

THE BULLETIN

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

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

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

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

The decisions are presented in the following way:

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

T. Markert

Secretary of the European Commission for Democracy through Law

THE VENICE COMMISSION

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

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

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

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European Court of Human Rights A. Vilfan Vospernik / L. Pardoe || Court of Justice of the European Union | R. Meyer / S. Hackspiel |
| Inter-American Court of Human Rights | J. Recinos |

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There was no relevant constitutional case-law during the reference period 1 May 2012 – 31 August 2012 for the following countries:

Canada, Japan, “The former Yugoslav Republic of Macedonia”, Luxembourg.

Armenia

Constitutional Court

Statistical data

1 May 2012 – 31 August 2012

- 91 applications have been filed, including:
 - 11 applications, filed by the President
 - 71 applications, filed by individuals
 - 2 applications, filed by the Human Rights Defender
 - 7 applications concerning elections, filed by the Deputies of the National Assembly
- 27 cases have been admitted for review, including:
 - 9 cases, concerning the compliance of obligations stipulated in international treaties with the Constitution
 - 11 cases based on individual complaints concerning the constitutionality of certain provisions of laws
 - 7 cases concerning the results of the elections to the National Assembly
 - 2 applications, filed by the Human Rights Defender
- 16 cases heard and 16 decisions delivered (including decisions on applications filed before the relevant period) including:
 - 6 decisions concerning the compliance of obligations stipulated in international treaties with the Constitution
 - 2 decisions on cases initiated on individual complaints
 - 7 decisions on applications concerned with the results of the elections to the National Assembly
 - 1 decision with the application filed by the Deputies of the National Assembly (application was filed before the relevant period)

Important decisions

Identification: ARM-2012-2-002

a) Armenia / **b)** Constitutional Court / **c)** / **d)** 31.05.2012 / **e)** / **f)** On the debate concerned with the decision on the elections to the National Assembly under proportional electoral system / **g)** *Tegekagir* (Official Gazette) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

4.9.1 Institutions – Elections and instruments of direct democracy – **Competent body for the organisation and control of voting.**

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

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

Keywords of the alphabetical index:

Election, equal voting power / Election, voters' list / Election, equality of votes / Right to vote / Voting right, persons who are abroad.

Headnotes:

The Constitutional Court emphasised that protection of the right to vote, especially within the sphere of constitutional justice, does not presume a formal approach, i.e. how strongly the passive or active electoral rights have been violated. The issue has a wider scope and refers to the public function of elections, namely, how and on what basis the system of representative government is being formed, how the freedom of participation in governance is harmonised with the responsibility of forming of the representative bodies, and what kind of role private persons have in this process. The Court stated that it is the responsibility of the state to guarantee the possibility of holding democratic elections.

Summary:

The applicant challenged decision N-265-A of the Central Electoral Commission, adopted on 13 May 2012, concerning the election of deputies to the National Assembly under the proportional electoral system. The applicant contended that during the entire period of preparation for the election of deputies to the National Assembly of 6 May 2012, the election campaign and on the Election Day, the principle of equality of conduct of elections, recognised in Article 4 of the Constitution, was violated. The applicant pointed in particular to the fact

that the President had participated in the electoral campaign combined with the performance of his presidential powers, and also to the participation of the Prime Minister and several other public officials in the electoral processes. The applicant also contended that the system of supervision of the electoral process and the system of voting in polling stations was ineffective, as well as the system for obtaining the invalidation of the election results. The applicant also argued that the number of the voters included in the electoral lists was indefinite, as well as the number of the voters who participated in the voting.

Concerning the right to equal voting power, the Court stated that it concerns the equal right to voting, to the accurate formation of constituencies and precincts, and to the equity of possibilities. Equity of possibilities is one of the most important elements of the right to equal voting power and includes, in particular, such conditions as coverage by mass media, airtime provided by television and radio channels, unconstrained campaigning, ensuring freedom of speech and expression, and transparency of campaign financing, among others. As stated in Point 19 of the Explanatory Report CDL-AD (2002) 23 of the European Commission for Democracy through Law ("Venice Commission") Code of Good Practice in Electoral Matters: Guidelines and Explanatory Report dated 30 October 2002: "The basic idea is that the main political forces should be able to voice their opinions in the main organs of the country's media and that all the political forces should be allowed to hold meetings, including on public thoroughfares, distribute literature and exercise their right to post bills." During the 6 May 2012 elections to the National Assembly, all observation missions provided a mainly positive assessment of the implementation of this requirement.

The Court stated that the neutrality of the state power during the electoral campaign is ensured by Article 22 of the Electoral Code, which places limitations on electoral campaigning by certain public officials who are also candidates. Article 107 of the Electoral Code has the same purpose. The Court also stated that the Electoral Code does not place any other limitation on the participation of various state officials, particularly the President, in electoral campaigns and that the Central Electoral Commission must be, and was, ruled by the requirements of law.

The Court stated that within the existing political system the issue should be solved not by way of forbidding persons holding certain political positions from participating in electoral campaigns, but by guaranteeing the strict implementation of Articles 18 and 22 of the Electoral Code.

As regards the applicant's contention concerning the ineffectiveness of the jurisdictional control of voting results in polling stations or the results of the elections, the Court stated that "sanity" of the norms of law or the issue of compliance with the constitutional principles could not be considered as a debate concerned with the decision of the Central Electoral Commission.

The Constitutional Court found that the argument concerning the ineffectiveness of the system of supervision of the electoral lists of voters was without basis, as the applicant had not exercised his right to get acquainted with the lists signed by the voters. In addition, the Court noted that the applicant had not claimed violation of his right to get acquainted with the lists signed by the voters, which would have been appealed in the manner defined by law and which would have been of probative value.

The Constitutional Court also considered the argument of the applicant concerning the number of voters included in the electoral lists. The applicant contended that only those citizens resident in the Republic of Armenia should have been included in these lists. The Court stated that the present constitutional regulations do not stipulate the formation of such lists of voters which would exclude citizens of the Republic of Armenia, who enjoy the right to vote, are not excluded from registration and are absent from the state territory. At the same time, having regard to the fact that the vast majority of the citizens who are absent from Armenia for a long period are not excluded from registration from their permanent residence on the one hand, and on the other hand do not get consular registration in another country, the solution to the problem concerned with the lists should be sought either by way of amendments to the electoral system or by improving the manner of maintaining the state registry of the population. In both cases the Court held that the solution is beyond the scope of the Central Electoral Commission's competence.

Having considered the probative value and content of both the applicants' and respondents' arguments, the Constitutional Court held that, given the problems of further development of the electoral system, the grounds, stipulated by law, under the disposal of the Central Electoral Commission concerning the results of elections to the National Assembly under the proportional electoral system, taken as a whole, served as an objective basis for decision N-265-A, adopted on 13 May 2012, and left the decision of the Central Electoral Commission unchanged.

Languages:

Armenian.



Austria

Constitutional Court

Important decisions

Identification: AUT-2012-2-003

a) Austria / **b)** Constitutional Court / **c)** / **d)** 14.03.2012 / **e)** U 466/11-18, U 1836/11-13 / **f)** / **g)** *Fletore Zyrtare* (Official Gazette) / **h)** CODICES (German, English).

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.**

2.2.1.1 Sources – Hierarchy – Hierarchy as between national and non-national sources – **Treaties and constitutions.**

2.2.1.6 Sources – Hierarchy – Hierarchy as between national and non-national sources – **Community law and domestic law.**

2.2.3 Sources – Hierarchy – **Hierarchy between sources of Community law.**

Keywords of the alphabetical index:

Fundamental rights, hierarchy / European Union, Charter of Fundamental Rights.

Headnotes:

The Charter of Fundamental Rights of the European Union sets a standard for judicial review by the Constitutional Court even though primary and secondary sources of European Union law do not.

Summary:

In its former case-law, the Constitutional Court generally held that its judicial review does not have to conform to the standards set in the European Union (formerly the “Community”) law. Decisions on European Union law rendered before the enforcement of the Lisbon Treaty cannot be transferred to the Charter of Fundamental Rights of the European Union (hereinafter, the “CFR”). In European Union law, the CFR is an area that is

markedly distinct from the Treaties of the European Union (hereinafter, the “TEU”).

Based on *Rewe* (ECJ 16 December 1976, Case 33/76, *Rewe*, [1976] ECR 1989) and *Comet* (ECJ 16 December 1976, paragraph 45/76, *Comet*, [1976] ECR 2043), the Court of Justice of the European Union developed the doctrine that, consistent with the principle of sincere cooperation (now laid down in Article 4.3.2 of the TEU), the domestic courts shall ensure the legal protection arising to the citizens from the direct effect of Community law. Where Community law does not cover a particular area or is silent on it, the domestic legal systems of the Member States shall designate the courts and tribunals to have jurisdiction. They shall also lay down the procedural rules governing actions to safeguard rights that individuals derive from the immediate effect of the Community (now the European Union) law. However, such rules are not less favourable than those governing similar domestic actions.

From this case-law, the Constitutional Court infers that under the European Union law, rights guaranteed by directly applicable European Union law must be enforceable in proceedings that exist for comparable rights that derive from the legal order of the Member States (also referred to as principle of equivalence).

Regarding the scope of the European Union law’s application, the CFR has now enshrined rights guaranteed by the Constitution in a similar manner as constitutionally safeguarded rights. As emphasised in the CFR preamble, it reaffirms “with due regard for the powers and tasks of the Union and the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Convention on Human Rights, the Social Charters adopted by the European Union and by the Council of Europe and the case law of the Court of Justice of the European Union, and of the European Court of Human Rights”.

The European Convention on Human Rights is directly applicable in Austria and has constitutional status. The rights it ensures are guaranteed by constitutional law within the meaning of Article 144 of the Constitution and Article 144a of the Constitution respectively, which protected by the Constitutional Court. According to the CFR explanation, several of its rights are modelled, both in wording and intention, on the corresponding rights laid down in the European Convention on Human Rights.

In light of the principle of equivalence, one will have to review in which manner and in which proceedings the rights laid down in the CFR can be enforced based on the domestic legal situation.

According to Article 144 of the Constitution, the Constitutional Court shall review the last-instance administrative decisions (“*Bescheide*”) to determine whether they violate constitutionally guaranteed rights. The system of legal protection set out in the Federal Constitutional Act generally provides for claims of constitutional violations to be brought to one instance, namely the Constitutional Court. In fact, the Constitutional Court is the only instance that possesses the competence to adjudicate on such violations through general norms (i.e. statutory acts and regulations) as well as to set aside such norms.

As expressed in Article 51, the CFR contains “rights” and “principles”. However, it remains to be specified which of the CFR provisions qualify as one or the other, and the significance of this differentiation. Regarding the scope of application of European Union law, the CFR has the same function in many of its provisions – the “rights” – as the constitutionally guaranteed rights in the (autonomous) area of Austrian law. Largely overlapping areas of protection emerge from the nearly identical substance and the similar wording of the CFR and the ECHR, whose rights are constitutionally guaranteed in Austria. It would counter the notion of a centralised constitutional jurisdiction provided for in the Federal Constitution if the Constitutional Court were not competent to adjudicate on largely congruent rights such as those contained in the CFR.

The Constitutional Court concluded that, based on the domestic legal situation, it follows from the equivalence principle that the rights guaranteed by the CFR may also be invoked as constitutionally guaranteed rights. The Court added that they constitute a standard of review in general judicial review proceedings (with regard to statutes and ordinances) in the CFR’s scope of application. In any case, this is true if the guarantee contained in the CFR is similar in its wording and purpose to rights guaranteed by the Federal Constitution.

In fact, some of the individual guarantees afforded by the CFR totally differ in their normative structure and some, such as Articles 22 or 37, do not resemble constitutionally guaranteed rights but are more like “principles”. One would therefore have to decide on a case-by-case basis which of the CFR rights constitutes a standard of review for proceedings before the Constitutional Court.

This means that the Constitutional Court – as it has done so far (cf. VfSlg 15.450/1999, 16.050/2000, 16.100/2001) – will refer a matter to the Court of Justice of the European Union for a preliminary ruling if doubts emerge on the interpretation of a provision of European Union law, including the CFR. If such

doubts do not arise, particularly in light of the European Convention on Human Rights and pertaining case-law of the European Court of Human Rights and other supreme courts, the Constitutional Court will decide without seeking a preliminary ruling. In matters relating to the CFR, the Constitutional Court is held by Article 267.3 of the Treaty on the Functioning of the European Union to bring them to the Court of Justice of the European Union.

In summary, the Constitutional Court – after referring a matter for a preliminary ruling to the Court of Justice of the European Union – takes the CFR in its scope of application as a standard of review for national law and sets aside contradicting general norms.

However, the CFR provisions are applied to acts of the bodies and institutions of the Member States only when they are “implementing European Union law” (Article 51.1 CFR). This occurs when complaints, in which a right of the CFR is invoked, fall within the scope of application of European Union law. According to case-law by the Court of Justice of the European Union, the latter is to be interpreted broadly. It covers the implementation of directly applicable European Union law by courts or administrative authorities of the Member States (ECJ 14 July 1994, Case C-351/92, *Graff*, [1994] ECR I-3361 [paragraph 17]), as well as the enforcement of Member States’ implementing regulations.

Languages:

German, English (translation by the Court).



Azerbaijan Constitutional Court

Important decisions

Identification: AZE-2012-2-001

a) Azerbaijan / **b)** Constitutional Court / **c)** / **d)** 15.07.2011 / **e)** / **f)** / **g)** *Azerbaijan, Respublika, Khalq gazeti, Bakinski rabochiy* (Official Newspapers); *Azərbaycan Respublikası Konstitusiyası Məhkəməsinin Məlumatı* (Official Digest) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

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

5.2.2.10 Fundamental Rights – Equality – Criteria of distinction – **Language.**

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

Keywords of the alphabetical index:

Proceedings, criminal, language / Fundamental rights / Right to a fair trial.

Headnotes:

In criminal court proceedings constitutional and legal norms and principles concerning the language in which the proceedings are to be conducted should be strictly observed in order to ensure fairness to the accused and vindication of the accused’s fundamental rights.

Summary:

I. In July 2010 the Garadakh district court of Baku city found Mrs A. Gasanova (hereinafter, the “applicant”) guilty of theft, as defined by Article 177.2.1 and 177.2.2 of the Criminal Code (hereinafter, the “CC”) and was sentenced to a 5-year term of imprisonment. By a judgment of the Hatayi district court of Baku city of 22 April 2009, the applicant’s conditional early

release from punishment under Article 76.6.3 CC, was cancelled, as a part of the sentence imposed by Ali-Bayramli city court of 21 August 2007 according to Article 67.1 CC was combined with the present sentence and definitive punishment in the form of imprisonment for a period of 5 years and 6 months was kept in force.

The Criminal Board of the Court of Appeal of Baku city (hereinafter, the "Court of Appeal of Baku") by its decision of 8 September 2010 declared the sentence of Garadakh district court of Baku city of 14 July 2010 to be correct.

Subsequently, the Criminal Board of the Supreme Court (hereinafter, the "Supreme Court") found that during the investigation concerning the applicant, serious criminal-procedural infringements were admitted, and by its decision of 26 January 2011 cancelled the decisions of the Court of Appeal of Baku and by a final judgment of 8 September 2010 returned the case to the Court of Appeal of Baku for re-consideration in a stage of preliminary consideration.

In the said decision the Supreme Court specified that the documents of a suspected or accused person who is not familiar with the Azerbaijani alphabet with a Roman type must be presented in the Cyrillic alphabet. Thus, in the report of the interrogation of the accused, the applicant declared that while she was able to freely read in the Azerbaijani language with a Roman type, she was unable to write in Roman type and was therefore asked to write her indications on the computer in the Cyrillic alphabet. The Supreme Court also noted that a foreigner who is unaware of the state language of the proceedings of a court and an Azerbaijani who is unfamiliar with the Azerbaijani alphabet with a Roman type in which court proceedings are held, are in reality in an identical position to a foreigner who is unaware of the language of court proceedings and an Azerbaijani who is unfamiliar with Roman type is therefore deprived of the possibility to read and understand court proceedings.

II. The Constitutional Court *en banc* considered it necessary to note the following.

The purpose of the criminal procedure legislation is to provide definitions of legal procedures of criminal prosecution and the protection of persons suspected or accused of having committed a crime. In the conduct of a criminal trial, the language used is an important factor. The suspected or accused person's knowledge of the language in which the criminal legal proceedings are conducted makes it possible for that person to protect his or her positions and interests. The principles concerning the language in which

criminal legal proceedings should be conducted, specified in Article 26 CC, should be applied according to principles of the equality of every person before the law and court (Article 11 of the Criminal procedure Code (hereinafter, "CPC")), the guarantee of the right to legal aid and the right to conduct one's defence (Article 19 CPC), among other principles.

The international legal instruments in the field of human rights recognise the suspected or accused person's knowledge of the language of the proceedings as one of the significant and important means for the effective protection of such person's rights. Article 14.3.a and 14.3.f of the International Covenant on Civil and Political Rights (ICCPR) state: "everyone shall be entitled to the following minimum guarantees, in full equality:

- a. to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him [and]
- f. to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

According to Article 5.2 ECHR, everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him. Article 6.3.a ECHR emphasises that everyone charged with a criminal offence should be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him.

The criminal-procedure requirements of the international norms connected with language provide a full and effective range of measures for the protection of persons accused of crimes.

According to Article 21 of the Constitution, the Azerbaijani language is the official language of the Azerbaijan Republic. Point 9 of the Decree of the President of the Republic "On improvement of the application of a state language", no. 506 of 18 June 2001, offers to provide a conversion into the Roman type production of all newspapers, magazines, bulletins, books and other printed matter published in the Azerbaijani language, until 1 August 2001. This Decree also states that responsibility for a number of administrative offences should be defined, such as engaging in secret or open propagation against a state language in the Republic of Azerbaijan, resisting the use and development of the Azerbaijani language, attempts to restriction language rights, and preventing or obstructing the use of Roman type. Article 315.1 of the Code of Administrative Offences accordingly provides for such responsibility in line with the said Decree. According to Article 14 of the

Law of the Republic of Azerbaijan “On a state language in the Republic of Azerbaijan” of 30 September 2002, the alphabet of the state language of the Republic of Azerbaijan is the Azerbaijani alphabet with a Roman type. In Article 11.4 of the said Law it is stipulated that criminal court proceedings in Republic of Azerbaijan must be conducted in a state language.

The Constitutional Court *en banc* held that in criminal court proceedings the requirements of Article 21 of the Constitution, Article 26 CC and also the corresponding norms of the Law “On a state language in the Republic of Azerbaijan” and the Decree “On improvement of application of a state language” should be strictly observed. In the interests of justice, in criminal proceedings where the suspect or accused person knows the state language of the Republic of Azerbaijan but does not know the alphabet of this language with a Roman type should be provided with Cyrillic type by the defence counsellor.

Languages:

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



Identification: AZE-2012-2-002

a) Azerbaijan / **b)** Constitutional Court / **c)** / **d)** 15.07.2011 / **e)** / **f)** / **g)** Azerbaijan, *Respublika, Khalq gazeti, Bakinski rabochiy* (Official Newspapers); *Azerbaycan Respublikasi Konstitusiyası Mehkemesinin Melumatı* (Official Digest) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Compensation, damage / Employment law / Employment, worker, protection / Fundamental rights.

Headnotes:

Employment should not degrade human dignity and should be carried out in a manner respectful of fundamental human rights and the fair payment of wages with arrangement of working conditions ensuring labour safety. Where a violation of labour safety regulations occurs an employer may be brought to justice solely where the employer’s guilt is proven.

Summary:

I. The case concerned a civil case taken by a Mr S. Tahirzade against “AMEC Services Limited” company claiming compensation for harm caused to his health in the performance of his employment, which required an official interpretation by the Constitutional Court of the expressions “employer, guilty (completely or partially)” and “through employer’s fault” contained in the text of Article 239.I and 239.II of the Labour Code.

With the aim of ensuring the application of regulations laid down by Article 239 of the Labour Code the Cabinet of Ministries by a Decision dated 9 January 2003 no. 3 approved “Terms and conditions of payments as well as an amount of payment to an employee whose health is impaired as a result of an accident at work or occupational illness, either to the employee’s family members or dependents of the employee whose death was caused by the accident or illness” (hereinafter, the “Decision of the Cabinet of Ministries”).

Item 1.1 of this Decision provided that, where an employee’s health is impaired as a result of an accident at work or an occupational illness or an employee’s death is caused (hereinafter, the “occupational injuries”), and an investigation into the injuries or death finds the employer (responsible) agencies, departments or organisations guilty (hereinafter, the “guilty employer (guilty agency)”) the employer bears financial responsibility in accordance with the legislation for the harm caused to the employee.

The Decision states that, except for harm inflicted due to the intent of the victim, occupational injuries should be compensated regardless of the degree of the victim’s fault. The appeal noted that despite the fact that in Item 1.1 of the Decision the expression “guilty

agencies, departments and organisations” is used, and the fact that the last sentence of the same item stated “except for harm inflicted due to the intent of the victim, the injury shall be compensated regardless of the degree of the victim’s fault”, in practice this regulation was applied in a such way that if an accident or occupational illness came about as a result of an employee’s duties, a presumption of guilt was applied against the employer and responsibility for compensation lay with the employer.

Baku Appeal Court found that the expressions “employer, guilty (completely or partially)” and “through employer’s fault” set out in Article 239 of the Labour Code, as well as “guilty employer (guilty agency)” used in Item 1.1 of the Decision of the Cabinet of Ministries, are interpreted ambiguously by courts, as well as parties to a case and relevant executive authorities (State Labour Inspection Service) which are directly responsible for the application and implementation of these regulations.

Baku Appeal Court concluded that an official interpretation of Article 239.I and 239.II of the Labour Code would be necessary in order to ensure the principle of the clarity of the law, as well as the uniform and correct application of these regulations in similar cases by courts and relevant executive authorities.

II. In connection with the appeal, the Constitutional Court *en banc* considered it necessary to note the following:

According to the text of Article 130.VI of the Constitution courts may apply to the Constitutional Court to seek interpretation of the Constitution and Laws only regarding implementation of human rights and freedoms.

The Court held that the issue raised in the application of Baku Appeal Court was directly related to implementation of the right to work enshrined in Article 35 of the Constitution.

According to Article 35.I of the Constitution employment is a foundation of personal and public welfare. Accordingly, employment has economic and social dimensions. From that point of view the right to work has an effect on welfare and the development of individuals and their families, as well as an individual’s self-determination in society.

The Court considered that employment should not degrade human dignity and should be carried out in a manner respectful of fundamental human rights and the fair payment of wages with arrangement of working conditions ensuring labour safety. According

to Article 35.VI of the Constitution everyone has a right to work in safe and healthy conditions and to receive payment for employment without discrimination not less than the minimum wage set by the state. Thus, the right of every person to work in safe and healthy conditions is an essential element of the right to work. This right is also related to the right to life and right to health protection guaranteed by the Constitution. The right of everyone to work in safe and healthy conditions requires that every employee has a right to work in conditions which are not harmful to the employee’s life or health, meeting safety requirements. In addition, the constitutional right provides labour safety and protection of employees’ life, health and employment by the employer.

In accordance with Article 191.2 of the Labour Code, where all three of the following conditions are established financial responsibility for the damage caused intentionally or unintentionally by one party to another gives rise to liability to pay compensation:

- a. detection of actual damage;
- b. if the act or omission of the guilty party contradicts a law; and
- c. where there is a causal relationship between the act or omission of the guilty party contradicting a law and the damage suffered.

With regard to financial responsibility for a violation of labour safety regulations, the legislator considering this principle has defined the content of Article 239 of the Labour Code. According to Provision 1 of this article the employer, guilty (completely or partially) for occupational accident or illness, is obliged to pay full compensation to the employee for the damage caused as a result of the injury or health impairment in another form, as well as costs of treatment, benefits and other additional costs established by the Civil Code of the Republic of Azerbaijan. It is clear that, where a violation of labour safety regulations occurs an employer may be brought to justice solely where the employer’s guilt is proven.

Regarding the issue of the impact of the extent of guilt regarding violation of labour safety standards by the employer to the type of responsibility attaching to the employer the Constitutional Court *en banc*, considered it necessary to point out the following:

The labour legislation established two types of responsibility: limited liability (in that case the compensation for damage caused is a predetermined limited amount); and full liability (in that case damage caused is compensated in full).

Limited liability is envisaged only in respect to employees and paid in a sum equal to their average

monthly salary. Article 198 of the Labour Code provides that, with the exception of cases provided for in Articles 199 and 200 of the present Code, an employer bears liability for the damage caused to an employee in a sum equalling, at maximum, the average monthly wage.

On the basis of these considerations, the Constitutional Court *en banc* concluded that, as provided by Article 239 of the Labour Code, financial responsibility for the caused harm to an employee's health due to the violation of labour safety standards or his death for this reason, upon requirements of the Article 191 of the present Code occurs only where the employer is at fault. According to the text of Article 239 of the Labour Code, regardless of the full or partial fault of an employer, in the presence of conditions envisaged in Article 191 of the present Code the employer bears full responsibility for the employee.

Languages:

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



Belarus Constitutional Court

Important decisions

Identification: BLR-2012-2-003

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 17.05.2012 / **e)** D-706/2012 / **f)** On the conformity of the Law "On Legal Status of the Territories Suffered from Radioactive Contamination Due to the Accident at the Chernobyl Nuclear Power Plant" to the Constitution / **g)** *Vesnik Kanstytucyjnaha Suda Respubliki* (Official Digest), 2/2012 / **h)** CODICES (English, Belarusian, Russian).

Keywords of the systematic thesaurus:

3.10 General Principles – **Certainty of the law.**
5.4.19 Fundamental Rights – Economic, social and cultural rights – **Right to health.**

Keywords of the alphabetical index:

Environment, protection / Environment, risk, information / Health, public.

Headnotes:

The constitutional right to public health protection requires that standards for permissible levels of radionuclide content in produced goods be set through legislative acts. The standards would create additional guarantees of life and public health protection from harmful effects of radionuclides. The procedure for the provision and dissemination of information on radiation in the environment, on the legal status of the territory of radioactive contamination, also need to be regulated on the legislative level because of its special significance for public health.

Summary:

I. The Constitutional Court, in an obligatory preliminary review, considered the constitutionality of the Law "On Legal Status of the Territories Suffered from Radioactive Contamination Due to the Accident at the Chernobyl Nuclear Power Plant" (hereinafter, the "Law").

The provisions of the Law specify the legal status of territories suffering from the radioactive contamination due to the accident at the Chernobyl Nuclear Power Plant, the criteria to rating these territories as the zones of radioactive contamination, the mode of their use and protection, the conditions of living, and the implementation of economic and other activities on these territories.

The possibility of putting out products with radionuclides content not exceeding the levels permissible in the state is one criteria to determine the contamination area in Article 4 of the Law. Any sale of products made in the territory of radioactive contamination must undergo mandatory review of its radioactive contamination and a document confirming that the radionuclides content in such products conforms to the Republic's permissible levels (Article 29 of the Law). The legislator has yet to define the standards of these levels, providing, instead, that they be defined by the appropriate governmental bodies.

II. The Court finds that the constitutional right to health care may not be completely ensured under this approach. The main content and principles of the rights, and freedoms must be established, as provided by the Constitution (Article 97.2 of the Constitution), at the legislative level. Setting appropriate levels will create additional conditions to protect life and health from the harmful effects of radionuclides.

According to Article 9 of the Law, citizens possess the right to receive complete, reliable and timely information about the radiation environment, the measures taken to improve it, as well as on the legal status of the territory of radioactive contamination and liability for its violation. At the same time, the procedure for the provision and dissemination of such information shall be established in the legislation on the environment protection, on citizens and legal entities' applications and other legislation.

The Court commented on the established procedure for the provision and dissemination of information on radiation environment, the legal status of the territory of radioactive contamination and liability for its violation by reference to the general rules relating to any of the available information. It noted the lack of guarantees for the implementation of the constitutional right to receive complete, reliable and timely information about the radiation environment in terms of the radiation situation. Because of the special importance of this information for public health, the peculiarities of its provision and dissemination require legislative action.

The Constitutional Court recognised the Law should conform to the Constitution.

Languages:

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



Identification: BLR-2012-2-004

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 05.07.2012 / **e)** D-742/2012 / **f)** On the conformity of the Law "On Making Addenda and Alterations to Certain Laws on Notarial Activity" to the Constitution / **g)** *Vesnik Kanstytucyjnaha Suda Respubliki* (Official Digest), 3/2012 / **h)** CODICES (English, Belarusian, Russian).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Notary / Dispute, settlement, out-of-court, compulsory.

Headnotes:

A legal procedure on notaries that allows a creditor to collect money sums on an undisputed claim from a debtor as a mandatory preliminary extrajudicial procedure of case settlement does not exclude the concerned person's right to protect his/her rights in court by filing a claim. At the same time, the obligation of the State to ensure accessibility to justice should be taken into account.

Summary:

I. The Constitutional Court, in an obligatory preliminary review, considered the constitutionality of the Law "On Making Addenda and Alterations to Certain Laws on Notarial Activity" (hereinafter, the "Law").

Provisions that make addenda and alterations to the Civil Procedure Code and the Law on Notaries aim to improve the order of consideration of indisputable claims of citizens and legal entities for recovery of money sums (debt).

Article 1.1 of the Law adds Part Five to Article 6 of the Civil Procedure Code. This Part sets forth that to assert the right to judicial protection, the person concerned must observe the order of prior-court settlement of the case. The requirement applies if it is provided by the legislation for the notary's executive inscription to recover indisputable money sums (debt) from the debtor, as well as in other cases stipulated by the legislative acts.

II. The Constitutional Court notes that the introduction of the Law established procedures for handling the creditor's indisputable claims as to the debtor to recover money sums (debt) based on the notary's executive inscription aimed at the maximum simplification of documents. This includes reducing the time of their examination, and period for debt collection for the creditors. The main advantage of an executive inscription for both writ and action proceedings in civil court proceedings is to promptly resolve the indisputable creditors' claims (citizens and legal entities). Revision of Article 394 of the Civil Procedure Code also proposes to improve the legal regulation of relations of indisputable claims by notaries.

In assessing the constitutionality of the addenda and alterations made by the Law to Articles 6 and 394 of the Civil Procedure Code, the Court proceeds from the related provisions of international instruments. They include the Universal Declaration of Human Rights (Article 8), International Covenant on Civil and Political Rights, which stipulates an obligation of each State participating in the Covenant to ensure that any person whose rights or freedoms are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity, and to develop the possibilities of judicial remedy (Article 2.3a and 2.3b). The Court relies also on Article 60 of the Constitution, according to which everyone is ensured the protection of his/her rights and freedoms by a competent, independent and impartial court in period defined by law.

The Court recognised that requiring a prior extrajudicial resolution of the case before asserting the right to appeal for judicial protection is motivated by the need to reduce the courts' burden on considering civil matters. The Court, however, emphasised that the legislator should firstly consider the State's duty to provide access to justice and guarantee everyone's

protection of rights and freedoms by competent, independent and impartial court.

The Court believes that provisions of the Constitution, based on the objectives of the rule of law and guarantee of the right to judicial protection, do not exclude the possibility of applying on certain conditions extrajudicial forms of protecting rights and freedoms. The provision of the Law on observance of prior extrajudicial settlement of a case does not exclude the right of a person concerned, in an event of a dispute, to protect his/her rights and legitimate interests in courts by filing a claim.

In connection with the abovementioned, the Court notes that the development of market relations requires establishment of a more effective mechanism for the protection of property rights. Its inviolability is protected by law. Also, regulating public relations in the field of notarial activities through legislative acts must be carried out not by removing a number of civil cases from the courts' competence but based on the functional purpose of notariat bodies. The main task is to protect the rights and interests of citizens, legal entities, and the public interest by notarial activity.

The Constitutional Court recognised the Law "On Making Addenda and Alterations to Certain Laws on Notarial Activity" to be conforming to the Constitution.

Languages:

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



Belgium

Constitutional Court

Important decisions

Identification: BEL-2012-2-008

a) Belgium / **b)** Constitutional Court / **c)** / **d)** 03.05.2012 / **e)** 60/2012 / **f)** / **g)** *Moniteur belge* (Official Gazette), 01.08.2012 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Juvenile, protection / Youth, protection / Juvenile, court / Juvenile, criminal responsibility, jurisdiction, relinquishment / Gap, in the law, role of the court.

Headnotes:

Treating two categories of young people brought before the youth court differently depending on their age at the time they committed an act classified as an offence is contrary to the rules on equality and non-discrimination.

Summary:

I. The Constitutional Court had before it a preliminary question referred by the youth court of Mons concerning the compatibility with the constitutional rules on equality and non-discrimination (Articles 10 and 11 of the Constitution) and with the constitutional rights of the child (Article 22bis of the Constitution) of Article 37.3 of the law of 8 April 1965 on the protection of young persons and the treatment of juveniles who have committed an act classified as an offence and on compensation for damage caused by the offence. The youth court was hearing a case involving a young person who had reached the age of

majority, who was being prosecuted for having committed a crime at the age of sixteen and in respect of whom only interim measures could be applied. The public prosecutor requested that the youth court relinquish jurisdiction in favour of the ordinary courts.

The youth court noted that the provision at issue dealt differently with the young people brought before it for having committed an act classified as an offence after the age of 18 depending on whether they had committed the act at the age of 16 or 17 years. In the latter instance, they could be the subject of protection measures up to the age of 20 and could avoid relinquishment of jurisdiction by the youth court if this court considered the protection measures appropriate; in the former instance, not all of the protection measures could be applied to them, thereby also depriving the youth court of its power to assess whether or not these measures were appropriate and, consequently, to decide whether or not to relinquish jurisdiction.

II. The Constitutional Court found that the difference in treatment referred to it was based on the young person's age at the time of committing an act classified as an offence. It considered this criterion to be irrelevant and inconsistent with the powers possessed by the youth court vis-à-vis both 16-year-olds and 17-year-olds. Nor was it appropriate in relation to the youth welfare objective consistently pursued by lawmakers since 1990. The Court further noted that the provision also had the effect of treating less favourably, without reasonable justification, those juvenile delinquents who were youngest at the time the acts were committed, when in fact this group should normally be dealt with through protection measures rather than relinquishment of jurisdiction.

The Court further noted that lawmakers had put an end to the difference in treatment through legislation enacted on 13 June 2006 but that the entry into force of the relevant provision had been postponed until 1 January 2013. The Council of Ministers justified this postponement on the ground that lawmakers could only gradually achieve their objective, in view of the implications in terms of organisation and funding of support for young people by the French, Flemish and German-speaking Communities which were competent in such matters.

The Constitutional Court considered that it was appropriate, in the light of this objective, to postpone the entry into force of the provision allowing protection measures to be extended beyond the age of 20, but that it was not appropriate to postpone the entry into force of the provision which treated 16- and 17-year-olds in the same way.

The Court concluded that the provision at issue was not compatible with the constitutional rules on equality and non-discrimination (Articles 10 and 11 of the Constitution) in that it denied young persons aged over 16 years but under 17 years at time of the offence the possibility of benefiting from the full range of protection measures.

It further stated that since the legal gap which it noted lay in the statute referred to it, the Court below had the duty of remedying the unconstitutionality found by the Court, since this finding was stated in terms of sufficient precision and completeness to permit the application of the impugned provision in accordance with the rules on equality and non-discrimination.

Languages:

French, Dutch, German.



Identification: BEL-2012-2-009

a) Belgium / **b)** Constitutional Court / **c)** / **d)** 28.06.2012 / **e)** 81/2012 / **f)** / **g)** *Moniteur belge* (Official Gazette), 24.09.2012 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

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

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

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

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

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:

Parliament, member, incompatibility, local office / Region, constitutive autonomy, electoral incompatibility.

Headnotes:

Every voter or candidate has the necessary interest to request the Court to annul provisions that might adversely affect his or her vote or candidacy.

A regulation prohibiting three quarters of the members of the Walloon Parliament from combining membership of this parliament with membership of a municipal (executive) college of the Region in question is not contrary to the rules on the division of powers in federal Belgium or to the principle of equality and non-discrimination (Articles 10 and 11 of the Constitution), possibly in conjunction with Article 3 Protocol 1 ECHR.

Summary:

I. Several persons had lodged an application for annulment of the special decree of the Walloon Region of 9 December 2010 limiting the concurrent holding by members of the Walloon Parliament of several offices at once. The Walloon Parliament is the democratically elected legislative assembly for the Walloon Region, one of the federated entities of federal Belgium.

The impugned decree stated that as from the next elections, three quarters of the members of each political group (members who had been candidates on the same list) within the Walloon Parliament could no longer combine membership of the parliament with membership of a municipal college (mayor, deputy mayor or chair of a social assistance council). The quarter of the members of each political group who had obtained the highest “penetration rate” (calculated by dividing the number of preference votes won by the elected representative by the number of valid votes cast in his or her constituency) could continue to hold several offices at once.

According to the preparatory documents, it was the intention of the drafters of the Walloon decree to reconcile two objectives: “on the one hand, to establish a direct link between the local authorities most in touch with the expectations of our fellow citizens and, on the other hand, the desire to give the Walloon Assembly the necessary stature to arbitrate between local interests, whilst avoiding the pitfalls of subregionalism”.

II. To demonstrate their interest in the case, the applicants relied on their capacity as voters in elections to the Walloon Parliament and, in some cases, their capacity as members of this parliament or future candidates in elections to this parliament.

The Court observed that the right to vote was a fundamental political right in a representative democracy and stated that every voter or candidate had the necessary interest in seeking the annulment of provisions that might adversely affect his or her vote or candidacy.

The applicants contended firstly that the drafters of the Walloon decree had no authority to decide the composition of the parliament. The largest federated entities in federal Belgium enjoyed a certain degree of “constitutive autonomy” enabling them, through a decree adopted by special majority, to determine the organisational structure and functioning of their own bodies, including the introduction of incompatibilities other than those introduced under the special federal law of 8 August 1980 on institutional reform. The legislation section of the Council of State had, however, stated in its opinion on the draft decree that while the Walloon Region certainly had the authority to introduce incompatibilities, it could not alter the actual composition of parliament.

In response, the Court stated that the special law of 8 August 1980 had not placed any restriction on the possibility of introducing additional incompatibilities subject to conditions that must necessarily apply to all members of the parliament and that the fact that the incompatibility in question affected the overall composition of the Walloon Parliament did not preclude it from being categorised as an incompatibility within the meaning of Article 24bis.3 of the special law of 8 August 1980. The Court concluded that the drafters of the Walloon decree, acting by special majority, were competent to adopt the special decree at issue.

Other arguments highlighted the violation of the principle of equality and non-discrimination (Articles 10 and 11 of the Constitution) in that the impugned special decree firstly infringed the right of the voter to foreseeability in terms of the useful effect of his or her vote and, secondly, created unjustified differences in treatment between voters and between candidates for election to the Walloon Parliament, as well as between elected members of this same parliament. The Flemish government, which intervened in the proceedings before the Court, likewise contended that the impugned decree contained various violations of Articles 10 and 11 of the Constitution, whether or not taken together with Article 3 Protocol 1 ECHR.

The Court observed firstly that the right to vote and the right to stand for election, guaranteed under Article 3 Protocol 1 ECHR, were crucial for establishing and maintaining the foundations of democracy but that these rights were not absolute. The Court

referred to the European Court of Human Rights judgment of 15 June 2006 in *Lykourazos v. Greece* (§ 51), according to which “there is room for “implied limitations”, and Contracting States must be given a margin of appreciation in this sphere”, a margin of appreciation that was “wide”.

With regard to the risk of the voter being misled, the Court replied that the latter voted with knowledge when he or she cast his or her vote for a candidate who already held office in a municipal college, and was therefore aware in advance of the risk that this candidate, if elected, might not meet the criteria that would allow him or her to hold both offices at once. In the Court's view, this was a different situation from that covered by the law annulled through its decision no. 73/2003 of 26 May 2003, which had allowed a person to stand as a candidate both for the Chamber of Representatives and for the Senate, because the elections in question took place at the same time.

With regard to the proportion of three quarters to one quarter, the Court ruled that the drafters of the decree, within the scope of their wide discretionary power and for the purpose of achieving a balanced compromise between the various opinions involved, had not adopted a regulation that was manifestly unjustified.

With regard to the “penetration rate”, the Court held that this criterion was not without relevance as it reflected the desire of voters to accord these elected representatives an unusually high degree of support. Nor did this criterion infringe the principle of equality between women and men as it applied in the same manner to all elected representatives and any disparity between the number of male and female representatives permitted to hold several offices at once could arise only from the choice made by the electorate.

In response to the complaint that candidates standing in a smaller constituency were, in theory, liable to achieve a higher penetration rate because the number of candidates that could appear on the same list was lower, the Court ruled, after examining simulations in which the penetration rate criterion was applied to the results of previous elections, that the impugned decree did not have disproportionate effects for candidates elected in larger constituencies.

The Court accordingly dismissed the applications.

Languages:

French, Dutch, German.



Identification: BEL-2012-2-010

a) Belgium / **b)** Constitutional Court / **c)** / **d)** 12.07.2012 / **e)** 88/2012 / **f)** / **g)** *Moniteur belge* (Official Gazette), 10.09.2012 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

5.1.1.3 Fundamental Rights – General questions – Entitlement to rights – **Foreigners.**

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

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

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

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

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

Keywords of the alphabetical index:

Access to justice, costs, *pro deo* / Judge, access, register duty / Court, access, register duty / General principles of law, access to the courts / General principles of law, right of appeal / Taxation, principle of lawfulness / Fair trial, right to be heard / Fair trial, right to reply / Annulment, maintenance of the effects of the annulled provision.

Headnotes:

The right of access to a court, which must be secured to everyone as a general legal principle, can be subject to limitations, including ones of a financial nature, in this case a registration fee, provided such limitations do not impair the very essence of the right of access to a court.

Delegation by the legislature to the executive does not violate the principle of lawfulness in fiscal matters, provided the powers of that authority are defined with sufficient clarity and concern the execution of measures, the essential features of which have previously been defined by law.

Except in criminal law, there is no general legal principle guaranteeing a right of appeal.

The fundamental right of access to a court does not include the right to use existing procedures for manifestly vexatious purposes. A fine for manifestly vexatious applications is not incompatible with this fundamental right, provided this notion is interpreted narrowly.

The need to speed up and simplify the proceedings in cases concerning aliens may justify waiving the requirement to hold a hearing and file pleadings in all cases. However, doing away with the right of applicants in annulment proceedings to file observations in reply, having studied the administrative file and the arguments advanced by the other party in its submissions, amounts to a disproportionate interference with the applicants' right of defence.

The Court may extend the effect of a repealed provision in the interest of legal certainty and to allow lawmakers to adopt new arrangements by such date as it may determine.

Summary:

I. An "Aliens Appeals Board" assuming, in respect of all disputes concerning the legislation on aliens, the powers and responsibilities of the Council of State and the Permanent Refugee Appeals Commission, was set up under a law of 15 September 2006, in an endeavour to ease the Council of State's considerable workload.

A few (anonymous) individuals and a number of non-profit-making associations, together with a professional association of lawyers, lodged an application for the repeal of this law, in particular the provisions relating to the € 125 registration fee. Under the contested legislation, anyone applying to the Aliens Appeals Board was required to pay this fee, unless they qualified for *pro deo* assistance (legal aid).

II. The Court held that the introduction of a registration fee did not *per se* interfere with the right of access to a court. The right of access to a court constituted a general legal principle which must be secured to everyone in accordance with the principle of equality and non-discrimination (Articles 10 and 11 of the Constitution) and the rights of aliens (Article 191 of the Constitution). According to the Court, this right could be subject to limitations, including ones of a financial nature, provided they did not impair the very essence of the right of access to a court. Moreover, to the extent that it guaranteed the right of everyone to lead a life consistent with human dignity, which included the right to legal aid, Article 23

of the Constitution did not preclude the introduction of a registration fee, with the possibility of exemption for litigants who qualified for legal aid.

The applicants also complained of a violation of the principle of lawfulness in fiscal matters (Articles 170.1 and 172 of the Constitution). The Court, which recognised that the registration fee amounted to a tax, referred to its well-established case-law to the effect that the above constitutional provisions did not extend to requiring lawmakers to themselves determine each and every aspect of a particular tax or exemption. Delegation to another authority was not incompatible with the principle of lawfulness provided the powers of that authority were defined with sufficient clarity and concerned the execution of measures, the essential features of which had been previously defined by law.

The fact that the lawmakers left it to the Crown to specify which documents must be produced in order to determine an applicant's eligibility for legal aid did not, in the Court's view, violate the principle of lawfulness in fiscal matters.

The Court considered that the amount of the registration fee was not excessive, not even to the extent it was demanded of each applicant individually in the case of collective applications. The Court did, however, criticise the fact that the fee was payable for each individual decision covered by the application, given that one and the same legal situation forming the subject of an action was often created by several separate and complementary decisions which might all be contested in the application. According to the Court, it could not be reasonably justified that the same person should have to pay a fee for each decision challenged, as the deterrent effect of this measure was potentially significant enough to prevent the aliens concerned from exercising their rights.

The Court also took the view that a time-limit of eight days for paying the registration fee was not unreasonably short and accepted that the fee must also be paid when an applicant claiming entitlement to legal aid was unable to produce within this time documentary evidence of such entitlement. There was, however, no justification for not refunding the fee in cases where the applicant was subsequently able to prove his or her entitlement to legal aid. In effect, there could be no justification for making a tax exemption based on the lack of means of the taxpayer concerned conditional upon the speed with which the persons and authorities responsible for issuing the requisite documents responded to his or her request.

In the Court's view, the fact that there was no remedy against the decision of the Aliens Appeals Board on whether or not to grant legal aid was not incompatible with the Constitution: the Court had only a narrow margin of discretion in setting the amount of the registration fee and, except in criminal matters, there was no general legal principle guaranteeing a right of appeal.

Certain applicants also considered that the fact that the Aliens Appeals Board could impose a fine for manifestly vexatious applications constituted a disproportionate interference with the right of access to a court.

The Court replied that the fundamental right of access to a court did not include the right to use existing procedures for manifestly vexatious purposes. However, because of the limitation of this fundamental right that imposing a fine for a manifestly vexatious application might represent, this notion must be interpreted narrowly. An applicant could not be fined on the sole ground that his or her application had only a very small chance of succeeding; the possibility, even if it were only theoretical, that a decision awarding him or her satisfaction might be given was sufficient to prevent the application from being categorised as "manifestly vexatious". From an analysis of previous decisions of the Council of State, the Court concluded that an applicant could be fined for a manifestly vexatious application only if the Court found that the application had been lodged in bad faith or for the purpose of harming or misleading or was the result of wrongdoing directly imputable to the applicant himself or herself, or that the application had not been lodged for the purpose permitted by law. Also, the contested provision required a hearing to be held, during which the applicant must have the opportunity to account for the vexatious nature of his or her application, with the result that compliance with the adversarial principle was ensured in the present instance.

At the same time, the fact that the Aliens Appeals Board was able to adjudicate the case on the basis of written documents exchanged and without a hearing did not, in the Court's view, violate the right to a fair trial, given the need to speed up and simplify proceedings in cases relating to aliens, particularly as, in the case in point, the law stated that the applicant was entitled, upon examining the order whereby the Court decided not to hold a hearing, to ask to be heard.

Lastly, the Court took the view that doing away with the right of applicants in annulment proceedings to file observations in reply, having studied the administrative file and the arguments put forward by the other party in its submissions, disproportionately

affected the rights of defence of these applicants. In the Court's view, the aim of speeding up and simplifying the proceedings could be achieved to a satisfactory degree, without similarly impairing the applicants' fundamental rights, by doing away with the requirement to file observations in reply but leaving the applicant, subject to a certain time-limit, the option of filing such observations if he or she saw fit.

The Court therefore annulled a number of provisions of the contested law but decided that in the interest of legal certainty, the effects of the annulled provision should be continued for all cases pending before the Aliens Appeals Board which had been brought before the judgment was delivered. In addition, in order to enable lawmakers to frame rules that took account of the foregoing paragraph, the effects of the repealed provision should be continued in respect of proceedings instituted after the judgment was delivered until such time as a new provision entered into force and until 31 December 2012 at the latest.

Languages:

French, Dutch, German.



Identification: BEL-2012-2-011

a) Belgium / **b)** Constitutional Court / **c)** / **d)** 12.07.2012 / **e)** 93/2012 / **f)** / **g)** *Moniteur belge* (Official Gazette), 18.10.2012 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Couple, same sex / Homosexual, marriage / Homosexual couple, adoption / Adoption, homosexual couple / Gap, in the law, role of the Court / Child, legal descent from both parents / Homosexual couple, co-parenthood.

Headnotes:

Even though the right to adopt does not appear as such among the rights guaranteed under the European Convention on Human Rights, the legal arrangements governing the family ties that exist *de facto* above and beyond any biological reality concern private life.

The child's potential interest in being able to claim legal descent from both parents generally prevails over the right of the mother to refuse consent for adoption by the woman to whom she had been married, with whom she had entered into a co-parenthood arrangement before the child was born and who had carried on with this arrangement after the birth, under an adoption procedure.

Summary:

I. The Constitutional Court had before it a number of preliminary questions referred by the youth court of Liège concerning the compatibility with the constitutional rules on equality and non-discrimination (Articles 10 and 11 of the Constitution) and with the constitutional rules on the right to private and family life and on the rights of the child (Article 22 and 22bis of the Constitution) possibly in conjunction with Articles 8 and 14 ECHR, of Articles 143.2, 348-3 and 348-11 of the Civil Code.

The first preliminary question related to a situation where the mother of a child refused to allow this child to be adopted by a woman to whom the mother had been married at the time when the child was born and the application made for adoption, who had signed an agreement with her in accordance with the law on medically assisted procreation and who had attended the preparation-for-adoption course required under the Civil Code, the adoption involving a child in respect of whom it was established that an actual family link existed and had been maintained since the spouses separated.

The Court noted that the only way in which a woman married to the mother of a child at the time of the child's birth and involved in a co-parenthood arrangement could establish a filial bond with that child was by adopting him or her. Under Article 348-11 of the Civil Code, however, the court could not grant an adoption if the child's mother refused to give her consent, unless this mother had lost interest in the child or had compromised his or her health, safety or moral welfare.

II. In its judgment, the Constitutional Court noted that lawmakers had taken numerous steps to take into account the interest of the child, in accordance with Article 22bis of the Constitution and Article 3 of the Convention on the Rights of the Child. It appeared from changes to the legislation that lawmakers had sought to protect children growing up in a family unit comprising a same-sex couple by allowing a dual filial bond to be established between the children and both members of this couple, through filiation via adoption, simple or full.

The Court went on to compare the provisions of the Civil Code with those of the Constitution. Relying on the case-law of the European Court of Human Rights, it highlighted the state's obligation to allow an existing family relationship to develop and benefit from legal protection, enabling the child to be integrated into his or her family. It pointed out that any interference with the right to respect for private and family life must be set out in a sufficiently precise legislative provision, correspond to a pressing social need and be proportionate to the legitimate aim pursued. There was also a positive obligation on the public authority to adopt measures designed to secure effective respect for private and family life, extending to the sphere of interpersonal relations. While lawmakers had a margin of discretion to ensure that the competing interests of the individual and of society as a whole were fairly balanced, this margin was not unlimited, as lawmakers must also balance the contradictory interests of the persons concerned, otherwise any measure they might adopt was liable to be disproportionate to the legitimate aims pursued.

Applying these principles, the Court held that the child's potential interest in being able to claim legal descent from both parents generally prevailed over the right of the mother to refuse consent for adoption by the woman to whom she had been married, with whom she had entered into a co-parenthood arrangement before the child was born and who had carried on with the arrangement after the birth, under an adoption procedure.

The Court therefore considered that the requirement for consent provided for in Article 348-11 of the Civil Code pursued a legitimate aim where the child adopted through full adoption ceased to belong to his or her family of origin. That was not the case, however, when the child adopted by the spouse of the adopter did not cease to belong to the family of origin. Any measure that established the mother's refusal of consent as an absolute bar to proceeding with the case, unless the mother had lost interest in the child or compromised his or her health, safety or moral welfare, and which therefore left the court no room to consider the interest of the child in order to

determine whether perhaps the refusal of consent was vexatious or not reasonably justified.

The Court concluded that this initial preliminary question called for a positive response and did not therefore rule on a second preliminary question concerning the constitutionality of Article 143.2 of the Civil Code, which stated that the presumption of the husband's paternity set out in Article 315 of the Civil Code did not apply if a marriage had been contracted between persons of the same sex.

The Court concluded that the gap which it had found was self-correcting: it was for the lower court to remedy the unconstitutionality found, since that finding was expressed in sufficiently precise and complete terms to enable the provision at issue to be applied in a way that complied with the Constitution.

Languages:

French, Dutch, German.



Identification: BEL-2012-2-012

a) Belgium / **b)** Constitutional Court / **c)** / **d)** 09.08.2012 / **e)** 103/2012 / **f)** / **g)** *Moniteur belge* (Official Gazette), 26.09.2012 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
 5.2.2 Fundamental Rights – Equality – **Criteria of distinction**.
 5.3.33.1 Fundamental Rights – Civil and political rights – Right to family life – **Descent**.
 5.3.34 Fundamental Rights – Civil and political rights – **Right to marriage**.
 5.3.44 Fundamental Rights – Civil and political rights – **Rights of the child**.

Keywords of the alphabetical index:

Marriage, right, limits / Incest, persons related in the collateral line / Marriage, prohibition / Family, protection / Family, morality / Child, establishment of descent from both parents / Child, best interests.

Headnotes:

Interference with children's rights to have their best interest taken into account cannot be justified by the aim of prohibiting incestuous relations between persons related by blood. It is no doubt legitimate that lawmakers should seek to prevent such relations for reasons that have to do both with protecting the family and individuals and with protecting society.

Unlike the bar on marriage, however, the absolute ban on establishing descent from both parents for any children born of such a union is not an appropriate means of achieving these objectives. For by making it impossible under any circumstances for the child to claim descent from both parents, Article 325 of the Civil Code cannot help to prevent a situation that, by definition, has already come about.

Summary:

I. The Court had before it a preliminary question referred by the Court of First Instance of Huy concerning Article 325 of the Civil Code under which an application to establish paternity was deemed to be inadmissible if the judgment would disclose an impediment to marriage, admitting of no royal dispensation, between the alleged father and the mother. The Court was asked to consider whether this provision was compatible with the rules on equality and non-discrimination (Articles 10 and 11 of the Constitution) in conjunction with Articles 8 and 14 ECHR and with Articles 3.1 and 7.1 of the Convention on the Rights of the Child. The court had received an application for an order establishing a man's paternity vis-à-vis his three children. The application had been lodged by the children's mother and their *ad hoc* guardian. The children had not been acknowledged by the father who had died in an accident, but they had been raised by both parents who were brother and sister through their mother, but had been unaware of the fact when they met. The children had lived continuously with both parents, the parents having furthermore made a declaration of legal cohabitation before the registrar.

II. In its judgment, the Constitutional Court noted that Article 325 of the Civil Code, related to the provisions of the Code on impediments to marriage, did not allow a child born of a relationship between persons between whom marriage was strictly prohibited to have his or her descent from both parents recognised, whether through acknowledgement or through establishment of parentage by judicial decision.

The Court went on to observe that impediments to marriage in the direct line or in the collateral line were based on the prohibition of incest, which was itself based on various reasons: physiological and eugenic reasons, ethical and moral reasons, and lawmakers' concern to secure the place of each generation within the family.

Relying on the European Court of Human Rights judgment of 12 April 2012, *Stübing v. Germany*, the Court went on to note that while disapproval of sexual intercourse between persons who were blood-related seemed to be almost universal, the way in which countries expressed this disapproval through legislation varied. Some had chosen to make it a criminal offence whereas in others, it was merely prohibited to officialise such relations through marriage. Establishing filial bonds that disclosed the incestuous nature of the relationship between a child's parents was not prohibited in all member states of the Council of Europe, or even in those where incest was a criminal offence.

The Court went on to note that Article 325 of the Civil Code created a difference in treatment with regard to the possibility of establishing descent from both parents between the children at whom it was directed and all other children. In introducing this difference in treatment, the drafters of the 1987 provision had proceeded from the idea that it was generally not in the interest of children born of an incestuous relationship to have their descent from both parents established. In the Court's view, while in some cases it might not be in the best interest of the child to have such descent established, it could not be assumed that that was always the case, particularly where, as in the instant case, paternity was to be established by a court at the request of the child or his or her legal representative, acting in his or her name. Among other possibilities, where the circumstances of his or her birth were known to the child and those around him or her, it could in fact be considered that the benefits, notably in terms of protection against poverty, that he or she would derive from the establishment of descent from both parents outweighed any disadvantages that he or she might suffer as a result of official recognition of the fact that his or her parents were strictly prohibited from marrying.

The Court concluded that by imposing a blanket ban on the establishment of descent from both parents, the provision at issue prevented the best interest of the child from being taken into account. Such interference could not be justified by the no doubt legitimate aim of prohibiting incestuous relations between persons related by blood. Unlike the impediment to marriage, however, categorically

banning the establishment of descent from both parents for any children born of such a relationship was not an appropriate means of achieving these objectives. The provision at issue could not contribute to the prevention of a situation that, by definition, had already come about.

In addition, given that it harmed mainly the children born of the relationship deemed to be objectionable and not the persons responsible for that relationship, it amounted to disproportionate interference with the right of the children concerned to claim descent from both parents, should it be in their interest to do so.

The Court concluded that Article 325 of the Civil Code violated the Constitution in that it prevented a court faced with an application for the establishment of paternity from granting this application even if it found that establishing such paternity was in the best interest of the child.

Cross-references:

- *Bulletin* 2006/3 [BEL-2006-3-011];
- *Bulletin* 2003/3 [BEL-2003-3-013].

Languages:

French, Dutch, German.



Bosnia and Herzegovina Constitutional Court

Important decisions

Identification: BIH-2012-2-002

a) Bosnia and Herzegovina / **b)** Constitutional Court / **c)** Plenary session / **d)** 26.05.2012 / **e)** AP 1106/09 / **f)** / **g)** *Sluzbeni glasnik Bosne i Hercegovine* (Official Gazette), 59/12 / **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:

Bank guarantee / Burden of proof / Debt, enforcement.

Headnotes:

The recognition of a debt is of legal relevance exclusively where the statement recognising the debt is clear, specified and unconditional.

Summary:

I. In the proceedings in question, which were concluded with the challenged Supreme Court's judgment, the Supreme Court dealt with the appellant's claim against the defendants for payment of a debt based on a guarantee for 5,536,742.00 clearing dollars, which it had issued to the buyer of property on 19 February 1982 in order to allow the buyer to conclude its contract with a foreign seller for the purchase of an entire technological project for the equipment to build a brewery in Bihać.

The appellant challenged the judgments of the ordinary courts for erroneously established facts, erroneously applied substantive law and arbitrarily assessed evidence. The appellant contended that the courts had incorrectly concluded that the defendants were not liable for the payment of the debt to the

appellant given that the appellant had proved in the proceedings that the defendants were the legal successors of the buyer—as they formed the buyer's organisational units as a Complex Organisation of Associated Labour (OOUR) (a specific form of economic enterprise under the law of the former Socialist Federal Republic of Yugoslavia (SFRY) – and given that the appellant had submitted evidence to prove that it had paid all obligations to the foreign seller for the received equipment which at present, the appellant claimed, is used in an unlawful manner by the first defendant. The appellant accordingly contended that the first defendant was liable to pay compensation for damages in the amount equal to the unlawful enrichment, i.e. unlawful reduction of the size of the appellant's property.

II. The Constitutional Court noted that it was undisputedly established in the proceedings that the buyer had entered into a contract with a foreign seller for the purpose of delivering the equipment for the construction of a brewery in Bihać and that, on the basis of this legal transaction, the appellant had issued a guarantee to the buyer on 19 February 1982 in the amount of 5,536,742.00 clearing dollars. With the aim of executing the said project the buyer had founded “*RO u osnivanju Pivara*” Bihać. That legal entity was subsequently liquidated and possession of the equipment of that legal entity was assumed by the Municipality of Bihać upon the conclusion of the liquidation procedure, which then transferred possession of the equipment to *RO Industrija Mlijecnih proizvoda Bihać* for their use. This company also went bankrupt, and before bankruptcy the said equipment was given to the first defendant which it has used to the present day.

However, the Court considered that the decisions of the courts in this matter were disputable whereby they had concluded that there was no liability of the defendants in the legal matter at hand, regarding the debt to the appellant, because the appellant had failed to prove the existence of the legal succession between the defendants and the buyer, whether the appellant had paid for the respective equipment to the foreign seller and whether the first defendant had used the respective equipment without a legal basis.

On the basis of the challenged judgments, the Constitutional Court noted that, regarding the appellant's contention that the position of the courts was erroneous, there was no liability on the part of the defendants regarding the payment of the debt. The ordinary courts had established all the crucial facts on the basis of the status of the case file, considering in particular the finding of the financial expert, which was assessed as objective and provided in accordance with the rules of the

profession, took a uniform position that the appellant had failed to prove, in procedural-legal terms, that the defendants were the legal successors of the buyer for which the bankruptcy procedure was completed, nor did it provide the courts with evidence on which basis such facts could have been established.

The Court noted that, under the provisions of Articles 123 and 126 of the Civil Procedure Code it is the responsibility of the party to prove the facts stated in every claim, for, in general, according to these legal provisions, each party ought to prove the truthfulness of every factual allegation made, otherwise those allegations will be considered not proven. As to the appellant's contention that during the proceedings it had proven that it had paid the debt to the foreign seller, the Constitutional Court considered this claim to be unproven, for on the basis of the reasoning of the challenged judgments, it follows that the courts had established, on the basis of the finding of the expert, that the debt to the foreign seller had been paid, and that after the expert analysis had been completed, two legal entities who had made the payment were identified, namely Jugobanka and Pik Krajina. Thus, bearing in mind the finding of the expert, the Constitutional Court considered that the appellant failed to prove its allegations that it had paid the disputed debt to the seller and supplier in the amount claimed, which was its obligation as the claimant under the said provisions of the Civil Procedure Code. This was due to the particular importance attached to the rule of the burden of proof in the new system of the civil procedure wherein the court no longer has the power to present evidence *ex officio*, in order to establish thoroughly and truthfully the disputed facts on which the decision on the claim depends; rather, the burden of proof lies exclusively on the claimant.

Regarding the appellant's allegations regarding unlawful enrichment, the Constitutional Court observed that the courts had provided clear and well-reasoned argumentation that the appellant had failed to specify its claim regarding the establishment of which entity has the respective equipment at its disposal, neither did it propose nor present in the evidentiary proceedings evidence relating to the value of the equipment which was allegedly acquired unlawfully at the time of purchasing the equipment. In addition, it was established that, even provided that the appellant had indeed made, on the basis of the issued bank guarantee, the payment of the value of the imported equipment to the foreign seller, that property did not become the property of the appellant but of the buyer as an importer thereof and the contracting party. Thus in that case there is no legal basis for the establishment of the responsibility of the first defendant to reimburse to the appellant the

claimed amount. Therefore, having found that the equipment which is at the disposal of the first Defendant does not constitute the property of the appellant, the Constitutional Court found these allegations to be arbitrary.

The Constitutional Court also observed that the courts at all three instances had noted that on 23 April 1990 the first defendant had made a proposal to the appellant for an out-of-court settlement of the dispute, which the courts had dismissed as ill-founded, concluding that such a statement by the first defendant did not amount to evidence of recognition of the debt, nor could the first defendant, on the basis of such a statement, be obliged to pay the debt to the appellant. In the courts' view, recognition of a debt is of legal relevance solely where the statement recognising the debt is clear, specified and unconditional.

Therefore, the Constitutional Court held that the courts had provided a sufficiently clear and detailed reasoning for their decisions, and that the proposal which the first defendant had made to the appellant did not meet the required standards in order to be taken as such and treated as recognition of the debt.

The Constitutional Court concluded that there was no violation of Article 6 ECHR and Article 1, Protocol 1 ECHR given that the ordinary courts had provided a clear reasoning for their respective decisions, i.e. the courts had provided clear and consistent arguments based on the relevant provisions of the Civil Procedure Code. The Court therefore held that the defendants were not liable to the appellant for the settlement of the debt.

Languages:

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



Identification: BIH-2012-2-003

a) Bosnia and Herzegovina / **b)** Constitutional Court / **c)** Plenary session / **d)** 26.05.2012 / **e)** AP 2120/09 / **f)** / **g)** *Sluzbeni glasnik Bosne i Hercegovine* (Official Gazette), 59/12 / **h)** CODICES (Bosnian, English).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Home, inviolability / House search / Search warrant, specification.

Headnotes:

The right to respect for home, private and family life is violated where the warrant providing the basis for a search of a person's home fails to specify, at a minimum level, the reasons suggesting that there exists a likelihood that someone (a perpetrator or accomplice) or something (the traces of a criminal offence or objects relevant to the proceedings) would be found in the home, which clearly stems from the content of the provisions of the Criminal Procedure Code and which represents a guarantee of justification for issuing a search warrant.

Summary:

I. In the instant case the appellant was suspected of a very serious offence; organised crime in connection with the offence of illicit narcotics trafficking. The grounds for suspicion were based on a Report of the Crime Police Administration of the Republica Srpska (one of the principal territories of Bosnia and Herzegovina) which was obtained through operations in the field. At the request of the prosecution, the Court issued a warrant which permitted a search of the appellant's apartment, car, mobile phones and computers, hard drives and other storage devices for the detection and seizure of items that encourage or can be brought into connection with the commission of the offence and traces of crime. The appellant complained that the search, which was conducted on foot of an unlawful search warrant of the court with excessive use of force and threats, and in full view of the public in order to discredit the appellant, was in violation of his rights under Article II.3.f of the Constitution and Article 8 ECHR.

II. The Constitutional Court examined whether the search warrant was issued "in accordance with the law." The Constitutional Court noted that the warrant was based on Article 51 of the Criminal Procedure Code which states that the search of a dwelling or other premises may be conducted only when there

are sufficient grounds for suspicion that a perpetrator of a crime or accomplice to a crime, traces of a criminal offence or objects relevant to the criminal proceedings might be found there. The Constitutional Court observed that the reason or basis for the issuance of the warrant is the existence of grounds for suspecting that they will find something or someone. This implies that when issuing a search warrant, the court does not address the existence of grounds for suspicion that a crime was committed.

Grounds for suspicion that a crime was committed are the “jurisdiction” of the prosecution and that is a *conditio sine qua non* for issuing the warrant. It also means that after the prosecution establishes that there is a lower degree of suspicion (so-called “reason to suspect” at the investigation stage) that the offence has been committed if there is a probability that something or someone can be found, it then submits a request for issuance of a search warrant but it must submit to the court the facts indicating the likelihood that the person, traces or objects (referred to in Article 51.1) will be found at the designated or described place or with a certain person.

When issuing a search warrant, the court does not deal with the grounds for suspicion that a criminal offence was committed but must establish sufficient grounds for suspicion that the search, of a person or place(s), will lead to the discovery of certain objects, traces or persons. Since the Criminal Procedure Code contains the terms “grounds for suspicion”, “likelihood” and “well-grounded suspicion”, which could be graded differently in ordinary life, it is important to note that “grounds for suspicion” is the lowest degree of suspicion, “well-grounded suspicion” is the degree of suspicion that the prosecution has when issuing the indictment (which implies a certain security) and the “likelihood” is found between these two degrees of suspicion. This also means that in order to issue a warrant, the court must have an even higher degree of suspicion that it will find something or someone through the search than just a mere grounds for suspicion that the crime was committed.

The reason for requiring a judicial decision on the issuance of a search warrant and for this “higher degree of suspicion” in a criminal investigation is the objective of protecting the home, privacy and family life of persons to whom a warrant relates. After the search is conducted, there is no more “confidentiality”, i.e. the person is already familiar with the specific actions of the prosecution. At this stage of the proceedings the sole guarantor of human rights protection (namely, the right to home, privacy and family life) is the court’s assessment of the probability that something will be found or the assurance of the court that the search is justified (Article 57 of the

Criminal Procedure Code), and that the “assurance” of the court should be known to the person to whom the search warrant relates. The Constitutional Court did not receive an assurance from the issuing court that it had sufficient grounds for suspicion that the search would result in the discovery of something or someone, because the issuing court referred solely to grounds for suspicion that the appellant had committed the offence: the warrant offered grounds for suspicion that a crime was committed and the warrant clearly defined the “target” of the warrant (to seek and seize items that encourage or can be correlated with criminal offences and traces of the crime); but the warrant lacked “the essence of a warrant” and “concretisation” of sufficient grounds for suspicion that the perpetrator, the accessory, traces of a criminal offence or objects relevant to the criminal proceedings might be found there.

The Court emphasised that grounds for suspecting the commission of a crime do not imply *a priori* a likelihood of finding items and clues to the crime; the “likelihood” must be set out in detail through a court warrant. The two concepts “grounds for suspicion” and “likelihood” are essentially and linguistically different and the court cannot operate on “automatism” and, if there are grounds for suspicion of a criminal offence, issue a search warrant.

On the basis of this analysis, the Constitutional Court held that in this case the procedure of issuing a search warrant for a search of the appellant and his home and others as specified by the warrant of the Court, did not satisfy the criterion of “interference in accordance with the law” under Article 11.3.f of the Constitution and Article 8 ECHR. The Court held that the process of issuing the search warrant had not been conducted in accordance with the relevant regulations, given that the issuing court had not given reasons that it had sufficient grounds for suspecting that the search would result in finding something with the appellant or in his home, car, mobile or computer, which is a necessary condition for the issuance of a search warrant.

Languages:

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



Brazil

Federal Supreme Court

Important decisions

Identification: BRA-2012-2-007

a) Brazil / **b)** Federal Supreme Court / **c)** Plenary / **d)** 25.03.2009 / **e)** 344.994 / **f)** Extraordinary Appeal / **g)** *Diário da Justiça Eletrônico* (Official Gazette) 162, 28.08.2009 / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Tax, deduction / Tax, foreseeability / Tax, income, calculation.

Headnotes:

Compensation for losses in previous fiscal years is a tax benefit which does not create a vested right. A law setting a limit on the amount of compensation for a business's losses over a fiscal year was held to be valid given that it did not create any vested rights, the parameters for calculating this tax derives from legal determination and does not need to coincide with economic or societal expectations.

Summary:

I. This case refers to an extraordinary appeal filed against a decision that judged Law 8.981/1995 valid. That Law set a limit of 30% on compensation for a business' losses over a fiscal year in the following year, in order to determine the actual income, which serves as the basis for calculating income tax. The applicant claimed that this constituted a breach of vested rights, since the Income Tax Rules authorised the full rebate of tax losses in the actual income. The applicant also contended that the Law breaches the principle of previously defined taxation, which prohibits the collection of a new tax in the same fiscal year in which the law that established or increased the new tax was published. Considering that the Law was published on Saturday, 31 December 1994, and

the first working day following occurred in 1995, such limitation could only be in effect in 1996.

II. The Federal Supreme Court of Brazil, by majority vote, dismissed the extraordinary appeal, on the ground that the possibility of compensation for losses for determining the amount of the income tax is merely a tax benefit, which could be changed at any time and may not create a vested right, since, in these cases, the applicable law is the one in force at the end of the fiscal year. It was stated that the parameters for calculating this tax derives from legal determination and does not need to coincide with economic or societal expectations.

III. In a separate opinion, a dissenting Justice stated that the Law would be a government ruse to defraud the principle of previously defined taxation, because the publication occurred in the last day of the year, which fell on a non-working day. It was also contended that the Law was an effective anticipation of tax because it would permit the tax to be levied without earned income, since the possibility of compensation for losses accumulated in previous fiscal years would be limited regarding eventual profits.

Supplementary information:

- Law no. 8.981/1995.

Languages:

Portuguese, English (translation by the Court).



Identification: BRA-2012-2-008

a) Brazil / **b)** Federal Supreme Court / **c)** Plenary / **d)** 12.03.2009 / **e)** 2.699 / **f)** Question of order on investigation / **g)** *Diário da Justiça Eletrônico* 84 (Official Gazette), 08.05.2009 / **h)**.

Keywords of the systematic thesaurus:

4.7.4.1.6.2 Institutions – Judicial bodies – Organisation – Members – Status – **Discipline.**

4.7.16.2 Institutions – Judicial bodies – Liability – **Liability of judges.**

5.3.31 Fundamental Rights – Civil and political rights – **Right to respect for one’s honour and reputation.**

Keywords of the alphabetical index:

Defamation / Honour, respect, right / Judiciary, independence / Judge, measure, disciplinary / Judge, immunity, scope / Judge, independence, guarantees.

Headnotes:

Members of the Bench have judicial immunity from their statements expressed when performing judicial duties. Such immunity protects their independence, which is imperative to maintain fundamental freedoms.

Summary:

I. This case refers to a Question of Order in investigation filed against two Justices of the Federal Supreme Court of Brazil, on charges of defamation (Articles 139 and 140 of the Penal Code). The claimant alleged that the Justices had committed criminal defamation on the basis that the Justices had attempted to induce, by deception, the other member of the Court to make an error, as they read their opinions.

II. The Federal Supreme Court unanimously decided the Question of Order raised, dismissing the penal proceeding as the Justices’ acts could not be foreseen. First, the Court stated that all members of the Bench are subject to strict ethical and legal precepts. Any possible violation of such precepts can lead to censorship, imposition of a penalty or criminal liability. However, members of the Bench shall not be punished for statements when entering judgments, if they did not use improper or excessive words, nor had an offensive purpose. That is the functional immunity ensured to all public agents (Article 142.3 of the Penal Code), including members of the Bench (Article 41 of the Complementary Law no. 35/1979 – Act of the National Members of the Bench), in order to ensure them independence and to ensure that they can perform their public duties free from inhibitions.

Moreover, judicial independence, within a state of law, is imperative to maintain fundamental freedoms, since without independent members of the Bench, there is no free society. Such independence also protects society from illegitimate state interference in citizens’ or institutions’ legal spheres.

In this situation, the expressions used were indispensable to understanding the case. Therefore, there was no malicious intent, which is necessary in order to establish crimes against honour, such as defamation.

Supplementary information:

- Articles 139, 140 and 142.3 of the Penal Code;
- Article 41 of Supplementary Law no. 35/1979.

Languages:

Portuguese, English (translation by the Court).



Identification: BRA-2012-2-009

a) Brazil / **b)** Federal Supreme Court / **c)** Second Panel / **d)** 14.04.2009 / **e)** 94.052 / **f)** “Habeas Corpus” / **g)** *Diário da Justiça Eletrônico* 152 (Official Gazette), 14.08.2009 / **h)**

Keywords of the systematic thesaurus:

4.7.12 Institutions – Judicial bodies – **Special courts.**
 5.3.13.4 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Double degree of jurisdiction.**
 5.3.13.10 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Trial by jury.**

Keywords of the alphabetical index:

Cassation judgment, principles, essential / Cassation, procedure, guarantees / Cassation, re-trial, evidence / Jury trial.

Headnotes:

Where an appellate court annuls a jury verdict, on the grounds that the verdict was issued against the evidence brought before the court, this does not breach the constitutional rule that guarantees the sovereignty of the jury verdict.

Summary:

I. This case refers to a petition for a writ of *habeas corpus* (which in Brazilian law has a much broader scope than vindication of the right to liberty) filed against a decision of the Superior Court of Justice which affirmed an appellate court's decision that annulled a jury verdict. The verdict was annulled because it was contrary to the evidence brought before the court. The petitioners contended that the sovereignty of the jury verdict, provided for by Article 5.35 of the Federal Constitution, was breached, because jurors, in order to decide, chose one out of two plausible alternatives.

II. The Second Panel of the Federal Supreme Court, by a unanimous vote, dismissed the petition. The Panel held that the petition for a writ of *habeas corpus* is not the proper proceeding to revise and reassess the evidence. It asserted that the appellate court's decision to annul the verdict flagrantly against the evidence was in accordance with the precedents of the Supreme Court. A jury verdict which is flagrantly against the evidence brought before the court is an error in the proceedings that may not be rectified by the appellate court. Pursuant to the sovereignty of the jury verdict, the appellate court cannot modify or reverse the jury verdict, but it may vacate the decision and remand the case for a new judgment by the same jurors. It was stated that the sovereignty of the jury verdict is not absolute and that it must remain subject to the appeal system, in compliance with Article 593.3.d of the Criminal Procedure Code.

Supplementary information:

- Article 593.3.4 of the Criminal Procedure Code.

Languages:

Portuguese, English (translation by the Court).

*Identification:* BRA-2012-2-010

a) Brazil / **b)** Federal Supreme Court / **c)** Plenary / **d)** 16.04.2009 / **e)** 1.980 / **f)** Direct Claim of Unconstitutionality / **g)** *Diário da Justiça Eletrônico* 148 (Official Gazette), 07.08.2009 / **h)**.

Keywords of the systematic thesaurus:

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

4.8.1 Institutions – Federalism, regionalism and local self-government – **Federal entities.**

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

Keywords of the alphabetical index:

Competence, legislative / Consumer, protection / Jurisdiction, concurrent / Norm, sub-constitutional, constitutionality.

Headnotes:

A State law establishing a consumer right to obtain information about the nature, origin and quality of the fuel products at petrol stations located in its territory is constitutional given that it does not trespass upon the sphere of exclusive law-making power of the Federal Union.

Summary:

I. This case refers to a direct claim of unconstitutionality against Law 12.420/1999 of the State of Paraná which ensured to consumers the right to obtain information about the nature, origin and quality of the fuel products at petrol stations located in its territory. The claimant pleaded that the power to legislate on fuel trade, civil law, commercial law, criminal law, freedom of initiative and free competition is the exclusive preserve of the Federal Union, which also enjoys a monopoly on regulation of the sale and resale of fuels, as well as its supervision and the application of penalties.

II. The Supreme Federal Court, by a unanimous vote, ruled to dismiss the direct claim of unconstitutionality on the ground that the challenged law operates in the field of the concurrent jurisdiction of federated states, which guarantees the possibility of different levels of a politically federated unit, at the state and federal level, to legislate on the same matter. It was argued that there is no unconstitutionality in these state laws, nor do they occupy the field reserved exclusively to the Union, because they only provided obligations related to consumer protection. The state laws do not provide for the regulation of the operation of fuel distribution services, nor trade relations between distribution companies and petrol stations, nor the exploration and production of oil.

It was explained that the possibility of federated states to institute rules of consumer protection derives from state legislative powers, through Articles 24.5, 24.8 and 24.8.2 of the Federal Constitution, which establish that the Union has to legislate on general rules of production and consumption of fuel, as well as on liability for damage to the consumer, and individual states in the Union must supply the gaps of legislation left by the Union regarding the general principles.

Supplementary information:

- Article 24.5, 24.8 and 24.8.2 of the Federal Constitution;
- Law no. 12.420/1999 of the State of Paraná.

Languages:

Portuguese, English (translation by the Court).



Identification: BRA-2012-2-011

a) Brazil / **b)** Federal Supreme Court / **c)** Plenary / **d)** 07.05.2009 / **e)** 96.233 / **f)** "Habeas Corpus" / **g)** *Diário da Justiça Eletrônico* 104 (Justice Gazette), 05.06.2009 / **h)**

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Defamation, candidate, public office / Election, candidate / Election, electoral code / Election, electoral law, infringement.

Headnotes:

To insert a false declaration in a public document in order to gain electoral advantages is a conduct offence, that is, the offence is committed when the action happens, regardless of the actual harm caused, as the existence of potential damage is sufficient.

Summary:

I. This case refers to a request for a writ of *habeas corpus* (which in Brazilian law has a much broader scope than vindication of the right to liberty) filed against a decision of the Superior Electoral Court which denied an electoral special appeal. The accused, who was a candidate for political office, was accused of making a false declaration in a public document in order to harm his opponent in the municipal election. He alleged that his conduct was not previously defined in the law, given that the false declaration did not cause any harm, as his opponent was elected to the post of mayor in any event. Accordingly, he requested dismissal of the criminal prosecution.

II. The Supreme Federal Court, by majority vote, denied the writ of *habeas corpus*. It was explained that the crime under analysis is a conduct offence, that is, the offence is committed when the conduct or the omission is perpetrated, regardless of the actual harm caused, as the existence of potential damage is sufficient. It was stated that the false declaration had a potential harm given that it was used as supporting proof to challenge the enrolment of the opponent candidate, alleging abuse of economic power by that candidate. Even though the opponent candidate was elected, such challenge would have risked damage to the electoral process itself.

Supplementary information:

- Article 350 of the Electoral Code.

Languages:

Portuguese, English (translation by the Court).



Identification: BRA-2012-2-012

a) Brazil / **b)** Federal Supreme Court / **c)** Plenary / **d)** 17.06.2009 / **e)** 511.961 / **f)** Extraordinary Appeal / **g)** *Diário da Justiça Eletrônico* 213 (Official Gazette), 13.11.2009 / **h)**

Keywords of the systematic thesaurus:

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

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

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

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

Keywords of the alphabetical index:

Journalism / Law, governing the profession / Media, journalism, restriction / Profession, access, conditions.

Headnotes:

The professional exercise of journalism does not require a diploma. Such requirement will only be necessary when the lack of technical expertise can cause harm to society. However, risks associated with journalism can be corrected by subsequent civil and criminal liability. Moreover, this activity represents the exercise of freedom of expression and cannot be subjected to any kind of prior censorship.

Summary:

I. This case refers to an extraordinary appeal filed against a decision holding that Article 4.5 of Decree-Law no. 972/1969 was received by the Federal Constitution, i.e. valid under the Constitution of 1988 adopted after the end of the military dictatorship. The provision established a requirement of a diploma for the exercise of journalism. The appellant argued that technical expertise can only be required when its lack can cause harm to society and the activity of journalism has no specificity that justifies the diploma requirement. Moreover, the appellant stated that the challenged provision was revoked by Article 13 of the American Convention on Human Rights (hereinafter, "ACHR"), which guarantees freedom of thought and expression.

II. The Federal Supreme Court, by a majority decision, declared that Article 4.5 of Decree-Law no. 972/1969 had not been received by the Federal Constitution. Article 5.13 of the Federal Constitution established the freedom of profession subject to qualifications specified by law. However, these qualifications are not open clauses that allow legislators to impose limits on the exercise of such freedom. The restrictions must comply with the principle of proportionality and are only justified when

the professional activity could cause harm to society due to the lack of a specific technical expertise of the profession. Although journalism involves risks, such risks do not derive from the lack of technical expertise, but from the abusive and unethical exercise of the profession. Thus, such excess should be subject to subsequent civil and criminal liability.

Furthermore, journalism is a distinct activity as it entails exercise of the freedom of expression. Accordingly, the systematic interpretation of Article 5.13, combined with Articles 5.4, 5.9, 5.14 and 220 of the Federal Constitution, which together guarantee the freedom of expression and information, and permit limited regulation of these freedoms, indicates that laws regarding journalist qualifications should only prevail if they establish limits due to other constitutional rights or if they reinforce the freedom of expression. In this sense, the diploma requirement is an instance of prior censorship. The Organisation of American States (OAS), through the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, has provided the same interpretation of Article 13 ACHR, which was incorporated into Brazilian legislation.

Lastly, the diploma requirement was established during the military regime, clearly intending to reduce the freedom of expression of intellectuals and artists opposed to the dictatorship.

III. In a separate opinion, a dissenting Justice contended that there was no formal unconstitutionality. The diploma requirement would not represent, nowadays, a limitation to the freedom of expression. Such requirement derived from a politic and normative option that aimed at providing more legal safety to what is published by the press.

Supplementary information:

- Articles 5.4, 5.9, 5.13, 5.14 and 220 of the Federal Constitution;
- Article 4.5 of the Decree-Law no. 972/1969;
- Article 13 of the American Convention on Human Rights.

Cross-references:

- ADPF 130;
- RE 414.426.

Languages:

Portuguese, English (translation by the Court).



Identification: BRA-2012-2-013

a) Brazil / **b)** Federal Supreme Court / **c)** Plenary / **d)** 19.11.2009 / **e)** 583.937 / **f)** Question of Order for General Impact on Extraordinary Appeal / **g)** *Diário da Justiça Eletrônico* 237 (Justice Gazette), 18.12.2009 / **h)**.

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Confidentiality, professional / Conversation, recording / Court session, public, tape recording, right / Evidence, illegally obtained, admissibility.

Headnotes:

The use of audio surveillance equipment ('bugging') by one of two interlocutors, without the awareness of the other, can be used as evidence in a criminal hearing.

Summary:

I. A question of order was raised in an extraordinary appeal filed against a decision that declared the use of audio surveillance equipment ('bugging') inadmissible as evidence in a criminal hearing when the bugging was carried out by one of the interlocutors, without the awareness of the other. The challenged decision held that the evidence was unlawfully obtained and that it could only be used if it was the sole basis for the defence of the accused. The appellant alleged that criminal hearings are open to the general public and that bugging carried out by one interlocutor, without the awareness of the other, is not forbidden by the law.

II. The Federal Supreme Court of Brazil, by a majority vote, acknowledged that the case had general repercussion (since 2004 a claimant must establish that a case has general repercussions within the legal system in order to be heard by the Supreme Court) and granted the extraordinary appeal to declare the proceedings null on the basis of the denial of the evidence. The Court decided that the evidence obtained through bugging by one of the interlocutors, without the awareness of the other, is lawful, mainly when it is uncontestable. The Court explained that it would be unlawful if the recording of the conversation was carried out by a third party or if it was about a subject that is subject to professional secrecy.

However, the Court stated that the disclosure of conversations without a legitimate reason is not allowed, especially when there are facts about the private lives of those involved. The judge must assess the necessity of the evidence in each case.

III. In a separate opinion, a dissenting Justice defended the unlawfulness of the evidence on the grounds that bugging, without the awareness of the accused, breaches the good faith that must exist in every human relationship.

Languages:

Portuguese, English (translation by the Court).



Identification: BRA-2012-2-014

a) Brazil / **b)** Federal Supreme Court / **c)** Plenary / **d)** 19.11.2009 / **e)** 602.527 / **f)** Question of Order for General Repercussion on Extraordinary Appeal / **g)** *Diário da Justiça Eletrônico* 237 (Official Gazette), 18.12.2009 / **h)**.

Keywords of the systematic thesaurus:

3.13 General Principles – **Legality.**

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

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

Keywords of the alphabetical index:

Criminal prosecution / Presumption of innocence.

Headnotes:

The extinction of the possibility of punishment, based on a “prospective or early” statute of limitations, in other words, based on a prevision of punishment that would hypothetically sentence the accused if considered guilty, is unlawful as it violates a number of central aspects of the constitutional right to due process, including the adversarial system, the comprehensive defence, and the presumption of innocence.

Summary:

I. An extraordinary appeal was filed against a decision holding that it was possible to declare extinct the possibility to punish the accused by means of the “prospective or early” statute of limitation, in other words, when the court unmistakably foresees that, if the accused is sentenced to a prison term, by the time the offender is sentenced, the term would already have expired. The appellant argued that an accused has the right to prove his innocence and that such individual guarantee is established in the constitutional text, in the principles of the procedural due process, the adversarial system, the comprehensive defence, and the presumption of innocence (Articles 5.54, 5.55 and 5.57 of the Federal Constitution).

II. The Federal Supreme Court unanimously held that the case had general repercussion (since 2004 a claimant must establish that a case has general repercussions within the legal system in order to be heard by the Supreme Court), raised in a Question of Order and, on the merits, also unanimously, granted the extraordinary appeal. The Court decided that the extinction of the possibility of punishment based on the declaration of the “perspective or early” statute of limitation is not established by law, violates procedural due process and is not possible, once it impedes any judicial hearing of the case. The Court also asserted that the application of this statute of limitations would impede the criminal proceedings and deny the accused the possibility to prove his innocence.

Lastly, the Court stated that to admit this type of statute would reverse the due course of the proceedings given that it would anticipate the offender’s guilt by discussing the proper penalty to impose before establishing the liability for and existence of the crime. This reversal would represent

a violation of a number of central aspects of the constitutional right to due process, including the adversarial system, the comprehensive defence, the presumption of innocence principle, the universality of jurisdiction principle and the legality principle.

Supplementary information:

- Article 5.54, 5.55 and 5.57 of the Federal Constitution.

Languages:

Portuguese, English (translation by the Court).

*Identification:* BRA-2012-2-015

a) Brazil / **b)** Federal Supreme Court / **c)** Plenary / **d)** 02.12.2009 / **e)** 547.245 / **f)** Extraordinary Appeal / **g)** *Diário da Justiça Eletrônico* 40 (Official Gazette), 05.03.2010 / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Contract, applicable law / Government, taxation, imposition / Lease, contract / Tax / Taxation.

Headnotes:

A financial leasing contract is an autonomous agreement, no longer characterised in accordance with the operations of leasing, selling and financing, which compose it. Such a contract is a rendering of service, and accordingly is subject to Municipal Services Tax.

Summary:

I. This case refers to an extraordinary appeal filed against a decision denying application of Municipal Services Tax to the operations of financial leasing, on the grounds that this activity is not a rendering of services. The appellant claimed that there are

precedents in the Supreme Federal Court which permitted the application of the tax to leasing operations.

II. The Supreme Federal Court, by a majority vote, granted the extraordinary appeal, because it considered that in financial leasing contracts the character of financing prevails, which is a service to which the Municipal Services Tax could be applied. It was explained that in this modality of leasing the lessor acquires goods from a manufacturer or supplier and delivers its use and enjoyment to the lessee, by making a periodic payment. At the end of the lease, the lessee may return the good, renew the lease or purchase it by the residual price agreed in the contract.

It was also stated that the content of legal concepts is ambiguous and that such concepts develop with the passage of time. Accordingly, a financial leasing contract is an autonomous agreement, no longer characterised in accordance with the operations of leasing, selling and financing, which compose it.

III. In a dissenting opinion, it was contended that financial leasing is a sort of lease, because the lessor does not provide service to the lessee, but only delivers to him/her a good, being entitled to a fee for the use of such asset. Thus, as the precedent of the Court establishes the unconstitutionality of the application of Municipal Services Tax to leasing activities, this tax should not be levied on financial leasing operations.

Supplementary information:

- Article 156.3 of the Federal Constitution.

Languages:

Portuguese, English (translation by the Court).



Identification: BRA-2012-2-016

a) Brazil / **b)** Federal Supreme Court / **c)** Plenary / **d)** 03.12.2009 / **e)** 389 / **f)** Internal Interlocutory Appeal in Suspension of Preliminary Injunction / **g)** *Diário da Justiça Eletrônico 086* (Official Gazette), 14.05.2010 / **h)**.

Keywords of the systematic thesaurus:

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

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

5.3.45 Fundamental Rights – Civil and political rights – **Protection of minorities and persons belonging to minorities.**

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

Keywords of the alphabetical index:

Religion, freedom, positive / Religion, practice, on Saturdays / Religion, religious neutrality of the state.

Headnotes:

The State is not compelled to determine an alternative date for implementing the National Secondary Education Examination (hereinafter, the “ENEM”, in the Portuguese acronym) for students of religious groups that have a day of rest. The possibility of these students to remain isolated until the sunset, and then take the exam, is legitimate.

Summary:

I. This case refers to an internal appeal filed against a decision that suspended a preliminary injunction. The suspended decision determined the designation of an alternative date for the ENEM, which does not coincide with the Jewish Sabbath (from sunset Friday to sunset Saturday) or other religious holiday, since the exam was scheduled for a Saturday. The preliminary injunction was suspended on the ground that it would be impossible to prepare another test with the same degree of difficulty and that the establishment of an alternative date for only one religious group would violate the principle of equality, because there are other religious groups besides the Jewish community which also have “days of rest”.

The appellants alleged violation of the constitutional clauses which prohibit the deprivation of rights on grounds of religion (Article 5.8 of the Federal Constitution) and the right to education (Article 227 of the Federal Constitution), since the participation in ENEM would be required for those who want to enter university. They also argued that the same degree of difficulty in different tests can be measured satisfactorily.

II. The Federal Supreme Court, by a majority decision, denied the internal appeal. The Court initially stated that, although the State is secular, it cannot be indifferent to religion. Thus, affirmative action for minority groups could be adopted, since it protects equality between the confessions and does not generate privileges or favours.

However, the arrangement of an alternative date would be a privilege, because it implies the application of different tests for the same examination. It would accordingly violate the public interest in imposing the same evaluation for all students. The alternative offered by the State (to isolate students during the regular schedule of tests and allow them to do after sundown on Saturday) would be more compatible with the duty of neutrality towards religion.

III. In a separate opinion, a dissenting Justice argued that the exam date could be changed to a weekday, which would obviate the necessity to carry out different tests. In this way, the respect for religious choice would not be violated.

Supplementary information:

- Article 5.8 of the Federal Constitution;
- Article 227 of the Federal Constitution.

Languages:

Portuguese, English (translation by the Court).



Identification: BRA-2012-2-017

a) Brazil / **b)** Federal Supreme Court / **c)** Plenary / **d)** 29.04.2010 / **e)** 153 / **f)** Claim of Noncompliance with a Fundamental Precept / **g)** *Diário da Justiça Eletrônico* 145 (Official Gazette), 06.08.2010 / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Amnesty / Amnesty, law, scope / Crime, political / Offence, political, politically motivated offence / Truth, right to know.

Headnotes:

Law no. 6.683/1979 (Amnesty Act) was received by the Federal Constitution of 1988, i.e. it was carried over into the constitutional regime founded by the 1988 Constitution. The Act granted a broad and comprehensive amnesty, which covered agents of repression and the opponents of the dictatorial military regime which had committed electoral or political crimes or crimes related to those offenses—that is, any kind of crime that had a political motivation—during the period from 2 September 1961 to 15 August 1979.

Summary:

I. This case refers to a claim of noncompliance with a fundamental precept (one of several claims of unconstitutionality under the 1988 Constitution) filed to declare that Article 1.1 of Law 6.683/1979 (Amnesty Law) was not received by the Federal Constitution of 1988. Alternatively, the claimant demanded that the Act should have an interpretation according to the Constitution through which the amnesty granted would not include non-political crimes committed by agents involved in the repression of political opponents during the dictatorial regime.

II. The Federal Supreme Court of Brazil, by a majority vote, denied the claim. The Court declared that Law no. 6.683/1979 is compatible with the Constitution and that the amnesty then granted is broad and comprehensive, as it covers the agents of repression and the opponents of the military regime who committed electoral or political crimes or crimes related to those offenses; that is, any kind of crime that had a political motivation.

The Court denied the argument that the Act would violate the right of citizens to obtain information related to individual or collective interests from public bodies. It explained that the right to access information related to the dictatorship period does not depend on the prosecution of those responsible for crimes. Besides, the access to information does not depend on the prosecution of those responsible, because the amnesty was objective, as it comprised facts and offences, instead of determined individuals.

The Court also rejected the argument that the Act, having been approved and sanctioned by military personnel who were not elected by the people, breached the principles of democratic and republican government. The Court stated that such argument would imply negation of the legal doctrine of the reception of laws approved before the Constitution of 1988. It added that the amnesty of the Act of 1979 was restated in the text of Constitutional Amendment 26/1985, which established the guidelines for the constitutional power of the Constitution of 1988. Hence, to question whether the amnesty was received by the Constitution of 1988 or not does not make sense.

The Court stated that the Amnesty Law, as an act-measure that regulates interests that have immediate and concrete effects, and in particular, the concept of “crimes related to political offenses” must be construed according to the historical context of the Act. During the transitional period from dictatorship to the new democratic order, there was a lengthy debate that led eventually to the approval of a political agreement. One outcome of this agreement was the Amnesty Law. In that context, the amnesty was bilateral, broad and comprehensive, but it was not unrestricted because it did not cover those who had already been sentenced.

Finally, the Court also emphasised that the Amnesty Law was issued before the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and Law no. 9.455/1997, which defines the practice of torture as a crime. Hence, the Amnesty Law is not subject to such norms. Besides, Article 5.43 of the Federal Constitution, which declares that the practice of torture is a crime that is not subject to grace or amnesty does not govern amnesties granted before the promulgation of the Constitution.

III. In a separate opinion, a dissenting Justice interpreted Article 1.1 of the Amnesty Law according to the Constitution as permitting judges to analyse, on a case-by-case basis, considering the preponderance and the atrocity of the means, if there was a non-political crime unrelated to political offenses.

In another separate opinion, the dissenting Justice, interpreting the act according to the Constitution, excluded from the amnesty those that committed heinous crimes established in Article 5.43 of the Federal Constitution and equivalent crimes, such as murder and rape.

Supplementary information:

- Article 5.43 of the Federal Constitution of 1988;

- Constitutional Amendment 26/1985;
- Article 1.1 of Law no. 6.683/1979 (Amnesty Law).

Languages:

Portuguese, English (translation by the Court).



Identification: BRA-2012-2-018

a) Brazil / **b)** Federal Supreme Court / **c)** First Panel / **d)** 16.06.2010 / **e)** 98.345 / **f)** “Habeas Corpus” / **g)** *Diário da Justiça Eletrônico* 173 (Justice Gazette), 17.09.2010 / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Informant, anonymity / Investigation, criminal / Investigation, preliminary, procedure / Secrecy of preliminary judicial investigation.

Headnotes:

No penal prosecution may be initiated solely on the basis of an anonymous complaint. In such cases, there shall be preliminary diligences, in order to verify the information received. The investigation procedure may begin solely if the information in the anonymous complaint is verified.

Summary:

I. This case refers to a request for a writ of *habeas corpus* (which in Brazilian law has a much broader scope than vindication of the right to liberty) filed against a decision that found that the police procedure, named Verification of the Correctness of the Information (VPI, in the Portuguese acronym), was not an illegal coercion. This procedure had been initiated on the basis of an anonymous letter with documents, in which supposedly irregular acts in notary public offices in Rio de Janeiro were

denounced. The applicant pleaded that it is impossible to proceed with the criminal investigation, when there is an anonymous report of a crime, according to the principle of the prohibition of anonymity (Article 5.4 of the Federal Constitution).

II. The First Panel of the Federal Supreme Court, by a majority vote, dismissed the writ of *habeas corpus*, on the grounds that the penal prosecution is banned only when it is solely based on anonymous complaint. It was argued that the anonymous report of a crime itself is not enough to provide the basis for initiating a police investigation, but it can trigger the carrying out of preliminary diligences, held by the police officer with caution and discretion, in order to verify if there was an illicit act, and, if the anonymous report is verified, the investigation procedure should begin. It was explained, at last, that the prohibition of the anonymity refers to the manifestation of thoughts and opinions under the guarantee of the freedom of expression, which is not related to anonymous complaints in the field of criminal law.

III. In a dissenting opinion, it was emphasised that the Federal Constitution, according to the principles of human dignity and the prohibition of the anonymity, does not allow the establishment of a criminal prosecution based on an apocryphal document. Otherwise it would provide the basis for irresponsible denunciations.

Supplementary information:

- Article 5.4 of the Federal Constitution.

Languages:

Portuguese, English (translation by the Court).



Identification: BRA-2012-2-019

a) Brazil / **b)** Federal Supreme Court / **c)** Plenary / **d)** 27.04.2011 / **e)** 4.167 / **f)** Direct claim of unconstitutionality / **g)** *Diário da Justiça Eletrônico* 162 (Official Gazette), 24.08.2011 / **h)**

Keywords of the systematic thesaurus:

3.6.3 General Principles – Structure of the State – **Federal State.**

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

4.8.7.4 Institutions – Federalism, regionalism and local self-government – Budgetary and financial aspects – **Mutual support arrangements.**

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

Keywords of the alphabetical index:

Education, duty of the state / Education, policy / Education, promotion / Education, subsidy / Education, teacher, employment, system / Remuneration, teacher / Teacher, equality of pay.

Headnotes:

Brazilian federalism is characterised by cooperation or integration. Thus, it derives from the power granted from the Federal Government to the state governments. Accordingly, a law that sets down a minimum wage and rules concerning the workload of teachers of basic public education is constitutional.

Summary:

I. This case refers to a direct claim of unconstitutionality filed by the governors of the State of Ceará, Mato Grosso do Sul, Paraná, Rio Grande do Sul and Santa Catarina against certain Articles of federal Law no. 11.738/2008. The challenged provisions established a minimum wage of R\$ 950.00 for teachers of basic public education of all regional governments, and established a workload of 40 hours a week, reserving one third of these hours to extracurricular activities. The Law also provided that the minimum wage would be the initial remuneration of a teacher beginning his or her career.

The claimants argued that the provisions on the standards and limits of teachers' workloads violated the federative pact as the regional governments enjoy the autonomy to organise their own educational system and to establish the legal framework of their civil servants. Moreover, the claimants alleged that the minimum wage value should include the salary, advantages and bonuses of teachers so it could correspond to each regional government's conditions. Lastly, they claimed violation of the principle of proportionality due to the high financial costs required to enforce the law.

II. The Federal Supreme Court, by a majority vote, denied the claim under the argument that the law established general rules on the matter, pursuant to Article 206.8 of the Federal Constitution, which determines the establishment of a national minimum wage value to public education professionals. The Court stated that Brazilian federalism is characterised by cooperation or integration and, as such, it derives from the power granted from the Federal Government to the state governments.

Specifically, the provision of a weekly workload of 40 hours is only a parameter related to the minimum wage. Thus, regional governments could set higher workloads if the salary was proportionately higher. Besides, reserving one third of the schedule for extracurricular activities would allow them to regulate the standards concerning these activities. The establishment of the minimum wage value as the initial salary of the career is legitimate, bearing in mind a merits policy under which each regional government could set advantages and bonuses as a means to improve education. Finally, the budgetary costs to enforce the law are constitutional since the law provides a compensation mechanism and establishes a grace period.

III. In a partially dissenting opinion, one Justice decided to construe interpretation pursuant to the Constitution so the minimum wage could comprehend the bonuses and additional advantages. The Justice argued that, in this sense, the local autonomy to legislate on the remuneration structure would be respected.

In a dissenting opinion on the reservation of one third of the workload to extracurricular activities, the Justice stated that such rule violated the jurisdiction of the federated entities to set out the legal framework of their servants. The Constitution would only have authorised the establishment of a minimum wage value and it did not mention the standards of the workload.

In a fully dissenting opinion, another Justice stated that the law would be unconstitutional as it is not the Federal Government competence to establish a salary policy to States and municipalities, otherwise it would violate principles of federalism.

Supplementary information:

- Article 206.8 of the Federal Constitution;
- Law no. 11.738/2008.

Languages:

Portuguese, English (translation by the Court).



Identification: BRA-2012-2-020

a) Brazil / **b)** Federal Supreme Court / **c)** Plenary / **d)** 05.05.2011 / **e)** 132 / **f)** Claim of Noncompliance with a Fundamental Precept / **g)** *Diário da Justiça Eletrônico* 198 (Justice Gazette), 14.10.2011 / **h)**.

Keywords of the systematic thesaurus:

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

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

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

5.3.5 Fundamental Rights – Civil and political rights – **Individual liberty**.

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

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

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

5.3.45 Fundamental Rights – Civil and political rights – **Protection of minorities and persons belonging to minorities**.

Keywords of the alphabetical index:

Cohabitation, same-sex partners / Homosexuality / Homosexuality, family life.

Headnotes:

Same-sex unions are considered family units and the rules applied to steady unions between man and woman are applied to same-sex unions, until the National Congress enacts a specific law to regulate the matter.

Summary:

I. This case refers to a Claim of Noncompliance with a Fundamental Precept (ADPF, in the Portuguese acronym) filed due to judicial interpretations of Articles 19.2, 19.5, 33.1 and 33.10 of Decree-Law no. 220/1975 (Rio de Janeiro Civil Servants' Statute). The interpretations had withdrawn from same-sex unions the rights given to heterosexual unions.

The claimant requested, in the case the ADPF was not the proper action to file, that the Court would hear it as a Direct Claim of Unconstitutionality (ADI, in the Portuguese acronym) in order to provide an interpretation according to the Constitution of the abovementioned articles of Decree-Law no. 220/1975 and to the Article 1.723 of the Civil Code, so that same-sex unions would be acknowledged as family units.

II. The Federal Supreme Court decided unanimously, as a preliminary matter, to hear the ADPF as ADI considering the fact that another ADI had been filed with the same main theme and considering the subsidiary nature of the ADPF. The Court also declared, as a preliminary matter, that the plea concerning the interpretation of the dispositions of the Decree-Law no. 220/1975 became moot due to Law no. 5.034/2007 of the State of Rio de Janeiro, which provided that partners of same-sex unions are equal to the partners in heterosexual unions for the purposes of social security benefits.

The Court, in the merits, granted the action in order to provide an interpretation pursuant to the Constitution of Article 1.723 of the Civil Code, so that same-sex unions are acknowledged as family units and to apply to them the rules set forth to steady unions of heterosexual couples. The Court held that neither the sex nor the sexual orientation of a person can provide the basis for legal inequality, pursuant to the constitutional guarantee that forbids prejudice (Article 3.4). The expression of one's sexuality falls into a sphere of private autonomy and it is also a fundamental right, which is the reason why it is considered an indelible clause (i.e. a clause of the Constitution which is not subject to amendment).

The Court stated that as the Constitution established the family as the foundation of society (Article 226), it guaranteed special state protection to it, without making any distinctions as to its format or composition. The Constitution limits itself to acknowledging the family as a private institution, voluntarily composed by adults, and it maintains a trichotomous relationship with the State and the society. Thus, what is not legally forbidden – or mandatory – is legally allowed.

III. In complementary votes, the Justices stated that same-sex relationships do not feature as steady unions—that requires the partners to be of different sex (Article 226.3 of the Constitution) and are a specific kind of family unit. However, the Court considered that it should provide its view on the matter in order to apply the rules of steady heterosexual unions to same-sex unions—provided that all of the factual elements of visibility, durability and continuity required by Article 1723 of the Civil Code pertain to such unions—until the Brazilian Congress enacts a specific law regulating the matter.

Supplementary information:

- Articles 3.4 and 226.3 of the Federal Constitution;
- Article 1723 of the Civil Code;
- Articles 19.2, 19.5, 33.1 e 33.10 of Decree-Law no. 220/1975 (Rio de Janeiro Civil Servants' Statute);
- Law no. 5.034/2007 of the State of Rio de Janeiro.

Languages:

Portuguese, English (translation by the Court).



Bulgaria

Constitutional Court

Statistical data

1 May 2012 – 31 August 2012

Number of decisions: 2

Important decisions

Identification: BUL-2012-2-001

a) Bulgaria / **b)** Constitutional Court / **c)** / **d)** 19.06.2012 / **e)** 02/12/2012 / **f)** / **g)** *Darzhaven vestnik* (Official Gazette), 49, 29.06.2012 / **h)** CODICES (Bulgarian).

Keywords of the systematic thesaurus:

2.1.1.4 Sources – Categories – Written rules – **International instruments.**

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

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

5.4.4 Fundamental Rights – Economic, social and cultural rights – **Freedom to choose one's profession.**

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

Keywords of the alphabetical index:

Employer, employee, relations / Employee, protection / Freedom of association, scope / Proportionality / Trade union, representativeness.

Headnotes:

Where the criteria of representativeness of trade unions and employers' organisations prescribed by the Labour Code provide for restrictions beyond what is necessary for achieving the legitimate aim pursued, that is to ensure adequate representation of the economic interests of the trade unions and the employers' organisations at national level, they infringe the principle of proportionality and limit the right of

association in so far as they prevent certain organisations of labour and management from participating in labour-management dialogue at national level. Consequently, they are unconstitutional.

Summary:

I. A group of 55 members of parliament of the 41st legislature applied to the Constitutional Court, asking it to establish the unconstitutionality of Articles 34, 35 and 414a of the Labour Code and their non-compliance with the provisions of international law and with the international treaties signed by Bulgaria. The applicants submitted that the first two texts were contrary to Articles 49.1, 49.2 and 57.2 of the Constitution, while the third was contrary to Articles 4.1 and 48 of the Constitution and not in compliance with International Labour Organisation (hereinafter "ILO") Conventions nos. 87/1948 and 98/1948, with the European Union Charter of Fundamental Rights (hereinafter, "EUCFR"), with the International Covenant on Economic, Social and Cultural Rights (hereinafter, "ICESCR"), with the European Social Charter (hereinafter, "ESC") and with the Universal Declaration of Human Rights (hereinafter, "UDHR").

The provisions of Article 34 of the Labour Code lay down the new requirements of representativeness at national level for workers' and employees' organisations. Some of these requirements are stricter than the earlier ones: for example, that the membership be increased from 50,000 to 75,000 and that the organisations must have been non-profit associations for at least three years before lodging the application for recognition of their representativeness, instead of the two years required by the previous statute. Others, however, as less strict: for instance, trade unions must now operate in a quarter, instead of a third, of the economic sectors and have local branches in a quarter, not half, of the municipalities.

II. The Constitutional Court held that these amendments did not infringe the Constitution as they were of a quantitative kind and did not affect the substance of the texts. They did not cover relations within trade unions, nor did they provide for state intervention such as would limit the right of association. The new parameters regarding the membership of trade unions and the time for which they had existed as non-profit associations did not impede labour-management dialogue, given that trade unions, even where they had not achieved national representativeness, participated in the collective agreement and in the reaching of decisions of common concern to employers and workers. The higher standards of representativeness were a matter of managerial expediency; they did not interfere with the right of

association but contributed to the wider representativeness of the unions. Consequently, the impugned provisions were not contrary to Articles 48.1, 49.1 and 57.2 of the Constitution or to the international treaties signed by Bulgaria such as ILO Conventions nos. 87/1948 and 98/1948. The functioning of trade unions was governed by their own articles, whereas the impugned provisions covered the relations of trade unions with labour and management as they regulated their representativeness at national level. For those reasons, they were not contrary to Article 5 ESC on the right of association of workers and employers. Nor were they discriminatory, or contrary to Article 2.2 ICESCR, Article 2.1 UDHR, or Article 20 EUCFR.

The impugned provisions of Article 35 of the Labour Code lay down stricter requirements as to the representativeness of employers' organisations.

The Constitutional Court held unconstitutional the stipulations providing for a marked increase in the number of workers employed under contract, but no longer taking account of the number of employers who had joined employers' organisations. Here it was a case of substantive amendments because the principal criterion of these organisations' representativeness, the number of employers, had been removed. Thus the new requirements prevented the organisations of small and medium-sized enterprises from participating in the tripartite dialogue at national level and led to unequal treatment of the industrial partners manifested by a selective attitude of the State to the benefit of large enterprises. National representativeness, where it overlooked the diversity of the interests of employers' organisations, was liable to distort the market environment.

The requirements as to representativeness were, in practice, restrictions imposed for reasons of managerial and economic expediency. They should nonetheless be reasonable and admissible if they were to remain in compliance with the Constitution. In the case of Article 35 of the Labour Code, the introduction of admissible requirements infringed the principle of proportionality with regard to the exercise of fundamental rights, given that without grounds justifying their introduction, these requirements turned into limitations of the right of association and were contrary to Articles 44.1 and 49.2 of the Constitution.

The stipulation that employers' organisations must not carry out activities unless expressly assigned to them by law or by a prescriptive act was also deemed unconstitutional. Under the constitutional procedure, the law alone may assign activities and not any activities whatsoever, but state activities, whereas the conduct of those activities must be approved by the

supreme representative body of the organisation. Failing such approval, this stipulation became a limitation of the right of association in so far as some organisations would be compelled to exercise only the functions unilaterally assigned to them by the State and consequently prevented from participating in labour-management dialogue at national level.

The requirements for employers' organisations to operate in a quarter of the economic sectors and to have local branches in more than a quarter of the municipalities were not unconstitutional because they were identical to those laid down for workers' organisations and because they regulated representativeness as a condition of participation in labour-management dialogue at national level. Nor did any unconstitutionality attach to the stipulation that employers' organisations should have existed for longer as non-profit associations.

The provision in Article 414a of the Labour Code for imposing on a worker or employee working without an employment contract a fine worth more than three times the amount of his personal contributions to health and old age assurance was contrary to Article 16 of the Constitution stipulating that work is guaranteed and protected by law, and to Article 48.1 according to which the citizens have a right to work and the State is obliged to ensure the creation of favourable conditions for the exercise of this right.

The Constitutional Court considered that the statute holding a worker who had not signed an employment contract to be as much at fault as his employer was contrary to the Constitution; in principle, the employer was in a more advantageous position, being the one who decided whether or not to employ the worker. When a worker was recruited without an employment contract, it benefited the employer in so far as the latter would not need to pay social security contributions and other dues under the employment contract. As to the worker recruited, he was in a situation of social and legal insecurity; without any claims to wages or social security entitlements, and not having the working time credited for calculation of length of service. It had been established that workers agreed to work without an employment contract so as not to remain unemployed, in other words they did not exercise their right to free choice of occupation, and therefore should not incur an administrative penalty.

The more so considering that in this case there was non-fulfilment of a private law obligation which could not be subject to an administrative penalty. The worker's conduct could not be construed either as attempted tax evasion or as attempted non-payment of health and old age insurance contributions, these being obligations towards the public authorities

whose non-fulfilment carried administrative penalties for the defaulter. Thus the impugned text of Article 414a of the Labour Code infringed the principle of rule of law (Article 4 of the Constitution) and the principle of the welfare state proclaimed by the Preamble.

Languages:

Bulgarian.



Chile

Constitutional Court

Important decisions

Identification: CHI-2012-2-006

a) Chile / **b)** Constitutional Court / **c)** / **d)** 23.08.2012 / **e)** 2267-2012 / **f)** / **g)** / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Legislative procedure / Parliament, decision / Parliamentary assembly, right of action.

Headnotes:

The Constitution grants the possibility of challenging a bill's specific rules during the law-making procedure. This action may be filed by a quarter of the currently serving members of one of the legislative branch's chambers, and may come to an early end, if it is withdrawn.

Summary:

I. The bill on the establishment of specific financial incentives to public employee's voluntary retirement was challenged by a quarter of the House of Representatives members. However, before the Constitutional Tribunal could judge the action, nine of the petitioners withdrew their support to the application.

II. After accepting those withdrawals, the Tribunal stated that the action no longer fulfilled the constitutional requirement of being submitted by a quarter of the House of Representatives currently serving members. Therefore the Tribunal deemed the process had terminated and the action was shelved, despite the contrary opinions of two of the Constitutional Tribunal's judges.

Languages:

Spanish.

*Identification:* CHI-2012-2-007

a) Chile / **b)** Constitutional Court / **c)** / **d)** 04.09.2012 / **e)** 2274-2012 / **f)** / **g)** / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

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

3.20 General Principles – **Reasonableness.**

3.21 General Principles – **Equality.**

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

4.15 Institutions – **Exercise of public functions by private bodies.**

Keywords of the alphabetical index:

Unconstitutionality, declaration / Act, general, application / Education, public / Law, enactment, deadline / Law, entry into force / Educational quality control, audit.

Headnotes:

The application of a rule requiring educational establishments to adopt a single corporate purpose should not be postponed as it would delay the implementation of a system that promotes probity and allows the supervision of public funds for the maintenance and development of the educational system.

Summary:

I. According to the Education Act, the Education State Department has the power to recognise official status to nurseries, elementary and high school establishments. In order to achieve official status, the institutions' supporters shall have, along with educational purpose, a unique corporate purpose as well.

II. In the Tribunal's opinion, this requirement helps define the "educational establishments" referred to

in the Constitution and leads them to their singular pedagogical objectives. Besides, the corporate purpose's uniqueness avoids the state subsidies from entering the personal assets of the establishment's supporters. This way, the responsibility and transparency principles are fully observed.

The aforementioned rule has not immediately entered into force because the establishments involved had a deadline to adjust to the new requirements.

Now, the legislature has proposed to postpone, again, this rule's effects. However, the Tribunal declared this postponement unconstitutional.

Due to the implementation of the Educational Quality Control National System and the Education Agency, the Tribunal stated that all educational institutions shall be equally supervised. There is no reasonable cause to delay once again the application of a rule that promotes probity and allows the supervising of public funds for maintenance and development of the educational establishments favoured by the State. Moreover, once the auditing process is fully operative, acknowledging any exceptions would affect the equality principle.

Finally, the Court stated that the legal purpose of allowing the auditing of public resources for educational institutions helps to accomplish the State's duty to finance a free public educational system and the freedom of teaching.

Languages:

Spanish.

*Identification:* CHI-2012-2-008

a) Chile / **b)** Constitutional Court / **c)** / **d)** 11.09.2012 / **e)** 2153-2011 / **f)** / **g)** / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

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

4.6.9 Institutions – Executive bodies – **The civil service.**

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

5.3.25.1 Fundamental Rights – Civil and political rights – Right to administrative transparency – **Right of access to administrative documents.**

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

Keywords of the alphabetical index:

Administrative act, nature / Civil servant, rights and obligations / Data, personal, treatment / Information, access, denial / Interception, invasion of privacy, personal data, secrecy of correspondence, storage.

Headnotes:

An article of the Law on Access to Public Information that allows public access to any information possessed by the public administration does not include private emails because it would affect the constitutional right to private communications' inviolability. Furthermore, the publicity rule may be limited by the law.

Summary:

I. Article 8 of the Constitution establishes the publicity of administrative acts and resolutions as well as their fundamentals and procedures; secrecy can only be stated by the law. According to the Law on Access to Public Information, citizens may require before the administration any information created with public funds and also any information possessed by the administration. This applies to any format, date, origin, classification or processing, unless it affects administrative functions, individual rights or national security.

The present case started when the Melipilla City mayor requested information on the Vice Minister of Interior, including his emails to the Melipilla Province governor, regarding budgetary specific themes. Since access to the emails was denied, the Melipilla City mayor requested a Transparency Council decision on the issue. This organ stated that the requested emails are public acts of the administration, so the mayor has the right to access them. Nevertheless, the Vice Minister appealed from that resolution and requested before the Constitutional Tribunal the inapplicability to this case of the Law on Public Information rule invoked by the Transparency Council.

II. The Constitutional Tribunal stated the constitutional inviolability of private communications includes all private communication, regardless of its contents,

format, authorship, etc. This inviolability may be broken down by a law and in special situations. According to the Court, emails fall under the inviolability of private communications clause, even if they are sent by civil servants through public property computers. Moreover, the Tribunal emphasised that public employees also have constitutional rights, namely the right to privacy. Legal limitations of these rights are possible but must be interpreted restrictively.

Finally, the Tribunal affirmed emails or any communication transmitted through closed channels shall not be considered public acts under Article 8 of the Constitution, unless they have a registered electronic signature and fulfil the Administrative Procedure Act provisions.

Languages:

Spanish.



Croatia

Constitutional Court

Important decisions

Identification: CRO-2012-2-006

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 29.05.2012 / **e)** U-I-2186/2008 / **f)** / **g)** *Narodne novine* (Official Gazette), 68/12 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

- 3.12 General Principles – **Clarity and precision of legal provisions.**
- 3.16 General Principles – **Proportionality.**
- 3.17 General Principles – **Weighing of interests.**
- 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, sports' fans, restriction / Preventive measure, prohibition on attending sporting events, attendance, prohibition / Preventive measure, condition / Measure, preventive, reason / Right to attend sporting events, preventive restriction / Third party rights, protection / Violence, risk / Violence, sport events, prevention.

Headnotes:

A disputed statutory provision entitles the police to request a misdemeanour court to ban an individual – known for previous illegal conduct on the way to, during or on the way back from a sporting event – from attending a specific sporting event(s). The ban shall not be shorter than six months or longer than a year. The misdemeanour court shall determine whether the preconditions to impose these preventive measures have been met.

The right of fans to attend sporting events can be restricted because of public interest and the protection of the right of other persons to attend sporting events safely and without hindrance. The fair balance between public interest (and the interest of others) and the interest of the individual should be

considered in light of constitutional law and a democratic society.

Summary:

The Constitutional Court did not accept a proposal to review the constitutionality of Articles 34a and 39b of the Prevention of Disorder at Sporting Events Act (hereinafter, the “Act”).

Article 34a.1 of the Act stipulates that an individual known for previous illegal conduct on the way to, during or on the way back from a sporting event may be placed under a misdemeanour court’s banning order. The ban shall be proposed by the police directorate competent for the venue of a sporting event or for the individual’s place of permanent residence. The proposal shall stipulate that the individual be banned from attending a specific sporting event or from attending sporting events for a time not shorter than six months or longer than a year.

Article 34b of the Act stipulates that the Ministry of Internal Affairs shall organise and keep a database about transgressors and occurrences at sporting events.

The applicants deem that Article 34a.1 of the Act breaches Article 14.2 of the Constitution and Article 28 of the Constitution. Because the legislator failed to, *inter alia*, define “known for,” the provision enables a broad scope of misuse from the way “knowledge” is gathered to the way truth and validity is established. Furthermore, they deem that Article 39b of the Act contravenes Article 3 of the Constitution (part relating to freedom, equality and the rule of law), Articles 14.2, 16.2, 28 and 35 of the Constitution.

The Constitutional Court found Articles 16, 42, 68.4 and 69.3 of the Constitution relevant in the given case.

It firstly found that Article 34a of the Act is in accordance with the legal norm requirements of clarity, precision and predictability. Its content clearly shows who it refers to, under what conditions this person may be banned from attending all or only some/specified sporting events and for how long.

The Constitutional Court then found that, in the given case, the matter is not about the protective measure as one of the sanctions prescribed by misdemeanour or penal legislation. Rather, it is about the special measure – a measure of prevention for the application of which the European legal order gives clear and detailed rules.

The legitimate aim of the Act derives from its title and contents. It strives to prevent socially unacceptable conduct of individuals who disturb public safety and prevent other spectators at sporting events from watching the game and rooting for their team peacefully and without interference. Applying the authority given to it in Article 34a of the Act makes the Ministry of Internal Affairs and misdemeanour courts crucially important in preventing dangerous conduct at sporting events.

Starting from the legitimacy of the aim of state interference on an individual right, the Constitutional Court has found that the public interest and the right of other people to attend sporting events safely and without hindrance outweighs the individual interest. Therefore, the disputed measure of prevention is proportional to the legitimate aim.

In accordance with the finding of the Constitutional Court, the right of a person to attend sporting events is not explicitly contained in constitutional provisions or relevant statutory provisions. This right may, however, be derived from interpreting particular parts of Article 3 of the Constitution and the content of Article 42 of the Constitution, which recognises the right to public assembly (in accordance with law). The right to public assembly is by its nature not absolute and unlimited. However, it necessarily presumes full respect for the freedoms and rights of other people, the legal order, public morality and health, i.e. all the values laid down in Article 16 of the Constitution.

The Constitutional Court held that in this specific instance, the impugned provisions represents a state interference (public authorities) on an individual right by imposing a ban on attending a specific sporting event or a ban on attending sporting events for a particular period of time.

One of the essential features of a democratic society is the respect for differences, which also applies in the case of sports fans who, by the nature of things, support only one option in a match. Difference does not exclude and in the social sense cannot exclude others only because they belong to a different sports option. On the contrary, civilisation has developed to the level of excluding the person whose illegal behaviour threatens the lives and health of other people, and public and private property.

The Constitutional Court has found that, in this case, a balance has been reached between the public interest (and the interest of others) and the individual interest. As such, the mechanism in Article 34a of the Act is acceptable under constitutional law and necessary in a democratic society. Starting from Article 42 of the Constitution, it has found that the

right of fans to attend sporting events has, in this case, been restricted because of the public interest and protection of the right of other persons.

The Constitutional Court examined the applicants' reasons for disputing the constitutionality of the Database about Persons and Occurrences Connected to Sporting Events (Article 34b of the Act). However, in no part of their proposal did the applicants explain their disagreement concerning the kind and manner of keeping those records with reasons relevant in constitutional law.

The meaning, aim and purpose of Article 39b Act are functionally and directly connected with the meaning, aim and purpose of Article 34a of the Act. The reason is that the Database is an operative police record that greatly alleviates police work, especially in the implementation of the legal mechanisms disputed in these constitutional proceedings. The importance of the Database in Article 39b of Act exceeds the national and European framework. It becomes relevant in the international proportions of police cooperation and for other users, in accordance with the regulations on personal data protection. The Constitutional Court especially emphasised that by its nature this Database cannot be compared with data in a criminal record, because these are different situations under constitutional law that cannot be compared.

The Constitutional Court has found that Articles 34a and 39b of the Act conform to the relevant provisions of the Constitution.

Languages:

Croatian, English.



Identification: CRO-2012-2-007

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 19.07.2012 / **e)** U-I-448/2009 *et al* / **f)** / **g)** *Narodne novine* (Official Gazette), 91/12 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

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

- 3.10 General Principles – **Certainty of the law.**
 3.12 General Principles – **Clarity and precision of legal provisions.**
 3.16 General Principles – **Proportionality.**
 3.17 General Principles – **Weighing of interests.**
 3.18 General Principles – **General interest.**
 3.22 General Principles – **Prohibition of arbitrariness.**
 5.1.3 Fundamental Rights – General questions – **Positive obligation of the state.**
 5.3.13.1.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Criminal proceedings.**
 5.3.13.2 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Effective remedy.**
 5.3.13.19 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Equality of arms.**

Keywords of the alphabetical index:

Criminal proceedings, prosecution and investigation, effective legal remedy, right / Law, precision, need / Law, criminal procedure, structural inadequacies and deficiencies, unconstitutional / Law-making, constitutional rules.

Headnotes:

The authority to accept, retain or remove specific aspects of criminal procedure from the accepted model of criminal procedure, or to change the model itself, rests exclusively with the legislator. From the perspective of constitutional law, the legislator's only obligation, when regulating aspects of criminal procedure, is to comply with the requirements laid down in the Constitution. This applies especially to requirements emerging from the principle of the rule of law and those that serve to protect particular constitutional principles and values. It is the duty of the Constitutional Court to ensure that these requirements are respected.

Special attention was focused on the internal structure of the new model of criminal procedure in order to ascertain its fundamental structural inadequacies and deficiencies. In executing the decision of the Constitutional Court, the legislator has the constitutional obligation to remove these deficiencies. The legislator is obliged to harmonise the new national model of criminal procedure with the Constitution and European Convention on Human Rights, and to achieve internal legal consistency and coherence.

The legislator has the following constitutional obligations:

To remove the structural deficiencies in the normative structure of preliminary proceedings, i.e.:

- introduce into the structure of preliminary proceedings a mechanism of effective judicial protection against illegal (arbitrary) criminal prosecution and investigation from the moment when a person is informed of his or her status as a suspect (Articles 2.5 and 217.1-2 Criminal Procedure Act (hereinafter, the "CrPA"),
- set out the legal obligation to determine this moment and inform the person of his or her status as a suspect in cases where no investigation is undertaken (Articles 2.5 and 217.1-2 CrPA), and
- set out the deadlines for the ruling on the crime report (dismissal, indictment) in cases where no investigation is undertaken (Article 230.3-5 CrPA);

To remove structural deficiencies in the normative regulation of the effectiveness of preliminary proceedings (Article 230.3-5 CrPA), i.e.:

- provide, within the framework of the state attorney's office, a legal remedy against delay in proceedings and other irregularities in the work of state attorneys, which lead to the ineffectiveness of preliminary proceedings or of particular pre-investigation or investigation activities and measures, so that this remedy complies with the requirements of the effective national legal remedy in Article 13 ECHR; and
- provide, within the framework of the court, a corresponding legal remedy against delay in proceedings and other irregularities in the work of investigating judges, which lead to ineffectiveness of the investigation or of particular investigation activities and measures, so that this remedy complies with the requirements of the effective national legal remedy in Article 13 ECHR.

To balance the regulation of criminal procedure by consistently basing it on determined, precise and predictable general rules, where all departures from these rules must be clearly recorded, exceptions justified under constitutional law, which specifically refers to criminal offences that threaten organised community life and are linked to an important public interest (Article 353.2 *et al.* CrPA).

Summary:

I. A law firm, four lawyers and one natural person submitted proposals for the institution of proceedings to review the constitutionality of more than 150 articles,

or their separate paragraphs, points, sentences or parts of sentences within specified paragraphs and points, of the Criminal Procedure Act of 2008 and its amendments of 2009 and 2011.

II. The Constitutional Court decided on all the proposals in one proceeding, in which, due to the extensive nature of the impugned provisions, the decision was delivered separately from the ruling. In the ruling, proposals to review a large number of provisions or parts of provisions of the CrPA were not accepted because they were ill-founded.

The Court ruled that the repealed provisions or parts of provisions of the CrPA shall no longer be in force on the day of the entry into force of the amendments of that Act, or of a new act, harmonised with the legal stands expressed in the decision, but no later than 15 December 2013. It also ruled that the decision shall have no legal effect on criminal proceedings that have been instituted or are being instituted or will be instituted, and on activities and measures that have been taken or are being taken or will be taken, before the "entry into force" of the decision. Until that moment, the decision does not produce any legally binding effects binding under constitutional law.

The Constitutional Court first pointed out that it lacks the authority to review the conformity of the legislative model of criminal procedure accepted by Parliament when enacting the CrPA. It stated that its task is to examine, within the framework of the normative model chosen by Parliament, whether the CrPA complies with both its functions viewed in the light of the dynamic interpretation of the Constitution in keeping with European legal standards. That is, first, does it enable the effective prosecution and punishment of the perpetrators of criminal offences. Second, does it at the same time adequately protect the rights in the Constitution and the European Court of Human Rights of suspected, accused or prosecuted persons from the illegal and arbitrary behaviour of the competent government bodies.

The Constitutional Court started from the fact that before the CrPA entered into force, the law of criminal procedure was – for more than 130 years – traditionally marked by a type of mixed criminal procedure with an element of judicial investigation. In these constitutional justice proceedings, the Court had to take into account for the first time the new model of criminal procedure. The Court also considered that it was objectively impossible, at the time of its enactment in 2008, to anticipate the problems that could only come to light during its application in practice. The normative framework of the new model of criminal procedure was still being developed at the time when this decision was

rendered, as seen from the two extensive novelties in the CrPA from 2009 and 2011. The practice of courts and state attorneys in the application of the CrPA to specific (individual) cases was also in its initial stage of development.

The CrPA underwent crucial amendment in connection with the stage of preliminary proceedings. The legislator separated the investigation from criminal proceedings, moved it into preliminary proceedings, and placed both criminal prosecution and investigation in the state attorney's hands. The state attorney is the *dominus litis* of the prosecution and investigation. S/he decides on the prerequisites for criminal prosecution, investigates and collects all the evidence, and proposes the application of procedural coercive measures. In the preliminary proceedings, judicial control is provided for in only exceptional, specified procedural coercive actions and measures.

Under Article 2.5 CrPA, criminal prosecution begins when the crime report is entered into the register or when the relevant body takes an action or measure leading to the restriction of personal rights and freedoms. Its aim is to elucidate whether a particular person committed a criminal offence. It also prescribes that criminal prosecution ends if the state attorney or another authorised plaintiff drops the charges or by court decision.

Under Article 217.1 CrPA, the state attorney issues an investigation order if there is well-founded suspicion that a criminal offence has been committed, which carries a mandatory investigation; the state attorney issues the investigation order within 90 days from entering of the crime report into the crime reports register; and the investigation order is entered into the crime reports register. Article 217.2 CrPA provides for the content of the investigation order.

Two applicants complained that Article 2.5 CrPA does not provide for the right of appeal or another legal remedy against the institution of criminal prosecution. Such absence breaches Article 18 of the Constitution (right to appeal), Article 29 of the Constitution (right to a fair trial) and Articles 6 and 13 ECHR. They also complained that the provisions of Article 217.1-2 CrPA, which regulates the manner of instituting an investigation, do not ensure citizens an "effective legal remedy" against the "decision" to carry out an investigation.

The Constitutional Court stated that it deems Article 2.5 (instituting and ending criminal prosecution) and Article 217.1-2 (carrying out an investigation) fundamental provisions of the CrPA, which show the framework, meaning and aims of the preliminary

proceedings. Thus, it examined them together, starting from the fact that the proponents' complaints indicated structural deficiencies in the general normative regulation of preliminary proceedings because there is no mechanism of judicial protection against illegal (arbitrary) criminal prosecution and investigation.

The legal requirements and the prohibition of arbitrariness of government bodies in criminal procedure emerge from the rule of law – the highest value of the constitutional order and ground for interpreting the Constitution (Article 3 of the Constitution) – and from the principle of constitutionality and legality (Article 5 of the Constitution). They also arise from the general guarantees contained in parts of Article 29 of the Constitution and Article 6 ECHR on criminal offenses, specifically where the guarantees cover preliminary proceedings. These guarantees are centred on courts and are read together with provisions in the Constitution and the European Convention on Human Rights that protect an individual from the arbitrary deprivation of liberty. This "spirit of the Constitution" must be obeyed.

Accordingly, the Constitutional Court found that the legislator has the constitutional obligation to introduce into the normative structure of the preliminary proceedings a judicial mechanism to protect against illegal (arbitrary) criminal prosecution and investigation.

Furthermore, regarding the scope of judicial protection required in the pre-investigation and investigation stages of the proceedings, the protection must cover the fundamental issues of the legality of preliminary proceedings. Courts must also have control over the existence of preconditions for criminal prosecution and control over the impediments for criminal prosecution.

In addition, the introduction of the legal remedy presupposes the state attorney's obligation – at the moment when s/he finds sufficient grounds to suspect that a certain person committed a criminal offence – to formally inform the person of this fact. At that moment, the person would acquire the legal status of a suspect, regardless of whether a crime report against him or her had already been entered in the register or his or her name had not even been mentioned in the crime report. In cases when there is an investigation, this moment can be determined (because the state attorney has the obligation to issue a written investigation order and enter it in the register of crime reports). However, when there is no investigation, under certain conditions, the person might not know that s/he has the status of a suspect until the last moment, when the state attorney has to examine him or her. This occurs immediately before indictment.

The legislator must, therefore, stipulate that a person must immediately be officially informed that s/he is a suspect and provide an effective legal remedy against illegal (arbitrary) prosecution in connection with this moment. After this moment, the person is protected by specific procedural guarantees from the criminal part of Article 29 of the Constitution and Article 6 ECHR, to the extent that the initial disrespect of these guarantees will probably seriously impair the fairness of the trial.

In conclusion, the Constitutional Court found that the lack of judicial protection from illegal (arbitrary) criminal prosecution and investigation around Articles 2.5 and 217.1-2 CrPA shows deficiencies in the normative structure of the preliminary proceedings.

Article 230.3-5 CrPA provides a legal remedy against "delay in proceedings and other irregularities in the investigation proceedings." This pertains to supervision by a higher instance of the regularity of the state attorney's work or of the investigating judge. It aims to provide the necessary measures to correct omissions in their work, within the framework of the general administrative and supervisory powers of the higher state attorney over the lower, or the president of the court over the investigating judge.

The applicants disputed its conformity with Article 13 ECHR, deeming that this is not an effective national legal remedy.

Starting from Article 230.1-2 CrPA, which provides deadlines for ending the investigation, the Constitutional Court noticed that the legislator did not establish deadlines for deciding on the crime report (dismissal, indictment) in cases when there is no investigation. It held that deadlines must be prescribed in these cases as well, because of the demands emerging from the principles of legal predictability and legal certainty.

Given that Article 230 CrPA gives a statutory deadline (one and a half years for ending the investigation), the Constitutional Court stated that the preliminary and investigating activities can be delayed but only within this constitutionally acceptable statutory deadline. This kind of delay is not a legal issue but considered one of the inappropriate work of the state attorney or investigating judge. It is not a case for judicial control but that of higher instances within the state attorney's office (for state attorneys) or the Court (for investigating judges). Nevertheless, a delay can be relevant in constitutional law from the aspect of the effective implementation of preliminary (pre-investigation and investigation) proceed-

ings, especially in criminal offences concerning the right to life and prohibition of ill treatment. Bearing this in mind, the Constitutional Court found that the applicants are right in deeming that the national legal order must have an effective legal remedy against the ineffectiveness of the preliminary proceedings.

The Constitutional Court also examined whether the CrPA's mechanism for ensuring the effectiveness of the preliminary proceedings complies with European standards. It noted that the fact of it being a non-judicial remedy is not relevant either from the standpoint of the Constitution or European Convention on Human Rights, as long as the remedy may be considered effective. It found that the state attorney's office is to be considered a judicial body with constitutional powers and guarantees that comply with the requirements in Article 13 ECHR. As for the presidents of courts, the Constitutional Court found that these administrative-judicial positions also incorporate powers and guarantees that enable it to ensure that the legal remedy against an investigating judge's inefficiency is effective within the meaning of Article 13 ECHR. This depends on the statutory regulation of their powers.

The Constitutional Court noted that the legal remedy in Article 230.3 CrPA, is limited to the investigation only. In a great number of cases, the investigations are not carried out in practice. On the other hand, it does not exist in the pre-investigation stage of the preliminary proceedings and in the execution of activities connected with evidence, which are implemented in all cases.

The Constitutional Court therefore held that since the legislator freely decided to recognise the right of appeal to higher instances in preliminary proceedings, this right must be regulated, so that it does not depend on the gravity of the criminal offence of a suspected or accused person. It has reiterated that the investigation is mandatory only when there is well-founded suspicion that a person has committed a criminal offence that carries long-term imprisonment. Only such persons would, therefore, have the statutory guarantee of the right to appeal. Not others. This distinction among persons as a standard for recognising the right to appeal in preliminary proceedings has no objective or reasonable justification. The formal classification of preliminary proceedings is not an acceptable reason under constitutional law for such unequal treatment.

Second, there is no reason to *a priori* doubt that the appeal in Article 230.3-5 CrPA is in principle capable of producing satisfactory effects in practice. That is, the removal of irregularities observed in the work of

the state attorney or investigating judge that have an impact on the effectiveness of the preliminary proceedings. It is certain, however, that this appeal cannot offer a party the appropriate satisfaction for the violations it suffered stemming from the irregular work of the state attorney or the investigation judge, up until the moment when these violations are brought to an end (for example, for violations against it by delaying the investigation proceedings). Therefore, this legal remedy does not comply with the requirement in Article 13 ECHR. Finally, the CrPA contains no other legal remedy that would satisfy the requirements of effectiveness in the Constitution and European Convention on Human Rights.

The Constitutional Court found that the manner of regulating the appeal in Article 230.3-5 CrPA does not conform to the requirements for effective national legal remedies in Article 13 ECHR. In that sense, it also determined the legislator's positive constitutional obligation.

Article 353.2 CrPA provides that the panel, on the state attorney's proposal, shall issue a ruling that approves postponing the provision of information about a particular piece of evidence important for the defence. The revelation to the defence could damage the investigation in other proceedings against the same or other defendants.

The applicants deemed that these provisions breach Article 29 of the Constitution, submitting, *inter alia*, that the legislator has placed a particular individual against whom proceedings are underway in an unjustifiably difficult position. By doing so, the provisions legalise the possibility for the state attorney to abuse his or her rights.

Bearing in mind the reason for "hiding" the evidence, the Constitutional Court noted that, in this case, the evidence must be examined. However, it may be postponed until the end of the taking of evidence (Article 353.4 CrPA). During the whole time, until it is taken, the court knows about this evidence. The court has also assessed all the circumstances underlying its decision to postpone informing the defence about it.

Under these circumstances, the Constitutional Court did not accept the applicants' complaints as well-founded in their entirety. It did find, however, a deficiency in the normative structure of Article 353.2 CrPA. It noted that the CrPA provisions are not consistently, clearly and precisely adapted to two very different categories of criminal offences. The first category covers crimes that destroy the very substance of society: "acts that threaten organised life in the community" (terrorism and organised terrorism, organised crime of massive proportions,

complex economic criminal offences, including corruption which is as a rule connected with the government and public sector, etc.). The second category covers “classical” criminal offences, most of which have always existed and will continue to exist.

In the view of the Constitutional Court, the principle of the rule of law and the protection of human rights, which underpin contemporary democratic societies, demand that criminal law procedure generally be adapted and regulated according to the standards of “classical” criminal offences. All departures from these standards, justified for the first category of criminal offences that threaten organised life in the community, should in principle be provided for in the form of exceptions from the general rule.

The Constitutional Court found that the legislator has the constitutional obligation to balance the national order of criminal procedure so that it consistently rests on specific, precise and predictable general rules. All departures from these rules must be clearly noted exceptions that plainly show their justification under constitutional law.

Examining Article 353.2 CrPA in this light, the Constitutional Court held that the constitutional justification for this solution is not disputable in cases that fall into the first category of criminal offences that threaten organised life in the community. However, it is impossible to justify it under constitutional law for the second category of “classical” criminal offences. In the view of the Constitutional Court, the reasons for this procedure are not legitimate in the case of “classical” criminal offences, violating the principle of the equality of arms guaranteed in Article 29 of the Constitution and Article 6 ECHR. In the case of these offences, it is not constitutionally acceptable to depart from the principle of the equality of arms in one proceeding so as not to harm the investigation in the other criminal proceedings. In this category of offences, the matter is not one of exceptionally important public interest, such as national security or the protection of the life or body of other persons, which compete in importance with the rights of the defence.

Cross-references:

- Decision no. U-I-659/1994 *et al.* of 15.03.2000, *Special Bulletin Inter-Court Relations* [CRO-2000-1-010];

Decisions of the European Court of Human Rights:

- *S.W. v. the United Kingdom* of 22.11.1995, Application no. 20166/92;

- *Kuralić v. Croatia* of 15.10.2009, Application no. 50700/07;
- *Salduz v. Turkey* of 27.11.2008, Application no. 36391/02, Judgment [GC];
- *Can v. Austria* of 12.07.1984, Application no. 9300/81, Commission report;
- *Mooren v. Germany* of 09.07.2009, Application no. 11364/03, Judgment [GC];
- *Branko Tomašić and Others v. Croatia* of 15.01.2009, Application no. 46598/06;
- *Deweer v. Belgium* of 27.02.1980, Application no. 6903/75;
- *Foti and Others v. Italy* of 10.12.1982, Applications nos. 7604/76, 7719/76, 7781/77 and 7913/77;
- *Hozee v. the Netherlands* of 22.05.1998, Application no. 21961/93;
- *Kudła v. Poland* of 26.10.2000, Application no. 30210/96, Judgment [GC];
- *Assenov and Others v. Bulgaria* of 28.10.1998, Application no. 24760/94;
- *Đurđević v. Croatia* of 19.07.2011, Application no. 52442/09;
- *Skendžić and Krznarić v. Croatia* of 20.01.2011, Application no. 16212/08;
- *Sürmeli v. Germany* of 08.06.2006, Application no. 75529/01, Judgment [GC].

Languages:

Croatian, English.



Czech Republic

Constitutional Court

Statistical data

1 May 2012 – 31 August 2012

- Judgments of the Plenary Court: 5
- Judgments of panels: 45
- Other decisions of the Plenary Court: 4
- Other decisions of panels: 1 445
- Other procedural decisions: 86
- Total: 1 585

Important decisions

Identification: CZE-2012-2-005

a) Czech Republic / **b)** Constitutional Court / **c)** Second Chamber / **d)** 24.04.2012 / **e)** Pl. ÚS 23/11 / **f)** Exclusion of Decision on Refusal of Visa from Judicial Review / **g)** <http://nalus.usoud.cz> / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

5.1.1.3 Fundamental Rights – General questions – Entitlement to rights – **Foreigners**.
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:

Visa / Administrative act, judicial review / Foreigners, expulsion.

Headnotes:

Excluding the decision to grant or refuse a visa from judicial review is not contrary to Article 36.2 of the Charter. The concerned decision does not interfere with any fundamental right or freedom that might occur in a decision on an administrative expulsion of aliens, which is subject to judicial review.

Summary:

I. Through a judgment, the Plenum of the Constitutional Court dismissed the Supreme Administrative Court's petition submitted pursuant to Article 95.2 of the Constitution to deem § 171.1.a of Act no. 326/1999 Coll., on Residence of Aliens in the Territory of the Czech Republic (hereinafter, the "Act") in its wording by and before 31 December 2010. The petition sought to set aside § 171.1.a of the Act, as amended by Law no. 427/2010 Coll.

The applicant submitted the petition as part of its decision-making activity when it tested a cassation complaint against a regional court's resolution, where an action against the Police of the Czech Republic not to grant the Plaintiff a visa was dismissed as inadmissible. The Supreme Administrative Court thus sought to have § 171.a of the Act set aside, excluding judicial review of the decision on refusal of a visa.

Should the Constitutional Court be unable to decide on the constitutionality of the provision since the currently applicable wording cannot be applied to the matter in question, the applicant would seek to have § 171.a of the Act declared unconstitutional. The applicant contend that a realistic threat to their constitutional rights exists and thus the decision on refusal of a visa cannot be excluded from judicial review.

II. The Constitutional Court ruled that the applicant was not entitled to file the petition seeking to have the § 171.a of the Act set aside. Pursuant to § 64.3 of the Act on the Constitutional Court, a court (pursuant to Article 95 of the Constitution) is authorised to submit a petition seeking annulment of a statute or individual provisions thereof. The court's standing to file such a petition requires that the contested provisions must be applied in proceedings pending before the concerned court. Such a prerequisite, however, was not satisfied in the instant proceedings, as the Supreme Administrative Court was to apply the regulation in the wording as amended by Act no. 427/2010 Coll.

In this respect, the Constitutional Court referred to the conclusions of its Judgment Pl. ÚS 3/07. The Applicant, however, was authorised to file a petition seeking to have § 171.a of the Act declared unconstitutional. The Constitutional Court in its case law has repeatedly addressed the review of expired legal regulations (see judgments Pl. ÚS 33/2000, Pl. ÚS 42/03 or Pl. ÚS 38/06). The Constitutional Court noted that it has also addressed through decisions whether to refuse a visa or to prolong the visa in relation to fundamental rights. The decisions are based on the notion that the refusal to grant a visa (or prolong

the validity of the visa) does not amount to legal entitlement. There is, thus, no valid reason justifying exemption of such decisions from the application of the principle excluding their judicial review. Above all, for the entire period of the Act's applicability, the adjudication and case law of both the Constitutional Court and the Supreme Administrative Court has been settled on the fact that neither the Charter nor international human rights treaties confer onto aliens the right to reside in the territory of the country. Thus, they are not entitled to be granted a visa either.

For the Constitutional Court, the crucial question was whether the decision on refusal of a visa may interfere with any of the fundamental rights or freedoms guaranteed by the Charter or by the constitutional order. The Constitutional Court viewed that the return to the country of origin and related risk of mistreatment or harm suffered in the state of origin do not amount to a direct effect of the refusal of visa. Such effect is given rise to by the decision on administrative expulsion without which an alien cannot be extradited to the country of origin. The decision on administrative expulsion is – with reference to the effect of the judgment PL. ÚS 26/07 – subject to judicial review. The Constitutional Court stated that it shall affirm the current conclusion that a decision on a refusal of visa is not fit to give rise to interference with fundamental rights and freedoms. It is thus at the discretion of the legislature to exclude such proceedings from judicial review without acting contrary to Article 36.2 of the Charter (right to judicial review of the decisions of a public administrative authority.) The Constitutional Court thus dismissed the concerned Petition.

III. Judge Rapporteur in the instant matter was Jiří Nykodým.

Judge Miloslav Výborný issued a dissenting opinion both regarding the ruling and the reasoning of the judgment. In his view, should the Chamber of the Supreme Administrative Court arrive at a different opinion regarding the constitutionality of the statutory exclusion of judicial review for decision on visa refusal than previously adjudicated by the Court, the matter should have been referred to the Extended Chamber of the Supreme Administrative Court. The Extended Chamber should have acted as the petitioner authorised to submit a petition pursuant to Article 95.2 of the Constitution. Thus the Petition should have been dismissed as inadmissible.

Regarding the merit of the matter, the Judge deemed the reasoning behind the judgment relating to the Petitioner's arguments were incomplete. To him, the view expressed by the judgment in certain instances establishes a construction that forces aliens to remain

in the country territory after unlawful refusal of the visa. This situation leads the state to commence proceedings on administrative expulsion. Only in the course of such proceedings and consequent judicial review related to such proceedings will the aliens seek the protection of their fundamental rights, provided that the alien does not voluntarily leave the territory of the republic after refusal of the visa. An alien alleging interference of fundamental rights thus has no other option but to either achieve judicial protection only after having acted in an unlawful manner or to waive the right to such protection by voluntarily leaving the territory. Either alternative is defined by applicable legal provisions for aliens in a fairly cynical manner. For this reason the judge would have granted the petition.

Languages:

Czech.



Identification: CZE-2012-2-006

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 15.05.2012 / **e)** Pl. ÚS 17/11 / **f)** Introducing levies and taxation of electricity produced in photovoltaic (solar) power plants / **g)** <http://nalus.usoud.cz> / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

3.10 General Principles – **Certainty of the law.**
 4.10.7 Institutions – Public finances – **Taxation.**
 5.3.38.4 Fundamental Rights – Civil and political rights – Non-retrospective effect of law – **Taxation law.**
 5.3.42 Fundamental Rights – Civil and political rights – **Rights in respect of taxation.**

Keywords of the alphabetical index:

Photovoltaic (solar) power plants / Changes, economic / Crisis, economic / Levies.

Headnotes:

The principle of legal certainty cannot be identified with the requirement of absolute invariability of any legal regulation. This is subject, among other things,

to social and economic changes that may also include demands laid onto the stability of the national budget. Particularly in the event that the legislature provides recipients of the legal regulation with “mere” benefice, the entities concerned may not rely, on their own, on the fact that the legislature will not re-evaluate its amount or existence in time.

Summary:

In its judgment, the Plenum of the Constitutional Court dismissed the petition of a group of Senators seeking to strike down in Sections 7.a to 7.i and in Section 8 the words “with the exemption of inspection of levies and the administration thereof” and the provisions of Article II.2 of transitional provisions of Act no. 180/2005 Coll., on the Support of Electricity Generation from Renewable Energy Sources and on Amendment of certain Acts, as amended. The Senators also sought to strike down in Sections 6.8, 7.a, 14.a, 20.1.a the words “with the exemption of allowances acquired free of charge”, Sections 20.15, 21.9 of Act no. 357/1992 Coll., on Inheritance Tax, Gift Tax, and Real Estate Transfer Tax, as amended, and Article II.2 of Act no. 346/2010 Coll., amending Act no. 586/1992 Coll., on Income Tax, as amended, and other related Acts.

The former Act imposed levies on electricity generated in photovoltaic power plants produced from 1 January 2011 to 31 December 2013 in a facility commissioned in the period from 1 January 2009 to 31 December 2010. The Act on Inheritance Tax, Gift Tax, and Real Estate Transfer Tax imposed taxation on emission allowances for greenhouse gases acquired free of charge. Finally, the latter tax regulation eliminated the income tax exemption applied to power engineering on the basis of renewable sources.

According to the petitioners, the contested provisions were inconsistent with the guaranteed right to own property under Article 11 of the Charter of Fundamental Rights and Freedoms (hereinafter, the “Charter”), with Article 17.1 of the EU Charter, or the right to protection from interference with peaceful enjoyment of property under Article 1 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (in relation to the violation of the principle of legitimate expectation), with the right to conduct business under Article 26 of the Charter and Article 16 of the EU Charter, and with the essential requirements of a democratic, rule of law state, since all the contested provisions suffer from retroactive effect. The petitioners also alleged violation of the constitutional principle of equality before the law pursuant to Articles 1 and 3 of the Charter.

First of all, the Constitutional Court held that the contested legal regulation had been enacted in a constitutionally prescribed manner, even though Act no. 346/2010 Coll. was discussed and adopted in summary consideration and as emergency legislation. In this respect, the Constitutional Court held that there had been no impermissible limitation of the rights of the political minority, pointing out the period of time between adopting the Act and filing the application in question, while also referring to its Judgments Pl. ÚS 55/10 and Pl. ÚS 53/10, in which it had dealt with these issues in detail.

The Constitutional Court considered a situation that had led to adopting this regulation. That is, the rapid development of energy production from renewable sources, which was mainly due to plummeting prices of photovoltaic panels, had increased the costs of financing it. This led to a re-evaluation of the State’s existing approach of public support for renewable sources energy production. The Constitutional Court concluded that this measure demonstrated the characteristics of so-called non-genuine retroactivity. It was not a case of genuine retroactivity. The reason is that, in the instant case, it is obvious that the tax period, or the period in which the produced electricity is subject to levy upon the legal regulation taking effect, has yet to commence. As such, the electricity produced prior to the Act becoming effective is not at all subject to levy. Despite this statement, however, the measure reduced the support provided to those producers to whom the fifteen-year guarantee period, pursuant to Section 6.1 of Act no. 180/2005 Coll., started to run prior to the amendment becoming effective, taking the form of Act no. 420/2010 Coll. The objective of the purchase price guarantee referred to above was to ensure the return of investment in renewable sources energy production.

With reference to Judgment Pl. ÚS 21/96 and Pl. ÚS 53/10, the Constitutional Court held that genuine retroactivity is admissible only exceptionally. Non-genuine retroactivity, however, is generally admissible, as it is consistent with the principle of protection of confidence in the law. This is conditioned on the fact that it is appropriate and necessary to achieve the aim pursued by the law and that the overall assessment of “disappointed” confidence and meaning, importance and urgency of the reasons for the legislative change do not go beyond the limit of acceptability.

Regarding the extensive comparison with foreign legal regulations and case law, the Constitutional Court did not establish that, on the side of the affected operators of photovoltaic power plants, there was a constitutionally relevant interest to maintain the existing fixed priced for electricity from renewable

sources. The Constitutional Court did not agree that bonuses without any further reduction by means of levy that would, when mutually measured, outweigh the afore-mentioned public interest in electricity price reduction.

At the same time, the Constitutional Court considered whether to maintain the return on investment in the given type of power plants (15 years). By doing so, this would maintain the essence and meaning of the concerned fundamental right to own property. The Court held that there were relevant economic reasons for the measures in question and the possibility granted to the legislature to re-evaluate the amount of support with respect to any future development and circumstances. Furthermore, the Constitutional Court did not establish any violation of the constitutional principle of equality in the case of the affected operators of power plants (compared to power plants commissioned earlier). The reason is that the measures adopted by the legislature had been rational, adequate and free of any arbitrariness.

As for imposing the gift tax – the subject of which is the acquisition (free of charge) of emission allowances for greenhouse gases in 2011 and 2012 for the purposes of electricity production – the Constitutional Court concluded that it amounted to mere reduction in government support anticipated in the earlier legislation. In the earlier legislation, it was impossible to agree with the petitioners that the amount of support as prescribed by the law would, in the future, exclude any newly imposed tax burden (regulation) as provided by the statute.

In the case of the cancellation of the exemption from the income tax imposed on the operation of solar facilities, the Constitutional Court held that the concerned legal regulation pursued, among other things, an important public interest (maintaining the stability of energy prices, not increasing the public debt, etc.). This might also be used, in the spirit of the case law of the Constitutional Court, to justify the interference with the legitimate expectations of taxpayers. At the same time, it also referred to the previous sections of the reasoning behind the Judgment.

In its Judgment, the Constitutional Court concluded that the choice of the statutory provisions aimed at reducing the government support for the production of solar energy was in the hands of the legislature, provided the guarantees were preserved. The principle of legal certainty may not be considered as a requirement for absolute invariability of the legal regulation. Regulation is subject, among other things, to social and economic changes and demands on the stability of the national budget.

Beyond the scope of the matter itself, the Constitutional Court added that, with respect to the individual character of every single case, it could not exclude its potential intervention. This is so in any individual case (e.g., small producers who financed the operation of power plants from bank loans would be burdened with repayments of relatively high interests) when the contested legal regulation had the so-called “strangulatory effect”. That is, the effect on the very property essence of the electricity producer. Pursuant to Act no. 280/2009 Coll. (Tax Procedure Code), the Court indicated the possibilities of dealing with the difficulties of such producers in the event of failure to fulfil their otherwise continuously performed obligations.

Judge Ivana Janu served as the Judge Rapporteur in the instant case. None of the Judges submitted a dissenting opinion.

Languages:

Czech.



Identification: CZE-2012-2-007

a) Czech Republic / **b)** Constitutional Court / **c)** Second Chamber / **d)** 15.05.2012 / **e)** II. ÚS 171/12 / **f)** Protection of Privacy versus Right to Information in Relation to Persons Publicly Active / **g)** <http://nalus.usoud.cz> / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

5.3.19 Fundamental Rights – Civil and political rights – **Freedom of opinion.**
 5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression.**
 5.3.24 Fundamental Rights – Civil and political rights – **Right to information.**
 5.3.32 Fundamental Rights – Civil and political rights – **Right to private life.**

Keywords of the alphabetical index:

Celebrity / Tabloid / Proportionality.

Headnotes:

The public has a right to be provided with information on circumstances related to a publicly active person even though the primary information is concerned with a spouse of a publicly active person. The actual fact that a serious traffic accident occurred had involved the spouse of a publicly active person can potentially affect the actions and conduct of such an individual in the course of his performance of his office, especially when such public office is held in the area of the media.

The Constitutional Court is especially aware that the tabloid press frequently misuse the freedom of speech and the right to information. Nevertheless, protection from such misuse may not rest in absolute bans. Both the Civil Code and the Press Act possess sufficient means of protection against misuse of freedom of speech and for the protection of the right to information (Article 17.1 of the Charter). The purpose of which is to affect individual interferences and not to impose absolute bans.

Summary:

I. In the Plaintiff's (an interested party in proceedings before the Constitutional Court) action submitted with the Municipal Court for protection of privacy, he sought for a refrain order issued against the Applicant, a publisher of periodicals. The Plaintiff did not want any images and/or name and surname of the Plaintiff relating to communication involving a traffic accident of the Plaintiff's spouse who was subject to criminal proceedings published. The Municipal Court granted the action of the Plaintiff on all counts. In response to the Applicant's appeal, the Higher Court affirmed the decision of the Court of First Instance. The Applicant submitted a Constitutional Complaint alleging that the Ordinary Courts through their decisions interfered with her fundamental right to freedom of expression and the right to information. The Applicant contended that the impermissible extensive wording of the refrain order made it impossible to publish information on the traffic accident that would not interfere with the privacy rights of the interested party, even if such information would be in the public interest.

II. The Constitutional Court primarily referred to its judgment File no. ÚS 154/97, where it opined on the intersection of the right to freedom of information and the right to privacy. According to the judgment, when two fundamental rights are at the same level, the court has discretion to consider whether one of the rights has not been preferred over the other in an unjustified manner, while taking into consideration the circumstances of each case. Regarding publicly known

or politically active persons, the Court stated that the right to criticism (Article 17.2 of the Charter and Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms) represents an inseparable part of the freedom of speech and of the right to information. The balance between this right and the privacy rights of a specific subject must be respected and cannot overstep certain boundaries related to the attributes of a democratic society. Barriers designated in such a way to a physical person who acts and presents herself as a "public person" are broader than in relation to a private person.

The Constitutional Court noted that at the time when the articles in question were published and when the ordinary courts issued the decisions, the interested party held the public office of the Deputy Chairwoman of the Czech Television Council and thus was a person with a significant post in the area of media. The information on a serious traffic accident of the spouse of the interested party to the proceedings, including the specification of the family ties, cannot be perceived as interference with a purely private domain. On the other hand, it still applies that the manner in which the given event is reported cannot amount to interference with the right to privacy of a publicly active individual through an unjustified emphasis on the family ties between the person participating in an act subject to criminal charges and the publicly active person. The reported information cannot be deprived of its informative core and become means for disrespectful treatment of such a publicly active person, giving rise to the impression that such person is liable for the conduct of the person related to her, although there are no indications of such conclusions. The Constitutional Court thus did not find interference with the right of the applicant to freedom of speech and her right to information from the point of constitutional law. The Constitutional Court's opinion assumed that the ordinary courts, based on the tested evidence, did not arrive at the conclusion that the assessed conduct of the applicant amounted to interference with the private rights of the interested party.

However, what the Constitutional Court did find that amounted to interference with the right to information was the wording of the contested decision. Here, the applicant was obligated to refrain from publishing in the periodicals, of which she is a publisher, any image, the given name and the surname of the interested party in relation to the traffic accident of the spouse of the interested party as specified in the above decision. Such wording of the decision represents an absolute bar on publishing information of any kind related to the given traffic accident. This interferes with the sphere of public interest regarding the right to information on publicly active persons.

The Constitutional Court is aware that the tabloid press in particular frequently misuse the freedom of speech and the right to information. Nevertheless, protection from such misuse may not rest in absolute bans. Both the Civil Code and the Press Act possess sufficient means of protection against misuse of freedom of speech and for the protection of the right to information the purpose of which is to affect individual interferences and not to impose absolute bans. The Constitutional Court for the above mentioned reasons quashed the contested decisions of the ordinary courts as being contrary to Article 17.1 of the Charter of Fundamental Rights and Freedoms.

III. Judge Rapporteur in the instant matter was Jiří Nykodým. No judge issued a dissenting opinion.

Languages:

Czech.



Identification: CZE-2012-2-008

a) Czech Republic / **b)** Constitutional Court / **c)** First Chamber / **d)** 26.06.2012 / **e)** I. ÚS 2050/11 / **f)** Damages for property left behind in Carpathian Ruthenia / **g)** <http://nalus.usoud.cz> / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Carpathian Ruthenia / Expropriation, compensation.

Headnotes:

Even when interpreting the law with historic origins, it is impossible to disregard the current principles of substantive rule of law state. Article 1.1 of the Constitution implies a duty imposed on ordinary

courts to interpret even the longest-standing legal regulations in light of currently effective constitutional values and principles of a democratic rule of law state. Failure to take these principles into consideration amounts to a violation of the right to due process guaranteed by Article 36.1 of the Charter of Fundamental Rights and Freedoms.

Summary:

I. The complainants, acting as descendants of persons leaving behind real estate property in the territory of Carpathian Ruthenia, sought damages for such property with the Ministry of Finance. The Ministry did not grant the complainants' application. The reason is that, by virtue of its extent, the abandoned property exceeds the definition of a single-family house pursuant to Decree no. 57/1957 Ú. I., and therefore no compensation might be provided. Following the complainants' appeal, the Minister of Finance upheld the decision in the instant case, with the complainants subsequently filing an action directed against his decision.

At first, the District Court discontinued the proceedings until the completion of the legislative procedure on the draft bill to mitigate the property injustice to citizens who had left their real estate property in the territory of Carpathian Ruthenia, and subsequently dismissed the complainants' action by means of the contested decision. The District Court held that the duty to provide compensation, arising from an international treaty concluded between the Czechoslovak Socialist Republic and the Union of Soviet Socialist Republics, had been adopted in the national law by means of Act no. 42/1958 Coll., on the basis of which Implementing Decrees no. 43/1959 Ú. I. and no. 159/1959 Ú. I. had been enacted. The latter of the Decrees defined the nature of the property for which compensation is provided. It stated that such property must, among other things, meet the characteristics of a single-family house as defined by Decree no. 57/1957 Ú. I.

Pursuant to the District Court, the real estate property left behind in the territory of Carpathian Ruthenia by the legal predecessors of the complainants exceeds the definition of the single-family house, and therefore no compensation may be provided. Following the complainants' appeal, the City Court upheld the decision of the District Court by means of the contested decision. The complainants objected that on 1 October 2009, Act no. 212/2009 Coll. had become effective. The complainants claimed that injustice to citizens regarding real estate property they had left in the territory of Carpathian Ruthenia in relation to its contractual assignment to the Union of Soviet Socialist Republics had been mitigated.

Hence, this resulted in the expiry of the reason for which the action had been dismissed.

II. Relying on Article 1.1 of the Constitution, the Constitutional Court held that the statement pursuant to which the state is governed by the rule of law, founded on respect for the rights and freedoms of man and of citizens, shall be deemed as a primary interpretation guideline concerning the activity of any public authority. Pursuant to the Constitutional Court, the principle of the substantive rule of law may imply that even while maintaining the continuity with “old law” (i.e. the law enacted in the period of the Communist regime), the interpretation and application of legal regulations must pursue their content-based substantive sense. With reference to its Judgments file reference Pl. ÚS 19/93 and Pl. ÚS 42/02, the Constitutional Court then pointed out that even when interpreting the law with historic origins (i.e. in the instant case, the interpretation of the Decrees referred to above), it is impossible to disregard the current principles of substantive rule of law state. For this reason, the interpretation of even the longest-standing regulations may not be performed without considering the currently effective constitutive values and principles of a democratic rule of law state.

Following the above maxims, the Constitutional Court observed that the element common to all the regulations governing compensation of persons who left their property in Carpathian Ruthenia is the attempt to redress or mitigate property injustice. Pursuant to the Constitutional Court and despite the absence of inter-temporal provisions of Act no. 212/2009 Coll., which would define the effect of the aforementioned Decrees onto the complainants’ claim, the ordinary courts ought to have selected an interpretation as compatible as possible with the complainants’ fundamental right to own property or their legitimate expectations. The Constitutional Court concluded that the ordinary courts had failed to sufficiently pursue the objective of Act no. 212/2009 Coll. In particular, it had failed to take into consideration the legislature’s will to extend the scope of compensation for property left behind in *Subcarpathian Rus* (i.e. Carpathian Ruthenia) beyond the scope delineated by the original legal regulations. As a consequence, the complainants’ right to due process guaranteed by Article 36.1 of the Charter on Fundamental Rights and Freedoms was violated. For this reason, the Constitutional Court set aside the contested decision of the City Court. At the same time, it dismissed as inadmissible the constitutional complaint in the section directed against the decision of the District Court, thus complying with the principle of minimising the interventions in decision-making activity of ordinary courts.

III. Judge Pavel Rychetský served as the Judge Rapporteur in the instant case. None of the Judges submitted dissenting opinions.

Languages:

Czech.



Estonia

Supreme Court

Important decisions

Identification: EST-2012-2-003

a) Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 27.03.2012 / **e)** 3-4-1-1-12 / **f)** / **g)** www.riigiteataja.ee/akt/130032012023 / **h)** www.nc.ee/?id=11&tekst=RK/3-4-1-1-12; CODICES (Estonian, English).

Keywords of the systematic thesaurus:

5.4.4 Fundamental Rights – Economic, social and cultural rights – **Freedom to choose one’s profession.**

Keywords of the alphabetical index:

Corruption prevention / Conflict of interest.

Headnotes:

The right of an official to be a member of the directing or supervisory body of a company outweighs the aspirational gain of a decrease in the abstract risk of corruption.

Summary:

I. The applicant, T., was found guilty of a misdemeanour on the basis of Article 263 of the Anti-corruption Act (hereinafter, the “ACA”) and ordered to pay a fine of 40 fine units. The punishment was imposed because the applicant, being an official within the meaning of Article 4.1 of the ACA, as the chief architect (deputy director) of the Department of Architecture and City Planning of a local government, and also being a director of his own company, violated the restrictions on officials’ employment and activity imposed by Article 19.2.2 of the ACA, thereby committing an offence qualified pursuant to Article 263 of the ACA. The applicant filed an appeal with the Supreme Court against the decision of the body conducting extra-judicial proceedings.

II. First, the Constitutional Review Chamber of the Supreme Court (hereinafter, the “Supreme Court”) determined to which extent the constitutionality of Article 19.2.2 of the ACA should be assessed. In order to ensure the efficiency of constitutional review, the Court considered that the entire text of Article 19.2.2 of the ACA should be deemed relevant. In assessing the constitutionality of the provision the Court considered that there was no substantial difference whether the provision is applied with regard to state or local government officials. Second, the Court considered that the justification of the prohibition was valid not only in relation to membership of the directing body of a company but also regarding membership of the supervisory body of a company. Third, the main court case constituted a situation where the activity of the official was related to his activity as a director of a company. The Court deemed that the reference in the ACA to the “professional activity of a person” is an undefined legal definition; and that the use thereof in delimiting a prohibition sanctioned by penal law is problematic from the aspect of legal clarity.

The Court held that the prohibition provided for in Article 19.2.2 of the ACA on being a member of the directing or supervisory body of a company infringed the fundamental right to freely choose one’s area of activity, profession and place of work, protected in Article 29.1 of the Constitution. A person’s right to freely choose his or her area of activity, profession and place of work includes also the employment or service relationship which has already been formed.

The Court noted that, in a democratic society, such restrictions may only be imposed where they are proportional regarding the objective sought to be achieved by the restrictions. The prohibition imposed on officials’ membership of directing and supervisory bodies of companies had been established with the aim to avoid corruption. Since the prohibition established in Article 19.2.2 of the ACA did not presume that a specific risk of corruption is to be ascertained in every single case, it should be deemed that the objective of the provision is to achieve a general decrease in corruption, i.e. the abstract risk of corruption. The Court was of the view that the avoidance of corruption, including a decrease in the abstract risk of corruption, is an acceptable justification in a state based on the rule of law.

The Court held that the prohibition on membership of the directing or supervisory body of a company decreases the said risk. The prohibition in question is also necessary for avoidance of the abstract risk of corruption. In principle, the prohibition could be replaced by an obligation to provide notification of one’s activity, to request permission for such activity,

and to disclose one's interests and the requisite permission. The obligation to obtain permission is not as efficient, compared to a prohibition, with a view to decreasing the abstract risk of corruption. The procedural restrictions cannot be deemed to be measures restricting the right to choose one's area of activity, profession and place of work to a lesser extent and at the same time deemed to be equally effective. These restrictions do not help to decrease the abstract risk of corruption but a specific risk of corruption accompanying specific acts.

The prohibition contained in Article 19.2.2 of the ACA was not moderate. Corruption causes damage, above all, due to acts of corruption. Such damage is not caused by different relationships involving a risk of corruption in an abstract manner. The connection between restrictions on activities and employment and avoidance of an act of corruption is more indirect.

The Court noted that if the prohibition in question did not exist, other restrictions on officials' activity would remain applicable. For example, the law provides that an official shall not engage in self-dealing, or conclude transactions of a similar nature or involving a conflict of interest; prohibited transactions include possible transactions with a company, the directing or supervisory body of which the person is a member.

The situation adjudicated in the instant case involved an abstract risk of corruption. The company's area of activity (architectural design) and the area in which the person was engaged as an official (chief architect of the city) coincided. Although the company did not operate in the local government unit where the official was employed, the possibility could not be excluded that, for example, a competitor of the company directed by the official might have contacts in the field of planning with the said local government unit. The official may in such a case have an opportunity to make decisions unfavourable to the competitor company. However, many cases where an official in a similar position would not be able to take any specific steps favouring the company of which he is a director also fall within the scope of application of the prohibition. This would be the case where the person's official duties and the company's activity do not overlap in any way.

The Court considered that the right of an official to be a member of the directing or supervisory body of a company outweighs the gain from decrease in abstract risk of corruption. The Court held that the prohibition provided for in Article 19.2.2 of the ACA violated the fundamental right provided for in Article 29.1 of the Constitution and declared the provision invalid.

Cross-references:

- Decision no. 3-4-1-24-11, 31.01.2012, Supreme Court;
- Decision no. 3-1-1-92-06, 25.01.2007, Supreme Court *en banc*;
- Decision no. 3-1-3-10-02, 17.03.2003, Supreme Court *en banc*.

Languages:

Estonian, English.



Identification: EST-2012-2-004

a) Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 17.04.2012 / **e)** 3-4-1-25-11 / **f)** / **g)** www.riigiteataja.ee/akt/123042012001 / **h)** www.riigikohus.ee/?id=11&tekst=RK/3-4-1-25-11; CODICES (Estonian, English).

Keywords of the systematic thesaurus:

1.5.4.5 Constitutional Justice – Decisions – Types – **Suspension**.
5.3.39.3 Fundamental Rights – Civil and political rights – Right to property – **Other limitations**.

Keywords of the alphabetical index:

Immovable property / Retrospective effect / Retroactivity, law.

Headnotes:

A restriction on the right to property is disproportionate if the use of land for its intended purpose is impossible and the compensation received for the restriction is even smaller than the applicable land tax.

The restriction is also generally disproportionate if the payment made for the obligation to tolerate the restriction is limited to the land tax subject to payment for the encumbered part of the immovable property and if the owner is able to enjoy partial use of the immovable property regardless of restrictions.

Summary:

I. Article 158.2.1 of the Law of Property Act (hereinafter, the "LPA") prescribed the right of an owner of immovable property to demand payment for tolerating utility networks or utility works in the amount established in Article 15.4 of the Law of Property Act Implementation Act (hereinafter, the "LPAIA"). Article 15.4.2-15.4.4 of the LPAIA provided that the amount of annual payment for tolerating a utility network or utility works on the immovable property of the owner or for tolerating a restriction on the use of land arising from a protective zone of a utility network or utility works equalled the amount of the one per cent taxable value of the land corresponding to the protective zone of the utility network or utility works, multiplied by the coefficient depending on the intended purpose of use of that land. The Chancellor of Justice contested the constitutionality of these laws on the basis that they did not prescribe a sufficient payment to the owner of an immovable property for the obligation to tolerate utility networks or utility works required in the public interest.

II. The Constitutional Review Chamber of the Supreme Court (hereinafter, the "Supreme Court") did not examine the constitutionality of all of the laws challenged by the Chancellor of the Justice as it found some of the laws were not relevant.

The Court confirmed that where a person's right to freely use his or her property is restricted this constitutes infringement of the right to property guaranteed by Article 32 of the Constitution. The objective of the restriction is to guarantee the availability, for a reasonable price, of the services provided through utility networks and utility works. One element of the price of universal services is, *inter alia*, the expenses of provision of the service, one part of which is the compensation which must be paid to owners of immovable property for the obligation to tolerate the restriction of their right to freely use their property. Since universal services are provided through infrastructures, the functioning of the free market is complicated in that field. The Court held that the objective of the infringement is legitimate.

The Court also considered that restricting the amount of payment prescribed for the obligation to tolerate is a suitable and necessary measure for guaranteeing the reasonable price of universal services. Concerning moderation of the restriction the court hold that a restriction on the right to property is disproportionate if the use of land for its intended purpose is impossible and the compensation received for the restriction is even smaller than the applicable land tax. The Court found that the compensation

prescribed by law is mostly smaller than the land tax to be paid on that land. The restriction would be generally disproportionate also if the payment made for the obligation to tolerate would be limited to the land tax subject to payment for the encumbered part of the immovable property and if the owner would be able enjoy partial use of the immovable property regardless of restrictions. The law in force failed to consider the actual effect of the restriction. Although compensation for the restriction must be provided in any case, it may be, having regard to the public interest, smaller than compensation for the restriction in full. The Supreme Court declared the relevant provisions invalid.

The Chancellor of Justice requested postponement of the judgment declaring the said provisions invalid for six months, as a situation where the bases for calculating compensation provided by law would become void could be problematic in view of the principles of both legal clarity and legitimate expectation. The Supreme Court denied this request as it did not deem it justified. Upon the entry into force of this judgment, there were no provisions in the legal order on the basis of which the amount of the payment could be calculated, but the bases for demanding payment remained valid. This means that the owner of an immovable property has the right to demand compensation from owners of utility networks and utility works for the obligation to tolerate a restriction on his right to property and thereby receive appropriate compensation for the restriction of his fundamental right.

The Supreme Court deemed it necessary to declare the impugned laws invalid differently from the usual procedure. The laws were declared invalid with solely prospective effect, i.e. *ex nunc*, in the interests of legal certainty. In this manner, the Court avoided a significant difficulty which would have arisen had the invalidity applied retroactively, as the owners of utility networks and utility works would have been encumbered with extensive and unforeseeable financial obligations. In general, owners of utility networks and utility works are holders of fundamental rights. The retroactive invalidation of the restriction would have had a deleterious impact on them, in that it would have harmed their legitimate expectation under the applicable law prior to its invalidation.

Cross-references:

- Decision no. 3-4-1-16-0, 26.03.2009, Supreme Court;
- Decision no. 3-3-1-69-09, 31.03.2011, Supreme Court;
- Decision no. 3-3-2-1-07, 10.03.2008, Supreme Court *en banc*.

Languages:

Estonian, English.

*Identification:* EST-2012-2-005

a) Estonia / b) Supreme Court / c) *en banc* / d) 12.07.2012 / e) 3-4-1-6-12 / f) / g) / h) www.riigikohus.ee/?id=11&tekst=RK/3-4-1-6-12; CODICES (Estonian, English).

Keywords of the systematic thesaurus:

3.1 General Principles – **Sovereignty**.
 3.3.1 General Principles – Democracy – **Representative democracy**.
 3.9 General Principles – **Rule of law**.
 4.5.2.1 Institutions – Legislative bodies – Powers – **Competences with respect to international agreements**.
 4.12.3 Institutions – Ombudsman – **Powers**.

Keywords of the alphabetical index:

Economic and Monetary Union / European Union, Treaty / Sovereignty / Sovereignty, popular.

Headnotes:

Article 4.4 of the European Stability Mechanism Treaty interferes with the financial competence of the *Riigikogu* (national parliament) and is related to the principle of a democratic state governed by the rule of law. It also interferes with the financial sovereignty of the state of Estonia, because the people's right of discretion is thereby indirectly restricted. However, Article 4.4 of the Treaty provides for a proportional measure for the achievement of the objectives of the Treaty as the interference is based on weighty constitutional values, namely, the need to guarantee the protection of fundamental rights and freedoms.

Summary:

I. By the Government order “Approval of the Draft Treaty establishing the European Stability Mechanism and grant of authorisation” the Draft European Stability Mechanism Treaty (hereinafter, the “Treaty”)

was approved and the permanent representative of Estonia to the European Union (EU) was authorised to sign it. The representative signed the amended Treaty which the Member States were required to ratify. The Chancellor of Justice had recourse to the Supreme Court, relying on Article 6.1.4 of the Constitutional Review Court Procedure Act (hereinafter, the “CRCPA”), with a request to declare Article 4.4 of the signed Treaty to be in conflict with the principle of parliamentary democracy and with Articles 65.10 and 115 of the Constitution.

II. The Court first considered whether the request of the Chancellor of Justice was admissible. The Court held that the Treaty is an international agreement given that it is not part of the primary or secondary law of the European Union. Paragraph 123 of the Constitution prohibits the State from entering into international treaties which are in conflict with the Constitution. Article 6.1.4 of the CRCPA grants the Chancellor of Justice the right to seek a declaration from the Supreme Court that a signed international agreement or a provision thereof is in conflict with the Constitution. The Court held that the Chancellor of Justice has the right to seek such a declaration regarding the ESM Treaty even if it has to be ratified and it has not been ratified yet. A preliminary review of the Treaty by the Supreme Court would prevent a situation in which an unconstitutional international agreement should later require to be withdrawn or denounced.

Second, the main question was whether the Article 4.4 of the Treaty is constitutional. The Court came to the conclusion that with the contribution key (a list setting out the capital contribution of each EU Member State to the European Stability Mechanism) the Treaty determines the upper limit of the financial obligations of the Member States to the European Stability Mechanism. The Treaty sets out when and how the capital required from each Member State must be paid in.

Article 4.4 of the Treaty interferes with the financial competence of Parliament provided for in Article 65.6 of the Constitution in conjunction with Article 115.1 of the Constitution and in Article 65.10 of the Constitution in conjunction with Article 121.4 of the Constitution, and is related to the principle of a democratic state subject to the rule of law. Parliament's possibility to make political choices is thereby restricted, because the choices already made have decreased the state's financial resources. It also interferes with the financial sovereignty of the state of Estonia arising from the preamble to the Constitution and Article 1 of the Constitution, because the people's right of discretion is thereby indirectly restricted. Article 4.4 of the Treaty interferes with the

financial competence of Parliament, the related financial sovereignty of the state, and the principle of a democratic state subject to the rule of law due to the possibility that at the request of the ESM the callable capital must be paid in the future.

The Court was of the view that the purpose of Article 4.4 of the Treaty is to guarantee for the ESM in an emergency the efficiency of the decision-making mechanism to eliminate a threat to the economic and financial sustainability of the euro area. This objective is a legitimate interference with the principles addressed above.

The objective of Article 4.4 of the Treaty is related to the purpose of the Treaty to safeguard the financial stability of the euro area. The financial instability and closely related economic instability of the euro area also endanger the financial and economic stability of the state of Estonia, because Estonia is a part of the euro area. Economic and financial stability is necessary in order for Estonia to be able to fulfil its obligations arising from the Constitution. Consequently, the interference arising from Article 4.4 of the Treaty is justified by substantial constitutional values, namely, the need arising from the preamble to the Constitution and from Article 14 of the Constitution to guarantee the protection of fundamental rights and freedoms.

The Court found that Article 4.4 of the Treaty provides for an appropriate, necessary and reasonable measure for the achievement of its objective. In weighing up reasonableness the Court deemed it necessary to distinguish the interference occurring on the ratification of the Treaty and the interference which may occur later in implementing the Treaty when, at the request of the ESM, the callable capital must be paid. The interference occurring on ratification is not in itself very serious; however, the interference is based on weighty constitutional values, namely, the need to guarantee the protection of fundamental rights and freedoms. Accordingly, the Court held that Article 4.4 of the Treaty does interfere with the financial competence of Parliament and thereby also the principle of the financial sovereignty of the state and of a democratic state subject to the rule of law, but the objectives justifying the interference are sufficiently important. Therefore, Article 4.4 of the Treaty is not in conflict with the Constitution, and the Court dismissed the request of the Chancellor of Justice.

As an *obiter dictum* the Court stated the following. With their endorsement of the Constitution of the Republic of Estonia Amendment Act (hereinafter, the "CREAA") in a popular referendum, the people gave their consent in form and in substance for Estonia to

accede to the European Union and to thereby enjoy the rights and obligations arising from membership of the European Union. The Court held that the CREAA is to be considered as an authorisation to ratify the Accession Treaty as well as an authorisation which allows Estonia to be a part of the changing European Union, provided that the amendment of the founding treaties of the European Union or a new treaty is in accordance with the Constitution. At the same time, the CREAA does not authorise the integration process of the European Union to be legitimised or the competence of Estonia to be delegated to the European Union to an unlimited extent. If it becomes evident that the new founding treaty of the European Union or the amendment to a founding treaty of the European Union gives rise to a more extensive delegation of the competence of Estonia to the European Union and a more extensive interference with the Constitution, it is necessary to seek the approval of the holder of supreme power, i.e. the people, and presumably to amend the Constitution once again. These requirements are to be considered also if the Treaty leads to amendments to the Treaty on the Functioning of the European Union (TFEU) and the Treaty on European Union (TEU).

Five separate opinions were issued from among the nine judges of the Court in this case.

Cross-references:

Case-law of the Supreme Court:

- Decision no. 3-4-1-17-08 of 19.03.2009, Supreme Court, *en banc*, *Bulletin* 2009/1 [EST-2009-1-003];
- Decision no. 3-4-1-1-03 of 17.02.2003, Constitutional Review Chamber, *Bulletin* 2003/2 [EST-2003-2-002];
- Decision no. III-4/A-1/94 of 12.01.1994, Constitutional Review Chamber.

Case-law of the European Court of Human Rights:

- *Golder v. United Kingdom*, Judgment no. 4451/70, 21.02.1975, Series A, no. 18; *Special Bulletin Leading Cases ECHR* [ECH-1975-S-001].

Languages:

Estonian, English.



France

Constitutional Council

Important decisions

Identification: FRA-2012-2-007

a) France / **b)** Constitutional Council / **c)** / **d)** 27.07.2012 / **e)** 2012-270 QPC / **f)** Departmental Federation of Trade Unions of Agricultural Operators from *Finistère* [Delimitation of protection zones for feeder areas for drinking water intakes, principle of public participation] / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 28.07.2012, 12357 / **h)** CODICES (French, English, Spanish).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Environment / Water.

Headnotes:

By not providing for the conditions in which it is possible to exercise the right of public participation in the delimitation of protection zones for water sources supplying drinking water and the drawing up, within those zones, of an action plan, the disputed provisions of the Environmental Code contravene Article 7 of the Environmental Charter, which provides for the right of all persons, in conditions and within limits set by the law, to participate in the preparation of public decisions with an effect on the environment.

Summary:

The Constitutional Council received from the *Conseil d'État* on 8 June 2012 a request for a priority preliminary ruling on the issue of constitutionality (QPC) raised by the associations *Union Départementale pour la Sauvegarde de la Vie, de la Nature et de l'environnement*, *Amoureux du Levant Naturiste* and *G. Cooper-Jardiniers de la mer*. This question (no. 2012-269 QPC) related to the conformity with the rights and freedoms safeguarded by the Constitution

of subparagraph 4 of Article L. 411-2 of the Environmental Code.

Furthermore, the Constitutional Council also received on the same day and in the same conditions from the *Conseil d'État* a request for a priority preliminary ruling on the issue of constitutionality raised by the *Fédération départementale des syndicats d'exploitants agricoles du Finistère*. This question (no. 2012-270 QPC) related to the conformity with the rights and freedoms safeguarded by the Constitution of subparagraph 5 of paragraph II of Article L. 211-3 of the Environmental Code in its formulation determined by Law no. 2006-1772 of 30 December 2006 on Water and Aquatic Environments.

These two requests for priority preliminary rulings on the issue of constitutionality relate to public decisions having an effect on the environment. Under Article L. 411-2 of the Code, it is for a decree to determine the conditions in which individual decisions may be taken granting exemptions to prohibitions of harm to non-domestic animal species or non-cultivated plant species. Article L. 211-3 of the same Code allows the regulatory authority to determine the conditions in which the administrative authority may delimit both zones where it is necessary to provide protection for areas where water sources supply drinking water and erosion zones, and to establish action plans for these.

The applicants argued that the disputed provisions of Articles L. 411-2 and L. 211-3 of the Environmental Code did not provide for regulatory or individual decisions taken on the basis thereof to be drafted in conditions complying with Article 7 of the Environmental Charter. This article sets down the right of all persons, in conditions and within limits set by the law, to participate in the preparation of public decisions with an effect on the environment. The Constitutional Council has well-established case-law to achieve compliance with this article and to censure legislative provisions which contravene it (no. 2011-183/184 QPC of 14 October 2011, no. 2012-262 QPC of 13 July 2012).

Again applying this case-law, the Council allowed both applications. It found that the disputed provisions did not include provisions enabling all persons to participate in the preparation of the decisions concerned. It therefore declared the disputed provisions to be unconstitutional. The declaration of unconstitutionality of subparagraph 5 of paragraph II of Article L. 211-3, which refers to regulatory provisions, takes effect on 1 January 2013. That of subparagraph 4 of Article L. 411-2, which requires a new system for individual decisions to be introduced, takes effect on 1 September 2013.

Cross-references:

- 2011-183/184 QPC of 14.10.2011;
- 2012-262 QPC of 13.07.2012.

Languages:

French, English, Spanish.

*Identification:* FRA-2012-2-008

a) France / **b)** Constitutional Council / **c)** / **d)** 09.08.2012 / **e)** 2012-653 DC / **f)** Treaty on Stability, Coordination and Governance in the Economic and Monetary Union / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 11.08.2012, 13283 / **h)** CODICES (French, English, German, Spanish).

Keywords of the systematic thesaurus:

- 3.1 General Principles – **Sovereignty.**
- 3.26 General Principles – **Principles of EU law.**
- 4.10 Institutions – **Public finances.**
- 4.17 Institutions – **European Union.**

Keywords of the alphabetical index:

Economic and Monetary Union, budgetary pact / Public finances, balance.

Headnotes:

Article 3.1 of Title III of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG) which requires the budgetary position of States' general government to be balanced or in surplus, does not infringe the essential conditions for the exercise of national sovereignty since it does not transfer any powers over economic or fiscal policy.

Authorisation to ratify the TSCG will only have to be preceded by amendment of the Constitution if France opts to put into effect the rules laid down in Article 3.1 through binding and permanent provisions. However, Article 3.2 of the Treaty offers an alternative which does not require such a decision. Consequently,

ratification of the Treaty does not require prior amendment of the Constitution.

Summary:

The Constitutional Council was seized by the President of the Republic on 13 July 2012, in pursuance of Article 54 of the Constitution, of the question of whether authorisation to ratify the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG), signed in Brussels on 2 March 2012, would have to be preceded by amendment of the Constitution.

The purpose of the TSCG is to strengthen the economic pillar of the economic and monetary union. Title III, in particular, sets down rules intended to promote budgetary discipline through a “fiscal compact”.

Firstly, within Title III of the TSCG, Article 3.1 requires the budgetary position of States' general government to be balanced or in surplus.

The Constitutional Council noted that France was already bound by rules of budgetary discipline in accordance with the Treaty on the Functioning of the European Union and Protocol no. 12. These rules were made more stringent by the European Regulation of 7 July 1997, as amended by the Regulations of 27 June 2005 and 16 November 2011. Those texts required the ratio between public deficit and Gross Domestic Product (GDP) to be below a reference value of 3%, and the medium-term structural debt objective to be less than 1% of GDP. The TSCG, which reduces this objective to 0.5%, in this respect merely reiterates, while tightening up, the existing commitments. It does not result in transfers of any powers over economic or fiscal policy. The Constitutional Council therefore ruled that the commitment to comply with these new budgetary rules does not infringe the essential conditions for the exercise of national sovereignty any more than the earlier commitments in terms of budget discipline.

Secondly, Article 3.2 provides that the rules on balanced public finances set out in paragraph 1 “shall take effect in the national law of the Contracting Parties [...] through provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to throughout the national budgetary processes”.

The Constitutional Council first pointed out that, once France has ratified the treaty and it has come into force, the rules on balanced public finances which appear in Article 3.1 will apply to it. The fiscal

situation of general government will therefore be required to be balanced or in surplus under the conditions laid down by the Treaty. In pursuance of Article 55 of the Constitution, the Treaty will be hierarchically superior to legislation. It will be for the different organs of State to monitor its application within the scope of their respective competences. Parliament will *inter alia* be required to comply with its provisions when enacting finance laws and social security financing laws.

The Council next examined the alternative opened by Article 3.2 in respect of the provisions to be enacted in French law in order for the rules on budget discipline to take effect.

In the first part of this alternative, the rules on balanced public finances must take effect under national law through “provisions of binding force and permanent character”. This option requires these rules to be directly introduced into the domestic legal order, in order for them to apply through the latter to finance laws and social security financing laws. Taking this direction would necessitate amendment of the constitutional provisions relating to the government's and parliament's prerogatives in the drafting and enacting of these laws, and of those relating to the principle that finance laws are enacted annually. Consequently, if France opts to put the rules set out in Article 3.1 into effect through binding and permanent provisions, authorisation to ratify the Treaty will have to be preceded by an amendment of the Constitution.

In the second part of this alternative, compliance with the rules which appear in Article 3.1 is not guaranteed by “binding” provisions. On the one hand, it is for States to determine, for the purposes of compliance with their commitment, those provisions ensuring that these rules take effect. On the other hand, the Treaty provides that compliance with the rules which appear in Article 3.1 will not then be guaranteed under national law by a provision hierarchically superior to legislation.

In France, institutional laws set the framework for policy laws on multi-year guidelines for public finances, finance laws and social security financing laws. An institutional act may therefore, in order for the rules laid down in Article 3.1 of the Treaty to take effect, include provisions applicable to these laws and relating *inter alia* to the medium-term objective, to the adjustment path for the fiscal situation of general government, to the corrective mechanism for the latter and to the independent institutions involved throughout the budgetary process. The opinions of these institutions will relate to compliance with the balanced budget rules and, if applicable, to the

“automatically triggered” correction mechanism. The Constitutional Council will take account of these opinions when monitoring the conformity of these laws with the Constitution, particularly when assessing whether finance laws have a genuine purpose.

The Constitutional Council concluded that if, in order to comply with the commitment set out in Article 3.1, France opts, on the basis of the second alternative in the first sentence of Article 3.2, to enact institutional provisions having the effect required by paragraph 2, it will not be necessary for authorisation to ratify the Treaty to be preceded by an amendment of the Constitution. In this case, Article 8 of the Treaty, on the monitoring that the Court of Justice of the European Union is required to conduct, will not infringe the essential conditions for the exercise of national sovereignty.

Finally, none of the other provisions of the Treaty contains a new binding clause in addition to the clauses contained in the treaties relating to the European Union and which would be unconstitutional.

Languages:

French, English, German, Spanish.



Identification: FRA-2012-2-009

a) France / **b)** Constitutional Council / **c)** / **d)** 09.08.2012 / **e)** 2012-654 DC / **f)** Supplementary Law on Finances for 2012 / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 17.08.2012, 13496 / **h)** CODICES (French, English, German, Spanish).

Keywords of the systematic thesaurus:

4.4 Institutions – **Head of State**.
4.10 Institutions – **Public finances**.
5.3.42 Fundamental Rights – Civil and political rights – **Rights in respect of taxation**.

Keywords of the alphabetical index:

Law on Finances / President of the Republic, salary / Prime Minister, salary / Exceptional tax on wealth.

Headnotes:

The Article of the Supplementary Law on Finances (hereinafter, "LFR") which amends the remuneration of the President of the Republic and Prime Minister breaches the principle of the separation of powers. It is for the executive to determine the pay of the President of the Republic, Prime Minister and members of the government.

The exceptional tax on wealth (hereinafter, "CEF") payable by persons subject to the solidarity tax on wealth (hereinafter, "ISF") does not breach the principle of equality in taxation, is not of a confiscatory nature and does not breach the principle of equality in the payment of public dues.

Summary:

In decision no. 2012-654 DC of 9 August 2012, the Constitutional Council ruled on the conformity with the Constitution of the Supplementary Law on Finances for 2012, which had been referred to it by over sixty Members of Parliament and over sixty Senators. The applicants challenged ten articles on substantive grounds and the place of four articles in a law on finances. The Constitutional Council *ex officio* examined another two articles.

In its decision, the Constitutional Council:

- censured the two articles examined *ex officio*: Article 11, which amended the powers of the Supreme Audiovisual Council and introduced a tax, and Article 40 on the remuneration of the President of the Republic and Prime Minister;
- ruled that the exceptional tax on wealth for 2012, introduced by Article 4, was in conformity with the Constitution, while providing details about the constitutional framework for the taxation of wealth;
- rejected the other applications directed against thirteen articles of the LFR.

I. The Constitutional Council examined *ex officio* and censured Articles 11 and 40 of the LFR for 2012.

- Paragraph I of Article 11 amended the Law of 30 September 1986 on freedom of communication, in order to establish a requirement for approval by the Supreme Audiovisual Council (hereinafter, "CSA") when control of a company which holds authorisation to broadcast over the radio spectrum is transferred. Paragraph II introduced a tax on the transfer of the accreditation of an audiovisual communication service broadcaster.

The Constitutional Council had to rule that the amendment of the Law on freedom of communication in order to establish a new requirement for approval by the CSA has no place, in accordance with the Basic Law (LOLF) of 1 August 2001, in a law on finances. The tax introduced in paragraph II was merely accessory to this approval system; it could not be separated from it. It was therefore Article 11 in its entirety that was censured.

- Article 40 of the LFR amended the remuneration of the President of the Republic and Prime Minister, which it reduced by 30 %. It incorporated this amendment into Article 14 of the Law of 6 August 2002, which had already been amended in 2007 and had never been submitted to the Constitutional Council. The Constitutional Council ruled that, by amending the remuneration of the President of the Republic and Prime Minister, Article 40 of the LFR breached the principle of the separation of powers. It therefore censured both that article and paragraph I of Article 14 of the Law of 6 August 2002. It will be for the executive to determine the remuneration of the President of the Republic, Prime Minister and members of the government.

II. The Constitutional Council ruled the exceptional tax on wealth for 2012 to be in conformity with the Constitution, while providing details about the need for rules setting a maximum level for a permanent tax on wealth.

Article 4 of the LFR introduced, for the year 2012, an exceptional tax on wealth (CEF) payable by persons subject to the solidarity tax on wealth (ISF) in respect of the year 2012. The amount of ISF due is deducted from the amount due in respect of this CEF. The applicants set out numerous objections to Article 4. They particularly complained of its confiscatory nature and of the lack of a limiting mechanism.

The Constitutional Council firstly dismissed the complaint of a breach of the principle of equality in taxation. The CEF does entail threshold effects whereby some owners of assets pay more than others whose assets are of greater value. But those effects are connected with parliament's decision to introduce a differentiated tax regime compared to the ISF due for the year 2012. Therefore the two taxes must be examined together in this context. And Parliament adopted tax brackets and rates which ensure the progressive nature of these two taxes.

Secondly, the Constitutional Council dismissed the complaint based on the confiscatory nature of the exceptional tax. Through the LFR, parliament

increased both the number of tax brackets and the rate of taxation applicable to the holding of wealth in 2012, in order to increase taxation on the holders of that wealth and to extract new tax revenue. It raised these taxation rates whilst maintaining the threshold above which tax is due at €1.3 million and leaving numerous assets and rights outside the scope of the tax. It set at 1.8% the higher marginal rate for wealth in excess of €16.79 million. The Constitutional Council lacks a general power of discretion and decision-making like that of parliament. It cannot seek to establish whether the objectives set for itself by parliament could have been reached in other ways, unless the procedures stipulated by law are manifestly inappropriate to the set objective. That is not the case in this instance. The CEF, combined with the ISF for 2012, does not impose on one category of taxpayers an excessive burden, having regard to the tax-paying capacity conferred by the holding of a number of assets and rights.

Thirdly, the Constitutional Council examined compliance with the principle of equality in the payment of public dues. It found that, in order to prevent the ISF from causing a clear breach of the principle of equality in the payment of public dues, parliament has, since the introduction of this tax in the Law on finances for 1989, included in the arrangements therefore, following calculation taking account of several taxes, rules on maximum limits. These rules limit the amount of the ISF and of the taxes payable in respect of income to a total fraction of net income. The purpose of these rules, until 2011, was to ensure that a person cannot, generally speaking, pay in respect of these taxes more than 85% of his or her income. In 2011, parliament, in conditions in conformity with the Constitution, repealed these rules on the maximum level of ISF, because of the significant concomitant fall in the rates of that tax. However, parliament could not establish an ISF scale such as that in force prior to the year 2012 without accompanying it with a rule on a maximum level or a rule generating equivalent effects intended to avoid a clear breach of the principle of equality in the payment of public dues.

The LFR introduces an exceptional tax based on the ISF scale prior to 2012, without providing for rules on a maximum level. Such a direction would be unconstitutional for a permanent tax on wealth. However, the Constitutional Council ruled that the breach in the principle of equality in the payment of public dues stemming from the absence of a rule on a maximum level or a rule generating equivalent effects cannot lead to the conclusion that this exceptional levy is unconstitutional. The Council took into account various non-renewable aspects specific to this exceptional levy for 2012: the LFR does implement, in

the course of a year, new fiscal aims including, on an exceptional basis, the creation of a tax on wealth payable solely in respect of the year 2012; this levy is established after deduction of the gross amount of ISF due in 2012; the right of restitution previously acquired under the “fiscal shield” relates to the ISF due in 2012.

III. The Constitutional Council dismissed the complaints against another thirteen articles of the LFR.

The Constitutional Council dismissed the applicants' complaints against another thirteen articles of the LFR, including Articles 3, 10, 20, 41 and 42.

- Article 3 reforms, largely through its abolition, the social security and tax relief for overtime for full-time and part-time workers which had been introduced by the Law of 21 August 2007 to promote work, employment and purchasing power (known as the “Law TEPA”). Through this amendment, it was parliament's intention to promote employment. This article was ruled not to be contrary to freedom of enterprise. It did not introduce differences contrary to the principle of equality.
- Article 10 introduces an exceptional levy on the value of oil stocks and products. The Council ruled that parliament had defined the taxable act and established a liability to taxation in keeping with the capacity to pay of enterprises in the oil industry. It had not breached the principle of equality, as it had taken account of the situation of the enterprises in the sector which were in difficulty.
- Article 20 requires *France Télécom* to pay to the State an additional amount as consideration for the latter's taking of responsibility for its officials' pensions. Parliament had, through this provision, intended to comply with a decision of the European Commission of 20 December 2011, pending the judgement of the Court of Justice of the European Union, where this decision has been challenged. In the light of this judgment, *France Télécom* might be justified in requesting repayment of the sums paid in pursuance of the challenged provisions. The Council ruled that these provisions were not in themselves unconstitutional.
- Article 41 reforms State medical assistance (AME), which entails payment by the State for health care supplied to certain foreign nationals who are unlawfully present. These provisions in particular restore the free nature of that assistance. They have a direct impact on the

State budget and therefore have a place in a law on finances. They do not make this assistance conditional on payment of a fee. Whether they are French or foreign, lawfully present or not, persons whose financial means are below a threshold are entitled to free health care under the AME scheme or the universal health care scheme. Article 41, which reflects a decision by parliament, is not therefore contrary to the principle of equality.

- Article 42 abolishes the payment by the State of school fees at French teaching establishments abroad. The constitutional obligation to organise public and secular education is not incumbent on the State beyond the territory of the Republic. Article 42, which reflects a decision by parliament, is not therefore unconstitutional.

Languages:

French, English, German, Spanish.



Germany

Federal Constitutional Court

Important decisions

Identification: GER-2012-2-011

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 04.05.2012 / **e)** 1 BvR 367/12 / **f)** / **g)** to be published in the Federal Constitutional Court's Official Digest / **h)** *Neue Juristische Wochenschrift* 2012, 1941-1945; *Deutsches Verwaltungsblatt* 2012, 830-834; *MultiMedia und Recht* 2012, 520-523; CODICES (German).

Keywords of the systematic thesaurus:

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

1.4.2 Constitutional Justice – Procedure – **Summary procedure.**

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

5.4.4 Fundamental Rights – Economic, social and cultural rights – **Freedom to choose one's profession.**

Keywords of the alphabetical index:

Statute, injunction, prior to the promulgation / "Call-by-call" services, prices, announce, obligation / Statutory transitional period, lack of.

Headnotes:

The precept of effective legal protection can justify the issue of a temporary injunction against a law before its promulgation that had been certified by the Federal President.

At least before the law comes into being according to Article 78 of the Basic Law, no difficult-to-reverse restructuring or extensive investments with regard to intended new statutory requirements concerning the exercise of an occupation or profession, may as a rule, be expected of a company. Whether a statutory transitional period is required must therefore be decided regardless of such preliminary measures.

Summary:

I. § 66b.1 of the Telecommunications Act (hereinafter, the “Act”) in its valid version at the time of the decision entails an obligation to announce the charges incurred prior to the commencement of the telephone call. This obligation only applied with “premium” services. Under § 3 no. 17b of the Act, these are “Services ... which provide another service beyond the telecommunications service, which are invoiced to the customer together with the telecommunications service and cannot be attributed to a different type of number.” Violation of this obligation led to the cessation to apply of the right to remuneration (§ 66g no. 1 of the Act), and could furthermore be punished as a regulatory offence (§ 149.1 no. 13d of the Act).

On 9 February 2012 the German *Bundestag* adopted an Act Amending Telecommunications Regulations (*Gesetz zur Änderung telekommunikationsrechtlicher Regelungen*). The *Bundesrat* consented to the Act on 10 February 2012. Expanding the obligation to announce the price as stipulated by § 66b.1 of the Telecommunications Act, it also covers what are known in Germany as “call-by-call” services. “Call-by-call” services make it possible to make telephone calls via a different service provider than the one providing the telephone line by dialing a prefix. According to the amending Act, providers of “call-by-call” services must announce the applicable tariff before such a call begins. In the event of a change of tariff occurring during an on-going call, the customer must be informed. The new provision was to come into force one day after the promulgation of the Act. The Federal President certified the Act on 3 May 2012. It was promulgated on 9 May 2012 in the Federal Law Gazette (*Bundesgesetzblatt*).

The applicant offers “call-by-call” services. In February 2012, it lodged a constitutional complaint and made a motion for an injunction. It complained of a violation of its fundamental rights to free exercise of a profession, to property and to economic freedom to act by virtue of the fact that the obligation to announce the price is to come into force without any transitional period. It claimed that it was unable to implement the prescribed price announcements until the anticipated time of entry into force. It claimed to be unable to comply with the obligation to announce the price prior to the commencement of a call until the end of March 2012 at the earliest, and not to be able to comply with the obligation with regard to a change of tariff until August 2012 at the earliest.

II. The applicant’s motion for an injunction was largely successful. The Federal Constitutional Court ruled by means of an injunction that the obligation to

announce prices introduced by the reform of § 66b.1 of the Telecommunications Act in the case of “call-by-call” services does not enter into force prior to 1 August 2012.

1. The motion for an injunction was admissible.

A constitutional complaint can in principle not be lodged against an Act prior to its promulgation; this also applies in principle to the motion for an injunction addressing an Act. Exceptionally, however, the Federal Constitutional Court can hand down an injunction prior to the promulgation of the impugned Act if the legislation proceedings have been fully completed before the legislating bodies *Bundestag* and *Bundesrat* and the competence of the Federal President to review prior to certification is respected. Furthermore, the impugned provisions are to come into force so soon after the promulgation of the Act that according to a realistic assessment, effective injunctive protection of fundamental rights cannot be obtained. These prerequisites apply here. The impugned statutory provision came into being by virtue of a resolution of the *Bundestag* and with the approval of the *Bundesrat*. Since § 66b.1 of the Telecommunications Act in its amended version was to come into force on the day after the promulgation of the Act, a motion to hand down an injunction not lodged until after promulgation would not be able to ensure effective protection of fundamental rights. The applicant would have had to accept grievous disadvantages at least for a transitional period. The reason is that without the necessary price announcement, it would lose its right to remuneration and also run the risk of being punished because of a regulatory offence.

2. The motion was largely successful.

a. An injunction cannot be issued if the main proceedings are manifestly unfounded. One may, however, not presume this to be the case with regard to the applicant’s constitutional complaint. Rather, there was much to suggest that the legislator should have set the coming into force of the price announcement obligation, which encroached on the freedom to exercise a profession, at a later point in time to safeguard the fundamental right of those concerned under Article 12.1 of the Basic Law. The need for a transitional regulation, particularly for the new law to enter into force at a later date, is considered in cases when (1) compliance with new regulations on the exercise of a profession is not possible without time-consuming, capital-intensive conversions of the operational procedures, (2) if the holder of the fundamental rights would therefore have to temporarily cease exercising its professional activity should the new regulation enter into force

immediately, or (3) if it could only continue under unacceptable conditions. This was the case at hand. The applicant had made a plausible case that not only it, but also other providers of “call-by-call” services, would not be able to completely implement the new price announcement obligations for several months. It was not evident, by contrast, that the legislator had been able to consider a transitional period to be dispensable. The reason is that the introduction of the price announcement was so urgent for reasons of consumer protection as to outweigh the interest of the “call-by-call” providers in a transitional period in every instance. The legislator had hence also not been permitted to dispense with a transitional period, claiming that the “call-by-call” providers would in any case have a sufficiently long period for conversion until the anticipated promulgation of the Act. At least prior to the coming into being of the Act, the holder of the fundamental right would as a rule not have anticipated any difficult-to-reverse restructuring or indeed extensive investments with regard to a coming new regulation.

b. The weighing of consequences, which is required in the injunctive legal protection proceedings, led to the postponement of the coming into force of the price announcement obligation with “call-by-call” services until 31 July 2012. In injunctive legal protection proceedings, an Act can be provisionally prevented from coming into force. However, this requires proving that the disadvantages that would result if it were to come into force and its unconstitutionality were subsequently ascertained would clearly outweigh the extent and gravity of the disadvantages that would occur through the temporary prevention of an Act that turned out to be constitutional. The disadvantages risked by the applicant – and likely by a number of other “call-by-call” service providers – in the event of the immediate coming into force outweighed the risks resulting for consumers from a limited postponement of the coming into force. The applicant would have been forced by the immediate coming into force of the price announcement obligation to temporarily convert its business model, with the likelihood of a considerable economic impact. This impact, however, is difficult to assess in individual cases. The applicant has now been able to implement the price announcement. Considerable weight however attached to the disadvantages resulting from it not being possible to install the necessary interim price announcement functionally until the end of July 2012 at the earliest. For a provisional period, it could have done completely without the tiered pricing which takes place according to time intervals in order to avoid violating the interim price announcement obligation. This would however have meant it giving up a major characteristic of its business model to date, which

largely relies on a partly very considerable differentiation in the call prices between different parts of the day. Alternatively, it could have invoiced calls strictly according to the price announced at their commencement, even where there was a change of tariff. This would, however, mean that it would have lost the higher income should the cheaper tariff announced have changed to a more expensive one. Conversely, in case of a change from a more expensive tariff to a cheaper one, if the call was nonetheless invoiced at the more expensive price announced, it would have to expect corresponding user dissatisfaction. With such an approach, the applicant could certainly only practice the model of tiered pricing selected to a restricted degree.

The risks incurred by consumers if the price announcement obligation provisionally does not come into effect were considerably less ponderous. There were no indications of a serious, global risk to consumers, making immediate action on the part of the legislator indispensable.

Cross-references:

- Decision of 30.07.2008, *Bulletin* 2008/2 [GER-2008-2-014].

Languages:

German; English press release on the Court's website.



Identification: GER-2012-2-012

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 19.06.2012 / **e)** 2 BvC 2/10 / **f)** Decision challenging the election of the justices of the Federal Constitutional Court and its composition / **g)** to be published in the Federal Constitutional Court's Official Digest / **h)** *Neue Zeitschrift für Verwaltungsrecht* 2012, 967-969; CODICES (German).

Keywords of the systematic thesaurus:

1.1.2.4 Constitutional Justice – Constitutional jurisdiction – Composition, recruitment and structure – **Appointment of members.**

Keywords of the alphabetical index:

Justices, Federal Constitutional Court, election, indirect / Composition, Federal Constitutional Court, decision, challenge.

Headnotes:

Article 94.1.2 of the Basic Law, according to which half the members of the Federal Constitutional Court are elected by the *Bundestag* and half by the *Bundesrat*, does not prescribe a specific mode of election. § 6 of the Federal Constitutional Court Act, which provides for a mode of election, is based on the interpretation of Article 94.1.2 of the Basic Law, which is open to legislative elaboration of the election procedure and states that the vote need not necessarily be cast in the plenary session.

Summary:

I. The subject matter of the proceedings is a complaint requesting the scrutiny of an election. In his complaint, the applicant originally challenged the five per cent barrier clause in force at the 2009 election to the European Parliament and the validity of the election. In its judgment of 9 November 2011, the Federal Constitutional Court held the barrier clause unconstitutional. Then, the applicant essentially sought only the election being repeated in the Federal Republic of Germany and in the alternative, a new allocation of the seats in the Federal Republic of Germany's contingent of Members of the European Parliament.

The applicant challenged the composition of the Federal Constitutional Court's Senate, stating that the Federal Constitutional Court justices elected by the German *Bundestag* are elected by the electoral committee established for this purpose by the *Bundestag*. He put forward that indirect election infringed Article 94.1.2 of the Basic Law, according to which half of the justices are elected by the *Bundestag*. According to the applicant, the composition of the Federal Constitutional Court as a constitutional body requires increased democratic legitimation and must be reserved to the plenary session of the *Bundestag*.

II. The Second Panel of the Federal Constitutional Court held that it is properly composed, rejecting the complaint as unfounded to the extent that it was not declared as having been disposed of with a view to the decision of 9 November 2011.

1. It is constitutionally unobjectionable that according to § 6 of the Federal Constitutional Court Act (hereinafter, the "Act"), the German *Bundestag* elects the Federal Constitutional Court justices to be elected by it indirectly, by an electoral committee consisting of twelve Members of the *Bundestag*. The members of the committee are obliged to maintain secrecy; it decides with a two-thirds majority. The provision of Article 94.1.2 of the Basic Law, according to which half the members of the Federal Constitutional Court are elected by the *Bundestag* and half by the *Bundesrat*, does not prescribe a specific mode of election but is intended to be elaborated by the legislator. The provision on the mode of election under § 6 of the Act is based on the interpretation that Article 94.1.2 of the Basic Law is open to a legislative elaboration of the election procedure that stipulates that the vote need not necessarily be cast in the plenary session. This interpretation was confirmed by the constitution-amending legislator and was deemed constitutional by the Federal Constitutional Court at an early point in time already.

Delegating the election of the justices to the committee according to § 6 of the Act also does not infringe the representative function of the *Bundestag*, which it exercises, in principle, in its entirety. The justification of the provision is the recognisable legislative objective of strengthening the Court's reputation and the confidence in its independence, thus ensuring the Court's ability to function.

2. To the extent that the applicant maintains his complaint, it is unfounded. There is no reason for ordering, in derogation of the judgment of 9 November 2011, the election to be repeated or a new allocation of the seats.

Cross-references:

- Decision of 09.11.2011, *Bulletin* 2011/3 [GER-2011-3-019].

Languages:

German; English press release on the Court's website.



Identification: GER-2012-2-013

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 19.06.2012 / **e)** 2 BvE 4/11 / **f)** Euro Plus Pact, ESM/Euro Plus Pact / **g)** to be published in the Federal Constitutional Court's Official Digest / **h)** *Wertpapier-Mitteilungen* 2012, 1229-1239; *Europäisches Wirtschafts- und Steuerrecht* 2012, 276-292; *Recht der Internationalen Wirtschaft* 2012, 534-550; *Neue Zeitschrift für Verwaltungsrecht* 2012, 954-967; CODICES (German).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

European Stability Mechanism / Euro Plus Pact / *Bundestag*, rights of participation in European Union matters / Federal Government, obligation to inform the *Bundestag*.

Headnotes:

1. European Union matters within the meaning of Article 23.2 of the Basic Law include Treaty amendments and corresponding amendments at primary-law level (Article 23.1 of the Basic Law) as well as legislative acts of the European Union (Article 23.3 of the Basic Law). European Union matters also include agreements under international law if they supplement, or stand in another particular proximity to, the law of the European Union. This is determined on the basis of an overall consideration of the circumstances, including the contents, objectives and effects of the legislation.

2. The [Federal Government's] obligation to inform [the German *Bundestag*], contained in Article 23.2.2 of the Basic Law, is linked to the right of the German *Bundestag*, entrenched in Article 23.2.1 of the Basic Law, to participate in European Union matters. The requirement of comprehensive information is intended to enable the German *Bundestag* to exercise its rights of participation. Accordingly, the provision of information must be the more intensive, the more complex a matter is, the more deeply it intervenes in the sphere of competences of the legislature, and the more it resembles a formal resolution or agreement. This gives rise to requirements as to the quality, quantity and timeliness of the information.

3. Article 23.2.2 of the Basic Law refers to the "earliest possible date"; this is to be interpreted to the effect that the *Bundestag* must receive the information from the Federal Government at the latest at a time which enables the *Bundestag* to consider the matter in depth and to prepare an opinion before the Federal Government makes declarations with outward effect, in particular binding declarations on legislative acts of the European Union and intergovernmental agreements.

4. Limits to the obligation to inform follow from the principle of the separation of powers. Within system of functions of the Basic Law, the government has a core area of specifically executive responsibility; this includes an area of initiative, consultation and action which is generally confidential. As long as the internal development of informed opinion of the Federal Government has not been completed, Parliament has no right to information.

Summary:

I. The ALLIANCE 90/THE GREENS parliamentary group made two applications against the Federal Government in *Organstreit* proceedings (proceedings relating to a dispute between supreme federal bodies). The applications related to the question of whether the Federal Government violated its duties to inform the *Bundestag* arising from Article 23.2 of the Basic Law.

According to this provision, the Federal Government shall inform the *Bundestag* "in European Union matters" comprehensively and at the earliest possible date.

The first application was aimed at the European Stability Mechanism (hereinafter, the "ESM"). The ESM is an intergovernmental instrument of the euro area Member States to combat the sovereign debt crisis in the area of the European Monetary Union. The applicant applied for a declaration that the Federal Government infringed the *Bundestag*'s rights to be informed under Article 23.2 of the Basic Law. The violation resulted from the Government's failure to inform the *Bundestag* immediately before and after the European Council meeting of 4 February 2011 comprehensively, at the earliest possible date and continuously, about the configuration of the ESM. It also resulted from the Government's not forwarding the Draft Treaty establishing the ESM to the *Bundestag* on 6 April 2011 at the latest.

The second application concerned the Euro Plus Pact, which was presented to the public for the first time at the European Council meeting of 4 February 2011. This agreement is intended in particular to

structurally reduce the risk of currency crises in the euro area. The applicant applied for a declaration that the Federal Government infringed the *Bundestag's* rights under Article 23.2 of the Basic Law omitting to inform the *Bundestag* before the European Council meeting on 4 February 2011 about the Federal Chancellor's initiative for an enhanced economic coordination of the euro area Member States. The infringement also arose from the *Bundestag's* not being informed comprehensively until 11 March 2011 and at the earliest possible date about the Euro Plus Pact after the meeting.

The *Organstreit* proceedings had to clarify whether the rights of participation and the rights to be informed, which are due to the *Bundestag* according to Article 23.2 of the Basic Law, can also apply to intergovernmental instruments of the nature described. They are dealt with by the Federal Government in the context of European integration and are related to the European Union.

II. The Federal Constitutional Court ruled that the Federal Government infringed the *Bundestag's* rights to be informed under Article 23.2 of the Basic Law with regard to the European Stability Mechanism and with regard to the agreement on the Euro Plus Pact. This results from the standards set out in the Headnotes.

1. European Stability Mechanism

a. The establishment and configuration of the European Stability Mechanism are a European Union matter within the meaning of Article 23.2.1 of the Basic Law. In an overall perspective, the characteristics that define it show substantial connections with the integration programme of the European Treaties. For instance, the establishment of the European Stability Mechanism is to be safeguarded by amending the Treaty on the Functioning of the European Union. Furthermore, the treaty to be concluded for its establishment assigns to the bodies of the European Union, in particular to the European Commission and the Court of Justice of the European Union, new responsibilities concerning the identification, realisation and monitoring of the financing programme for Member States in need of assistance. Moreover, the European Stability Mechanism is to serve to complement and safeguard the economic and monetary policy, which has been assigned to the European Union as an exclusive responsibility. Admittedly, the European Stability Mechanism is to be established by way of a separate international treaty outside the structure of Community law existing so far. This, however, does not call into question its assignment to the integration programme laid down in the Treaties establishing the

European Union and on the Functioning of the European Union. Since it is intertwined with supranational elements, the European Stability Mechanism is of a hybrid nature that makes it a European Union matter.

b. By not submitting to the *Bundestag* a text of the European Commission on the establishment of the European Stability Mechanism, which was available to the Federal Government on 21 February 2011 at the latest, and the Draft Treaty Establishing the European Stability Mechanism (ESM) of 6 April 2011, the Federal Government infringed the rights of the *Bundestag* under Article 23.2.2 of the Basic Law. Oral and written information came too late and do therefore not compensate this. As a result from the cumulative requirement of early and comprehensive information, the duty to inform cannot be exercised "in an overall package" with regard to processes of the nature existing here. The Federal Government is obliged to supply the *Bundestag* not merely with the text of a treaty when deliberations have already been concluded, or after the treaty has already been adopted. The Federal Government must at the earliest possible date submit interim results that are available to it.

2. Euro Plus Pact

a. Due to its specific orientation towards the integration programme of the European Union, the agreement on the Euro Plus Pact is a European Union matter within the meaning of Article 23.2.1 of the Basic Law. It is directed towards the European Union Member States. In view to its objectives (qualitative improvement of the economic policy and of the public budget situation, and strengthening of financial stability), it is, with regard to its contents, oriented towards a policy area of the European Union laid down in the Treaties. Bodies of the European Union participate in the realisation of the objectives of the Pact. The fact that the Euro Plus Pact operates for the most part with self-commitments of the participating Member States does not call into question its classification as a European Union matter.

The Euro Plus Pact affects important functions of the *Bundestag*. In particular the self-commitments in areas falling within the legislative competence of the Member States, and where the legislator will be subjected to monitoring by bodies of the European Union, concern parliamentary responsibility and are liable to restrict the legislator's freedom of drafting. It was therefore required to inform the legislator early and comprehensively.

b. The Federal Government did not comply with this obligation. It did not inform the German *Bundestag* in advance about the initiative for the adoption of the Euro Plus Pact, which was presented at the European Council meeting on 4 February 2011. The respondent would have had to inform the *Bundestag* about this plan on 2 February 2011 at the latest. At that date, it was certain that a discussion proposal for enhanced economic policy coordination in the euro area to improve competitiveness would be submitted to the heads of state and government at the forthcoming meeting.

Furthermore, the Federal Government did not submit to the German *Bundestag* an unofficial document prepared by the Presidents of the European Commission and of the European Council of 25 February 2011, which described essential features of the Euro Plus Pact. The official draft of the Pact was forwarded on 11 March 2011. At that time, it was no longer possible for the German *Bundestag* to discuss its contents and to exert an influence on the Federal Government by giving an opinion because the heads of state and government already agreed on the Pact on the same day.

Languages:

German; English press release and English translation of the decision on the Court's website.



Identification: GER-2012-2-014

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 04.07.2012 / **e)** 2 BvC 1/11, 2 BvC 2/11 / **f)** The right to vote and be elected of German nationals living abroad / **g)** to be published in the Federal Constitutional Court's Official Digest / **h)** CODICES (German).

Keywords of the systematic thesaurus:

4.9 Institutions – **Elections and instruments of direct democracy.**
5.3.41 Fundamental Rights – Civil and political rights – **Electoral rights.**

Keywords of the alphabetical index:

German nationals living abroad, right to vote and be elected.

Headnotes:

The principle of general election (Article 38.1.1 of the Basic Law) guarantees the right of all citizens to vote and be elected. It is to be understood within the meaning of strict, formal equality with regard to entitlement to participate in elections of the German *Bundestag*. Distinctions may only be justified by reasons legitimated by the Constitution and are at least as weighty as the principle of general election.

The sole prerequisite of prior three-month permanent residence in the federal territory for the right of German nationals living abroad to vote and be elected oversteps the boundaries of the latitude to which the legislator is entitled.

Summary:

I. Germans living abroad are entitled to vote and be elected according to § 12.2 of the Federal Electoral Act (*Bundeswahlgesetz*) (hereinafter, the "Act") if they have continuously resided or had their habitual residence in Germany for at least three months prior to moving away.

The legislator had gradually relaxed the requirement of established residence in the past. In addition to the requirement of prior three-month residence, the right of German nationals living abroad to vote and be elected was initially contingent on no more than ten years having passed since they moved away. The period since moving away with regard to German nationals living outside the member States of the Council of Europe was later increased to 25 years. No such period was imposed for Germans living in other member States of the Council of Europe. The legislator ultimately ceased making any distinction whatever between German nationals living abroad within and outside the member States of the Council of Europe, abolishing the period since moving away.

The applicants were born in Belgium in 1982 and are German nationals. Since they had not lived continuously in Germany for three months at any time, they were denied participation in the 2009 *Bundestag* elections. With their complaints requesting review of an election, they contend that the prerequisite of prior established residence in the Federal Republic of Germany violates the principle of general election.

II. The Federal Constitutional Court ruled that the right of German nationals living abroad to vote and be elected, as formulated by § 12.2.1 of the Act, is incompatible with the principle of general election under Article 38.1.1 of the Basic Law, and is null and void. The electoral error that has been ascertained, however, does not invalidate the 2009 *Bundestag* elections.

1. The principle of general election guarantees the right of all nationals to vote and be elected. The legislator only has narrow latitude to restrict the elaboration of the right to vote and be elected. Distinctions may only be justified if the reasons for them are legitimated by the Constitution and are at least as weighty as general elections. Potentially justifiable reasons include in particular the objective pursued with democratic elections to safeguard the nature of the election as an integrative process in the political will-formation of the people. Hence, exclusion from the right to vote may be constitutionally justified if there were a specific group of individuals for which the possibility to participate in the process of communication between them and state bodies did not exist to an adequate degree.

2. According to these standards, § 12.2.1 of the Act violates the principle of general election. The provision brings about unequal treatment within the group of German nationals living abroad. It denies those German nationals living abroad who do not meet the requirement of prior three-month residence in the Federal Republic of Germany the right to vote. This unequal treatment is not legitimated by an adequate reason.

It is constitutionally unobjectionable that the legislator does not fully realise the principle of general election in the participation of German nationals living abroad in elections because, according to the legislator's assessment, the ability to take part in the political will-forming and opinion process requires a minimum of personal and directly acquired familiarity with the political situation in Germany. Linking the right to vote and be elected solely to prior three-month residence in the federal territory, however, violates the requirement to carefully balance the principle of general election with the communication function of elections. The goal pursued by the legislator to ensure familiarity with the political situation in the Federal Republic of Germany, which is considered a prerequisite to take part in elections, cannot be achieved solely by requiring prior three-month residence in Germany. According to this requirement, a non-negligible number of German nationals living abroad is permitted to take part in elections who have not been able to acquire such familiarity at all because, at the time of their residence in Germany,

their age did not permit them to yet have the maturity and insight to do so. Others left the Federal Republic of Germany so long ago that the experience acquired at that time no longer corresponds to the current political situation. It is true that the requirement of prior three-month residence is likely to exclude German nationals who have no on-going relationship with Germany from taking part in elections. At the same time, however, its effect is that Germans cannot vote in elections for the German *Bundestag* who are typically familiar with the political situation and are affected by it, such as Germans living abroad who work in Germany as "border workers".

The provision contained in § 12.2.1 of the Act can, finally, also not be justified by stating that an accumulation of persons entitled to vote in elections in specific constituencies or a major change in the electorate structure would otherwise take place. It is not possible to state that the link to prior three-month residence in the locality from which a person moved away would reliably ensure an equal distribution among the constituencies of qualified German voters living abroad. It is also not necessary to link the right to vote and be elected to prior residence in the federal territory in order to prevent constituencies being created that are unequal in size. The reason is that it is not evident that this objective was unable to be achieved just as reliably by other, less incisive allocation criteria.

III. The ruling was handed down with 7:1 votes. A member of the Panel submitted a dissenting opinion and stated as follows:

The requirement of at least three months' residence in the electoral area remaining after the successive reduction of the restrictions on voting for German nationals living abroad may be considered relatively inexpedient as the sole criterion for communication potential relevant to the right to vote and be elected. This is, however, not the point. As to the link that is established and is to be established by democratic elections, it is not the connection in terms of communication, but the connection in terms of responsibility. The latter connection is more fundamental – a connection in terms of responsibility of the real, serious kind, in which not only words are to be exchanged, but consequences of personal decision-making conduct are also to be borne both by those electing and by those elected.

It corresponds to the purpose of democratic elections to link the right to vote and be elected not to formal affiliation alone, but also to the fact that the voters influence the policies that impact their own living conditions, but not those of others. The justification of the three-month rule lies in the fact that it is intended

to safeguard the necessary minimum of a real tie with the Federal Republic of Germany. It takes into account, on the one hand, the fact that, even after living abroad for many years, Germans may still have links to Germany which make the German *res publica* a personal concern for them. On the other hand, it prevents the right to vote inherited via nationality being passed on to individuals with regard to whom the exercise of a right to vote in Germany would no longer constitute an act of democratic self-determination, but only an act of co-determination over others. Hence, a justifiable balance has been struck between contradictory constitutional interests.

Languages:

German; English press release on the Court's website.



Identification: GER-2012-2-015

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 10.07.2012 / **e)** 1 BvL 2/10, 1 BvL 3/10, 1 BvL 4/10, 1 BvL 3/11 / **f)** / **g)** to be published in the Federal Constitutional Court's Official Digest / **h)** CODICES (German).

Keywords of the systematic thesaurus:

5.2 Fundamental Rights – **Equality**.

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

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

Keywords of the alphabetical index:

Parental benefit / Allowance, child-raising / Parents, foreign / Foreign nationals, residence permits, humanitarian grounds.

Headnotes:

The law that excludes foreign nationals who have been granted residency under international law or on political or humanitarian grounds but do not fulfil any of the criteria for integration in the labour market defined in § 1.6 no. 3b of the Federal Child-Raising Allowance Act 2006 (*Bundeserziehungsgeldgesetz*

2006) and § 1.7 no. 3b of the Federal Parental Benefit and Parental Leave Act (*Bundeselterngeld- und Elternzeitgesetz*) from receiving a child-raising allowance or a parental benefit violates Article 3.1 and 3.3.1 of the Basic Law.

A provision that is not gender specific or based on criteria that from the outset only relate to women or only relate to men, but which nonetheless discriminates against women in comparison to men due to legal or practical reasons connected with maternity, is subject according to Article 3.3.1 of the Basic Law to strict standards of justification.

Summary:

I. The Federal Child-Raising Allowance Act and the Federal Parental Benefit and Parental Leave Act make the granting of a child-raising allowance or a parental benefit to foreign nationals dependent on the type of residence title the person concerned possesses (§ 1.6 of the Federal Child-Raising Allowance Act and § 1.7 of the Federal Parental Benefit and Parental Leave Act). The holder of a settlement permit (*Niederlassungserlaubnis*), which allows permanent residence, will always be entitled to an allowance or benefit. On the other hand, the holder of a residence permit (*Aufenthaltserlaubnis*), which is a temporary title, will generally only be entitled to an allowance or benefit if the residence permit authorises or has authorised him or her to pursue an economic activity. Even if they fulfil those criteria, foreign nationals who have been granted a residence permit under international law or on political or humanitarian grounds are not, as a rule, entitled to a child-raising allowance or a parental benefit. However, there is a provision for an exception to the exception for these persons. According to this provision, they are entitled to a child-raising allowance or a parental benefit. Either entitlement requires legally residing in the territory of the Federal Republic of Germany for at least three years and satisfying one of the criteria for integration in the labour market specified in § 1.6 no. 3b of the Federal Child-Raising Allowance Act or § 1.7 no. 3b of the Federal Parental Benefit and Parental Leave Act. This means that they must be employed, draw class I unemployment benefits or take parental leave during the reference period in the territory of the Federal Republic of Germany.

The plaintiffs in the original proceedings had been issued residence permits on humanitarian grounds, were entitled to pursue an economic activity and also satisfied the residency requirement of at least three years of legal residence. However, they did not satisfy the requirements of § 1.6 no. 3b Federal Child-Raising Allowance Act or § 1.7 no. 3b Federal

Parental Benefit and Parental Leave Act regarding integration in the labour market. The actions they brought for a grant of a child-raising allowance or a parental benefit led the Federal Social Court (*Bundessozialgericht*), which considered the provisions to be in violation of the general principle of equality before the law, to refer the case to the Federal Constitutional Court.

II. The Federal Constitutional Court declared the referred provisions void. The reason is that they violate the general principle of equality before the law in Article 3.1 of the Basic Law and the prohibition of discrimination on the grounds of gender under Article 3.3.1 of the Basic Law.

1. The referred provisions discriminate against the persons concerned in an unconstitutional manner (Article 3.1 of the Basic Law). They deny holders of residence permits issued on humanitarian grounds who do not satisfy the specified criteria of labour market integration a benefit that other parents with the same residence permit receive. This unequal treatment is not justified.

a. The specified requirements do in fact serve what is in principle a legitimate legislative objective, namely to restrict the grant of a child-raising allowance or a parental benefit to only those foreign nationals who are likely to stay permanently in Germany. The different length of stay in Germany may in principle justify unequal treatment in this case if the legislator wishes to promote a sustainable demographic development in Germany. This objective of the legislator would not be achieved if foreign nationals who were soon to leave the territory of the Federal Republic of Germany were granted the allowance or benefit.

b. The distinguishing criteria chosen by the legislator are, however, not suitable for achieving this objective because the length of stay of the persons concerned cannot be predicted on this basis.

aa. The possession of a residence permit issued on humanitarian grounds is not in and of itself a sufficient indication that the foreign national concerned will not stay in Germany permanently. According to the case-law of the Federal Constitutional Court and the European Court of Human Rights, the type of a residence title is not a suitable basis for predicting the length of a foreign national's stay.

bb. In addition, the criteria for integration in the labour market in the laws submitted are not an adequate basis for predicting the expected length of stay. It is true that they have a certain probative value in respect of the integration in the labour market of the

persons concerned around the time of the birth of their child. Thus, this could be regarded as an indication that such persons have a chance of obtaining permanent residency. This does not, however, justify the contrary argument that it must be assumed that persons who do not satisfy these requirements will not stay permanently in Germany. In fact, holders of a residence permit issued on humanitarian grounds do not, as a rule, return to their country of origin for as long as the reasons that gave rise to the issue of the residence permit continue to be valid. In these cases, their integration in the labour market does not play a role. Furthermore, a foreign national's inability to satisfy the specified criteria regarding the integration in the labour market is also not of such significance for the extension of the residence title as to be a negative predictor of the chances of obtaining a settlement permit. This is because according to the Residence Act (*Aufenthaltsgesetz*), a foreign national does not necessarily have to support him or herself in order to obtain an extension of his or her residence permit issued on humanitarian grounds.

In addition, it is not the case that the foreign national holding a residence permit on humanitarian grounds has no prospect of obtaining a settlement permit and the related unlimited right of residence if he or she fails to satisfy the employment-related requirements. Therefore, the latter does not indicate that he or she does not have a prospect of staying permanently in Germany. The fact that the criteria are not satisfied during the period in which a parental benefit or child-raising allowance could be paid does not indicate that a settlement permit will not be issued later. The criteria specified in the referred provisions are not suitable to predict, regarding the grant of a settlement permit, whether the person concerned will be able to support him or herself without recourse to public funds in the future. For one thing, they only consider a short reference period and ignore integration in the labour market at other times. In addition, the requirements use as their point of reference a period of time – namely the first 14 or 24 months of a child's life. During this time, due to the birth of the child, it is difficult especially for parents to pursue an economic activity or be available to the labour market as is required in order to be entitled to class I unemployment benefits. The same applies in the case of the third alternative, namely the taking of parental leave. This is almost impossible in the period after the birth of a child unless a parent has entered into an employment relationship prior to the birth of the child and such employment relationship has continued to be valid during the reference period.

In addition, a requirement that a parent pursue an economic activity or be available to the labour market during the first months of a child's life is contrary to the objective sought to be achieved by the legislator through the granting of a parental benefit or child-raising allowance. It is intended to give parents the opportunity to look after their children themselves during their first months of life without undergoing financial difficulties.

2. Moreover, the provisions violate the prohibition of discrimination on the grounds of gender under Article 3.3.1 of the Basic Law. They discriminate against women in comparison to men since they make the right to receive a child-raising allowance or a parental benefit dependent on satisfying labour-market-related requirements which women have more difficulty in satisfying than men. Women are not available to the labour market for legal reasons during the first eight weeks after the birth of a child. In addition, from a practical point of view, mothers who are breastfeeding are faced with problems if they seek to pursue an economic activity.

A provision that is not gender specific or based on criteria that from the outset only relate to women or only relate to men, but which nonetheless discriminates against women compared to men for legal or practical reasons connected with maternity, is subject according to Article 3.3.1 of the Basic Law to strict standards of justification. The referred provisions must be measured by these standards. It is true that their wording is gender neutral. However, the discrimination of women that it gives rise to is closely connected with the legal and biological state of motherhood. This discrimination against women cannot be justified if for no other reason than that the specified criteria for differentiation do not enable the legislator to achieve its objective of covering cases involving a probably long length of stay.

Languages:

German; English press release on the Court's website.



Identification: GER-2012-2-016

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 11.07.2012 / **e)** 1 BvR 3142/07, 1 BvR 1596/08 / **f)** Delisting / **g)** to be published in the Federal Constitutional Court's Official Digest / **h)** *Der Betrieb* 2012, 1618-1623; *Zeitschrift für Wirtschaftsrecht und Insolvenzpraxis* 2012, 1402-1408; *Wertpapiermitteilungen* 2012, 1378-1383; *Neue Zeitschrift für Gesellschaftsrecht* 2012, 826-832; *Betriebsberater* 2012, 2010-2014; *Die Aktiengesellschaft* 2012, 557-563; CODICES (German).

Keywords of the systematic thesaurus:

3.9 General Principles – **Rule of law.**
5.3.39 Fundamental Rights – Civil and political rights – **Right to property.**

Keywords of the alphabetical index:

Delisting, voluntary / Admission of shares to trading on a stock exchange, revocation / Shareholder, fundamental right to property / Further development of the law by judges.

Headnotes:

The revocation of the admission of shares to trading in the regulated market upon the application of the issuer in principle does not affect the area protected by the shareholder's fundamental right to property (Article 14.1 of the Basic Law).

By way of an overall analogy, the non-constitutional (ordinary) courts demand a mandatory offer, which can be judicially reviewed, to acquire its shares to be made by the corporation or by its main shareholder to the other shareholders in the case of a complete withdrawal from the stock exchange; the offer keeps within the bounds set by the constitution to further develop the law by judges (Article 2.1 in conjunction with Article 20.3 of the Basic Law).

Summary:

I. The constitutional complaints relate to the consequences of revoking the admission of shares to trading on a German stock exchange in what is known as the regulated market upon the application of the stock corporation itself (voluntary delisting). Delisting is the withdrawal of a stock corporation that had so far been stock exchange listed from the regulated market. Voluntary delisting can take place as a complete withdrawal resulting from the discontinuation of the listing at all stock exchanges, or

as a partial withdrawal after the discontinuation of the listing at one or several stock exchanges, or in connection with a change to a special segment of qualified over-the-counter trading, which is essentially regulated by the stock exchanges themselves. This segment is a trading platform established under private law, for which there is no state-regulated obligation to admit the traded securities.

In the original proceedings before the ordinary court that gave rise to the constitutional complaint 1 BvR 1569/08, the applicant, a minority shareholder, wanted to achieve in corporate proceedings a cash payment from a partnership limited by shares and from the partnership's majority shareholder as a compensation for revoking the stock exchange listing. However, delisting took place only partially, in the form of downgrading. After withdrawal from the regulated market, the shares were traded in a standardised segment of qualified over-the-counter trading. The ordinary courts held the corporate proceedings inadmissible.

Constitutional complaint 1 BvR 3142/07 relates to the following facts. Together with the revocation of admission to stock exchange trading (applied for by the stock corporation), the applicant, as its major shareholder, made the other shareholders an offer – in its view, voluntarily – to buy its shares. Some shareholders demanded a higher cash payment in corporate proceedings. The ordinary courts held the proceedings admissible based on the case-law of the Federal Court of Justice (*Bundesgerichtshof*). Since its *Macrotron* decision from 2002, withdrawal from the stock exchange requires protection of the minority shareholders that goes beyond the protection provided by capital markets law. It held that delisting deprived the minority shareholder of the market that had enabled the minority shareholder to sell its share at any time. Including the shares in the over-the-counter trading could not compensate this. Experience had shown that as soon as the delisting became known, the consequence was a collapse of share prices. Article 14 of the Basic Law therefore protected the special transferability of the stock exchange listed share. Delisting was only permissible if the shareholder's meeting took a decision on this at least by simple majority, and if the majority shareholder or the stock corporation made an offer for the purchase of stocks to the minority shareholders whose appropriateness was possible to be reviewed in corporate proceedings.

II. The Federal Constitutional Court rejected the two constitutional complaints as unfounded.

1. Area protected by the shareholder's fundamental right to property – proceedings 1 BvR 1569/08

a. The property guaranteed by Article 14.1 of the Basic Law includes the ownership in a company that is embodied in the share. The elaboration by company law of the ownership in a company is characterised by the private benefit of the property and the right to dispose of it. The protection of the fundamental right to property covers the substance of the ownership in a company in its elaboration under the law governing membership rights and under company law. The area of protection is affected if shareholders lose their legal position embodied in the share, or if the substance of the legal position is altered (e.g., integration of the stock corporation into a group) by the conclusion of a control agreement, a profit transfer agreement or a squeeze-out of the shareholder.

b. According to these standards, the revocation of the admission of shares to trading in the regulated market does not affect the area protected by the shareholder's fundamental right to property.

aa. The continued existence of the membership right and the relative participation rights resulting from membership are not affected. The shareholders' position under the law governing membership rights is not weakened. The internal structure of the company is not altered by its withdrawal from the regulated market.

bb. It is true that the Federal Constitutional Court's case-law acknowledges the share's special transferability as a "characteristic" of the property in shares. This means, however, that only the legal transferability is part of the property acquired, which is protected under Article 14.1 of the Basic Law. The transferability of the share, understood as the legal authority to sell it in a market at any time, is not affected by the delisting.

cc. Thus, admission to the regulated market is a value-creating factor. Several other such factors can be identified with regard to shares; they are merely considered as market opportunities, which means that they are not protected by constitutional law.

dd. Neither the fact that admission to the regulated market results in the application of numerous special company-law and commercial-law provisions concerning stock exchange listed companies, nor the standards of stock exchange law that are applied in the regulated market make it possible to consider the listing in the regulated market as part of property. The set of regulations applying to stock exchange listed companies and the high standards of protection

under stock exchange law indirectly serve, inter alia, the individual shareholder's asset and membership interests. In this respect, however, their benefit to the shareholder is merely a reflex, which does not make the special regime of regulations for stock exchange listed companies and the standard under stock exchange law an object of protection of the shareholder's property in shares.

ee. Thus, the challenged decisions do not violate the fundamental right to property of the applicant in proceedings 1 BvR 1569/08 because the area protected by it is not affected by the delisting. The downgrading of the share to stock exchange regulated qualified over-the-counter trading without a mandatory offer by the company or by its main shareholder that can be reviewed in corporate proceedings is also constitutionally unobjectionable.

2. Permissibility of further development of the law by judges – mandatory offer for a takeover of shares (*Macrotron* decision) – proceedings 1 BvR 3142/07

The rulings that held admissible the corporate proceedings, which had been applied for to be instituted against the applicant to review the share purchase offer made by it, are also constitutionally unobjectionable.

a. The ordinary courts' assessment that the applicant's offer was a mandatory offer to be inferred from an overall analogy to company-law provisions governing other structural measures, and the corresponding application of the Corporate Proceedings Act (*Spruchverfahrensgesetz*), respect the bounds set by the constitution to the judicial authority to decide (Article 2.1 in conjunction with Article 20.3 of the Basic Law).

aa. The courts' application and interpretation of the laws is in harmony with the rule of law (Article 20.3 of the Basic Law) if it takes place within the bounds of justifiable interpretation and permissible further development of the law by judges. The duties connected with the administration of justice include the further development of the law. Therefore, an analogous application of provisions from ordinary law and the closing of gaps in the legislation are in principle constitutionally unobjectionable. The further development of the law by judges may however not result in the recognisable will of the legislator being pushed aside and being replaced by an autonomous weighing of interests by judges.

bb. The overall analogy challenged by the applicant lives up to these standards. Statute law does not contain a provision prescribing the majority shareholder or the corporation itself to offer the

minority shareholders a compensation for an impairment of tradability in case of the revocation of the listing of the share in the regulated stock exchange market. The courts originally dealing with the matter regarded this as insufficient. The reason is that they assumed with regard to its requirements and legal consequences, the situation under company law applying to voluntary delisting had to be assessed in the same manner as the existing provisions under capital markets law. This is not a gross contradiction to the clearly recognisable will of the legislator, or any other derogation from the law in terms of judges' self-assumed authority (*richterliche Eigenmacht*). Statutory duties of compensation exist in cases of integration, merger, change of legal form and the conclusion of a control and profit transfer agreement. The ordinary courts have inferred from these duties the consistent fundamental idea that mandatory offers prescribed by statute provide shareholders with the possibility to decide whether they want to uphold their membership right under the circumstances that have substantially changed by the structural measure. Mandatory offers particularly provide minority shareholders, who cannot prevent such a structural measure, with the possibility of withdrawing from the stock corporation due to the changed circumstances against adequate compensation. The fact that the legislator, in spite of repeatedly becoming active in corporate transformation and company law, did not counteract the legal development initiated by the Federal Court of Justice's *Macrotron* decision is another factor that speaks against the assumption that the limits of the judiciary's being bound by the law have been transgressed.

As the overall analogy that has been established with regard to the requirement of a mandatory offer in the case of a complete withdrawal from the stock exchange is constitutionally unobjectionable, this also applies to the corresponding application of the provisions of the Corporate Proceedings Act to make it possible to review the adequateness of the purchase price offered.

b. An overall analogy, which is constitutionally unobjectionable, also does not run counter to the assumption that the revocation of the stock exchange listing does not affect the area protected by the fundamental right to property. It is true that one of the factors that initiated the legal development concerning the overall analogy was the fact that in its *Macrotron* decision, the Federal Court of Justice held that the property in shares was affected. However, to answer the question of whether a further development of the law by judges is still constitutional, it is not decisive whether the further development of the law can be justified, inter alia, by Article 14.1 of the Basic Law. The further development of the law is not evaluated

according to its motives but only according to whether the interpretation as such respects the boundaries of a constitutionally permissible further development of the law.

The overall analogy is permissible, but not required, under the constitution. It is left to the further case-law of the ordinary courts to examine, on the basis of the circumstances in share trading that will then apply, whether the line of argument followed in case-law until then will be upheld, and to evaluate how the change from the regulated market to qualified over-the-counter trading will be assessed in this context.

Cross-references:

- Decision of the Federal Court of Justice of 25.11.2002, *BGHZ* (Official Digest of the Federal Court of Justice in civil matters) 153, 47.

Languages:

German; English press release on the Court's website.



Identification: GER-2012-2-017

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 18.07.2012 / **e)** 1 BvL 10/10, 1 BvL 2/11 / **f)** Asylum Seekers Benefits Act / **g)** to be published in the Federal Constitutional Court's Official Digest / **h)** *Gewerbemiete und Teileigentum* 2012, 234-236; CODICES (German).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Asylum Seekers Benefits Act / Dignified minimum existence, fundamental right to guarantee.

Headnotes:

The amount of the cash benefits paid according to § 3 of the Asylum Seekers Benefits Act (*Asylbewerberleistungsgesetz*) is evidently insufficient because it has not been changed since 1993.

Article 1.1 of the Basic Law in conjunction with the principle of the social welfare state in Article 20.1 of the Basic Law establishes a fundamental right to the guarantee of a dignified minimum existence. Article 1.1 of the Basic Law GG establishes this right as a human right. It encompasses both the physical existence of a human being and the possibility to maintain interpersonal relationships and a minimal degree of participation in social, cultural and political life. German and foreign nationals alike who reside in the Federal Republic of Germany are both entitled to the fundamental right.

If the legislator wishes to consider the particular characteristics of specific groups of individuals when determining the dignified minimum existence, it may not, in defining the details of existential benefits, differentiate across the board in light of the recipients' residence status. Such differentiation is only possible if their need for existential benefits significantly deviates from that of other persons in need, and if this may be substantiated consistently based on the real and actual need of this group specifically, in a procedure that is transparent in terms of its content.

Summary:

Based on two submissions of a Higher Social Court (*Landessozialgericht*), the Federal Constitutional Court decided on the constitutionality of the basic benefits according to § 3 of the Asylum Seekers Benefits Act (hereinafter, the "Act").

Since it came into effect in November 1993, the Act has established specific rules for minimum social benefits for certain foreign nationals. It set significantly lower benefits and primarily benefits in kind rather than cash, separate from the substantive law applicable to Germans and those legally defined to be similarly treated. The Act was passed in the context of efforts by the then Federal Government between 1990 and 1993 to limit the relatively high number of refugees coming to Germany, to step up against abuse of the right to asylum, and to keep the cost of hosting and providing general care to refugees low.

The personal scope of application of the Asylum Seekers Benefits Act has been expanded over the years. Those who are eligible under the Asylum Seekers Benefits Act are asylum seekers, war refugees and others in possession of a residence permit, those whose deportation has been suspended and those who are subject to an enforceable order to leave as well as their spouses, registered partners and children below age.

In § 3 of the Act, the legislator has provided for benefits in kind to take priority over cash benefits that may, however, replace benefits in kind. The amounts of these cash benefits have been set by law that remained unchanged since the entry into force of the Act. However, the Federal Ministry of Labour and Social Affairs is obliged, with the *Bundesrat's* consent, to adjust the amounts annually to take effect on 1 January, if and to the extent necessitated in light of the actual cost of living to satisfy existential needs.

The Federal Constitutional Court decided that the provisions governing basic cash benefits according to the Asylum Seekers Benefits Act are incompatible with the fundamental right to a minimum existence under Article 1.1 in conjunction with Article 20.1 of the Basic Law. The benefits are evidently insufficient because they have not been changed since 1993 despite considerable price increases in Germany. Furthermore, the amounts provided have neither been comprehensibly calculated, nor is it apparent that a realistic, needs-oriented calculation has been made that serves to presently secure the recipients' existence.

The legislator is obliged to immediately enact new provisions in the area of application of the Asylum Seekers Benefits Act that serve to secure a dignified minimum existence. Because of the importance of basic benefits to secure the recipients' lives, the Federal Constitutional Court has ordered a transitional arrangement that will apply until new provisions enter into force. Pursuant to this transitional arrangement, from 1 January 2011 onwards, basic benefits in the area of application of the Asylum Seekers Benefits Act shall be calculated based on the generally applicable provisions regarding the Second and Twelfth Book of the Code of Social Law (*Zweites und Zwölftes Buch des Sozialgesetzbuches*). This shall apply retroactively from 2011 onwards to benefits that have been set but are still disputed. Furthermore, it shall apply until the legislator has complied with its obligation to enact new provisions.

1. Article 1.1 of the Basic Law in conjunction with the principle of the social welfare state in Article 20.1 of the Basic Law establishes that the guarantee to a

dignified minimum existence is a fundamental right. The legislator must set the adequate amount of benefits, which may not be evidently insufficient and must be ascertained realistically.

a. Article 1.1 of the Basic Law establishes the right to the guarantee of a dignified minimum existence as a human right. German and foreign nationals alike who have their residence in the Federal Republic of Germany are entitled to it. Adequate benefits have to be ascertained in light of the circumstances in Germany.

The fundamental right to a guarantee of a dignified minimum existence encompasses both the physical existence of an individual and the possibility to maintain interpersonal relationships and a minimum of participation in social, cultural and political life. Article 1.1 of the Basic Law provides, as a basic guarantee, for a claim to benefits. The principle of the welfare state in Article 20.1 of the Basic Law calls upon the legislator to ascertain concrete amounts according to the actual current and realistic needs of people.

b. The benefits to secure a dignified minimum existence may not be evidently insufficient and, to specify the fundamental rights claim, it must be possible to calculate the amounts in a transparent and adequate way. This calculation shall be realistic, i.e. based on actual and current needs. These requirements do not refer to the legislative process but to its results.

Whether and to what extent the need for existence of persons with a temporary right of residence in Germany can be set by law as different from the need of other persons in need depends solely on whether one can comprehensibly ascertain specific lower needs exactly because of a short period of staying in the country. If specific lower needs can indeed be ascertained in the case of short-term residence that is not intended to become permanent, and if the legislator wants to take this into account in setting the amount of benefits, the legislator must define the relevant group. The legislator must do so in such a way that it will indeed cover, with sufficient probability, only those who stay in Germany for a short time.

c. The legislator's discretion to assess the minimum existence corresponds to a restrained Federal Constitutional Court review. Substantive review is limited to examine whether benefits are evidently insufficient. Beyond this review of evident failure, the Federal Constitutional Court examines whether benefits are currently justifiable, based on reliable data and plausible methods of calculation.

2. According to these standards, the provisions submitted do not meet the requirements of the fundamental right to the guarantee of a dignified minimum existence.

a. The cash benefits specified in § 3 of the Act are evidently insufficient. Their amount has not been changed since 1993 although the price level in Germany has increased by more than 30 % since then. At the time, the legislator had provided an adaptation mechanism according to which the amount of benefits should have been adapted in regular intervals to the current cost of living. However, this has never happened. The evident insufficiency of the cash benefits today is also illustrated by a comparison between benefits paid to an adult head of a household according to the law in question with the amount of benefits paid according to general welfare law of the Second and the Twelfth Book of the Code of Social Law. The amount of the latter was redefined only recently for the very reason of securing a minimum existence. It is true that these benefits may not be directly compared, but even an adjusted calculation results in a difference of approximately one-third, and thus an evident deficit in securing a dignified existence.

b. In addition, the basic cash benefits are not assessed realistically and cannot be justified. The decision about the amount of benefits was not based on reliable data when it was introduced, and is not based on such data today. At the time, legislation was based on a mere estimate of costs; even today, no comprehensible calculation has been submitted or is anywhere in sight. This does not meet the requirements of the Basic Law on securing a minimum dignified existence.

Also, migration-policy considerations of keeping benefits paid to asylum seekers and refugees low to avoid incentives for migration, if benefits were high compared to international standards, may generally not justify any reduction of benefits below the physical and socio-cultural existential minimum. Human dignity may not be relativised by migration-policy considerations.

Cross-references:

- Decision of 09.02.2010, *Bulletin* 2010/1 [GER-2010-1-003].

Languages:

German; English press release on the Court's website.



Identification: GER-2012-2-018

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 18.07.2012 / **e)** 1 BvL 16/11 / **f)** Real estate transfer tax in the case of civil partnerships / **g)** to be published in the Federal Constitutional Court's Official Digest / **h)** *Deutsches Steuerrecht* 2012, 1649-1652; CODICES (German).

Keywords of the systematic thesaurus:

1.6.5.2 Constitutional Justice – Effects – Temporal effect – **Retrospective effect (ex tunc)**.
 5.2.1.1 Fundamental Rights – Equality – Scope of application – **Public burdens**.
 5.2.2.11 Fundamental Rights – Equality – Criteria of distinction – **Sexual orientation**.

Keywords of the alphabetical index:

Real estate transfer tax / Registered civil partners, unequal treatment / Duty to enact retrospective amendments.

Headnotes:

The fact that registered civil partners were not exempted from real estate transfer tax in the same way as marital spouses were prior to the entry into force of the Annual Tax Act 2010 (*Jahressteuergesetz 2010*) constitutes a violation of the general principle of equality before the law.

Where a statute has been found to be unconstitutional because its constitutionality was not sufficiently clarified prior to its enactment, the Federal Constitutional Court may only make an order that the statute should continue to apply, even though this is contrary to the fundamental retrospective effect of a declaration of voidness and a declaration of incompatibility with the Basic Law, in exceptional circumstances and if there is sufficient justification for doing so.

Summary:

I. Through the enactment of the Annual Tax Act 2010 that entered into effect on 14 December 2010, the legislator provided that registered civil partners be treated equally with marital spouses as far as all of the exemptions from real estate transfer tax that apply to marital spouses is concerned. Registered

civil partners are two people of the same sex who have registered a civil law partnership pursuant to the Civil Partnerships Act (*Lebenspartnerschaftsgesetz*).

The revised version of the Real Estate Transfer Tax Act (*Grunderwerbsteuergesetz*) (hereinafter, the "Act") does not apply retrospectively, but is instead limited to real estate acquisitions made after 13 December 2010. Therefore, the provisions of the 1997 version of the Real Estate Transfer Tax (hereinafter, the "Old Act") apply to all old transfers that were not final and conclusive upon the entry into force of the Civil Partnerships Act on 1 August 2001. The Old Act does not grant registered civil partners – unlike marital spouses – an exemption from real estate transfer tax. According to § 3 no. 4 of the Old Act, which was relevant to the original proceedings, an acquisition of real estate by the marital spouse of the transferor is exempt from real estate transfer tax. In addition, an acquisition of real estate by the transferor's former marital spouse in connection with the division of marital assets following a divorce is also exempt from real estate transfer tax (§ 3 no. 5 of the Old Act). Moreover, § 3 of the Old Act makes provision – mostly for reasons of matrimonial property law – for further exemptions for marital spouses.

The plaintiffs in the original proceedings are registered civil partners. At the time of their separation in 2009, they entered into a settlement agreement. The plaintiffs each had half-shares in two jointly owned properties. Under the settlement agreement, each transferred one of his co-ownership shares to the other so that each became sole owner of one property. Each of them brought an action before the Finance Court (*Finanzgericht*) against the real estate transfer tax assessed against him. This led the Finance Court to refer the case to the Federal Constitutional Court since it considered § 3 no. 4 of the Old Act unconstitutional on the grounds that it violated the general principle of equality before the law.

II. The Federal Constitutional Court decided that § 3 no. 4 of the Old Act as well as the other provisions governing exemptions in § 3 of the Old Act are incompatible with the general principle of equality before the law in Article 3.1 of the Basic Law to the extent that they do not exempt registered civil partners from real estate transfer tax in the same way as they do marital spouses. The legislator has until 31 December 2012 to amend the law in respect of old cases. The amendment must correct the violations of the principle of equality before the law in the period from the entry into force of the Annual Tax Act 2010 retrospectively back to the inception of the institution of civil partnerships on 1 August 2001.

1. The unequal treatment of marital spouses and registered civil partners in relation to the exemption from real estate transfer tax must be able to withstand measurement against the strict requirements of proportionality in addition to withstanding measurement against the specific tax aspects of the principle of equality before the law. This is because the differentiation is based on a person's sexual orientation. There are no differences sufficiently important as to justify treating civil partners less favourably than marital spouses under the 1997 version of the Real Estate Transfer Act.

Privileging of marital spouses over civil partners cannot be justified from the point of view of family or succession law. Registered civil partners enjoy equal treatment with marital spouses under family and succession law, and are joined together personally and financially in the same way in a legally formalised partnership of a permanent nature. The legislative assumption underlying tax exemptions is that real estate transfers between marital spouses, as between close relatives who are also exempted from tax, are often made for the purpose of dealing with family-law claims of marital spouses inter se or in anticipation of an inheritance. The same presumption applies to registered civil partners. Furthermore, registered civil partnerships, like marriages, create mutual duties of support and responsibility for one another. Consequently, unequal treatment may also not be justified by reference to a family principle derived from a special legal bond.

Finally, the less favourable treatment of civil partners as compared with marital spouses cannot be justified on the basis of the state's duty to protect and promote marriage and the family, which is anchored in Article 6.1 of the Basic Law. If the promotion of marriage is accompanied by unfavourable treatment of other ways of life, even where these are comparable to marriage with regard to the life situation provided for and the objectives pursued by the legislation, the mere reference to the requirement of protecting marriage will not justify such a differentiation.

2. There is no reason to release the legislator from its duty to retrospectively correct the unconstitutional legal situation. In particular, no order should be made for the continued application of exemption provisions declared unconstitutional because their constitutionality was not sufficiently clarified prior to their enactment. Such an order, which would be contrary to the fundamental retrospective effect of a declaration of voidness and a declaration of incompatibility with the Basic Law, may only be made in exceptional circumstances and if there is sufficient justification for doing so. However, the

Federal Constitutional Court's knowledge alone that a statute violates the provisions of the Basic Law does not in and of itself indicate that the constitutionality of the statute was unclarified in this sense before its enactment, and thus release the legislator from its duty to retrospectively correct unconstitutional circumstances.

Languages:

German; English press release on the Court's website.



Identification: GER-2012-2-019

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 25.07.2012 / **e)** 2 BvF 3/11, 2 BvR 2670/11, 2 BvE 9/11 / **f)** Negative voting weight, "overhang mandates" / **g)** to be published in the Federal Constitutional Court's Official Digest / **h)** *Gewerbemiete und Teileigentum 2012*, 236-237; CODICES (German).

Keywords of the systematic thesaurus:

4.5.3.1 Institutions – Legislative bodies – Composition – **Election of members.**
 4.9.3 Institutions – Elections and instruments of direct democracy – **Electoral system.**
 5.2.1.4 Fundamental Rights – Equality – Scope of application – **Elections.**
 5.3.41 Fundamental Rights – Civil and political rights – **Electoral rights.**

Keywords of the alphabetical index:

Overhang mandates / Voting weight, negative / Parties, equal opportunities.

Headnotes:

1. The calculation of the number of seats allocated in a Land (state) by the number of voters according to § 6.1.1 of the Federal Electoral Act (*Bundeswahlgesetz*) facilitates the effect of the negative voting weight and hence violates the principles of equal and direct elections, as well as of equal opportunities of the parties.

2.a In a system of proportional representation created by the legislator, in conjunction with the personal election of candidates, overhang mandates (§ 6.5 of the Federal Electoral Act) are only acceptable to a degree that does not eliminate the fundamental nature of the elections as proportional representation elections.

2.b The principles of equal elections and of equal opportunities of the parties are violated in the case of overhang mandates accruing in a number corresponding to more than roughly half the size of a parliamentary group.

Summary:

The Federal Constitutional Court ruled on a request for an abstract review of statutes lodged by members of the SPD and ALLIANCE 90/THE GREENS parliamentary groups in the *Bundestag*, a constitutional complaint and an application in a dispute between supreme federal bodies brought by the party ALLIANCE 90/THE GREENS. The applications are against the Nineteenth Act to Amend the Federal Electoral Act (*Neunzehntes Gesetz zur Änderung des Bundeswahlgesetzes*) (hereinafter, the "Act") of 25 November 2011.

By judgment of 3 July 2008, the Federal Constitutional Court regarded an election system which, in typical constellations, permits an increase in the number of votes to lead to the loss of a mandate, or a loss of votes to lead to winning a mandate (negative voting weight effect) as incompatible with the principles of equal and direct elections. It declared the previous § 7.3.2 in conjunction with § 6.4 and § 6.5 of the Act to be unconstitutional insofar as the offsetting of constituency and list mandates that it ordered could trigger the effect of negative voting weight. At the same time, it instructed the legislator to bring about a constitutional provision by 30 June 2011 at the latest.

The legislator wished to remedy the unconstitutional state by forgoing in future elections the nationwide combining of parties' lists and by calculating the number of delegates to which the Land lists are entitled separately in each case in the individual Federal Länder (states). The Amending Act, which came into force on 3 December 2011, implements this by rescinding the previous § 7 of the Act and correspondingly modifying § 6.1 of the Act. Each Federal Land is allocated a number of seats in line with the number of voters for which only the Land lists of the parties standing in the Land compete. Additionally, according to § 6.2a of the Act, additional mandates are awarded to parties standing in several *Länder*

the number of which corresponds to the total obtained by nationally adding up rounding-off losses in the individual Land lists ("residual votes").

The Federal Constitutional Court ruled that the new procedure for awarding delegates' seats in the German *Bundestag* violates the principles of equal and direct elections, as well as of equal opportunities of the parties.

The Court found § 6.1.1 and § 6.2a of the Act to be null and void, and declared the provision regarding the awarding of overhang mandates with no compensation (§ 6.5 of the Act) to be incompatible with the Basic Law. The previously applicable provisions are not restored because the Federal Constitutional Court declared them to be unconstitutional by judgment of 3 July 2008 and to continue to be applicable only for a transitional period, which has now expired.

1. The negative voting weight effect

The spread of the mandates among the parties in line with the ratio of the total of votes may, as a matter of principle, not lead to a situation where the number of seats accruing to a party correlates with the number of votes corresponding to this party or to a competing party in a manner contrary to expectations (negative voting weight effect). This impairs equal suffrage and the equal opportunities of the parties. It also violates the principle of direct elections. It is no longer recognisable for the voter how his or her voting can affect the success or failure of the electoral candidates. A procedure for attributing seats is unconstitutional insofar as it brings about such effects not only in rare, unavoidable exceptional cases.

According to § 6.1.1 of the Act, each Land is allocated a number of seats calculated by the number of voters for which only the Land lists of the parties standing in the Land compete. This permits the effect of negative voting weight to occur. This is because the number of seats accruing to the Land is not determined by a quantity which is established prior to the casting of the votes, but by the respective voter turnout. The effect of negative voting weight can come about if the increase in number of second votes of the Land list of a party does not impact its number of seats (either because the additional votes are insufficient for the attribution of a further seat or because the Land list has already won more constituency mandates than the list mandates because of the result of the first ballot). But, if the increase in the number of voters accompanying the increase in the number of second votes increases the number of seats of the Land as a whole by one seat then the seat added in this Land can be accounted for

by a competing Land list, or the Land list of the same party can lose a seat in another Land. The same applies, conversely, if the loss of second votes of a party's Land list does not impact its seat allocation result but the accompanying reduction in the number of voters reduces the number of seats of the Land by one seat. One must expect such effects to occur if a change in the number of second votes coincides with a corresponding change in the number of voters, for instance, because voters do not participate in the election.

The effect of negative voting weight cannot be predicted in concrete terms and individual voters are virtually unable to influence it; this, however, does not make it acceptable. Objectively arbitrary ballot results already make democratic competition for the approval of the electorate appear paradoxical. The effect of negative voting weight is also not a natural consequence of proportional representation elections linked with the personal election of candidates in list constituencies at Land level forgoing nationwide list combinations.

2. Additional mandates

The award of additional mandates according to § 6.2a of the Act also violates the principles of equal suffrage and of equal opportunities of the parties. The provision aims to compensate for rounding losses in the award of seats at Land level in nationwide offsetting (compensation for residual votes).

Not every voter can take part in the award of these additional seats in the *Bundestag* with equal prospects of success. This is because compensation for the residual votes affords to a section of the votes a further chance to have an effect on mandates. This unequal treatment is not justified. The objective pursued by the legislator to compensate for differences in contribution to success occurring by virtue of the attribution of seats within a Land is not constitutionally objectionable. The provision is, however, not suited to achieve this objective. It one-sidedly takes into account the rounding losses of a party's Land lists and disregards its rounding gains. This may make the votes previously unsuccessful effective in terms of mandates, but the comparatively greater success of the currently over-weighted votes remains unchanged. Hence, additional mandates are not awarded to create equality of contribution to success, but in deviation from this. The provision is also not suited to compensate for a distortion of the equality of contribution to success linked to the overhang mandates.

3. Overhang mandates

§ 6.5 of the Act violates the principles of equal suffrage and equal opportunities of the parties insofar as overhang mandates with no compensation are permitted to a degree that may eliminate the fundamental nature of the *Bundestag* election as proportional representation elections. This is the case if the number of overhang mandates exceeds roughly half the number of delegates necessary to form a parliamentary group.

The German electoral system is fundamentally based on proportional representation. By counting the constituency mandates towards the list mandates of the respective party, the total number of seats is spread among the parties in a manner corresponding to the ratio of the totals of the second votes cast for them. Meanwhile, the first vote as a matter of principle only decides on which persons enter the *Bundestag* as constituency delegates. If the number of seats won by a party in the constituencies exceeds the number of seats to which it would be entitled by the result of the second vote, the party nonetheless retains the seats. In this case, the total number of seats is increased by the difference, without any new proportional compensation taking place.

The attribution of overhang mandates without compensation or offsetting leads to unequal treatment of votes in the seat allocation procedure. The reason is that in addition to the second vote, influence on the distribution of seats in the *Bundestag* also accrues to the first vote. This is justified in principle by the constitutionally legitimate objective to enable voters within the framework of proportional representation elections to also vote for personalities. However, in the system created by the legislator, a system of proportional representation, linked with personal election of candidates, overhang mandates are only acceptable to a degree that does not eliminate the fundamental nature of the election as a proportional representation election.

Should overhang mandates occur in a number corresponding to roughly more than half the size of a parliamentary group, the principles of equality of elections, as well as of equal opportunities of the parties, are violated. This scale is orientated in line with the quorum of at least five per cent of the *Bundestag* delegates required for status as a parliamentary group. It also takes into account the will of the legislator to reduce where possible the influence of the first vote on the spread of the list mandates. In order to place future elections on a reliable legal foundation, and to counter the risk of the dissolution of Parliament in election review proceedings, the Court considers it to be necessary

to bring together the statutory evaluations on a manageable scale. This gives rise to a limit of roughly 15 permissible overhang mandates.

Taking into account the actual development in overhang mandates, one may expect with a considerable degree of probability that their number will regularly exceed the number that is constitutionally acceptable by far in the foreseeable future. The legislator must hence take precautions to prevent excessive numbers of overhang mandates occurring without compensation.

Cross-references:

- Decision of 03.07.2008, *Bulletin* 2008/2 [GER-2008-2-013].

Languages:

German; English press release on the Court's website.



Greece

Council of State

Important decisions

Identification: GRE-2012-2-001

a) Greece / **b)** Council of State / **c)** Assembly / **d)** 07.11.2003 / **e)** 3216/2003 / **f)** **g)** **h)**.

Keywords of the systematic thesaurus:

2.1.1.4 Sources – Categories – Written rules – **International instruments.**

4.10 Institutions – **Public finances.**

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

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

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

5.4 Fundamental Rights – **Economic, social and cultural rights.**

Keywords of the alphabetical index:

Administrative Court, jurisdiction / Annulment, application / Constitutional complaint, admissibility / Constitutional complaint, limits of review / Fundamental rights / International agreement, constitutional requirements / Agreement, international, parliamentary approval / Judicial review, scope, limits.

Headnotes:

The “Memorandum” agreement, dated 9 February 2010, which was signed between the Greek Government and the Eurozone Member States and the International Monetary Fund (hereinafter, “IMF”), sets the goals and time-limits with regard to the granting of financial support to Greece during the economic crisis and does not constitute an international treaty, since it is not legally binding for the signatory parties. State measures adopted to fulfil the aims set by the “Memorandum” do not violate basic individual rights, because they are intended to serve, for a limited period of time, the public interest of avoiding default and restructuring a viable economy.

Summary:

I. The Athens Bar Association joined forces with the highest syndicate of civil servants and other professional organisations and individual citizens to challenge, by way of application for judicial review, various regulatory and individual administrative acts, which set economic austerity measures in implementation of the laws responding to the economic crisis and the need to establish financial support to Greece by the IMF and by Eurozone Member States (Statutes 3833/2010 and 3845/2010).

II. At the outset, the Court deemed the application admissible only insofar as it concerned administrative acts, whether regulatory or individual, issued under statutory authorisation of the said laws in order to set the conditions of the application of these laws to particular cases or individual situations. The constitutionality review of these laws was only incidental to the review of the directly challenged administrative acts. The application was rejected as inadmissible insofar as it was directed against particular provisions of the above-mentioned laws, as it was held that these legislative provisions were of a non-reviewable, general and abstract nature and did not contain a complete and exhaustive regulation of a certain individual case that would render ineffective the issue of a reviewable administrative act. Had the latter been the case, then the legislative provisions in question would be considered reviewable by the Court on the grounds of unconstitutionality; more specifically, for being contrary to the citizens’ right to judicial protection (Article 20.1 of the Constitution and Article 6.1 ECHR, because they would then implement the choice of the Administration to initiate a legislative act, which escapes direct judicial review, instead of administrative acts establishing severe economic austerity measures, which are subject to judicial review.

The Court proceeded to examine the question whether the Memorandum (analysed in the Memorandum of Understanding on Specific Economic Policy Conditionality and the Memorandum of Economic and Financial Policies), signed by the Greek State on one part, and the Eurozone Member States and the IMF on the other, and ratified by Statute 3845/2010, to which it was attached, constituted an international agreement that conveyed national competences to organs of international organisations and was adopted contrary to the application requirements of Article 28.2 of the Constitution, which indicate that such an agreement must be approved in a parliamentary vote by a majority of three-fifths of the total number of Members of Parliament.

The majority of the Court in plenary session decided that Statute 3845/2010 was not enacted in breach of Article 28.2 of the Constitution, because the attachment of the said Memorandum to it served nothing more than to publicise its content and the time-schedule set for the enforcement of the aims and means of the Greek government's programme to deal with the financial crisis and avoid default. Being a mere governmental programme in nature, the Memorandum neither conveys competences to organs of international organisations nor does it establish rules with immediate effect, but requires, instead, the further issue of legislative acts (statutes or regulatory acts authorised by statute) for the realisation of the stated policies. The Memorandum is not an international treaty for the additional reason that it is not legally binding for the signatory parties since no mutual commitments are undertaken by them and no enforcement mechanisms or other forms of legal sanctions are provided for as means to secure the realisation of the aims of the Treaty.

The only legal obligations that the Greek State undertook as against the other Member States of the Eurozone arise from the adoption of Council Decision 2010/320/EU in accordance with Article 126.9 and 136 of the Treaty on the Functioning of the European Union (TFEU) and from the EU Loan Facility Agreement of 8 May 2010. These European-law instruments – issued, in any case, after the enactment of Statute 3845/2010, which authorised the directly challenged administrative acts – are the only internationally binding rules for the Greek State, as they set out the measures that it has to adopt in order to fulfil the obligations it assumed, as a Member State of the Eurozone, in its programme to limit its enormous deficit.

Given the fact that neither the Memorandum nor Statute 3845/2010 grants competences relevant to the exercise of economic and financial policy to other Member States of the Eurozone, to organs of the European Union or to the IMF, and the fact that they do not transfer any other kind of powers to organs of international organisations that limit the exercise of national sovereignty, the Court found that the Greek government maintains its powers under Article 82.1 of the Constitution to make national policy and that Statute 3845/2010 is not contrary to Article 28.3 of the Constitution which states that: "Greece shall freely proceed by law passed by an absolute majority of the total number of Members of Parliament to limit the exercise of national sovereignty, insofar as this is dictated by an important national interest, does not infringe upon the rights of man and the foundations of democratic government and is effected on the basis of the principles of equality and under the condition of reciprocity."

The Court then proceeded to examine the constitutionality of the content of the Memorandum provisions that formed part of Statutes 3833/2010 and 3845/2010. In general terms, the Court held that all measures taken by the Greek government which involved cuts in salaries and pensions paid by the state and by state social security organisations, as a small part of a broader programme of financial adjustment and structural reform of the Greek economy within the European framework, aimed at the immediate lowering of public-sector expenditure, the rationalisation of public finances, the viable reduction of the financial deficit and the servicing of the country's international debt. In adopting the necessary measures to achieve the above-mentioned goals, the legislator enjoys a wide margin of appreciation which is subject to judicial review only in its outer limits. The cuts in salaries and pensions lead to a reduction in the income of citizens deriving from the state, but not to the deprivation thereof and they are thus not opposed to Article 1 of the First Additional Protocol ECHR or the constitutional principle of proportionality (Article 25.1.4 of the Constitution).

The Court held, further, that the said measures are not contrary to the constitutional protection of property (Article 17 of the Constitution) because the Constitution does not guarantee the right to a salary or pension at a specific level, but allows for the differentiation of the amounts paid by the state according to national circumstances, without requiring the provision of compensation. The fact that these measures are obligatory and do not leave to the Administration the exercise of a margin of appreciation at each particular case, is not in opposition to any other constitutional or legislative provision. In addition, no violation of the right to human dignity (Article 2 of the Constitution) was established because the applicants failed to prove that a minimum standard of decent living is jeopardised by the aforementioned cuts. Finally, the Court held that there was no violation of the principle of equality in the sharing of public burdens by measures that provide for cuts in citizens' incomes, while, at the same time, allowing tax-payers to put in order their obligations by paying less tax to the state than the amounts really owed.

The majority of the Court held that the impugned measures are only temporary and seek to create an immediate revenue stream for the Greek state, only until another set of measures, designed to fight tax-avoidance and tax-fraud, begin to operate. Viewed in this light, the challenged economic austerity measures are not contrary to the principle of equal contribution to the public burdens by Greek citizens.

Languages:

Greek.



Hungary Constitutional Court

Important decisions

Identification: HUN-2012-2-002

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 29.06.2012 / **e)** 31/2012 / **f)** On the suspension of the entry into force of Section 8 of the Act CCXI of 2011 on the Protection of Families / **g)** *Magyar Közlöny* (Official Gazette), 2012/82 / **h)**.

Keywords of the systematic thesaurus:

1.2.1.8 Constitutional Justice – Types of claim – Claim by a public body – **Ombudsman**.

1.5.4.5 Constitutional Justice – Decisions – Types – **Suspension**.

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

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

Keywords of the alphabetical index:

Scope, entry into force, suspension / Collision, legal provisions / Inheritance, registered partners.

Headnotes:

A provision on inheritance in the Act on the Protection of Families was not entered into force because it did not conform to the Civil Code.

Summary:

I. In December 2011, Parliament adopted Act CCXI of 2011 on the Protection of Families (hereinafter, the “Act”). Section 8 of the Act, which contains rules on inheritance, would have entered into force on the 1 July 2011.

According to Section 8, if the deceased did not leave any last will (in case of legal succession), only relatives (related in collateral line or linear descent), persons in adoptive relationship and the spouse shall inherit. Because the Commissioner of Fundamental Rights found these norms to be contrary with those of

the Civil Code that made possible legal succession also within registered partnerships, he petitioned to suspend the entry into force of the given norm.

II.1. The Constitutional Court, first of all, examined whether a petition can be initiated individually in order to suspend the entry into force of a legal provision, which can be ordered “while examining” a case. The violation of the Fundamental Law can be predicted by the Constitutional Court. The Constitutional Court – not of the petitioner – has a right to establish whether the violation of the Fundamental Law is probable.

Based on Section 61.2 of the Act on the Constitutional Court in the course of the examination of a legal regulation or a provision therein that has been promulgated but has yet to enter into force, the Constitutional Court considers it probable that the said legal regulation or provision thereof is contrary to the Fundamental Law. In such case, it may make an exception to suspend the entry into force of the legal regulation or provision thereof specified in the petition. Exceptions are made when the avoidance of serious and irreparable damage or disadvantage or the protection of the Fundamental Law or of legal certainty necessitates immediate measures.

Only legal regulations that have not yet entered into force can be suspended. Suspension shall be always in exceptional cases. The damage or disadvantage shall be both serious and irreparable. The negative consequences that the suspension aims to avoid shall be at no distant time. The suspensive measure shall serve the protection of the Fundamental Law or of legal certainty. The mere suspected violation of an international treaty is not a ground for suspension. Either a whole legal regulation or just a part of it (a provision) can be suspended.

2. The Court examined if the contested provisions are in harmony with the rules of the Civil Code. The basic rules of inheritance are contained in the Civil Code. According to these rules, legal heirs are, firstly, the descendants of the deceased and secondly, the spouse or the registered partner. So according to the Constitutional Court, same sex partners are also entitled to inherit from each other. The contested Act does not mention the possibility of inheritance between registered partners.

3. The Fundamental Law declares that Hungary is an independent, democratic State governed by the rule of law. According to the jurisprudence of the Constitutional Court, legal certainty forms a *conditio sine qua non* of the rule of law. Legal certainty also means that the lawmaker shall guarantee the functioning of a given legal institution is predictable.

The mere conflict between certain statutory provisions in itself does not constitute a violation of the Fundamental Law. When contradictory regulations cannot be resolved by interpreting the norms, this leads to a material unconstitutionality. The impossibility of interpreting norms may lead to violation of fundamental rights. In this case, the collision of legal regulations would constitute a violation of the Fundamental Law.

The Court therefore suspended the entry into force of Section 8 of the Act on the Protection of Families. Under Article 61.4 of the Act on the Constitutional Court, the Constitutional Court, in its decision on suspension, sets the date of entry into force of the legal regulation or the provision thereof if the decision on suspension expires. The date of entry into force shall be set as follows: the period that would elapse between the promulgation of the legal regulation and the repeal of the decision on suspension shall be added to the date set in the legal regulation as entry into force of the legal regulation or the provision thereof. In the present case, the Constitutional Court set the date of entry into force of Section 8 accordingly. It will enter into force on 29 June 2013.

III. Justice Béla Pokol and Justice Mária Szívós attached a dissenting opinion to the judgment.

Languages:

Hungarian.



Identification: HUN-2012-2-003

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 17.07.2012 / **e)** 33/2012 / **f)** On the unconstitutionality of certain provisions of the Act CLXII of 2011 on the Legal Status and Remuneration of Judges / **g)** *Magyar Közlöny* (Official Gazette), 2012/95 / **h)**.

Keywords of the systematic thesaurus:

1.6.5.2 Constitutional Justice – Effects – Temporal effect – **Retrospective effect (ex tunc)**.
 4.7.4.1.5 Institutions – Judicial bodies – Organisation – Members – **End of office**.
 4.7.4.1.6 Institutions – Judicial bodies – Organisation – Members – **Status**.

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

Keywords of the alphabetical index:

Compulsory retirement, judge / Retirement age, interpretation / Historical constitution.

Headnotes:

New provisions on the compulsory retirement age of judges cannot have retroactive effect.

Summary:

I. Several judges concerned by the Act CLXII of 2011 on the Legal Status and Remuneration of Judges (hereinafter, the “Act”) lodged constitutional complaints at the Constitutional Court against the Act, which replaced the previous retirement age of 70 years by the “general retirement age”. *De facto*, the retirement age was reduced to 62-65 years according to a gradual system depending on the date of the judges’ birth. According to the new rules, the service of those who have reached the maximum age before 1 January 2012 would terminate on 30 June 2012. For judges who reach that age between 1 January 2012 and 31 December 2012, their service shall end on 31 December 2012.

II.1. The Court examined the formal and substantial requirements of the constitutional complaints lodged based upon Section 26.2 of the CC Act (violation of fundamental rights, individual concern, fundamental relevance of constitutional law). Because they met the criteria, the Court considered them admissible and therefore examined them also on the merits.

2. The Court first examined whether point ha) of Section 90 and Section 230 of the Act is related to the rule of the Fundamental Law (hereinafter, “FL”) on independence of judges. The Court applied a special rule on interpretation of the FL laid down in Article R.3. That is, the provisions of the FL shall be interpreted according to their purposes, with the Avowal of National Faith contained therein, and with the achievements of the historical constitution.

The Constitutional Court determines the achievements of the historical constitution. Many statutes adopted in the XIXth century formed a solid base of a modern State governed by the rule of law. The Court cites two historical statutes on judges of that time: Act 1869:IV. and Act 1871:IX. These Acts were crucial because they ordered the separation of the judiciary and public administration, and guaranteed the independence and

irremovability of judges. For the age of retirement for judges special rules applied, it was established in 70 years. The retirement system was regulated in a special statute.

The Court held that one of the achievements of the historical constitution is the special status and special treatment of judges by the lawmaker. Independence and irremovability of judges are also achievements of the historical constitution that are obligatory for all and these principles are to be considered when interpreting other norms of the legal system.

The stability of the judges’ service is a constitutional requirement that needs special protection and guarantees: the reasons, the term of office, and the maximum age are to be regulated in cardinal acts.

The FL also guarantees the “right to independent judge” (Article XXVIII). The irremovability of judges assures the independent and impartial judiciary.

The Court referred in its decision to the Recommendation Rec(2010)12 of the Committee of Ministers of the Council of Europe (points 49-50).

3. The FL refers to the “general retirement age”. The Transitory Provisions use the same term, but neither the FL, the Transitory Provisions nor the Act have an exact interpretative explanation to define what age it refers to. The term “general retirement age” is not a normative concept because it is not defined in any piece of legislation. The retirement system has been recently modified, and it might be modified also in the future. Retirement limits are not regulated in cardinal laws.

The retirement age – which is not the same as “general retirement age” – is regulated by the Act LXXXI of 1997 on Social Security Retirement (hereinafter, the “SSR”), which is an ordinary (not cardinal) statute. The Act uses another term: “individual/relevant retirement age” in the sense that the age limit to be applied varies. Generally, it depends on the date of birth and gender of the judge.

Actually the SSR does not use the terms “general retirement age” and “individual/relevant age”. So the Constitutional Court shall give the interpretation of the terms.

To provide a coherent system of interpretations, the rules of the FL are to be interpreted in connection with each other. Therefore the meaning of “general retirement age” shall not violate the relevant elements of the independence of judges.

To guarantee the principle of irremovability, the greater the difference between the new retirement age and the previous retirement age, the longer transitional period for introducing a lower retirement age is needed.

The Transitional Provisions do not define the general retirement age. Nevertheless, they define the time limits for the application of the rules. These terms could be very short, sometimes only three months.

The expression “individual/relevant age” of the Act refers to a subjective age limit that changes based on individual circumstances. The FL uses the term “general retirement age” in a singular form (not in plural), which means that it refers to an objective age limit that is to be applied for everyone and that should be uniform for all. This is in contrast with the rule of the Act, which refers to the provisions of the SSR and establishes different age limits that can change from one person to another.

The Act connects the term “individual/relevant retirement age” with the maximum age of service of judges. The cardinal act here refers to the provisions of an ordinary act that results in a lower retirement age for judges: between 62 and 65 years instead of 70 years (which was the maximum age limit in the previous Act on Status and Remuneration of Judges).

The consequence is that the new regulation resulted in the removal of judges in a short period of time, even within three months. This violates the independence of judges both on formal and substantial grounds.

3. The maximum age limit for the service of judges shall be regulated by a cardinal act. Until the maximum age limit for the service of judges is regulated by a cardinal act, as it is required by Article 26.2 of the FL, the service of judges shall not be terminated against their will.

The concrete measure of the maximum age limit for judges can be regulated by the Constitution-maker or by cardinal acts. The concrete age cannot be deduced from the FL. However, it can be deduced that the introduction a new retirement age (when not increasing but decreasing the previous age limit) shall be made gradually, a longer transitional period is needed, and it shall not violate the principle of irremovability of judges.

Since the contested provision of the Act did not fulfil this requirement, the Court ordered to annul the provisions in question with retroactive effect, for especially important interest of petitioners and for the sake of the certainty of law.

III.4. Seven judges have made dissenting opinions (István Balsai, Egon Dienes-Oehm, Barnabás Lenkovichs, Béla Pokol, István Stumpf, Péter Szalay and Mária Szívós).

Supplementary information:

The Bill on the Second Amendment of the FL submitted by the Justice Minister on 7 September 2012 would change and amend the Transitional Provisions so that judges’ term of employment can continue until age 65. The Bill specifies that those over 62 may not hold senior posts in courts, but this provision does not apply to the president of the Curia and the head of the National Judicial Office.

Languages:

Hungarian.



Identification: HUN-2012-2-004

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 11.05.2012 / **e)** 22/2012 / **f)** On the interpretation of Articles E.2 and E.4 of the Fundamental Law / **g)** *Magyar Közlöny* (Official Gazette), 57/2012 / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Abstract constitutional interpretation / EU treaty / Sovereignty-transfer.

Headnotes:

The authorisation for expressing consent to be bound by every international treaty that results in further sovereignty-transfer to the European Union requires the votes of two-thirds of all Members of Parliament.

Summary:

I. On behalf of the Government, the Minister of Justice asked the Constitutional Court to provide an interpretation of Articles E.2 and E.4 of the Fundamental Law (hereinafter, the "FL"). According to Section 38.1 of the Act on the Constitutional Court, on the petition of Parliament or its standing committee, the President of the Republic or the Government, the Constitutional Court shall interpret the provision of the FL regarding a certain constitutional issue. The interpretation shall be directly deduced from the FL.

In the current case, the Government submitted the following question connected with the Treaty on Stability, Coordination and Governance (hereinafter, the "TSCG") in the Economic and Monetary Union:

Whether such an international agreement, which is not among the Treaties establishing the European Union (sources of primary law) and is not a piece of EU legislation (sources of secondary law):

- a. but the member states of which are all member states of the EU;
- b. which regulates such topics regulated also by the Treaties establishing the EU and the legislation of the EU;
- c. which aims at economically strengthening and further developing the EU in such a field, which constitutes an integral part of the Treaties establishing the EU;
- d. and according to which the programme designed by the TSCG will be implemented by EU institutions and the implementation will be monitored by EU institutions;

is an international agreement within the meaning of Article E.2 of the FL?

The contracting party of the TSCG could be a EU member state whose currency is the euro. The TSCG will enter into force after it has been ratified by 12 euro area member states, and it will be open to the accession of EU member states other than the contracting parties. Hungary is not in the Eurozone, but ratifying the TSCG would mean that it becomes an international obligation.

II. 1. First of all, the Constitutional Court compared the so-called European clause of the former Constitution to the European clause of the FL. According to Article 2/A.1. of the former Constitution, "in order to participate in the European Union as a Member State, and on the basis of an international treaty, the Republic of Hungary may, to the extent necessary to exercise rights and fulfil the obligations set out in the European Communities and European

Union foundation treaties, exercise some of its competences deriving from the Constitution jointly with other Member States; the exercise of these competences may be realized independently, through the institutions of the European Union." In addition, Article 2/A.2 stipulated that "the votes of two-thirds of all Members of Parliament are required for the ratification and adoption of the international treaty specified in paragraph (1)".

Under Article E.2 of the FL, "in order to participate in the European Union as a Member State, and on the basis of an international treaty, Hungary may, to the extent necessary to exercise the rights and fulfil the obligations set out in the founding treaties, exercise some of its competences deriving from the Fundamental Law jointly with other Member States, through the institutions of the European Union." Article E.4 reads that "the authorisation for expressing consent to be bound by an international treaty referred to in paragraph (2) shall require the votes of two-thirds of all Members of Parliament."

In the current case, the content of the relevant texts of the former Constitution and the FL are identical. If that is the case, the Constitutional Court, as the principal organ for the protection of the FL, can use those arguments of its previous decisions based on the former Constitution, which are relevant to deciding on a constitutional matter and do not contradict the FL provisions and interpretative rules. Consequently, in the instant case, the previous CC Decision 143/2010 was the starting point.

2. The Decision 143/2010 pointed out that the expression "on the basis of an international treaty" in the constitutional text refers not only to the EU accession treaty but to every other treaty concerning complex structural reform of the EU. In such case, the two-thirds majority of the MPs can decide whether such a reform is acceptable for the country. In the current case, the Court affirmed that the votes of two-thirds of the MPs are required for every international treaty, which results in further sovereignty-transfer to the EU.

The information concerning the subject matter and the member states of the treaty, as well as the rights and obligations deriving from the treaty can help in deciding whether a two-thirds majority is needed. The votes of two-thirds of the MPs are required if the high contracting parties are the EU member states (including Hungary) and the content of the treaty relates to subject matters regulated in the Treaties establishing the EU, or the treaty aims at implementing the Treaties establishing the EU or supervising the implementation.

3. First of all, it is the task of the Government to decide whether the TSCG is such a treaty requiring a two-thirds majority since the Government submits the bill proposing to ratify and adopt the TSCG. Secondly, it is up to the Parliament whether it approves the assumption of the obligations defined in TSCG by a two-thirds majority act. Certainly, the Constitutional Court can examine the adopted but not yet published act on the promulgation of the TSCG for conformity with the FL based upon Article 24.2.a of the FL.

Cross-references:

- Decision 143/2010, *Bulletin* 2010/2 [HUN-2010-2-007].

Languages:

Hungarian.



Identification: HUN-2012-2-005

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 04.07.2012 / **e)** 32/2012 / **f)** On the annulment of governmental decree concerning student fees / **g)** *Magyar Közlöny* (Official Gazette), 2012/85 / **h)**.

Keywords of the systematic thesaurus:

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

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

5.4.4 Fundamental Rights – Economic, social and cultural rights – **Freedom to choose one's profession.**

Keywords of the alphabetical index:

Limitation, basic rights / Scope, governmental decree / Student fee, higher education.

Headnotes:

The terms of contracts for students receiving state scholarships contained in a governmental decree should have been incorporated into an Act.

Summary:

I. The Commissioner of Fundamental Rights requested the Constitutional Court to review whether the Governmental Decree 2/2012 on the state scholarship students' contracts (hereinafter, the "Decree") is compatible with Articles B.1, I.3, II, XI and XII of the Fundamental Law (hereinafter, the "FL"). According to the Commissioner, the Decree is against the FL. The reason is that the subject matter of state scholarship students' contracts concerns fundamental rights (the right to freely choose a job or a profession and the right to education). Therefore, it should have been regulated by an Act of Parliament (formal ground). In addition, the Commissioner argued that obliging students with state grants to sign a contract restricts their rights to freely choose a job and participate in higher education (substantive ground).

The Decree obliged students with state grants to sign a contract according to which they agree to take up employment after graduation in Hungary for a period equal to double their period of study within 20 years.

II.1. First of all, the Constitutional Court compared the fundamental rights restriction clause of the former Constitution to the fundamental rights restriction clause of the FL. According to the first sentence of Article 8.2 of the former Constitution, "in the Republic of Hungary rules relating to fundamental rights and obligations shall be laid down in Acts." Under the first sentence of Article I.2 of the FL, "the rules relating to fundamental rights and obligations shall be laid down in Acts." In the current case, the relevant texts of the former Constitution and the FL are identical. And if that is the case, the Constitutional Court can use those arguments of its previous decisions based on the former Constitution that are relevant in deciding a constitutional matter and are not in contradiction with the provisions and interpretative rules of the FL. Consequently, in the instant case, the Constitutional Court had to decide how directly the regulation concerning the student contracts affected fundamental rights.

2. Article 70/F.1 of the former Constitution ensured the right to education for all its citizens. According to Article 70/F.2, this right should be implemented – among others – through higher education accessible to everyone according to their abilities and through financial support for students in training. Under Article XI.2 of the FL, the right to education shall be ensured by – among others – higher education accessible to everyone according to their abilities, and by providing financial support as laid down in an Act to those receiving education. According to the established constitutional case-law, the Constitution does not provide a substantive right to any person for a university place. However, the regulations on the form

and structure of the education as well as the requirements for receiving a diploma are essential guarantees of the right to education. Therefore, they shall be laid down in Acts. In addition, the last sentence of Article XI.2 of the FL explicitly requires that providing financial support for higher education shall be laid down in an Act. Consequently, the Constitutional Court established that regulating state scholarship student contracts directly impacted the right of affected students to take part in higher education, which constitutes an essential element for state subsidies to higher education.

3. Article 70/B.1 of the former Constitution ensured that everyone has the right to work and to freely choose a job and profession. Article XII.1 of the FL also reads that everyone has the right to freely choose a job or profession. Therefore, the Court examined whether the regulation concerning the state scholarship students' obligation to work in Hungary for a certain period of time effect directly the fundamental right of free choice of employment and occupation. The Constitutional Court when interpreting the right to freely choose a job or profession took into account the relevant EU law. First of all, Article 45 of the Treaty of the Functioning of the EU, which secures freedom of movement for workers within the EU. In addition the Court considered the relevant case law of the ECJ (Joined Cases C-11/06 and C-12/06 *Rhiannon Morgan v. Bezirksregierung Köln* and *Iris Bucher v. Landrat des Kreises Düren*). Under the Decree, students awarded state scholarships are obliged after graduation to work in Hungary for a period equal to double their period of study within 20 years. According to the Court, this rule directly affected the right to free choice of occupation; therefore, it should have been regulated in an Act. As a result, the Court annulled the Decree and decided that it must not enter into force.

III. Justice András Bragyova attached concurring opinion to the decision, Justice István Balsai, Barnabás Lenkovics, Béla Pokol, Péter Szalay and Mária Szívós attached separate opinions to the judgment.

Supplementary information:

On 12 July 2012 Parliament approved an amendment to the Act on Higher Education, which incorporated the terms of state scholarship students' contracts without making any changes to these terms. Consequently, the Commissioner for Fundamental Rights has again turned to the Constitutional Court to seek an opinion over the constitutionality of the Act on Higher Education, which incorporated the terms of student contracts.

Languages:

Hungarian.



Ireland

Supreme Court

Important decisions

Identification: IRL-2012-2-003

a) Ireland / **b)** Supreme Court / **c)** / **d)** 26.04.2012 / **e)** SC 322/2011 / **f)** Cosgrave v. Director of Public Prosecutions / **g)** [2011] IEHC 24 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

5.3.13.13 Fundamental Rights – Civil and political rights – **Trial/decision with reasonable time.**

Keywords of the alphabetical index:

Criminal offences, prosecution, corruption charges, trial of offences in due course of law.

Headnotes:

The Director of Public Prosecutions (hereinafter, the “DPP”), remains subject to the Constitution and the law and the courts will interfere with a decision of the DPP on rare occasions, when applying the Constitution and the law. Thus, an accused may claim that to continue with their prosecution would be unjust for reasons such as delay or prejudicial publicity and where such a person established that there is a real risk that they could not obtain a fair trial, an order prohibiting the trial will be granted in exceptional circumstances.

Summary:

I. The Supreme Court is the final court of appeal in civil and constitutional matters. It hears appeals from the High Court, which is a superior court of full original jurisdiction in all matters of law in the civil, criminal and constitutional spheres. The decision of the Supreme Court summarised here arose from an appeal from the High Court to the Supreme Court. The Appellant sought an order permanently restraining the Director of Public Prosecutions (hereinafter, the “DPP”) from prosecuting him in the regional Circuit Court on charges for receiving corrupt payments in the early 1990s. The Applicant had

previously been an elected public representative serving on the local council and subsequently in the Senate. He had previously been charged and convicted of an offence contrary to electoral legislation for failing to declare a political donation. He argued that both sets of offences arose out of the same factual circumstances and that the DPP should have prosecuted all of the charges against him at the same time. The time difference between the separate prosecutions was approximately five years. He argued that this was an abuse of process amounting to a violation and failure to vindicate his constitutional right to trial in due course of law in accordance with Article 38.1 of the Constitution. The DPP argued that the Applicant did not establish as required by law that there was a real risk that he would not obtain a fair trial and the DPP also argued that the second prosecution was not an abuse of process as alleged by the Applicant. The reason for deferring the second set of charges was because the main witness had not yet been prosecuted for corruption himself and therefore his evidence could not be relied upon safely without his prosecution first.

II. The majority decision of the Supreme Court delivered by the Chief Justice noted that the decision to prosecute is made by the DPP who provides an independent prosecution service. She stated that the courts play no role in the prosecution of offences and both the decision to prosecute and the subsequent conduct of that prosecution are functions exclusively assigned to the DPP. However, the DPP remains subject to the Constitution and the law and the courts will interfere with a decision of the DPP on rare occasions, when applying the Constitution and the law. Thus, an accused may claim that to continue with their prosecution would be unjust for reasons such as delay or prejudicial publicity and where such a person established that there is a real risk that they could not obtain a fair trial, an order prohibiting the trial will be granted in exceptional circumstances.

The Chief Justice referred to the general rule at common law that the Court should stay (halt) an indictment when it is satisfied that new charges are grounded on the same facts as charges on a previous indictment on which an accused has been tried and convicted or acquitted. The majority of the Court applied the first aspect of this rule to the facts and found that it did not apply in this case since the second set of charges on corruption was not founded on the same facts as the earlier electoral legislation charges. It applied the second aspect of the general rule which arises where the charges form or are part of a series of offences of the same or similar character as the offences charged in the previous indictment. The majority of the Court found that this aspect of the rule did not apply to the case either

since the second set of charges is not the same or of a similar character as the earlier electoral legislation charges. The majority held that the offences differed in nature, degree and moral turpitude. The majority also held that there are exceptions to the general rule which enable the Court to exercise its discretion in favour of permitting the prosecution to proceed.

The members of the Court in the minority (Hardiman J and O'Donnell J) did not accept the reasons of the DPP for failure to prosecute both sets of offences at the same time. The minority were also of the view that both sets of offences arose out of the same factual circumstances. O'Donnell J also referred to the way in which accused persons are treated by the criminal justice system and that a trial in due course of law must ensure that the process is not arbitrary, oppressive or needlessly humiliating. He stated that when a person is convicted and sentenced, the rehabilitative purposes are engaged because the convicted person is encouraged to believe that on serving their sentence they have an opportunity of resuming a place as a member of the community. These values are subverted if an accused person is subjected to repeated or sequential prosecutions and if long after they have pleaded guilty and been punished, they are without warning, subjected once again to the criminal process.

The majority of the Court also approached the case from a broader aspect and analysed whether in all the circumstances there was an abuse of process, and if so whether there was a real or serious risk of an unfair trial. The Court reiterated that it retains discretion to protect the fair trial process against an abuse of process in all the circumstances. The majority held that there was no such abuse of process in this case.

The majority recognised that there had been delay in the prosecution of the second set of charges on corruption however it accepted the DPP's reasons for the delay and also considered in the balance of competing rights, including the community's right to have the criminal offences prosecuted. It held that in cases such as this which involve charges of corruption of public officials there is a very significant public interest in permitting such allegations to proceed to trial.

Cross-references:

The factual circumstances of this case overlap with that of *Kennedy v. The Director of Public Prosecutions* [2012] IESC 34; *Bulletin* 2012/2 [IRE-2012-2-004].

Languages:

English.



Identification: IRL-2012-2-004

a) Ireland / **b)** Supreme Court / **c)** / **d)** 07.06.2012 / **e)** SC 315/11 / **f)** *Kennedy v. The Director of Public Prosecutions* / **g)** [2012] IEHC 34 / **h)** CODICES (English).

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**.
5.3.13.13 Fundamental Rights – Civil and political rights – **Trial/decision with reasonable time**.

Keywords of the alphabetical index:

Criminal offences, prosecution, corruption charges / Offences, trial, in due course of law / Evidence, disclosure, civil proceedings.

Headnotes:

When a decision to prosecute is made by the Director of Public Prosecutions, the Court will intervene in such a decision and prohibit trial only in exceptional cases.

Summary:

I. The Supreme Court is the final court of appeal in civil and constitutional matters. It hears appeals from the High Court, which is a superior court of full original jurisdiction in all matters of law in the civil, criminal and constitutional spheres. The decision of the Supreme Court summarised here arose from an appeal from the High Court decision to the Supreme Court. The Appellant sought an injunction prohibiting his criminal trial for offences of corruptly giving sums of money to local government politicians as an inducement or reward for voting in favour of council motions concerning the rezoning of lands for planning permission and development purposes. In his appeal to the Supreme Court, the Appellant raised issues

concerning disclosure of evidence in the High Court; his right to an expeditious (speedy) trial; and his rights under Article 6 ECHR. During a disclosure application by the Appellant, the High Court judge examined certain documents in the possession of the Director of Public Prosecutions (hereinafter, the "DPP") which the Appellant objected to. The judge refused the application on the basis that the public interest in maintaining the confidentiality of the documents outweighed the Appellant's interest. The Appellant submitted that this procedure was unfair. He submitted that the practice generally adopted when a claim of privilege is challenged, is that the documents are examined by a different judge who is not hearing the substantive proceedings. The Appellant relied on *Edwards and Lewis v. The United Kingdom* (2005) 40 E.H.R.R. 24 in challenging the alleged unfairness of the procedure. He also claimed that there was objective bias on the part of the judge because he proceeded to hear the judicial review application having seen material in the disclosure application which he referred to as highly prejudicial to the Applicant. The Appellant also argued that the constitutional right to be tried on a criminal charge in due course of law included the right to an expeditious (speedy) trial and claimed that his Article 6 ECHR were breached.

II. The Chief Justice noted that the decision to prosecute was made by the DPP which is an independent statutory office and that the Court will intervene in a decision to prosecute and prohibit a trial, only in exceptional circumstances. Thus, the issue in this case was whether such exceptional circumstances existed or not.

In relation to the disclosure issue, the Chief Justice noted that inspection of documents by a court of trial is a very useful one and is often very much in the interest of the party challenging the privilege claimed. The Edwards case refers to a criminal trial while this case concerned the civil process, arising on an application for judicial review. She highlighted the fact that the Court was not referred to any authority, either in a legal text or in a case of the European Court of Human Rights which has applied the Edwards case outside the criminal law sphere. On the circumstances of the case, the Chief Justice held that the objective bias issue could not be raised on appeal since it was not raised in the High Court and in any event the facts of the case did not illustrate such bias.

The next issue concerned the right to an expeditious trial. The Chief Justice pointed out that the Constitution does not expressly state that there is a right to an expeditious trial. She referred to Article 38.1 of the Constitution which provides that "[n]o person shall be tried on any criminal charge save in due course of

law" and Article 40.3.1 which states that "[t]he State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen". She referred to case law of the Supreme Court which recognised the personal right to a trial with reasonable expedition. This right protects three interests which were set out in the United States Supreme Court case of *Barker v. Wingo* (1972) 407 US 514 which are, the prevention of oppressive pre-trial incarceration; to minimize anxiety and concern of the accused; and to limit the possibility that the defence will be impaired. In this case, the first two of these interests did not arise. The Chief Justice recognised that there had been delay in bringing the prosecutions. Having analysed the facts of the case, she found that there were valid reasons for the delay on the facts of the case and that there was no prejudice or impairment to the Applicant's defence.

The Chief Justice held that the issue of damages under the European Convention on Human Rights Act 2003 could not be argued on appeal since the Applicant had not sought damages in the High Court. Also, no case law was submitted to the Court which showed that the European Court of Human Rights ever ordered the prohibition of a trial where there is delay. Damages are the appropriate remedy in such a case.

Fennelly J and Clarke J wrote separate opinions dismissing the Applicant's appeal thus allowing the criminal trial to proceed. Hardiman J wrote a dissenting judgment in which he did not accept the Respondent's reasons for failing to prosecute the offences sooner and upheld the appeal.

Cross-references:

The factual circumstances of this case overlap with those in *Cosgrave v. Director of Public Prosecutions* [2011] IESC 24, *Bulletin* 2012/2 [IRE-2012-2-003].

Languages:

English.



Israel

Supreme Court

Important decisions

Identification: ISR-2012-2-008

a) Israel / **b)** Supreme Court (High Court of Justice) / **c)** Panel / **d)** 17.05.2012 / **e)** HCJ 1758/11 / **f)** Orit Gorren v. Home Centre / **g)** / **h)** CODICES (Hebrew).

Keywords of the systematic thesaurus:

3.21 General Principles – **Equality**.

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

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

Keywords of the alphabetical index:

Employee, labour, economic and social conditions.

Headnotes:

When a female employee receiving lower wages than a male employee who carries out the same work for the same employer manages to prove her cause of action under the Equal Pay to Male and Female Workers Act (hereinafter, “Equal Pay Act”), a presumption arises that the employer has discriminated against her because of her gender, and she may therefore also have a cause of action pursuant to the Equal Opportunities in the Workplace Act (hereinafter, “Equal Opportunities Act”). In such circumstances, the burden of proof will fall upon employers who have been paying female employees a lower salary than their male counterparts, to show that gender was not a consideration in determining the female workers’ wages. The mere fact that the female employee requested lower wages than the male employee during the employment negotiations cannot serve a defence under the Equal Pay Act. Women may at times have less leverage than men in negotiating payment; claims that the parties negotiated wages freely will not be enough to justify a significant gap in wages of female and male workers.

Summary:

I. The applicant was employed as an advisor in the tools department of a homeware chain store. Having discovered that a male employee holding the same job was earning wages 35 % higher than hers, she approached the branch manager and requested that her wages be made equal to those of the male employee. When her request was not answered, she resigned from her job and filed suit for compensation, claiming violations of both the Equal Pay Act and the Equal Opportunities Act. The National Labour Tribunal determined that her suit pursuant to the Equal Pay Act should be accepted, as the respondent could not prove substantial justification for the wage disparity between the applicant and the other employee. However, her suit pursuant to the Equal Opportunities Act was denied. The National Tribunal, in a majority decision, ruled that proving a course of action pursuant to the Equal Pay Act does not automatically also give rise to a course of action under the Equal Opportunities Act (which enables the court to rule compensation without proof of damage in favour of the discriminated employee). In this context it was ruled that the Equal Opportunities Act sets a higher evidentiary bar in comparison to the Equal Pay Act, and requires the employee to prove the existence of a causal link between one of the considerations that the employer is prohibited from considering (such as the gender of the employee) and the decision that was made regarding that employee (in this case, the applicant’s wage level). Consequently, the employee filed a petition with the Supreme Court, requesting the Court to intervene in the ruling of the National Labour Tribunal and to determine her entitlement to compensation pursuant to the Equal Opportunities Act.

II. A decision was rendered by President D. Beinisch (Judges N. Hendel and Y. Amit concurring), in which President Beinisch stressed the differences between the Equal Pay Act and the Equal Opportunities Act. Firstly, while the Equal Pay Act addresses gender discrimination against women in the workplace, the Equal Opportunities Act deals with other forms of discrimination against different minority groups (such as sexual orientation, age, race and religion). Secondly, both acts define the prohibited discrimination differently. Thirdly, each act requires different standards of proof. The Equal Pay Act requires a relatively lenient burden of proof, examining the discrimination according to an “outcome” test; i.e., it is sufficient to prove a disparity in the wages of a man and a woman who hold the same job for the same employer for the action to succeed. The Equal Opportunities Act, however, requires proof of a causal connection between the employer’s intention and the decision made regarding the employee; i.e., the

discrimination prohibited by this act is discrimination “because of” a certain characteristic of the employee, which the employer is prohibited from considering. The President stressed that the Equal Pay Act does not require proof of the employer’s intention to discriminate against the employee as a condition of the crystallisation of a cause of action. Fourthly, the differences between the acts affect the remedies they afford. The Equal Pay Act does not determine a criminal sanction for its violation, and the longest period for which the discriminated employee can claim wage disparities is 24 months. In contrast, in cases of violation of the Equal Opportunities Act, the Labour Tribunal may grant the employee compensation without proof of damage, in an amount it sees fit considering the circumstances of the case. This compensation naturally has a deterrent and educational aspect, which does not exist under the Equal Pay Act. The violation of the Equal Opportunities Act is also considered a criminal offence.

In the decision, President Beinisch determined that the employer’s freedom of contract during negotiations cannot stand as an independent consideration which might justify wage discrimination between men and women. If the employer’s freedom of contract were to be recognised as a defence under the Equal Pay Act, this might, in the Court’s opinion, allow it to be used as a cover for gender discrimination and its perpetuation, undermining the fundamental purpose of the Equal Pay Act. This consideration also ignores the actual disparities in the labour market between men and women with respect to their demands regarding wages, and the manner in which negotiations regarding wages are conducted. Therefore, President Beinisch ruled that when there is no substantive consideration regarding the employees themselves, the employer is prohibited from granting different wages to male and female employees performing the same job.

Due to the differences between these acts, President Beinisch ruled that proving a cause of action pursuant to the Equal Pay Act does not “automatically” give rise to a cause of action under the Equal Opportunities Act. However, if the female employee manages to prove her cause of action pursuant to the Equal Pay Act, this would *prima facie* be regarded as gender discrimination, and the burden of proof, under the Equal Opportunities Act, shifts to the employer. The employer would then have to prove that the employee’s gender was not a consideration in determining her wage. If the employer cannot do so, the female employee is entitled to cause pursuant to both Acts. An employer who proves that the wages of his employees were determined by negotiation, in which the same policy was applied towards male and female applicants in terms of wages, may raise the

burden of the Equal Opportunities Act, provided the employer can then show that the policy adopted was not affected by the applicants’ gender or other prohibited considerations. However, as the wage disparity between male and female employees is more significant, the burden upon the employer to show that the female employee’s gender was not a consideration in determining her wages, and that they were set at a lower rate simply because she entered the negotiations with a lower asking price, grows heavier.

President Beinisch ruled that due to the significant disparity (almost 35 %) between the wages of the applicant and the male employee, the respondent could not benefit from the claim that the two employees simply asked for different wages during negotiation. Therefore, the applicant’s claim under the Equal Opportunities Act was also accepted.

Languages:

Hebrew.



Identification: ISR-2012-2-009

a) Israel / **b)** Supreme Court (High Court of Justice) / **c)** Panel / **d)** 22.05.2012 / **e)** HCJ 8300/02 / **f)** Nasser v. The Government of Israel / **g)** / **h)** CODICES (Hebrew).

Keywords of the systematic thesaurus:

2.3.10 Sources – Techniques of review – **Contextual interpretation.**

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

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

5.2 Fundamental Rights – **Equality.**

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

Keywords of the alphabetical index:

Tax criteria, distribution / Equality.

Headnotes:

The arbitrary distribution of tax benefits without set criteria impinges upon the right to equality and discriminates against residents of neighbouring municipalities that do not differ from those listed in a relevant manner. The violation is closely related to the residents' constitutional right to human dignity and fails to meet the limitations clause in Article 8 of the Basic Law: Human Dignity and Liberty.

Summary:

President D. Beinisch (ret.), writing for the Court (President A. Grunis and Deputy President E. Rivlin concurring), ruled that the arbitrary distribution of tax benefits pursuant to a statute without a set criteria leads to discrimination, violating the constitutional right to equality. In its ruling, the Court noted that no controversy exists between the parties regarding the constitutional difficulty arising from these tax benefits. Loyal to the principle of separation of powers, the Court agreed to repeated requests by the government and the Knesset (the Israeli parliament) to grant them extensions to advance legislation to set criteria for the distribution of tax benefits. Ultimately, after seven hearings dedicated to the subject, the government and the Knesset announced that the amendment would not be legislated.

In the face of the constitutional violation of the right to equality (undisputed by the parties) and that Article 11.b of the Income Tax Ordinance was not amended by the government and the Knesset, the Court decided to intervene in all those sections of Article 11.b included in the petition and where a violation had been proven. The Court ruled that the lack of criteria led to discrimination and to violation of the right to equality. Even in circumstances where a criterion could have been extracted – such as proximity to the northern border – the tax benefits were not distributed equally in accordance with that criterion. In fact, the Court ruled that except for a small number of cases, it was unclear how the list of municipalities or the tax benefit rates were determined.

Regarding the relationship between the proved discrimination and the constitutional right to dignity, the Court ruled that the legislature's disregard of the characteristics of the municipal authorities' residents when distributing public resources violated their dignity. That is, they were entitled, *prima facie*, to the same tax benefits as that of their similar neighbors. "Ignoring the similarity between the two – one who enjoys a tax benefit and the other who should enjoy such a benefit but was excluded from the eligibility list – deprives the excluded one of his autonomy," the

Court ruled. "Such discrimination conveys a depriving and negating social message to all those taxpayers whom the tax benefit skipped over, without any justification or relevant difference".

The Court's ruling also emphasised that granting tax benefits is financially equivalent to granting public money to specific individuals. Although it is true that the State does not transfer money directly to taxpayers (commonly regarded as indirect support), the indirect support is equivalent to requiring all taxpayers to pay taxes, and then returning them to specific individuals only. Therefore, it was determined that "such distribution of public resources without any criteria, creates a reality in which certain individuals are given priority over others, even though there is no relevant difference to justify such differentiation. That constitutes blatant disrespect of the equal status of people in the eyes of the authorities". Nevertheless, in light of the scope of arguments presented by the petitioners, the Court did not declare the annulment of all of Article 11.b of the ordinance, despite its arbitrariness. Instead, the Court voided only the single amendment brought before the Court (Amendment 146), pursuant to which the eligibility of five municipal authorities to tax benefits was determined.

In addition, the Court accepted the petitions of three Druze and Arab settlements in the north of the country. The petitioners proved that their residents were unjustly discriminated against, compared to residents of similar nearby municipalities located in the same distance from the Lebanese border. Regarding the three municipalities, the Court ordered that they be added to the list of municipalities in Article 11.b of the ordinance, applying, for the first time, the doctrine of "reading in" in constitutional law.

Languages:

Hebrew.



Italy

Constitutional Court

Important decisions

Identification: ITA-2012-2-002

a) Italy / **b)** Constitutional Court / **c)** / **d)** 02.07.2012 / **e)** 172/2012 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), 11.07.2012 / **h)** CODICES (Italian).

Keywords of the systematic thesaurus:

- 3.16 General Principles – **Proportionality**.
- 3.19 General Principles – **Margin of appreciation**.
- 3.20 General Principles – **Reasonableness**.
- 3.22 General Principles – **Prohibition of arbitrariness**.
- 5.1.1.3 Fundamental Rights – General questions – Entitlement to rights – **Foreigners**.
- 5.3.9 Fundamental Rights – Civil and political rights – **Right of residence**.
- 5.4.3 Fundamental Rights – Economic, social and cultural rights – **Right to work**.

Keywords of the alphabetical index:

Citizenship, European / Criminal offence, sanction / Employment, relationship.

Headnotes:

A legal provision which stipulates automatic refusal to regularise the employment relationship of a non-European Union national who incurs conviction, albeit not yet final, of an offence in respect of which Article 381 of the Code of Criminal Procedure provides the possibility of arrest where the perpetrator is caught in the act, instead of providing that the Administration has powers of appraisal for ascertaining whether in fact the national represents a danger to public order and state security such that his request for regularisation must be refused.

Summary:

I. The Marches Regional Administrative Court and the Calabria Administrative Court raised a question regarding the constitutionality of a provision which did not permit regularisation of the occupational situation

(*regolarizzazione della propria posizione lavorativa*) of non-European Union (hereinafter, “non-EU”) workers assisting dependent persons or doing housework in a family where they had been convicted, albeit not finally, of one of the offences contemplated in Articles 380 and 381 of the Code of Criminal Procedure. These articles contain a list of very varied offences in respect of which the law prescribes mandatory arrest (Article 380) or optional arrest (Article 381) where the perpetrator is caught in the act. The Marches Court held that the right to equality in Article 3 of the Constitution was violated, and the Calabria Court held that this Article was violated together with Articles 27 and 117.1 of the Constitution, by reference to Articles 6 and 8 ECHR.

According to the Marches Court, Article 3 was violated because the same refusal of regularisation sanctioned offences of widely differing gravity and thus did not allow consideration of subsequent conduct on the part of the culprit – who might have demonstrated regret – hence of his present dangerousness.

According to the Calabria Court, the refusal of regularisation was founded on mere suspicion of guilt since it followed a judgment at first instance, not final instance, thus violating Article 27 of the Constitution which declares an accused innocent until finally convicted. As to the violation of Article 8 ECHR, hence indirectly of Article 117.1 of the Constitution, the Court acknowledged that the European Convention on Human Rights recognised member states’ power to exercise control over foreigners wishing to enter state territory and the power to expel them should they commit a crime prejudicing public security. However, the penalty should be commensurate with the seriousness of the offence committed. That was not so in the provision which was the subject of the referral, as it automatically entailed refusal of regularisation for anyone convicted of the offences set out in Articles 380 and 381 of the Code of Criminal Procedure, without consideration of the seriousness of the wrongdoing committed in the case in point, as required by the European Convention on Human Rights for cases of expulsion (Judgment of 02.08.2001, *Boutif v. Switzerland*). Violation of Article 6 ECHR was also claimed, since the expulsion of a non-EU alien that would follow denial of regularisation would occur after a judgment which was not final, and it would be extremely difficult for the accused to exercise his right of defence in the appeal proceedings.

II. The Constitutional Court declared the question founded in relation to Article 3 of the Constitution.

Where rules on foreigners' access to and residence in the national territory are to be laid down, the legislator enjoys a wide discretion as it must necessarily strike a balance between several public interests. It may establish conditions which non-EU nationals are required to fulfil in order to work in Italy and, for those purposes, introduce automatic processes into the regulations on the granting or renewal of residence permits (Judgment no. 148 of 2008) or on expulsion of these nationals (Orders no. 463 of 2005 and no. 146 of 2002). This automaticity reflects the principle of strict compliance with the law which pervades the regulations governing immigration, shielding non-EU nationals from arbitrary acts of the administration (Judgment no. 148 of 2008, Order no. 146 of 2002).

However, for the legislator's discretion to remain within the limits of Article 3 of the Constitution, it must have a reasonable justification. Accordingly, the Court considered it reasonable and consistent with Article 3 of the Constitution for a residence permit to be automatically withheld from a non-EU national convicted of a drug offence, given that this type of offence involves contacts at various levels with members of criminal organisations (Judgment no. 148 of 2008). The Court therefore retained power of oversight over the automatic processes (sanctions or legal effects applying automatically under certain conditions) in order that the prohibition of arbitrariness might be upheld. The legislator could make regularisation of an employment relationship (*rapporto di lavoro*) subject to conditions taking account of the various interests, all given equal consideration by the legislation on immigration, by weighing them up reasonably with care not to infringe fundamental rights, such as the right to work, secured even to non-EU nationals.

In the instant case, the provision ordaining that refusal of regularisation of the employment relationship (*rapporto di lavoro*) must automatically follow a judgment convicting a person of one of the offences contemplated in Article 381 of the Code of Criminal Procedure, although all were not of equal gravity, did not meet the conditions stipulated by Article 3 of the Constitution for the provision to be considered reasonable. This was proven by the fact that in order to make an arrest in the act (permitted but not mandatory) for the offences listed in Article 381 of the Code of Criminal Procedure, the seriousness of the acts and the dangerousness of the culprit must be taken into consideration, having regard to his personality and to the circumstances of the offence. This demonstrated that the measure required elements beyond sole proof of perpetration of the offence to be taken into account.

The unreasonableness of the provision was still more plainly apparent in the light of all the aspects to which it applied. Regularisation of the employment relationship was intended, for non-EU nationals having rendered assistance in a family context to persons dependent for health reasons over a period of time deemed appreciable by the legislator, though in a situation of irregularity. In such circumstances, first, the dangerousness of the individual asking to be regularised could be assessed *in concreto* on the basis of behaviour in the family environment, and second, automatic refusal to regularise an individual having assisted a dependent person for an appreciable period of time could seriously interfere with the latter's rights. It must therefore be possible to determine factually whether the refusal of regularisation was indeed commensurate with the aim of securing public order and security.

The Administration must therefore be able to determine on the basis of factual data whether, following non-final conviction of one of the offences for which Article 381 of the Code of Criminal Procedure provides the possibility of arrest in the act, involving a non-EU applicant for regularisation of an employment relationship, the non-EU worker poses a danger to public order and state security justifying refusal of regularisation.

Supplementary information:

This is a "substitute" decision: the Court drafts the text itself that will replace the current text in force; the Court adjusts the text of the law so that it is in line with the Constitution.

Languages:

Italian.



Korea

Constitutional Court

Important decisions

Identification: KOR-2012-2-008

a) Korea / **b)** Constitutional Court / **c)** / **d)** 25.11.2010 / **e)** 2006Hun-Ma328 / **f)** Military Service Law / **g)** 22-2(B) KCCR, *Korean Constitutional Court Report* (Official Digest), 446 / **h)**.

Keywords of the systematic thesaurus:

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

3.20 General Principles – **Reasonableness**.

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

Keywords of the alphabetical index:

Deferential standard of review / Military service, duty, mandatory / Defence, national, duty.

Headnotes:

The legislation that only a man must have military duty and therefore be subject to the physical examinations for conscription does not appear to be outrageously arbitrary because: men as a group are physically fit to be a combat soldier better than women as a group are; in reality, it is difficult for the government to have a system for physical examination which is capable of comparing the people based on each individual's physical ability; it would be demanding much that even a woman of excellent physical ability is placed into a troop during menstruation, pregnancy, or childbirth.

Summary:

I. The Complainant, as a male born on 13 August 1981, applied for KATUSA (Korean Augmentation Troops to the United States Army) and received an email notice of military duty from the Military Manpower Administration and then joined the KATUSA on 13 March 2006. On 10 March 2006, complainant filed this constitutional complaint with the Constitutional Court (hereinafter, the "Court"). He

claims that the first part of Article 3.1 (the "Instant Provision") and Article 8.1 of the Former Military Service Act when they impose the duties of military service only on men infringe his right to equality and therefore violate the Constitution. (The complainant has completed his duty of active service since he filed this case with the Court).

Koreans shall be equal before the law and there shall be no discrimination in political, economic, social or cultural life on the basis of sex, religion or social status (Article 11.1 of the Constitution).

The Constitution has particular provisions of gender equality protection for the important parts of people's activities including 'working woman' and 'marriage and family life', etc, the areas necessary for a strict prohibition of unreasonable different treatment based on sex (Article 32.4 and Article 36.1 of the Constitution).

Every male who is a national of the Republic of Korea, shall faithfully perform military service under the conditions as prescribed by the Constitution of the Republic of Korea and this Act. Any woman may perform only active service by application (Article 3.1 of the Military Service Act).

The Constitutional Court should determine whether the legislature in its legislation exercises its discretion in an unreasonable and arbitrary way and examine that the statutory provisions either violate the principle of clarity, the principle of proportionality and the principle of prohibition of excessive restriction under Article 37.2 of the Constitution by departing from the necessity to achieve the purpose.

II. In a vote of 6 (constitutional): 2 (unconstitutional): 1 (dismissal), the Court held that the Instant Provision is in conformity with the Constitution.

Majority Opinion of 4 Justices

It is evident that the Instant Provision imposes different military service based on 'gender' and therefore it might amount to be a discrimination because that imposition is based on the reason prohibited in the second part of Article 11.1 of the Constitution. However, that second part of Article 11.1 of the Constitution focuses on the prohibition of unreasonable discrimination and therefore it neither requires the legislature to absolutely prohibit any discrimination described in that Section nor always demands the Court to apply a strict scrutiny standard of review.

The Court has applied a strict scrutiny standard for the cases requiring particular gender equality as the instances of Articles 32.4 and 36.1 of the Constitution. However, it is hard to consider that the Instant Provision amounts to such cases. The individuals under those duties cannot be deemed that they particularly sacrifice themselves for our nation or public interests and therefore we do not find that the imposition of those duties on men would seriously restrict on their basic rights related. Moreover, the legislature has wide latitude to exercise its policy-making power in classifying those who are to be subject to the draft. For the foregoing reasons, it is reasonable that, in reviewing as to whether the Instant Provision infringes on the right to equality, we should apply a rational basis test, a deferential standard of review, under which a statutory provision is unconstitutional only when it manifests a patently arbitrary classification.

It can hardly be considered arbitrary when the compulsory military service such as reserve service is not imposed on women because a person in a reserve service or in a second militia service, as a person who could be immediately arrayed into the troops in a national emergency for a reserve military strength, is required to have a certain amount of physical ability. The Instant Provision that chooses the person subject to the draft based on his or her gender, consequently, does not violate the rule against arbitrariness and therefore does not infringe on the complainant's right to equality.

III. 1. Concurring opinion of 1 Justice

The legislature has to make a sincere effort to improve the draft system: the non-active military service shall be imposed only necessary for the national defences, the original purpose of military duty; the citizens not having that military duty are required to support the other's fulfilment of military duty. However, the legislature will exercise its broad policy-making power in setting forth the details.

2. Concurring opinion of 2 Justices

The Instant Provision is about the imposition of the duty of national defence, the duty of mandatory military service, and therefore this Court's review on that provision does not need to deal with the excessive infringement on basic rights. Rather, this Court is just required to determine whether the imposition of that mandatory duty has a legitimate goal or whether the contents of that imposition are reasonable and fair. In this regard, the Instant Provision in its imposition of basic duties on the citizens satisfies the requirements of reasonableness and justification considering its aim to secure the best

combat capabilities for national defence, the problems which would be caused if women become subject to the draft, the reality of national security of Korea, and physical characteristics of women. Therefore, the incidental infringement on basic rights caused by having duties of military service shall be admitted.

3. Dissenting opinion (unconstitutional) of 2 Justices

Even when we should admit that the different treatments between men and women based on their physical abilities is reasonable, the military service which is directly relevant to physical conditions or capabilities are limited to the active service, the full time reserve service, and the service of on-the-ship reserve service. Moreover, in fulfilling their duties of those who are in the replacement service or second militia service in peace time, their physical conditions or physical capabilities are not indispensable. Even in national emergency, physical abilities of men do not appear to be an indispensable requirement for the duties to be called to the military forces mobilisation and the wartime labour because those duties are just to obey the military operation orders or cooperate with them. For these reasons, we conclude that the imposition of national defence duties under the Instant Provision, when it imposes such duties only on men without any institutional framework to alleviate the unreasonableness of that imposition under our current statutes, is arbitrary without any reasonable reasons and therefore is against the Constitution by infringing on the right to equality of men.

4. Dissenting opinion (dismissal) of 1 Justice

Even when the Court declares the Instant Provision to be unconstitutional, it would not have any direct or material influence on men including the complainant in the contents or scope of their military service duties but only remove the benefits, the exemption from military service duties, which women have received before. I, accordingly, do not find that there is a possibility which the basic right of the complainant, the right to equality, will be infringed by the Instant Provision. Thus, it is difficult to find that the declaration of unconstitutionality of the Instant Provision would bring either a remedy to such infringement or legal effect in favour of the complainant as well as improvement of his legal status. For these reasons, I conclude that the complaint over the Instant Provision shall be dismissed due to lack of standing because the requirement of self-relatedness or justiciable interest is not satisfied.

Cross-references:

Former decisions concerning similar issues:

- Decision of 22.02.2007, 2003Hun-Ma428, 19-1 KCCR, *Korean Constitutional Court Report* (Official Digest) 118, 131;
- Decision of 23.23.1999, 98Hun-Ma363, 11-2 KCCR, *Korean Constitutional Court Report* (Official Digest) 770, 787, 783;
- Decision of 28.11.2002, 2002Hun-Ba45, 14-2 KCCR, *Korean Constitutional Court Report* (Official Digest) 704, 710.

Languages:

Korean, English (translation by the Court).

*Identification:* KOR-2012-2-009

a) Korea / **b)** Constitutional Court / **c)** / **d)** 25.11.2010 / **e)** 2009Hun-Ba57 / **f)** Statutory Protection of Specific Crime Informants / **g)** 22-2(B) KCCR, *Korean Constitutional Court Report* (Official Digest), 387 / **h)**.

Keywords of the systematic thesaurus:

3.17 General Principles – **Weighing of interests.**
 3.18 General Principles – **General interest.**
 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:

Witness, cross examination, informants / Non-disclosure, witness, identity / Organised crime, fight / Least restrictive means, principle.

Headnotes:

Ordering the accused to leave the court in order to prevent the revelation the identity of a witness to the accused does not violate the right to cross-examine witnesses because the witness can be cross-

examined by the defence attorney after having had a discussion with the accused.

Summary:

I. Petitioners are Kim, Hwachang who is the boss of Chunggha-wishang Faction, an organised group of gangsters assembled for the purpose of committing crimes and Shim, Kyuhyun who is the chief executioner or the second boss of the gang. They were indicted for committing property damage, personal injury, extortion, etc. in order to maintain the gang syndicate and Petitioner Kim was sentenced to seven years of imprisonment and Petitioner Shim was sentenced to four years of imprisonment for violating the Punishment of Violence, etc. Act (extortion by an organisation or group) on 24 October 2008. (2007GoHap129, etc.). Upon this, the petitioners appealed to the Seoul High Court on 2 December 2008 (2008 no. 3169). While the case was pending, they also filed a motion to request a constitutional review of Article 11.2, 11.3 and 11.6 of the Act on Protection of Specific Crime Informants (hereinafter, the “Instant Provisions”) which prevent disclosure of witnesses’ personal information and order the accused to leave the court and conduct the witness examination (2009ChoGi21), but the motion was denied. Subsequently, the petitioners filed this constitutional complaint against the Instant Provisions.

When any retaliation is likely to be taken against summoned witnesses or their relatives, the chief judge or a judge may allow the relevant court official of Grade IV or clerk to omit all or part of personal information of the relevant witnesses, after recording the purport thereof in the protocol of trial. In such cases, the chief judge or a judge may request prosecutors to prepare and manage the identity management cards of witnesses whose identity management cards have not been prepared (Article 11.2 of the Act on Protection of Specific Crime Informants).

The chief judge or a judge shall endeavour to ensure that the personal information of witnesses is not disclosed in the processes of the examination of witnesses, such as identification, witness oath or testimony, in cases under paragraph (2). In such cases, the identification of witnesses summoned under paragraph (1) shall be made by identity management cards suggested by prosecutors (Article 11.3 of the Act on Protection of Specific Crime Informants).

The chief judge or a judge may order the accused or audiences to leave the court or conduct the examination of witnesses in places, other than open

court, either ex officio or when it is recognised that there are sufficient grounds for application under paragraph (5). In such cases, state-appointed defence counsel shall be appointed when no defence attorney is available (Article 11.6 of the Act on Protection of Specific Crime Informants).

II. The Court held that the Instant Provisions is constitutional when they prevent disclosure of witnesses' personal information and order the accused to leave the Court and conduct the witness examination.

Article 11.2 and 11.3 of the Act ('non-disclosure provisions') which prevent disclosure of witness' personal information throughout the witness examination process and the part of '...may order the accused ... to leave the court or conduct the examination of witnesses' in Article 11.6 of the Act ('leaving the court provision') which allows the presiding judge to order the accused to leave the court and conduct the witness examination are to eliminate anything that can restrict victim's testimony by effectively protecting informants, etc., in order to ensure that citizens can voluntarily cooperate in criminal procedures concerning specific crimes without reservation, thereby contributing to defending the society from crimes and facilitating fact finding procedures. Therefore, the legislative purposes are legitimate and the means to achieve the purposes are appropriate.

Also, the Instant Provisions also strike the balance between legal interests concerned at the degree to which fundamental rights are infringed cannot outweigh the public interests to protect witnesses including informants concerning specific crimes and to contribute to the finding of substantive facts, in that a cross examination is still guaranteed for the accused by Article 161-2 of the Criminal Procedure Act even though a witness examination is conducted after the accused leaves the court pursuant to the 'leaving the court' provision; that the right to cross examination of the accused is substantially guaranteed even after leaving the court as the defence attorney can assist the accused to make a list of questions asked before the cross examination; that the contents of witness examination can be predicted as it is possible to review or copy the record written by the investigation authority or the statement written by the witness before the witness examination when the witness' identity is not disclosed and even when there are some unexpected testimonies, the defence attorney can cross examine the witness after having had a discussion with the accused. Thus, the principle of least restrictive means is also not violated. Therefore, the right to fair trial is not infringed.

Cross-references:

Former decisions concerning similar issues:

- Decision of 28.04.1994, 93Hun-Ba26, 6-1 KCCR, *Korean Constitutional Court Report (Official Digest)*, 348, 355;
- Decision of 28.04.1994, 93Hun-Ba26, 6-1 KCCR, *Korean Constitutional Court Report (Official Digest)* 348, 362;
- Decision of 25.01.1996, 95Hun-Ka5, 8-1 KCCR, *Korean Constitutional Court Report (Official Digest)* 1,14;
- Decision of 26.03.1996, 94Hun-Ba1, 8-2 KCCR, *Korean Constitutional Court Report (Official Digest)* 808, 819-820;
- Decision of 16.07.1993, 97Hun-Ba22, 10-2 KCCR, *Korean Constitutional Court Report (Official Digest)*, 218, 226;
- Decision of 30.09.1998, 97Hun-Ba51, 10-2 KCCR, *Korean Constitutional Court Report (Official Digest)*, 541, 549.

Languages:

Korean, English (translation by the Court).



Identification: KOR-2012-2-010

a) Korea / **b)** Constitutional Court / **c)** / **d)** 28.12.2010 / **e)** 2008Hun-Ba89 / **f)** Restriction on Contribution of Political Funds related to Organisation / **g)** 22-2(B) KCCR, *Korean Constitutional Court Report (Official Digest)*, 659 / **h)**.

Keywords of the systematic thesaurus:

- 3.12 General Principles – **Clarity and precision of legal provisions.**
- 3.14 General Principles – **Nullum crimen, nulla poena sine lege.**
- 3.16 General Principles – **Proportionality.**
- 5.1.4 Fundamental Rights – General questions – **Limits and restrictions.**
- 5.3.19 Fundamental Rights – Civil and political rights – **Freedom of opinion.**
- 5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression.**

Keywords of the alphabetical index:

Political, funds, contribution, illegal / Opinions, democratic formation, distortion / Political activities, freedom / Political expression, freedom / Political Fund Act / Legislation, repetitive / Restriction, excessive, rule against.

Headnotes:

No one shall contribute any political fund related to any corporation or any organisation both at home and abroad (Article 12 of the former Political Fund Act) and one who has contributed or received political funds in violation of the provisions of Article 12 shall be punished by imprisonment for not more than five years or by a fine not exceeding ten million won (Article 30 of the former Political Fund Act).

Only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the criminal law must accurately construe elements of crime and an offence must be defined so clearly that an individual can know and reasonably foresee from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable.

Restriction on constitutional rights is unconstitutional unless it is prescribed by law; it pursued a legitimate aim set out in law; and the means adopted is least restrictive to be proportionate or necessary to achieve such legitimate aim.

Summary:

I. Petitioners were indicted for contributing illegal political funds, collected from the members of the National Union of Media workers under the name of supporting general election, to a candidate for election to the National Assembly in violation of Article 12.2 of the former Political Fund Act. While the litigation was pending, the petitioners filed a motion to request for a constitutional review of the Instant Provisions but the court denied the motion. Upon this, the petitioners subsequently filed this constitutional complaint.

II. In an opinion of 5 (constitutional): 3 (incompatible with the Constitution): 1 (unconstitutional), the Constitutional Court held constitutional Article 12.2 of the former Political Fund Act which prevents anyone from contributing political funds related to any corporation or organisation and Article 30 of the same Act which imposes criminal sanctions on the violation of Article 12.2, on the grounds that the aforemen-

tioned provisions (hereinafter, the "Instant Provisions") neither violate the rule of clarity under the principle of *nulla poena sine lege* nor infringe the freedom of political activity in violation of the principle against excessive restriction.

Court opinion

Considering the legislative purposes, historical backdrop and structure of related provisions, the Instant Provisions do not fall into the category of repetitious legislation of the provision 'prohibiting political contribution from labour organisations' against which the Constitutional Court held unconstitutional in 1999, because the Instant Provisions do not have any intention at all to place discriminatory restriction on labour organisations.

'Organisation' in the Instant Provisions means 'a social unit of people gathered on a continuous basis with collective goals or common interests in which a systematic formation of opinion and decision making is possible,' and 'fund related to organisation' means a fund that can be contributed in the name of an organisation according to the decision of the organisation, and also includes a fund that is collected and formed through an organisation's own initiative under its name, as well as assets as a basis of an organisation's existence and activity. Therefore, there is not enough basis to state that the meaning of the words are vague.

The Instant Provisions are legislated in order to prevent distortion of democratic formation of opinions or infringement on freedom of political speech of members of organisation, which can be caused by donating political fund from organisation, and the Instant Provisions can be considered as appropriate means to achieve the legitimate legislative purpose. Meanwhile, as the Instant Provisions do not prevent an organisation from expressing its political opinion itself, but simply control the way of using 'funds' which can be given from an individual to an individual in an unbalanced way, they neither infringe the core of freedom of political expression nor violate the principle of least restrictive means. Further, while the extent of limitation imposed on the freedom of political expression of a person or an organisation does not exceed the acceptable scope, the public interests to be achieved, such as prevention of plutocracy and breaking the chain of collusive ties between politics and business, are very important and huge, and therefore, the Instant Provisions do not fail to strike balance between legal interests. Consequently, the Instant Provisions cannot be considered as infringing upon the freedom of political activity and the freedom of political expression in violation of the rule against excessive restriction.

II.1. Concurring opinion of 1 Justice

Although the Instant Provisions are repetitive legislation of the provision prohibiting contribution of political funds by a labour organisation which had been declared unconstitutional (95Hun-Ma 154) in terms of their infringement on the freedom of political expression, etc. of a labour organisation, they do not conflict with the binding force of the decision of unconstitutionality because there exist special reasons for justifying the exclusion of the binding force; the Instant Provisions were legislated according to the changes in people's legal confidence and the public outcry for the need of strong legislative measures to root out the practice of giving illegal political funds in the Presidential elections held after the decision of unconstitutionality was rendered.

2. Dissenting opinion of incompatibility with the Constitution by 3 Justices

The Instant Provisions also apply to a political organisation whose purpose of association is to conduct political activity, which is a fundamental infringement on political organisation's freedom of political activity and association. Further, although it is possible that contribution of political funds by non-political organisations could distort the process of democratic formation of opinions or tarnish fairness in election, uniformly prohibiting contribution of political funds without providing any institutional measure to prevent such side effects, even in the case where such contribution is necessary to achieve an organisation's purpose, cannot be regarded as appropriate means. Also, overall restriction on contribution of political funds by an organisation, in the fear of the possibility that donation of political funds by an organisation can be done against the will of members of the organisation, cannot be considered as appropriate means to achieve the legislative purposes because in some sense, contribution of political fund by an organisation should be considered as having gone through its inner process of democratic formation of opinions. However, as the Instant Provisions contain both constitutional and unconstitutional parts, and distinguishing the two is a task of the National Assembly, it would be appropriate to declare that the Instant Provisions are not compatible with the Constitution and urge legislative revision.

3. Dissenting opinion of unconstitutionality

The concept of "organisation" in the Instant Provisions fails to concretise the general understanding of the word, which is 'gathering of multiple people on a continuous basis.' Moreover, the meaning of 'fund related to organisation' is also hard to be clearly

determined, and the Instant Provisions do not provide any concrete and practical standard which can distinguish funds related to organisation from those not related to it. Therefore, the Instant Provisions run afoul of the Constitution, in violation of the rule of clarity under the principle of *nulla poena sine lege*.

Cross-references:

Former decisions concerning similar issues:

- Decision of 25.11.1999, 95Hun-Ba154, 11-2 KCCR, *Korean Constitutional Court Report* (Official Digest), 555;
- Decision of 30.06.2005, 2002Hun-Ba83, 17-1 KCCR, *Korean Constitutional Court Report* (Official Digest), 812, 822;
- Decision of 29.12.2009, 2008Hun-Ba141, *Korean Constitutional Court Gazette* (Official Digest), 159, 123, 127.

Languages:

Korean, English (translation by the Court).



Identification: KOR-2012-2-011

a) Korea / b) Constitutional Court / c) / d) 28.12.2010 / e) 2009Hun-Ka30 / f) Limitation of Extending the Period of the Communication-Restricting Measures / g) 22-2 (B) KCCR, *Korean Constitutional Court Report* (Official Digest), 545 / h).

Keywords of the systematic thesaurus:

- 3.17 General Principles – **Weighing of interests.**
- 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.**
- 5.3.32 Fundamental Rights – Civil and political rights – **Right to private life.**
- 5.3.36 Fundamental Rights – Civil and political rights – **Inviolability of communications.**

Keywords of the alphabetical index:

Communication privacy protection, suspect / Communication restrictive measures / Crime investigation / Communication, interception / Privacy, invasion of, secret communication / Rule against excessive restriction.

Headnotes:

Warrant issued by a judge through due process upon the request of a public prosecutor shall be presented in case of arrest, detention, seizure or search: Provided.... (Article 12.3 of the Constitution).

The period of communication-restricting measures shall not exceed 2 months and in the event that the objective of the communication-restricting measures is attained during the period, such communication-restricting measures shall be immediately discontinued: Provided, That if the requirement for permission under Article 5.1 are still valid, a request for extending the period of communication-restricting measures pursuant to paragraph (1) and (2) may be filed, within the limit of 2 months and such request shall be appended by material establishing a prima facie case (Article 6 of the Protection of Communication Secrets Act).

Summary:

I. The movants, who are the accused of the underlying case, were detained and indicted for allegedly violating Article 6 (Infiltration and Escape) and Article 7 (Praise and Incitement) of the National Security Act. While the underlying case was pending at the requesting court, the prosecutor of the underlying case applied for the submission of emails, recorded telephone call, and the facsimile transcripts collected by the investigation agency through the communication-restricting measures as the convicting evidence. Against this application, stating the above evidence had been collected through the communication-restricting measures that had been extended 14 times during 30 months, the movants argued that the proviso of Article 6.7 of the Communication Secrets Act (hereinafter, the "Instant Provision") that allowed the unlimited extension of the period of communication-restricting measures infringed their right to privacy and privacy of communication, filing the motion to request for the constitutional review of the Instant Provision. The requesting court made this request for the adjudication on the constitutionality of the instant provision, reasoning there are reasonable grounds to consider its unconstitutionality for the invasion of privacy and secret communication.

II. The Constitutional Court, by a vote of 6: 3, held that the Instant Provision is unconstitutional because there are no limitations on the entire period or entire numbers of times for extending the period of the communication-restricting measure, violating principle against excessive restriction and thus infringing the privacy of communication.

Court opinion

Because it is possible for the public prosecutors to apply for the additional communication-restricting measures, the purpose of investigation would be sufficiently achieved, even if, in permitting the extension of the period of communication-restricting measures, the entire period of extension or numbers of times of such measures are limited or such measures are suspended when the suspicion is not proved during the first extended period.

As far as the court's control over the abuse of extension on the duration of communication-restricting measures is limited, we hardly expect that the judicial control on the permission for extending the period of communication-restricting measures can prevent the excessive invasion of privacy to communication. Notwithstanding, there must be necessary to establish the least standard to prevent the abuse of the permission of extending communication-restricting measures but the Instant Provision did not have any of those standards, violating the principle of the least restriction.

The nature of restriction on the basic right at issue itself prevents the suspects, who had been intercepted by communication-restricting measures, from knowing the fact that he/she has been intercepted or not, hardly defending their right to privacy. Moreover, the Instant Provision also fails to balance between interests concerned because, if there is no limitation on the entire period or number of times of communication-restricting measures, the secrecy of private communication of the suspect, which is not related to the criminal investigation, would be significantly invaded. Therefore, the instant provision violates the Constitution.

Nevertheless, in this case, if the Court delivers the decision of unconstitutional that nullifies the effects of the Instant Provision, the legal vacuum may occur by invalidating the legal grounds to permit the extending of communication-restricting measures and thus the permission of the reasonable communicant-restricting measures required for investigation would not be possible. Therefore, it would be desirable to decide the Instant Provision shall be temporarily applicable despite it is incompatible with the Constitution; and the Legislature shall revise it until 31 December 2011.

III.1. Dissenting opinion with regard to the Holding Statement of 2 Justices

The legal vacuum would not occur because additional communication-restricting measures for the identical criminal offense would be newly permitted when they are required for its investigation even if the legal ground of permission of extending such measures becomes unconstitutional by the decision of the Court, losing its effects. Therefore, the Court should hold the Instant Provision to be unconstitutional.

2. Concurring opinion of 1 Justice

The interception of communication should accord with the warrant issued by judges under due process because it invades the fundamentals of right of privacy and privacy to communication (Article 12.3 of the Constitution). However, the Protection of Communication Secrets Act broadly stipulated the scope of the crime which may be subject to the interception of communication, allowing the interception for the investigation of crime stipulated by Article 5 of the Act. According to the Act, any notice with regard to the interception of communication is not required unless the interception is completed; no appeal procedure is provided for the subject of the interception; and the entire period or numbers of times of the interception is not limited on extending the interception. As a result, the subject of the interception would be intercepted without recognising whether she is intercepted or not, being deprived of the opportunity to appeal the permission of the interception. Therefore, the current communication interception system violates Article 12.3 of the Constitution that requires the search according to the due process.

3. Dissenting opinion of 3 Justices

Persistent investigation would be required in case of conspiracy of felony, threat to national security, or organised mass crime, demanding continuous communication-restricting measures to collect evidence. However, the purpose of such investigation would not be achieved if there are limits on the entire period or number of times of the period of communication-restricting measures. In addition, the judicial control is already set in place to prevent the abuse of communication-restricting measures because the permission of the court is required for extending the period of communication-restricting measures. Accordingly, we found that the Instant Provision would not violate the principle of the least restrictive means just because it does not limit the entire period or number of times of communication-restricting measures with the groundless presumption that the court does not thoroughly review the motion to extend the communication-restricting measures in practice.

As long as each communication-restricting measure is approved by the court's review on the elements of justifying the permission of extending such measures, the restrictive interests of communication privacy protection may not clearly outweigh the public interests of crime investigation pursued by the Instant Provision, satisfying the principle of balance of interests. Therefore, in our view, the Instant Provision does not violate the Constitution.

Cross-references:

Former decision concerning similar issues:

- Decision of 21.03.2001, 2000Hun-Ba25, 13-1 KCCR, *Korean Constitutional Court Report* (Official Digest), 652,658.

Languages:

Korean, English (translation by the Court).



Identification: KOR-2012-2-012

a) Korea / **b)** Constitutional Court / **c) / d)** 28.12.2010 / **e)** 2008Hun-Ba157, 2009Hun-Ba88 (Cases consolidated) / **f)** Punishment on False Communication under Electric Telecommunication Act / **g)** 22-2 (B) KCCR, *Korean Constitutional Court Report* (Official Digest), 684 / **h)**.

Keywords of the systematic thesaurus:

3.12 General Principles – **Clarity and precision of legal provisions.**
 3.14 General Principles – **Nullum crimen, nulla poena sine lege.**
 5.3.22 Fundamental Rights – Civil and political rights – **Freedom of the written press.**
 5.3.23 Fundamental Rights – Civil and political rights – **Rights in respect of the audiovisual media and other means of mass communication.**

Keywords of the alphabetical index:

Information, false, internet site / Excessive restriction, rule against / Freedom of expression, scope of protection.

Headnotes:

A person who has publicly made a false communication through the electric telecommunication facilities and equipment with the intent to harm the public interest shall be punished by imprisonment for not more than five years or by a fine not exceeding fifty million won (Article 47 of the Electrical Telecommunication Act).

Only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the penal code must accurately prescribe elements of crime and offence to be punished. Under the principle of clarity, such elements of crime must be defined so clearly that an ordinary reasonable individual can know and reasonably foresee from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable and the kind of punishment to be imposed.

Summary:

I. The petitioner in 2008Hun-Ba157 was charged with the violation of "the Electric Telecommunication Act, Article 47.1 (hereinafter, the "Instant Provision")" by posting untrue information on an internet site that a woman was raped by a police officer during the protest while the petitioner in 2009Hun-Ba88 was charged with the same offense by posting the untrue statements on an internet site that currency exchange was halted because the Korean foreign reserve was drained and also that the Korean government ordered seven major Korean banks and other major export companies to halt dollar buying. Petitioners filed the motions for constitutional review of the Instant Provision. After trial courts denied their motions, petitioners directly filed motions to review the constitutionality of the Instant Provision with the Constitutional Court.

II. The Court, in vote of 7 to 2, held the Instant Provision unconstitutional.

Court's opinion

The instant provision is a restrictive legislation on the freedom of expression with criminal penalties and, therefore, it is subject to the rule of clarity on a strict level. While the instant provision prohibits false communication with 'the intent to harm public interest,' the term of "public interest" used here is so unclear and abstract that it seems to be the rewriting of the constitutional provisions which prescribes minimum conditions to restrict basic rights and the limitation of the Constitution. Since the Instant

Provision does not notify ordinary citizens of what purpose of communication, among 'permitted communications,' is prohibited, it is unconstitutional for violating the rule of clarity stemming from the freedom of expression and the rule of clarity embedded in the principle of *nulla poena sine lege*.

II. 1. Concurring opinion of 4 Justices on the issue of violation of the rule of clarity with respect to 'false communication

The legislative intent of the instant provision is to regulate 'communication with false pretence.' Yet, the issue on the meaning of 'false communication' arises as it has recently been applied to the case involving communication with false information despite the instant provision has not been quoted for forty years. The instant provision opens a door to the broad interpretation and the application of a law because it fails to materialise the legislative intent in its plain language and in the legal structure with other related provisions. Therefore, the instant provision does not satisfy the rule of clarity in the principle of *nulla poena sine lege* because of its latent ambiguity not only in the phrase of 'intent to harm the public interest' but also in that of 'false communication.'

2. Concurring opinion of 5 Justices on the issue of violation of the rule against excessive restriction

We cannot exclude a certain expression from the protection of the freedom of expression because it contains certain contents. Therefore, "expression of false communication" remains within the scope of protection of the freedom of speech and the press under the Article 21 of the Constitution although it could be restricted under the Article 37.2 of the Constitution. Yet, the instant provision, by purporting to regulate false communication with the 'intent to harm public interest,' violates the rule against excessive restriction because it, due to its ambiguous, abstract and overbroad nature, ends up regulating the expressions which should not be regulated. Therefore, the instant provision infringes the freedom of expression by violating the rule against excessive restriction and thus is against the Constitution.

2. Dissenting opinion of 2 Justices

The 'public interest' is 'the interest of all or the majority of citizens who live in Korea and the interest of a state composed of those citizens,' while 'intent to harm' the public interest includes the case where the major intent of an act is for harming the public interest. "False communication" is about 'the fact of which the truthfulness can be verified objectively' and thus implies both the communication with false contents and the communication with false pretence.

Therefore, its meaning is clear and not against the rule of clarity in the principle of *nulla poena sine lege*.

The legislative goal of the instant provision is justifiable as it contributes to the development of democracy by preventing the disturbance of public morality and social ethics and the disorder of the public order. The stricter restriction should apply to the communication with palpably false information because electric telecommunication has the features such as:

1. the severe ramification from the dissemination of false information;
2. difficulty to correct false information by communication users in a swift manner and;
3. the high social expense for lengthy discussion surrounding false information. Further, the instant provision punishes only when an act of transmission of false information through electric telecommunication facility is committed with the intent to 'harm the public interest.'

Therefore, the instant provision does not violate the rule of the least restrictive means. Finally, as the restricted basic rights is the freedom to disseminate palpably false information both from an objective and a subjective perspective with the intent to harm the public interest, there is no gross imbalance between the protected public interest by the instant provision and the restricted basic right. Therefore, the instant provision is not against the freedom of expression by violating the rule against excessive restriction.

Cross-references:

Former decisions concerning similar issues:

- Decision of 26.12.1996, 93Hun-Ba65, 8-2 KCCR, *Korean Constitutional Court Report* (Official Digest), 785, 792-793;
- Decision of 30.04.1998, 95Hun-Ka16, 10-1 KCCR, *Korean Constitutional Court Report* (Official Digest), 327, 342.

Languages:

Korean, English (translation by the Court).



Identification: KOR-2012-2-013

a) Korea / b) Constitutional Court / c) / d) 31.03.2011 / e) 2008Hun-Ba141 / f) Confiscation of property awarded for pro-Japanese collaboration from 1910-1945 / g) KCCR, *Korean Constitutional Court Report* (Official Digest), 276-325 / h).

Keywords of the systematic thesaurus:

- 3.16 General Principles – **Proportionality**.
- 3.17 General Principles – **Weighing of interests**.
- 5.1 Fundamental Rights – **General questions**.
- 5.3.13.2 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Effective remedy**.
- 5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts**.
- 5.3.38 Fundamental Rights – Civil and political rights – **Non-retrospective effect of law**.
- 5.3.39.1 Fundamental Rights – Civil and political rights – Right to property – **Expropriation**.

Keywords of the alphabetical index:

Collaboration, nature / Property, confiscation, collaborators / Retroactivity, required by public interest / Fundamental right, limitation, least restrictive means / Retroactivity, notion.

Headnotes:

Under the Constitution, state control which is restrictive of fundamental rights should be deployed in the least restrictive fashion in pursuing its legislative aim and should strike a balance between the public interests to be protected and the private ones which may be encroached upon.

There are two types of retroactive legislation. The first derives its legal force from matters of fact or law which have already been finalised; the second from matters which remain pending. The latter is permissible but the court should ensure a balance is struck between the public interest and the necessity to protect confidence in the legal system; this can result in a degree of restriction of the legislature's right to legislation. The former is not permitted, unless exceptional circumstances exist, under the Constitution because rule by law as a principle must be respected to ensure public confidence in law. Retroactive legislation may be allowed if people could, exceptionally, expect it or if the interest in the confidence in law to be protected is not so great due to uncertainty or confusion of legal status. It may also be allowed if loss and damage to the parties

concerned is non-existent or nominal, or if the reason for securing the public interest is so significant that it takes precedence over the necessity for public confidence in the law.

Summary:

I. One of the applicants, who had been awarded the title of Viscount by the Japanese colonial government in Korea on 7 October 1910 for his contribution to the Japanese annexation of Korea, received a commemoration medal for his collaboration with Japanese colonial rule. Title to land – which had been conferred on him by the Japanese colonial government in Korea under the land survey in the period of 1910-1945 – was subsequently transferred to his descendants and registered.

The Investigative Commission on Pro-Japanese Collaborators' Property ("the Commission"), resolved on 22 November 2007 that the applicant was one of the Japan collaborators in the meaning of "the Japan collaborators whose property acquired in the Japanese colonial period (1910-1945) are subject to confiscation" ("the Collaborators") set out in Article 2.1, *Mok* 1 of the Special Act to Redeem Japanese Collaborators' Property ("the Special Act") and the land described above should be seized by the Korean government as it constituted an asset of Japan collaborators, as defined in Article 2.2 of the Special Act.

The applicant's descendants, (the applicants in these proceedings) filed suit against this decision with the Seoul Administrative Court. They asked for the confiscation to be vacated and, pending the suit, requested the court to seek an assessment from the Constitutional Court on the constitutionality of Articles 2 through 5 ("the Instant Provisions") of the Special Act. The Administrative Court dismissed this request, whereupon the applicants filed this constitutional complaint with the Constitutional Court, claiming that the Instant Provisions encroached on their property rights and were unconstitutional.

II. According to the Constitutional Court, the provision of the Special Act which presumes property acquired by Japan collaborators during the 1910-1945 occupation to have been awarded for their collaboration with Japan (Article 2.2 second sentence of the Special Act, "the Assumption Provision") and the provision of the Special Act which requires the confiscation of such property from those collaborators or their descendants (Article 3.1 of the Special Act, "the Confiscation Provision") did not contravene the Constitution.

A. Whether the Assumption Provision was in violation of due process

It is difficult for the state to determine which properties were bestowed as rewards for pro-Japanese collaboration; the Korean government is now trying to confiscate them many years after liberation from Japanese occupation. On the other hand, it is highly probable that the person who acquired those properties knows the details. The Assumption Provision does not shift the burden of proof entirely to the Collaborator's side. A procedural safeguard is available – an administrative suit may be filed to rebut that assumption. Even in cases where the disposition authorities or the courts do not readily approve the rebuttal of that assumption, the legislature is not to blame for abuse of it or for incorrect exercise of its discretion in enacting the Assumption Provision. The disposition authorities and the courts are culpable, for not fulfilling the aims of that Provision. The Assumption Provision neither encroaches on the right of access to court nor violates due process.

B. Whether the Confiscation Provision violates Article 13.2 of the Constitution

The Confiscation Provision is retroactive legislation that takes away or impairs vested rights acquired under existing laws or attaches a new and different legal effect to legal relations established in the past. Such retroactive legislation is permissible in exceptional cases, where the law in question is so justifiable that people could have expected it. In the case in point, Japan collaborators could reasonably have expected the retroactive confiscation of property bestowed as a reward for collaboration with Japan in view of the nature of the collaborators' actions against their own people leading them to acquire such property and the preamble of the Constitution declaring to uphold the spirit of the Korean interim government established in the Japanese occupation. Furthermore, confiscation of the property of collaborators is one of the national tasks; it is such an exceptional measure and concerns about retroactive legislation in the event of this Court finding the measure constitutional could be allayed. The Confiscation Provision does constitute retroactive legislation but does not run counter to Article 13.2 of the Constitution.

C. Whether the Confiscation Provision encroaches on property rights

The Confiscation Provision pursues legitimate aims. The legislature intends to rectify past injustices, tighten the spirit of the nation and to realise the constitutional ideology of the 1 March Independence Movement. It would be difficult to achieve those legislative aims under the existing property law

system, including the civil law. The Confiscation Provision limits the type of collaboration with Japan which would be subject to that provision to four categories of serious collaboration. There are exceptions for collaborators who later actively engaged in the independence movement. A Japan collaborator and his or her descendants can prevent confiscation by proving that the property in question was not acquired as a reward for collaboration with Japan. There are also provisions to protect *bona fide* third parties who acquired property from collaborators in exchange for payment of just compensation. We accordingly find that the Confiscation Provision is not out of line with the rule of the least restrictive means and strikes a balance between the relevant interests. It does not impinge on the property rights of the applicants.

Cross-references:

Previous decisions concerning similar issues:

- Decision of 30.04.1995, 95Hun-Ka16, 10-1 KCCR, *Korean Constitutional Court Report* (Official Digest), 341;
- Decision of 22.12.2005, 2004Hun-Ba45, 17-2 KCCR, *Korean Constitutional Court Report* (Official Digest), 712, 721;
- Decision of 25.10.2007, 2005Hun-Ba96, 19-2 KCCR, *Korean Constitutional Court Report* (Official Digest), 467, 477;
- Decision of 16.02.1996, 96Hun-Ka2, 8-1 KCCR, *Korean Constitutional Court Report* (Official Digest), 51, 88;
- Decision of 22.07.1999, 97Hun-Ba76, 11-2 KCCR, *Korean Constitutional Court Report* (Official Digest), 175, 193-194;
- Decision of 21.03.2001, 99Hun-Ma139, 13-1 KCCR, *Korean Constitutional Court Report* (Official Digest), 676, 693;
- Decision of 30.06.2005, 2004Hun-Ma859, 17-1 KCCR, *Korean Constitutional Court Report* (Official Digest), 1016, 1020;
- Decision of the Supreme Court, 13.11.2008, 2008 Du13491.

Languages:

Korean, English (translation by the Court).



Identification: KOR-2012-2-014

a) Korea / b) Constitutional Court / c) / d) 28.04.2011 / e) 2010Hun-Ma474 / f) Suspension from performing duties of Head of Local Government during detention pending final judgment / g) 23-1(B) KCCR, *Korean Constitutional Court Report* (Official Digest), 126-156 / h).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
 3.17 General Principles – **Weighing of interests**.
 5.2 Fundamental Rights – **Equality**.
 5.3.13.1.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Criminal proceedings**.
 5.3.13.2.2 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Presumption of innocence**.
 5.4.9 Fundamental Rights – Economic, social and cultural rights – **Right of access to the public service**.

Keywords of the alphabetical index:

Local self-government, head, suspension / Administration, effective.

Headnotes:

Under the constitutional principle of the presumption of innocence, an accused person shall be presumed innocent until a conviction by a court against him or her.

A statute is constitutional if it pursues a legitimate aim set out in law; and the means adopted are the least restrictive to be proportionate or necessary to achieve such legitimate aim.

The right of citizens to hold public office, including the right to hold public elected office, such as membership of the National Assembly, is guaranteed by Article 25 of the Constitution, which states that all citizens have the right to hold public office under the conditions prescribed by statute. The right to run for election and the right to take public office can be included within the right to hold public office. In addition, the right not to be deprived of the right to take public office by an arbitrary decision or process shall be included within the right to hold public office.

All citizens are equal before the law. There is to be no discrimination in political, economic, social or cultural life on account of sex, religion or social status (Article 11.1 of the Constitution). Citizens are not to receive different treatment without reasonable grounds.

Summary:

I. The applicant took office on 1 July 2010 after he had been elected as head of the Seoul Metropolitan borough of Jung-gu in the 5th nationwide local election held on 2 June 2010.

However, he was arrested on 19 June 2010, immediately after taking office, and charged with violation of the election law, which then meant he had to be suspended from performing his duties as head of the Seoul Metropolitan borough of Jung-gu from the first day of taking office in accordance with Article 111.1.2 (hereinafter, the "Instant Provision") of the Local Autonomy Act (hereinafter, the "LAA"), which stipulates that heads of local government who are detained after a prosecution has been commenced will be suspended from performing their duties. The deputy head will then be required to act in their place.

On 29 July 2010, the applicant filed this constitutional complaint with the Constitutional Court claiming that the Instant Provision impinged on his right to hold public office and the right to equality.

II. The Constitutional Court voted to reject the complaint (4 denial: 1 admittance). It held that the Instant Provision did not infringe the applicant's right to hold public office or violate his right to equality; it was not inconsistent with the rule against excessiveness or the principle of presumption of innocence.

1. Whether the rule against excessiveness was violated

The legislative purpose of the Instant Provision is to prevent a harmful impact on the smooth and effective administration of local government for the welfare of residents by suspending the head of local government from his or her duties during the period of detention, relieving him or her from performing them in a proper and timely manner.

Where the detention of a head of local government means that he or she is physically isolated from society and limited in communication with those visiting the detention centre, it is difficult to argue that continuity and flexibility in local government administration is being achieved, or the implementation of policy to bring about the best result for the welfare of residents. There would also be uncertainty over when the head might return to work. Suspension is, in our view, the only adequate and appropriate measure to prevent negative effects on the timely and smooth administration of local government.

Detention would be enforced by a warrant issued by the court based on findings by a judge of the existence of reasons to detain the head of local government. There is therefore no further scope for examination as to the necessity for suspension from the performance of duties in relation to the nature of crime committed or the gravity of the matters at issue, the relationship between the crime committed by the head of local government and the duties he or she carried out, any specific damage to local government administration caused by the crime or the nature of the crime itself (whether it constituted serious anti-social crime or minor negligence). Additional requirements for suspension from performing duties do not therefore need to be set out.

Under the statutory provisions, the head of local government is temporarily suspended from his or her office only for the period of detention; he or she can return to work upon release. The infringement caused by the Instant Provision was, in our view, the least restrictive and struck a balance between the relevant legal interests.

2. Whether the principle of presumption of innocence was violated

The Instant Provision does not represent social disapproval over the applicant's detention nor does it suspend his function based on the probability of his guilt. The applicant was suspended from conducting his duties as head of local government in order to avoid a decline in the efficient execution of his duties and potential interference in the smooth and continuous administration of local government due to physical absence from work. In other words, such suspension, imposed in accordance with the Instant Provision, could not be deemed to be a disadvantage resulting from acknowledgment of the applicant's commission of crime or culpability, nor could it be viewed as social disapproval or moral criticism based on the assumption of his guilt. The Instant Provision did not therefore run counter to the principle of presumption of innocence.

3. Whether the right to equality was violated

A "suspension of function" provision such as the Instant Provision does not exist for ministers of various administrative branches and members of the National Assembly. However, a head of local government, as an elective public officer with sole authority of decision making, has a different influence from the officials mentioned above, on the smooth and continuous administration of local government. Different treatment between the two groups cannot be viewed as arbitrary.

Different treatment between a head of local government who is detained and one who is hospitalised is also reasonable. In the latter case, provision is made, unlike the Instant Provision, for a sixty day suspension prior to suspension from performance of duty. It differs from detention, where there is restricted access for visitors; those visiting the patient can come and go as they please. The date of discharge from hospital will be predictable, except in very rare cases, and the patient can, albeit in a limited fashion, perform their duties.

Cross-references:

Previous decisions concerning similar issues:

- Decision of 19.11.1990, 90Hun-Ka48, 2 KCCR, *Korean Constitutional Court Report* (Official Digest), 393, 402;
- Decision of 26.05.2005, 2002Hun-Ma699, 17-12 KCCR, *Korean Constitutional Court Report* (Official Digest), 734, 744;
- Decision of 25.05.2004, 2004Hun-Ba12, 18-1(B) KCCR, *Korean Constitutional Court Report* (Official Digest), 58, 68;
- Decision of 25.06.2009, 2007Hun-Ba25 21-1(B) KCCR, *Korean Constitutional Court Report* (Official Digest), 784, 798; *Bulletin* 2011/1 [KOR-2011-1-004];
- Decision of 02.09.2010, 2010Hun-Ma418, KCCG, *Korean Constitutional Court Gazette* (Official Gazette), 167, 1539.

Languages:

Korean, English (translation by the Court).



Latvia Constitutional Court

Important decisions

Identification: LAT-2012-2-004

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 06.06.2012 / **e)** 2011-21-01 / **f)** On Compliance of Section 8.2 of the Law on Compensation for Losses Caused by State Administration Institutions with the third sentence of Article 92 of the Constitution of the Republic of Latvia / **g)** *Latvijas Vestnesis* (Official Gazette), 07.06.2012, no. 89(4692) / **h)** CODICES (Latvian, English).

Keywords of the systematic thesaurus:

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

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

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

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

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

Keywords of the alphabetical index:

Damage, compensation, loss, non-economic / Damage, compensation, limitation / Damage, compensation, natural and legal persons / Legal persons / Compensation, commensurate / Decision of a political nature / Cassation instance.

Headnotes:

As one of the most important guarantees of a state governed by the rule of law, the protection of fundamental human rights creates a corollary duty on the state to ensure that people whose rights have been infringed are effectively protected. This includes a general guarantee that if a state has infringed the rights of an individual, the latter has the right to compensation.

The term “commensurate compensation” shall, first of all, be interpreted as the appropriate satisfaction of any infringement of rights, which includes both compensation for losses and non-material compensation (moral and individual).

The court’s ability to restore justice in each particular case is closely related to the procedural and material legal norms adopted by the legislator, according to which a particular case is adjudicated.

Although any norm of human rights incorporated into the Constitution shall be applied directly and immediately, the principle of legitimate expectations requires the legislator to establish preconditions to practically implement the particular constitutional norm.

Generally assuming that the protection of fundamental rights of legal persons may be implemented to a lesser extent as compared to that of natural persons may lead to arbitration actions by the legislator and threaten fundamental rights.

When interpreting human rights norms, one should take account of the close link between democratic principles and fundamental rights, which means that fundamental rights should be guaranteed to the full extent. This means that available interpretation methods should be applied in such a way as to ensure a sufficiently broad application of a legal norm rather than to restrict fundamental rights.

The legislator’s duty to assure effective protection of fundamental rights and to observe or guarantee it may not be regarded as fully accomplished through the adoption or coming into force of the respective legal regulatory framework. The legislator has to ensure *ex officio* after enforcing a legal norm that it is effective enough when applied. Should it be established that a legal norm fails to function when applied, then it is necessary to improve it. After expiry of a certain period of time, the legislator is obliged to re-consider whether a particular legal regulatory framework is still effective, appropriate and necessary as well as whether it should be improved.

The primary aim of compensation is restitution or reimbursement; however, such compensation should also be aimed at discouraging the offender from committing similar infringements.

Judicial control over decisions of the executive power is one of the fundamental principles of a law-governed state that follows from the idea of the separation of powers. An application to a court is regarded as the most powerful instrument, by means of which a person can control decisions of the executive power.

Even if a solution of a particular issue depends on the legislator’s political decision, it does not release the legislator from the duty to observe the fundamental rights and general legal principles established in the Constitution. In such cases, the legislator is committed to observe principles of a law-governed state.

Summary:

I. A contested provision included in the Law on Compensation for Losses Caused by State Administration Institutions provides that a legal person (businessman) shall have the right to compensation only if the state action caused personal losses to the reputation of its transactions, commercial secret or copyright.

The Administrative Department of the Senate of the Supreme Court adjudicated a matter in which the association “*Daugavas vanagi Latvija*” contested not only a decision of the Riga City Executive Director to organise a procession but also asked for compensation for moral loss. The Administrative District Court annulled the decision of the Executive Director and rejected the compensation claim for loss based on the contested provision.

The applicant – the Senate of the Supreme Court – holds that the legal regulatory framework included in the contested provision restricts the rights of persons in a disproportional manner.

The Senate asked the Constitutional Court to assess whether the contested norm complies with the provision of the Constitution that establishes that everyone, where his or her rights are violated without grounds, has a right to commensurate compensation.

II. By applying several methods for interpretation (grammatical, historical and systemic), the Constitutional Court concluded that the contested provision permits a court to grant a legal person compensation for personal loss in three cases. They include cases when the damage has been caused to the reputation of its transactions, commercial secret or copyright.

The Constitutional Court indicated that the Constitution does not prohibit the legislator from distinguishing between legal persons and natural persons by conferring certain rights to a natural person but not to legal persons. However, in legal relations, along with natural persons, legal persons are also involved; therefore, state institutions may infringe, without reason, the rights of legal persons as occurs with those of natural persons.

In the field of public law, the State is responsible not only for losses but also for non-material loss caused to natural or legal persons.

Under the freedom of assembly, both natural persons of private law and certain legal persons of private law shall be protected.

The Constitutional Court concluded that it would not be reasonable to interpret the Constitution in a way that in certain cases would completely release a person subject to public law from compensating non-material loss caused to a legal person.

The contested norm does not give the judiciary (the Court) the possibility to guarantee a fair trial and to grant commensurate compensation for ungrounded infringement of his or her fundamental rights. The Constitutional Court recognised that the word “only” included in the contested provision fails to comply with the Constitution and shall become null and void as from the date of the norm’s adoption.

Cross-references:

Previous decisions of the Constitutional Court:

- Judgment no. 2000-03-01 of 30.08.2000;
Bulletin 2000/3 [LAT-2000-3-004];
- Judgment no. 2000-07-0409 of 03.04.2001;
Bulletin 2001/1 [LAT-2001-1-002];
- Judgment no. 2001-06-03 of 22.02.2002;
Bulletin 2002/1 [LAT-2002-1-002];
- Judgment no. 2001-07-0103 of 05.12.2001;
- Judgment no. 2002-08-01 of 23.09.2002;
- Judgment no. 2003-08-01 of 06.10.2003;
Bulletin 2003/3 [LAT-2003-3-010];
- Judgment no. 2004-16-01 of 04.01.2005;
- Judgment no. 2004-18-0106 of 13.05.2005;
Bulletin 2005/2 [LAT-2005-2-005];
- Judgment no. 2005-08-01 of 11.11.2005;
- Judgment no. 2005-13-0106 of 15.06.2006;
Bulletin 2006/2 [LAT-2006-2-003];
- Judgment no. 2005-18-01 of 14.03.2006;
- Judgment no. 2006-03-0106 of 23.11.2006;
Bulletin 2006/3 [LAT-2006-3-005];
- Judgment no. 2006-28-01 of 11.04.2007;
Bulletin 2007/3 [LAT-2007-3-002];
- Judgment no. 2007-01-01 of 08.06.2007;
Bulletin 2007/3 [LAT-2007-3-004];
- Judgment no. 2007-03-01 of 18.10.2007;
Bulletin 2007/3 [LAT-2007-3-005];
- Judgment no. 2007-22-01 of 02.06.2008;
- Judgment no. 2008-42-01 of 23.04.2009;
- Judgment no. 2009-05-01 of 07.10.2009;
- Judgment no. 2009-43-01 of 21.12.2009;
Bulletin 2009/3 [LAT-2009-3-005];
- Judgment no. 2010-11-01 of 11.06.2010.

European Court of Human Rights:

- *Christian Democratic People’s Party v. Moldova*, Judgment of 02.02.2010;
- *The United Macedonian Organisation Ilinden and Ivanov v. Bulgaria*, Judgment of 18.10.2011.

Languages:

Latvian, English (translation by the Court).



Liechtenstein

State Council

Important decisions

Identification: LIE-2012-2-001

a) Liechtenstein / **b)** State Council / **c)** / **d)** 30.06.2011 / **e)** StGH 2010/161, StGH 2011/34 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

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

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

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

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

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

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

Keywords of the alphabetical index:

Translation / Correspondence, secrecy / Lawyer, professional secrecy / Testify, refusal to.

Headnotes:

It follows from the case-law of the European Court of Human Rights on the limits of the right to translation based on Article 6.3.a ECHR that the assistance of an interpreter at all stages in preliminary proceedings is not compulsory. Translation may be superfluous where defendants have been provided with adequate information during prior questioning, when an interpreter has supplied a translation and the conclusions submitted on this occasion make it clear that such defendants are fully aware of the substance

of the charges. Where the Court has duly noted that defendants have been able to understand the facts charged against them and that they can therefore answer for them, there can be no infringement of their fundamental right to translation.

According to the European Court of Human Rights, the right not to incriminate oneself is part of the “hard core” of the right to a fair trial laid down in Article 6 ECHR. The obligation to inform defendants, in accordance with applicable law, of their right to refuse to testify is inherent in the “*nemo tenetur se ipsum accusare*” principle. This principle is not absolute, however, as the European Court of Human Rights considers that the fairness of a trial must be assessed as a whole. Therefore, the circumstances of the individual case must be taken into account in assessing whether there has been, *in concreto*, a violation of the defendant’s fundamental right.

Summary:

I. An appeal was lodged with the State Council under criminal proceedings. The defendant complained of the failure to translate records of examinations which were decisive for the trial before the higher court, even though he had stated during the proceedings before the lower courts that he did not need an interpreter and could easily understand the questions put by the investigators. He contended that he had not been informed of his right to refuse to testify against himself. The defendant also claimed that during the police examination he had been informed in an erroneous manner on the right of witnesses to refuse to testify. Furthermore, he disputed the reading out of a letter from counsel for the witness, who had written it at his request, as violating his right to refuse to give evidence, particularly since the witness and counsel for the latter had themselves, later on in the proceedings, invoked their right to refuse to testify. The State Council rejected the defendant’s request, and subsequently dismissed his appeal.

II. Having regard to the case-law of the European Court of Human Rights to the effect that the fairness of a hearing must be assessed as a whole, the State Council considers that there was no violation in the instant case of the fundamental principle “*nemo tenetur*”, since the defendant was well aware of his right not to make self-accusatory statements. The fact that this information was transmitted in an erroneous manner, notably in the light of §107 of the Code of Criminal Procedure (right of witnesses to refuse to testify), does not affect the legitimacy of the overall proceedings.

Moreover, according to the State Council, §198a.1 of the Code of Criminal Procedure stipulates that the witness's right to refuse to testify refers solely to the reading out of records and administrative documents containing the witness's statements. There is clearly no rule deriving from Article 33 of the Constitution or Article 6 ECHR which would permit any broader interpretation.

Furthermore, the scope of the right to refuse to testify protects the secrecy of all correspondence between lawyers and their clients, particularly in criminal proceedings. This is not the case here, because the correspondence in question was not between the defendant and his lawyer but with counsel for the witness in the proceedings. This difference means that the right to refuse to testify is not violated if the courts have utilised evidence produced by counsel for the witness, even where the witness and his counsel have relied on their right to refuse to testify at a later stage in proceedings.

Languages:

German.



Identification: LIE-2012-2-002

a) Liechtenstein / **b)** State Council / **c)** / **d)** 29.08.2011 / **e)** StGH 2011/11 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

2.1.3.3 Sources – Categories – Case-law – **Foreign case-law.**

3.13 General Principles – **Legality.**

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

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:

Personality rights, posthumous nature / Professional secrecy, trust.

Headnotes:

Only persons directly affected by a violation of personality rights can take action to defend such rights. They may not adduce, through legal representation, a violation of the personality rights of deceased members of their family. They can only do so to the extent that their own privacy has been infringed.

The question of whether the right to information on a deceased person is also applicable to members of his or her family is essential for guaranteeing the right to protection of personal data. This question must therefore be settled by the legislature.

Summary:

The applicant had submitted to a trust agency a request under the Data Protection Act for information on her deceased spouse, without providing specific evidence to demonstrate the existence of a business relationship. This information was withheld, and the competent courts rejected her subsequent appeal. The State Council also rejected the applicant's further appeal against these decisions.

In rejecting this appeal the State Council drew on Swiss doctrine and case-law, because the applicable legislation is broadly based on the Swiss model, which, unlike the case-law of the German Federal Constitutional Court, does not recognise posthumous personality rights.

The State Council also found that provisions of the Data Protection Act are not applicable where other provisions provide similar protection, and recalled on this occasion the prime importance of professional secrecy in both the banking and trust fields.

Languages:

German.



Lithuania

Constitutional Court

Important decisions

Identification: LTU-2012-2-006

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 29.03.2012 / **e)** 21/2010-30/2010 / **f)** On the legal provisions regulating the electoral conditions / **g)** *Valstybės Žinios* (Official Gazette), 40-1973, 03.04.2012 / **h)** CODICES (English, Lithuanian).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Election, deposit / Political parties, discrimination / Election, thresholds / List, joint, candidates / Election, conditions.

Headnotes:

The requirement that an election deposit must be paid in advance neither denies the property owner's right nor limits this right in a disproportionate manner, even if it is not refunded. The deposit is required when a candidate for President submits his or her application documents.

In establishing procedures to determine the election results of Members of the *Seimas*, according to the Constitution, the legislator may choose the election threshold as a legal institution because the legislator enjoys the discretion to establish a concrete minimal percentage limit of voters' votes.

Summary:

I. Two groups of parliamentarian members initiated the case. They challenge provisions of the electoral laws

and provisions of the Law on the funding of, and control over the funding of, political parties and political campaigns. These provisions regulate the election deposit payment, candidates' submission of declarations, reach of the election threshold, conclusion of an agreement with the political campaign treasurer, and distribution of the state budget fund to political parties.

II. The Court primarily ruled on the constitutionality of provisions pertaining to the election deposit requirement. It stressed that while regulating the election relations connected with the procedures for the President's election, the legislator may establish, *inter alia*, constitutionally grounded conditions to implement the passive electoral right to proportionally ensuring that the presidential election would be a responsible process that only comprises serious candidates. Therefore, in regulating the election relations, the legislator, under the Constitution, may consolidate the election deposit as a legal institution and enjoy the discretion to establish the terms of the process. Such discretion includes determining at which procedural stage of the presidential elections the election deposit must be paid, who is allowed to pay the election deposit, at which procedural stage of the presidential elections or whether the election deposit is refunded to the person who has paid it and the conditions of such refund.

It was also noted that the advance election deposit requirement, which is binding upon a freely nominated or freely self-nominated candidate's application for President, neither denies the right of the owner to property nor limits this right in a disproportionate manner. Furthermore, because the provisions requiring the election deposit payment apply to all presidential candidates, there are no sufficient grounds to state that the legal regulation under consideration discriminates smaller political parties or individual persons. This is particularly relevant to parties and persons whose possibilities of paying the deposit are more limited and are more influenced by the fact that the deposit may not be refunded.

The Court also ruled on the constitutionality of the provisions of the Law on Elections to the *Seimas*. It determined that the list of party candidates may receive mandates of Members of the *Seimas* (participate in the distribution of mandates) only if that list receives no less than 5% of votes cast by the voters who participated in the election, and the joint list of candidates – if it receives no less than 7% of votes.

The Court *inter alia* stressed that no system of elections may ensure that the established election results would reflect the vote of each voter participating in the election and that each candidate for whom at least a certain number of voters have cast their votes would participate in the distribution of

mandates. Nevertheless, it is important that this system not favour certain subjects over others in implementing their passive electoral right. Moreover, this system should avoid creating any preconditions that do not reflect the will of the majority of voters.

The Court noted that the amounts (5 % and 7 %) of the election thresholds established by the impugned legal regulation do not create preconditions that fail to reflect the interests of various voters. Also, the said amounts do not violate the voters' right to participate in governing their state through their democratically elected representatives.

The Court held that the legal regulation under consideration is constitutionally grounded, creating preconditions to avoid the fragmentation of the *Seimas* into small groups. The regulation also ensures the stability and efficiency of work of the *Seimas* and the stability of the Government whose activity is grounded on the confidence of the *Seimas*. Under the majoritarian system of elections or under the proportionate system of elections where a mixed system of elections has been formed, it is not sure that absolutely all the votes cast by the voters would determine the election of the candidates for Members of the *Seimas* who compete in the 71 single-member electoral constituencies and for the lists of candidates who compete in the multi-member electoral constituency. Also, it is not clear that all those candidates for whom those votes were cast would represent them later.

The Court stated that the impugned legal regulation does not deny the possibilities of the Nation to implement the supreme sovereign power directly or through democratically elected representatives. Also, the regulation does not distort the right of citizens to participate in the governance of their state both directly and through their democratically elected representatives and does not tighten the constitutional grounds of the elections of representatives of the Nation – Members of the *Seimas*.

This ruling also analysed other conditions to stand for the elections, such as submission of declarations of candidates, conclusion of an agreement with the political campaign treasurer, the funding of the electoral campaign, etc.

III. This ruling had one dissenting opinion.

Supplementary information:

The judgment prompted wide discussion amongst legal writers as well as society as a whole. It also led to initiatives in Parliament to change the Constitution (process currently started but not completed yet).

Languages:

Lithuanian, English (translation by the Court).



Identification: LTU-2012-2-007

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 04.06.2012 / **e)** 36/2009-20/2010-4/2011-9/2011 / **f)** On criminal liability for murder of a close relative or family member or for causing a severe health impairment to him / **g)** *Valstybės Žinios* (Official Gazette), 64-3246, 07.06.2012 / **h)** CODICES (English, Lithuanian).

Keywords of the systematic thesaurus:

5.2.2.5 Fundamental Rights – Equality – Criteria of distinction – **Social origin**.

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

Keywords of the alphabetical index:

Criminal liability / Murder / Health, impairment / Family member / Feature, qualifying.

Headnotes:

The situation of people who murdered their close relative or family member is not the same as that of people who committed the same deed but do not have close family ties with the victim. The different criminal liability established for people who committed the aforementioned crimes against the life or health of a human being is objectively justified.

Summary:

I. The constitutional justice case was initiated by two courts of general jurisdiction that disputed provisions of the Criminal Code. The challenged legal regulation established stricter criminal liability respectively for the murder of one's close relative or family member, or severely impairing his or her health.

The petitioners allege that the life or health of a human being must not be assessed according to individual or other features of a person. Therefore,

the life or health of a close relative or family member may not have any other more significant feature under which his or her life or health would be distinguished in comparison to people who do not have such a feature. Furthermore, according to the petitioners, the challenged legal regulation creates a precondition to assess, in a different manner, the same legal facts – murder and severe health impairment. This occurs if no other features qualifying the crime have been established except for family relation or relation by kin between the culprit and the victim. Finally, such regulation may limit the court's possibilities to properly evaluate the concrete situation and all the circumstances of the commission of a criminal deed and to impose a just punishment.

II. The Court noted that the legislator may – while taking into account the nature, gravity, scale and other features of the crime and other significant circumstances – consolidate different legal regulations and establish a different legal liability for similar crimes. It was also stressed that it stems from the provisions of the Constitution that the life of a human being, inviolability of the person, close relation by kin, family, motherhood, fatherhood and childhood are constitutional values. Yet, the constitutional principle of a state governed by the rule of law provides the legislator with discretion to establish strict criminal liability for persons who attempt to harm their close relatives or family members. Such liability may vary according to the extent of the attempted harm inflicted.

The Court held that by establishing a stricter criminal liability for murder of one's close relative or family member or the severe impairment of his or her health, one sought to protect not only such constitutional values as the life of a human being, the inviolability of the person, but also the close relation by kin, family, motherhood, fatherhood, childhood. Thus, by the crimes under consideration, one attempts not only to put in danger the life of a human being, the inviolability of a person, but also other constitutional values. Consequently, having provided stricter criminal liability in the legal regulation under consideration, the legislator made a distinction between the criminal liability for the different levels of crimes. They are crimes whereby an attempt is made not only to put an end to a human life, to the inviolability of a person, but also on other constitutional values, where a correspondingly stricter criminal liability is established. The establishment of such stricter criminal liability means that a reasonable differentiation has been made between them, and it allows the Court to choose a just punishment. The Court ruled that the challenged legal regulation meets the requirements of the constitutional principle of a state governed by the rule of law.

The Court stated that the situation of people who murdered their close relative or family member or severely impaired his or her health and people who committed the same deed but do not have family ties with the victim, is not the same. The people related by the said relations attempted to violate not only such constitutional values as the life of a human being, the inviolability of the person, but also such constitutional values as close relation by kin, family, motherhood, fatherhood, childhood. The different criminal liability established for people who committed the aforementioned crimes against the life or health of a human being, having different levels of gravity, is objectively justified. It was concluded, that there is no ground to state that by the impugned provisions one violates the principle of equality of all persons before the law.

Languages:

Lithuanian, English (translation by the Court).



Identification: LTU-2012-2-008

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 19.06.2012 / **e)** 15/2009 / **f)** On restoration of the ownership rights of religious associations / **g)** *Valstybės Žinios* (Official Gazette), 70-3612, 23.06.2012 / **h)** CODICES (English, Lithuanian).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Religion, association / Property rights, restoration / Term limits for application / *Restitutio in integrum.*

Headnotes:

If the legislator establishes a sufficient (reasonable) term for people to file their applications for the restoration of their ownership rights, the legislator does not have to establish a corresponding regulation enabling courts to renew this term for people who missed it for certain reasons. In itself, the mere fact that the legislator renders it possible for courts to renew the application term to restore the ownership

right of citizens who, due to certain reasons, missed it, does not mean that, under the Constitution, the legislator must entrench an identical legal regulation also in the law restoring the right of ownership of religious associations – legal persons, which differ from citizens in essence according to the possibilities to implement their rights.

Summary:

I. Initiated by the administrative court, this case involved a religious association that asked to renew the term for filing the application to restore the rights of its ownership to the existing real property. As such, the petitioner alleges that this denies the legitimate expectations of a part of members of society to receive a fair compensation for the expropriated real property. It reasons that a religious association, if it does not file an application to restore the rights of ownership within one year after the entry into force of this law, loses its right to restoration of the rights of ownership. The petitioner refers to the provisions of the official constitutional doctrine whereby the state has a duty to act so that the rights of ownership would be restored to the owners; the owners have a legitimate expectation that their rights of ownership to the existing residential houses, parts thereof, flats will be restored; and such a legitimate expectation is protected and defended by the Constitution.

II. The Court held that the Law does not provide *expressis verbis* that in accordance with a certain procedure, the missed one-year term to file applications to restore the right of ownership to the existing real property and the return of the property may be renewed with religious associations. Also, it does not provide *expressis verbis* that religious associations that missed the term (established in the Law) to file the applications end up losing the right to restore the right of ownership.

The Court emphasised that the legislator, while regulating the restoration of ownership rights, enjoys discretion to establish *inter alia* the time limits for filing applications to restore the rights of ownership. While doing so, the legislator must take account of the fact that unreasonably long time limits, especially groundless prolongation thereof (*inter alia* multiple lengthening thereof), may distort the institute to restore the ownership rights of existing real property. The relevant official constitutional doctrine, *inter alia* the requirements disclosed therein for terms within which applications must be filed, is to be applied *mutatis mutandis* to the legal regulation on restoring the ownership rights of religious associations to the existing real property. This includes, *inter alia*, the establishment of terms within which applications of religious associations must be filed. Thus, the legislator, while

regulating the restoration of ownership rights of religious associations to the existing real property, enjoys discretion to establish *inter alia* constitutionally sufficient (reasonable) terms of applications of religious communities to restore the rights of ownership. While doing so, the legislator must take account of the fact that unreasonably long time limits to restore the rights of ownership of religious associations to the existing real property may distort the institute of restoration of the rights of ownership to the existing real property.

The Court also recalled that until respective state institutions have not adopted a decision on the restoration of ownership rights, in reality, the persons to whom the rights of ownership are restored do not enjoy the subjective rights to the property which earlier belonged to them. The principle of equality of all persons does not deny a possibility to provide in a law for a different legal regulation in respect to certain categories of persons who are in different situations.

Thus the Court held that neither the Constitution – *inter alia* Articles 23 and 29 of the Constitution – nor the constitutional principle of a state under the rule of law requires the legislator to establish *expressis verbis* such legal regulation to restore ownership rights of religious associations (*inter alia* the term of filing applications) compatible with the established legal regulation on restoration of the rights of ownership of citizens. The latter includes, *inter alia*, the term of applications of citizens requesting to restore the rights of ownership (and the possibility to renew such a term).

Languages:

Lithuanian, English (translation by the Court).



Identification: LTU-2012-2-009

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 05.09.2012 / **e)** 8/2012 / **f)** On the prohibition for a person, who was removed from office under procedure for impeachment proceedings, to stand in elections for a Member of the *Seimas* / **g)** *Valstybės Žinios* (Official Gazette), 105-5330, 08.09.2012 / **h)** CODICES (English, Lithuanian).

Keywords of the systematic thesaurus:

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

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

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

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

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

Keywords of the alphabetical index:

Treaty, international, conflict / Constitution, supremacy / Re-interpretation / Impeachment / Constitutional doctrine, overruling.

Headnotes:

By establishing a legal regulation that ignores the constitutional liability for a gross violation of the Constitution and breaches the oath decided in the Constitutional Court ruling of 25 March 2004, the legislator had tried to overrule the power of the aforesaid Constitutional Court's ruling. By doing so, the legislator violated the constitutional prohibition to repeatedly establish, by adopting corresponding laws, a legal regulation inconsistent with the concept of the Constitution set in the ruling, as well as with the principle of integrity of the Constitution and the principle of supremacy of the Constitution.

When the legal regulation entrenched in a ratified international treaty competes with the one established in the Constitution, the provisions of such an international treaty do not have priority with regard to their application. Consequently, the judgment of the European Court of Human Rights itself may not be a ground to ignore the Constitutional Court's jurisprudence.

Summary:

I. The case was initiated by the group of parliamentarians. The origins of this case arise from a Constitutional Court decision of 25 May 2004, when the Constitutional Court judged that a person removed from office or his or her mandate under impeachment proceedings, could never be re-elected to the position that requires the swearing of an oath, e.g. President of the State, a Member of the Parliament, a judge,

etc. After this decision, the privy – former President of Lithuania who had been dismissed from office because of a breach of the oath-addressed its petition to the European Court of Human Rights, insisting that its electoral rights had been violated. The challenged Law, which established the legal regulation impugned in the case at issue, was adopted while reacting to the judgment of the Grand Chamber of the European Court of Human Rights in the case of *Paksas v. Lithuania* (Application no. 34932/04) of 6 January 2011. In that case, the permanent and irreversible prohibition for a person, who was removed from office in accordance with impeachment proceedings for a gross violation of the Constitution and a breach of the oath, to stand in elections to the *Seimas* was recognised as disproportionate and a violation of the right entrenched in Article 3 Protocol 1 ECHR. In the judgment, it was noted that the aforesaid prohibition is set in constitutional stone.

The petitioner claims that this Law is unconstitutional, because the former wording of the Constitution prohibiting the re-election to all offices requiring a swearing in is still valid. The simple Law cannot overrule the existing constitutional jurisprudence even after the decision of the European Court of Human Rights. While establishing the same legal regulation that had already been recognised as unconstitutional, the *Seimas* exceeded the powers of the parliament established in the Constitution. This occurred when the *Seimas* had adopted the Law which establishes a legal regulation (which is still different from the one established in the Constitution) permitting the election to the *Seimas* of a person, who has been removed from office, or whose mandate as a parliamentarian had been revoked under impeachment proceedings.

II. The Constitutional Court recognised that the challenged Law conflicts with the Constitution. First of all, the Court recalled that it is bound by its own precedents and by official constitutional doctrine that it has formed, which substantiates those precedents. The necessity to reinterpret certain official constitutional doctrinal provisions so that the official constitutional doctrine would be corrected (as required in the decision of the European Court of Human Rights) may be determined only by circumstances necessary to increase the possibilities to implement the innate and acquired rights of persons and their legitimate interests. This also includes the need to better defend and protect the values enshrined in the Constitution, to create better conditions to reach the country's aims set in the Constitution, on which the Constitution itself is based, and to expand the possibilities of the constitutional control in this country. However, in this case, the Court did not envisage the aforesaid necessity to reinterpret the constitutional doctrine.

The Court stated that the aforesaid judgment of the European Court of Human Rights means that provisions of Article 3 Protocol 1 ECHR insofar as they imply the international obligation of the Republic to guarantee the right of a person – especially a person whose mandate as a Member of the *Seimas* has been revoked through impeachment proceedings and a person who has been removed through impeachment proceedings for a gross violation of the Constitution and a breach of the oath from the offices where the person needs to be sworn in, to stand in elections for a Member of the *Seimas* – are incompatible with the provisions of the Constitution.

The main responsibility for the effective implementation of the European Convention on Human Rights and its Protocols falls upon the states. Parties to the European Convention on Human Rights and its Protocols, therefore, enjoy broad discretion to choose the ways and measures to apply and implement the European Convention on Human Rights and its Protocols, including the execution of judgments of the European Court of Human Rights. However, such discretion is limited by the peculiarities (related to the established system of harmonisation of the national (domestic) and international law) of the legal systems of the states, including their constitutions and the character of the human rights and freedoms guaranteed under the European Convention on Human Rights and its Protocols. In this context, the Court underlined that the European Court of Human Rights plays a subsidiary role in the implementation of the European Convention on Human Rights and its Protocols. However, it neither replaces the competence and jurisdiction of national courts, nor is it an appeal or cassation instance with regard to judgments of the latter. Even though the case-law of the European Court of Human Rights, as a source for the construction of law, is important also for construction and application of Lithuanian law, the jurisdiction of the said Court does not replace the powers of the Constitutional Court to officially construe the Constitution.

In the course of the implementation of international obligations of the Republic in domestic law, one must take account of the principle of superiority of the Constitution entrenched in Article 7.1 of the Constitution. Emphasised by the Constitutional Court, the legal system of the Republic is grounded on the fact that any law or other legal act, as well as international treaties of the Republic, must not conflict with the Constitution. In itself, the constitutional provision of Constitutions' supremacy cannot invalidate a law or an international treaty, but it requires that the provisions thereof not contradict the provisions of the Constitution.

While construing the necessity to implement the decision of the European Court of Human Rights, the Court said that the constitutional institutions of impeachment, the oath and electoral right are closely interrelated and integrated. Changing any element of these institutions would change the content of other related institutions, i.e. the system of values entrenched in all aforementioned constitutional institutions would be changed. So in itself the judgment of the European Court of Human Rights may not serve as the constitutional basis for reinterpretation (correction) of the official constitutional doctrine (provisions thereof) if such reinterpretation, in the absence of corresponding amendments to the Constitution, changed the overall constitutional regulation (*inter alia* the integrity of the constitutional institutions – impeachment, the oath and electoral right) in essence. This also applies if it disturbed the system of the values entrenched in the Constitution and diminished the guarantees of protection of the superiority of the Constitution in the legal system.

On the other hand, the Court emphasised that respecting international law (i.e. the observance of international obligations undertaken on its own free will) and respect of universally recognised principles of international law (as well as the principle *pacta sunt servanda*) are a legal tradition and a constitutional principle of the restored independent State of Lithuania. Therefore from Article 135.1 of the Constitution, a duty arises for the Republic to remove the aforesaid incompatibility of the provisions of Article 3 Protocol 1 ECHR with Articles 59.2 and 74 of the Constitution. While taking account of the fact that, as mentioned, the legal system is grounded upon the principle of superiority of the Constitution, the adoption of the corresponding amendment(s) to the Constitution is the only way to remove this incompatibility.

III. There were two dissenting opinions in this decision. Their main argument was that the Constitutional Court should have chosen another way to implement the decision of European Court of Human Rights without changing the text of the Constitution itself – to re-interpret the constitutional jurisprudence. Both judges considered (in addition to other arguments) that the decision of the European Court of Human Rights was sufficient ground to re-interpret the Constitutional provisions and that the Constitution should be construed harmoniously with the state commitments under international law.

Languages:

Lithuanian, English (translation by the Court).



Mexico

Electoral Court

Important decisions

Identification: MEX-2012-2-006

a) Mexico / **b)** Electoral Court of the Federal Judiciary / **c)** High Chamber / **d)** 11.07.2012 / **e)** SUP-JDC-1782/2012 / **f)** / **g)** *Official Collection of the decisions of the Electoral Court of the Federal Judiciary of Mexico* / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

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

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

5.3.29.1 Fundamental Rights – Civil and political rights – Right to participate in public affairs – **Right to participate in political activity.**

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

Keywords of the alphabetical index:

Election, deputy, candidate / Requirement, reinstallation, license / Mayor.

Headnotes:

The requirements for being a Federal Deputy candidate are established in Articles 1, 5, 55 and 125 of the Constitution.

Summary:

I. A candidate, elected as federal deputy, brought the case to the Court, challenging a municipal authority's determination that he return to a public position previously implemented, a position that requires obtaining a license to comply with the electoral law.

The plaintiff claims that the requirement infringes his right to be elected, specifically his access to a public position – federal deputy – for which he was elected. He emphasised that he had complied with the requirement set forth in the Constitution, which is

separate from the public position that was held previous to the election.

II. The Court did not validate the agreement at issue, reasoning that it violates the right to be elected for individuals exercising a public service. In response to protecting the principle of impartiality established in the Constitution, the Court emphasised that it must be separate from the public position that was held before the election.

III. Judge Flavio Galván Rivera voted against the draft judgment. He considered that the matter should be referred to the Supreme Court to discuss conflict resolutions, determining that the municipal authority had placed a demand on the deputy of miscellaneous administrative tribunal.

Supplementary information:

Project presented by: Electoral Justice José Alejandro Luna Ramos.

Languages:

Spanish.



Netherlands

Supreme Court

Important decisions

Identification: NED-2012-2-002

a) Netherlands / **b)** Supreme Court / **c)** Civil Law Chamber / **d)** 09.04.2010 / **e)** 08/01354 / **f)** The Dutch State (Ministry of the Interior) v. Clara Wichmann Test Trials Foundation / **g)** *Landelijk Jurisprudentienummer, LJN: BK4549, NJ 2010, 388* / **h)** CODICES (Dutch).

Keywords of the systematic thesaurus:

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

4.9 Institutions – **Elections and instruments of direct democracy.**

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

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

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

Keywords of the alphabetical index:

Election, candidacy, restriction / Fundamental rights, balance / Religion, religious neutrality of the state.

Headnotes:

The Dutch government is legally obliged to take appropriate measures which ensure that the *Staatkundig Gereformeerde Partij* (the Reformed Protestant Party) does not discriminate against women by denying them the right to stand for election.

Summary:

I. This case concerns the position taken by a Dutch political party, the *Staatkundig Gereformeerde Partij* (the Reformed Protestant Party, hereinafter, the “SGP”), on the eligibility of women to be elected as public officials. The SGP is of the view, based on their

interpretation of the Bible, that women are not eligible to hold public office. They therefore do not allow women on their candidacy lists for public office. The Clara Wichmann Test Trials Foundation and four other non-governmental organisations (NGOs) concerned with women’s rights filed a tort action against the Dutch Government claiming that the Dutch State, by not taking appropriate and effective measures against this position of the SGP, is in violation of its obligations under Article 7 of the United Nations Convention on the Elimination of All Forms of Discrimination against Women (hereinafter, the “CEDAW”), which stipulates: “State Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right... [t]o vote in all elections and public referenda and to be eligible for election to all publicly elected bodies”.

Both the District Court of The Hague and the Appellate Court of The Hague held that the Dutch Government was in violation of its obligations under Article 7 of the CEDAW by not taking any appropriate measures against the SGP to require the SGP to reconsider its discriminatory position towards women. Both the Dutch Government and the SGP lodged an appeal on points of law to the Supreme Court. These appeals were joined and led to one judgment.

II. The Supreme Court held that Article 7 of the CEDAW had direct effect in the Dutch legal order and that this Article placed an obligation on the State to take all appropriate measures to ban the discrimination of women in political and public life, and, in addition, an obligation to ensure that political parties do not merely admit women as members, in so far as membership of a party is required for nomination as a candidate, but also to admit them to nomination as candidates itself.

Only by ensuring the latter could the State ensure the right of women to stand for election as guaranteed by Article 7 of the CEDAW. The Supreme Court held that the State has no margin of appreciation on this point. However, this does not alter the fact that the right to non-discrimination of women as set out in the CEDAW can in particular cases come in conflict with other equally important human rights such as the freedom of religion and freedom of association, and that in those cases the conflicting rights must be weighed against each other in order to decide which should take precedence. The basic rights of freedom of religion and freedom of association guarantee that citizens may unite in a political party on the basis of a religious or philosophical conviction and may express their conviction and the political principles and programmes based thereon within the framework of that party.

However, the Supreme Court stressed that, in a democratic state governed by the rule of law, these principles and programmes may only be given practical effect within the limits posed by laws and treaties. The general representative bodies represent the entire population without making distinctions among the citizens of whom the population is made up. They form the heart of the democracy and a guarantee for the democratic content of the State. The rights to vote and to stand for election are essential to guarantee the democratic content of these bodies. Article 4 of the Dutch Constitution and Article 25 of the International Covenant on Civil and Political Rights (ICCPR), taken together with Articles 2 and 7 of the CEDAW guarantee to everyone, without any distinction based on gender, the right to elect members of these bodies as well as to be elected to them. The right to vote and the right to stand for election necessarily go hand in hand in a democratic society, since the voters must be able to determine for themselves who among them should be eligible.

The Supreme Court therefore held that since the possibility to exercise the right to stand for election goes to the core of the State's democratic functioning, it is unacceptable that a political formation in composing its list of candidates violates a basic right that guarantees the elective rights of all citizens, regardless of whether such action reposes on a principle rooted in the religious or philosophical convictions of that political formation. The Supreme Court accordingly held that the Court of Appeal was right to conclude in its judgment that the Dutch State is obliged to take measures that will actually lead to the SGP allowing women to stand for election.

The SGP lodged an application with the European Court of Human Rights in Strasbourg on 6 October 2010 complaining that its rights under Articles 9, 10 and 11 ECHR were infringed by the judgment of the Supreme Court of 9 April 2010.

On 8 April 2011 the Minister of the Interior informed the Lower House of Parliament (*Tweede Kamer*) that he proposed to await the outcome of the SGP application to the European Court of Human Rights in Strasbourg before deciding whether to take any action to execute the decision of the Supreme Court of 9 April 2010.

On 10 July 2012 the European Court of Human Rights (Third Section) declared the application of the SGP inadmissible.

Cross-references:

- Administrative Jurisdiction Division of the Council of State, 27.01.2011, no. 201101075/1/H2, *Bulletin* 2011/1 [NED-2011-1-001];
- European Court of Human Rights, 10.07.2012, no. 58369/10.

Languages:

Dutch.



Identification: NED-2012-2-003

a) Netherlands / **b)** Supreme Court / **c)** Civil Law Chamber / **d)** 17.06.2011 / **e)** 10/03626 / **f)** X (a member of the parliament of Aruba) v. Y (a minister in the government of Aruba) / **g)** *Landelijk Jurisprudentienummer*, LJN: BQ2302 / **h)** CODICES (Dutch).

Keywords of the systematic thesaurus:

3.4 General Principles – **Separation of powers**.
 4.5.9 Institutions – Legislative bodies – **Liability**.
 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:

Fundamental right, restriction, justification / Parliament, immunity.

Headnotes:

Parliamentary immunity for statements made during a session of parliament is absolute. However, this does not constitute a violation of the right of access to court guaranteed by Article 6 ECHR as it is not an absolute right and interference with the right can be justified when it is in pursuance of a legitimate aim and the interference is necessary and proportional.

Summary:

I. Y, a minister in the local government of Aruba and a member of the political party in government at that

time, publicly accused X, a member of the Aruban parliament and leader of the opposition party, of being a paedophile during a session of parliament which was being broadcast live on a local news channel. X sued Y for defamation. Y claimed parliamentary immunity from suit as laid down in Article III.20 of the Aruban Constitution (*Staatsregeling van Aruba*). The Court of First Instance (*Gerecht in Eerste Aanleg van Aruba*) rejected the defence of immunity from suit and held that upholding the claim to parliamentary immunity by Y would amount to an infringement of X's right of access to court as guaranteed by Article 6 ECHR. The Court of Appeal (*Gemeenschappelijk Hof van Justitie van de Nederlandse Antillen en Aruba*) overturned this decision and held that the immunity from suit afforded to members of parliament, ministers and other participants in parliamentary debate in Article III.20 of the Aruban Constitution did not amount to a violation of X's right of access to court as guaranteed by Article 6 ECHR. X appealed against this decision on a point of law to the Supreme Court and argued that parliamentary immunity should not attach to statements made outside the scope of parliamentary debate.

II. The Supreme Court held that access to court as guaranteed by Article 6 ECHR is not an absolute right and interference with this right can be justified when it is in pursuance of a legitimate aim and the interference is necessary and proportional. The Supreme Court further held that parliamentary immunity as laid down in Article III.20 of the Aruban Constitution may constitute an interference with the right to access to court, but this interference is justified since it pursues a legitimate aim, which is twofold:

- i. the freedom of expression in the parliamentary debate; and
- ii. the separation of powers: any adjudication of claims regarding the defamatory nature of statements made in parliament would mean a violation of the principle of separation of powers which is at the core of the system of parliamentary democracy.

Cross-references:

- Council of State, 28.06.2002, *LJN: AE1544*, NJ 2002, 577;
- European Court of Human Rights, 17.12.2002, Application no. 35373/97 (*A. v. UK*).

Languages:

Dutch.



Identification: NED-2012-2-004

a) Netherlands / **b)** Supreme Court / **c)** Civil Law Chamber / **d)** 28.10.2011 / **e)** 10/05147 / **f)** The Dutch State (Ministry of Justice) v. a group of 8 squatters / **g)** *Landelijk Jurisprudentienummer*, *LJN: BQ9880* / **h)** CODICES (Dutch).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Remedy, effective / Housing, eviction, arbitrariness, protection.

Headnotes:

Legislation making squatting a criminal offence and granting the police the authority to evict squatters without a court order and without giving them any prior notice does not violate the right to an effective remedy given that, where a squatter has requested an injunction from the court in summary proceedings in order to prevent their eviction, the squatter is provided with the opportunity to have the proportionality of the eviction assessed by an independent tribunal.

Summary:

I. On 1 October 2010 legislation came into force which made squatting a criminal offence and which granted the police the authority to evict squatters without a court order and without giving them any prior notice. In an injunction procedure against the State a group of squatters put forward the claim that the new legislation amounted to a violation of their rights protected by Articles 8 and 13 ECHR since it did not afford them the procedural safeguard to have their eviction examined by a judge before they were actually evicted, thereby depriving them of an effective remedy against the impending violation of their right to a home.

II. The Supreme Court held that the new legislation did not constitute a violation of the right to an effective remedy in the case of an impending violation of the right to home and privacy as set out in the case law of the European Court of Human Rights. The public prosecutor's office had published its policy regarding the implementation of the new legislation and had announced that in cases where squatters had requested an injunction from the court in summary proceedings in order to prevent their eviction, it would await the outcome of these proceedings before executing the evictions. The Supreme Court held that this policy provided the squatters with the opportunity to have the proportionality of their eviction examined by an independent tribunal which fell within the ambit of the case law of the European Court of Human Rights.

Languages:

Dutch.



Identification: NED-2012-2-005

a) Netherlands / **b)** Supreme Court / **c)** Civil Law Chamber / **d)** 11.11.2011 / **e)** 10/02632 / **f)** X (a former alderman of the city of Delft) v. Y (a Delft city council member) and Z (the political party to which Y belongs) / **g)** *Landelijk Jurisprudentienummer, LJN: BU3917* / **h)** CODICES (Dutch).

Keywords of the systematic thesaurus:

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

5.3.31 Fundamental Rights – Civil and political rights – **Right to respect for one's honour and reputation.**

Keywords of the alphabetical index:

Political expression, freedom.

Headnotes:

Political speech is afforded a higher degree of protection from defamation charges than regular speech, even when it is expressed outside the political forum.

Summary:

I. X was an acting alderman of the city of Delft when a recording was leaked to the press of phone calls made by X while he was having dinner at a local Italian restaurant in which he discussed confidential city council deliberations in the course of a business proposition. On the basis of the information in the leaked recordings Y and Z accused X in several press publications of corruption, and of being a "liar" and a "drunk". X then sued Y and Z for defamation. The court of first instance declared the statements by Y and Z defamatory and held them liable for damages.

However, the Court of Appeal held that the statements of Y and Z were protected as political speech and did not constitute defamation. The Court of Appeal referred to the case law of the European Court of Human Rights with regard to the protection given to political speech by Article 10 ECHR and held that the protection given to statements which criticised politicians and public officials was broader than the protection given to statements aimed at private individuals. Since in this case the accusations made by Y and Z had a political context and referred to the actions of X as a public official, these statements were protected as political speech. This protection attaches to these political statements even when they are made outside the political forum – the city council in this case – and were made in press publications. X appealed to the Supreme Court on a point of law and argued that statements made by politicians outside the political forum were not protected as political speech.

II. The Supreme Court held that the Court of Appeal had not erred in its application of the relevant case law and that in the present case the statements made by Y and Z were protected as political speech even though they were made outside the political forum and in press publications.

Languages:

Dutch.



Identification: NED-2012-2-006

a) Netherlands / b) Supreme Court / c) Civil Law Chamber / d) 22.06.2012 / e) 11/01017 / f) Knooble v. 1. The Dutch State, 2. The Dutch Standardisation Institute / g) *Landelijk Jurisprudentienummer*, LJN: BW0393 / h) CODICES (Dutch).

Keywords of the systematic thesaurus:

3.15 General Principles – **Publication of laws.**
4.15 Institutions – **Exercise of public functions by private bodies.**

Keywords of the alphabetical index:

Legislative act, nature / Publication of laws.

Headnotes:

Standardisation norms (construction regulations, in the instant case) issued by the Dutch Standardisation Institute are not legal norms, as the Institute lacks the constitutional authority to issue legal norms. Standardisation norms are non-legally binding technical norms and the publication rules for legal norms, prescribed by Article 89 of the Constitution, are therefore not applicable.

Summary:

I. The Dutch Constitution (Article 89) stipulates that new legislation should be published in government-controlled publications (*Staatsblad* and *Staatscourant*) which are accessible to the public free of charge. Legislation concerning construction regulations (*Bouwbesluit* and *Regeling Bouwbesluit*) is published in that constitutionally prescribed manner. However, the construction regulations contain standardisation norms which are not published in the same free (government) publication. These standardisation norms are issued by the Dutch Standardisation Institute and are protected by copyrights. They are therefore only accessible free of charge at the library of the Dutch Standardisation Institute and the University of Delft, copies are made available to the public after payment to the Dutch Standardisation Institute.

The applicant claimed that this method of publication of construction regulations is unconstitutional on the basis that standardisation norms are legal norms and should therefore be published in the manner prescribed by Article 89 of the Dutch Constitution. The claim was put forward in both administrative and civil proceedings and was denied in the administrative proceedings. The court of first instance in the civil

court action held that the standardisation norms in the construction legislation should be published in the same manner prescribed by the Constitution for the construction legislation itself. However, the Court of Appeal held that standardisation norms are not legal norms and need not be made available to the public free of charge. The applicant appealed this decision to the Supreme Court on a point of law, arguing that standardisation norms become legal norms by their incorporation in the construction regulations and should therefore be published in the manner prescribed by Article 89 of the Dutch Constitution.

II. The Supreme Court held that the Dutch Standardisation Institute did not have the authority derived from the Constitution to issue legal norms and that standardisation norms were therefore non-legally binding technical norms and not legal norms. It held that the incorporation of standardisation norms in legislation did not change their status from technical norms to legal norms. The publication rules prescribed by Article 89 of the Constitution were therefore not applicable to standardisation norms issued by the Standardisation Institute. The copyrights attached to these norms were not nullified after the incorporation of these standardisation norms in the construction regulations. Neither the State nor the Dutch Standardisation Institute were therefore legally obliged to make the standardisation norms referred to in legislation available to the public free of charge.

Cross-references:

- Council of State, 02.02.2011, LJN: BP2750, AB 2011, 85.

Languages:

Dutch.



Netherlands

Council of State

Important decisions

Identification: NED-2012-2-007

a) Netherlands / **b)** Council of State / **c)** General Chamber / **d)** 15.08.2012 / **e)** 201111341 / **f)** De Kampanje and Others v. Minister of Education, Culture and Science / **g)** *Landelijk Jurisprudentienummer*, LJN: BX4695 / **h)** CODICES (Dutch).

Keywords of the systematic thesaurus:

3.19 General Principles – **Margin of appreciation**.
 5.3.13.1.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Criminal proceedings**.
 5.4.2 Fundamental Rights – Economic, social and cultural rights – **Right to education**.

Keywords of the alphabetical index:

Procedure, administrative / Constitution, judicial review / Education, school, parents' freedom of choice.

Headnotes:

The binding opinion of the Minister of Education, Culture and Science that an educational institution could no longer be regarded as a 'school' in the sense of the Compulsory Education Act 1969 does not constitute a violation of the rights to a fair hearing or to education as the Minister had interpreted the legal criterion 'education' in an adequate and proportionate way, the parents had the right to choose an educational institution which met certain minimum criteria set by the State, and the State had a margin of discretion in the matter, the exercise of which the courts should review only with restraint.

Summary:

I. The Minister of Education, Culture and Science (hereinafter, the "Minister") had issued a binding opinion indicating that De Kampanje, an educational institution (hereinafter, the "school") based on the Sudbury Valley School concept, which allows

students from pre-school to high school age explore the world freely, at their own pace and in their own unique ways (see <www.sudval.org>), could no longer be regarded as a 'school' in the sense of the Compulsory Education Act 1969. The applicants (the school, parents, pupils and teachers) lodged objections against the decision, which were rejected.

The applicants appealed to the District Court, which ruled that their appeal was unfounded. The applicants then appealed to the Administrative Jurisdiction Division of the Council of State, arguing, *inter alia*, that their rights under Article 6 ECHR and Article 23 of the Constitution and Article 2 Protocol 1 ECHR had been violated. The Administrative Jurisdiction Division found for the Minister.

II. The Administrative Jurisdiction Division held that Article 6 ECHR was not applicable in the present case. It did not apply to the preparatory stage of the decision-making process, as the decision did not establish any guilt on the part of the applicants. Neither could the institution be regarded as a charged person, nor the decision as a punishment. Besides, the decision and possible (future) prosecution of the parents, who were under a legal obligation to subscribe children in their care to a school in the sense of the Compulsory Education Act 1969, were not closely connected.

The applicants could not rely on their rights under Article 23 of the Constitution, as Article 120 of the Constitution stipulates that the constitutionality of Acts of Parliament, including the Compulsory Education Act 1969, cannot be reviewed by the courts.

The Administrative Jurisdiction Division of the Council of State ruled that Article 2 Protocol 1 ECHR had not been violated. The right protected by this provision was not unconditional, while the Minister had interpreted the legal criterion 'education' in an adequate and proportionate way. The parents had the right to choose an educational institution which met certain minimum criteria set by the State. The State had a margin of discretion in the matter, the exercise of which the courts should review only with restraint. In this case the criteria had been clear, foreseeable and proportionate, leaving room for a variety of pedagogical convictions.

Cross-references:

- European Court of Human Rights, *Hrdalo v. Croatia*, 27.09.2011, no. 23272/07;
- European Court of Human Rights, *Konrad v. Germany*, 11.09.2006, no. 35504/03; and
- Administrative Jurisdiction Division of the Council of State, *De Koers*, 15.08.2012, no. 201009068/1/1A2.

Languages:

Dutch.



Norway Supreme Court

Important decisions

Identification: NOR-2012-2-002

a) Norway / **b)** Supreme Court / **c)** Grand Chamber / **d)** 29.03.2012 / **e)** 2012-00669-S / **f)** / **g)** *Norsk retstidende* (Official Gazette), 2012, 519 / **h)** CODICES (Norwegian, English).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Judicial review.

Headnotes:

Courts are authorised to review the Criminal Cases Review Commission's decision to not reopen a criminal case. While courts may review the general interpretation of the said provisions, they can neither review the Commission's assessment of evidence nor the concrete application of the law. Nevertheless, the courts must review whether the Commission has complied with fundamental rules of procedure, such as compliance with impartiality requirements and the adversarial principle. Unless the issue is a question of serious and obvious errors, other aspects of the Commission's procedure fall outside the right of review.

Summary:

I. The case concerns whether courts possess the competence to review a decision made by the Criminal Cases Review Commission (hereinafter, the "Review Commission") not to reopen a criminal case. The case involved a man who, in 2002, was convicted of rape and premeditated murder of two minor girls. His sentence was set at eleven years of

preventive detention with a minimum term of ten years. In 2008, he filed three requests to reopen the case, based on new evidence that satisfy a reopening under Section 391.3 of the Criminal Procedure Act or alternatively, a reopening under Section 392.2 of the Criminal Procedure Act. The Review Commission denied the requests.

The convicted person issued a writ requesting that the Review Commission's decision be found invalid. He primarily argued that the courts have full competence to review the Commission's decisions and that the conditions to reopen contained in *inter alia* Sections 391.3 and 392.2 of the Criminal Procedure Act were satisfied. In the alternative, he argued that the decisions suffered from specifically stated errors. In response, the State submitted that the court's review must be limited to the Commission's general interpretation of the law and procedure.

The District Court decided to split the main hearing under Section 16-1 of the Disputes Act, limiting the issue to the courts' right of review. If the Court should conclude that the right of review was limited in the way submitted by the State, the validity of the decisions would have to be decided on this basis.

In the District Court's view, the courts' right of review was limited, but not to the extent submitted by the State. Within the framework that it believed applied to the review, the District Court did not find any errors in the Commission's decision. The court therefore found in favour of the State.

The convicted person appealed and applied for leave to bring the case directly before the Supreme Court. The Appeals Committee granted the application as regard to the submission that the courts have full competence to review the Commission's decisions. The Appeals Committee emphasised that the proceedings before the Supreme Court must be limited to the issue of the courts' review competence. The Chief Justice of the Supreme Court decided that the Grand Chamber would try the case.

II. The Supreme Court held that a convicted person, whose request to reopen a case has been rejected, may bring a validity action before the courts to review the Review Commission's decision. The issue was whether there were limits to the courts' judicial review competence.

There are no rules of law that directly regulate the extent of the judicial review competence. However, the Supreme Court found that the legislative history and the preliminary works leading to the establishment of the system of a separate review commission showed that the legislator had not

intended for the courts to have full right of review. In a proposition to amend the law, the Ministry of Justice had admittedly stated that regarding the Commission's decisions, the same rules were to apply as for administrative decisions in general. This should not be interpreted to mean that, according to the Ministry, the courts were to have full right of review. The Supreme Court highlighted the fact that the Ministry had explicitly rejected a system with full review based on the Criminal Procedure Act system. Accordingly, there was no reason to think that the Ministry had meant that, instead, a full-scale review could take place by civil actions. The Standing Committee on Justice must be understood in the same way.

The Supreme Court stated that the Review Commission was established in response to the need for distance between the courts and the instance that decides on requests to reopen cases. The legislator was, therefore, opposed to the principle that a full-scale review of the Commission's decisions should be allowed in case of criminal procedure appeals. This attitude must have validity also in relation to the civil procedure track.

In this light, the Supreme Court evaluated more concretely what the courts can review when the Commission has denied a request to reopen a case under Sections 391.3 and 392.2 of the Criminal Procedure Act.

The Supreme Court found it clear that the courts are authorised to review the Commission's general interpretation of the said provisions.

However, the Commission's assessment of evidence cannot be reviewed. Reference was made to the fact that the considerations on which the establishment of a separate commission was based were particularly relevant for the assessment of evidence. It would be contrary to the idea behind the establishment of the Commission if the courts could be made into an arena for rematches concerning the evidence.

The concrete application of the law also cannot be reviewed. Since Sections 391.3 and 392.2 partly recommend very discretionary evaluations, the Commission needs to look into the evidence adduced in the criminal case rather thoroughly in order to decide on the request to reopen a case. The courts cannot review the Commission's concrete application of the law without doing the same. A review of the application of the law would therefore *de facto* easily open the door to a rematch about the assessment of evidence, which would be contrary to the legislator's intent.

Finally, the courts must review whether the Commission has complied with fundamental rules of procedure, such as compliance with requirements as to impartiality and the adversarial principle. However, unless it is a question of serious and obvious errors, other aspects of the Commission's procedure fall outside the right of review. The Supreme Court underscored that it would be contrary to the fundamental idea behind the establishment of the Commission if the courts were authorised to review the Commission's evaluations as to what investigations of the case are necessary.

The said limits to the right of review were in the Supreme Court's view neither contrary to Section 88 of the Constitution nor any other constitutional rules or principles. Additionally, the limits did not constitute a breach of the European Court of Human Rights, Article 6.1 ECHR.

That the rules in force at the time of the offence and sentence entailed a right to use a criminal procedure appeal against a refusal to reopen a case – with full right of judicial review for the Court of Appeal – did not mean that Section 97 of the Constitution prohibited the use of the said review limitations in the concrete case. The provision does not prevent the application of new rules of procedure to older cases, even if it entails that the position of the person concerned becomes less advantageous. It is possible that certain reservations need to be made if the procedural amendments are made while a case is still pending before the courts. This was not the case here, however.

The appeal was quashed.

Languages:

Norwegian, English (translation by the Court).



Poland

Constitutional Tribunal

Statistical data

1 May 2012 – 31 August 2012

Number of decisions taken:

Judgments (decisions on the merits): 24

- Rulings:
 - in 13 judgments the Tribunal found some or all of the challenged provisions to be contrary to the Constitution (or other act of higher rank)
 - in 11 judgments the Tribunal did not find the challenged provisions to be contrary to the Constitution (or other act of higher rank)
- Initiators of proceedings:
 - 3 judgments were issued upon the request of the President of the Republic (*ex post facto* review)
 - 1 judgment was issued upon the request of Members of Parliament
 - 1 judgment was issued upon the request of the Commissioner for Citizens' Rights (i.e. Ombudsman)
 - 1 judgment was issued upon the request of the First President of the Supreme Court
 - 1 judgment was issued upon the request of the Prosecutor General
 - 1 judgment was issued upon the request of the National Bailiffs' Council
 - 13 judgments were issued upon the request of courts – the question of legal procedure
 - 3 judgments were issued upon the request of a legal person – the constitutional complaint procedure
- Other:
 - 3 judgments were issued by the Tribunal in plenary session
 - 6 judgments were issued with at least one dissenting opinion

Important decisions

Identification: POL-2012-2-003

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 13.06.2011 / **e)** SK 41/09 / **f)** / **g)** *Dziennik Ustaw* (Journal of Laws), 2011, no. 130, item 762; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2011, no. 5A, item 40 / **h)** CODICES (English, Polish).

Keywords of the systematic thesaurus:

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

5.2 Fundamental Rights – **Equality.**

5.2.1 Fundamental Rights – Equality – **Scope of application.**

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

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

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

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

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

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

Keywords of the alphabetical index:

Real estate / Warsaw Decree.

Headnotes:

No rational justification exists that former owners of immovable properties other than single-family houses and of plots of land meant for development other than the construction of single-family housing should be deprived of the right to compensation.

In such a situation, the unique character of the expropriation institution allows one to assume that the right to compensation is a substitute for the right of ownership of immovable property.

Excessively restricting compensation claims arising from infringements on the right of ownership may be regarded as an unauthorised interference with the legal protection of ownership itself.

The restrictions on the rights of the former owners of immovable properties in Warsaw and the limited

compensatory responsibility of the State Treasury appear to be aimed at protecting its budget.

Full satisfaction of compensation claims put forward by persons (or their legal successors) who lost the ownership of immovable property as a result of the Warsaw Decree could actually infringe on the constitutional rights of other persons on a massive scale.

Summary:

I. The applicants requested the Tribunal to examine the constitutionality of Article 215.2 of the Act of 21 August 1997 on the Management of Immovable Property (Journal of Laws – Dz. U. of 2010, no. 102, item 651, as amended), [hereinafter, the “Act”].) The applicants claim that it rules out the application of the provisions of the Act concerning compensation for expropriated immovable property. Based on Decree of 26 October 1945 on the Ownership and Use of Land in the Capital City of Warsaw (Journal of Laws – Dz. U. no. 50, item 279), the property became state property that turned into buildings other than single-family homes. This included multi-family house, commercial buildings and tenement house, as well as to plots of land, which could have been used for buildings other than single-family houses before the Decree had entered into force. Several articles in the Constitution are implicated: Articles 2, 21.2, 31.3, 32, 64.2 and 77.1 of the Constitution.

II. According to the applicants, the provisions do not conform to Article 32 of the Constitution. The reason is that the Warsaw Decree, initially, did not differentiate the legal situation of individuals, who lost immovable property as a result of the application of the said decree. Differentiation of this kind was introduced only in subsequent legislation, e.g. in the challenged Act. The challenged provisions limit the right to just compensation disproportionately. The right of ownership may only be limited by means of a statute and only to the extent that it does not violate the substance of such right. Furthermore, the said limitation finds no substantiation in the values indicated in Article 31.3 of the Constitution.

According to the Tribunal, systemic changes after 1989, which were finalised by the entry into force of the Constitution of 1997, have restored the unified character of ownership and the equal protection thereof. Article 64.2 of the Constitution currently provides an interpretation rule to apply provisions on ownership.

The right to compensation is undoubtedly an autonomous subjective right. A claim related thereto is normative in form, which constitutes one of the

“other property rights” within the meaning of Article 64.1 of the Constitution. As such, it is subject to a separate protection based on Article 64.2 of the Constitution. The unique character of the institution of expropriation allows one to assume that in such a situation, the right to compensation is a kind of substitute for the right of ownership of immovable property.

At the moment, there is no rational justification for the fact that the former owners of immovable properties other than single-family houses and of the plots of land meant for other development than the construction of single-family housing were deprived of the right to compensation. It is, furthermore, impossible to link the omission of the former owners of immovable properties other than single-family houses and of plots of land meant for development other than the construction of single-family housing – Article 215.2 of the Act on the Management of Immovable Property – to any constitutional values, principles or norms.

It should be noted that, currently, the complicated legal situation of immovable properties, which were lost subsequent to the Warsaw Decree, resulted from the inconsistent policy of the legislator combined with the post-war political decisions taken on a mass scale. The consequences may not be reversed or fully remedied without detriment to the public interest.

III. One dissenting opinion was raised.

Cross-references:

Decisions of the Constitutional Tribunal:

- Decision U 7/87 of 09.03.1988, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1988, item 1;
- Decision K 10/92 of 23.02.1993, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1993, no. 1, item 5, *Bulletin* 1993/2 [POL-1993-2-006];
- Decision K 8/94 of 20.12.1994, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1994, no. 2, item 43;
- Decision K 11/94 of 26.04.1995, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1995, no. 1, item 12;
- Resolution W 19/95 of 18.06.1996, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1996, no. 3, item 25, *Bulletin* 1996/2 [POL-1996-2-010];
- Decision K 10/96 of 03.09.1996, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1996, no. 4, item 33, *Bulletin* 1996/3 [POL-1996-3-013];
- Decision K 25/95 of 03.12.1996, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1996, no. 6, item 52, *Bulletin* 1996/3 [POL-1996-3-018];
- Judgment K 8/97 of 16.12.1997, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1997, no. 5-6, item 70;
- Judgment K 37/97 of 06.05.1998, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1998, no. 3, item 33, *Bulletin* 1998/2 [POL-1998-2-009];
- Judgment SK 4/98 of 24.02.1999, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1999, no. 2, item 24;
- Judgment K 23/98 of 25.02.1999, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1999, no. 2, item 25, *Bulletin* 1999/1 [POL-1999-1-005];
- Judgment K 34/98 of 02.06.1999, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1999, no. 5, item 94, *Bulletin* 1999/2 [POL-1999-2-019];
- Judgment P 11/98 of 12.01.2000, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2000, no. 1, item 3, *Special Bulletin Human Rights Limitations* [POL-2000-H-001]; *Bulletin* 2000/1 [POL-2000-1-005];
- Procedural decision Ts 182/99 of 08.06.2000, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2000, no. 5, item 172;
- Judgment SK 7/00 of 24.10.2000, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2000, no. 7, item 256;
- Judgment P 4/99 of 31.01.2001, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2001, no. 1, item 5, *Bulletin* 2001/1 [POL-2001-1-006];
- Judgment K 23/00 of 29.06.2001, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2001, no. 5, item 124;
- Procedural decision SK 10/01 of 24.10.2001, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2001, no. 7, item 225;
- Judgment SK 22/01 of 24.10.2001, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2001, no. 7, item 216, *Bulletin* 2002/2 [POL-2002-2-011];
- Judgment K 45/01 of 25.06.2002, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2002, no. 4A, item 46, *Bulletin* 2002/2 [POL-2002-2-020];
- Procedural decision SK 17/02 of 11.12.2002, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2002, no. 7A, item 98;
- Judgment K 33/02 of 19.12.2002, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2002, no. 7A, item 97, *Bulletin* 2003/1 [POL-2003-1-012];

- Judgment K 24/01 of 06.01.2003, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2003, no. 1A, item 1;
- Judgment K 39/01 of 19.05.2003, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2003, no. 5A, item 40, *Bulletin* 2003/2 [POL-2003-2-022];
- Judgment SK 5/03 of 09.06.2003, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2003, no. 6A, item 50;
- Judgment SK 23/02 of 06.10.2004, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2004, no. 9A, item 89;
- Procedural decision SK 42/03 of 11.10.2004, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2004, no. 9A, item 99;
- Judgment K 10/04 of 22.02.2005, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2005, no. 2A, item 17;
- Judgment SK 7/03 of 04.04.2005, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2005, no. 4A, item 34;
- Judgment P 17/04 of 08.09.2005, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2005, no. 8A, item 90;
- Judgment SK 25/02 of 08.11.2005, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2005, no. 10A, item 112;
- Judgment SK 8/05 of 22.11.2005, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2005, no. 10A, item 117;
- Judgment K 4/06 of 23.03.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2006, no. 3A, item 32, *Bulletin* 2006/1 [POL-2006-1-006];
- Judgment SK 51/05 of 23.05.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2006, no. 5A, item 58;
- Judgment SK 18/05 of 27.11.2007, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2007, no. 10A, item 128;
- Judgment K 37/07 of 02.12.2008, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2008, no. 10A, item 172;
- Judgment SK 43/07 of 09.12.2008, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2008, no. 10A, item 175;
- Procedural decision SK 12/07 of 16.06.2009, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2009, no. 6A, item 95;
- Judgment K 49/07 of 16.12.2009, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2009, no. 11A, item 169;
- Judgment SK 50/08 of 11.05.2010, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2010, no. 4A, item 34;

- Judgment SK 9/08 of 19.05.2011, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2011, no. 4A, item 34;
- Procedural decision SK 26/09 of 13.06.2011, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2011, no. 5A, item 46.

Decisions of the European Court of Human Rights:

- *Jabłońska v. Poland* of 09.03.2004, Application no. 60225/00;
- *Beller v. Poland* of 01.02.2005, Application no. 51837/99;
- *Szenk v. Poland* of 22.03.2005, Application no. 67979/01;
- *Koss v. Poland* of 28.03.2006, Application no. 52495/99;
- *Grabiński v. Poland* of 17.10.2006, Application no. 43702/02;
- *Berent-Derda v. Poland* of 01.07.2008, Application no. 23484/02;
- *Serafin and others v. Poland* of 21.04.2009, Application no. 36980/04;
- *Prączyńska-Pozdniakow v. Poland* of 07.07.2009, Application no. 20982/07;
- *Tymieniecki v. Poland* of 07.07.2009, Application no. 33744/06;
- *Radoszewska-Zakościelna v. Poland* of 20.10.2009, Application no. 858/08;
- *Derda v. Poland* of 01.06.2010, Application no. 58154/08.

Languages:

Polish, English (translation by the Tribunal).



Identification: POL-2012-2-004

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 06.07.2011 / **e)** P 12/09 / **f)** / **g)** *Dziennik Ustaw* (Journal of Laws), 2011, no. 146, item 879; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2011, no. 6A, item 51 / **h)** CODICES (English, Polish).

Keywords of the systematic thesaurus:

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

4.4 Institutions – **Head of State.**

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

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

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

5.3.31 Fundamental Rights – Civil and political rights – **Right to respect for one's honour and reputation.**

Keywords of the alphabetical index:

Head of State, defamation.

Headnotes:

Penalisation for public defamation of the President does not have a chilling effect on the freedom of expression within the scope of public debate.

The insult referred to in Article 216 of the Penal Code is an offence against the dignity of the person (internal part). In Article 135.2 of the Penal Code, the subject of protection comprises not only the dignity and good reputation of the President, but also the authority of the President and the undisturbed performance of his/her duties, public order, and in some situations also the security of the Republic of Poland.

Committing the act specified in Article 135.2 of the Penal Code by insulting an authority that constitutes the systemic embodiment of the “common good”, undermines the Republic of Poland as the common good of all citizens. The reason is that it undermines the prestige of the organs of the state, weakens citizens' trust in the Republic, and may diminish the degree to which citizens identify with the state.

Committing the act set out in Article 135.2 of the Penal Code is tantamount to showing disrespect for the Republic itself.

The fundamental difference between defamation and an insult lies in the rationalisation of an allegation.

Summary:

I. The Circuit Court in Gdańsk referred a question of law as to whether Article 135.2 of the Act of 6 June 1997 of the Penal Code (Journal of Laws -

Dz. U. no. 88, item 553, as amended, hereinafter, the “Code”) is consistent with Articles 54.1 and 31.3 of the Constitution, as well as with Article 10 ECHR.

II. According to the Circuit Court in Gdańsk, Article 135.2 of the Code might be considered a threat for the freedom of speech, since it limits the right to criticise the head of state and the right to participate in an unrestrained public debate in a disproportionate way. Unlike Article 216 of the Code, which concerns insulting behaviour towards citizens, the offence under Article 135.2 of the Code is prosecuted *ex officio*. Article 135.2 of the Code neither provides for the possibility to apply non-custodial penalties nor enables the Court to refrain from imposing such a penalty if a given insult was provoked by the behaviour of the injured party.

In the present case, the Circuit Court in Gdańsk did not suggest that Article 135.2 of the Code is an excessive privilege of the President with regard to other public functionaries, but with regard to Article 216 of the Code, applicable to citizens.

According to the Tribunal, in a democratic state, which is the common good of all citizens, the public debate may be held in a civilised and well-mannered way without endangering the rights and freedoms of persons and citizens as well as the proper functioning of public institutions. Moreover, the state, in principle, has the right to aggravate criminal liability in the case of acts aimed against public functionaries.

By using the criterion of the “proof of truth,” the Constitutional Tribunal distinguished between insults, and defamation and slander.

The Tribunal stated that a defamatory statement constitutes prejudice to private dignity due to its form but not to its content. The penalisation of defamation is to protect, under criminal law, the part not regarded as a subjective feeling of the injured party, but as a correlation with a largely objective factor, such as the public opinion.

The Tribunal also pointed out that the challenged provision of the Code is applied very leniently by common courts, as other provisions of the Code, not indicated by the Circuit Court in Gdańsk, make it an obligation for the criminal court to opt for non-custodial penalties.

After analysing Strasbourg case-law, the Tribunal stated that the challenged provision of the Code does not infringe on Article 10 ECHR.

III. The Tribunal issued this judgment *en banc*. Two dissenting opinions were raised.

Cross-references:

Decisions of the Constitutional Tribunal:

- Processual decision Ts 43/98 of 06.10.1998, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1998, no. 5, item 75;
- Processual decision SK 1/98 of 18.11.1998, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1998, no. 7, item 120;
- Judgment P 2/98 of 12.01.1999, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1999, no. 1, item 2, *Bulletin* 1999/1 [POL-1999-1-002];
- Processual decision P 13/99 of 29.03.2000, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2000, no. 2, item 68;
- Judgment K 21/00 of 13.03.2001, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2001, no. 3, item 49;
- Judgment P 9/01 of 12.03.2002, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2002, no. 2A, item 14, *Bulletin* 2002/3 [POL-2002-3-022];
- Judgment K 26/00 of 10.04.2002, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2002, no. 2A, item 18, *Bulletin* 2002/3 [POL-2002-3-025];
- Judgment P 2/03 of 05.05.2004, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2004, no. 5A, item 39, *Bulletin* 2004/2 [POL-2004-2-015];
- Judgment K 27/04 of 31.05.2005, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2005, no. 5A, item 54;
- Judgment K 4/06 of 23.03.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2006, no. 3A, item 32, *Bulletin* 2006/1 [POL-2006-1-006];
- Judgment P 3/06 of 11.10.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2006, no. 9A, item 121;
- Judgment P 10/06 of 30.10.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2006, no. 9A, item 128, *Bulletin* 2007/2 [POL-2007-2-003];
- Judgment P 1/06 of 20.02.2007, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2007, no. 2A, item 11;
- Judgment K 8/07 of 13.03.2007, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2007, no. 3A, item 26, *Bulletin* 2008/1 [POL-2008-1-001];
- Judgment K 2/07 of 11.05.2007, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2007, no. 5A, item 48, *Bulletin* 2007/3 [POL-2007-3-005];

- Judgment SK 16/07 of 23.04.2008, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2008, no. 3A, item 45, *Bulletin* 2008/3 [POL-2008-3-006];
- Judgment SK 43/05 of 12.05.2008, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2008, no. 4A, item 57;
- Judgment U 5/08 of 16.09.2008, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2008, no. 7A, item 122;
- Decision Kpt 2/08 of 20.05.2009, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2009, no. 5A, item 78, *Bulletin* 2010/1 [POL-2010-1-001].

Decisions of the European Court of Human Rights:

- *Castells v. Spain* of 23.04.1992, Application no. 11798/85;
- *Oberschlick v. Austria* of 01.07.1997, Application no. 20834/92;
- *Janowski v. Poland* of 21.01.1999, Application no. 25716/94;
- *Tammer v. Estonia* of 06.02.2001, Application no. 41205/98;
- *Colombani v. France* of 25.06.2002, Application no. 51279/99;
- *Lešnik v. Slovakia* of 11.03.2003, Application no. 35640/97;
- *Pakdemirli v. Turkey* of 22.02.2005, Application no. 35839/97;
- *Artun and Günever v. Turkey* of 26.06.2007, Application no. 75510/01;
- *Otegi Mondragon v. Spain* of 15.03.2011, Application no. 2034/07.

Languages:

Polish, English (translation by the Tribunal).



Portugal

Constitutional Court

Important decisions

Identification: POR-2012-2-009

a) Portugal / **b)** Constitutional Court / **c)** First Chamber / **d)** 22.05.2012 / **e)** 247/12 / **f)** / **g)** *Diário da República* (Official Gazette), 121 (Series II), 25.06.2012, 22128 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

- 3.16 General Principles – **Proportionality**.
- 3.17 General Principles – **Weighing of interests**.
- 3.22 General Principles – **Prohibition of arbitrariness**.
- 5.3.32.1 Fundamental Rights – Civil and political rights – Right to private life – **Protection of personal data**.
- 5.3.33 Fundamental Rights – Civil and political rights – **Right to family life**.
- 5.3.33.1 Fundamental Rights – Civil and political rights – Right to family life – **Descent**.

Keywords of the alphabetical index:

Parentage, interests of the child / Time-limit, expiry.

Headnotes:

The constitutionality of a three-year time limit for bringing a filiation investigation action was raised in cases where the existence of a parent/child relationship is already assumed, and whether the legislator had exceeded its margin of appreciation because the time limit imposed was disproportionately short or whether it had actually exercised a valid option in order to protect legal certainty and security. According to the Constitutional court's case-law, if time limits after which the right to bring maternity or paternity investigation actions lapses are to respect the principle of proportionality, the holders of the right to personal identity must be left with a real, effective possibility of exercising the right to investigate. This possibility is the essential content of the right in question, rather than a supposed right to investigate such relationships *ad aeternum*. The case-law of the European Court of Human Rights also accepts that actions to establish filiation may be subject to certain preconditions,

including the imposition of time limits, provided they do not preclude the use of the means of investigation in question or represent an excessive burden. In this case-law, the existence of a time limit for bringing a lawsuit for the recognition of maternity or paternity does not in itself constitute a breach of the European Convention on Human Rights; the question is whether the nature, duration and characteristics of the time limit result in a just balance between the investigating party's interest in clarifying an important aspect of his/her personal identity, the interest of the investigated party and his/her close family in being protected from suits concerning facts pertaining to their personal life which occurred many years ago and the public interest in the stability of legal relations.

The current Civil Code regime combines a general 10-year time limit calculated from the occurrence of an objective fact (the investigating party's coming of age) with specific time limits calculated from the occurrence of subjective facts which depend on knowledge of the facts that caused the investigating party to decide to bring the action. The latter limit normally ensures that somebody who believes they may be someone else's child has sufficient time to reflect on whether to bring an investigation action. There are other specific time limits, which only begin to run from the date on which the investigating party becomes aware of the facts that might constitute grounds for the investigation action.

Summary:

I. The Public Prosecutors' Office appealed against a district court decision refusing to apply two Civil Code norms that impose time limits on the right to investigate the identity of one's father. The appeal was mandatory because the district court based its decision on the unconstitutionality of the norms. The question of the constitutionality of the norms had already been analysed by the Plenary of the Constitutional Court (Ruling no. 401/11). At that time the Plenary declined to find the Civil Code norm to the effect that paternity investigation actions can only be brought while the investigating party is still a minor, or during the ten years following his/her coming of age or emancipation unconstitutional. In the present case the Court applied this jurisprudence and adopted the same solution.

The second norm before the Court was the Civil Code provision that even if the general time limit on investigation has lapsed, the investigating party may bring an investigation action during the three years after he/she becomes aware of facts or circumstances that justify an investigation – particularly in cases in which, and counting from the moment when, the party's supposed father stops treating him/her as his child.

The Public Prosecutors' Office brought the present mandatory appeal against the decision of first instance (although it had itself supported the district court's view that the norms were unconstitutional). The district court supported its decision with jurisprudence from the Supreme Court of Justice, to the effect that the right to bring paternity investigation actions cannot lapse. The Constitutional Court had already ruled against this jurisprudence, but its decision did not have generally binding force because it was handed down in a concrete review case.

II. The Constitutional Court reiterated that, while its jurisprudence has evolved over time, the grounds for its decisions have consistently followed the philosophy that the imposition of time limits on the right to bring filiation investigation actions is not in itself unconstitutional. There has been some divergence in the Court's jurisprudence, not with regard to the constitutional conformity of setting time limits on filiation investigation actions, but in relation to the proportionality of the limits.

A finding of unconstitutionality can result from a weighing-up of opposing rights or interests. The acceptability of the imposition of time limits on filiation investigation actions is linked to acknowledgement that the values such actions seek to safeguard are not absolute. The Court has already accepted that the legislator can opt to safeguard other values which deserve protection and which may clash with the right to personal identity. The Court therefore remained of the opinion in this case that the ordinary legislator enjoys the freedom to decide (provided the essential content of the fundamental rights at stake is protected) whether to submit paternity investigation actions to a time limit, and that the legislator is also responsible for setting the duration of that time limit, within the constitutionally accepted bounds imposed by the need to respect the principle of proportionality.

To the extent the norm under dispute establishes a three-year time limit on bringing paternity/maternity investigation actions from the moment at which the supposed parent stops treating the investigating party as his/her child, it is necessary to recognise that in situations in which the parent/child relationship has been openly assumed, it is also possible to justify the imposition of a time limit on maternity/paternity investigation actions, provided the purpose of that time limit is to safeguard other values or interests which warrant legislative protection.

The lapse of the right to bring filiation investigation actions is not simply a civil-law sanction on failure to exercise the right for a certain period of time. As the Constitutional Court has said in accumulated

jurisprudence, the reasons for setting time limits on bringing paternity (or maternity) investigation actions are linked not only to concerns regarding legal security, but also to issues involving the abuse of a right. Both general interests and values related to the organisation of society around the institution of the family can justify the definitive consolidation in the legal order of a paternity that may not correspond to the biological reality, based on the passage of a given amount of time. In such a situation, it is the interests of legal security and certainty regarding legal commerce in general that require the stabilisation of already established filial relationships. These values mean that family relationships must be legally stable, and interested parties are obliged to act quickly, so as to clarify such relationships when they exist. The legislator may thus validly opt to protect the values of legal certainty and security.

III. The original rapporteur dissented from the Ruling, observing that what was at stake here was the three-year time limit following the point when a father stops openly assuming a child as his; there were reasons for considering the limit too short. This represents a specific social situation created by the fact that one person acts paternally towards another who is not officially registered as his child. To require the latter to bring a paternity investigation action within three years of the end of the period in which he/she was treated as the supposed father's child, when that end is not necessarily definitive, while the supposed parent is still alive (the supposed child may always nurture the hope that a relationship which he/she may feel to be only temporarily interrupted can be restored, thereby placing him/her under the burden of needing to bring an action against someone perceived as his/her father) runs the risk of damaging the relationship between them even more. The dissenting Justice therefore took the view that this norm was inappropriate and disproportionate.

Cross-references:

- Ruling no. 401/11 of 22.09.2011, which was included in the selection of jurisprudence sent to the Venice Commission with regard September-December 2011;
- Rulings nos. 99/88 of 28.04.1988, 370/91 of 25.09.1991, 626/09 of 02.12.2009, 65/10 of 04.02.2010 and 446/10 of 23.11.2010.

Languages:

Portuguese.



Identification: POR-2012-2-010

a) Portugal / **b)** Constitutional Court / **c)** Second Chamber / **d)** 23.05.2012 / **e)** 274/12 / **f)** / **g)** / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

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

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

3.25 General Principles – **Market economy.**

4.5 Institutions – **Legislative bodies.**

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

4.6 Institutions – **Executive bodies.**

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

Keywords of the alphabetical index:

Environment, protection / Health, effective protection / Emissions, monitoring.

Headnotes:

A norm requiring all businesses using petroleum coke fuels to monitor emissions on a continuous basis does not, in view of the particular risks arising from the use of such fuels, contravene the constitutional principles of universality and free competition. All enterprises using this fuel are subject to the same rules; they can elect to use another type of fuel. The imposition of this continuous monitoring obligation specifically on enterprises that use this fuel is not intended to arbitrarily discriminate against them by comparison with other enterprises; the regulatory option in question is based on clear, objective criteria. Petroleum coke contains high levels of impurities that are hard to remove prior to use, so safety and control measures designed to protect human life and the environment are important. The decision to impose the legal duty under challenge in these proceedings was founded on a justification that is sufficient to exclude any finding of arbitrariness and was taken in pursuit of policies and values that are guaranteed by the Constitution, namely the promotion of fundamental tasks with which the state is charged in relation to citizens' well-being and quality of life, the effective implementation of the right to a life environment that is healthy and ecologically balanced, the fulfilment of

the duty to defend that right and the protection of the environment in general.

Summary:

I. The applicant in this matter, a private company, challenged the organic and material unconstitutionality of that part of a Ministerial Order which required combustion facilities that consume petroleum coke as a fuel to continuously monitor sulphur dioxide (SO₂) emissions, whatever their mass flow. The Ministerial Order stated that the regime under which such provisions only applied above a certain mass flow did not apply to combustion facilities consuming petroleum coke. The applicant argued that this created a new administrative offence.

The legislation which the Ministerial Order regulated established the regime governing the prevention and control of polluting emissions into the atmosphere, laying down the appropriate principles, objectives and instruments for ensuring the protection of the natural resource 'air', together with the measures, procedures and obligations applicable to the operators of the facilities in question, in order to avoid the atmospheric pollution generated in those facilities or to reduce it to acceptable levels. Under this legislation, emissions of pollutants the mass flow of which exceeded a threshold to be decided by Ministerial Order were subject to continuous monitoring. The applicant contended that the establishment of a mandatory continuous monitoring regime regardless of mass flow for combustion facilities consuming petroleum coke was organically unconstitutional because it created a new administrative offence, thereby breaching the Assembly of the Republic's partially exclusive legislative competence. The applicant also argued that this norm suffered from material unconstitutionality, because it violated the principles of the universality of the treatment of every enterprise and of free competition between enterprises.

II. In terms of organic unconstitutionality, the Constitutional Court noted its own jurisprudence to the effect that the exclusive competence of the Assembly of the Republic only covers legislation on the general regime governing mere social administrative offences and the respective proceedings (even then, the Assembly has the power to authorise the government to legislate in this respect). Within the limits imposed by that regime, the government is able to exercise its concurrent legislative competence to create new administrative offences and set out the appropriate punishment, modify or abolish existing offences, and mould secondary rules for use in administrative-offence proceedings. The conduct which, according to the norm presently before the

Court is an administrative offence, consists of the breach of the obligation to continuously monitor certain polluting emissions. The government issued the respective Executive Law in the exercise of its own competence, and in doing so respected the limits laid down in the framework Executive Law, which was in turn issued under an authorisation to legislate granted by the Assembly of the Republic. The specific Executive Law, which, according to the applicant, does not contain the administrative offence in question, only states that a Ministerial Order must set the limits above which the continuous monitoring of polluting emissions is to be required. By setting limits for atmospheric pollutants, the Ministerial Order does not create a new administrative offence by making the continuous monitoring regime obligatory for all combustion facilities consuming petroleum coke as a fuel, irrespective of their mass flow.

As the matter is covered by the Assembly of the Republic's partially exclusive legislative competence (which only covers the general regime governing social administrative offences and the applicable proceedings), the government was not obliged to obtain prior parliamentary authorisation to create the administrative offence under dispute here, and to establish appropriate penalties.

The applicant had also alleged that by imposing a continuous monitoring obligation on businesses using petroleum coke, regardless of the volume of the mass flow, the government violated the constitutional principle of universality – a principle that is applicable to legal persons because the Constitution states they enjoy the rights that are compatible with their nature. It also argued a breach of the constitutional principles of free competition and free access to the market, caused by the creation of different rules for the same situations, thereby interfering at the level of business competition, creating unequal forms of treatment, placing obstacles in the way of enterprises and their effective inspection. The Court rejected these allegations.

III. Two Justices, including the President of the Constitutional Court, dissented in terms of the question of organic unconstitutionality. They disagreed with the majority view that the imposition of mandatory continuous monitoring fell within the task of concretely setting the limits above which the emission of pollutants must be continuously monitored, and could therefore be implemented by Ministerial Order. In their view, when the Executive Law required the issue of a Ministerial Order, it had a very precise objective – that of complementing the primary rules established by a given legislative norm, in order to ensure their practical implementation. These primary rules limited the obligation to

continuously monitor, in every case and without exception, situations in which certain minimum thresholds for the polluting flow were exceeded. According to the dissenting Justices, as a secondary norm which is subordinate to the Law in question, the norm before the Court should have restricted itself to quantifying those thresholds; by stating that the basic criterion for the obligation to monitor did not apply to petroleum coke, the Ministerial Order ran counter to the principle of the pre-eminence of the law.

Languages:

Portuguese.



Identification: POR-2012-2-011

a) Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 05.07.2012 / **e)** 353/12 / **f)** / **g)** *Diário da República* (Official Gazette), 140 (Series I), 20.07.2012, 3846 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
 3.17 General Principles – **Weighing of interests**.
 3.21 General Principles – **Equality**.
 3.22 General Principles – **Prohibition of arbitrariness**.
 4.10.2 Institutions – Public finances – **Budget**.

Keywords of the alphabetical index:

Crisis, economic, assistance / Pension, reduction / Salary, reduction.

Headnotes:

A measure provided for the suspension of payments for the Christmas-month (13th month) and holiday-month (14th month) in 2012-2014, both for persons in receipt of salary-based remuneration from public entities and for those in receipt of retirement pensions via the public social security system. However, there should have been limits to the difference between the extent of the sacrifice made by the persons who were affected by this measure and the sacrifice of those who were not; the inequality caused by the difference in situations should have been the object of a degree of proportionality.

The very grave economic/financial situation and the need for the adoption of measures to deal with it did not mean that the legislator was no longer subject to the fundamental rights and key structural principles of the state based on the rule of law, or the principle of proportional equality. Although the Constitution cannot distance itself from economic and financial reality, it does possess a specific normative autonomy that prevents economic or financial objectives from prevailing in an unlimited way over parameters such as that of equality, which the Constitution defends and with which it must ensure compliance.

Summary:

I. Under the rules governing abstract *ex post facto* reviews, a group of Members of the Assembly of the Republic asked the Constitutional Court for a declaration with generally binding force of the unconstitutionality of various norms contained in the State Budget Law (hereinafter, the "LOE") for 2012. These norms created measures that provided for "suspension of the Christmas and holiday-month payments" (non-payment, in principle for a number of years, with no prospect of payment of the lost amounts at any time in the future), while simultaneously maintaining the measures involving "remuneratory reductions" contained in the LOE for 2011. The group encompassed by the measures was comprised of public-sector workers, and retirees (in the latter case, including those from the private sector). The LOE 2012 norms were to remain in force for as long as the Financial Assistance Programme (hereinafter, the "FAP") for Portugal remained in force – a duration that was by nature extendable – and did not respect the legal assumption that the remuneratory reduction measures provided for in LOE 2011 would only remain in effect for one year at a time and would require annual renewal if they were to last longer than that. The applicants alleged violation of the principles of a democratic state based on the rule of law (protection of trust aspect), proportionality, and equality.

The FAP comprises a set of legal instruments, the parties to which are the Portuguese government and the International Monetary Fund (IMF). They include a Technical Memorandum of Understanding and a Memorandum of Economic and Financial Policies, setting out the terms and conditions governing the provision of financial assistance to Portugal by the International Monetary Fund. In addition, the Portuguese government and the European Union signed a Memorandum of Understanding on Specific Economic Policy Conditionality. All these Memoranda are binding on the Portuguese state, to the extent that they are based on international-law and European Union-law instruments – the Treaties that

instituted the international entities which are parties to them, one of which is Portugal – that are recognised by the Constitution. These documents require the Portuguese state to adopt the measures they set out, as one of the conditions for the phased fulfilment of the financing contracts entered into by the same parties.

The reasons the legislator gave for adopting the measure contained in the norms before the Court were primarily based on the need to comply with the budget-deficit limits (4.5% of GDP in 2012) imposed in both the Technical Memorandum of Understanding and the Memorandum of Economic and Financial Policies.

The cutting of the Christmas and holiday-month payments, or any payments that were equivalent to the so-called 13th and 14th months of pay, was applicable to persons who received a remuneration or pensions worth more than €1,100 euros/month, and came on top of the earlier reductions that had already been imposed in 2011 and were maintained for 2012. Non-payment of the whole of these amounts represented a 14.3% reduction in the annual value of salaries and retirement pensions, in addition to the previous reductions. The latter already entailed a decrease of between 3.5% and 10% in the net monthly pay of persons working in the public sector who had been earning a gross amount of more than €1,500 euros/month at the end of 2010. The Court also took account of the fact that there had been a public-sector pay freeze in 2010, 2011 and 2012, and a freeze on pensions in 2011 and 2012, and that the FAP Memoranda provided for these freezes to continue in the coming years. Taking inflation into account, this implied a real fall in the value of such salaries and pensions. On the other hand, in terms of measures with a universal nature that were adopted under the public revenue heading and directly reduced citizens' net incomes by increasing everyone's contribution to the budget consolidation effort, the only thing that LOE 2012 did apart from making a number of amendments to the regime governing the calculation of personal income tax (IRS), was to subject taxpayers in the highest income bracket to an additional 2.5% on their taxable income. The legislator did not opt to repeat the extraordinary 3.5% surtax on income subject to IRS in 2012-2014, as it had done for 2011; nor did it create any specific new extraordinary tax. It preferred to act primarily on the spending side of the equation, by reducing the amount the state paid to persons who received holiday and Christmas-month payments from public funds.

The Constitutional Court noted that the nature of these and any other equivalent 13th and 14th month payments was no different from that of the salaried forms of

remuneration that had been the object of reduction in LOE 2011 – reductions which the Court had declined to declare unconstitutional in a previous *ex post facto* review (Ruling no. 396/11 of 21 September 2011). The law says that the nature of both the Christmas and the holiday bonuses is that of payment for work done and that they form part of the worker's annual remuneration, regardless of whether they are paid under the private-law or the public-law regime.

The Court recalled that the principle of equality with regard to the just distribution of public costs, as a specific manifestation of the principle of equality, is a necessary legislative parameter which the legislator must consider when it decides to reduce the public deficit in order to safeguard the state's solvency. The sustainability of the public finances is of interest to all; everyone must, to the extent they are able to do so, contribute to the burden of the readjustments that must be made in order to safeguard that sustainability. The fact that the measures contained in the norms before the Court were not universal meant that the sacrifices were not distributed equally between all citizens, in proportion to their individual financial capacity. Additional effort was required exclusively from certain categories of citizen.

The Court considered that the only justification for the measure included in LOE 2012 which could be deemed proven was its efficacy, given that it was certain to produce effects and to do so quickly in the search for a result that would be of important public interest. However, the Court also noted that even in the context of a grave economic crisis, the legislator does not possess unlimited discretion to resort to cutting the remuneration and pensions of persons who receive them from public funds, in order to achieve a budgetary balance. There has to be a limit to the difference between the degree of sacrifice undergone by those who are affected by this measure and that of those who are not.

Legal equality is always a proportional equality; any inequality that is justified by a difference in situations cannot be immune from a judgement of proportionality. The Court stated that the difference in treatment in this case was so substantial and significant that the efficacy-related reasons advanced for the measure were not valid enough to justify it, particularly because alternative solutions could have been deployed

As the implementation of the 2012 Budget was already under way, the Constitutional Court considered that the consequences of an unqualified declaration of unconstitutionality could endanger the maintenance of the agreed financing and thus the state's solvency. It therefore restricted the effects of the declaration of

unconstitutionality as permitted by the Constitution, and did not apply them to the suspension of payment of the Christmas and holiday bonuses or any equivalent payments with regard to 2012.

III. Three Justices were of the view that the effects of the declaration of unconstitutionality should also extend to the current year, and therefore dissented from the decision to exclude 2012.

Three Justices dissented from the declaration of unconstitutionality itself.

Cross-references:

- Rulings nos. 39/88 of 09.02.1988, 96/05 of 23.02.2005 and 396/11 of 21.09.2011.

Languages:

Portuguese.



Identification: POR-2012-2-012

a) Portugal / **b)** Constitutional Court / **c)** First Chamber / **d)** 05.07.2012 / **e)** 360/12 / **f)** / **g)** / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

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

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**.

Keywords of the alphabetical index:

Extradition, rights, procedural, requesting state.

Headnotes:

A norm which does not allow the requesting state in extradition proceedings to appeal against a judicial decision that affects its rights after the extradited

person has already been handed over to its authorities cannot be criticised on constitutional grounds. As the decision was not handed down against the requesting state, the norm in question lies outside the scope of the protection offered by the right of access to the courts. It does not violate the right to a dual degree of jurisdiction or breach the principle of effective jurisdictional protection derived from the principle of a state based on the rule of law. The right of a person or entity to appeal against a judicial decision handed down in proceedings to which it was not a party is not at issue.

Summary:

I. The Lisbon Court of Appeal decided to rescind an extradition authorisation after the citizen concerned had already been extradited, on the grounds of a breach of the principle of speciality. This principle precludes a state which secures the surrender of an accused or convicted person from trying him or her for prior facts other than those for which the extradition was granted, or imposing a penalty or measure other than those for the purpose of which he or she was extradited, without the consent of the extraditing state.

The Supreme Court of Justice (hereinafter, the "STJ") upheld the Court of Appeal's decision and refused to admit an appeal which the requesting state (the Union of India) sought to bring, stating that the law does not permit such an appeal. The Union of India brought the present appeal against the STJ Ruling, asking the Constitutional Court to review the constitutionality of Criminal Procedural Code norms that deny the state requesting extradition legitimacy to appeal against a judicial decision that affects its rights. At stake were both the norm that prevents the requesting state from appealing after the extradited person has already been handed over to its authorities, and the norm that denies legitimacy to appeal to a requesting state that had always intervened in the proceedings at the request of the competent judicial authorities, particularly in response to appeals lodged by other procedural subjects. The Union of India alleged violations of the principles of a state based on the rule of law, interpretation in accordance with the Constitution, the right of access to the courts, effective jurisdictional protection, fair trial, and equality of arms.

The Portuguese legal order does not provide for specific consequences of a breach of the principle of speciality by a state that has requested an extradition. This does not, however, prevent Portugal, as the sovereign state to which the request was made, from reacting to a violation of that principle. This can be done by political/diplomatic means, invoking the earlier breach when future extradition requests are

made by the same country and making new extraditions more difficult or denying them altogether, or by asking international jurisdictional instances or internal courts in the violating state to intervene.

II. The Constitutional Court emphasised that the constitutional right of access to the courts has not been rendered operable to the point that the constitutional norm can be said to give rise to a general right of appeal, with the ensuing duty on the part of the legislator to include a dual degree of jurisdiction as a rule in the law. It was questionable, in the Court's opinion, whether access to the law and effective jurisdictional protection could be invoked as a parameter for gauging the constitutional conformity of the norms in the case before it. The issue was whether an international-law public legal person (a foreign state) can invoke a fundamental right against the Portuguese state, when that right exists specifically to defend the legally protected rights and interests of natural and legal persons. The Court has previously held that enjoyment of the right of access to the law and the courts is compatible with the nature of private legal persons. However, the enjoyment of fundamental rights by public legal persons has been controversial in both Portuguese and foreign legal doctrine and jurisprudence. The compatibility of the possession of fundamental rights with the nature of legal persons depends on the nature of the legal person and the nature of the particular fundamental right. Those rights that can only be conceived of in connection with natural persons (e.g. the right to life) are incompatible in this respect. A particular fundamental right may be compatible with the nature of a legal person but its applicability in this domain may operate under terms that differ from those regarding natural persons. This is clearly visible in the case of systems that are the object of a review of their constitutionality as a result of a challenge on constitutional grounds or an appeal for an *amparo* remedy.

The Court has previously accepted that there is nothing to prevent certain defence arguments that are typical of subjective fundamental rights from being absorbed by the principle of a state based on the rule of law and by the institutional guarantees that objectively limit legislative discretion. It has also accepted that a public authority (the president of a public institute) can possess the right to be represented in court as a fundamental procedural right to legal representation; and that the exercise of penal action by the state (acting via the Public Prosecutors' Office) is not protected by the fundamental right of access to the courts, which is a fundamental right for use against the state, although it cannot be said that public legal persons are always excluded from the scope of the protection provided by the right of access to the courts.

Although the Constitutional Court's jurisprudence makes an extensive contribution to the implementation of the scope of the principle that foreigners and stateless persons located or resident in Portugal are legally considered to enjoy the same fundamental rights as Portuguese citizens, the Court has not had much cause to consider the enjoyment of such rights by foreign public or private legal persons. Portuguese legal doctrine accepts that foreign and international-law legal persons can enjoy fundamental rights under the same terms as those which the Constitution accepts for Portuguese legal persons, subject to the restrictive conditions imposed by the Constitution. However, legal theorists consider that foreign legal persons with a public nature should not be able to enjoy fundamental rights, to the extent that this would lead to a contradiction with national sovereignty.

In these proceedings, the party that invoked the fundamental right of access to the courts was a state – an international-law public legal person. The legal nature of extradition is based on the solidarity between states in the fight against crime; a form of international judicial cooperation between states in the penal field, and one of particular significance in the light of the general principle of territoriality in the spatial application of the criminal law. It is useful to the state requesting the extradition because it is able to exercise its *ius puniendi*, and to the extraditing state because it ceases to have the perpetrator of a criminal offence in its territory. However, the role of the requesting state is that of a mere participant; that state does not qualify as a subject in the proceedings, or even a procedural participant. As a form of judicial cooperation between sovereign states, a fundamental pillar of which is reciprocity, extradition excludes any procedure in which the requesting state can procedurally confront the host state in any way. Extradition can only take place on the level of relations between sovereign states – a level that is eminently political and whose main stage is the international legal order. The level of the relations between the state that grants an extradition request and the person who is to be extradited is, however, internal legal order of the requested state. The requested state does not exercise its *ius puniendi*; it exercises its power and fulfils its duty as a state to provide judicial assistance in criminal matters. The competence to exercise *ius puniendi* pertains to the state to which assistance is provided, which suggests that the format of the proceedings is that the requested state confronts the potential object of the extradition with the objective of fulfilling the requesting state's request. By placing the positive decision to extradite within the exclusive competence of a judge (a negative decision can be taken beforehand, as part of the administrative process), and as part of the chapter on fundamental rights, freedoms and

guarantees, the Constitution is seeking to protect the person whose extradition has been requested in the face of the state, when the latter exercises its power and fulfils its duty to provide judicial assistance in criminal matters. The Constitution does not, however, exclude the possibility that the political aspect of extradition may take precedence over the judicial one, in that the government of the requested state can decide not to surrender the person after a court has taken a positive decision to extradite, particularly when circumstances have changed since the point at which the extradition request was approved.

In the Ruling against which the present appeal was brought, the STJ held that the Union of India had violated the principle of speciality and decided to rescind the authorisation to extradite the respondent. The decision did not, however, require the Union of India to return the extradited person to Portugal.

Portugal is governed by international law principles including equality between states, and non-interference in other states' internal affairs.

Cross-references:

- Constitutional Court Rulings nos. 539/97 of 24.09.1997, 638/98 of 04.11.1998, 174/00 of 22.03.2000, 365/00 of 05.07.2000, 415/01 of 03.10.2001, 530/01 of 04.12.2001, 120/02 of 14.03.2002 and 399/07 of 11.07.2007 and more recently, 160/10 of 27.04.2010, 216/10 of 01.06.2010 and 496/10 of 15.12.2010.

Languages:

Portuguese.



Identification: POR-2012-2-013

a) Portugal / **b)** Constitutional Court / **c)** Second Chamber / **d)** 25.07.2012 / **e)** 387/12 / **f)** / **g)** *Diário da República* (Official Gazette), 155 (Series II), 10.08.2012, 4345 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

3.3 General Principles – **Democracy.**

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

Keywords of the alphabetical index:

Territory, ordering / Planning, regional, tourism.

Headnotes:

The partial suspension of a Tourism Spatial Plan (hereinafter, the “POT”) until its revision at some future stage had the same ramifications as if the affected part of the Plan had lost its legal force. Because the regional legislator was entitled to amend the POT, the amendment brought about by partially suspending it rather than amending it could not be perceived as excessive or arbitrary; use of this option could not be criticised on constitutional grounds.

The Constitution allows interested parties to participate in the process of drawing up urban-planning and any other spatial-planning instruments, especially when what is at stake is the ordering (and promoting the ordering) of the territory; a concrete implementation in the spatial planning field of the principle of participative democracy proclaimed in the Constitution. Territorial citizenship is a necessity in areas such as urban and spatial planning, where there is potential for a clientele, lobbies, interest groups and corruption to turn the territory and towns and cities into opportunities for schemes for distributing economic benefits. The right to participate is directed at the drawing up (and revision) of all urban and spatial planning instruments, and pertains to every citizen and organisation residing or with registered offices in the corresponding areas.

Under the Constitution, interested parties can participate with regard to any spatial planning instrument – a dimension which sectoral tourism plans necessarily entail, even if they are intended to be reflected in urban instruments and even if they are only binding on public entities. The options they contain predetermine, or at least condition, elements of the spatial planning instruments to which such sectoral plans must conform or with which they must be compatible. For these reasons, where a decision has been made to draw up such an instrument, interested parties must be able to participate in the process, even in the case of spatial management instruments, the existence of which should not be seen as a constitutional requirement. Interested parties in these proceedings enjoy a right to participate in a broad sense which could include any substantial modification to the spatial management instruments in question.

The provision in question entailed a substantial change to the POT. Its legal effects (the content of the norms it suspended and the inherent result in terms of its effects on spatial planning) meant that it met the requirements imposed by the need for participative democracy giving rise to the right of interested parties to take part in drawing up spatial planning instruments.

Summary:

I. This was a prior review case instigated by the Representative of the Republic for the Madeira Autonomous Region. The norms that were suspended set overall limits on Porto Santo Island or limits in terms of the geographical distribution of tourist accommodation capacity on the island of Madeira, established the maximum capacity per operating unit, determined the typologies for tourist business units in agro-forestry areas and laid down the rules governing exceptions. Their suspension meant that they could no longer serve to orient the growth in tourist occupation in the timeframe and geographical area they covered. The POT is designed to orient both public and private investments, and to ensure that the distribution and characteristics of tourist facilities are appropriate to the landscape and history of the various areas in the Region and fit into the social and cultural environment, contributing to a complete local development. The norms the Court was asked to review did not amend the respective POT norms, but suspended them pending their revision. Such revision had not yet occurred and was not under way at the time of the proceedings.

In conformity with its nature as a sectoral plan with territorial effects, the POT is binding on the public entities with the competence to draw up and approve municipal spatial plans. These norms apply directly in the respective sectoral area. Any acts that issue licences or authorise projects in breach of the legislative provisions are null and void.

The applicant argued that the norms under dispute resulted in citizens being deprived of their right to the environment and a correct ordering of the territory. He observed that both the insufficiency of the explanation the legislator gave for its action and the disproportionate duration of the measures meant that the norms violated constitutional requirements with regard to the correct planning of the territory and the right to the environment and quality of life, particularly the right of citizens to participate.

He went on to say that the protection afforded by the Constitution to the environment is one of the fundamental tasks with which it charges the state, and includes the obligation to defend nature and the

environment, preserve natural resources and ensure correct spatial planning. An overall interpretation of the various constitutional precepts would indicate that the Constitution not only imposes requirements in terms of an environment policy, but also creates a constitutional-law duty on the part of public authorities to protect the environment. The applicant did not criticise the legislator's choices on the grounds that they directly damaged subjective legal positions which could result in individual aspirations. He accused the norms in question of violating procedural guarantees in the spatial planning domain (due to the absence of informed participation in the planning process by interested parties), and of failing to fulfil the requirements with which the process of writing norms must comply and which are imposed by the principle of the state based on the rule of law, which in turn demands that laws must be determinable and prohibits excess.

Regarding the suggestion that the norms were not determinable and breached the principle of proportionality, the Court took the view that the lack or insufficiency of the contextual statement of the factual assumptions made when a given legislative provision is issued does not affect the clarity or operability of the norm that is constructed in this way. It conceded that the text of normative acts made by public authorities should be intelligible, but observed that they should not have to set out the reason for the provisions.

The Court decided that the meaning of the norms contained in the legislative act was clear and unequivocal.

The adoption of an unspecified term for the suspension (i.e. pending the revision of the Plan) did not result in the content of the norms being unconstitutional.

The Court did not uphold the applicant's argument that the shortcomings and insufficiencies in the grounds the legislator gave for the norms made it impossible to evaluate the legislative options in question by applying the constitutional criterion of proportionality.

However, the fact that the legislative procedure was not opened up to participation by citizens in the form of a phase in which interested parties could participate publicly led the Constitutional Court to conclude that the norms before it conflicted with the Constitution. It therefore exercised its right to consider the constitutionality of challenged norms on grounds other than those alleged by an applicant, and declared those before it unconstitutional.

Cross-references:

- Rulings nos. 285/92 of 22.07.1992, 394/04 of 02.06.2004 and 436/04 of 22.06.2004.

Languages:

Portuguese.



Identification: POR-2012-2-014

a) Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 28.08.2012 / **e)** 397/12 / **f)** / **g)** *Diário da República* (Official Gazette), 178 (Series I), 13.09.2012, 5207 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

3.9 General Principles – **Rule of law**.
3.10 General Principles – **Certainty of the law**.
3.12 General Principles – **Clarity and precision of legal provisions**.

Keywords of the alphabetical index:

Criminalisation, legal asset, definition.

Headnotes:

Certain norms were introduced prohibiting the sale or the making available of any substances with a natural or synthetic origin in any physical state that have, or any product, plant, mushroom or part thereof containing one or more substances that have, a direct or indirect action on the central nervous system, without being specifically indicated for human use and whose manufacture or introduction into any trading circuit is not regulated by specific provisions, and created an administrative offence and a police power (closure of places where the substances were available) regarding such substances.

To determine the constitutional compliance of the norms, certain definitions were required. This primarily concerned the definition of “psychoactive substances” and “substances with a direct action on the central nervous system”. The generic definition in the norms of the substances whose consumption they

sought to prevent as substances that cause “irreversible damage to the physical and mental health of an individual” meant that their scope could not be restricted to that specific category of substances; this definition extends to every lawful substance with any kind of effect on the central nervous system, regardless of the nature of that effect or how insignificant it may be.

It cannot be said that requirements based on typicity apply with the same degree of rigour to the law governing mere administrative offences as they do to criminal law. A social administrative offence is sanctioned with a fine, which does have repercussions in terms of a reduction in the offender’s net worth. Nonetheless, the principles that apply in a democratic state based on the rule of law must be respected, such as those of legal security and the protection of trust. Constitutional-law theory accepts that, as an important restriction on fundamental rights, public law which imposes sanctions is bound by the essence of the guarantees which the Constitution explicitly imposes on the criminal law as a whole – i.e. the core guarantees allowing citizens to rely on security, certainty, trust and predictability with regard to the law. When failure to comply with the content of a prohibition is sanctioned by a fine, the determinability of the content of that prohibition is a precondition for the existence of a balanced relationship between the citizen and the state, and is a factor in guaranteeing the protection of trust and legal security.

Where the legal prohibition in an administrative offence considers forms of conduct with a tenuous axiological relevance to be unlawful, the law must formulate the content of the prohibition in such a way as to make it explicitly clear to its intended audience.

Summary:

I. The present case involved a prior review of the constitutionality of norms contained in a Decree of the Legislative Assembly of the Madeira Autonomous Region (hereinafter, the “RAM”) that “approved norms for the protection of citizens and measures for the reduction of the offer of ‘legal drugs’”. The case was brought before the Constitutional Court by the Representative of the Republic for the Madeira Autonomous Region.

In recent decades, society has witnessed the multiplication of new psychoactive substances known as ‘legal highs’ (a term encompassing a vast category of unregulated psychoactive compounds) and products containing them. Concerned at the proliferation in the RAM of establishments that freely sell substances which, in its view, could cause irreversible harm to the physical and mental health of consumers and pose a

danger to public health, the regional legislator sought to limit the accessibility of such substances in the Region by passing the legislative act under dispute, creating a mere social administrative-offence regime. To this end the legislation prohibited selling psychoactive substances not specifically controlled by dedicated legislation and making them available in any way. It identified these substances by establishing a positive formulation that covered any origin, state, form or product in which they occur or of which they are a part, and it indicated the functional human bodily system in which they act (“a direct or indirect action on the central nervous system”). In doing the latter, the legislator sought to limit the spectrum of the definition by using two negative elements (“without being specifically indicated for human use” and “whose manufacture or introduction into any trading circuit is not regulated by specific provisions”). While the second of these two elements was intended to give the prohibition a residual nature, so that it only operated with regard to substances whose manufacture or sale was not regulated by existing legislation, the first is hard to interpret. It is impossible to determine whether the specific indication “for human use” results from the labelling of a substance, from a description made by an entity that is qualified to do so, or from social usage.

The Decree defined the concept of “psychoactive substances” as “substances with a direct action on the central nervous system”. According to the WHO, a “psychoactive substance” is defined in accordance with its effects on the central nervous system. This concept includes every natural or synthetic substance with the ability to alter consciousness, mood or thoughts, a vast range of effects with widely differing manifestations.

The legislative act before the Court specified the prohibited forms of conduct with regard to such substances by classifying the act of announcing, publicising, selling or transmitting them in any way as an administrative offence.

It set limits on the fines for the administrative offence classified in this way, and allowed those fines to be accompanied by the accessory sanction of prohibition of the exercise of the relevant profession or activity, without any limits. It also ordered the Regional Inspectorate of Economic Activities to close all places where such substances were made available.

II. Regarding the potential organic unconstitutionality of the norms (the Autonomous Regions do not possess the competence to legislate on criminal unlawful acts and can only define unlawful acts that constitute mere social administrative offences, otherwise they would be in breach of the Assembly of the Republic’s exclusive competence to legislate on

the general regime governing such unlawful acts), the Constitutional Court highlighted the need to bear in mind that the choice between sanctioning a certain form of conduct by making it a criminal unlawful act or by making it an unlawful act that merely constitutes an administrative offence, with a view to protecting a given legal asset, is a decision that lies within the legislator's power of discretion. In taking that decision, the legislator must respect the constitutional-law axiological order and, except in cases in which the Constitution expressly requires the criminalisation of certain acts, the criminal law must only act when the need to protect requires it to do so. For there to be a finding of unconstitutionality in a prior review case, it must be possible to individualise forms of conduct that undeniably either come under the criminal law or come under the law governing mere social administrative offences, and for the legislator to have made a manifestly inappropriate choice between the two.

The Regional Decree in question came under the heading of the general protection of the legal asset 'public health'. Making substances that are harmful to human health available and publicising them is a form of behaviour which the legal order often classes as entailing a danger of causing harm to public health.

The Court noted that at a national level, forms of behaviour linked to other substances that are psychoactive and epidemiologically prevalent around the world (alcohol and substances present in tobacco) can be included among the unlawful acts that are considered to be administrative offences. The choice between resorting to the criminal law or the law governing administrative offences must depend on the type of substance whose consumption one is seeking to prevent, and must take into account not only the degree of damage it causes to human health, but also the extent to which society accepts that consumption.

At stake here was the imposition of sanctions on a form of behaviour solely because of its typical danger to a given legal asset. Although it would be possible for the criminal law to intervene, this would be exceptional and demanding requisites would have to be fulfilled. The Court was not convinced that it was confronted here by forms of conduct which definitively fall under the criminal law. It should be recognised that, in the exercise of its political/administrative autonomy, and although it is not permitted to define criminal policy by creating types of crime, the regional legislator is entitled to intervene at an administrative-offence level to attempt to dissuade people from forms of conduct that pose a risk to human health. The regional legislator may do this by

developing regional policies designed to promote and protect public health. The Court therefore held that the norms before it were not organically unconstitutional. However, the fact that the norms violated the principle of the democratic state based on the rule of law led the Court to declare their material unconstitutionality.

III. One Justice dissented from the decision. In her opinion, the norms were based on a given concept (that of 'psychoactive substance'). The delimitation they established made it possible to objectively determine the form of behaviour they considered to be an administrative offence. The typicity-based requirements at the social administrative-offence level were accordingly met.

Supplementary information:

The Ruling considers these questions in the light of European Union law and a number of international documents (particularly from the World Health Organisation, the European Monitoring Centre for Drugs and Drug Addiction, and Europol), and makes comparisons with the solutions proposed in them.

Cross-references:

- Rulings nos. 41/2004 of 14.01.2004 and 336/08 of 19.06.2008.

Languages:

Portuguese.



Romania

Constitutional Court

Important decisions

Identification: ROM-2012-2-003

a) Romania / **b)** Constitutional Court / **c)** / **d)** 27.06.2012 / **e)** 683/2012 / **f)** Decision on the legal dispute of constitutional nature between Government, represented by the Prime Minister, on the one hand, and the President of Romania, on the other hand / **g)** *Monitorul Oficial al României* (Official Gazette), 479, 12.07.2012 / **h)** CODICES (Romanian).

Keywords of the systematic thesaurus:

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

4.4.3.2 Institutions – Head of State – Powers – **Relations with the executive bodies.**

4.4.3.5 Institutions – Head of State – Powers – **International relations.**

4.6.2 Institutions – Executive bodies – **Powers.**

4.16 Institutions – **International relations.**

Keywords of the alphabetical index:

Conflict of powers / Government, prerogative / Head of State.

Headnotes:

The President's constitutional privilege includes participating in meetings of the European Council in his capacity as the Head of State. The President may delegate the task to the Prime Minister.

Summary:

I. Based on Article 146.e of the Constitution, as well as of Articles 11.1.A.e and 34 of Law no. 47/1992 on the Organisation and Operation of the Constitutional Court, the President had requested the Constitutional Court to settle a legal dispute of a constitutional nature between the Government (represented by the Prime Minister) and the President. The dispute stems from their decision to prevent the President from delegating his constitutional right to participate at

meetings of the European Council on 28-29 June 2012. The general issue is whether the privilege to represent the State at the European Council could be delegated to the Prime Minister.

II. Having examined the request to settle the legal dispute of a constitutional nature, the Court held as follows:

1. Whether the admissibility of the request, in relation to the provisions of Article 146.e of the Constitution and to the interpretation given by the Constitutional Court, in its case-law, to the expression constitutes a "legal dispute of a constitutional nature".

The dispute between the two public authorities is a legal dispute, as it aims to determine the role of the President and the role of the Government in defining and guiding the foreign policy of the State.

The legal dispute is one of a constitutional nature, as it is aimed, in principle, at the interpretation of Articles 80.1 and 102.1 of the Constitution. In this regard, the Court held that the different ways in which public authorities interpret and apply a constitutional provision is likely to trigger a legal dispute of a constitutional nature (e.g. Decision no. 270 of 5 March 2008, published in the Official Gazette of Romania, Part I, no. 290, 15 April 2008).

The legal dispute of a constitutional nature has occurred between two public authorities provided under Title III of the Constitution, respectively the Government and the President (see Decision no. 988, 1 October 2008, published in Official Gazette of Romania, Part I, no. 784, 24 November 2008).

Therefore, the Court ruled that the request is admissible.

2. The merits of the request:

The Court held that the wording contained in Article 10.2 second sentence of Article 15.2 of the Treaty on European Union concerning the composition of the European Council – Heads of State or Government of the Member States – is generic. It does not oblige Member States with a two-headed executive to ensure representation by both the Head of State and the Head of Government, but rather by a teleological interpretation of the text. Hence, its purpose is to ensure the Member State's representation at the highest level by the competent public authority.

The Court held that, in its case-law, the President has been declared the Head of State first implicitly (see Ruling no. 3, 09.09.1996, published in the Official

Gazette of Romania, Part I, no. 216, 11 September 1996) and then explicitly (see Decision no. 147, 21 February 2007, published in the Official Gazette of Romania, Part I, no. 162, 7 March 2007).

Pursuant to Article 80.1 of the Constitution, the President represents the Romanian State, which means that in the field of foreign policy, he heads the State and undertakes commitments on its behalf. The constitutional text allows him to develop the State's foreign policy, that is, determining foreign relations that take into account, of course, the national interest. Such a conception is legitimised by office representativeness, as the President is elected by citizens through universal, equal, direct, secret, and freely expressed vote.

In terms of foreign policy, the Prime Minister has the constitutional power to ensure the implementation of foreign policy (Article 102.1 of the Constitution). This means that, according to guidelines set by the representative of the State in foreign relations, who is the President of the State, the Government, through its representative, must properly implement measures to which the State has committed itself. Thus, the role of Government is rather derivative, not original, as the one of the President. As we do not speak of a delegated power but rather of the President's own power, the latter through a specific act of will may delegate the representation of the State when he deems necessary.

Likewise, the Court noted that Article 80.1 of the Constitution is a constitutional text of principle, which need not be interpreted restrictively but in the spirit of the Constitution, respectively in conjunction with Articles 91 and 148.4 of the Constitution. The latter text expressly provides that the Parliament, the President, the Government and the judiciary shall guarantee "the obligations arising from the accession instrument". However, one of these obligations is the highest-level representation of the state in the European Council, respectively by the public authority, which has the power to undertake commitments at the state level. Otherwise, the provisions of Article 148.4 of the Constitution relating to the President would be deprived of content.

Referring to the act of Parliament that had established a sharing of prerogatives of the two public authorities – Parliament Declaration no. 1/2012 – the Court held that the proposed sharing is horizontal, not vertical. However, sharing of prerogatives is, according to the relevant constitutional texts, a vertical one. The reason is that the State's foreign policy guidelines are determined and defined by its representative, the President, and the implementation and achievement thereof, by the Government. The

Court also held that an act expressing political will cannot add to the Constitution, as it is subordinated to constitutional principles, values and requirements, regardless of the relationship, even tense, between public authorities.

Therefore, the Court concluded that the President not only has the right but also the obligation undertaken in the accession instrument, i.e. to attend the meetings of the European Council. Otherwise, the commitments that Romania has undertaken therein would be infringed upon.

Consequently, the Court recognised that a legal dispute of a constitutional nature exists between the Government on the one hand and the President, on the other hand. This dispute is generated by the action of the Government and of the Prime Minister to exclude the President from the participating delegation in the European Council on 28-29 June 2012. The Court held that, in exercising his constitutional prerogatives, the President participates in the meetings of the European Council as the Head of State. This task may be specifically delegated by the President to the Prime Minister.

III. Four judges of the Constitutional Court have expressed their dissenting opinions and one has expressed a concurring opinion.

Languages:

Romanian.



Identification: ROM-2012-2-004

a) Romania / **b)** Constitutional Court / **c)** / **d)** 09.07.2012 / **e)** 727/2012 / **f)** Decision on the referral of unconstitutionality of the Law amending Article 27.1 of Law no. 47/1992 on the Organisation and Operation of the Constitutional Court / **g)** *Monitorul Oficial al României* (Official Gazette), 90, 03.02.2012 / **h)** CODICES (English, Romanian).

Keywords of the systematic thesaurus:

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

1.1.4.3 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Executive bodies.**

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

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

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

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

Keywords of the alphabetical index:

Constitutional Court, jurisdiction, limit / Constitutionalism, protection / Powers, separation and interdependence, principle.

Headnotes:

The amendment of the organic law of the Constitutional Court, which abolishes the power of this Court to rule on the constitutionality of resolutions by the Plenary of the Chamber of Deputies, the Plenary of the Senate, and the Plenary of the two Joint Chambers of Parliament, without any distinction, diminishes the authority of the Constitutional Court, fundamental institution of the State.

Summary:

I. Pursuant to the provisions of Article 146a of the Constitution and Article 15.1 and 15.4 of Law no. 47/1992 on the Organisation and Operation of the Constitutional Court, the Secretary General of the Chamber of Deputies requested the Constitutional Court to review the constitutionality of the Law amending Article 27.1 of Law no. 47/1992 on the Organisation and Operation of the Constitutional Court. It was signed by 67 Deputies of the parliamentary group of the Liberal Democrat Party.

The applicants contend that the impugned law is unconstitutional, depriving the Constitutional Court of its competence to review resolutions of the Plenary of the Chamber of Deputies, of the Senate and of the Plenary of the joint Chambers of Parliament. The applicants claim that the effect of the legal act (the above-mentioned resolutions) issued by a public authority is that the Court can no longer review the lawfulness or constitutionality of a legal act. Therefore, the Parliament could decide anything, including matters contrary to the Constitution, which is unconceivable.

In support of the referral, the applicants invoked Article 1.3 of the Constitution concerning the characteristics defining Romania as a democratic state and Article 1.4 of the Constitution concerning

the principle of separation and balance of powers within constitutional democracy.

II. By majority vote to allow the referral of unconstitutionality, the Court held the following:

1. Separate from the challenges of unconstitutionality, the Court noted that after the Government's referral of the above-mentioned law and before the Court could rule upon it, the Government adopted an emergency ordinance that enshrined an identical legislative solution with exactly the same legislative content. From this perspective, the Court outlined the solution chosen by the Government. The solution was to adopt – shortly before the Court could rule upon the constitutionality of the Law amending Article 27.1 of Law no. 47/1992 – an emergency ordinance (of immediate application) that fully incorporated the legislative content of the impugned law. The Court pointed out that the Government's behaviour was unconstitutional and abusive towards the Court.

The Court also held that according to its case-law, the subsequent primary regulation acts cannot incorporate the legislative content of an unconstitutional legislative norm and thus extend its existence (see, to that effect, Decision no. 1615, 20 December 2011, published in the Official Gazette of Romania, Part I, no. 99, 8 February 2012).

2. As for the complaints of unconstitutionality, the Court held, firstly, that its power to rule upon the resolutions by the Plenary of the Chamber of Deputies, by the Plenary of the Senate or by the Plenary of the joint Chambers of Parliament was implemented by Article I.1 of Law no. 177/2010 amending and supplementing Law no. 47/1992 on the Organisation and Operation of the Constitutional Court, the Civil Procedure Code and the Criminal Procedure Code of Romania, published in the Official Gazette of Romania, Part I, no. 672, 4 October 2010.

Examining, within the *a priori* constitutional review, the provisions of Article I.1 of the mentioned law, the Court found that the respective regulation enshrines a new power of the Court. The power clearly circumscribed to the constitutional framework enshrined by Article 146, which establishes under paragraph I) that the Court "also fulfils other prerogatives as provided by the Court's organic law".

In its case-law concerning this power, the Court defined its power established following the amendment and completion of Article 27 of Law no. 47/1992. It specified that resolutions subject to constitutional review can be only resolutions of Parliament adopted following the granting of the new power. These are resolutions that affect constitutional values, rules

and principles. They could also include, as the case may be, the organisation and operation of constitutional authorities and institutions (see Decision no. 53, 25 January 2011, published in the Official Gazette of Romania, Part I, no. 90, 3 February 2011 and Decision no. 1631, 20 December 2011, published in the Official Gazette of Romania, Part I, no. 84, 2 February 2012).

The Court also held that the granting of the power to exercise such constitutional review represents a diversification and strengthening of the competence of the Court. This power would increase efforts to achieve a democratic State governed by the rule of law and thus, it cannot be considered a circumstantial action or one justified on grounds related to necessity. However, even the legal, political and social reality proves its actuality and usefulness, since the Court was asked to rule on the constitutionality of certain resolutions of Parliament questioning the constitutional values and principles.

Consequently, the impugned legislative amendment does nothing but to diminish the authority of the Court, a fundamental institution of the State, and to infringe on the principles of the rule of law. Exclusion from constitutional review of all resolutions issued by Parliament is not based on the rule of law but, possibly, on grounds of necessity.

The Court also held that this power cannot mean an “excessive” burden for the Court, as stated in the explanatory memorandum to the law subject to review. Rather, it is inextricably integrated, once legitimately granted, into a legal mechanism likely to contribute to the separation and balance of powers in a democratic and social State governed by the rule of law. To assess and decide on the activity of the Court, especially in terms of quantitative standards, is to incorrectly perceive it and furthermore, to ignore the substance of its fundamental role.

Languages:

Romanian.



Russia Constitutional Court

Important decisions

Identification: RUS-2012-2-003

a) Russia / **b)** Constitutional Court / **c)** / **d)** 18.05.2012 / **e)** 12 / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 124, 01.06.2012 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
3.17 General Principles – **Weighing of interests**.
5.3.28 Fundamental Rights – Civil and political rights – **Freedom of assembly**.

Keywords of the alphabetical index:

Public gathering / Number of participants / Penalties.

Headnotes:

The organiser of a public gathering cannot be punished on account of a difference between the declared number of participants and the number actually present at the gathering.

Summary:

I. The applicant organised a public gathering. In his request for permission lodged with the mayor's office he stated that 150 participants were expected. On the day of the gathering, twice that number actually attended. The applicant received an administrative penalty against which he appealed unsuccessfully to the competent court.

The law does indeed provide for penalties against the organisers of public gatherings when the declared number of participants differs from the number actually present. The applicant then sought to challenge the constitutionality of this provision.

II. The right of assembly is not absolute: restrictions may be placed on it by federal legislation. Those restrictions may not be arbitrary and must be designed to protect the foundations of constitutional order, guarantee security and preserve public order.

The competent authorities must seek to strike a balance between the interests of the organisers and participants and those of third parties.

The Court had already held that the public authorities had no jurisdiction to authorise or prohibit a public gathering, but could only require a change in the date or place of the event. Reasons must be given for such a decision. For this purpose, the relevant department must have at least a rough idea of the number of participants expected at the gathering. A large gathering of people wishing to express their views in public generates certain risks. To forestall those risks, it is important to be sufficiently well informed about the potential number of participants. If this is not the case, the authorities cannot evaluate the risks and take appropriate and necessary measures.

The rules in question provide for penalties against organisers when the declared number of participants differs from the number actually present. However, a larger turn-out than expected does not carry an automatic penalty. There must be a real threat to public order, to the safety of participants and non-participants or to physical property. It is also necessary to prove negligence on the part of the organiser.

This interpretation given by the Court is binding. Parliament retains its right to specify the applicable rules, lay down the conditions governing the organisation of public gatherings and introduce penalties. In the instant case, the decision imposing a penalty on the applicant must be reviewed.

Languages:

Russian.



Identification: RUS-2012-2-004

a) Russia / **b)** Constitutional Court / **c)** / **d)** 27.06.2012 / **e)** 15 / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 159, 13.07.2012 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

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

5.1.1.4.2 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Incapacitated**.

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

Keywords of the alphabetical index:

Mental disorder, degree / Incapacity, degree / Civil Code.

Headnotes:

The provisions of the Civil Code relating to legal capacity violate the Constitution when they fail to establish different degrees of incapacity or recognise intermediate situations. The provisions of the Civil Code which do not apply different treatment according to the degree of mental impairment are therefore unconstitutional.

Summary:

I. The applicant is a disabled woman cared for in a specialised facility. In 2010 a court declared her lacking in legal capacity. In reaching its decision, the court referred to the legislative provisions requiring a finding of total incapacity in the case of persons suffering from mental illness.

According to the applicant, the lack of any system of partial incapacity violates the Constitution since she is deprived of the free exercise of her rights. She considers that her degree of mental disorder does not interfere with other people's freedoms and therefore does not justify a total restriction of her rights. The rules in question are accordingly alleged to be discriminatory.

II. The Court notes that the Constitution proclaims the individual and his rights and freedoms as the supreme value. Discrimination against persons suffering from a mental deficiency is therefore unacceptable. The state must accordingly take measures to ensure real and effective protection of their rights and interests.

The Court points out that the legislation only recognises two situations, total capacity or total incapacity of persons of unsound mind, without providing for any intermediate situations. The Court refers *inter alia* to the recommendation of the

Committee of Ministers of the Council of Europe and the judgments of the European Court of Human Rights which set out a series of principles for the legal protection of adults lacking in legal capacity. All these factors point to the need for flexible legislation allowing for personalised responses.

The Court states that the fact that a person may be declared lacking in capacity on the grounds of mental illness is not in itself a violation of the Constitution because it is intended to protect the person's rights and legitimate interests.

According to the Court, however, the relevant provisions of the Civil Code violate the Constitution in that they do not provide for different degrees of incapacity and do not recognise any intermediate situations.

The decisions given in this case by the courts of first instance must therefore be reviewed.

Languages:

Russian.



Serbia

Constitutional Court

Important decisions

Identification: SRB-2012-2-002

a) Serbia / **b)** Constitutional Court / **c)** / **d)** 11.07.2012 / **e)** VIIIU-534/2011 / **f)** / **g)** *Službeni glasnik Republike Srbije* (Official Gazette), 71/2012 / **h)** CODICES (English, Serbian).

Keywords of the systematic thesaurus:

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

4.7.4.1.3 Institutions – Judicial bodies – Organisation – Members – **Election.**

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, appointment, conditions.

Headnotes:

If a person is not entitled to take part in the decision-making of a particular body, they cannot participate in the conduct by that body of a procedure which is concluded by the rendering of a decision, and they cannot be counted in the quorum.

Summary:

109 persons lodged appeals with the Constitutional Court against decisions made by the High Judicial Council (hereinafter, "HJC") in proceedings arising from objections they had made to decisions by which the first composition of the HJC held that in the process of the general election of judges, the applicants had not been elected to judicial office with permanent tenure under the Law on Judges (*Official Gazette of the RS*, no. 116/08, 58/09 and 104/09) and that their tenure as judges should end on 31 December 2009. The objections filed by the

applicants sought the review of the decisions passed by the first composition of the HJC, which were rejected by the decisions challenged in the appeals before the Court.

The appeals were brought on the grounds of substantive violation of the rules of procedure, erroneous and incomplete finding of fact, violations of substantive law, and the violation of constitutional rights and rights guaranteed by the European Convention on Human Rights. The applicants drew attention to the composition of the HJC which decided on the objections, and the manner in which those decisions were made, as one of the substantive violations.

The Court noted that certain permanent members of the HJC which decided on the objections of the unelected judges were members *ex-officio* who had acted in the same capacity as members of the first composition of the HJC (President of the Supreme Court of Cassation, Minister in charge of the judiciary and Chair of the Competent Committee of the National Assembly) and that this also applied to one of the elective members of the HJC; that they were present at sessions and that they were counted in the quorum; that they refrained from voting; that during the decision-making procedure, criminal proceedings were instituted against an elective member and he was held on remand; that one of the elective members resigned from office during the process; that during the proceedings, the Anti-Corruption Agency (hereinafter, "ACA") passed a decision against an elective member who had been holding public office as Dean of the Faculty, establishing that he had breached the ACA Act by assuming another public office (membership of the HJC), on which grounds his public office as member of the HJC was terminated under compulsion of law; that the Board of the ACA, deciding on the objection he filed against the above first-instance decision, resolved to overturn his objection as without merits, while the National Assembly rejected the motion for the termination of office of the above member.

An objection against a decision of the HJC constitutes a legal remedy. Impartiality comes under question when a member who was part of the decision-making process at first instance then decides on the legal remedy. The option of refraining from voting is not possible in a body that proceeds and decides in the manner of a tribunal established under the law.

The office of an HJC member elected from among faculty of law professors may only be terminated by a decision passed by the National Assembly. However, the Court held that the ACA's decision objectively called into question the impartiality of the above member.

A provision within Article 5.1 of the Law on Amendments to the Law on Judges (*Official Gazette of the RS*, no. 101/10) prescribes that the HJC, in its permanent composition, shall review all decisions on the termination of judicial office passed by the first composition of the HJC, referred to in Article 101.1 of the Law on Judges.

The Court found that in the review procedure, certain omissions were made which carried such weight that the presumption that the unelected judges were entitled to be elected was not overturned even where the permanent composition of the HJC passed decisions on the basis of legally valid votes. Cases included decisions in which certain unelected judges were accused of being unqualified, incompetent or unworthy of exercising judicial function. This is based on the fact that in decision-making procedure, the principle of equality of arms was violated, while decisions by which objections were overturned were founded on a clearly arbitrary application of substantive law.

The qualification may not be assessed based on the percentage of set aside decisions which is determined in relation to the total number of decisions against which appeals were lodged. Neither may the minimum level of success be viewed on its own.

In terms of the criterion of competence, the notions of "gross breach" clearly do not meet the standards of a legal norm that is sufficiently precise.

Regarding the criterion of worthiness, the Court stressed that the principle of equality of arms is only one feature of the right to a fair trial. Unelected judges whose worthiness was challenged should have been given the opportunity to contest those allegations in a public hearing, but this was not the case. The same applied to the criteria of qualification and competence.

The Constitutional Court was accordingly of the view that the presumption of having the right to be elected was not overturned. The Court annulled all decisions made by the HJC and ordered it to elect, in accordance with Article 30 of its Rules, the applicants to serve as judges in courts that have assumed jurisdiction or partial jurisdiction of the court in which they performed their judicial function, taking into account the type of court in which they worked, the matters they handled, and their application to the public notice on the election of judges.

The passing of this decision and the decision by the HJC to the effect that this body shall elect the applicants to judicial office with permanent tenure does not interfere with the HJC's application of a

provision contained in Article 6 of the Law on Amendments to the Law on Judges and reconsideration on the existence of grounds for calling into question their qualification, competence or worthiness.

Languages:

English, Serbian.



Slovenia

Constitutional Court

Statistical data

1 May 2012 – 31 August 2012

In this period, the Constitutional Court held 14 sessions – 7 plenary and 7 in panels: 4 in the civil panel, 1 in the criminal panel and 2 in the administrative panel. It received 129 new requests and petitions for the review of constitutionality/legality (U-I cases) and 413 constitutional complaints (Up cases).

In the same period, the Constitutional Court decided 68 cases in the field of the protection of constitutionality and legality, as well as 395 cases in the field of the protection of human rights and fundamental freedoms. It also decided 1 case on the review of the admissibility of a referendum.

Decisions are published in the Official Gazette of the Republic of Slovenia, whereas the orders of the Constitutional Court are not generally published in an official bulletin, but are notified to the participants in the proceedings.

However, the 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 the dissenting/concurring opinions);
 - On the website of the Constitutional Court (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 Slovene and English).
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Important decisions

Identification: SLO-2012-2-002

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 05.07.2012 / **e)** Up-402/12, U-I-86 / **f)** / **g)** *Uradni list RS* (Official Gazette), 55/2012 / **h)** *Pravna praksa*, Ljubljana, Slovenia (abstract); CODICES (Slovenian, English).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Extradition, detention / *Locus standi*.

Headnotes:

The fundamental guarantees in relation to detention must be respected when decisions are taken on the conditions for the extradition of an individual.

Summary:

Courts are bound by the Constitution and laws in their decision making (Article 125 of the Constitution). In extradition procedures involving defendants and convicted persons, courts may not adopt positions which entail a violation of the human rights and fundamental freedoms of individuals determined by the Constitution. If a court decides on conditions for the extradition of an individual on the basis of a detention decision, such decision must respect the fundamental guarantees determined in the first paragraph of Article 20 of the Constitution, among which the requirement that a judicial decision be issued is essential. This requirement cannot be overlooked merely because it was established that other constitutional conditions for detention have been fulfilled. The position of the court which allows that a decision on detention be issued by an investigating judge of another state which operates within the framework of the state prosecutor's office of that state, which is not an independent and impartial bearer of judicial power, violates the right to personal liberty.

Applicants will only have a legal interest if they show that the granting of their petition would lead to an improvement in their legal position; their petitions will be rejected unless this is demonstrated to the satisfaction of the Constitutional Court.

Languages:

Slovenian, English (translation by the Court).



South Africa Constitutional Court

Important decisions

Identification: RSA-2012-2-004

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 07.06.2012 / **e)** CCT 98/11, [2012] ZACC 11 / **f)** Mashilo Shadrack Sebola and Another v. Standard Bank of South Africa and Others / **g)** <http://41.208.61.234/uhtbin/cgiisirs/20120905165000/SIRSI/0/520/J-CCT98-11> / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Credit institution / Credit, protection / Consumer, protection, constitutional value / Debt, enforcement / Default judgment / Execution, writ / Interpretation, purposive / Law, interpretation, according to purpose / Notice, delivery / Notice, right / Notification, postal.

Headnotes:

The National Credit Act 34 of 2005 requires credit providers, before taking legal proceedings to recover debts, to prove delivery of a notice advising consumers of their right to refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court, or ombud, to resolve any dispute under the agreement. In the ordinary course, the credit provider must show delivery by proving:

- i. registered despatch to the address of the consumer; and
- ii. that the notice reached the post office chosen by the consumer.

If, however, the consumer contends that the notice was not received, the Court must establish whether the credit provider has complied with the terms of the Act. If

not, the Act requires the matter be adjourned for the credit provider to take the steps directed by the Court to enable the consumer to exercise her rights.

Summary:

I. Mr and Mrs Sebola entered into a home loan agreement with Standard Bank, which specified a post office box to which notices were to be delivered. When the Sebolas fell into arrears, Standard Bank's attorneys sent a notice in terms of Section 129 of the National Credit Act 34 of 2005 (the Act) to the chosen address.

Section 129, read with Section 130 of the Act, requires credit providers, before taking legal proceedings to recover debts, to provide consumers with a notice advising them of their right to refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court, or ombud, to resolve any dispute under the agreement.

The notice was, however, erroneously diverted to the wrong post office. Unaware of this, the Bank took default judgment against the Sebolas and obtained a writ of execution against their home. The Sebolas applied to the High Court for rescission of the judgment on the basis that they had not received the notice or the summons.

Both the High Court and the Full Court, on appeal, dismissed the application to rescind, ruling that the Act did not require actual receipt of the notice and that proof by the Bank that it had despatched the notice to the consumers' chosen address was sufficient. In the Constitutional Court the Sebolas argued that the Act's provisions must be constitutionally interpreted to give effect to the consumer protections envisioned in the Act. The Bank urged the Court not to decide the issue, as there had been no proper ventilation of the constitutional issues before any of the lower courts.

II. Writing for the majority, Cameron J interpreted the Act mindful of the need to balance the respective rights and responsibilities of credit providers and consumers.

The Court found that the Act requires a credit provider to aver and prove that the notice was delivered to the consumer. The notice did not need to come to the actual attention of the consumer. The credit provider should ordinarily show delivery by proving:

- i. registered despatch to the chosen address of the consumer and
- ii. that the notice reached the appropriate post office for delivery to the consumer.

If, however, the consumer contends that the notice was not received, the Court must establish whether the credit provider has complied with the terms of the Act. If not, the Act requires the matter be adjourned for the credit provider to take the steps directed by the Court to enable the consumer to exercise her rights.

In this case, the Bank had not proved that the notice reached the post office chosen by the Sebolas. The application for rescission was therefore granted.

III. In a separate judgment, Zondo AJ (with whom Mogoeng CJ and Jafta J concurred) agreed with the order proposed by Cameron J, but for different reasons. In Zondo AJ's view, the credit provider had to make the consumer aware of the consumer's default and the non-litigious options of dispute resolution which Section 129 stipulates. His view is based on the common law principles relating to delivery of notices, judicial interpretations of statutes with similar provisions and a construction of the statute as a whole with a special emphasis on its purposes and Section 129.1.a.

Supplementary information:

Legal norms referred to:

- National Credit Act 34 of 2005.

Cross-references:

- *Van Wyk v. Unitas Hospital and Another* [2007] ZACC 24; 2008 (2) *South African Law Reports* 472 (CC); 2008 (4) *Butterworths Constitutional Law Reports* 442 (CC);
- *MEC for Education, KwaZulu-Natal, and Others v. Pillay*, *Bulletin* 2007/3 [RSA-2007-3-014].

Languages:

English.



Identification: RSA-2012-2-005

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 12.06.2012 / **e)** CCT 75/11, [2012] ZACC 12 / **f)** Hilda Van der Burg and Another v. National Director of Public Prosecutions (Centre for Child Law as amicus curiae) / **g)** <http://41.208.61.234/uhtbin/cgiisirs/20120829144918/SIRSI/0/520/J-CCT75-11> / **h)** CODICES (English).

Keywords of the systematic thesaurus:

- 5.1.1.4 Fundamental Rights – General questions – Entitlement to rights – **Natural persons.**
- 5.3.39 Fundamental Rights – Civil and political rights – **Right to property.**
- 5.3.44 Fundamental Rights – Civil and political rights – **Rights of the child.**
- 5.4.13 Fundamental Rights – Economic, social and cultural rights – **Right to housing.**

Keywords of the alphabetical index:

Family, home, forfeiture / Forfeiture, property, used for crime / Property, immovable, forfeiture / Housing, expulsion order, non-execution / Child, best interests.

Headnotes:

Persistence of parents in criminal acts involving the family home can justify the forfeiture of the home, taking into account the children's best interests.

Summary:

I. Section 154.1 of the Liquor Act 27 of 1989 (Liquor Act) prohibits the sale of liquor without a license. Section 50.1 of the Prevention of Organised Crime Act 121 of 1998 (hereinafter, "POCA") provides for forfeiture of the property used for the commission of an offence to the state.

The applicants are a married couple with four children, three of whom are minors. They have been running an illegal shebeen or bar for a number of years from the property in which they and their four children live. Despite many complaints from neighbours about harmful effects, the applicants persisted. Even in the face of numerous police actions (including warnings, searches, seizures of illegal liquor and repeated arrests) and a preservation order granted over the property, the applicants continued flouting the law by running the shebeen.

The High Court (both a single judge and an appeal panel) was satisfied that the applicants' property was an instrumentality of the offence of selling liquor without a license and that the forfeiture was not disproportionate. Forfeiture was accordingly granted.

The applicants applied to the Constitutional Court to have this set aside.

The Centre for Child Law was admitted as *amicus curiae*. It argued that the Constitution guarantees children separate representation and that the Court should not order forfeiture unless it is satisfied that the children's interests are adequately considered. It argued that because the High Court did not sufficiently consider the children's interests, this Court must consider the report of a curator before deciding on forfeiture.

II. In a unanimous judgment, penned by van der Westhuizen J, this Court dismissed the appeal. The Court found the applicants' arguments regarding the applicability of POCA to the offence of illegal liquor sales unconvincing. Moreover, forfeiture was not deployed abusively. Almost 60 police actions failed to deter the profitable and co-ordinated criminal business. Also, the applicants did not show that their legitimate monthly income, from two fruit stalls, is insufficient to lease another home while supporting their children. The Court found the forfeiture proportionate.

The Court also found that the High Court dealt sufficiently with the interests of the children and that a separate report was not necessary. But it found the children appeared to be in need of care and protection. Under its constitutional duty to consider the child's best interests as paramount in every matter concerning the child, it ordered the NDPP to engage a social worker as contemplated by the Children's Act to undertake an investigation to determine whether the minor children are in need of care and protection.

Supplementary information:

Legal norms referred to:

- Section 25.1 of the Constitution of South Africa Act 108 of 1996;
- Section 26.3 of the Constitution of South Africa Act 108 of 1996;
- Section 28.2 of the Constitution of South Africa Act 108 of 1996;
- Section 50.1 of the Prevention of Organised Crime Act 121 of 1998;
- Item 33 of the Schedule to the Prevention of Organised Crime Act 121 of 1998;
- Section 154.1 of the Liquor Act 27 of 1989;

- Section 150.1 of the Children's Act 38 of 2005;
- Section 155 of the Children's Act 38 of 2005.

Cross-references:

- *Mohunram and Another v. National Director of Public Prosecutions and Another (Law Review Project as amicus curiae)*, *Bulletin* 2007/1 [RSA-2007-1-003];
- *Prophet v. National Director of Public Prosecutions*, *Bulletin* 2006/3 [RSA-2006-3-013];
- *National Director of Public Prosecutions and Another v. Mohamed NO and Others* [2002] ZACC 9; 2002 (4) *South African Law Reports* 843 (CC); 2002 (9) *Butterworths Constitutional Law Reports* 970 (CC);
- *S v. M (Centre for Child Law as amicus curiae)*, *Bulletin* 2007/3 [RSA-2007-3-011].

Languages:

English.



Identification: RSA-2012-2-006

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 13.06.2012 / **e)** CCT 112/11; [2012] ZACC 13 / **f)** South African Transport and Allied Workers Union and Another v. Jacqueline Garvas and Others / **g)** <http://41.208.61.234/uhtbin/cgiirsi/20120813135415/SIRSI/0/520/J-CCT112-11> / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

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

3.20 General Principles – **Reasonableness.**

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

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

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

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

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

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

Keywords of the alphabetical index:

Assembly, function, democratic / Burden of proof, presumption affecting / Burden of proof, reversal / Compensation, damage / Damages, liability / Freedom of expression, collective / Freedom of assembly, restriction, legitimate aim / Fundamental rights, conflict / Assembly, organiser, liability / Justification, grounds / Justification, reasonable / Liability, civil / Liability, strict / Liability, third party / Victim, compensation / Violence, public demonstration.

Headnotes:

The Regulation of Gatherings Act, 205 of 1993 does provide a real defence to a claim for damages arising from the provision holding organisers of meetings liable for damage caused as a result of the meeting. Whilst the provision does limit the right to freedom of assembly, as guaranteed by the Constitution, this limitation is reasonable and justifiable.

Summary:

I. In the exercise of its right to assemble and demonstrate peacefully and unarmed, as guaranteed by Section 17 of the Constitution, the South African Transport and Allied Workers Union (hereinafter, “SATAWU”) organised a gathering of thousands of people during a security industry strike. The property of street vendors and owners of small businesses, as well as some privately owned motor vehicles and property of the City of Cape Town were allegedly damaged as a result.

A number of individuals who suffered loss as a result of the gathering instituted action against SATAWU in the High Court, basing their claim on Section 11.1 of the Regulation of Gatherings Act, 205 of 1993 (Act), alternatively, the common law. Section 11.1 imposes liability on an organiser of a gathering or demonstration that results in “riot damage”. Section 11.2 provides the organiser with a defence. SATAWU challenged the constitutional validity of the provision. Its challenge was two-fold. First, it argued that the defence Section 11.2 provided is irrational, in that it is illusory and not capable of application. Second, the provision limits the right to freedom of assembly in a manner that is unreasonable and unjustifiable in an open and democratic society based on human dignity, equality and freedom.

The Supreme Court of Appeal upheld a decision of the Western Cape High Court (High Court), dismissing the challenge.

II. Writing for the majority, Mogoeng CJ dismissed the appeal, upholding the decisions of the High Court and Supreme Court of Appeal. The majority concluded that the defence is capable of application and is therefore not irrational. To escape liability, an organiser would have to prove that the harm-causing conduct was not reasonably foreseeable and that it took reasonable steps to ensure that any reasonably foreseeable harm-causing conduct did not occur. While the provision does limit the right of assembly, it does not negate its exercise. It merely subjects the exercise of the right to certain strict conditions, in a way designed to moderate or prevent damage to property or injury to innocent people. The purpose of the provision is to protect members of society, including those who do not have the resources to identify and pursue those who caused the damage, by placing liability for damage arising from gatherings at the doorstep of the organisation responsible for those gatherings. This, the majority concluded, was a reasonable and justifiable limitation.

III. Jafta J, in a concurring judgment, agreed that the appeal should be dismissed, but because the union’s challenge was misdirected. He held that Section 11.2 does not limit the right. It is Section 11.1, which imposes liability on the organisers that does so. Additionally, Jafta J held, the applicants failed to show that the defence is irrational because when the requirements of Section 11.2.b and 11.2.c are construed in a way that makes Section 11.2.c an alternative to Section 11.2.b, a rational meaning emerges.

Supplementary information:

Legal norms referred to:

- Regulation of Gatherings Act, 205 of 1993;
- Section 17 of the Constitution of the Republic of South Africa, 1996.

Cross-references:

- *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others, Bulletin 2000/1 [RSA-2000-1-003];*
- *Fedsure Life Assurance Ltd and Others v. Greater Johannesburg Transitional Metropolitan Council and Others, Bulletin 1999/1 [RSA-1999-1-001];*
- *S v. Mhlungu and Others, Bulletin 1995/3 [RSA-1995-3-003];*

- *Bertie van Zyl (Pty) Ltd and Another v. Minister for Safety and Security and Others*, *Bulletin* 2009/2 [RSA-2009-2-005];
- *Investigating Directorate: Serious Economic Offences and Others v. Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v. Smit NO and Others*, *Bulletin* 2000/2 [RSA-2000-2-011];
- *Albutt v. Centre for the Study of Violence and Reconciliation, and Others*, *Bulletin* 2010/1 [RSA-2010-1-002];
- *South African National Defence Union v. Minister of Defence and Another*, *Bulletin* 1999/2 [RSA-1999-2-006];
- *S v. Mamabolo (E TV and Others Intervening)*, *Bulletin* 2001/1 [RSA-2001-1-005].

Languages:

English.



Identification: RSA-2012-2-007

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 26.06.2012 / **e)** CCT 81/11, [2012] ZACC 14 / **f)** Competition Commission v. Yara South Africa (Pty) Ltd and Others / **g)** <http://41.208.61.234/uhtbin/cgiisirs/20120905155717/SIRSI/0/520/J-CCT81-11.html> / **h)** CODICES (English).

Keywords of the systematic thesaurus:

1.4.3.3 Constitutional Justice – Procedure – Time-limits for instituting proceedings – **Leave to appeal out of time.**

1.4.4 Constitutional Justice – Procedure – **Exhaustion of remedies.**

1.5.4.1 Constitutional Justice – Decisions – Types – **Procedural decisions.**

Keywords of the alphabetical index:

Appeal, filing late, reasons / Appeal, leave to appeal / Appeals procedure / Competition law, domestic / Competition, judicial proceedings / Constitutional Court, jurisdiction / Proceedings, pending, application / Justice, interests / Constitutional issue, Court, jurisdiction / Court, jurisdiction, constitutional issue.

Headnotes:

An application for condonation for excessive delay in applying for leave to appeal to the Constitutional Court can be refused if effectively no reasons are provided for said delay. It also may not be in the interests of justice for the Constitutional Court to hear a case before the Competition Appeals Court has made a decision regarding an application pending before it for leave to appeal to the Supreme Court of Appeal. The Competition Tribunal's powers to amend complaints before it is a constitutional issue.

Summary:

I. A case was brought before the Competition Commission (Commission) against SASOL. The Competition Commission investigated the matter, referred it to the Competition Tribunal (Tribunal) and also listed two additional entities as respondents, namely Yara South Africa (Pty) Ltd (Yara) and Omnia Fertilizer Ltd (Omnia). Following the first amendment, the Competition Commission amended the referral twice thereafter. On 24 February 2010, the Competition Tribunal granted the Competition Commission leave to amend the referral.

Omnia appealed to the Competition Appeal Court (hereinafter, "CAC") against the decision of the Tribunal. The question before the CAC was whether the Competition Tribunal had the power to grant the amendments sought. The CAC held that the Competition Tribunal did not have the power to amend a referral to introduce a new complaint or a new respondent, unless the new complaint or new respondent had previously been submitted or initiated by, or was subject to a claim before the Commission.

The Commission sought leave to appeal against the decision of the CAC. The Commission applied for leave to appeal to both the Constitutional Court and the Supreme Court of Appeal. The application for leave to appeal to the Supreme Court of Appeal was pending before the CAC at the time the matter was heard by the Constitutional Court.

II. Although the substantive issue before the Constitutional Court was whether the Tribunal had the power to amend the claims before it, the Constitutional Court's decision was limited to procedural issues. The Constitutional Court, relying on the *Senwes* judgment, concluded that a dispute concerning the extent of the Tribunal's powers was indeed a constitutional matter. Furthermore, because the Commission was still awaiting leave from the CAC to appeal to the Supreme Court of Appeal, the Constitutional Court assumed that the case had

reasonable prospects of success. The question was whether it would be in the interests of justice to grant the Commission leave to appeal.



Justice Zondo, writing for the majority, held that the Commission failed to provide substantive reasons for the excessive four-month delay in filing the application for leave. The application for condonation for late filing should not be granted. The application for leave to appeal was dismissed with costs.

III. In a concurring judgment, Justice Froneman concluded that condonation should be granted, but that the application for leave should be dismissed. He stated that it would not be in the interests of justice for the Constitutional Court to hear the matter before the CAC decided on the application pending before it.

In a dissenting judgment, Justice Cameron and Justice Yacoob, with whom Moseneke DCJ concurred, held that condonation and leave to appeal should have been granted. The delay in applying for leave to appeal was not deliberate and the respondent companies were not unduly prejudiced by it. Further, it was not essential for the Supreme Court of Appeal to hear the matter before it was heard by the Constitutional Court, particularly since the issues were constitutional, and the statute specifically envisages appeals directly from the CAC to the Constitutional Court. Proceedings before the Supreme Court of Appeal would cause undue delay, which the Commission argued it could not afford. They held in addition that the Commission could appeal to the Constitutional Court without first seeking leave from the CAC.

Supplementary information:

Legal norms referred to:

- Sections 19.1, 22, 26.1, 36.1 of the Competition Act 89 of 1998;
- Rule 19 of the Rules of the Constitutional Court.

Cross-references:

- *Competition Commission of South Africa v. Senwes Ltd* [2012] ZACC 6.

Languages:

English.

Identification: RSA-2012-2-008

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 26.06.2012 / **e)** CCT 90/11; [2012] ZACC 15 / **f)** Competition Commission v. Loungefoam (Pty) Ltd and Others / **g)** <http://41.208.61.234/uhtbin/cgiisirs/20120829145105/SIRSI/0/520/J-CCT90-11> / **h)** CODICES (English).

Keywords of the systematic thesaurus:

1.4.4 Constitutional Justice – Procedure – **Exhaustion of remedies.**

4.7.1.1 Institutions – Judicial bodies – Jurisdiction – **Exclusive jurisdiction.**

Keywords of the alphabetical index:

Anti-trust, procedure / Appeal, leave to appeal / Competition law, domestic / Competition, fair / Competition, judicial proceedings / Competition, economic, protection / Competition, proceedings, formal error, remedy / Constitutional Court, Supreme Court, jurisdiction, distribution / Procedural fairness, principle / Procedural formality / Procedure for enforcing a charge / Justice, interests / Constitutional matter, Constitutional Court, leave to appeal, requirement.

Headnotes:

Section 63.2 of the Competition Act 89 of 1998 (Act) provides that an appeal may be brought to the Supreme Court of Appeal, or, if it concerns a constitutional matter, to the Constitutional Court, only with leave of the Competition Appeal Court; or if it refuses leave, with leave of the Supreme Court of Appeal or the Constitutional Court, as the case may be. An appeal directly to the Constitutional Court ought to be with leave of the Competition Appeal Court unless the interests of justice justify a direct appeal.

Summary:

I. The respondents – Loungefoam (Pty) Ltd, GommaGomma (Pty) Ltd, Vitafoam SA (Pty) Ltd, Steinhoff Africa Holdings (Pty) Ltd, Steinhoff International Holdings (Pty) Ltd, Feltex Holdings (Pty) Ltd, and Kap International Holdings (Pty) Ltd – are manufacturers and sellers of flexible polyurethane

foam who are alleged to have engaged in anti-competitive conduct in breach of the Competition Act 89 of 1998 (the Act).

The Act sets out procedures by which the Competition Commission (Commission) may address “prohibited practices”. Generally, a private individual or the Commission may initiate a complaint; the Commission must conduct an investigation based on the complaint initiated; and then the Commission may either issue a notice of non-referral or submit a referral to the Tribunal for adjudication.

The Commission initiated three separate complaints and ensuing investigations, and submitted a referral to the Competition Tribunal (the Tribunal). It contained no complaint against Steinhoff Africa. The Tribunal granted the Commission’s application to amend its referral to include Steinhoff Africa and to expand the charges to cover Steinhoff International, Feltex and Kap International. The amendment was motivated by the defence put up to the original referral. The Competition Appeal Court (CAC) overturned the decision of the Tribunal and instead refused to allow the amendment.

II. The Constitutional Court in a majority judgment held that the question regarding the scope and proper exercise of the Commission’s statutory power of complaint initiation and referral is a constitutional matter. The majority judgment held that Section 63.2 of the Act is capable of two constitutionally compliant interpretations:

- a. it bars a litigant seeking leave to appeal against a decision of the CAC from approaching either the Supreme Court of Appeal or Constitutional Court directly without first applying to the Competition Appeal Court for leave, or
- b. it constitutes a bar unless the interests of justice under Section 167.6 of the Constitution permit a direct approach to the Constitutional Court. The majority judgment concluded that it is unnecessary to decide which interpretation is to be preferred as the facts show non-compliance with either interpretation. It dismissed the application on that basis.

III. A minority dissenting judgment of two judges held that Section 63.2 does not bar the Commission from seeking leave directly from the Constitutional Court, even if its provisions have not been met. The minority held that the importance of the Commission’s public role, the significance of the issues it raises, and their prospects of success in the appeal and the fact that the matter does not lie at the complex intersection of law and economics, warrant the grant of leave to appeal.

Supplementary information:

Legal norms referred to:

- Section 63.2 of the Competition Act 89 of 1998;
- Sections 1, 2, 4, 8, 19, 26, 27, 49(B), 50, 51, 53, 62 and 67 of the Competition Act 89 of 1998;
- Rule 18.1 of the Competition Tribunal Rules;
- Rule 19.2 of the Constitutional Court Rules;
- Sections 39.2 and 167 of the Constitution of the Republic of South Africa Act 108 of 1996;
- Section 16 of the Constitutional Court Complementary Amendment Act 79 of 1997.

Cross-references:

- *American Natural Soda Ash Corporation and Another v. Competition Commission and Others*, 2005 (6) SALR 158 (SCA);
- *Competition Commission of South Africa v. Senwes Ltd*, [2012] ZACC 6;
- *Everfresh Market Virginia (Pty) Ltd v. Shoprite Checkers (Pty) Ltd*, 2012 (1) SALR 256 (CC), [2011] ZACC 30;
- *Netstar (Pty) Ltd v. Competition Commission*, 2011 (3) SALR 171 (CAC);
- *Pharmaceutical Manufacturers Association of SA and Another*. In *Re Ex Parte President of the Republic of South Africa and Others*, *Bulletin* 2000/1 [RSA-2000-1-003];
- *Prophet v. National Director of Public Prosecutions*, *Bulletin* 2006/3 [RSA-2006-3-013];
- *Woodlands Dairy (Pty) Ltd and Another v. Competition Commission*, 2010 (6) SALR 108 (SCA);
- *S v. Boesak* 2001 (1), *Bulletin* 2001/1 [RSA-2001-1-001];
- *Investigating Directorate: Serious Economic Offences and Others v. Hyundai Motor Distributors (Pty) Ltd and Others*: In *re Hyundai Motor Distributors (Pty) Ltd and Others v. Smit NO and Others*, *Bulletin* 2000/2 [RSA-2000-2-011].

Languages:

English.



Identification: RSA-2012-2-009

a) South Africa / b) Constitutional Court / c) / d) 27.07.2012 / e) CCT 110/11, CCT 126/11, [2012] ZACC 16 / f) Minister of Home Affairs and Others v. Tsebe and Others, Minister of Justice and Constitutional Development and Another v. Tsebe and Others / g) <http://41.208.61.234/uhtbin/cgiisirs/20120829145105/SIRSI/0/520/J-CCT110-11> / h) CODICES (English).

Keywords of the systematic thesaurus:

1.2.1.3 Constitutional Justice – Types of claim – Claim by a public body – **Executive bodies.**
 2.1.3.1 Sources – Categories – Case-law – **Domestic case-law.**
 2.2.1.1 Sources – Hierarchy – Hierarchy as between national and non-national sources – **Treaties and constitutions.**
 5.1.1.3 Fundamental Rights – General questions – Entitlement to rights – **Foreigners.**
 5.1.1.4 Fundamental Rights – General questions – Entitlement to rights – **Natural persons.**
 5.3.1 Fundamental Rights – Civil and political rights – **Right to dignity.**
 5.3.2 Fundamental Rights – Civil and political rights – **Right to life.**
 5.3.3 Fundamental Rights – Civil and political rights – **Prohibition of torture and inhuman and degrading treatment.**

Keywords of the alphabetical index:

Death penalty, non-imposition, guarantee / Death penalty, obtaining assurances against imposition / Deportation, receiving state, assurances / Extradition, assurance by receiving state / Extradition, safeguard against death sentence / Foreigner, deportation / Foreigner, stay, illegal / Human right, scope of application / Precedent, judicial / Punishment, cruel, inhuman or degrading / Right to life, scope.

Headnotes:

South African officials may not extradite or deport a person to another country where he or she faces the real risk of the death penalty being imposed and executed, unless that country has provided an official assurance that the death penalty will not be imposed, or if imposed, will not be executed.

Summary:

I. Mr Emmanuel Tsebe and Mr Jerry Phale were charged, in Botswana, with murdering their romantic partners. In Botswana, murder remains a capital

offence. Both men fled to South Africa and were arrested and detained. The government of Botswana sent an extradition request to the South African government in respect of Mr Tsebe. South Africa later asked Botswana to provide assurances that the death penalty will not be imposed, or in the alternative, not executed (requisite assurance) should he be extradited. Botswana refused.

While in custody, the two men separately applied to the High Court for an order preventing the government from extraditing or deporting them. Mr Tsebe died before the case was heard. The High Court granted the relief, relying on *Mohamed v. President of the Republic of South Africa (Mohamed)* which held that a person may not be surrendered to a country where he or she faces the real risk of the death penalty being imposed and executed.

The Minister for Home Affairs and the Minister for Justice and Constitutional Development applied for leave to appeal to the Constitutional Court. They argued that if Mr Phale were not extradited, he would pose a threat to the rights of others, since under current legislation South Africa does not have jurisdiction to try them.

II. The appeal was unanimously dismissed. Zondo AJ on behalf of the Court ruled that the case could not be distinguished from *Mohamed* and that there was also no evidence that that decision was wrong. It would therefore be in breach of the constitutional rights to life, dignity and not to be subjected to cruel or inhuman treatment to extradite or deport a person to a country when that country refuses to provide the requisite assurance. The rights in the Constitution apply to all persons in South Africa, and not only to its citizens.

The Court further held that under South Africa's treaty obligations, both with Botswana and under the Southern African Development Community Treaty, it had the right to refuse extradition if Botswana did not give the requisite assurance.

III. In a judgment dissenting on the form of the order, Yacoob J held that the High Court rightly and persuasively decided the case before it and that leave to appeal should not have been granted at all.

Supplementary information:

Legal norms referred to:

- The Constitution of South Africa Act 108 of 1996;
- The Immigration Act 13 of 2002;

- The Extradition Act 67 of 1962;
- The SADC Protocol on Extradition;
- The Penal Code of Botswana.

Cross-references:

- *Mohamed and Another v. President of the Republic of South Africa and Others*, Bulletin 2001/2 [RSA-2001-2-007].

Languages:

English.



Spain Constitutional Court

Important decisions

Identification: ESP-2012-2-005

a) Spain / **b)** Constitutional Court / **c)** First Chamber / **d)** 02.07.2012 / **e)** STC 145/2012 / **f)** *Sortu* / **g)** *Boletín Oficial del Estado* (Official Gazette), 181, 30.07.2012, www.boe.es/boe/dias/2012/07/30/pdfs/BOE-A-2012-10258.pdf / **h)** www.tribunalconstitucional.es/es/jurisprudencia/Paginas/Sentencia.aspx?cod=20617; CODICES (Spanish).

Keywords of the systematic thesaurus:

2.2.1.6.2 Sources – Hierarchy – Hierarchy as between national and non-national sources – Community law and domestic law – **Primary Community legislation and domestic non-constitutional legal instruments.**
 3.13 General Principles – **Legality.**
 3.26 General Principles – **Principles of EU law.**
 4.13 Institutions – **Independent administrative authorities.**
 4.17.1.4 Institutions – European Union – Institutional structure – **Court of Justice of the EU.**
 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:

Principle, legality, primacy / Administrative, sanction, violation / Authorisation.

Headnotes:

The right to an effective remedy is violated when a judge applies a provision that the Court of Justice has declared contrary to European Union Law. The principle of primacy binds not only Member States' judges and courts, but also their administrative and regulatory bodies. Thus, they are not allowed to apply national provisions contrary to European Union Law, irrespective of the status of such provisions in the hierarchy of norms.

Summary:

I. The so-called "Function 14" of the Law 34/1998 on the hydrocarbon sector establishes that the National Energy Commission must authorise every increase of more than 10% of the interest in the share capital of gas storage and distribution companies.

As such, in April 2007, the Spanish national authorities imposed an administrative sanction on Iberdrola S.A., which had increased its interest in the share capital of Medgaz S.A. without the necessary prior authorisation.

Afterwards, the so-called "Function 14" was declared contrary to European Union Law by the then Court of Justice of the European Communities (now Court of Justice of the European Union) in its Judgment of 17 July 2008, *Commission v. Kingdom of Spain*. Nonetheless, the Madrid High Court of Justice, applying that provision, confirmed the administrative sanction in April 2010. For this reason before the Constitutional Court, Iberdrola S.A. claims that it's right to an effective remedy and the principle of legality in sanctioning matters have been violated.

II. The Constitutional Court recalls that the administrative sanction imposed on Iberdrola S.A. was founded on a provision declared contrary to European Union Law by the Court of Justice of the European Union. This judgment, even if declaratory, is directly enforceable on every Member State, taking effect from the time of approval of the challenged provision (*ex tunc*), eliminating it retroactively.

The Constitutional Court applies the case-law of the Court Justice of the European Union. It concludes that the Madrid High Court of Justice should have set aside the provision requiring the prior authorisation of the National Energy Commission to allow Iberdrola S.A. to increase its interest in the share capital of Medgaz S.A. As a result, the judicial body carried out an unreasonable and arbitrary selection of the rule to be applied in the trial.

In conclusion, there has been a violation of the right of the applicant company to an effective remedy and of the principle of legality in sanctioning matters.

Cross-references:

Court of Justice of the European Communities:

- *Commission of the European Communities v. Kingdom of Spain*, Third Chamber, 17.07.2008.

Languages:

Spanish.



Switzerland

Federal Court

Important decisions

Identification: SUI-2012-2-004

a) Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 02.11.2011 / **e)** 1C_289/2009 / **f)** X. v. Federal Intelligence Service and Federal Data Protection and Transparency Commissioner / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 138 I 6 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

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

3.13 General Principles – **Legality.**

3.16 General Principles – **Proportionality.**

4.11.3 Institutions – Armed forces, police forces and secret services – **Secret services.**

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

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

Keywords of the alphabetical index:

Personal data, informing data subjects / Personal data, computer processing / Data, right of oversight / State, security / Confidential information, protection / Information, collection and processing / Secret surveillance, measure / Privacy, invasion.

Headnotes:

Right to respect for private life, consultation of documents drawn up to guarantee the security of the State, indirect right to be informed. Articles 8 and 13 ECHR.

Principles governing the collection and processing of information in the field of State security and the indirect right to be informed under the Federal Law establishing measures to safeguard internal security (LMSI) (recital 3).

Right to respect for private life within the meaning of Article 8.1 ECHR (recital 4.1); interference under Article 8.2 ECHR, formal and substantive requirements (recitals 4.2 and 4.3).

The LMSI is a sufficient basis for the collection and processing of information and for deferral of the consultation of documents in the form of an indirect right to be informed (recital 5.2); it is sufficiently detailed (recital 5.3), contains mechanisms to protect fundamental rights (recital 5.4), pursues legitimate aims (recital 5.5) and appears consistent with the principle of proportionality (recital 5.6).

Right to an effective remedy within the meaning of Article 13 ECHR (recital 6.1); lawfulness of secret surveillance and secret retention of personal data, requirements for the deferral of information (recital 6.2).

The rules on the indirect right to be informed, the limits on data retention and oversight by Parliament constitute mechanisms for protecting fundamental rights (recital 7.1-7.3); recommendations to the relevant authorities in connection with secret surveillance are binding (recital 7.5); on the whole, the LMSI complies with Article 13 ECHR; remittal of the case for further investigation in accordance with the terms of the judgment (recital 7.7).

Summary:

I. X. is a Polish journalist working for an international monthly magazine and living in Basle. In 2008, during an operation by the Basle police against protesters, he was arrested and released the same evening. X suspected that his identity and personal data were checked by the Federal Intelligence Service (the SRC) and that he has now been listed in this service's files as a "violent international anti-globalisation activist".

X. applied to the Federal Data Protection and Transparency Commissioner (the Federal Data Commissioner), requesting information on the data retained and access to this information. In reply, the Federal Data Commissioner stated that no data concerning him had been processed illegally and if any error had been made in processing the data concerned, a recommendation would have been addressed to the SRC to rectify it. X. was told that he could appeal to the President of the relevant section of the Federal Administrative Court (the President of the Court), and that is what he did. The President of the Court replied that he had investigated whether there had been any illegal processing of personal data and whether any errors had been corrected; if an error had been made, he would have recommended that it be rectified.

X. lodged a public-law appeal asking the Federal Court to set aside the communication from the President of the Court, to grant him access to all documents concerning him and to order the destruction of the impugned documents. He argued that the retention of any data and their processing and use constituted interferences with the right to respect for his private life within the meaning of Article 8 ECHR and had no justification. The possibility of receiving a communication from the Federal Commissioner or the President of the Court could not in itself meet the requirements of an effective remedy under Article 13 ECHR.

II. The Federal Court allowed the appeal in part and remitted the case to the Federal Data Commissioner for further investigation.

The protection of Switzerland's security is regulated by the Federal Law establishing measures to safeguard internal security (the LMSI) and other federal laws and orders. Their aim is to guarantee respect for Switzerland's democratic and constitutional foundations and to protect the freedoms of its population. Among other things they provide for information gathering and the processing of personal data. Data may be collected even without the knowledge of the persons concerned and security bodies may process sensitive data.

Article 18 of the LMSI governs the right to information and contains special rules which differ from those in the Federal Law on data protection (LPD). All citizens may ask the Federal Data Commissioner to check whether data concerning them is processed in accordance with the law. The Commissioner then issues a communication stating that checks have been carried out and no data has been processed illegally or, where an error has been made in the processing of data, that he has issued a recommendation for the Intelligence Service to rectify the error. The same procedure is employed by the President of the Court. In this way, the secrecy of any recording of data is preserved. The information communicated by the Federal Data Commissioner and the President of the Court is of a provisional and indirect nature. Actual information provision is deferred until the data is finally made available.

The main issue arising in the instant case is the right to protection of private life under Article 8.1 ECHR. It is brought into play by the mere fact of retaining personal data in files, regardless of whether it is used at any given time. Interference includes the transmission of personal data, the refusal to provide access to it and the impossibility of mounting a challenge.

The protection that Article 8.1 ECHR affords is not absolute; restrictions are possible under Article 8.2 ECHR. These must be provided for by a law which is adequately accessible and must be defined in a sufficiently foreseeable manner. In the field of national security, foreseeability requirements cannot be the same as in other fields. Secret surveillance and recording of citizens, which are typical practices in police states, can only be tolerated in so far as is strictly necessary to safeguard democratic institutions. Any measures coming into consideration in a state governed by the rule of law must be proportionate to the aims pursued in order to guard against the risk of undermining democracy or even destroying it on the pretext of defending it. The European Court of Human Rights has held in several cases that secret surveillance and establishing, keeping and using files are compatible with Article 8 ECHR.

To date, the applicant has had no direct access to information systems and has not been given any information on possible recordings or any opportunity to challenge, rectify or delete possible recordings. This situation constitutes a restriction of the right to respect for private life. The law on safeguarding internal security and the other federal laws cited above represent a formal legal basis which meets the requirements of the Convention. The use of vague legal concepts changes nothing in this respect. By exercising the appropriate caution and possibly taking advice, it is possible to adapt one's conduct and anticipate the consequences of certain actions. Furthermore, the legislation contains various measures to prevent abuses. Under the law on safeguarding internal security it is possible to apply to independent authorities, which will review the lawfulness of the processing of personal data; in the instant case, the Commissioner conducted a thorough investigation. The stock of data should be reviewed when requests for information are made or the limit on storage times has expired, and at regular intervals. The Federal Parliament's Control Commission exercises comprehensive, continuous oversight over national security activities. All of these measures are designed to ensure that democratic and constitutional foundations are respected and may justify restrictions on private life. Such restrictions must be in keeping with the principle of proportionality. The legislation and its application in the instant case were compatible with the requirements of Article 8 ECHR.

Another issue that arises is whether the denial of access and the temporary refusal to provide any substantive information were compatible with the requirements of Article 13 ECHR. This article guarantees that all persons who believe they have been wronged have an effective remedy before a

national body which will examine their complaints and is empowered to set aside the impugned measure. The remedy must be effective in practice and in law and provide for appropriate redress. The European Court regards this guarantee as one of the core components of the entire Convention system. It recognises in particular that a secret information system which is acknowledged to be in accordance with the requirements of Article 8 ECHR will be consistent with the guarantee of an effective remedy under Article 13 ECHR provided the system contains mechanisms to prevent abuses and offers the possibility of effective remedies as soon as there is no longer any interest in keeping the information secret.

The Commissioner and the President of the Court had not provided the appellant with any substantive information, simply issuing a standard communication. This procedure before independent bodies is an important means of preventing abuse. The system of indirect information offers some guarantee that any errors will be detected and eliminated. The length of time for which files can be kept is limited by the law; recordings are also subject to checks. The parliamentary commission permanently monitors the whole system.

The Federal Commissioner and the President of the Court may recommend that the responsible bodies modify or cease the processing of data. According to the relevant legislation the purpose of the recommendation is to rectify any errors. This can only be achieved if recommendations are deemed to be binding. Article 13 ECHR would justify giving them such a binding effect. The provision of the LMSI must be interpreted in this way.

Article 13 ECHR also requires it to be established whether a remedy is available when there is no longer any interest in keeping information secret. When such a situation arises, the controller of the file must immediately inform the person concerned, and then deal with his or her request for information. A new application by the appellant is unnecessary. A person may therefore assert his or her rights through judicial proceedings.

It follows that the system of an indirect right to be informed can be applied in a manner that is compatible with the requirements of Article 13 ECHR. This finding is based in particular on an interpretation of the LMSI in the light of the Convention. This showed that any recommendations by the Federal Commissioner or the President of the Court have a binding effect and that appellants should be automatically informed in accordance with their requests. In the instant case, the Federal Commis-

sioner and the President of the Court have not yet been able to take account of this interpretation in the light of the Convention. For this reason, their communications are set aside and the case is remitted to the Federal Commissioner for further investigation in accordance with the terms of the judgment.

Languages:

German.



Identification: SUI-2012-2-005

a) Switzerland / **b)** Federal Court / **c)** Second Public Law Chamber / **d)** 22.11.2011 / **e)** 2C_360/2010 / **f)** B.X v. Tax office of the Canton of Bern / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 138 I 55 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

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

5.3.18 Fundamental Rights – Civil and political rights – **Freedom of conscience.**

Keywords of the alphabetical index:

Church tax / Tax, general nature / Salary, minister, funding.

Headnotes:

Funding of the salaries of religious ministers by the State; Article 15 of the Federal Constitution and Article 14 of the Constitution of the Canton of Bern (freedom of conscience and belief), Article 9 ECHR.

Following the repeal of Article 49.6 of the former Federal Constitution, liability for tax earmarked for religious purposes must be assessed in relation to the general criteria that apply in the sphere of freedom of conscience and belief (recital 2).

Because of the general nature of tax, it is not possible to contest liability for tax on the basis of arguments concerning the use of tax revenues by the State (recital 3).

Summary:

The tax office of the Canton of Bern collected cantonal and municipal taxes for 2005 from a couple residing in the canton. It did not collect church tax from the wife, Mrs X, because she had left the Evangelical Reformed Church of the Canton of Bern in 1991. However, Mrs X also requested a reduction of 0.813% in her cantonal tax on the ground that this share of the tax was earmarked to finance the salaries of ministers of the church. Her request was dismissed by the tax office and, in the last instance at cantonal level, by the Administrative Court of the Canton of Bern.

In a public-law appeal, Mrs X asked the Federal Court to set aside the judgment of the Administrative Court and to grant her the reduction in tax she had requested. She relied on her freedom of conscience and belief, asserting that she is not obliged to finance church ministers' salaries. The Federal Court dismissed the appeal.

Under Article 15 of the Federal Constitution and Article 14 of the Constitution of the Canton of Bern, freedom of conscience and belief is guaranteed. All persons have the right to choose their religion freely and form their own philosophical convictions. All persons are entitled to join or belong to a religious community and no one may be forced to do so. Under Article 49.6 of the former Federal Constitution (in force up to the end of 1999), nobody could be required to pay taxes whose proceeds were specifically earmarked for the actual costs of worship of a religious community to which he or she did not belong. It is not clear from the preparatory work on the new Constitution why this clause was dropped. It is accepted, however, that this guarantee still applies today and may be inferred directly from Article 15.1 of the Federal Constitution.

According to established case-law, the principle of not being required to contribute to the costs of churches applies only to taxes whose proceeds are specifically earmarked for the actual costs of worship or, in other words, to church taxes. The Constitution guarantees the right to leave a recognised church at any time and therefore, once a person has left, he or she can no longer be required to pay church tax.

The principle of not being required to contribute to churches after leaving a religious community does not apply, however, to ordinary taxes through which the state finances its commitments. Taxes are payable unconditionally without any direct benefit in return. There is therefore no direct link between taxes on the one hand and the State's financial commitments on the other. Because of the general nature of tax, it is

collected regardless of the taxpayer's religious affiliation. As part of its duties, the State finances various activities. It is active for instance in the sectors of national defence and security and social insurance. These commitments do not exempt citizens from their duty to contribute to the State budget through taxes because of their religious beliefs or their philosophical ideas. For this reason, the applicant cannot ask for her taxes to be reduced simply because the Canton of Bern finances the salaries of ministers in a recognised religious community. The complaint that there has been an infringement of freedom of conscience and belief is unfounded.

Languages:

German.

*Identification:* SUI-2012-2-006

a) Switzerland / **b)** Federal Court / **c)** First Civil Law Chamber / **d)** 31.01.2012 / **e)** 4A_672/2011 / **f)** H.X and F.X v. Court of Justice of the Canton of Geneva / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 138 I 1 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

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:

Withdrawal, judge / Judge, withdrawal.

Headnotes:

Application for withdrawal of a judge presiding over a division of the rent tribunal; Article 30.1 of the Federal Constitution (guarantee of an independent and impartial tribunal) and Article 6.1 ECHR.

An application cannot be made for the presiding judge of a division of the rent tribunal to be withdrawn

on the sole ground that he or she worked previously as a lawyer for the Swiss tenants' association, Asloca. A relationship of friendship or enmity between a judge and a lawyer can only constitute a ground for withdrawal if there are ties between the two whose closeness and nature are such as to raise objective fears that the judge may be influenced during the conduct of the proceedings and in his or her decision.

Summary:

I. Some property owners brought proceedings in the rent tribunal of the Canton of Geneva. During one of the hearings, they became aware that the division with jurisdiction to decide such disputes was to be presided over by a judge who, before entering the Geneva legal service, had been a lawyer in Geneva and had worked, in particular, for the tenants' association, Asloca. The applicants applied for withdrawal of the judge because of her links with Asloca and its lawyers. Their application was dismissed by the Civil Court and then by the Civil Division of the Court of Justice of the Canton of Geneva, ruling in the last instance at cantonal level.

In a civil-law appeal, the owners asked the Federal Court to set aside the impugned decision and for the judge to be withdrawn.

II. The Federal Court dismissed the appeal.

The guarantee of an independent and impartial tribunal deriving from Article 30.1 of the Federal Constitution and Article 6.1 ECHR, both of which have the same effect in this respect, makes it possible, regardless of cantonal procedural law, to apply for the withdrawal of a judge whose situation or attitude is such as to raise doubts as to his or her impartiality. It is aimed at preventing circumstances outside the case from influencing the judgment for or against a party. It does not require a judge's withdrawal only where actual bias is established because a disposition coming within the *forum internum* can scarcely be proved; it is enough for circumstances to give the appearance of bias and raise fears that the judge may be partial. However, only objective circumstances may be taken into account and the purely subjective impressions of the party requesting a judge's withdrawal cannot be a determining factor. Parties who know of a reason for a judge to withdraw must raise the matter immediately or risk being deprived of their right to do so subsequently.

The Federal Court has already held that a judge presiding over a division of the rent tribunal cannot be asked to withdraw for the sole reason that he has previously worked as a lawyer for Asloca. A close examination of the circumstances of the case is therefore required.

It was noted that the judge had left Asloca in February 2010. The proceedings referred to had been brought before the rent tribunal after that date. The judge therefore could not have been involved in them as a lawyer for Asloca. The applicants are not claiming that the judge acted as legal representative of one of their opposing parties in any other proceedings.

The applicants submit that the judge has maintained ties of friendship with some of her former colleagues, who are lawyers for Asloca. It is frequently the case that judges and lawyers know one another. For example they may have studied together, been members of the same political party, worked together at a certain point in their career or had the same leisure pursuits. Such commonplace circumstances are not enough to justify a judge's withdrawal. The fact that the judge in the instant case has maintained close contacts with her former colleagues is not a sufficient reason to suppose objectively that she would not have the necessary detachment to hear cases entirely impartially. It has already been found that a relationship of friendship or enmity between a judge and a lawyer can only constitute a ground for withdrawal in special circumstances, where the closeness and nature of the ties between the two are such as to raise objective doubts about the judge's impartiality. The applicants have not alleged, proved or established the likelihood that such circumstances exist.

There are not therefore any circumstances which could influence the judge's decision for or against one of the parties. The complaint of a violation of Article 30.1 of the Federal Constitution or Article 6.1 ECHR is therefore unfounded.

Languages:

French.



Turkey

Constitutional Court

Important decisions

Identification: TUR-2012-2-001

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 29.12.2011 / **e)** E.2010/104, K.2011/180 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 19.05.2012, 28297 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

3.9 General Principles – **Rule of law**.
3.16 General Principles – **Proportionality**.
5.3.6 Fundamental Rights – Civil and political rights – **Freedom of movement**.

Keywords of the alphabetical index:

Driving licence, withdrawal / Drug, narcotic.

Headnotes:

The permanent withdrawal of the driving licences of those who have been caught driving under the influence of drug or narcotics as an additional sanction constitutes a disproportionate interference with the freedom of movement and runs counter to the principle of the rule of law.

Summary:

I. Tokat 1. Criminal Court of Peace asked the Constitutional Court to assess the compliance with the Constitution of Article 48 of the Highway Traffic Law (Law no. 2918). Under Article 48.6 of the Highway Traffic Law, driving under the influence of narcotic drugs, despite the fact that this constitutes another offence, carries penalties of six months imprisonment, a fine and permanent withdrawal of the offender's driving licence.

According to the applicant, the permanent withdrawal of the driving licence of somebody driving under the influence of narcotic drugs is a disproportionate and very heavy sanction in a state governed by the principle of the rule of law. The applicant also drew attention to the role of the driving licence in modern

society, pointing out that withdrawing somebody's driving licence on a permanent basis could constitute a serious interference with their freedom of movement. The phrase "his or her driving licence is withdrawn permanently" contravened Articles 2 and 23 of the Constitution in the applicant's opinion.

II. The Constitutional Court noted the existence of legislative discretion to determine which acts should be considered as criminal offences. However, criminal laws and administrative sanctions cannot be contrary to general principles of criminal law and to the Constitution. It observed that one of the basic aims of criminal law is the correction and rehabilitation of offenders and their reintegration into society; criminal sanctions must be appropriate for pursuing this function. It noted that the contested provision stipulates the permanent withdrawal of the driving licence of somebody driving under the influence of narcotic drugs without considering the offender's personal situation and their willingness to seek medical help. The Court accordingly found the measure to be disproportionate and contrary to the principle of the rule of law. It annulled the contested provision.

Languages:

Turkish.



Identification: TUR-2012-2-002

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 12.01.2012 / **e)** E.2011/62, K.2012/2 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 05.07.2012, 28344 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

3.10 General Principles – **Certainty of the law**.
3.14 General Principles – **Nullum crimen, nulla poena sine lege**.

Keywords of the alphabetical index:

Law, quality, foreseeable consequences.

Headnotes:

Punishment of individuals for violation of provisions aimed mainly at political parties may constitute a punishment without a proper legal base.

Summary:

I. Özalp 1. Criminal Court asked the Constitutional Court to assess the compliance with the Constitution of Article 117 of the Law on Political Parties (Law no. 2820). Under this provision, anybody committing the prohibited acts mentioned in the fourth section may be sentenced to a prison term of at least six months, unless their actions require a stiffer penalty.

The applicant explained that the Fourth Section of the Law on Political Parties (Articles 78 to 96) sets out prohibitions for political parties. Most of these are directed at the legal personality of the political party rather than individuals. However, Article 117 requires punishment of individuals carrying out the prohibited acts. The applicant contended that as the Fourth Section includes too many prohibitions (mostly of a general nature) aimed at the legal personality of political parties, it is not easy to discern which acts constitute crimes for individuals. The applicant also noted that the phrase “any person who commits” did not determine who should be answerable for the activities of political parties and whether all participants should be held responsible or only representatives of the political party. The meaning of Article 117 of the Law on Political Parties was therefore not certain and could cause individuals to be punished without a proper legal basis.

II. The Constitutional Court noted the discretion enjoyed by the legislature to determine which acts should be considered as criminal offence and the sanctions that should be applied, depending on the purpose of the law. Criminal laws must not, however, be contrary to the principle of legality of crime and punishment. The Court observed that since the Fourth Section of the Law on Political Parties stipulates too many prohibitions for political parties, individuals cannot discern which acts constitute crimes under Article 117. Article 117 of the Law was therefore found to be contrary to Article 38 of the Constitution, which regulates legality of crime and punishment, and was annulled.

III. Judges Serruh Kaleli, Mehmet Erten, Nuri Necipoğlu and Celal Mümtaz Akinci put forward dissenting opinions. Judges Serdar Özgüldür and Burhan Üstün wrote separate concurring opinions.

Languages:

Turkish.

*Identification:* TUR-2012-2-003

a) Turkey / b) Constitutional Court / c) / d) 15.03.2012 / e) E.2010/49, K.2010/87 / f) / g) *Resmi Gazete* (Official Gazette), 21.07.2012, 28360 / h) CODICES (Turkish).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Child, right to determine identity of father, limit.

Headnotes:

A one month statutory time limitation which prevents a child from bringing an action to establish paternity is too short. It violates the right to dignity of the child and right to access to courts.

Summary:

I. Akçaabat 2. Civil Court asked the Constitutional Court to assess the compliance with the Constitution of certain aspects of Article 303 of the Civil Code. Under Article 303 of the Civil Code, a child can file an action to establish paternity within one year after maturity, provided a custodian has not appointed for him or her. Article 303.4 also provides that if a paternity suit has not been filed within the one year time limit for a just cause, a paternity suit may be filed within one month following the abatement of the cause. The applicant argued that a deadline of one month for filing a paternity suit is too short and violates the right to access to courts, in view of the consequences of this time limit.

II. The Constitutional Court limited its review to Article 303.4. It found that the right of a child to establish paternity with his biological father is an essential element of his or her right to free development of personality and dignity. However, the biological father has a personal interest in the certainty of his civil status. The introduction of time-limits for the institution of paternity proceedings by the child may be justified by the need to safeguard legal certainty and to protect the interests of the biological father. Legislation establishing time limits should be proportionate and should strike a fair balance between these competing interests. If a child fails to instigate a paternity suit within the one month deadline, he or she completely loses the opportunity to establish a legal link with his or her biological father and inheritance rights. In view of these consequences, one month is a very short time and is in breach of the right of free development of personality and dignity and that of access to courts. The Constitutional Court therefore annulled Article 303.4 of the Civil Code.

III. Judge Serruh Kaleli put forward a dissenting opinion.

Languages:

Turkish.



Ukraine Constitutional Court

Important decisions

Identification: UKR-2012-2-007

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 30.05.2012 / **e)** 12-rp/2012 / **f)** Conformity to the Constitution (constitutionality) of Article 202.1 of the Rules of Procedure approved by the Law “On the Rules of Procedure of the *Verkhovna Rada*” in the wording of the Law “On Introducing Amendments to the Rules of Procedure of the *Verkhovna Rada*” (case on the legislative initiative) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 44/2012 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Law-making, constitutional rules / Legislation, initiating / Treaty, international, validity.

Headnotes:

A law requiring that draft laws on the denunciation of an international treaty must be submitted to the national parliament (*Verkhovna Rada*) by the President and the Cabinet of Ministers is unconstitutional given that the Constitution does not include provisions which would exclude the possibility of People’s Deputies (members of parliament) submitting draft laws on the ratification and denunciation of international treaties for consideration by the parliament.

Summary:

I. The petitioners, 47 People’s Deputies (members of parliament), applied to the Constitutional Court with a petition to examine the constitutionality of the Law “On Introducing Amendments to the Rules of Procedure” no. 4308-VI, 11 January 2012, which amended the wording of Article 202.1 of the Rules of Procedure, approved by the Law “On the Rules of

Procedure” no. 1861-VI, 10 February 2010 (hereinafter, the “Rules of Procedure”), which require that draft laws on the denunciation of an international treaty must be submitted to the national parliament (*Verkhovna Rada*) by the President and the Cabinet of Ministers. According to the previous wording of Article 202.1 of the Rules of Procedure this right was also granted to the People’s Deputies.

Article 9.1 of the Constitution states that international treaties that are in force, and agreed to be binding by the parliament, are part of national legislation. In its Opinion no. 3-v/2001, 11 August 2001, concerning the Rome Statute of the International Criminal Court, the Constitutional Court indicated that consent to the binding nature of the international treaty (its ratification) shall be given by the parliament in the form of a law which does not differ from other laws by its legal nature (item 2.5.3 of the motivation part). It may be concluded, accordingly, that laws on the ratification and denunciation of international treaties must be adopted in the manner established for adoption of ordinary laws.

The Constitution envisages general principles of the legislative process and, in particular, it defines what officials and institutions of state enjoy the right to initiate legislation. Article 93.1 of the Fundamental Law confers the right of legislative initiative in the parliament on the President, People’s Deputies, the Cabinet of Ministers and the National Bank.

II. In Decision no. 5-rp/2001, 17 May 2001, concerning amendments to the law on the budget, the Constitutional Court interpreted Article 93.1 of the Constitution as meaning that the President, People’s Deputies, the Cabinet of Ministers and the National Bank have a right to submit draft laws on any issue except those draft laws which according to the Constitution shall be submitted by specially established subjects of the right to legislative initiative to the parliament (item 1 of the resolution part). In the motivation part of this Decision the Constitutional Court stated that Article 93.1 of the Fundamental Law does not envisage any difference regarding the content and scope of the right to legislative initiative entitled to the enumerated subjects.

The Constitution does not include provisions which would exclude the possibility of the People’s Deputies to submit draft laws on the ratification and denunciation of international treaties for consideration by the parliament.

Accordingly, the Constitutional Court held that Article 202.1 of the Rules of Procedure is contrary to Articles 6, 8.1, 8.2, 19.2 and 93.1 of the Constitution.

Cross-references:

- Opinion of the Constitutional Court no. 3-v/2001, 11.07.2001;
- Decision of the Constitutional Court no. 5-rp/2001, 17.05.2001.

Languages:

Ukrainian, Russian (translation by the Court).



Identification: UKR-2012-2-008

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 12.06.2012 / **e)** 13-rp/2012 / **f)** Conformity to the Constitution (constitutionality) of some provisions of the Tax Code / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 47/2012 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

- 5.3.35 Fundamental Rights – Civil and political rights – **Inviolability of the home.**
- 5.3.39.3 Fundamental Rights – Civil and political rights – Right to property – **Other limitations.**
- 5.3.42 Fundamental Rights – Civil and political rights – **Rights in respect of taxation.**

Keywords of the alphabetical index:

Arrest, debt / Home, inviolability / Tax debt / Tax authority, powers.

Headnotes:

Provisions of the Tax Code which oblige taxpayers to allow state tax authorities to survey business premises that are used for obtaining income or are related to the maintenance of objects of taxation, as well as for inspecting the calculation and payment of taxes and fees in certain cases, which confer a right on state tax authorities to examine business premises used to conduct economic activities relevant to tax payment, and which allow for administrative arrest in certain circumstances, are constitutional in light of the constitutional requirement that everyone is obliged to pay taxes and levies in accordance with the procedure and to the extent established by law, and do not offend the principle of inviolability of the dwelling.

Summary:

I. Article 16.1.13 of the Tax Code (hereinafter, the "Code") envisages that a taxpayer is obliged to allow officials of a controlling authority while carrying out inspections to survey the premises and territories (other than residential premises of citizens) that are used for obtaining income or are related to the maintenance of objects of taxation, as well as for inspecting the calculation and payment of taxes and fees in the cases established by the Code.

According to Article 20.1.11 of the Code the state tax authorities have a right to examine areas and premises (other than residential premises of citizens) and other property used to conduct economic activities and/or are object of taxation and used to generate income (profit) or related to other taxable objects and/or may serve as a source of tax repayment.

The petitioner contended that the said provisions of the Code do not conform to Articles 30.1, 30.2 and 124.1 of the Constitution given that entry into a dwelling place or other possessions of an individual, the examination or search thereof shall not be permitted other than pursuant to a substantiated court decision.

II. The Constitutional Court noted that the disputed provisions of the Code concern not entry but access of the controlling bodies to examination of the territories and premises defined in the Code and the liability of a taxpayer to allow officials of the controlling bodies while conducting an inspection to examine respective premises and territories.

The Court also noted that where officials of bodies of the State Tax Service are not permitted to examine territories or premises defined in Article 20.1.11 of the Code these bodies have the right to apply to a court seeking the suspension of expenditure operations of a taxpayer on his or her accounts in banks and other financial institutions (except operations on salary payments and discharge of tax, levies, single contribution for the mandatory state social insurance, as well as monetary obligations of a taxpayer defined by the controlling body).

The Constitutional Court considered that the authority of the controlling bodies and liability of taxpayers established in Articles 16.1.13, 20.1.11 of the Code are necessary conditions for ensuring the execution of Article 67.1 of the Constitution according to which everyone is obliged to pay taxes and levies in accordance with the procedure and in the extent established by law.

The petitioner argued that application of administrative arrest of property to an individual who has incurred a tax debt and who travels abroad (Article 94.2.2 of the Code) restricts his or her right to freely leave the territory guaranteed by Article 33.1 of the Fundamental Law.

The Court considered that the said provisions of the Code gives grounds to state that they do not prohibit an individual who has incurred a tax debt from traveling abroad, but Article 94.2.2 of the Code concerns only the right to property of a taxpayer regarding the property he or she possesses in case this person has incurred a tax debt and travels abroad.

Article 94.2.5 of the Code provides that administrative arrest of property may be applied where a person has not registered as a taxpayer with the state tax authority, should such registration be mandatory according to the Code, or where a taxpayer who has received a tax notice or who has incurred a tax debt performs actions on transferring property outside Ukraine, concealing or handing it over to other persons.

The petitioner argued that the said provisions of the Code violate the principles of the inviolability of a dwelling place and the right of private property provided by Articles 30 and 41 of the Fundamental Law since, in his opinion, it is seen from the content of these provisions that an arrest may be applied to property which is not used for economic activities, including a person's dwelling place.

The right of the legislator to establish a special order for a taxpayer not to dispose of his or her assets which include a dwelling place in laws for a certain term conforms to the legal position of the Constitutional Court stated in its Decision no.2-rp/2005, 24 March 2005, reading that "the establishment of a tax system, taxes and levies, its scale and order of discharge is an exclusive prerogative of a law." While regulating these public relations the state has a right to define mechanisms which ensure due discharge of taxes and levies by taxpayers (item 4.1.4 of the motivation part).

The Constitutional Court held that the application of administrative arrest to a taxpayer's property in order to ensure the taxpayer discharges his or her liabilities is not a violation of the right of inviolability of a dwelling place. Therefore, the administrative arrest of property of a taxpayer does not deprive the taxpayer of the right to property regarding such assets, guaranteed by Article 41 of the Constitution.

Judge V.D. Bryntsev submitted a dissenting opinion.

Cross-references:

- Decision of the Constitutional Court no. 2-rp/2005, 24.03.2005.

Languages:

Ukrainian, Russian (translation by the Court).

*Identification:* UKR-2012-2-009

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 03.07.2012 / **e)** 14-rp/2012 / **f)** Official interpretation of Article 786 of the Civil Code / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 52/2011 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

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

Period of limitation, term / Landlord, damages, reimbursement, claims / Lease, contract / Tenant / Right.

Headnotes:

The provisions of Article 786 of the Civil Code which govern the beginning of the applicable one-year period of limitation regarding leases (rental agreements) shall be understood as applying solely to claims by landlords for reimbursement of expenses related to damage of property transferred to tenants, and tenants' claims for reimbursement of expenses incurred in making improvements to the property and shall not apply to other claims of the tenant and landlord under the lease.

Summary:

I. A private company, Scientific and production firm VD MAIS, applied to the Constitutional Court seeking an official interpretation as to whether the provision of

Article 786.2 of the Civil Code (hereinafter, the "Code") shall be applied exclusively to the claims between tenants and landlords, determined in Article 786.1 of the Code or to all claims following from the lease.

II. The Constitutional Court began by noting that general provisions regarding the period of limitation and the procedure of its calculation to be applied when resolving disputes between parties to the obligations are set out in Chapter 19 of the Code. The period of limitation refers to the term within which a person may apply to court to demand protection of his or her civil rights or interests (Article 256 of the Code).

The beginning of a period of limitation is calculated under the rules of Article 261 of the Code and is connected with the day when a person learnt or could learn about the violation of his or her right or about the person who violated such right (Article 261.1). Pursuant to Article 261.7 of the Code exceptions to this rule may be prescribed by law.

The Code, in particular, determined that regarding claims related to defects of purchased goods the period of limitation shall be one year, calculated from the date of detection of flaws within the terms stipulated in Article 680 of the Code, and, if there is a warranty period (expiry date), since the detection of defects within the warranty (validity) period (Article 681); for claims related to improper quality of work performed under contract, the period of limitation shall be one year, and for buildings and constructions, three years from the date of acceptance by a customer (Article 863); regarding claims arising from a contract of carriage of cargo, mail, the period of limitation shall be one year from the date determined in accordance with transport codes (statutes) (Article 925.3).

Analysis of the above provisions of the Code gives grounds to conclude that the beginning of a period of limitation provided by the special law is initiated by the specific features of legal relations and must meet the essence of a violated right, having regard to the principles of justice, equality and proportionality.

According to Article 759.1 of the Code under a lease (rental agreement; hereinafter; the "lease") the landlord transfers or agrees to transfer property in use to the tenant for a fee for a specified period.

At the stage of conclusion, execution, amendment, cancellation and termination of the lease there arise mutual obligations of the landlord and the tenant, in particular: the obligation of the landlord to transfer the property for use by the tenant immediately or within

the period fixed in the lease, to carry out major repairs of items or property transferred under the lease, unless otherwise provided by contract or law; the obligation of the tenant to use the property according to its purpose and terms and conditions of the contract and, where the lease is terminated, to immediately return the property to the landlord in the state in which it was received, subject to normal wear, or condition, which was stipulated by the lease (Articles 765, 773.1, 776.2, 785.1 of the Code).

Pursuant to Article 786.1 of the Code, which is the subject of interpretation, the period of limitation applied to claims for compensation regarding damage to property which has been assigned for use by a tenant, as well as claims for reimbursement to carry out improvements, shall be one year. The period of limitation regarding claims of the landlord begins with the return of the property by the tenant and the period of limitation for claims by the tenant begins upon termination of the lease (Article 786.2).

The Constitutional Court held that the provisions of Article 786 of the Code, in its content and complete structure, serves solely to establish a specific period of limitation—one year—and the beginning of such period regarding claims by landlords for compensation in connection with damage caused to property which has been assigned for use by a tenant as well as regarding claims of tenants for reimbursement of expenses to improve the assigned property. The provisions of Article 786.2 do not apply to other claims arising from the lease.

Languages:

Ukrainian, Russian (translation by the Court).



Identification: UKR-2012-2-010

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 11.07.2012 / **e)** 15-rp/2012 / **f)** Conformity to the Constitution (constitutionality) of the provisions of Articles 75.5, 75.6, 77.4 of the Rules of Procedure, approved by the Law “the Rules of Procedure of the *Verkhovna Rada*” (case on elections of the Chairman of the *Verkhovna Rada*) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 56/2012 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

4.5.4.2 Institutions – Legislative bodies – Organisation – **President/Speaker**.

Keywords of the alphabetical index:

Parliament, action, internal / Parliament, quorum / Parliament, voting procedure / Transparency, decision-making process.

Headnotes:

Election of the Chairman of the national parliament (*Verkhovna Rada*) by a secret ballot does not ensure the openness of parliamentary activities envisaged by Article 84.1 of the Fundamental Law and also contravenes Article 84.2 of the Constitution according to which decisions shall be made at plenary meetings of Parliament.

Summary:

I. The petitioners, 51 People’s Deputies (members of parliament), sought a declaration of unconstitutionality from the Constitutional Court concerning the provisions of Articles 75.5, 75.6 and 77.4 of the Rules of Procedure approved by the Law “On the Rules of Procedure of the parliament (*Verkhovna Rada*), no. 1861-VI, 10 February 2010, (hereinafter, the “Rules of Procedure”).

In examining the constitutional petition, the Constitutional Court began by noting that Articles 1 and 5.2 of the Fundamental Law recognise that the distinctive principle of parliamentarism is the openness of parliamentary activities, and that the essence of representative democracy envisages, first of all, the indirect participation of citizens in decision-making of state importance by means of their representatives called on to act on behalf of voters, and to express and protect the interests of the people as a whole. Implementation of the principle of openness of parliamentary activities guarantees constant communication of the People’s Deputies as plenipotentiary representatives of the Ukrainian People in the national parliament with voters, which creates conditions for the comprehensive analysis of the activities of specific People’s Deputies and the parliament as a whole.

According to Article 82.5 of the Fundamental Law rules on the conduct of work of the parliament shall be laid down in the Constitution and their Rules of Procedure. The Fundamental Law, specifically Article 88.1, does not provide a special requirement concerning the election and recall of the Chairman from office by

secret vote by means of a secret ballot. It is seen from the content of Articles 84.1 and 88.1 of the Fundamental Law that the Chairman shall be elected and recalled from office at the open plenary meeting of the parliament except occasions when a closed plenary meeting is held upon a decision of a majority of the parliament's constitutional composition.

The Constitutional Court considered that according to Articles 84.2, 84.3, 88.1 and 91 of the Constitution decisions concerning election or recall of the Chairman from office shall be adopted by majority of the constitutional composition at its plenary meetings by means of voting. Therefore, the provisions of Articles 75.5 and 77.4 of the Rules of Procedure according to which decisions concerning candidates for the position of Chairman and recall of the Chairman from office shall be made by a secret ballot do not ensure the openness of parliamentary activities, do not conform to Article 84.1 of the Fundamental Law, and contravene Article 84.2 of the Constitution according to which decisions shall be made at its plenary meetings only.

The disputed provisions of Articles 75.6 and 77.4 of the Rules of Procedure provide that the elected Chairman is considered a candidate for a position who received a majority of votes of the People's Deputies of the constitutional composition of parliament if ballots for a secret vote are submitted to no less than two-thirds of the factual number of People's Deputies; the vote is considered to have taken place if the ballots for secret vote have been provided to no less than two-thirds of the total number of People's Deputies.

With regard to this the Constitutional Court mentioned that decisions concerning election and recall of the Chairman from office shall be executed with relevant resolutions (Articles 75.7, 77.4 of the Rules of Procedure). Pursuant to Article 91 of the Constitution the national parliament adopts laws, resolutions and other acts by the majority of its constitutional composition except in cases envisaged by the Fundamental Law.

Thus, according to the Fundamental Law the only requirement concerning the number of the People's Deputies which determines the adoption of decisions (acts) by the competent national parliament is the presence of the relevant number of votes of the People's Deputies of the constitutional composition of the parliament defined by Article 91 and other provisions of the Fundamental Law.

The Constitutional Court held that the provisions of Articles 75.6 and 77.4 which state, respectively, "if the ballots for a secret vote have been provided to no less than two thirds of the total number of People's Deputies" and "the vote is considered to have taken place if ballots for secret vote have been provided to no less than two thirds of the total number of People's Deputies" of the Rules of Procedure do not conform to Article 91 of the Constitution.

Judges M. Markush, V. Shyshkin, P. Stetsiuk submitted dissenting opinions.

Languages:

Ukrainian, Russian (translation by the Court).



Identification: UKR-2012-2-011

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 27.08.2012 / **e)** 2-v/2012 / **f)** conformity of a draft law on introducing amendments to the Constitution on guaranteeing immunities to certain officials to the requirements of Articles 157 and 158 of the Constitution (case on introducing amendments to Articles 80, 105 of the Constitution) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette) / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

1.2.5 Constitutional Justice – Types of claim – **Obligatory review**.
 1.3.2.1 Constitutional Justice – Jurisdiction – Type of review – **Preliminary / ex post facto review**.
 4.4.6.1.1.1 Institutions – Head of State – Status – Liability – Legal liability – **Immunity**.
 4.5.9 Institutions – Legislative bodies – **Liability**.

Keywords of the alphabetical index:

Constitution, amendment / Parliament, member, duties / Parliament, member, immunity, limit / President, immunity.

Headnotes:

A draft law on amending the constitutional provisions concerning the immunity of certain state officials complied with the constitutional time limits for introducing such laws, did not seek to amend the same provision of the Constitution for a second time, which is forbidden by the Constitution, and was not aimed at destroying the independence of state officials or at violating the territorial indivisibility of the state.

Summary:

I. According to the Resolution “On forwarding the draft law on introducing amendments to the Constitution on guaranteeing immunities to certain officials” no. 5056-VI, 5 June 2012 to the Constitutional Court the national parliament (*Verkhovna Rada*) submitted an appeal to the Constitutional Court seeking its opinion regarding the conformity of a revised draft law on introducing amendments to the Constitution on guaranteeing immunities to certain officials, registr. no. 3251 (hereinafter, the “draft law”) to the requirements of Articles 157 and 158 of the Constitution.

Pursuant to Article 158 of the Fundamental Law a draft law on introducing amendments to the Constitution, considered by the national parliament and not adopted, may be submitted to the national parliament no sooner than one year from the day of the adoption of the decision on this draft law (Article 158.1); and, within the term of its authority, the national parliament shall not amend the same provisions of the Constitution twice (Article 158.2).

The abovementioned draft law on introducing amendments to Articles 80 and 105 of the Constitution has not been considered by the *Verkhovna Rada* of the sixth convocation during the last year and the abovementioned provisions of the Constitution have not been amended since its adoption. Thus, the draft law conforms to the requirements of Article 158 of the Constitution.

According to Article 157.2 of the Constitution, the Constitution shall not be amended in conditions of martial law or a state of emergency. At the time of the Constitutional Court’s opinion there is no martial law or a state of emergency in Ukraine, thus in this part the draft law does not contravene the requirements of Article 157.2 of the Constitution. Article 157.2 also provides that the Constitution shall not be amended if the amendments foresee the abolition or restriction of human and citizens’ rights and freedoms, or if they are oriented towards the liquidation of the independence or violation of the territorial indivisibility.

The draft law proposes to exclude Article 80.1 from the current wording of the Constitution, according to which “People’s Deputies are guaranteed parliamentary immunity”. The abovementioned draft law also proposes to revise Article 80.3 to state the following: “People’s Deputies shall not be held criminally liable, detained or arrested without the consent of the *Verkhovna Rada* until a verdict of guilty is rendered by a court against them”.

II. The Constitutional Court examined the draft laws on introducing amendments to Articles 80.1 and 80.3 of the Fundamental Law and provided its Opinions, in which the Constitutional Court held that the proposed amendments did not contravene the requirements of Article 157.1 of the Constitution (Opinions of the Constitutional Court no. 3-v/2000, 5 December 2000; no. 1-v/2010, 1 April 2010; no. 1-v/2012, 10 July 2012).

Compliance of the draft law on introducing amendments to Article 105 of the Constitution with the requirements of Articles 157 and 158 of the Constitution has also been the subject of consideration of the Constitutional Court.

In its Opinion no. 1-v/2010, 1 April 2010 the Constitutional Court stated that alterations to Article 105.3, in particular, to exclude words “unless the President has been removed from office by the procedure of impeachment”, were not aimed at destroying the president’s independence or at violating the territorial indivisibility of the state and did not contravene Article 157.1 of the Constitution (paragraphs 2, 3 of item 4.6 of the motivation part).

Cross-references:

Opinions of the Constitutional Court:

- no. 3-v/2000, 05.12.2000;
- no. 1-v/2010, 01.04.2010;
- no. 1-v/2012, 10.07.2012.

Languages:

Ukrainian, Russian (translation by the Court).



Identification: UKR-2012-2-012

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 29.08.2012 / **e)** 16-rp/2012 / **f)** Conformity to the Constitution (constitutionality) of the provisions of Articles 18.4, 171^{1.2}, 171^{1.3}, 171^{1.5}, 183^{1.2}, 183^{1.6} of the Code of Administrative Proceedings and the provisions of Article 89.1 of the Law “On Judicial System and Status of Judges” (case on jurisdiction of some categories of administrative cases) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette) / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

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

4.7.7 Institutions – Judicial bodies – **Supreme court.**

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

Keywords of the alphabetical index:

Cassation, appeal / Court decision, review, jurisdiction / Jurisdiction, exclusion.

Headnotes:

The conferral of jurisdiction regarding certain categories of cases to the High Administrative Court as the court of first instance, appellate administrative courts as courts of first instance and the High Administrative Court as the court of appellate instance by law is permitted by the constitutional text, it guarantees the right to judicial protection and does not restrict it, it does not restrict the meaning and scope of rights and freedoms secured by law, and it does not violate the equality of citizens before the law. The establishment of some categories of administrative cases which do not envisage appellate and cassational challenge of a court decision by the legislator also does not deprive the Supreme Court of its status of the highest judicial body in the system of courts of general jurisdiction.

Summary:

I. The petitioners argued that the provisions of Articles 18.4, 171^{1.1}, 171^{1.2}, 171^{1.6}, 180.1, 183^{1.2} and 183^{1.6} of the Code of Administrative Proceedings (hereinafter, the “Code”) which govern cases in which appellate or cassational challenge of court decision is not envisaged contravene Articles 22.2, 22.3, 24.1, 24.2, 55.1, 55.2, 64.2, 129.3.8 of the Constitution.

II. The Constitutional Court emphasised that one of the main fundamentals of justice is ensuring appellate and cassational challenge of a court decision except in cases provided by law (Article 129.3.8 of the Constitution). It is seen from the content of this provision that the law establishes a regime governing the consideration of judicial cases by courts of general jurisdiction which provides for appellate and cassational challenge of a court decision except in certain categories of cases, established and defined by the legislator, in which such challenge of a court decision is not envisaged.

Article 129.3.8 of the Constitution does not set down specific requirements concerning the establishment by law of cases which do not envisage appellate and cassational challenge of a decision of a court of general jurisdiction. The Constitutional Court deems that in this case, in order to provide human and citizens’ rights and freedoms, legislative regulation of the said issues shall conform to requirements of the Constitution, the primary and governing principle being the rule of law.

The petitioners’ appeal claimed non-conformity to the Constitution (Article 129.3.8) of the disputed provisions of the Law “On the Judicial System and the Status of Judges” no. 2453-VI, 7 July 2010 (hereinafter, “Law no. 2453”) and the Code according to which the High Administrative Court as a court of first instance considers in particular cases acts, deeds and omissions of the national parliament (*Verkhovna Rada*), the President, the High Council of Justice and the High Qualification Commission of Judges, as well as cases concerning pre-term termination of the mandate of a People’s Deputy (member of parliament) where he or she has failed to meet the requirements concerning incompatibility with the office of People’s Deputy.

The Constitutional Court noted that legal forms of realising the authority of the parliament, the President, the High Council of Justice and the High Qualification Commission of Judges are of importance to the state and society, concern the rights and freedoms of citizens, and the formation and functioning of the judiciary.

According to the Constitution, requirements concerning the incompatibility of deputy’s mandate with other types of activity must be established by law (Article 78.3); where a deputy fails to fulfil the incompatibility requirements the deputy’s mandate powers may only be terminated by a court decision (Article 81.4).

The Constitutional Court held that the legislative regulation of jurisdiction of some categories of administrative cases defined by the disputed provisions of Law no. 2453 and the Code provides

preconditions for the impartial execution of justice by the High Administrative Court as a court of first instance within a reasonable term, secures guarantees of fair judicial consideration of cases and establishes an order for a court to adopt a grounded and lawful decision.

Thus, the disputed provisions of Law no. 2453 and the Code concerning jurisdiction of the mentioned categories of administrative cases do not contravene the provisions of Articles 8.1 and 129.3.8 of the Constitution.

The petitioners also claimed that Article 183^{1.2} and 183^{1.6} of the Code did not conform to Article 129.3.8 of the Constitution concerning the jurisdiction of appellate administrative courts as courts of first instance and the High Administrative Court as the court of final appellate instance regarding cases concerning the compulsory alienation, in the public interest, of land, and other objects of real estate located on such land, from landowners.

The Constitutional Court proceeded from the fact that according to Article 129.3.8 of the Constitution a law may define certain categories of administrative cases which do not envisage cassational challenge of a court decision.

The Court accordingly held that the legislative provisions concerning the conferral of jurisdiction regarding this category of administrative cases to appellate administrative courts as courts of first instance and the High Administrative Court as the court of the appellate instance do not contravene Articles 8.1, 129.3.8 of the Constitution.

The petitioners also requested the Constitutional Court to examine the disputed provisions of Law no. 2453 and the Code concerning their conformity to the provisions of Articles 22, 24, 55 and 64 of the Constitution.

The Court noted that, pursuant to Article 129.3.8 of the Constitution, it is permissible to establish by law categories of cases in which appellate and cassational challenge of a court decision is not envisaged. Legal regulation of jurisdiction regarding certain categories of administrative cases by Law no. 2453 and the Code according to the said constitutional provision guarantees adherence to rights and freedoms of citizens to which administrative justice gives effect.

With regard to this, the conferral of jurisdiction regarding certain categories of cases to the High Administrative Court as the court of first instance, appellate administrative courts as courts of first

instance and the High Administrative Court as the court of appellate instance by law guarantees the right to judicial protection and does not restrict it, does not restrict the meaning and scope of rights and freedoms secured by law, and does not violate the equality of citizens before the law.

The petitioners also argued that the provisions of Articles 18.4, 171^{1.1}, 171^{1.2}, 171^{1.6} and 180.1 of the Code contravene Article 125.2 of the Constitution.

The Court noted that the Constitution provides that the Supreme Court is the highest judicial body in the system of courts of general jurisdiction (Article 125.2); and that its authority as the highest judicial body in the system of court of general jurisdiction is determined by the legislature (Article 92.1.14).

In analysing the disputed provisions of the Code, the Constitutional Court came to the conclusion that the establishment of some categories of administrative cases which do not envisage appellate and cassational challenge of a court decision by the legislature does not deprive the Supreme Court of its status of the highest judicial body in the system of courts of general jurisdiction.

Therefore, the disputed provisions of the Code do not contravene Article 125.2 of the Fundamental Law.

Judges M. Markush and V. Shyshkin submitted dissenting opinions.

Languages:

Ukrainian, Russian (translation by the Court).



United States of America

Supreme Court

Important decisions

Identification: USA-2012-2-004

a) United States of America / **b)** Supreme Court / **c)** / **d)** 25.06.2012 / **e)** 10-9646 and 10-9647 / **f)** Miller v. Alabama / **g)** 132 *Supreme Court Reporter* 2455 (2012) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
 5.3.3 Fundamental Rights – Civil and political rights – **Prohibition of torture and inhuman and degrading treatment**.
 5.3.44 Fundamental Rights – Civil and political rights – **Rights of the child**.

Keywords of the alphabetical index:

Juveniles / Sentence, life, without parole / Society, maturing / Decency, standards, evolving / Minor, culpability, reduced / Death penalty, life without parole sentence, similarity / Punishment, unusual / Youth, mitigating quality.

Headnotes:

Mandatory criminal sentences of life without parole for homicide offenders under the age of 18 at the time of their crimes violate the constitutional prohibition on cruel and unusual punishments.

The requirement of proportionality is central to the constitutional prohibition against cruel and unusual punishments, and proportionality must be viewed less through a historical prism than according to evolving standards of decency that mark the progress of a maturing society.

Juveniles are constitutionally different from adults for purposes of sentencing; because they have diminished culpability and greater prospects for reform, they are less deserving of the most severe punishments.

By making youth irrelevant to imposition of the harshest prison sentence, a mandatory penalty of life without parole for juvenile homicide offenders poses too great a risk of disproportionate punishment and thereby violates the constitutional prohibition against cruel and unusual punishments.

Sentencing authorities must have the opportunity to consider the mitigating qualities of youth, and mandatory life-without-parole sentences for juvenile homicide offenders that do not provide for the exercise of such discretion are flawed and invalid under the constitutional prohibition against cruel and unusual punishments.

Summary:

I. Two juveniles, convicted of murders committed when they were 14 years old, were sentenced to mandatory terms of life imprisonment without parole in the courts of the States of Alabama and Arkansas, respectively. The terms were mandatory, prohibiting the sentencing authorities from imposing any different punishments. In their state court appeals, both offenders claimed that mandatory life-without-parole prison terms for juveniles violate the Eighth Amendment to the U.S. Constitution, which bars the infliction of “cruel and unusual punishments.” The Eighth Amendment is applicable to the States under the Fourteenth Amendment to the U.S. Constitution, which prohibits the States from depriving any person of liberty “without due process of law.”

II. The U.S. Supreme Court agreed to review the decisions of the Alabama Court of Appeals and the Arkansas Supreme Court. The Court reversed those decisions, ruling that a mandatory sentence of life without parole for a juvenile violates the Eighth Amendment.

Citing its precedents, the Court stated that the Eighth Amendment guarantee is grounded in the precept that a criminal punishment should be graduated and proportioned to both the offender and the offense. The concept of proportionality, according to the Court, “is central to the Eighth Amendment” and the Court views that concept less through a historical prism than according to the “evolving standards of decency that mark the progress of a maturing society.”

The Court described two strands of precedent that reflect its concern with proportionate punishment. The first strand has adopted categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty. The Court noted that several of its decisions in this group, such as those barring capital punishment for children and life sentences without

parole for juveniles convicted of non-homicide offenses, have specially focused on juvenile offenders because of their lesser culpability. According to the Court, children are constitutionally different from adults for purposes of sentencing, for three reasons. First, they lack maturity and have an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking. Second, more vulnerable to negative influences and outside pressures, they have limited control over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings. Third, a child's character is not as "well formed" as an adult's; personal traits are "less fixed" and conduct is less likely to be evidence of irretrievable depravity.

The second proportionality strand in the Court's case law has required sentencing authorities to consider the individual characteristics of defendants and the details of their offenses before imposing the death sentence. In this regard, the Court reiterated its position that life without parole sentences share some characteristics with capital punishment that are shared by no other sentences.

Therefore, the Court concluded that its case law demonstrates that sentencing authorities must have the opportunity to consider the mitigating qualities of youth. As a result, mandatory life-without-parole sentences for juvenile homicide offenders that do not provide for the exercise of discretion on the part of sentencing authorities are invalid under the Eighth Amendment. According to the Court, by making the characteristic of youth and all that accompanies it irrelevant to imposition of the harshest prison sentence, such schemes pose too great a risk of disproportionate punishment.

III. The Court's decision was the result of a 5-4 vote among the Justices. In addition to the opinion of the Court, four Justices filed separate opinions. Justice Breyer filed a concurring opinion, in which Justice Sotomayor joined. Chief Justice Roberts filed a dissenting opinion, in which Justices Scalia, Thomas, and Alito joined. Justice Thomas filed a dissenting opinion, in which Justice Scalia joined. Justice Alito filed a dissenting opinion, in which Justice Scalia joined. In their separate opinions, the dissenting Justices set forth their views that: the sentences in this case are not "unusual", given that they are found in the legislation of 29 jurisdictions; the Court has departed from the exercise of identifying "evolving standards of decency"; and the Court simply is applying its own sense of morality to pre-empt the will of legislatures.

Supplementary information:

At the Supreme Court, the Alabama case (*Miller v. Alabama*) was combined with the Arkansas case of *Jackson v. Hobbs*.

The parties in *Miller v. Alabama* agreed that approximately 2,500 inmates in the United States are serving life sentences for crimes committed when they were juveniles. Of these, the Court found, approximately 2,000 were sentenced pursuant to the types of mandatory systems in question. In light of the Court's decision in this case, commentators noted that many of these offenders could be expected to seek judicial review of their sentences.

Languages:

English.



Identification: USA-2012-2-005

a) United States of America / **b)** Supreme Court / **c)** / **d)** 25.06.2012 / **e)** 11-182 / **f)** Arizona *et al v.* United States / **g)** 132 *Supreme Court Reporter* 2492 (2012) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

4.8.1 Institutions – Federalism, regionalism and local self-government – **Federal entities.**

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

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

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

Keywords of the alphabetical index:

Pre-emption, federal / Immigration, competence, distribution / Foreigner, immigration, illegal, regulation, competence.

Headnotes:

Federal law is supreme; the federal legislature has the power to pre-empt state law.

Federal law is superior to State law in at least two circumstances: first, the States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance; second, state laws are pre-empted when they conflict with federal law, either because compliance with both federal and state regulations is a physical impossibility, or where the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Where Congress occupies an entire field, as it has in the field of alien registration, even complementary state regulation is impermissible; field pre-emption reflects a congressional decision to foreclose any state regulation in the area, even if it is parallel to federal standards.

The federal government's broad power over the subject of immigration and the status of aliens rests in part on its inherent power as sovereign to control and conduct relations with foreign nations. The federal government's broad power over the subject of immigration and the status of aliens rests in part on the constitutional power to establish a uniform rule of naturalisation.

So far as legislative acts fairly may be construed in such a way as to avoid doubtful constitutional questions, they should be so construed; and it is to be presumed that state laws will be construed in that way by the state courts.

Summary:

I. In 2010, the State of Arizona enacted the Support Our Law Enforcement and Safe Neighbourhoods Act. The United States, claiming that four of the Act's provisions were pre-empted by federal law, filed suit seeking an injunction against Arizona's enforcement of those provisions.

The Act seeks to address issues related to the large number of unlawful aliens in Arizona. The four provisions challenged by the United States were:

- Section 3, which made failure to comply with federal alien-registration requirements a state misdemeanor;
- Section 5.C, which made it a misdemeanor for an unauthorised alien to seek or engage in work in the State;

- Section 6, which authorised state and local officers to arrest without a warrant a person "the officer has probable cause to believe . . . has committed any public offense that makes the person removable from the United States"; and
- Section 2.B, which required officers conducting a stop, detention, or arrest to make efforts, in some circumstances, to verify the person's immigration status with the federal government.

The U.S. District Court enjoined the State from enforcing the four provisions, and the U.S. Court of Appeals for the Ninth Circuit affirmed. The U.S. Supreme Court accepted review.

II. In its ruling, the Supreme Court set forth basic principles of federal pre-emption in the system of federalism. The Supremacy Clause in Article VI.2 of the U.S. Constitution gives the U.S. Congress the power to pre-empt state law. A federal legislative act may contain an express pre-emption provision, but state law must also give way to federal law in at least two other circumstances. First, States are precluded from regulating conduct in a field that Congress has determined must be regulated by its exclusive governance. Second, state laws are pre-empted when they conflict with federal law, including when they stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

The Court also reviewed the nature of the federal government's "broad, undoubted power over immigration and alien status." Federal governance, according to the Court, is extensive and complex. Among other things, federal law: specifies categories of aliens who are ineligible to be admitted to the United States; requires aliens to register with the federal government and to carry proof of status; imposes sanctions on employers who hire unauthorised workers; and specifies which aliens may be removed and the procedures for doing so.

Turning to the challenged provisions of the Act, the Court concluded that Sections 3, 5.C and 6 were pre-empted by federal law. Section 3 intruded on the field of alien registration, a field in which Congress has left no room for States to regulate. Because Congress has occupied the field, even complementary state regulation is impermissible. As to Section 5.C, its criminal penalty stood as an obstacle to the federal regulatory system. According to the Court, the correct lesson to draw from the text, structure, and history of the applicable federal legislation is that Congress decided it would be inappropriate to impose criminal penalties on unauthorised employees. Section 6 also created an obstacle to federal law, by authorising state and local officers to make warrantless arrests of certain aliens suspected of being removable. By

authorising state officers to decide whether an alien should be detained for being removable, Section 6 violated the principle that the removal process is entrusted to the discretion of the federal government.

As to Section 2.B of the Act, the Court concluded that it was improper to enjoin it before the state courts had had an opportunity to construe it and without some showing that its enforcement in fact conflicts with federal immigration law and its objectives. The Court recognised that the detention of individuals solely to verify their immigration status would raise constitutional concerns, and would disrupt the federal framework to put state officers in the position of holding aliens in custody for possible unlawful presence without federal direction and supervision. However, the Court concluded that state courts could construe Section 2.B to avoid these concerns, and that therefore it would be premature to enjoin its enforcement.

III. The Court's decision was based on a five to three vote among the Justices, with another Justice (Justice Kagan) abstaining because of her involvement with the issues in her prior position in the U.S. government. In addition to the Court's opinion, three Justices filed separate opinions in which they concurred in part with the Court's judgment and dissented in part with it. In their opinions, Justices Scalia and Thomas agreed with the Court that Section 2.B was not pre-empted, but disagreed that federal law pre-empted the other challenged provisions. Justice Alito in his opinion agreed with the Court that Section 3 was pre-empted and that Section 2.B was not pre-empted; however, he also concluded that Sections 5.C and 6 were not pre-empted.

Supplementary information:

In addition to Arizona, other States also recently enacted legislation intended to address illegal immigration. At the time of the Supreme Court's decision, lower courts had enjoined implementation of such laws in at least five States: Alabama, Georgia, Indiana, South Carolina and Utah. After the Court's decision, those courts began revisiting their rulings in order to conform them to the Supreme Court's dictates.

Languages:

English.



Identification: USA-2012-2-006

a) United States of America / **b)** Supreme Court / **c)** / **d)** 28.06.2012 / **e)** 11-210 / **f)** United States v. Alvarez / **g)** 132 *Supreme Court Reporter* 2537 (2012) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Counter speech / Statement, false, protection, constitutional / Truth, test, power of thought, acceptance / Statement, false, punishment.

Headnotes:

In certain circumstances, false statements associated with legally cognisable harms such as defamation or fraud fall outside constitutional freedom of speech guarantees; however, the Constitution does not recognise a categorical rule that all false statements do not receive constitutional protection.

The absence of an exception to constitutional protection for all false statements comports with the understanding that some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the Constitution seeks to guarantee.

The Constitution requires that a content-based restriction on protected speech be presumed invalid, placing a heavy burden on the government to demonstrate its validity.

To permit the government to compile a list of subjects about which false statements are punishable would lack a clear limiting principle, creating the potential for the exercise of an impermissible chilling power over the exercise of free speech.

When the government seeks to regulate protected speech, the restriction must be the least restrictive means among available, effective alternatives.

In seeking to demonstrate that the government has chosen the least restrictive means of regulating protected speech, it must show that the opportunity for counter speech will not satisfy this requirement.

Summary:

I. The federal Stolen Valour Act of 2005 makes it a crime to falsely claim receipt of military decorations or medals and provides an enhanced penalty of a fine, or maximum of one year's imprisonment, or both, if the false claim is made regarding the Congressional Medal of Honour. The Congress established the Medal of Honour so that the U.S. could demonstrate its highest respect and esteem for those who, in the course of carrying out the duty of contributing to the nation's defence, have acted with extraordinary honour.

In 2007, at a public meeting in California, Xavier Alvarez stated that he had received the Congressional Medal of Honour in 1987. He was indicted under the Stolen Valour Act for this statement. He did not contest the government's claim that the statement was an intended lie. Apparently, he made the statement only to gain respect, and not to secure employment or financial benefits or admission to privileges reserved for those who have earned the Medal.

Before the U.S. District Court, Alvarez presented the claim that the Act is invalid under the First Amendment to the U.S. Constitution, which in relevant part states that "Congress shall make no law...abridging the freedom of speech." The District Court denied this defence. Alvarez pleaded guilty to one count, reserving the right to appeal on his First Amendment claim. The U.S. Court of Appeals for the Ninth Circuit found the Act invalid under the First Amendment and reversed the conviction.

II. The U.S. Supreme Court agreed to review the Court of Appeals decision. The Court ruled that the Act violated the First Amendment and affirmed the Court of Appeals decision.

In its defence of the Act, the government argued that false statements are not protected speech under the First Amendment. The government pointed to numerous examples from the Court's case law stating that false statements are devoid of First Amendment value. The Court, however, observed that its statements cited by the government all derived from disputes involving defamation, fraud, or some other legally cognisable harm associated with a false statement. The Court also concluded that the government's citation of certain legislative prohibitions against false speech, including perjury, were not applicable to the Stolen Valour Act.

In all, the Court stated that the government's examples did not support the existence of a general exception to First Amendment protection for all false statements. The Court said that it had never recognised such a

categorical exception, and would not do so now. The Court's prior decisions have not confronted a measure, like the Act, that targets falsity and nothing more. According to the Court, permitting the government to criminalise the speech in question would endorse a governmental authority to compile a list of subjects about which false statements are punishable. That governmental power, the Court observed, has no clear limiting principle. The mere potential for the exercise of such a power casts a chill, a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of freedom. Some false statements are inevitable, the Court said, if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee.

The Court then turned to the question of whether the Act was a legitimate restriction on protected speech. It noted that the Act is a prohibition based on the content of speech, and that the First Amendment requires that a content-based restriction be presumed invalid, placing a heavy burden on the government to demonstrate its validity. In this regard, the Court stated that the Act sought to advance a legitimate, compelling Government interest, "indeed a most valued national aspiration and purpose." However, for several reasons, it could not survive First Amendment scrutiny.

For one thing, the Act is overly broad in its sweep. By its plain terms, it applies to a false statement made at any time, in any place, to any person. It seeks to control and suppress all false statements on this one subject in almost limitless times and settings, and does so entirely without regard to whether the lie was made for the purpose of material gain. As a related matter, the Act must satisfy the requirement that a restriction on protected speech must be the least restrictive means among available, effective alternatives. In this regard, the First Amendment requires that the Act's restriction on speech that protects the Medal of Honour be "actually necessary" to achieve its interest. There must be a direct causal link between the restriction imposed and the injury to be prevented. In the instant case, the Court concluded that the link between the government's interest in protecting the integrity of the military honours system and the Act's restriction on false claims has not been shown.

In regard to the "actually necessary" requirement, the Court also observed that the government had not demonstrated why counter speech would not suffice to achieve its interest. The remedy for speech that is false is speech that is true. The theory of the Constitution is that the best test of truth is the power of the thought to get itself accepted in the competition of the market.

III. Six of the nine Justices agreed with the Court's ruling that the Stolen Valour Act was unconstitutional. Four Justices (Justices Kennedy, Chief Justice Roberts, and Justices Ginsburg and Sotomayor) signed the opinion of the Court. Justice Breyer, joined by Justice Kagan, filed a separate opinion concurring in the Court's judgment. Justice Alito filed a dissenting opinion, which was joined by Justices Scalia and Thomas.

Languages:

English.



Identification: USA-2012-2-007

a) United States of America / **b)** Supreme Court / **c)** / **d)** 28.06.2012 / **e)** 11-393 / **f)** National Federation of Independent Business *et al v. Sebelius et al* / **g)** 132 *Supreme Court Reporter* 2566 (2012) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

4.8.1 Institutions – Federalism, regionalism and local self-government – **Federal entities.**

4.8.7.2 Institutions – Federalism, regionalism and local self-government – Budgetary and financial aspects – **Arrangements for distributing the financial resources of the State.**

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

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

Keywords of the alphabetical index:

Commerce, regulation / Insurance, health, mandatory / Penalty / Spending power / Taxation power, federal.

Headnotes:

The powers of the federal government are limited to those competencies enumerated in the constitutional text.

The federal government's exercise of its powers enumerated in the Constitution is not unlimited; courts reviewing federal acts must read the constitutional grants carefully in order to avoid creating a general federal authority.

The Constitution protects an individual from regulation under the power to regulate commerce if the individual abstains from the regulated activity.

The Constitution does not guarantee that individuals through inactivity may avoid exactions imposed under the power to tax.

A legislative act's description of a particular provision will not be controlling as a constitutional matter; instead, a reviewing court should follow a functional approach that disregards the designation and addresses its substance and application.

Under the constitutional grant of a power to spend federal funds for the general welfare, the federal legislature may establish cooperative state-federal programs if the States voluntarily and knowingly accept the terms of such programs; however, the spending power does not give the legislature the authority to require the States to regulate.

Federal legislation, enacted under the constitutional power to spend, that threatens to terminate other funding grants as a means of pressuring States to accept a particular program is not compatible with the system of federalism.

Summary:

I. In 2010, the federal Patient Protection and Affordable Care Act became law. The Act seeks to increase the number of people covered by health insurance and decrease the cost of health care. Twenty-six States, several individuals, and an association of businesses filed a suit in Federal District Court, claiming that two of the Act's provisions, the individual mandate and the expansion of the Medicaid program, exceeded the powers of the federal government.

Under the individual mandate, most adults are required to maintain "minimum essential" health insurance coverage. Individuals who are not exempt, and do not receive health insurance through an employer or government programme, must purchase insurance from a private company. Beginning in 2014, an individual who does not comply with this mandate must make what Congress called a "shared responsibility payment" to the federal government. The Act describes that payment as a "penalty".

The Medicaid program offers federal funding to states to assist pregnant women, children, needy families, the blind, the elderly, and the disabled in obtaining medical care. To receive that funding, states must comply with federal criteria governing matters such as the types of services provided, the recipients, and the costs of such care. The Act expanded the scope of the Medicaid program and increased the number of individuals the states must cover. The Act also increased federal funding to cover the states' costs of expansion; however, states not in compliance with the Act's new coverage requirements would risk not only the loss of federal funding for those requirements, but also the loss of all of their federal Medicaid funds.

II. In ruling on the plaintiffs' claims, the U.S. Supreme Court concluded that the individual mandate was constitutional, but the Medicaid expansion was not.

Under the U.S. Constitution, the powers of the Congress are limited to those enumerated in Article I. The U.S. government advanced three grounds from the constitutional text for upholding the validity of the individual mandate: the power to regulate commerce; the "Necessary and Proper" Clause; and the power to tax.

In the Commerce Clause (Article I, Section 8, Clause 3), the Constitution grants Congress the power to "regulate Commerce...among the several States." Concluding that this power requires the existence of some sort of activity to be regulated, the Court noted that the individual mandate instead compels individuals to become active by purchasing a product. This expansion of federal authority, the Court concluded, would be an unconstitutional construction of the Commerce Clause.

The Necessary and Proper Clause in Article I, Section 8, Clause 18 of the Constitution grants Congress the power to "Make all Laws which shall be necessary and proper" for the execution of the specific enumerated powers and all other powers vested in the Constitution. Without an underlying basis in an enumerated power, the Court concluded, this Clause could not be an independent ground for the individual mandate.

The Court concluded that the individual mandate was a valid exercise of the taxing power, found in Congress's power to "lay and collect Taxes" in Article I, Section 8, Clause 1 of the Constitution. In this regard, the fact that the Act describes the "shared responsibility payment" as a "penalty," and not as a "tax," is not controlling. On such a constitutional question, the Court stated, it would follow a functional approach, "disregarding the designation of the exaction, and viewing its substance and application."

In regard to the Medicaid expansion, the Spending Clause in Article I, Section 8, Clause 1 of the Constitution grants Congress the power to "provide for the general Welfare of the United States." Congress may use this power, the Court observed, to establish cooperative state-federal spending programs. The validity of such legislative acts, however, depends on whether a State voluntarily and knowingly accepts the terms of such programs: the Constitution does not give Congress the authority simply to require the States to regulate. Therefore, as in the Medicaid expansion when Congress threatens to terminate other grants as a means of pressuring the States to accept a spending program, the legislation runs counter to the system of federalism.

III. The Court's decision is comprised of six opinions. The opinion of the Court, upholding the individual mandate, is found in Parts I, II, and III-C of the opinion. Second, an opinion of Justice Roberts, joined by Justices Breyer and Kagan and striking down the Medicaid expansion, is found in Part IV. The four dissenting Justices (Justices Scalia, Kennedy, Thomas, and Alito) also agreed with the conclusion regarding the Medicaid expansion's invalidity. Third, Justice Roberts authored his own opinion, found in Parts III-A, III-B, and III-D, setting forth the reasons for the Court's ruling that the individual mandate did not fall under the interstate commerce Clause. The four dissenting Justices agreed with that determination. Fourth, Justice Ginsburg authored an opinion that concurred with the Court's judgment as to the validity of the individual mandate under the taxing power and dissented from the determination as to the invalid exercise of the commerce power. Fifth, the four dissenting Justices authored a joint opinion, dissenting from the Court's upholding the individual mandate as a valid exercise of the taxing power. Sixth, Justice Thomas wrote a dissenting opinion with additional views on the limits of the Commerce Clause.

Supplementary information:

Because of the comprehensive nature of the Act and the controversy surrounding it, the sensitive issues of federal power that it raised, and the release of the Court's decision during a Presidential election campaign, this case was subject to an exceptionally high degree of public attention.

Languages:

English.



Systematic thesaurus (V21) *

* Page numbers of the systematic thesaurus refer to the page showing the identification of the decision rather than the keyword itself.

1 Constitutional Justice¹

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 - 1.1.3.6 Remuneration
 - 1.1.3.7 Non-disciplinary suspension of functions
 - 1.1.3.8 End of office
 - 1.1.3.9 Members having a particular status¹⁰

¹ This chapter – as the Systematic Thesaurus in general – should be used sparingly, as the keywords therein should only be used if a relevant procedural question is discussed by the Court. This chapter is therefore not used to establish statistical data; rather, the *Bulletin* reader or user of the CODICES database should only look for decisions in this chapter, the subject of which is also the keyword.

² Constitutional Court or equivalent body (constitutional tribunal or council, supreme court, etc.).

³ For example, rules of procedure.

⁴ For example, age, education, experience, seniority, moral character, citizenship.

⁵ Including the conditions and manner of such appointment (election, nomination, etc.).

⁶ Including the conditions and manner of such appointment (election, nomination, etc.).

⁷ Vice-presidents, presidents of chambers or of sections, etc.

⁸ For example, State Counsel, prosecutors, etc.

⁹ (Deputy) Registrars, Secretaries General, legal advisers, assistants, researchers, etc.

¹⁰ For example, assessors, office members.

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¹¹ (Deputy) Registrars, Secretaries General, legal advisers, assistants, researchers, etc.

¹² Including questions on the interim exercise of the functions of the Head of State.

¹³ Referrals of preliminary questions in particular.

¹⁴ Enactment required by law to be reviewed by the Court.

¹⁵ Review *ultra petita*.

¹⁶ Horizontal distribution of powers.

¹⁷ Vertical distribution of powers, particularly in respect of states of a federal or regionalised nature.

¹⁸ Decentralised authorities (municipalities, provinces, etc.).

¹⁹ For questions other than jurisdiction, see 4.9.

²⁰ Including other consultations. For questions other than jurisdiction, see 4.9.

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²¹ Examination of procedural and formal aspects of laws and regulations, particularly in respect of the composition of parliaments, the validity of votes, the competence of law-making authorities, etc. (questions relating to the distribution of powers as between the State and federal or regional entities are the subject of another keyword 1.3.4.3).

²² As understood in private international law.

²³ Including constitutional laws.

²⁴ For example, organic laws.

²⁵ Local authorities, municipalities, provinces, departments, etc.

²⁶ Or: functional decentralisation (public bodies exercising delegated powers).

²⁷ Political questions.

²⁸ Unconstitutionality by omission.

²⁹ Including language issues relating to procedure, deliberations, decisions, etc.

³⁰ For the withdrawal of proceedings, see also 1.4.10.4.

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³¹ Pleadings, final submissions, notes, etc.

³² May be used in combination with Chapter 1.2. Types of claim.

³³ For the withdrawal of the originating document, see also 1.4.5.

³⁴ Comprises court fees, postage costs, advance of expenses and lawyers' fees.

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³⁶ Only for issues concerning applicability and not simple application.

³⁷ This keyword allows for the inclusion of enactments and principles arising from a separate constitutional chapter elaborated with reference to the original Constitution (declarations of rights, basic charters, etc.).

³⁸ Including its Protocols.

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³⁹ Presumption of constitutionality, double construction rule.

⁴⁰ Including the principle of a multi-party system.

⁴¹ Includes the principle of social justice.

⁴² See also 4.8.

⁴³ Separation of Church and State, State subsidisation and recognition of churches, secular nature, etc.

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⁴⁴ Including maintaining confidence and legitimate expectations.

⁴⁵ Principle according to which general sub-statutory acts must be based on and in conformity with the law.

⁴⁶ Prohibition of punishment without proper legal base.

⁴⁷ Including compelling public interest.

⁴⁸ Only where not applied as a fundamental right (e.g. between state authorities, municipalities, etc.).

⁴⁹ Including questions of treason/high crimes.

⁵⁰ Including prohibition on monopolies.

⁵¹ For the principle of primacy of Community law, see 2.2.1.6.

⁵² Including the body responsible for revising or amending the Constitution.

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⁵³ For example, presidential messages, requests for further debating of a law, right of legislative veto, dissolution.

⁵⁴ For example, nomination of members of the government, chairing of Cabinet sessions, countersigning.

⁵⁵ For example, the granting of pardons.

⁵⁶ For regional and local authorities, see Chapter 4.8.

⁵⁷ Bicameral, monocameral, special competence of each assembly, etc.

⁵⁸ Including specialised powers of each legislative body and reserved powers of the legislature.

⁵⁹ In particular, commissions of enquiry.

⁶⁰ For delegation of powers to an executive body, see keyword 4.6.3.2.

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⁶¹ Obligation on the legislative body to use the full scope of its powers.

⁶² Representative/imperative mandates.

⁶³ Including the convening, duration, publicity and agenda of sessions.

⁶⁴ Including their creation, composition and terms of reference.

⁶⁵ State budgetary contribution, other sources, etc.

⁶⁶ For the publication of laws, see 3.15.

⁶⁷ For example, incompatibilities arising during the term of office, parliamentary immunity, exemption from prosecution and others. For questions of eligibility, see 4.9.5.

⁶⁸ For local authorities, see 4.8.

⁶⁹ Derived directly from the Constitution.

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⁷¹ 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.

⁷² Civil servants, administrators, etc.

⁷³ Practice aiming at removing from civil service persons formerly involved with a totalitarian regime.

⁷⁴ Other than the body delivering the decision summarised here.

⁷⁵ Positive and negative conflicts.

⁷⁶ Notwithstanding the question to which to branch of state power the prosecutor belongs.

⁷⁷ For example, Judicial Service Commission, *Haut Conseil de la Justice*, etc.

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⁷⁸ Comprises the Court of Auditors in so far as it exercises judicial power.

⁷⁹ See also 3.6.

⁸⁰ And other units of local self-government.

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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 For the access of media to information, see 5.3.23, 5.3.24, in combination with 5.3.41.

⁹² Impartiality of electoral authorities, incidents, disturbances.

⁹³ For example, signatures on electoral rolls, stamps, crossing out of names on list.

⁹⁴ For example, in person, proxy vote, postal vote, electronic vote.

⁹⁵ This keyword covers property of the central state, regions and municipalities and may be applied together with Chapter 4.8.

⁹⁶ For example, Auditor-General.

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⁹⁸ Parliamentary Commissioner, Public Defender, Human Rights Commission, etc.

⁹⁹ For example, Court of Auditors.

¹⁰⁰ The vesting of administrative competence in public law bodies situated outside the traditional administrative hierarchy. See also 4.6.8.

¹⁰¹ *Staatszielbestimmungen*.

¹⁰² Institutional aspects only: questions of procedure, jurisdiction, composition, etc. are dealt with under the keywords of Chapter 1.

¹⁰³ Including state of war, martial law, declared natural disasters, etc.; for human rights aspects, see also keyword 5.1.4.1.

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¹⁰⁵ For rights of the child, see 5.3.44.

¹⁰⁶ The criteria of the limitation of human rights (legality, legitimate purpose/general interest, proportionality) are indexed in Chapter 3.

¹⁰⁷ Includes questions of the suspension of rights. See also 4.18.

¹⁰⁸ Taxes and other duties towards the state.

¹⁰⁹ Universal and equal suffrage.

¹¹⁰ According to the European Convention on Nationality of 1997, ETS no. 166, "'nationality' means the legal bond between a person and a state and does not indicate the person's ethnic origin" (Article 2) and "... with regard to the effects of the Convention, the terms 'nationality' and 'citizenship' are synonymous" (paragraph 23, Explanatory Memorandum).

¹¹¹ For example, discrimination between married and single persons.

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¹¹² This keyword also covers “Personal liberty”. It includes for example identity checking, personal search and administrative arrest.

¹¹³ Detention by police.

¹¹⁴ Including questions related to the granting of passports or other travel documents.

¹¹⁵ May include questions of expulsion and extradition.

¹¹⁶ Including the right of access to a tribunal established by law; for questions related to the establishment of extraordinary courts, see also keyword 4.7.12.

¹¹⁷ In the meaning of Article 6.1 of the European Convention on Human Rights.

¹¹⁸ This keyword covers the right of appeal to a court.

¹¹⁹ Including the right to be present at hearing.

¹²⁰ Including challenging of a judge.

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¹²¹ Covers freedom of religion as an individual right. Its collective aspects are included under the keyword "Freedom of worship" below.

¹²² This keyword also includes the right to freely communicate information.

¹²³ Militia, conscientious objection, etc.

¹²⁴ Aspects of the use of names are included either here or under "Right to private life".

¹²⁵ Including compensation issues.

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¹²⁶ This keyword also covers "Freedom of work".

¹²⁷ This should also cover the term freedom of enterprise.

¹²⁸ Includes rights of the individual with respect to trade unions, rights of trade unions and the right to conclude collective labour agreements.

Keywords of the alphabetical index *

* The précis presented in this Bulletin are indexed primarily according to the Systematic Thesaurus of constitutional law, which has been compiled by the Venice Commission and the liaison officers. Indexing according to the keywords in the alphabetical index is supplementary only and generally covers factual issues rather than the constitutional questions at stake.

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