ECHR that the sole purpose of subparagraph 3.b was to provide further elucidation of the notion "forced or compulsory labour", which neither recognised nor excluded a right to conscientious objection. It should therefore not have a delimiting effect on the rights guaranteed by Article 9 ECHR.

Accordingly, although Article 9 ECHR did not explicitly refer to a right to conscientious objection, opposition to military service motivated by a serious and insurmountable conflict between the obligation to serve in the army and an individual's conscience or deeply and genuinely held religious or other beliefs constituted a conviction or belief of sufficient cogency, seriousness, cohesion and importance to attract the guarantees of Article 9 ECHR. This being the situation of the applicant, Article 9 ECHR was applicable to his case.

The applicant's failure to report for military service had been a manifestation of his religious beliefs and his conviction therefore amounted to an interference with his freedom to manifest his religion. Leaving open the questions whether the interference had been prescribed by law or whether it pursued a legitimate aim, the Court went on to examine the margin of appreciation afforded to the respondent State in the applicant's case. Given that almost all Council of Europe member States had introduced alternatives to military service, any State which had not done so enjoyed only a limited margin of appreciation and had to demonstrate that any interference corresponded to a "pressing social need". At the material time, however, the existing system in Armenia imposed on citizens an obligation which had potentially serious implications for conscientious objectors while failing to allow any conscience-based exceptions and penalising those who, like the applicant, refused to perform military service. Such a system therefore failed to strike a fair balance between the interests of society as a whole and those of the individual. The imposition of a criminal sanction on the applicant, where no allowances were made for the exigencies of his religious beliefs, could not be considered a measure necessary in a democratic society. Furthermore, the applicant's prosecution and conviction had occurred after the Armenian authorities had officially pledged, upon acceding to the Council of Europe, to introduce alternative service within a specific period and they had done so less than a year after the applicant's conviction. In these circumstances, the applicant's conviction, which had been in direct conflict with the official policy of reform and legislative changes in

pursuance of Armenia's international commitment, could not be said to have been prompted by a pressing social need. There had therefore been a violation of Article 9 ECHR.

#### Cross-references:

- *Grandrath v. the Federal Republic of Germany*, no. 2299/64, Commission report of 12.12.1966, Yearbook, vol. 10, 626;
- *X. v. Austria*, no. 5591/72, Commission decision of 02.04.1973, Collection 43, 161;
- *Conscientious objectors v. Denmark*, no. 7565/76, Commission decision of 07.03.1977, *Decisions and Reports (DR)* 9, 117;
- *X. v. the Federal Republic of Germany*, no. 7705/76, Commission decision of 05.07.1977, *Decisions and Reports (DR)* 9, 196;
- *Tyrer v. the United Kingdom*, 25.04.1978, Series A, no. 26;
- *Campbell and Cosans v. the United Kingdom*, 25.02.1982, Series A, no. 48;
- *C. v. the United Kingdom*, no. 10358/83, Commission decision of 15.12.1983, *Decisions and Reports (DR)* 37, 142;
- *A. v. Switzerland*, no. 10640/83, Commission decision of 09.05.1984, *Decisions and Reports (DR)* 38, 219;
- *N. v. Sweden*, no. 10410/83, Commission decision of 11.10.1984, *Decisions and Reports (DR)* 40, 203;
- *Autio v. Finland*, no. 17086/90, Commission decision of 06.12.1991, *Decisions and Reports (DR)* 72, 245;
- *Kokkinakis v. Greece*, 25.05.1993, Series A, no. 260-A;
- *Peters v. the Netherlands*, no. 22793/93, Commission decision of 30.11.1994, unreported;
- *Heudens v. Belgium*, no. 24630/94, Commission decision of 22.05.1995, unreported;
- *Manoussakis and Others v. Greece*, 26.09.1996, *Reports of Judgments and Decisions* 1996-IV;
- *X, Y and Z v. the United Kingdom*, 22.04.1997, *Reports* 1997-II;
- *Buscarini and Others v. San Marino* [GC], no. 24645/94, *Reports of Judgments and Decisions* 1999-I;
- *Serif v. Greece*, no. 38178/97, *Reports of Judgments and Decisions* 1999-IX;
- *Thlimmenos v. Greece* [GC], no. 34369/97, *Reports of Judgments and Decisions* 2000-IV;
- *Hasan and Chaush v. Bulgaria* [GC], no. 30985/96, *Reports of Judgments and Decisions* 2000-XI;
- *Kress v. France* [GC], no. 39594/98, *Reports of Judgments and Decisions* 2001-VI;
- *Metropolitan Church of Bessarabia and Others v. Moldova*, no. 45701/99, *Reports of Judgments and Decisions* 2001-XII;
- *Pretty v. the United Kingdom*, no. 2346/02, *Reports of Judgments and Decisions* 2002-III, *Bulletin* 2002/1 [ECH-2002-1-006];
- *Stafford v. the United Kingdom* [GC], no. 46295/99, *Reports of Judgments and Decisions* 2002-IV;
- *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, *Reports of Judgments and Decisions* 2002-VI;
- *Agga v. Greece (no. 2)*, nos. 50776/99 and 52912/99, 17.10.2002;
- *Gorzelik and Others v. Poland* [GC], no. 44158/98, *Reports of Judgments and Decisions* 2004-I;
- *Leyla Şahin v. Turkey* [GC], no. 44774/98, *Reports of Judgments and Decisions* 2005-XI;
- *Ülke v. Turkey*, no. 39437/98, 24.01.2006;
- *Moscow Branch of the Salvation Army v. Russia*, no. 72881/01, *Reports of Judgments and Decisions* 2006-XI;
- *Vilho Eskelinen and Others v. Finland* [GC], no. 63235/00, *Reports of Judgments and Decisions* 2007-II;
- *Dickson v. the United Kingdom* [GC], no. 44362/04, *Reports of Judgments and Decisions* 2007-XIII;
- *Demir and Baykara v. Turkey* [GC], no. 34503/97, 12.11.2008, *Reports of Judgments and Decisions* 2008;
- *Scoppola v. Italy (no. 2)* [GC], no. 10249/03, *Reports of Judgments and Decisions* 2009;
- *Micallef v. Malta* [GC], no. 17056/06, *Reports of Judgments and Decisions* 2009.

#### Languages:

English, French.







## **Systematic thesaurus (V20) \***

\* Page numbers of the systematic thesaurus refer to the page showing the identification of the decision rather than the keyword itself.

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<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.

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<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.

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<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.

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<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.

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<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.

<sup>37</sup> This keyword allows for the inclusion of enactments and principles arising from a separate constitutional chapter elaborated with reference to the original Constitution (declarations of rights, basic charters, etc.).

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<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.

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<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.



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<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.

<sup>62</sup> Representative/imperative mandates.

<sup>63</sup> Including the convening, duration, publicity and agenda of sessions.

<sup>64</sup> Including their creation, composition and terms of reference.

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<sup>65</sup> State budgetary contribution, other sources, etc.

<sup>66</sup> For the publication of laws, see 3.15.

<sup>67</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>68</sup> For local authorities, see 4.8.

<sup>69</sup> Derived directly from the Constitution.

<sup>70</sup> See also 4.8.

<sup>71</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>72</sup> Civil servants, administrators, etc.

<sup>73</sup> Practice aiming at removing from civil service persons formerly involved with a totalitarian regime.

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<sup>74</sup> Other than the body delivering the decision summarised here.

<sup>75</sup> Positive and negative conflicts.

<sup>76</sup> Notwithstanding the question to which to branch of state power the prosecutor belongs.

<sup>77</sup> For example, Judicial Service Commission, *Haut Conseil de la Justice*, etc.

<sup>78</sup> Comprises the Court of Auditors in so far as it exercises judicial power.

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79

See also 3.6.

80

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81

See also keywords 5.3.41 and 5.2.1.4.

82

Organs of control and supervision.

83

Including other consultations.

84

For questions of jurisdiction, see keyword 1.3.4.6.

85

Proportional, majority, preferential, single-member constituencies, etc.

86

For example, *Panachage*, voting for whole list or part of list, blank votes.

87

For aspects related to fundamental rights, see 5.3.41.2.

88

For the creation of political parties, see 4.5.10.1.

89

For example, names of parties, order of presentation, logo, emblem or question in a referendum.

90

Tracts, letters, press, radio and television, posters, nominations, etc.

91

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<sup>92</sup> Impartiality of electoral authorities, incidents, disturbances.

<sup>93</sup> For example, signatures on electoral rolls, stamps, crossing out of names on list.

<sup>94</sup> For example, in person, proxy vote, postal vote, electronic vote.

<sup>95</sup> This keyword covers property of the central state, regions and municipalities and may be applied together with Chapter 4.8.

<sup>96</sup> For example, Auditor-General.

<sup>97</sup> Includes ownership in undertakings by the state, regions or municipalities.

<sup>98</sup> Parliamentary Commissioner, Public Defender, Human Rights Commission, etc.

<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*.

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<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.

<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.

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<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.

<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.

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<sup>117</sup> In the meaning of Article 6.1 of the European Convention on Human Rights.

<sup>118</sup> This keyword covers the right of appeal to a court.

<sup>119</sup> Including the right to be present at hearing.

<sup>120</sup> Including challenging of a judge.

<sup>121</sup> Covers freedom of religion as an individual right. Its collective aspects are included under the keyword “Freedom of worship” below.

<sup>122</sup> This keyword also includes the right to freely communicate information.

<sup>123</sup> Militia, conscientious objection, etc.



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<sup>124</sup> Aspects of the use of names are included either here or under "Right to private life".

<sup>125</sup> Including compensation issues.

<sup>126</sup> This keyword also covers "Freedom of work".

<sup>127</sup> This should also cover the term freedom of enterprise.

<sup>128</sup> Includes rights of the individual with respect to trade unions, rights of trade unions and the right to conclude collective labour agreements.

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\* The précis presented in this Bulletin are indexed primarily according to the Systematic Thesaurus of constitutional law, which has been compiled by the Venice Commission and the liaison officers. Indexing according to the keywords in the alphabetical index is supplementary only and generally covers factual issues rather than the constitutional questions at stake.

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