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)*
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5. *Summary*
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7. *Cross-references*
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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.

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Strasbourg, July 2014

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Albania, Bulgaria.

Précis of important decisions of the reference period 1 September 2013 – 31 December 2013 will be published in the next edition, *Bulletin* 2014/1, for the following country:

Brazil.

Armenia
Constitutional Court

Statistical data
1 September 2013 – 31 December 2013

- 94 applications have been filed, including:
  - 10 applications filed by the President
  - 75 applications filed by individuals
  - 4 applications filed by the courts
  - 4 applications filed by the Human Rights Defender
  - 1 case on the basis of the application of 1/5 of the Deputies of the National Assembly
- 23 cases have been admitted for review, including:
  - 4 cases based on individual complaints concerning the constitutionality of certain provisions of laws
  - 10 cases based on applications filed by the President
  - 1 case based on the application of 1/5 of the Deputies of the National Assembly
  - 4 cases based on applications filed by the courts
  - 4 cases based on applications filed by the Human Rights Defender
- 29 cases heard and 29 decisions delivered (including decisions on applications filed before the relevant period) including:
  - 19 cases based on applications filed by the President
  - 8 cases based on individual complaints
  - 1 case based on application filed by the Human Rights Defender
  - 1 joint case based on three applications filed by the courts
- Outcome of the decisions:
  - 19 decisions declaring the obligations derived from international treaties have to be in compliance with the Constitution
  - 3 decisions declaring the challenged provisions to be in compliance with the Constitution
  - 3 decisions declaring the challenged norms have been declared to be in breach of the Constitution and therefore void
  - 3 decisions declaring the challenged provisions to be in conformity with the Constitution on the basis of their constitutional legal contents
  - 1 decision dismissing the review of the case

Important decisions

Identification: ARM-2013-3-004

a) Armenia / **b)** Constitutional Court / **c)** / **d)** 05.11.2013 / **e)** / **f)** On the conformity with the Constitution of the provisions of the Civil Code / **g)** *Tegekagir* (Official Gazette) / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Moral damage / Right to compensation, pecuniary compensation for non-pecuniary damage.

Headnotes:

The right to pecuniary compensation for moral damage derives from the Constitution, several legislative provisions, as well as international obligations undertaken by the state. The manner of such compensation shall be prescribed by law.

Summary:

I. The applicant petitioned the Constitutional Court, challenging that Article 17 of the Civil Code was unconstitutional because it failed to include moral damage as a type of harm and to guarantee compensation for it.

II. The Court held that the key component of human dignity is avoiding moral suffering conditioned by individual characteristics. In cases of illegal deprivation of liberty or search, the damage caused to a person may not automatically be equated to compensation for physical or pecuniary damage. In such cases, the compensation would not be proportionate to the psychological suffering.

The Court also stated that torture, inhuman or degrading treatment or punishment is accompanied by moral suffering, which may even be more extensive than potential physical (bodily) or material damage. The Court stressed that it is impossible to compensate the damage caused to a person and his/her dignity without rational and just compensation for moral damage.

The Court pointed out that several legislative acts include provisions concerning pecuniary compensation for non-pecuniary damage. Simultaneously, the Court noted that the institute of pecuniary compensation of non-pecuniary damage, anyway, is not completely regulated by national legislation.

The Court also emphasised that the state's obligation to guarantee pecuniary compensation for moral damage derives from a number of judgments by the European Court of Human Rights in the cases against Armenia, notably the Case of *Khachatryan and others v. Armenia* (no. 23978/06, 27 November 2012) and the Case of *Poghosyan and Baghdasaryan v. Armenia* (no. 22999/06, 12 June 2012).

Based on the above, the Constitutional Court declared the challenged provision in breach of the Constitution and void as it does not include moral damage as a type of damage and does not ensure possibility for its compensation.

The Court held that the challenged provision is invalidated on 1 October 2014.

Languages:

Armenian.

Identification: ARM-2013-3-005

a) Armenia / **b)** Constitutional Court / **c)** / **d)** 10.12.2013 / **e)** / **f)** On the conformity with the Constitution of the provisions of the Administrative Procedure Code / **g)** *Tegekagir* (Official Gazette) / **h)**.

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:

Right to judicial protection, access to court, limitations / Administrative procedure, excessive procedural responsibilities.

Headnotes:

Consistent with the view of the European Court of Human Rights concerning the limitations on the access to court, the state may set conditions for the realisation of this right. The limitations should not, however, restrict the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, the limitation shall pursue a legitimate aim and proportional to the means employed, balanced with the objective sought (*Khalfaoui v. France*, no. 34791/97, 14 March 2000).

Summary:

I. The applicant challenged the provisions of the Administrative Procedure Code obliging them to provide the Administrative Court with documents verifying receipt of the application and copies of the attached documents by the respondent. The applicant considered that this mandatory requirement was contrary to the right to judicial protection.

II. The Constitutional Court considered the meaning of the discussed requirement in the context of the right to judicial protection and access to court. Emphasising the importance of the creation and development of normative prerequisites guaranteeing the effective protection of human rights, the Court noted that none of the judicial peculiarities or proceedings shall obstruct the possibility to exercise the right to judicial protection or prevent it.

In light of the above, the Court held that requiring the application and copies of the attached documents to be sent to the respondent is legitimate, as it is an administrative procedure aimed at guaranteeing the effective realisation of the procedural rights and responsibilities of the other party. Regarding the requirement to submit the receipts and copies of the attached documents, however, the Court determined that the submission of the mentioned documents by

the respondent excessively overloads the extent of the applicants procedural responsibilities.

Based on the aforementioned, the Court ruled that the challenged provisions concerning the requirement to provide the Administrative Court the documents indicating the receipt of the application and the attached documents by the respondent, does not have a legitimate aim. It makes access to the Court complicated and jeopardises the full realisation of the constitutional right to judicial protection.

As a result, the Court declared the challenged provision to be in breach of the Constitution and therefore void.

The Court held that the challenged provision will become invalid on 1 July 2014.

Languages:

Armenian.

Austria
Constitutional Court

Important decisions

Identification: AUT-2013-3-004

a) Austria / **b)** Constitutional Court / **c)** / **d)** 10.12.2013 / **e)** G 16/2013, G 44/2013 / **f)** / **g)** / **h)** www.icl-journal.com; CODICES (German).

Keywords of the systematic thesaurus:

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950**.
5.2.2.11 Fundamental Rights – Equality – Criteria of distinction – **Sexual orientation**.
5.3.32 Fundamental Rights – Civil and political rights – **Right to private life**.
5.3.33 Fundamental Rights – Civil and political rights – **Right to family life**.
5.3.33.1 Fundamental Rights – Civil and political rights – Right to family life – **Descent**.
5.3.45 Fundamental Rights – Civil and political rights – **Protection of minorities and persons belonging to minorities**.

Keywords of the alphabetical index:

Family, protection / Partnership, homosexual / Homosexuality, family life / Motherhood, protection.

Headnotes:

Excluding women in stable, same-sex relationships from access to sperm donation violates the right to respect of private and family life as protected by the European Convention on Human Rights. An undifferentiated limitation of all forms of medically assisted reproduction to heterosexual couples must be justified by “particularly convincing and weighty reasons”, as required by European Court of Human Rights’case-law.

Summary:

I. The applicants, two women in a stable relationship, wanted to conceive a child through sperm donation, which qualifies as medically-assisted reproduction under Austrian law.

The Reproductive Medicine Act of 1992 *(Fortpflanzungsmedizingesetz)* allows for certain types of assisted reproduction, such as sperm donation, but prohibits others, such as surrogacy (Article 1 Reproductive Medicine Act). Article 3.2 of the Reproductive Medicine Act explicitly states that the sperm of a donor, who is not the mother's partner, can only be used if the partner is not able to biologically reproduce (infertility requirement).

Since the introduction of the Reproductive Medicine Act, access to assisted reproduction has been limited to married or domestic partners and requires the written consent of the mother's partner. Non-married couples need a notarised certification (Reproductive Medicine Act Article 8.1). Until 2011, a court could also issue an authentication certificate.

In the context of establishing civil unions for same-sex partners in 2009, an amendment to the Reproductive Medicine Act was passed, which restricted access to reproductive medicine to opposite-sex couples (Article 2.1 Reproductive Medicine Act).

In February 2010, the applicants sought an authentication certificate by the Wels District Court *(Bezirksgericht Wels)* in order to register the consent of the intended mother's partner to a sperm donation. The Court rejected their application. The Appellate Court *(Landesgericht Wels)*, while also rejecting their application, granted the applicants an appeal to the Austrian Supreme Court of Justice (OGH). The issue presented before this court was whether limiting reproductive technologies to heterosexual couples violated EU law, the European Convention on Human Rights and/or Austrian constitutional law.

The Supreme Court, in turn, referred the matter to the Constitutional Court, asking for judicial review of Article 2.1 of the Reproductive Medicine Act based on the refusal of the applicant's initial claim. In the first ruling, the Constitutional Court rejected the application. The reason given was that the scope of the desired review was not broad enough, since a finding of unconstitutionality would affect other paragraphs of the FMedG, as well – among them Article 3.2 (fertility requirement) which could not apply in a relationship between two women. The Supreme Court consequently revised and resubmitted its application (filed as G 16/2013). Additionally, the lesbian couple entered a separate application *(Individualantrag)*, claiming discrimination based on sex and sexual orientation, due to the exclusion of same-sex couples in the Reproductive Medicine Act (filed as G 44/2013).

II. The Constitutional Court examined the restriction of assisted reproduction in light of the constitutionally guaranteed right of equal treatment *(Gleichheitssatz),* which bars the legislator from distinguishing between homo- and heterosexual relationships without an objective reason. Then, it assessed the case in light of the right to respect for private and family life. The Court stated that the desire to conceive a child through natural or artificial means falls within the scope of Article 8 ECHR. Moreover, the European Court of Human Rights had established that same sex partnerships can constitute a family under this Article and thus enjoyed heightened protection. Article 14 ECHR, according to the European Court of Human Rights case law, required "particularly convincing and weighty reasons" to justify a different treatment based on sexual orientation in the context of rights guaranteed in the Convention.

By excluding women in a stable, same sex partnership from conceiving a child by intrauterine insemination (i.e., insemination inside the mother's uterus), the provisions of the Reproductive Medicine Act challenged before the Constitutional Court amounted to an interference within the scope of Article 8 ECHR.

Whereas the Court accepted that the Austrian legislator had a certain margin for devising artificial reproduction rules according to political preferences, it held that in cases of intrauterine insemination, this margin was limited compared to questions of *in-vitro* fertilisation or the donation of egg cells. These methods, the Court stated, raised different ethical and moral problems than the procedure at hand, which – setting aside its artificial initiation – resembled the natural process of reproduction and had been in use long before the Reproductive Medicine Act was introduced in 1992. Indeed, artificial (intrauterine) insemination had been regularly employed since the 1970s; its prevalence thus also distinguished it from techniques such as *in-vitro* fertilisation. Additionally, intrauterine insemination was less intrusive than other methods of medically-assisted reproduction, and risks for the mother's health were unknown.

The fear that potential abuse of medically-assisted reproduction might eventually lead to surrogacy – apparently the main legislative motive behind the blanket prohibition for same-sex couples to use reproductive assistance – did not convince the Court as a legitimate justification. It, furthermore, did not share the concern that suspending the infertility requirement would present an ethical danger. The reason is that the Court did not believe abandoning the idea of reproductive technologies as a mere means to overcome physical impediments would automatically pave the way for surrogacy. In the

Court's opinion, the prohibition of surrogacy was based on a separate set of ethical considerations.

Finally, the legal restriction of the artificial insemination procedures in question could not be justified as a means of protecting families, neither by Article 8 ECHR nor by Article 12 ECHR. Since same-sex partnerships did not substitute, but complement marriage and different-sex cohabitation, the traditional family was not endangered by same-sex couples or by lesbian parents.

Against this backdrop, the examined provisions of the Reproductive Medicine Act amounted to a disproportionate interference with the scope of Article 14 in conjunction with Article 8 ECHR, as they prevented lesbian women in stable relationships to conceive children through heterologous intrauterine insemination.

Cross-references:

The decision of the Supreme Court to submit an application to the Constitutional Court is filed under 3Ob147/10d (22.03.2011); the decision to resubmit a revised application is filed under 3Ob224/12f (19.12.2012).

Languages:

German.

Belarus
Constitutional Court

Important decisions

Identification: BLR-2013-3-005

a) Belarus / **b)** Constitutional Court / **c)** En banc / **d)** 25.09.2013 / **e)** D-846/2013 / **f)** On the Procedure of Exemption from Payment of a State Fee for Filing Complaints against Rulings on Administrative Offences Cases / **g)** *Vesnik Kanstytucijnaga Suda Respubliki Belarus* (Official Digest), no. 4/2013 / **h)** CODICES (English, Belarusian, Russian).

Keywords of the systematic thesaurus:

1.3.5.15 Constitutional Justice – Jurisdiction – The subject of review – **Failure to act or to pass legislation**.
3.13 General Principles – **Legality**.
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:

Access to courts, administrative sanction, appeal / Penalty, administrative / Fee, exception / Proceedings, fee / Sanction, administrative, appeal.

Headnotes:

With the aim of ensuring the constitutional right of everyone to judicial protection, the Constitutional Court recognised the necessity to fill a legal gap in the legislation on administrative proceedings and established a procedure to allow exemption of individuals from payment of a state fee for filing complaints to courts against rulings on cases concerning administrative offences, where they lack the financial means to pay the fee.

Summary:

The Constitutional Court, pursuant to its competence to eliminate legal gaps, contradictions and legal uncertainty in normative legal acts, considered a citizen's application alleging a gap in the legislation on administrative proceedings concerning the exemption from payment of a state fee for filing

complaints against rulings on administrative offences cases to the Court.

The Tax Code establishes the duty of citizens to pay a state fee for filing complaints against court rulings to courts of general jurisdiction. At the same time Article 258.2 of this Code enshrines the power of a court (a judge) to exempt individuals, fully or partially, from the judicial state fee proceeding from their property status on objects liable to a state fee if they are not related to entrepreneurial activity.

Article 12.2.3 of the Procedural and Executive Code on Administrative Offences (hereinafter, the "PECoAO") states that complaints to a court against rulings on administrative offences cases are liable to a state fee according to the legislation. In case of non-payment of a state fee this complaint is to be returned to the complainant. The Code does not contain the procedure of exemption of individuals from payment of the state fee.

According to Article 1.1.2 of the PECoAO this Code is the only legal act which establishes administrative proceedings applied in the territory of the Republic. Provisions of other legal acts which establish the rules of procedure within the scope of the administrative proceedings, rights and obligations of its parties are to be included in the PECoAO.

The above-mentioned legal regulation points to a legal gap which leads to law enforcement problems. In a number of cases courts dismiss complaints against rulings on administrative offence cases due to non-payment of a state fee and do not satisfy applications for exemption from payment of the fee due to a difficult financial situation, because the PECoAO makes no provision for a judge to take such a decision.

In its decision, the Constitutional Court held that the inability of an individual to pay a state fee due to his lack of financial means should not impede the exercise of his or her constitutional right to judicial protection, including in administrative proceedings.

Aiming to ensure the constitutional principle of the rule of law, the implementation of everyone's constitutional right to judicial protection and aiming to fill a legal gap concerning administrative proceedings, the Constitutional Court considered it necessary to make addenda to the PECoAO by establishing a procedure of exemption of individuals by a court (a judge) from payment of a state fee for filing a complaint to the Court against rulings on administrative offences cases.

The Court proposed that the Council of Ministers prepare a draft law on the appropriate addenda to the PECoAO and introduce it in the established order to the Parliament (House of Representatives of the National Assembly).

Languages:

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

Identification: BLR-2013-3-006

a) Belarus / **b)** Constitutional Court / **c)** En banc / **d)** 21.11.2013 / **e)** D-855/2013 / **f)** On the conformity of the Law on Making Alterations and Addenda to the Population Register Law to the Constitution / **g)** *Vesnik Kanstytucijnaga Suda Respubliki Belarus* (Official Digest), no. 4/2013, www.kc.gov.by / **h)** CODICES (English, Belarusian, Russian).

Keywords of the systematic thesaurus:

3.10 General Principles – **Certainty of the law**.
3.12 General Principles – **Clarity and precision of legal provisions**.
5.3.32.1 Fundamental Rights – Civil and political rights – Right to private life – **Protection of personal data**.

Keywords of the alphabetical index:

Data base / Data, personal, collecting, processing.

Headnotes:

Regulation of issues concerning the population register, established by law (adjusting the list of personal records, improving the gathering mechanism, avoiding duplication of information in different registers, depersonalising some data, data protection, preventing any unauthorised interference into the records' entering process), ensures the use of an effective mechanism for the gathering and storing personal information in appropriate information systems (registers). These approaches meet modern information security trends, ensure the confidentiality of individuals' personal records and exclude identification of the individual in the process of application of depersonalised personal records.

Summary:

Under legislation enacted in 2008, all laws adopted by Parliament are sent automatically to the Constitutional Court for an obligatory preliminary review, prior to their signature by the President. The Constitutional Court, in open court session in the exercise of obligatory preliminary review, considered the constitutionality of the Law on Making Alterations and Addenda to the Population Register Law (hereinafter, the "Law ").

The Law makes alterations and addenda to the Population Register Law in order to optimise the content of personal records deposited in the Population Register, to improve the order of their entering, and to harmonise the Population Register Law with the provisions of other legislative acts.

In its review of the constitutionality of the Law the Constitutional Court proceeded from the following.

First, according to the Constitution, the Republic is a state based on the rule of law and it shall be bound by the principle of the supremacy of the law (Articles 1.1, 7.1). Article 28 of the Constitution enshrines the right of everyone to protection from unlawful interference with his or her private life.

The guarantees for implementation of the said constitutional provisions are established by Article 34.2 and 34.3 of the Constitution, which declare that state bodies, public associations and officials shall provide citizens of the Republic with an opportunity to familiarise themselves with materials that affect their rights and legitimate interests; and that the use of information may be restricted by legislation with the aim of safeguarding the honour, dignity, personal and family life of the citizens and the full exercise of their rights.

In terms of the guarantee to observe the individual's constitutional right to protection from unlawful interference with his or her privacy, the Constitutional Court noted that the source of the Register is the database of personal records of individuals, which contains confidential information and which, due to its nature, processing and application procedures, requires protection in order to eliminate any possibility of violations of the right to privacy.

The need to protect personal records is also based on the international obligations of the Republic in the field of compliance with one of the fundamental human and civil rights – the right to privacy enshrined in Article 12 of the Universal Declaration of Human Rights, and Article 17 of the International Covenant on Civil and Political Rights.

The provisions of the Law are aimed at further developing the provisions of the Constitution, international legal instruments and at improving legal mechanisms that regulate procedures of entering personal records in the Register, and at further updating and protecting it.

Second, Article 1.3 of the Law excluded Article 10.1.2 and 10.4.5 of the Population Register Law, which refer respectively to personal records regarding blood type and information on whether an individual is a founder (participant, owner of the property) of a legal entity (except for public companies, homeowners' associations, consumer co-operatives, horticultural associations, chambers of commerce), or an individual entrepreneur. At the same time Article 12 of the Population Register Law specifies more precisely the list of state institutions authorised to enter personal records in the Register.

Third, the Constitutional Court was of the view that adjusting the list of personal records to be gathered and deposited in the Register aimed at their optimisation, removing from the Register records that must be stored (already deposited) in the special information systems connected to the Register makes the duplication of information already contained in the Register unnecessary.

Legal regulations established by the Law create conditions for the construction of a coherent and efficient mechanism for gathering and storing the necessary information in appropriate information systems, specifically designed to store that information, which will facilitate gathering only those records in the Register that are really necessary for the accomplishment of the Register's tasks.

Fourth, Article 30 of the Population Register Law contains a list of data that are to be excluded from personal records in the process of their depersonalisation for scientific, statistical, sociological, medical and other purposes – identification number, surname, name and middle name of the individual, his or her parents, guardians, spouse, child (children), and digital picture. Beside that data, in the process of depersonalisation other personal records may be excluded also in a way decided by the manager of the Register.

The Law (Article 9.1) has made an addendum to Article 30 of the Population Register Law that makes it possible to exclude some data from the records during the process of depersonalisation of personal records.

The Constitutional Court considered that the said modification of the rules in the Population Register Law intends to make it (bearing in mind the concrete purposes of implementation) possible to remove from the personal records, data that permits the identification of a specific individual. This regulation meets modern information security trends, including enhancement of legal mechanisms that ensure the confidentiality of citizens' personal records, and excludes the identification of individuals in the process of using depersonalised personal records contained in the Register, which is consistent with the provisions of Articles 28 and 34.3 of the Constitution.

The Constitutional Court accordingly recognised the Law on Making Alterations and Addenda to the Law on the Population Register to be in conformity with the Constitution.

Languages:

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

Identification: BLR-2013-3-007

a) Belarus / **b)** Constitutional Court / **c)** En banc / **d)** 30.12.2013 / **e)** D-913/2013 / **f)** On the conformity of the Law on Making Alterations and Addenda to the Labour Code to the Constitution / **g)** *Vesnik Kanstytucijnaga Suda Respubliki Belarus* (Official Digest), no. 4/2013, www.kc.gov.by / **h)** CODICES (English, Belarusian, Russian).

Keywords of the systematic thesaurus:

3.5 General Principles – **Social State**.
3.21 General Principles – **Equality**.
5.2.2.1 Fundamental Rights – Equality – Criteria of distinction – **Gender**.
5.4.14 Fundamental Rights – Economic, social and cultural rights – **Right to social security**.

Keywords of the alphabetical index:

Regulation, social, differentiation by gender / Right to leave / Paternity, leave, right / Child, care, leave, conditions.

Headnotes:

Provisions of the Law concerning the right of workers to social leave (including maternity leave and also childcare leave for women who have adopted a child under the age of three) comply with constitutional requirements guaranteeing the equality of every person before the law in relation to the said social leave. It also ensures the application of the same approaches to all individuals having adopted children or having been appointed as their tutors and having taken appropriate care of these children.

Summary:

The Constitutional Court, in open court session in the exercise of obligatory preliminary review, considered the constitutionality of the Law on Making Alterations and Addenda to the Labour Code.

The Court noted that the Constitution enshrines the provisions that the is a social state (Article 1.1); marriage, family, motherhood, fatherhood, and childhood shall be under the protection of the State (Article 32.1); all shall be equal before the law and have the right to equal protection of their rights and legitimate interests without any discrimination (Article 22).

Article 43 of the Constitution in correlation with Articles 1.1 and 32.1 of the Constitution is implemented through the right of workers to social leave stipulated by the Labour Code.

In order to strengthen social protection for workers having the right to social leave the Law modifies appropriate rules of the Labour Code. For example, Article 266 of the Code (amended by Article 1.116 of the Law) which regulates maternity leave and also childcare leave for women who have adopted a child under the age of three. This Article covers all workers who have adopted children or who have been nominated as their guardians (both women and men). Requirements of Article 22 of the Constitution on the equality of everyone before the law in relation to social leave are implemented thereby ensuring application of the same approach to all individuals who have adopted children or who have been nominated as their guardians and who take appropriate care of these children.

Article 185 of the Labour Code (amended by Article 1.82 of the Law) enshrines the right to parental leave to care for a child under the age of three not only for working mothers, but also for working fathers, other relatives, and family members. The legislator took into consideration the position of the

Constitutional Court concerning the need to respect the constitutional principles of legal equality, proportionality of restriction of rights and freedoms of individuals, norms guaranteeing the right to labour and social security, non-discrimination in the field of labour relations and other relations in connection with them and also ensuring social justice, effective mechanisms to protect the family, motherhood, fatherhood and childhood under the Decision of 4 October 2011 “On Some Issues of Legal Regulation of Parental Leave to Care for a Child”.

Thus, this Article of the Code provides that parental leave to care for a child under the age of three can be granted to a relative or member of the family of the child who *de facto* cares for him or her in circumstances where the child's mother is occupied (work, service, studies) or exercises independent activities set out in the legislation (i.e., in cases when the mother is an individual entrepreneur, notary, lawyer, artist, artisan or works in the field of agroecotourism).

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

Languages:

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

German.

Belgium
Constitutional Court

Important decisions

Identification: BEL-2013-3-009

a) Belgium / **b)** Constitutional Court / **c)** / **d)** 26.09.2013 / **e)** 121/2013 / **f)** / **g)** *Moniteur belge* (Official Gazette), 22.11.2013 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

2.3.2 Sources – Techniques of review – **Concept of constitutionality dependent on a specified interpretation**.
5.1.1.2 Fundamental Rights – General questions – Entitlement to rights – **Citizens of the European Union and non-citizens with similar status**.
5.1.1.3 Fundamental Rights – General questions – Entitlement to rights – **Foreigners**.
5.2 Fundamental Rights – **Equality**.
5.2.2.4 Fundamental Rights – Equality – Criteria of distinction – **Citizenship or nationality**.
5.3.33 Fundamental Rights – Civil and political rights – **Right to family life**.

Keywords of the alphabetical index:

Family reunification / Reverse discrimination / Law, absence of provision / Discrimination, citizen of the European Union / EU, national, reverse discrimination.

Headnotes:

Although the case-law of the European Court of Human Rights shows that Article 8 ECHR does not guarantee a foreigner’s right to live on the territory of a specific country, and although States are entitled, without prejudice to their commitments derived from treaties, to control the admission of non-nationals to their territory, the Constitutional Court considers that the impossibility, for a person living in Belgium, of living with the members of his or her family may constitute interference in the right to respect for family life (Article 22 of the Constitution and Article 8 ECHR). In order to comply with those provisions, such interference – in this case restriction of the right to family reunification – must be provided for by a

provision of law which is sufficiently precise, meets a pressing social need and is proportionate to the legitimate aim pursued.

In the case concerned, the legislature had proper reasons for introducing a difference in treatment, making, in respect of certain points (such as the condition of a minimum age of 21), the conditions for the reunification of members of the families of Belgians who have not availed themselves of their right to freedom of movement on the territory of the European Union, whose situation is governed solely by domestic law, more stringent than the conditions for the reunification of members of the families of citizens of the European Union living in Belgium, which were imposed in implementation of the relevant European directives.

Summary:

I. Several applications for the setting aside of the Law of 8 July 2011 "amending the Law of 15 December 1980 on admission to Belgium, residence, settlement and the removal of foreigners where the conditions set for family reunification are concerned" had been made to the Court by individuals and by not-for-profit associations which defend foreigners' rights. Following joinder, the 38 cases were determined by an exceptionally long judgment of 157 pages. Only certain aspects of that decision will be highlighted, given the impossibility of covering all of them in the context of this contribution.

During the preparatory work on the law at issue, it had been emphasised that over 50% of the visas issued in Belgium concerned family reunification, which constituted the prime source of legal immigration. The legislature's aim through the law at issue had been better to regulate the granting of the right of residence in the context of family reunification in order to control migratory flows and pressures. Its principal aim had been to prevent or deter certain abuses or cases of fraud, particularly through marriages or partnerships of convenience or fictitious adoptions. Furthermore, the need to regulate the conditions for family reunification had been decided in order to prevent the members of families coming to settle in Belgium from becoming dependent on the authorities, and to prevent family reunification from taking place in circumstances conflicting with human dignity, for example because of an absence of decent housing. Finally, attention had been drawn several times during the preparatory work to the fact that, when it regulated the conditions for family reunification, the legislature had to take account of the obligations which derived from European Union law.

The Court declared the applications admissible, including those lodged by not-for-profit associations, and examined successively the conditions for family reunification with a national of a third State, those for family reunification with a foreigner who was a national of another European Union member State, those for family reunification with a Belgian national, and, finally, the conditions for family reunification on the basis of the bilateral agreements concluded by the Belgian State with certain other countries.

II. The Court first drew attention to the case-law of the European Court of Human Rights relating to family reunification. According to that case-law, Article 8 ECHR did not guarantee a foreigner's right to live in a specific country, and the contracting States were entitled, without prejudice to their commitments derived from treaties, to control the admission of non-nationals to their territory. The Constitutional Court, however, considered that the impossibility for a person of living with the members of his or her family could constitute interference in the right to respect for family life guaranteed by Article 22 of the Constitution and Article 8 ECHR. In order to comply with those provisions, such interference must be provided for by a provision of law which is sufficiently precise, meets a pressing social need and is proportionate to the legitimate aim pursued.

The Court also drew attention to the case-law of the Court of Justice of the European Union and to Directive 2003/86/EC of the Council of 22 September 2003, on the right to family reunification. That directive required member States, in the situations determined by the directive, to allow the family reunification of certain members of the sponsor's family without the possibility of exercising their discretion.

The Court then examined compliance with the constitutional and international conditions and compliance with the conditions of Union law, in the light of the applicants' complaints. Most of those complaints were dismissed subject to the provisions at issue being interpreted in accordance with the provisions of the Constitution and the Convention.

A number of complaints were deemed to be founded. Each concerned absences of legislative provision noted by the Court.

An important aspect of the case lies in so-called "reverse discrimination", which results from the difference between the arrangements relating to family reunification by a sponsor who is a national of another member State of the European Union (Article 40bis and Articles 41 to 47 of the Law of 15 December 1980 transposing Directive 2004/38/EC

relating to the right of citizens of the Union and the members of their families to free movement and residence on the territory of member States) and the arrangements for the residence on national territory of the members of the family of a Belgian who has not availed him or herself of his or her right to free movement (Article 40ter of the Law of 15 December 1980). For the Court of Justice of the European Union, a difference in treatment between these categories of persons is not in itself contrary to the general principle of the law of the European Union of equality and non-discrimination, because of the specific characteristics of that legal system and its limited field of application, which did not extend to purely domestic situations. The Constitutional Court observed that Articles 10 and 11 of the Constitution prohibited any discrimination, irrespective of its origin, and that it was therefore the Court's duty to ensure that the rules adopted by the legislature, when transposing the law of the European Union, did not culminate in the creation, in respect of nationals, of differences in treatment which would not be reasonably justified.

In this context, the Constitutional Court found that the legislature had been able to take reasonable account of the fact that, as a result of several legislative amendments, access to Belgian nationality had been facilitated in recent years, to the extent that the number of Belgians likely to submit applications for family reunification for the benefit of members of their families had appreciably risen. According to the Court, it was therefore relevant to impose more stringent conditions on family reunification for a Belgian than on a non-Belgian European citizen. Provided that they were proportionate, the differences in treatment complained of by the applicants could therefore be justified by the objective of controlling migratory movements.

Languages:

French, Dutch, German.

Identification: BEL-2013-3-010

a) Belgium / **b)** Constitutional Court / **c)** / **d)** 26.09.2013 / **e)** 127/2013 / **f)** / **g)** *Moniteur belge* (Official Gazette), 21.11.2013 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

4.7.15.1 Institutions – Judicial bodies – Legal assistance and representation of parties – **The Bar**.
5.2 Fundamental Rights – **Equality**.
5.2.2.7 Fundamental Rights – Equality – Criteria of distinction – **Age**.
5.2.2.8 Fundamental Rights – Equality – Criteria of distinction – **Physical or mental disability**.
5.3.4 Fundamental Rights – Civil and political rights – **Right to physical and psychological integrity**.
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**.
5.3.13.27 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to counsel**.

Keywords of the alphabetical index:

Physical and psychological integrity, right, vulnerable person, protection / Physical and psychological integrity, right, minor, protection, general interest, pressing reason / Professional duty of confidentiality, exception, passing of information to the prosecution service / Criminal matter, legality, vulnerable person, physical or mental disability or deficiency / Criminal matter, legality, real and serious danger, indications / Professional duty of confidentiality, lawyer, duty to report / Professional duty of confidentiality, lawyer, self-incrimination, prohibition / Criminal matter, legality, minor.

Headnotes:

By using concepts such as "vulnerable person", "physical or mental disability or deficiency", "minors" and "indications of a real and serious danger", the legislature which allows those bound by a professional duty of confidentiality to depart from the duty of confidentiality of which breaches are a criminal offence in order to inform the prosecution service of specific sexual offences committed against minors or vulnerable persons does not infringe the principle of legality in criminal matters.

Where the lawyer's duty of confidentiality is concerned, account needs to be taken of the lawyer's particular role in the context of the administration of justice, which makes the situation of lawyers different from that of other persons who are bound by a professional duty of confidentiality in respect of information conveyed by their clients and likely to incriminate those clients. To this extent the legislature has disproportionately infringed the procedural guarantees afforded by Article 6 ECHR.

Summary:

I. The Flemish Bar and its Chair, Edgar Boydens, had lodged an application for the setting aside of Article 6 of the Law of 30 November 2011 amending the legislation relating to the improvement of the approach to sexual abuse and acts of paedophilia within a relationship of authority.

The provision at issue has superseded Article 458bis of the Criminal Code. It sets down the conditions in which any person holding confidential information through status or occupation may depart from the professional duty of confidentiality imposed on him or her by Article 458 of the Criminal Code. In pursuance of the latter provision, in practice, persons bound by a professional duty of confidentiality in principle have to keep secret all confidential information obtained in the circumstances covered by the aforementioned article, in order to protect the fundamental right to respect for the private life of the persons confiding information in them, sometimes relating to their most personal affairs.

Article 458bis of the Criminal Code, as superseded by the article at issue, allows any person who, through status or occupation, holds confidential information and consequently has knowledge of a specific offence committed against a minor or a person who is vulnerable on account of age, pregnancy, illness or physical or mental disability or deficiency to inform the Crown prosecutor thereof in two cases: firstly when a serious and imminent danger exists to the physical or mental integrity of the minor or the vulnerable person concerned, whose integrity the person confided in is unable, alone or with third-party assistance, to protect, and secondly when there are indications of a real and serious danger that other minors or vulnerable persons concerned may fall victim to the offences covered by Article 458bis, persons whose integrity the person confided in is unable, alone or with third-party assistance, to protect. The offences concerned are indecent assault or rape, homicide, intentional assault and battery, mutilation, neglect or abandonment of children or vulnerable persons in need, and depriving children/minors or vulnerable persons of food or care.

II. It was argued, firstly, that the provision at issue did not infringe the principle of legality in criminal matters. That principle implied that the terms used by the criminal law should be sufficiently precise to enable a person to assess whether the conduct that he or she adopted was punishable. The Court did not accept that complaint and ruled that concepts such as “vulnerable person”, “physical or mental disability or deficiency”, “minors” and “indications of a real and serious danger” were sufficiently clear.

A second complaint related to the fact that the provision at issue dealt identically with lawyers and the other categories of persons bound by a professional duty of confidentiality, such as doctors, pharmacists, police officers and priests, which was alleged to entail a disproportionate restriction of the lawyer’s professional duty of confidentiality.

The Court found that the legislature had opted for an extension of the freedom to speak and that the person confided in could depart from the professional duty of confidentiality in the circumstances for which Article 458bis of the Criminal Code provided, not only in respect of information which had come to his or her knowledge because he or she had questioned the victim or received the victim’s confidence, as had previously been the case, but also when he or she had found information or learned it from a third party, or even from the offender him or herself.

The Court considered that the particular role of lawyers within the administration of justice, especially in criminal proceedings, made the situation in which they found themselves essentially different from that of the other persons bound by a professional duty of confidentiality. In terms of confidential information conveyed by their clients and likely to incriminate those clients, the right of lawyers to depart from their professional duty of confidentiality related to activities which were central to their role of defence in criminal proceedings. Thus the rule of professional confidentiality should give way only if that could be justified by a pressing reason of general interest and if the lifting of confidentiality was strictly proportionate to that objective.

The Court accepted that the protection of minors’ or vulnerable adults’ physical or mental integrity indisputably constituted a pressing reason of general interest. That reason could not, however, reasonably justify the measure at issue, account being taken of the particular features of the lawyer’s profession as compared to that of the other persons bound by a professional duty of confidentiality, when the confidential information had been conveyed to the lawyer by his or her client and was likely to incriminate that client. The legislature, to that extent, according to the Court, had disproportionately infringed the fundamental procedural safeguards afforded by Article 6 ECHR.

For that reason, the Court set aside the article at issue, but only insofar as it applied to a lawyer in whom information had been confided by his or her client, the perpetrator of the offence committed within the meaning of that article, when that information was likely to incriminate that client.

Languages:

French, Dutch, German.

Identification: BEL-2013-3-011

a) Belgium / **b)** Constitutional Court / **c)** / **d)** 10.10.2013 / **e)** 133/2013 / **f)** / **g)** *Moniteur belge* (Official Gazette), 05.12.2013 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

1.2.2.2 Constitutional Justice – Types of claim – Claim by a private body or individual – **Non-profit-making corporate body**.
1.4.9.2 Constitutional Justice – Procedure – Parties – **Interest**.
5.2 Fundamental Rights – **Equality**.
5.3 Fundamental Rights – **Civil and political rights**.
5.3.3 Fundamental Rights – Civil and political rights – **Prohibition of torture and inhuman and degrading treatment**.
5.3.13 Fundamental Rights – Civil and political rights – **Procedural safeguards, rights of the defence and fair trial**.
5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts**.

Keywords of the alphabetical index:

Court action, interest / Interest, collective / Application for setting aside, admissibility, interest / Court proceedings, collective action, rights and freedoms, protection / Law, absence of provision, unconstitutionality / Legislative omission.

Headnotes:

The difference in treatment which results from the autonomous interpretation of admissibility conditions by courts acting within their spheres of jurisdiction is justified by the circumstance that the parties in a case brought before the courts are in a situation essentially different from that of parties before the Constitutional Court: whereas the former act to bring an end to a violation of a right which they claim to hold (infringement of an individual right), the latter challenge the validity of a legislative rule (infringement of the law not involving an individual right). The former can obtain only a court decision with limited *inter partes* effects, whereas the latter may, if the Court considers the application to be founded, obtain a decision with *erga omnes* effects.

Legal entities which bring an action which corresponds to one of their purposes under their articles of association in order to bring an end to inhuman or degrading treatment within the meaning of Article 3 ECHR, and which is ruled inadmissible, are discriminated against as compared to associations which rely on a collective interest connected with the protection of fundamental freedoms as recognised by the Constitution and by the international treaties to which Belgium is a party, and which have been allowed by a law to begin an action in the collective interest in the ordinary courts.

Summary:

I. The Constitutional Court had been asked by the Brussels Labour Tribunal about the compatibility with the constitutional rules of equality and non-discrimination (Articles 10 and 11 of the Constitution) of Articles 17 and 18 of the Judicial Code, which concern interest in taking action in the courts. Action had been taken in the Brussels Labour Tribunal by the ASBL *"Défense des Enfants – International – Belgique – Branche francophone" (D.E.I. Belgique)* with a view to the Belgian State being ordered to take in, accommodate and care for all unaccompanied foreign minors. The admissibility of that action was challenged in the Labour Tribunal because D.E.I. Belgique did not claim a personal interest in taking action, but the collective interest which stemmed from its purposes under its articles of association. The Labour Tribunal therefore asked the Constitutional Court about the constitutionality, on the one hand, of the difference in treatment between legal entities based on whether they are acting in the ordinary courts or lodging an application for setting aside in the Constitutional Court, and, on the other hand, of the similarity of the treatment of legal entities acting in the ordinary courts, whereas associations which take action with a view to bringing an end to inhuman or degrading treatment should be treated differently from legal entities which are not acting to defend a general interest of that kind.

II. Regarding the difference in treatment, the Constitutional Court found that Articles 17 and 18 of the Judicial Code and Article 2.2 of the special law of 6 January 1989 on the Constitutional Court both required, as a condition of admissibility, that an interest in action be demonstrated. That requirement stemmed from a concern not to allow *actio popularis*.

The Court also ruled that it was to the ordinary courts and the Constitutional Court that the legislature had entrusted the task of determining, each within their sphere of jurisdiction, the substance of that requirement for an interest.

The Court then noted that the ordinary courts had made use of the discretion allowed to them which depended on the case which they were required to deal with, a case relating to individual rights, and that the Court of Cassation had ruled that a legal entity's own interest comprised only that which concerned its existence, assets and non-pecuniary rights. On the other hand, a purpose pursued, even if it were in accordance with articles of association, did not entail the creation of a legal entity's own interest.

The Constitutional Court allowed, as a condition for the admissibility of an application for setting aside, the taking of the action by a legal entity in defence of a purpose in accordance with its articles of association or in defence of its members' interests.

The Court concluded that that difference in treatment was justified by the essentially different situations of parties taking action in the ordinary courts, on the one hand, and those taking action in the Constitutional Court, on the other.

The legislature could of course, without breaking the constitutional rules of equality and non-discrimination (Articles 10 and 11 of the Constitution), have adopted provisions allowing legal entities to take action in the collective interest in the ordinary courts. However, the fact that it had not done so did not lead to the conclusion that the difference in treatment was discriminatory.

Regarding the similarity of the treatment of legal entities, the Court accepted that the legislature was pursuing legitimate aims, namely that of ensuring proper administration of justice by not allowing *actio popularis* and that of obtaining compliance with the principle reflected in the "No pleading by proxy" adage. The fact that the legislature had adopted several laws entitling certain associations which relied on a collective interest to take action did not oblige it to extend that possibility to all associations. The Court nevertheless found that certain laws had allowed action to be taken in ordinary courts by associations relying on a collective interest connected with the protection of fundamental freedoms. Thus there was discrimination between those associations and the legal entities which, as in this case, took action corresponding to that purpose under their articles of association in order to bring to an end inhuman or degrading treatment within the meaning of Article 3 ECHR, which could not rely on a collective interest connected with the protection of fundamental freedoms as could the associations covered by the above laws.

It was, however, for the legislature to specify the conditions in which a right to take action may be recognised for legal entities wishing to take action corresponding to their purposes under their articles of association in order to protect fundamental freedoms as recognised by the Constitution and by the international treaties to which Belgium is a party. This absence of provision could only be rectified through legislation. The Court concluded that there had been no violation.

Languages:

French, Dutch, German.

Identification: BEL-2013-3-012

a) Belgium / **b)** Constitutional Court / **c)** / **d)** 07.11.2013 / **e)** 146/2013 / **f)** / **g)** *Moniteur Belge* (Official Gazette), 28.02.2014 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

1.4.9.1 Constitutional Justice – Procedure – Parties – ***Locus standi***.
1.4.9.2 Constitutional Justice – Procedure – Parties – **Interest**.
1.4.10.1 Constitutional Justice – Procedure – Interlocutory proceedings – **Intervention**.
2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950**.
2.3.2 Sources – Techniques of review – **Concept of constitutionality dependent on a specified interpretation**.
3.14 General Principles – ***Nullum crimen, nulla poena sine lege***.
5.2 Fundamental Rights – **Equality**.
5.2.2.6 Fundamental Rights – Equality – Criteria of distinction – **Religion**.
5.3.4 Fundamental Rights – Civil and political rights – **Right to physical and psychological integrity**.
5.3.5 Fundamental Rights – Civil and political rights – **Individual liberty**.

5.3.20 Fundamental Rights – Civil and political rights – **Freedom of worship**.
5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression**.
5.3.27 Fundamental Rights – Civil and political rights – **Freedom of association**.
5.3.32 Fundamental Rights – Civil and political rights – **Right to private life**.
5.3.39 Fundamental Rights – Civil and political rights – **Right to property**.

Keywords of the alphabetical index:

Integrity, physical or psychological, weakness, abuse, criminal sanction / Integrity, physical or psychological, weakness, sect / Indoctrination / Sect, donation / Application, interest, *habeas corpus*, penalty, custodial / Application, joinder, Church of Scientology / General principle, criminal law, subsidiarity.

Headnotes:

It is not contrary to the Constitution and to several fundamental treaty-based rights to make general provision, without specifically targeting sects, for criminal sanctions against persons who fraudulently abuse a person's state of physical or psychological weakness to drive him or her to an act or omission seriously prejudicing his or her bodily or mental integrity or property.

Summary:

I. The Court has before it applications to set aside Article 36 of the law of 26 November 2011 amending and amplifying the Criminal Code […]. This provision has inserted within the Criminal Code an Article 442quater, which provides for prison sentences and fines to be imposed on anyone who has fraudulently abused a person's state of physical or psychological weakness to drive him or her to an act or omission seriously prejudicing his or her bodily or mental integrity or property.

The Court acknowledges the interest of natural persons in bringing legal action without examination of their personal situation: provisions prescribing a custodial penalty, in the Court's view, bear upon such an essential aspect of the citizen's freedom that they do not solely concern persons involved in or having been involved in criminal proceedings.

The Court also acknowledges the interest of the non-profit association (ASBL) "Belgian Church of Scientology" in being joined to the proceedings before the Court in support of the applications, as this party plausibly submits that the impugned criminal law provisions may also be applied to it and it complies with the procedural rules for bringing an action as a legal person.

II. A first pleading alleges violation of the principle of equality and non-discrimination (Articles 10 and 11 of the Constitution) in that believers belonging to a sect are treated differently from believers of a recognised religion and in that the impugned provision proceeds from the idea that persons who are members of a sect are in a state of subjection. The Court's response is that the impugned provision has neither the purpose nor the effect of establishing a difference in treatment between members of reputed sects and members of recognised religions. Nor does it signify that the mere fact of belonging to a religious minority should suffice for somebody to be deemed in a state of weakness seriously impairing his or her faculties of discernment. Moreover, given that there are reasonable grounds for abuse of weakness committed in the circumstances described in the law to be punished more severely, the Court holds that the supposition of such circumstances occurring within sect-like movements more frequently than elsewhere does not amount to a violation of Articles 10 and 11 of the Constitution.

In a second pleading, the parties submit that the impugned criminal law provisions embody a series of concepts formulated in an unduly broad and vague manner and thereby infringe the principle of compliance with the law in criminal justice (Article 12 of the Constitution and Article 7 ECHR). Having recalled the established case-law on the scope of the principle of compliance with the law in criminal justice and referring to the preparatory documents for the impugned provision, the Court concludes that concepts such as "situation of weakness", "grave prejudice to bodily or mental integrity or to property", "intended act or omission resulting from reduction to a state of physical or psychological subjection by the application of severe or repeated pressure or of techniques calculated to impair the faculty of discernment" and "act of participation in the principal or incidental activity of an association" are sufficiently clear. As regards the concept of "fraudulent abuse", the Court points out that it should be construed in the sense that the law requires the culprit to have known that the victim was in a state of weakness, that the act constituted an abuse of that situation, i.e. a specific action deliberately taking advantage of the lowering of the victim's vigilance, and that the behaviour which it prompted on the victim's part was capable of severely prejudicing his or her bodily or mental integrity or property. With these reservations of interpretation, the Court holds that the concept of "fraudulent abuse" is not so vague as to prevent anyone from knowing whether a type of behaviour, at

the time when it is adopted, may involve the criminal responsibility of the person concerned. The fact that the judge can still have discretion in certain circumstances of the case does not deprive the law of its precision sufficing to fulfil the principle of compliance with the law in the sphere of criminal justice.

A third pleading alleges violation of freedom of religion and freedom of expression (Article 19 of the Constitution and Articles 9 and 10 ECHR). The Court accepts that the impugned provision, owing to the generality of its formulation, may constitute interference with the freedom of worship of the members of reputed sects and that consequently it should be ascertained whether this interference is defined by a sufficiently accessible and precise law, whether it is necessary in a democratic society, whether it meets a compelling social need and whether it is commensurate with the objectives pursued by the legislator. The Court tests the impugned provision against each of these conditions, having regard to the case-law of the European Court of Human Rights, and reaches the conclusion that they are fulfilled.

A fourth pleading alleges violation of the right to respect for private life (Article 22 of the Constitution and Article 8 ECHR). The Court recalls the scope of these provisions and observes that they require any official interference with the right to respect for private and family life to be prescribed by a sufficiently precise legislative provision, to meet a compelling social need and to be commensurate with the legitimate aim pursued. Referring to what it held in this connection with regard to the foregoing pleadings, the Court declares that the principle of compliance with the law is fulfilled and that the measure meets a compelling social need and is commensurate with the aim pursued. The Court finds that the applicants' complaint concerning the effect which the impugned provision may have on the right to respect for the private and family life of the persons whose freedom of choice and action may be limited is indistinguishable from the complaint concerning respect for freedom of worship, and thus does not require a different reply.

A fifth pleading alleges violation of freedom of association (Article 27 of the Constitution), in conjunction with Articles 11 and 53 ECHR. The Court replies that the impugned provisions do not have the purpose or the effect of regulating individuals' freedom of association and that participation in the activities of an association is not in itself punishable. In addition, the criminal charge embodied in the provision at issue does not depend on any affiliation with an association and thus is not linked with freedom of association.

A sixth pleading alleges violation of individual freedom (Article 12 of the Constitution). The Court firstly recalls that this freedom is not absolute: it does not preclude the legislator from intervening in order to protect certain persons in a state of weakness against the fraudulent manipulations to which their condition exposes them. Neither does it prevent the legislator from making the perpetrators of these fraudulent actions subject to punishment under criminal law. The Court adds that the impugned provision does not limit the individual freedom of victims of abuse of weakness; it is confined to punishing the perpetrator of this abuse.

A seventh pleading alleges violation of the right of property (Article 16 of the Constitution and Article 1 of the First Protocol) in that the impugned provision punishes an established interference with property. The Court observes firstly that where a provision of international law, such as Article 1 of the First Protocol to the ECHR, is of similar scope to Article 16 of the Constitution, the guarantees which it embodies form a whole which cannot be dissociated from those written into this constitutional provision, so that the Court takes account of them in its review of challenged provisions. The Court holds that this challenged provision purports precisely to safeguard the right of property of the persons to whom it applies and who are in a well-established state of weakness. To the extent that this provision, in conjunction with Article 42.3 of the Criminal Code, may result in confiscation of the pecuniary advantages which the culprits of the fraudulent abuse of the weakness of persons, committed in order to drive them to an act or omission seriously prejudicing their property, have derived from the offence or in confiscation of the pecuniary advantages which other beneficiaries have derived from the offence, it is expedient to find that the right of property of the above culprits or beneficiaries is not violated. The pecuniary advantages derived from the offence have not in fact been secured lawfully.

A final pleading alleges the violation of the "principle of subsidiarity of criminal law" as it emerges from Article 12 of the Constitution, in conjunction with Articles 7, 8, 9, 11 and 14 ECHR, with Articles 9 and 15 of the International Covenant on Civil and Political Rights and Articles 6 and 49 of the Charter of Fundamental Rights of the European Union. Referring to Articles 9 and 15 of the International Covenant on Civil and Political Rights, the Court's reply is that, in so far as it invokes the "principle of subsidiarity of criminal law" and alleges the violation of individual freedom as enshrined in the provisions to which it refers, the pleading invites consideration of the expediency and proportionality of the legislator's instituting a sanction of a criminal nature. The Court

declares that it already answered this complaint when examining the third pleading which alleges violation of Article 19 of the Constitution in conjunction with Article 9 ECHR. No other answer, in the Court's view, is obtained by considering other treaty provisions.

The Court concludes that the applications are unfounded, with the reservations of interpretation formulated in point B.15.3 of the judgment, concerning the second pleading.

Languages:

French, Dutch, German.

Identification: BEL-2013-3-013

a) Belgium / **b)** Constitutional Court / **c)** / **d)** 19.12.2013 / **e)** 166/2013 / **f)** / **g)** *Moniteur belge* (Official Gazette), 12.03.2014 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

5.1.1.3 Fundamental Rights – General questions – Entitlement to rights – **Foreigners**.
5.2 Fundamental Rights – **Equality**.
5.3.1 Fundamental Rights – Civil and political rights – **Right to dignity**.
5.3.3 Fundamental Rights – Civil and political rights – **Prohibition of torture and inhuman and degrading treatment**.
5.3.5.1 Fundamental Rights – Civil and political rights – Individual liberty – **Deprivation of liberty**.
5.3.7 Fundamental Rights – Civil and political rights – **Right to emigrate**.
5.3.9 Fundamental Rights – Civil and political rights – **Right of residence**.
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**.
5.3.44 Fundamental Rights – Civil and political rights – **Rights of the child**.

Keywords of the alphabetical index:

Minor, detention / Detention, lawfulness / Foreigner, detention / Foreigner, immigration, legislation.

Headnotes:

Article 5.1 ECHR does not deny states the "incontestable right" of sovereign control over the entry and residence of foreigners on their territory. The state has the right to deprive persons against whom expulsion proceedings are under way, if it considers this necessary on reasonable grounds. Deprivation of liberty can be effected "under procedures prescribed by law" only in so far as it is compatible with the "general principle of legal certainty", that is it stems from the predictable application of a sufficiently accessible and precise law clearly defining the conditions of deprivation of liberty, to avert any risk of arbitrariness and enable any individual, assisted by informed advice as required, to have reasonable foresight, according to the circumstances, of the possible consequences of an act.

The propriety of detention depends, *inter alia*, on there being a link between the reason for it and the place and conditions thereof. There is no such link where an underage foreign child, whether or not accompanied by a parent, is detained in a closed centre designed for illegally resident foreign adults under the same conditions as those applying to the detention of an adult. Regard should also be had to the fact that the term of detention cannot exceed the reasonable time necessary for attaining the objective pursued.

Summary:

I. The Constitutional Court has before it an application by several legal entities for the defence of children's rights, including the foundation of public benefit "UNICEF Belgique", the ASBL (non-profit association) D.E.I. Belgique and the ASBL "*Ligue des Droits de l'Homme*", to set aside a law of 16 November 2011 including in the law on access to the territory a provision concerning prohibition of children's detention in closed centres of the aliens department. The applicants raise several arguments alleging violation of the constitutional and international provisions that enshrine individual freedom, the rights of the child, the right to human dignity, the right to private and family life and the constitutional rules of equality and non-discrimination (Articles 10 and 11 of the Constitution).

The challenged law introduces the principle of prohibiting underage children's detention but in exceptional circumstances allows families with underage children attempting to enter the country to be detained for as short a period as possible in suitable surroundings with a view to removal from the territory.

II. Concerning individual freedom, the Court recalls the case-law of the European Court of Human Rights relating to Article 5.1 ECHR, from which it infers that the underage children of a family cannot be subjected to the same holding conditions as the parents. A family with underage children cannot be put in a place unless it is suited to the needs of families with underage children and its amenities comply with Article 17 of European Parliament and Council Directive 2008/115/EC of 16 December 2008.

The Court observes that according to the preparatory documents for the law, assigned places of residence are places where "each member of the family may daily leave the place of accommodation without prior permission" (Article 19 of the aforementioned royal decree) and that the possibility of depriving the parents of their liberty, where the conditions laid down in the agreement with the aliens department are infringed, must be realised without the underage children undergoing its consequences.

Subject to these interpretations, the Court dismisses the argument alleging violation of individual freedom.

Concerning the rights of the child, the Court holds that Article 22bis of the Constitution and Article 3 of the Convention on the Rights of the Child do not absolutely prohibit detention of minors. Article 37 of the latter Convention moreover authorises such detention if carried out in accordance with the law and provided that it is ordered only as a last resort and for the briefest possible term. It also emerges from the case-law of the European Court of Human Rights that the protection of the child's interests does not absolutely preclude the detention of minors provided that the unity of the family is not jeopardised, that there are no alternatives, and that detention is only contemplated as a last resort. The Court holds that within the interpretation already stated, the provision meets these requirements.

With the same interpretative reservations, the Court also dismisses the arguments based on violation of the right to lead a life in accordance with human dignity (Article 23.1 of the Constitution), the prohibition of torture and inhuman or degrading treatment (Article 3 ECHR), the right to private and family life (Article 22 of the Constitution and Article 8 ECHR) and the constitutional rules of equality and non-discrimination (Articles 10 and 11 of the Constitution).

Languages:

French, Dutch, German.

Identification: BEL-2013-3-014

a) Belgium / **b)** Constitutional Court / **c)** / **d)** 19.12.2013 / **e)** 181/2013 / **f)** / **g)** *Moniteur Belge* (Official Gazette), 27.03.2014 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

5.2 Fundamental Rights – **Equality**.
5.3.14 Fundamental Rights – Civil and political rights – ***Ne bis in idem***.

Keywords of the alphabetical index:

Administrative penalty, classification / Interpretation, compatible / Penalty, classification, *ne bis in idem*.

Headnotes:

The *ne bis in idem* principle forbids a person's prosecution or trial for a second 'offence' in so far as this originates in identical acts or acts which are the same in substance.

Summary:

I. The Liège Court of Appeal has referred to the Constitutional Court a preliminary question on Article 233 of the Criminal Code (welfare offences) interpreted as allowing the penalisation of persons already punished by administrative penalties of a retributive nature for acts which are the same in substance. The Court is to examine the conformity of this provision to the constitutional rules of equality and non-discrimination (Articles 10 and 11 of the Constitution) read separately or in conjunction with Article 6 ECHR, Article 4 of Protocol no. 7 to the Convention, Article 14.7 of the International Covenant on Civil and Political Rights and the general legal principle of *ne bis in idem*.

II. The Court firstly recalls the substance of the legal principle of *ne bis in idem*.

It goes on to observe that according to the case file, the accused had imposed on them administrative penalties prescribed by the regulations on unemployment or by the rules of the compulsory insurance scheme for health care and allowances.

The Court *a quo* held that these penalties were of a predominantly retributive nature as they were intended to penalise recipients of welfare allowances by depriving them of replacement income for a certain time. The Court's reply to the preliminary question takes account of this assessment by the Court *a quo*.

The Court observes that while Article 233 of the Criminal Code (welfare offences) requires the accused to have committed the offence wittingly and deliberately, whereas the administrative penalties already incurred do not as a rule require this particular moral ingredient, this circumstance in no way detracts from the finding that the same action can be punished by two penalties of a retributive nature. If the law is interpreted as permitting this dual penalisation, it is contrary to the principle of *ne bis in idem*.

The Court further observes that another construction may also be placed on the provision, not compelling the criminal court to convict someone a second time for the same act. Under this interpretation, it is for the court to have regard to the consequences of applying the principle of *ne bis in idem* to the case before it.

The operative part of the judgment contains both interpretations.

Languages:

French, Dutch, German.

Bosnia and Herzegovina
Constitutional Court

Important decisions

Identification: BIH-2013-3-003

a) Bosnia and Herzegovina / **b)** Constitutional Court / **c)** Plenary / **d)** 27.09.2013 / **e)** AP 325/08 / **f)** / **g)** *Sluzbeni Glasnik* (Official Gazette of Bosnia and Herzegovina), 80/13 / **h)** CODICES (Bosnian, English).

Keywords of the systematic thesaurus:

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950**.
2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights**.
5.3.13.1.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Criminal proceedings**.
5.3.16 Fundamental Rights – Civil and political rights – **Principle of the application of the more lenient law**.
5.3.38.1 Fundamental Rights – Civil and political rights – Non-retrospective effect of law – **Criminal law**.

Keywords of the alphabetical index:

Crime against humanity / Sentence, punishment, lenient.

Headnotes:

Article 7.1 ECHR is violated when a ground exists that a retroactive application of the Criminal Code was possibly detrimental to an appellant's sentencing. Given the prescribed range of prison term, it is contrary to Article 7.1 ECHR irrespective of the fact that the appellant would or would not have received a lower imprisonment sentence had the SFRY Criminal Code been applied.

Summary:

I. The Court of Bosnia and Herzegovina (hereinafter, the "State Court") found Zoran Damjanović (hereinafter, the "appellant") guilty for the criminal offence of war crime against civilians under Article 173.1.c of the Criminal Code (hereinafter, the "Criminal Code"), sentencing him for 10 years and six months in prison.

According to the allegations set forth in the appeal, the challenged decisions of the State Court are not in accordance with Article 7 ECHR, given that the appellant was convicted under the provisions of the Criminal Code. The appellant holds that he should have been convicted under the provisions of the Criminal Code of SFRY because that law was in force when the criminal offence in question (war crime against civilians) was perpetrated and, allegedly, prescribes a more lenient punishment for this criminal offence. As such, that law would be more favourable (i.e., more lenient) to the appellant.

II. The Constitutional Court observes that on 18 July 2013, the European Court of Human Rights rendered a judgment in the case of the applicants Abduladhim Maktouf and Goran Damjanović (see ECHR, *Maktouf and Damjanović v. Bosnia and Herzegovina,* Applications nos. 2312/08 and 34179/08), finding Article 7 ECHR was violated. The European Court of Human Rights clearly emphasised that this does not mean that lower sentences ought to have been imposed in the applicants' cases, but simply that the 1976 SFRY Criminal Code should have been applied.

The Constitutional Court, first and foremost, notes that the case of the appellant Zoran Damjanović, as regards to both the factual substrate and the legal issue, is not different from the case of *Maktouf and Damjanović* considered by the European Court of Human Rights in the aforementioned decision. In that respect, the Constitutional Court notes similarities, including the fact that the appellant Zoran Damjanović, too, was found guilty and convicted of the same crime by the same verdict of the State Court as the applicant Goran Damjanović. Furthermore, the appellant Zoran Damjanović was convicted of a criminal offence of a war crime against civilians in accordance with Article 173 of the Criminal Code, although it was an offence committed on 2 June 1992, at the time when the SFRY Criminal Code had been in force, which prescribed the same criminal offence in Article 142 in an identical manner. Thus, the Criminal Code was applied retroactively also in the appellant's case (see, ECHR *Maktouf and Damjanović*, paragraph 67).

The Constitutional Court further observes that in light of the reasons adduced to support the challenged verdicts, it follows that the State Court based the application of the substantive law (specifically the Criminal Code) and the assessment that this law was more lenient to the appellant, on argumentation that may be subsumed. First, Article 7.2 ECHR allows for an exception to the general rule of non-retroactivity contained in Article 7.2.1 ECHR. Second, given the prescribed punishment, the Criminal Code was more lenient to the appellant, as the provisions of Article 173 of that law do not prescribe the death penalty for the respective criminal offence. This contrasts with provisions in Article 142 of the SFRY Criminal Code, which had been in force and applicable at the time the respective criminal offence had been committed. And third, a state duty under international humanitarian law to punish war crimes adequately required that the rule of non-retroactivity be set aside in this case.

Thus, these are identical arguments as those considered before the European Court of Human Rights in the case of *Maktouf and Damjanović* (paragraphs 69-74). Accordingly, the Constitutional Court holds that there is no reason not to accept, in this part, the reasons and reasoning provided by the European Court of Human Rights in the present case.

Namely, the appellant Zoran Damjanović was sentenced to ten years and six months imprisonment under the provisions of Article 173.1.c of the Criminal Code. The Constitutional Court observes that the imposed sentence falls within the latitude of both the Criminal Code and the SFRY Criminal Code. Pursuant to the SFRY Criminal Code, war crimes were punishable by imprisonment for a term of five to fifteen years or for the most serious cases, the death penalty, instead of which a twenty-year prison term could have also been imposed. Pursuant to the Criminal Code, war crimes attract imprisonment for a term of ten to twenty years or, for the most serious cases, long-term imprisonment for a term of twenty to forty-five years.

Further, the Constitutional Court observes that based on the challenged verdicts, the offences that the appellant Zoran Damjanović was found guilty of having committed and was punished do not belong to the category of the most serious war crimes cases (loss of life), which, under the SFRY Criminal Code, the death penalty was a possibility. Namely, the Court found the appellant guilty and convicted him for having actively participated in the beating of the group of captured men of Bosniak ethnicity.

Thus, these do not concern the most serious cases of the respective criminal offence, for which it was possible to impose on the appellant the maximum prescribed penalty for the respective criminal offence. Moreover, the appellant received an imprisonment penalty slightly above the minimum provided for by the Criminal Code for war crimes (ten years and six months), wherefrom one may conclude that the Court's intention was to impose a more lenient sentence on the appellant. Therefore, it was not necessary to establish in the present case which Code had provided a more lenient maximum penalty. Instead, it was necessary to establish which Code was more lenient in respect of the minimum sentence (see, ECHR, *Maktouf and Damjanović*, paragraph 69). Given that the minimum sentence of imprisonment under the SFRY Criminal Code was five years and under the Criminal Code ten years, it unambiguously follows that, in the circumstances of the present case, the SFRY Criminal Code was more lenient, irrespective of the fact that, given the prescribed range of the prison term, this does not mean that the appellant would have received a lower imprisonment sentence had the SFRY Criminal Code been applied in his case. Namely, it is of crucial importance that the appellant could have received a lower sentence had this Code been applied (see, ECHR, *Maktouf and Damjanović*, paragraph 70).

The Constitutional Court recalls that guarantees contained in Article 7 ECHR constitute one of the fundamental factors of the rule of law and occupy a prominent position in the system of the exercise of rights safeguarded by the European Convention on Human Rights. The importance of Article 7 ECHR is reflected also in the fact that, in accordance with Article 15 ECHR, no derogation from the application of the guarantees set forth in Article 7 ECHR shall be allowed either in the time of war or other public threat. Article 7 ECHR must be construed and applied in such a manner as to ensure successful protection against arbitrary prosecution, conviction and punishment. Furthermore, the Constitutional Court recalls that Article 7.1 guarantees not only the principle of non-retroactivity of more stringent criminal laws but also, implicitly, the principle of retroactivity of the more lenient criminal law. That principle is embodied in the rule that where there are differences between the criminal law in force at the time of the commission of the offence and the criminal laws which were enacted and entered into force thereafter but before a final judgment was rendered, the courts must apply the law the provisions of which are most favourable to the defendant (see, ECHR, *Scoppola v. Italy*, no. 2, 17 September 2009, paragraph 109). Lastly, according to the standpoint of the European Court of Human Rights, States are free to decide their own penal policy. They must, however, comply with the requirements of Article 7 ECHR in doing so (see, ECHR, *Maktouf and Damjanović*, paragraph 75).

By interlinking the circumstances of the present case to the aforementioned standpoints of the European Court of Human Rights and the positions taken in the case of *Maktouf and Damjanović,* the Constitutional Court holds that there is a realistic possibility in the present case that the retroactive application of the Criminal Code was to the detriment of the appellant in respect of the sentencing, which is contrary to Article 7.1 ECHR.

Cross-references:

European Court of Human Rights:

- *Maktouf and Damjanović v. Bosnia and Herzegovina,* nos. 2312/08 and 34179/08 of 18.07.2013.

Former decisions concerning similar issues:

- Decision no. AP 1785/06 of 30.03.2007, *Bulletin* 2007/2 [BIH-2007-2-003].

Languages:

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

Canada
Supreme Court

Important decisions

Identification: CAN-2013-3-002

a) Canada / **b)** Supreme Court / **c)** / **d)** 07.11.2013 / **e)** 34687 / **f)** R. v. Vu / **g)** *Canada Supreme Court Reports* (Official Digest), 2013 *SCC* 60, [2013] 3 *S.C.R.* 657 / **h)** http://scc.lexum.org/en/index.html; [2013]; *S.C.J.* no. 60 (*Quicklaw*); CODICES (English, French).

Keywords of the systematic thesaurus:

3.17 General Principles – **Weighing of interests**.
5.3.13.1.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Criminal proceedings**.
5.3.32.1 Fundamental Rights – Civil and political rights – Right to private life – **Protection of personal data**.
5.3.35 Fundamental Rights – Civil and political rights – **Inviolability of the home**.
5.3.36.3 Fundamental Rights – Civil and political rights – Inviolability of communications – **Electronic communications**.

Keywords of the alphabetical index:

Constitutionality, review / Criminal Code / Search and seizure / Search and seizure of home computer, police / Evidence, obtained unlawfully.

Headnotes:

Prior authorisation of searches is a cornerstone of Canadian search and seizure law. The purpose of the prior authorisation process is to balance the privacy interest of the individual against the interest of the state in investigating criminal activity before the state intrusion occurs. Only a specific, prior authorisation to search a computer found in the place of search ensures that the authorising justice has considered the full range of the distinctive privacy concerns raised by computer searches and, having done so, has decided that this threshold has been reached in the circumstances of a particular proposed search. This means that if police intend to search any computers found within a place they want to search, they must first satisfy the authorising justice that they have reasonable grounds to believe that any computers they discover will contain the data they are looking for. If police come across a computer in the course of a search and their warrant does not provide specific authorisation to search computers, they may seize the computer, and do what is necessary to ensure the integrity of the data. If they wish to search the data, however, they must obtain a separate warrant.

Summary:

I. The accused was charged with production of marijuana, possession of marijuana for the purpose of trafficking and theft of electricity. The police had obtained a warrant authorising them to search a residence for evidence of electricity theft, including documentation identifying the owners and/or occupants of the residence. Although the Information to Obtain (hereinafter, the “ITO”) indicated that the police intended to search for computer generated notes, the warrant did not specifically refer to computers or authorise the search of computers. In the course of their search of the residence, police found marijuana, two computers and a cellular telephone. Their search of the devices revealed evidence that the accused was the occupant. At trial, he claimed that the searches had violated his right under Section 8 of the Canadian Charter of Rights and Freedoms to be free of unreasonable searches and seizures. The trial judge concluded that the ITO did not establish reasonable grounds to believe that documents identifying the owners and/or occupants would be found in the residence and so the warrant could not authorise the search for them. Further, the police were not authorised to search the personal computers and cellular telephone because those devices were not specifically mentioned in the warrant. She excluded most of the evidence found as a result of these searches and acquitted the accused of the drug charges. The Court of Appeal set aside the acquittals and ordered a new trial on the grounds that the warrant had properly authorised the searches and that there had been no breach of the accused’s Section 8 Charter rights.

II. In a unanimous decision, the Supreme Court of Canada dismissed the accused’s subsequent appeal. Although the trial judge found that the ITO did not contain a statement by its author that there were reasonable grounds to believe that documents identifying the owners and/or occupants would be found in the residence, the ITO set out facts sufficient to allow the authorising justice to reasonably draw that inference. The search for such material, therefore, did not breach the accused’s rights under Section 8 of the Charter.

The search of the computers, however, did breach the accused's Section 8 rights because the warrant did not provide specific authorisation to search the computers. The Court held that privacy interests implicated by computer searches are markedly different from those at stake in searches of receptacles such as cupboards and filing cabinets. It is difficult to imagine a more intrusive invasion of privacy than the search of a personal or home computer. Computers potentially give police access to an almost unlimited universe of information that users cannot control, that they may not even be aware of, may have tried to erase and which may not be, in any meaningful sense, located in the place of search. The numerous and striking differences between computers and traditional receptacles call for distinctive treatment under Section 8 of the Charter. The animating assumption of the traditional rule – that if the search of a place is justified, so is the search of receptacles found within it – simply cannot apply with respect to computer searches.

Having found that the search of the computers was unlawful, the final issue was whether the evidence obtained should be excluded. Section 24.2 of the Charter requires that evidence obtained in a manner that infringes the rights of an accused under the Charter be excluded from the trial if it is established that the admission of it would bring the administration of justice into disrepute. Here, the ITO did refer to the intention of the officers to search for computer-generated documents and considering that the state of the law with respect to computer searches was uncertain when police carried out their investigation and the otherwise reasonable manner in which the search was conducted, the Court held that the violation was not serious. Further, there was a clear societal interest in adjudicating on their merits charges of production and possession of marijuana for the purpose of trafficking. Balancing these factors, the evidence should not be excluded. The police believed on reasonable grounds that the search of the computer was authorised by the warrant. While every search of a personal or home computer is a significant invasion of privacy, the search here did not step outside the purposes for which the warrant had been issued.

Languages:

English, French (translation by the Court).

Identification: CAN-2013-3-003

a) Canada / **b)** Supreme Court / **c)** / **d)** 15.11.2013 / **e)** 34890 / **f)** Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401 / **g)** *Canada Supreme Court Reports* (Official Digest), 2013 *SCC* 62, [2013] 3 *S.C.R.* 733 / **h)** http://scc.lexum.org/en/index.html; [2013]; *S.C.J.* no. 62 (*Quicklaw*); CODICES (English, French).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
3.17 General Principles – **Weighing of interests**.
5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression**.

Keywords of the alphabetical index:

Personal Information Protection Act / Information, protection, collection and processing / Privacy, invasion / Strike, picketline, video-taping and photographing by union.

Headnotes:

The Alberta Personal Information Protection Act (hereinafter, "PIPA") establishes a general rule that organisations cannot collect, use or disclose personal information without consent. PIPA does not achieve a constitutionally acceptable balance between the interests of individuals in controlling the collection, use and disclosure of their personal information and a union's freedom of expression. To the extent that PIPA restricts collection for legitimate labour relations purposes, it violates a union's expressive right under Section 2.b of the Canadian Charter of Rights and Freedoms and the infringement is not a reasonable limit prescribed by law, which can be demonstrably justified in a free and democratic society under Section 1 of the Charter. While PIPA is rationally connected to a pressing and substantial objective, its broad limitations on freedom of expression are not demonstrably justified because its limitations on expression are disproportionate to the benefits the legislation seeks to promote.

Summary:

I. During a lawful strike lasting 305 days, both the union and the employer video-taped and photographed individuals crossing the picketline. The union posted signs in the area of the picketing stating that images of persons crossing the picketline might be placed on a website. Several individuals who were recorded crossing the picketline filed complaints with

the Alberta Information and Privacy Commissioner. The Commissioner appointed an Adjudicator to decide whether the union had contravened PIPA. The Adjudicator concluded that the union's collection, use and disclosure of the information for the purpose of advancing its interests in a labour dispute was not authorised by PIPA. On judicial review, PIPA was found to violate the union's rights under Section 2.b of the Charter. The Court of Appeal agreed and granted the union a constitutional exemption from the application of PIPA. The Information and Privacy Commissioner and the Attorney General of Alberta appealed.

II. In a unanimous decision, the Supreme Court of Canada dismissed the appeal on the issue of PIPA's constitutionality but rather than sustain the constitutional exemption ordered by the Court of Appeal, the Court declared PIPA to be invalid in its entirety.

The Court held that the collection, use and disclosure of personal information by the union in the context of picketing during a lawful strike is inherently expressive. Freedom of expression under Section 2.b of the Charter is clearly engaged by the union's activities. The union collected personal information by recording the picketline. One of the primary purposes for the union's collection of personal information was, as the Adjudicator recognised, to dissuade people from crossing the picketline. Recording conduct related to picketing and, in particular, recording a lawful picketline and any individuals who crossed it, is expressive activity: its purpose was to persuade individuals to support the union. So too is recording and potentially using or distributing recordings of persons crossing the picketline for deterring people from crossing the picketline and informing the public about the strike. Given the Adjudicator's finding that none of PIPA's exemptions applied to allow the union to collect, use and disclose personal information for the purpose of advancing its interests in a labour dispute, the Court found that PIPA restricts freedom of expression.

Turning to the justification analysis under Section 1 of the Charter, the Court then determined whether PIPA serves a pressing and substantial objective and, if so, whether its provisions are rationally connected to that objective, whether it impairs the right to freedom of expression no more than is necessary, and whether its effects are proportionate to the government's objective.

In the Court's opinion, the purpose of PIPA is to enhance an individual's control over his or her personal information by restricting the collection, use and disclosure of personal information without that individual's consent. The objective of providing an individual with this measure of control is intimately connected to individual autonomy, dignity and privacy, self-evidently significant social values. But the Act does not include any mechanisms by which a union's constitutional right to freedom of expression may be balanced with the interests protected by the legislation. The Court has long recognised the fundamental importance of freedom of expression in the context of labour disputes. PIPA prohibits the collection, use, or disclosure of personal information for many legitimate, expressive purposes related to labour relations. Picketing represents a particularly crucial form of expression with strong historical roots. PIPA imposes restrictions on a union's ability to communicate and persuade the public of its cause, impairing its ability to use one of its most effective bargaining strategies in the course of a lawful strike. This infringement of the right to freedom of expression is disproportionate to the government's objective of providing individuals with control over the personal information that they expose by crossing a picket line. The Court held that the infringement is therefore not justified under Section 1 of the Charter.

Given the comprehensive and integrated structure of the statute, the Government of Alberta and the Information and Privacy Commissioner requested that the Supreme Court not select specific amendments, requesting instead that the entire statute be declared invalid so that the legislature can consider the Act as a whole. The declaration of invalidity was therefore granted but was suspended for a period of 12 months to give the legislature the opportunity to decide how best to make the legislation constitutionally compliant.

Languages:

English, French (translation by the Court).

Identification: CAN-2013-3-004

a) Canada / **b)** Supreme Court / **c)** / **d)** 20.12.2013 / **e)** 34788 / **f)** Canada (Attorney General) v. Bedford / **g)** *Canada Supreme Court Reports* (Official Digest), 2013 *SCC* 72, [2013] 3 *S.C.R.* 1101 / **h)** http://scc.lexum.org/en/index.html; [2013] *S.C.J.* no. 72 (*Quicklaw*); CODICES (English, French).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
3.17 General Principles – **Weighing of interests**.
5.3.12 Fundamental Rights – Civil and political rights – **Security of the person**.

Keywords of the alphabetical index:

Constitutionality, review / Criminal Code / Prostitution.

Headnotes:

The impugned Criminal Code prohibitions relating to bawdy-houses, living on the avails of prostitution and communicating in public for the purposes of prostitution violate prostitutes' security of the person rights under Section 7 of the Canadian Charter of Rights and Freedoms by preventing them from implementing safety measures that could protect them from violent clients. While these prohibitions address pressing and substantial objectives, they are grossly disproportionate and overbroad.

Summary:

I. Current and former prostitutes brought an application seeking a declaration that the Criminal Code prohibitions on keeping or being in a bawdy-house, living on the avails of prostitution and communicating in public for purposes of prostitution infringe their rights under Section 7 of the Charter. The trial judge declared the three prohibitions unconstitutional whereas the Ontario Court of Appeal declared unconstitutional only the bawdy-house and the living on the avails of prostitution prohibitions.

II. In a unanimous decision, the Supreme Court declared all three prohibitions unconstitutional. The prostitutes established that the prohibitions deprived them of their security of the person and that that deprivation is not in accordance with the principles of fundamental justice: principles that attempt to capture basic values underpinning the Canadian constitutional order. This case concerned the basic values against arbitrariness (where there is no connection between the effect and the object of the law), overbreadth (where the law goes too far and interferes with some conduct that bears no connection to its objective), and gross disproportionality (where the effect of the law is grossly disproportionate to the state's objective). These are three distinct principles, but overbreadth is related to arbitrariness, in that the question for both is whether there is no connection between the law's effect and its objective. All three principles compare the rights infringement caused by the law with the objective of the law, not with the law's effectiveness; they do not look to how well the law achieves its object, or to how much of the population the law benefits or is negatively impacted. The analysis is qualitative, not quantitative. The question under Section 7 is whether anyone's life, liberty or security of the person has been denied by a law that is inherently bad; a grossly disproportionate, overbroad, or arbitrary effect on one person is sufficient to establish a breach of Section 7.

Applying these principles to the impugned provisions, the Court concluded that the negative impact of the bawdy‑house prohibition on the prostitutes' security of the person was grossly disproportionate to its objective of preventing public nuisance. The harms to prostitutes identified by the lower courts, such as being prevented from working in safer fixed indoor locations and from resorting to safe houses, were grossly disproportionate to the deterrence of community disruption. The Court found that Parliament has the power to regulate against nuisances, but not at the cost of the health, safety and lives of prostitutes.

The Court was of the opinion that the purpose of the living on the avails of prostitution prohibition was to target pimps and the parasitic, exploitative conduct in which they engage. The law, however, punished everyone who lives on the avails of prostitution without distinguishing between those who exploit prostitutes and those who could increase the safety and security of prostitutes, for example, legitimate drivers, managers, or bodyguards. It also included anyone involved in business with a prostitute, such as accountants or receptionists. In these ways, the law included some conduct that bears no relation to its purpose of preventing the exploitation of prostitutes. The living on the avails provision was consequently overbroad.

The Court also found that the purpose of the communicating prohibition was not to eliminate street prostitution for its own sake, but to take prostitution off the streets and out of public view in order to prevent the nuisances that street prostitution can cause. The provision's negative impact on the safety and lives of street prostitutes, who are prevented by the communicating prohibition from screening potential clients for intoxication and propensity to violence, was a grossly disproportionate response to the possibility of nuisance caused by street prostitution.

While the prostitutes' Section 7 rights are subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society under Section 1, the prohibitions could not be justified in this case. The living on the avails of prostitution prohibition not only caught drivers and

bodyguards, who may actually be pimps, but it also caught clearly non‑exploitative relationships, such as receptionists or accountants who work with prostitutes. The law was therefore not minimally impairing. Nor was the law's effect of preventing prostitutes from taking measures that would increase their safety, and possibly save their lives, outweighed by the law's positive effect of protecting prostitutes from exploitative relationships.

The Court concluded that each of the challenged provisions violates the Charter, but that Parliament was not precluded from imposing limits on where and how prostitution may be conducted, as long as it does so in a way that does not infringe the constitutional rights of prostitutes. Considering all the interests at stake, the declaration of invalidity should be suspended for one year.

Languages:

English, French (translation by the Court).

Chile
Constitutional Court

Important decisions

Identification: CHI-2013-3-012

a) Chile / **b)** Constitutional Court / **c)** / **d)** 14.08.2013 / **e)** 2320-2012 / **f)** / **g)** / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

3.20 General Principles – **Reasonableness**.
5.2.1.3 Fundamental Rights – Equality – Scope of application – **Social security**.
5.2.2.1 Fundamental Rights – Equality – Criteria of distinction – **Gender**.

Keywords of the alphabetical index:

Diplomat / Disabled person, benefit, right / Social assistance, entitlement, condition.

Headnotes:

Differentiation between male and female spouse of diplomats regarding access to special social benefits constitutes arbitrary discrimination.

Summary:

I. The applicant is a female diplomat who claimed social benefits payments for her husband, corresponding to a period of an overboard mission. She contended that during that period her husband should have received those social benefits, but the law granted them for a diplomat's husband only if he is disabled. The applicant argued that that law is discriminatory because a diplomat's wife is entitled to receive such social benefits without being disabled. Therefore, the law establishes an additional requirement in the case of diplomats' husbands.

II. The Constitutional Tribunal declared the law as inapplicable due to unconstitutionality with effects on the pending trial. It was established that the differentiation made by law between the entitlement of diplomat's husbands and wives to social benefits is not justified. Although such social benefits are always granted to a diplomat's wife, whether she is disabled or not, in this case the husband must certify an

additional requirement. Thus the Tribunal held that the legislator may set differentiations, but these must be strongly justified, which is not the case here.

In addition, the Tribunal stated that this differentiation is not justified for reasons of public funds protection. Although the legislator must always consider appropriate protection of the public treasury, this cannot be pursued by setting gender discrimination or by taking action prejudicial to the family, especially if the wife provides the primary economic support to the family.

Languages:

Spanish.

Identification: CHI-2013-3-013

a) Chile / **b)** Constitutional Court / **c)** / **d)** 14.08.2013 / **e)** 2341-2012 / **f)** / **g)** Official Journal, 06.12.2012 / **h)** CODICES (Spanish).

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**.
1.5.4.7 Constitutional Justice – Decisions – Types – **Interim measures**.
5.3.25.1 Fundamental Rights – Civil and political rights – Right to administrative transparency – **Right of access to administrative documents**.

Keywords of the alphabetical index:

Byelaw, requirement / Freedom of information / Public Prosecutor / Transparency, principle.

Headnotes:

Exceptions to the publicity of administrative acts and documents can only be established by law. In addition, the effects of an impugned legal precept can have a decisive application on the complaint at the Supreme Court.

Summary:

I. In 2005 the Constitution was amended to introduce the principle that government acts are to be public. It establishes that only a law may make exceptions to the publicity principle, on the grounds of the correct function of a state organ, national security, rights of third parties or the national interest. Before this amendment, in 1999 the Congress had passed a law on the office of the Public Prosecutor, establishing that the Public Prosecutor may declare some of his acts to be confidential by internal regulation or through a bye-law.

The applicant presented a request for public information, but this was denied based on a bye-law of the public prosecutor's office. He filed an action of inapplicability for unconstitutionality of that norm, arguing that it contravenes the Constitution, since only a law may establish exceptions to the general principle of access to public information. Once the inapplicability of the norm was filed, the Tribunal ordered, as an interim measure, the suspension of the trial of public information before the Appeal Court. However, the Appeal Court issued its sentence, and therefore the applicant complained before the Supreme Court.

II. In this case the Tribunal had to resolve two questions. First, the question of admissibility of the action; whether the impugned norm is decisive for the trial on access to public information and, by extension, whether the norm has an unconstitutional effect on the trial. Second, whether the power of the Public Prosecutor office to issue a bye-law that establishes exceptions to public access to information contravenes the publicity principle asserted in the Constitution.

Concerning the admissibility question, the Tribunal held that the impugned norm is decisive for the case. Although the pending trial is different, the impugned legal precept will be also discussed in the Supreme Court's hearing, and therefore a determination as to its constitutionality is necessary.

Concerning whether a norm that grants the Public Prosecutor's office the power to dictate a bye-law that establishes exceptions to the principle of access to public information, the Tribunal resolved that the constitutional amendment clearly established that only a law may set exceptions to access public information. Although the Public Prosecutor law enacted in 1999 permits that a bye-law may set these exceptions, it is clear that, since the constitutional reform of 2005, that norm has become unconstitutional.

Languages:

Spanish.

Identification: CHI-2013-3-014

a) Chile / **b)** Constitutional Court / **c)** / **d)** 20.08.2013 / **e)** 2381-2012 / **f)** / **g)** / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

5.1.1.5.1 Fundamental Rights – General questions – Entitlement to rights – Legal persons – **Private law**.
5.3.13.4 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Double degree of jurisdiction**.
5.3.13.23.1 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to remain silent – **Right not to incriminate oneself**.

Keywords of the alphabetical index:

Legal representative, attorney / Self-incrimination / Testimony, lawyer / Testimony, refusal.

Headnotes:

The right against self-incrimination is not granted to legal persons and does not protect legal representatives, when they testify about acts committed by a company under investigation.

Summary:

I. The applicant was involved in an anti-trust process as the legal representative of an investigated enterprise. He challenged a legal norm that obliges every party to testify, under oath, about facts related to the trial, where requested by the other party or the tribunal. He argued that this rule contravenes his right to due process, namely his right to remain silent, the right against self-incrimination and the right to defence.

II. The Constitutional Tribunal declared that this norm does not contravene the constitutional rights invoked by the plaintiff.

In its decision, the Tribunal stated first that the right against self-incrimination is mainly for criminal procedures but it might be applicable to others, such as an anti-trust trial. Although, in this case, the plaintiff is a natural person, his involvement in the trial is as the legal representative of a legal entity. Legal persons are entitled to constitutional rights in some cases, but in terms of the constitutional text, the right against self-incrimination does not extend to them, because this particular constitutional right protects a person who is accused of a crime and an enforcement to testify against oneself may infringe the individual's right to personal liberty and security, both rights which are not extend to legal entities. Thus, in this particular case the obligation to testify under oath is a contribution to clarifying the facts of the case and that is a general obligation of every citizen.

Regarding the right to remain silent, the Tribunal declared that this right relates to testifying about acts committed by oneself, and in this case the plaintiff was required to testify about facts related to the legal person.

Finally, the Tribunal declared that the right to defence had been protected, since the procedure guarantees to the parties several legal mechanisms to defend themselves in the course of a criminal trial.

Languages:

Spanish.

Identification: CHI-2013-3-015

a) Chile / **b)** Constitutional Court / **c)** / **d)** 24.09.2013 / **e)** 2509-2013 / **f)** / **g)** / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

1.2.1.2 Constitutional Justice – Types of claim – Claim by a public body – **Legislative bodies**.
1.3.2.1 Constitutional Justice – Jurisdiction – Type of review – **Preliminary / *ex post facto* review**.
1.6.7 Constitutional Justice – Effects – **Influence on State organs**.

5.3.23 Fundamental Rights – Civil and political rights – **Rights in respect of the audiovisual media and other means of mass communication**.
5.4.6 Fundamental Rights – Economic, social and cultural rights – **Commercial and industrial freedom**.

Keywords of the alphabetical index:

Abstract review / Audience measurement system / Bill, constitutionality / Freedom of enterprise / Non-discrimination principle.

Headnotes:

The Constitutional Tribunal is competent to review the constitutionality of precepts that are included in a bill, if a quarter of the members of Congress impugn them. The legislator is not permitted to reset a similar norm with identical effects, which was already declared unconstitutional by the Tribunal.

Summary:

I. The applicants were Congress members challenging the constitutionality of a provision of the bill on digital television, under discussion in Congress. The provision aims to establish a mechanism called “people meter overnight”, in order to allow the owners of television channels to consult audience ratings only after 3.00a.m.of day after the show was on air. The applicant argued that this norm is similar to another one which was already declared unconstitutional by the Tribunal (case no. 2358-2013); this previous norm prohibited the “people meter online” mechanism.

The applicant contended that the “people meter overnight” constitutes a restriction on the autonomy of broadcast channels, an infringement of the freedom of speech and an indirect means of censorship. They also claimed that this norm breaches the right to broadcast granted by the Constitution, the right to equal treatment before the law and the right to the liberty of enterprise.

II. The Constitutional Tribunal answered the first question – whether the new norm is similar to the previous norm declared unconstitutional – in the affirmative. The Court held that, in fact, both norms have equal effects, because of the indirect prohibition on the use of an online mechanism to measure audiences of television programmes. The ruling also noted that the arguments for establishing a “people meter overnight” were the same previously invoked by the legislator, such as the poor quality of shows on television.

In consideration of the applicants’ arguments, the Tribunal reiterated the reasoning in its previous decision. Thus, the Tribunal stated that the right to broadcast implies not only the right to the license owner for broadcasting, but also the right to use any mechanisms to operate a full broadcasting service. The legislator has the right to restrict that freedom, but not to suppress it in a disproportionate manner. Regulation of broadcasting is already carried out by a state authority, the TV Council, which supervises and sets standards for exercising that freedom.

The Constitutional Tribunal also held that there is a violation of the principle of non-discrimination, since the restriction on audience ratings measurement applies to television broadcasting, but not to other social media.

Finally, the Tribunal held that there is a violation of the freedom of enterprise, because the prohibition inhibits broadcasting enterprises from exercising their economic activity and there is no justification based on morality, public order or national security that argues in favour of the prohibition.

Languages:

Spanish.

Identification: CHI-2013-3-016

a) Chile / **b)** Constitutional Court / **c)** / **d)** 30.09.2013 / **e)** 2523-2013 / **f)** / **g)** / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

1.3.5.6 Constitutional Justice – Jurisdiction – The subject of review – **Decrees of the Head of State**.
2.2.1.1 Sources – Hierarchy – Hierarchy as between national and non-national sources – **Treaties and constitutions**.
3.13 General Principles – **Legality**.

Keywords of the alphabetical index:

Decree, presidential, validity / International law, domestic law, relationship / International treaty.

Headnotes:

An eventual incompatibility between a presidential decree and international treaties, which have legal rank according to the Tribunal´s jurisprudence, has to be resolved by the General Comptroller's Office, who is competent to review the legality of presidential decrees according to the Constitution.

Summary:

I. The applicants were members of Congress who challenged the constitutionality of a presidential decree, which establishes a new regulation on the consultation of indigenous people, according to ILO Convention no. 169 on Indigenous and Tribal People, and which also regulates environment impact evaluation.

The applicants argued that the decree contravenes the Constitution; firstly for an infringement of equal treatment before the law. They contended that indigenous people are a historically discriminated group and the administrative regulation should have established an adequate procedure for consulting indigenous people. Secondly, the applicants argued that consultations should have covered a broader range of issues than the specific situations to which consultation of indigenous people is restricted to under the decree. Thirdly, the applicants claimed that consulting indigenous people derives from the human right to self-determination established in ILO Convention no. 169, and that the executive cannot regulate the exercise of human rights through administrative acts, since this is an exclusive competence of the legislative branch. The applicants also argued that the decree also regulates environment impact evaluation and, as such, contravenes the Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere (Washington Convention), because the new regulation allows exploitation in national parks, nature sanctuaries and areas of extraordinary beauty. According to the Constitution the right to protection of the environment is guaranteed and this regulation contravenes it.

II. The Constitutional Tribunal declared the constitutional action as inadmissible. In its holding the Tribunal declared that the applicants' arguments are based on the grounds that the presidential decree constituted a contravention of international treaties. According to the Tribunal's doctrine international treaties have no constitutional rank, but a legal rank, and therefore the conflict is between a law and an administrative act, which escapes the Tribunal's competences. That kind of conflict has to be resolved by the General Comptroller's Office, who is empowered to review the legality of a presidential decree.

Languages:

Spanish.

Identification: CHI-2013-3-017

a) Chile / **b)** Constitutional Court / **c)** / **d)** 10.10.2013 / **e)** 2143-2011 / **f)** / **g)** / **h)** CODICES (Spanish).

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**.

Keywords of the alphabetical index:

Disciplinary proceedings, judge / Disciplinary proceedings, procedural guarantee / Discretionary power / Judge, disciplinary measure.

Headnotes:

The Supreme Court's decision to hear oral allegations, and the failure to do so in a disciplinary procedure against a member of the judiciary, are neither breaches of the principle that judicial acts are public nor a violation of the right of due process.

Summary:

I. The applicant was a municipal judge, accused of the crimes of fraud and illegal association during her office as Head of a Region (a political position by presidential appointment). Because of that accusation a disciplinary procedure was initiated against her. She challenged the constitutionality of two articles of the Code on the Organisation of Tribunals that regulate the disciplinary procedure for judges accused of committing acts against morality and decency. One of the norms establishes that the appeal against the internal investigation for disciplinary issues may be heard by the Supreme Court, at its discretion, with or without oral pleadings. The other impugned rule grants Appeal Courts and the Supreme Court the competence to judge acts committed by judicial officers against morality and decency.

The applicant argued that the Supreme Court's discretion in deciding whether or not to have an oral pleading before judgment on the matter is a breach of her right to due process, the publicity principle concerning judicial acts, the guarantee of an impartial and independent judgment and the right to be heard, guaranteed in Article 8 of the American Convention of Human Rights, and the right to judicial recourse and equal treatment before law.

The applicant also argued that the competence of the courts to sanction her acts against morality and decency is an infringement of the *nullum crimen nulla poena sine lege praevia* principle and the constitutional principle that guarantees the independence and immobility of judges.

II. The Constitutional Tribunal held that the impugned norms are constitutional. First, the principle that judicial acts should be public is not inherent only in oral procedures, since written procedure accomplishes that principle as well. Therefore an appeal without oral pleadings before judgment is not a breach of the publicity principle, when the reasoning and holding of Supreme Court´s decision is known by the parties. There is also no infringement of due process rights because the applicant has the possibility to present her pleas in written form before the Court, which is a suitable mechanism to guarantee the right to judicial defence.

The Tribunal also held that there is no breach of the right to a fair trial under Article 8 of the American Convention of Human Rights. Although the applicant claimed a breach of the principle of judicial independence, this is out of the question. In the Court's view, it also must be considered that the American Convention guarantees the right of recourse and access to the courts and in the present case the plaintiff has the right to an appeal against a first-instance decision. In fact, the allegation is against the Supreme Court's discretion to decide whether to have an oral pleading before judgment, but, as the Court had previously observed, oral pleas are not inherent to the publicity principle of judicial acts and the plaintiff had been guaranteed her right to recourse as established in the American Convention.

The Tribunal also held that there is no infringement of the right to equal treatment before the law. First, the Court observed that the discretionary competence of the Supreme Court to decide whether or not hear an oral pleading before judgment is common to many procedures in national legislation; and second, because the Constitution establishes disciplinary supervision of the inferior courts as a competence of the Supreme Court.

Relating to the principle of *nullum crimen nulla poena sine lege praevia*, the Tribunal held that the competence granted by the law to the Appeal Courts and to the Supreme Court to sanction judicial conduct contrary to morality and decency is not an arbitrary power. Although the felonies of which the applicant was accused were committed during her office as regional authority and not during her actual office as a municipal judge, there is a reasonable degree of certainty to a respondent in a disciplinary procedure that her actions may be subject to disciplinary actions, as in the applicant's case. Finally, there is no breach of the constitutional principle that guarantees the independence and immobility of judges, since this principle only applies with regard to the good behaviour of judges.

Languages:

Spanish.

Identification: CHI-2013-3-018

a) Chile / **b)** Constitutional Court / **c)** / **d)** 17.10.2013 / **e)** 2452-2013 / **f)** / **g)** / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

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

Access to courts, scope / Appeal, conditions.

Headnotes:

A law requiring an employer to first pay all social security contributions due under the judgment of a first instance court, in order to appeal the judgment, does not violate the right of access to court.

Summary:

I. The applicant was an employer who was sentenced at first instance in a social security contributions collection trial to pay contributions to a social security institution. He argued that the requirement for previous payment into court of the total amount of the contributions in order to appeal the first instance's sentence violated his rights to due process, to equal treatment before the law and to access to the courts.

II. The Constitutional Tribunal held that there was no contravention of the applicant's fundamental rights and accordingly dismissed the constitutional action.

First, the Tribunal recalled that social security contributions are involved. According to the national social security system, social security contributions are workers' property, and thus any discussion involving those social contributions necessarily compromise workers' property rights. Therefore, the regulation and principles that rule over the social security system and the mechanisms for their judicial collection are matters of public order. In this meaning, social contributions are part of the social security system, guaranteed by the Constitution and, therefore, mechanisms to guarantee that social human right exist.

Although the possibility for a party to appeal a first instance decision is part of the general right to due process, its mechanisms may be established within the legislator's competences. By considering the relevance of social contributions and the public interest involved, the legislator may establish differences to requirements for an appeal, especially considering that social security contributions are the worker's property and the public interest involved for that matter.

The Constitutional Tribunal held that there is no violation of the right of access to court, because the case is already viewed by a court and not by an administrative body, in which case the Tribunal has already declared the unconstitutionality of precepts that demand payment into administrative bodies of the pecuniary sanction before gaining access to a court.

Languages:

Spanish.

Identification: CHI-2013-3-019

a) Chile / **b)** Constitutional Court / **c)** / **d)** 18.11.2013 / **e)** 2541-2013 / **f)** / **g)** / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

1.2.1.2 Constitutional Justice – Types of claim – Claim by a public body – **Legislative bodies**.
1.3.2.1 Constitutional Justice – Jurisdiction – Type of review – **Preliminary / *ex post facto* review**.
5.2.1.1 Fundamental Rights – Equality – Scope of application – **Public burdens**.
5.4.6 Fundamental Rights – Economic, social and cultural rights – **Commercial and industrial freedom**.

Keywords of the alphabetical index:

Abstract review / Bill, constitutionality / Pluralism, broadcasting.

Headnotes:

A provision of a Bill establishing the principle of pluralism in broadcasting, meaning the respect of social, cultural, ethnical, political, religious and gender diversity, and imposing a duty on broadcasters to promote in their broadcast that principle and to exclude any form of programmes that contravene the pluralism principle is unconstitutional, because it is a state intervention in the autonomy of television broadcasting companies and their editorial policies, which are both protected by the Fundamental Law. A second provision, requiring television companies to broadcast public interest campaigns, designed by the public authorities in order to protect citizens and promote the respect of human rights, is constitutional, given that the provision does not interfere with the autonomy of broadcasters since the campaigns only use a few minutes of the total broadcasting time and also because television broadcasting has a public function.

Summary:

I. A group of members of the National Congress requested review of the constitutionality of four legal provisions of the Bill on Digital Television. The applicants' arguments and the Tribunal's decision are as follows.

The first of the legal precepts established the principle of pluralism in broadcasting, meaning the respect of social, cultural, ethnical, political, religious and gender diversity, and imposed a duty on broadcasters to promote in their broadcast that

principle and to exclude any form of programmes that contravene the pluralism principle. The applicants argued that this rule infringes freedom of expression, because it creates a prior censorship mechanism.

Second, the applicants challenged the obligation on TV concessioners to broadcast public interest campaigns, meaning those designed by the public authorities in order to protect citizens and promote the respect of human rights. The applicants based their arguments on an infringement of the right to information because it would be an imposition on editorial liberty, and also an infringement of the right to equal treatment before the law, because it establishes a burden only for television on broadcasting such campaigns.

II. With regard to the first argument, the Tribunal declared that such a rule does not constitute a violation of freedom of expression, because is a duty to promote pluralism in the society. Nevertheless it held the exclusion of broadcasting programmes that contravene pluralism to be unconstitutional, because it is a state intervention in the autonomy of television broadcasting companies and their editorial policies, which are both protected by the Fundamental Law.

As regards the second argument, the Tribunal declared that this obligation is constitutional. The Tribunal held that there is no breach of the right to information and that the provision does not interfere with the autonomy of broadcasters since the campaigns only use a few minutes of the total broadcasting time and also given that television broadcasting has a public goal, and thus has to collaborate for this public meaning. The Tribunal also declared that there was no contravention of the right to equal treatment before the law; given the public finality and importance of television broadcasting in society; it is an adequate means to broadcast public interest campaigns by the authorities.

Third, the Tribunal reviewed the constitutionality of a norm that empowers the National Television Council to give a second broadcasting license to the National Television Network, although in principle each licensee may only own one license for broadcasting. The applicants contended that this ruling contravenes the right to non-discrimination in economic matters, guaranteed by the Constitution. The Tribunal declared that this norm is constitutional; first, because it is compatible with the ruling on state enterprises and principles of competition. Second, because the legislator's intention was to grant mechanisms for broadcasting, through a State Enterprise, such as the National Television Network. The Court noted, as a matter of fact, the importance of the National Television Network and its capacity to cover a vast geographical area, grants an effective broadcast to all the national territory.

Finally, the Tribunal reviewed a provision that obligates private satellite television distributor's licensees to broadcast regional networks. The applicants argued that this contravenes the freedom of enterprise. The Tribunal declared that this ruling is constitutional, since there is a public interest involved; namely to promote regional networks and to protect them against the possibility of exclusion by cable television.

Languages:

Spanish.

Croatia
Constitutional Court

Important decisions

Identification: CRO-2013-3-012

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 27.08.2013 / **e)** U-I-4175/2013-PP *et al* / **f)** / **g)** *Narodne novine* (Official Gazette), 108/13 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

1.2.3 Constitutional Justice – Types of claim – **Referral by a court**.
1.4.9.1 Constitutional Justice – Procedure – Parties – ***Locus standi***.

Keywords of the alphabetical index:

Legal remedy, right / Constitutionality, review, preliminary objection / Constitutionality, review, relation to stay of ordinary court proceedings.

Headnotes:

In specific court proceedings when a ruling on a stay of proceedings is rendered pursuant to Article 37.1 of the Constitutional Act on the Constitutional Court, preliminary objections of a formal legal nature are admissible in the domestic legal system upon a court's request for the Constitutional Court to review the constitutionality of a law (also by reference to Article 37.1 of the Constitutional Act). The parties to court proceedings that are stayed are authorised to file such objections during such a stay in proceedings. The preliminary objections are examined by the Constitutional Court in preliminary proceedings related to the court's submission whereby a review of constitutionality is requested of the law that should have been applied in the stayed court proceedings.

Summary:

I. In a pre-bankruptcy settlement case of the Zagreb Commercial Court, a single judge (hereinafter, "single trial judge") delivered a ruling on staying the proceedings. Seven days later, he filed in person with the Constitutional Court a submission for a review of the constitutionality of individual provisions of the Financial Operations and Pre-Bankruptcy Settlement Act (hereinafter, the "Act"), which he grounded on Article 37.1 (alternatively Article 38.1) of the Constitutional Act on the Constitutional Court (hereinafter, the "Constitutional Act").

Article 37.1 of the Constitutional Act stipulates that if a court of justice in a proceeding determines that the law to be applied or some of its provisions are not in accordance with the Constitution, it shall stop the proceedings and present a request with the Constitutional Court to review the constitutionality of the law or some of its provisions.

The provision of Article 38.1 of the Constitutional Act specifies that every natural or legal person has the right to propose the institution of proceedings to review the constitutionality of the law and the legality and constitutionality of other regulations.

Thereafter, a joint stock company filed with the Constitutional Court a submission entitled a "constitutional complaint" in which it objected to the ruling on the stay of pre-bankruptcy settlement proceedings against it (the ruling stated above). It deemed that a single judge is not entitled to file a request for the review of constitutionality of a law because only the court enjoys this authority, and that "the decision to institute proceedings for a review of constitutionality of the Act was rendered arbitrarily and without stating any specific legal provisions that would ostensibly be unconstitutional".

II. The Constitutional Court found that a constitutional complaint is not permitted against the ruling on the stay of proceedings because the requirements in Article 62.1 were not met. On the other hand, no challenge has been recorded so far in the case law of such rulings before the Constitutional Court.

In exploring the direction of constitutional case law development in relation to this new legal situation, the Constitutional Court started from the direct and immediate connection of an individual act on the stay of court proceedings with the issues of the constitutionality of laws. It took a position about the general, adequate implementation of the rules developed by the European Court of Human Rights in its application of the European Convention on Human Rights in its case law in connection with preliminary objections. These preliminary objections relate to the admissibility of applications, including the compatibility of the application with the Convention *ratione materiae, personae, temporis and loci*, the questions related to the jurisdiction of the European Court of Human Rights, and other formal legal questions.

Having applied the stated rules to the case at hand, the Constitutional Court found that the submission of the joint stock company may in certain parts be regarded as preliminary objection against the court's submission in which the single trial judge requested the review of the Act within the meaning of Article 37.1 of the Constitutional Act. These parts of the joint stock company's submission are reviewed in these preliminary constitutional court proceedings, while other objections were dismissed.

1. *Locus standi* within the meaning of Article 37.1 of the Constitutional Act:

Articles 35 and 36 of the Constitutional Act define which state and public bodies, which are not issuers of the disputed enactments, are entitled to submit to the Constitutional Court requests by which the constitutional proceedings for the review of constitutionality of legal norms are *ex lege* initiated. Unlike persons in Article 38.1 of the Constitutional Act, bodies of state and public power defined in Article 35 of the Constitutional Act (one fifth of the members of the Parliament, a committee of the Parliament, the President of the Republic, the Government, the Supreme Court or another court of justice and the Ombudsman), and Article 36 of the Constitutional Act (a representative body of a unit of local and regional self-government) are considered qualified to institute these proceedings before the Constitutional Court.

The Constitutional Court considered Article 35.5 ("the Supreme Court or another court of justice, if the issue of constitutionality and legality has arisen in the proceedings conducted before that particular court") together with Article 39 of the Constitutional Act, which prescribes the mandatory elements of each request (in particular the one about the "signature and seal of the presenter"). It interpreted that only bodies represented by their heads have qualified standing to institute proceedings for the review of constitutionality of legal rules before the Constitutional Court, not their organisational units or physical persons in the capacity of holders of certain functions within those bodies.

With regard to judicial power, the Constitutional Court has not so far distinguished between the courts and others qualified to initiate proceedings for the review of constitutionality of legal norms. It has never excluded the possibility that a particular judge or president of a particular court chamber signs the request. It has held, however, that the activity of the Court, when it addresses the Constitutional Court in proceedings for a review of the constitutionality of legal rules, is that of a body of state authority (the institutional criterion). It must be represented before the Constitutional Court by the court president as the highest body of court administration at courts, and the request itself must contain his or her signature and the seal of the court. This has neither questioned the power of the judge to challenge the constitutionality of a law or other regulations before the Constitutional Court under Article 38.1 of the Constitutional Act nor his or her power to decide in specific court proceedings on all questions inherent to the function of adjudication.

In cases where the requirements in Article 37 of the Constitutional Act have not been met, the Constitutional Court took the view not to dismiss such submissions, but to treat them as proposals to institute proceedings within the meaning of Article 38.1 of the Constitutional Act.

Distinguishing between "a request" and "a proposal" may result in concrete consequences for the rights of the parties in the court proceedings. Namely, the competent court has the legal ground to stay specific court proceedings only in relation to the request referred to in Article 37, in connection with Articles 35.5 and 39, but not in relation to the proposal referred to in Article 38.1 of the Constitutional Act.

The Constitutional Court found that the single trial judge's submission cannot be deemed a request within the meaning of Article 37.1 of the Constitutional Act, but a proposal within the meaning of Article 38 of the Constitutional Act.

Accordingly, it found that in the specific case of the pre-bankruptcy settlement a stay of proceedings was not permitted because in these proceedings the request within the meaning of Article 37.1 of the Constitutional Act had not been submitted.

2. Compliance of the application *ratione materiae* with Article 37.1 of the Constitutional Act:

A request can be used to challenge the constitutionality of only those provisions of laws that are to be applied in those court proceedings, not of any provision of any law, which clearly stems from the first sentence of Article 37.1 of the Constitutional Act. The allegations on the unconstitutionality of the legal provisions must be substantiated in the context of the specific case in which they are to be applied.

The Constitutional Court found that the submission filed by the single trial judge to the Constitutional Court fails to meet the stated requirements.

Further to the above, the Constitutional Court found that the submission of the single trial judge must be deemed a proposal to institute proceedings for a review of the constitutionality of the Act, within the meaning of Article 38.1 of the Constitutional Act. It ordered that the proceedings be continued without delay pursuant to Article 31.4-5 of the Constitutional Act.

Cross-references:

- Ruling no. U-I-2385/2011, 05.03.2013;
- Ruling no. U-I-3733/2004 *et al.,* 13.01.2009;
- Ruling no. U-I-3467/2003, 28.09.2010;
- Ruling no. U-II-4403/2008, 27.10.2010;
- Ruling no. U-II-2160/2008, 29.05.2012;
- Decision no. U-I-448/2009 *et al.*, 19.07.2012, *Bulletin* 2008/3 [CRO-2008-3-016];
- Decision no. U-II-1665/2005, 07.02.2007.

European Court of Human Rights:

- *Brezovec v. Croatia*, presuda, no. 13488/07, 29.03.2011;
- *Micallef v. Malta* [GC], no. 17056/06, 15.10.2009;
- *Vilho Eskelinen and Others v. Finland* [GC], no. 63235/00, 19.04.2007;
- *Mamatkulov i Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, 04.02.2005.

Languages:

Croatian, English.

Identification: CRO-2013-3-013

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 10.09.2013 / **e)** U-III-462/2010 / **f)** / **g)** *Narodne novine* (Official Gazette), 120/13 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

1.2.1.6 Constitutional Justice – Types of claim – Claim by a public body – **Local self-government body**.
1.4.9.1 Constitutional Justice – Procedure – Parties – ***Locus standi***.

Keywords of the alphabetical index:

Constitutional complaint, admissibility / Local self-government, right to constitutional protection.

Headnotes:

Under certain circumstances, units of local self-government are entitled to lodge a constitutional complaint, but only if it is related to a request for protection against unconstitutional interventions in their constitutional right to local self-government (also known as a municipal constitutional complaint). Only in such cases are units of local self-government recognised as having the position of entities that enjoy constitutional rights, rather than entities obliged to protect these rights. This applies also to counties, as units of regional self-government.

Summary:

In these proceedings, the Constitutional Court examined whether a unit of local self-government is entitled to lodge a constitutional complaint under Article 62.1 of the Constitutional Act on the Constitutional Court (hereinafter, the “Constitutional Act”).

The Constitutional Court noted that Articles 128 - 131 regulate basic matters and guarantees of local self-government.

Bearing in mind the content of Article 62 of the Constitutional Act, the Constitutional Court recalled that units of local self-government, as entities vested with public authority at the local level, due to their constitutional functions and activities, are primarily entities obliged to protect human rights and fundamental freedoms. They are not entities that enjoy these rights and freedoms.

However, bodies vested with public authority, including courts, may disrupt or limit the self-government position of units of local self-government guaranteed by the Constitution, which includes violating the principle of equality of one unit in relation to other units of local self-government of the same type. Therefore, Article 62 of the Constitutional Act guarantees units of local self-government (city, municipality), under prescribed conditions, the right to lodge a constitutional complaint in cases where the state authority interferes in their activities related to the self-government. This also observes the principles prescribed by Article 11 of the European Charter of Local Self-Government.

In these constitutional court proceedings, the issue is whether misdemeanour proceedings to establish the liability of a unit of local self-government (hereinafter, the "unit") for committing a specific misdemeanour can be deemed proceedings to establish whether the unit's constitutional right to local self-government may be violated. That is, can this unit be deemed a "victim" of a violation of the constitutional right to local self-government?

The Constitutional Court determined that in the specific case, the constitutional complaint did not relate to the so-called municipal constitutional complaint (i.e. the constitutional complaint for the violation of the constitutional right of the unit to local self-government). Namely, the court judgments against which the constitutional complaint was lodged were not directed to disrupting and limiting the constitutional right of the unit to perform activities within its self-government remit. The unit exercised this right when it started the works on the construction and reconstruction of the sports and recreational centre – the thermal water park.

In doing so, it violated the law by building without a main design certificate when repairing the road. Therefore, conducting misdemeanour proceedings and consequently establishing the liability of the unit for the commission of the misdemeanour with which it has been charged may not, in the view of the Constitutional Court, be deemed a disruption or limitation of a constitutional right of the unit to local self-government.

In accordance with the above, the Constitutional Court found that in the circumstances of this particular case, the unit cannot be deemed holder the constitutional rights and thus has no standing *(locus standi)* for lodging a constitutional complaint.

Cross-references:

European Court of Human Rights:

- *Ayuntamiento de Mula v. Spain,* no. 55346/00, 01.02.2001.

Languages:

Croatian, English.

Identification: CRO-2013-3-014

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 10.09.2013 / **e)** U-III-3846/2012 / **f)** / **g)** *Narodne novine* (Official Gazette), 120/13 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
5.1.4 Fundamental Rights – General questions – **Limits and restrictions**.
5.3.28 Fundamental Rights – Civil and political rights – **Freedom of assembly**.

Keywords of the alphabetical index:

Fundamental right, criteria applied / Fundamental right, protection / Judgment, reasoning / Misdemeanour proceedings.

Headnotes:

The range of behaviour regarded as going beyond the limit of a peaceful protest may not be interpreted narrowly. The term "peaceful" must be interpreted to include behaviour that may, in a certain way, disturb persons who oppose the ideas or claims put forward at a peaceful protest, and even behaviour that may temporarily hinder, slow down or prevent the activities of a third party. If in the public gathering, there is accidental violence or disorder, the individuals not participating in that disorder will not lose the protection of the right to public assembly and peaceful protest.

Summary:

I. The applicant of a constitutional complaint joined a registered, lawful and peaceful protest in Zagreb, on Varšavska Street. On that occasion, together with another 200 or so protesters, he yelled, "We won't give up Varšavska", pounding with his hands on the metal fence of the construction site *"Cvjetni prolaz"*. At one point, the metal fence fell inside the protected area secured by employees of the security company, *"Sokol Marić"*. One of the security guards used force to subdue the applicant and held him at the premises of *"Hoto-grupa"* until the arrival of the police. Following the interviews, the applicant was charged with a misdemeanour.

In the first instance proceedings, the applicant was found guilty of a misdemeanour in Article 13 of the Act on Misdemeanours against Public Order and Peace. The High Misdemeanour Court rejected the applicant's appeal as unfounded and upheld the first instance judgment.

The applicant lodged a constitutional complaint against the above judgments, claiming the violation of Articles 14, 16, 18, 26 and 28 of the Constitution. He also deemed that his rights in Articles 1, 6.1, 6.3, 11, 13 and 14 ECHR were violated.

II. Given the claims in the constitutional complaint and the circumstances of the particular case, the Constitutional Court reviewed the applicant's complaint from the aspect of Article 42 of the Constitution separately and in conjunction with Article 16 of the Constitution.

In these constitutional court proceedings, the issue for the Constitutional Court was whether the applicant's constitutional right to public gathering and peaceful protest in Article 42 of the Constitution been violated by the fact that the courts found him guilty of disrupting the public order and peace because he pounded with his hands on the metal fence of the construction site during the registered, lawful and peaceful protest.

The Constitution protects only peaceful protest. A gathering will not be regarded peaceful if it is organised with the specific intention of causing or instigating violence and disrupting public order, and if the applicant and/or his fellow protesters committed violent acts during the gathering. However, the gathering is peaceful even if the public order and peace are disrupted but the applicant and other protesters did not actively participate in the violence. Peaceful gathering does not mean that there is no disturbance of the surroundings. However, it must not be excessive.

The Constitutional Court noted that the operative provisions of the disputed judgments do not correspond with the respective statement of reasons given in the judgments. Namely, the applicant was found guilty of disturbing public order and peace only because he pounded with his hands on the metal fence of the construction site *"Cvjetni prolaz"*.

From the operative parts of the disputed judgments, it cannot be seen at all that the incriminated offence was committed in special circumstances – during a registered, lawful and peaceful protest, which enjoys the protection of the Constitution and the European Convention on Human Rights, which fact is essential in the specific case particularly because different criteria apply to behaviour that constitutes offences in "regular circumstances" and in the circumstances of peaceful protests.

The Constitutional Court noted that in the statement of reasons, the courts specified why they consider that the applicant's behaviour goes beyond the limits of permissible behaviour at a protest. However, such reasoning is obviously not in line with the statement of facts given in the operative parts of the disputed decisions. Neither the High Misdemeanour Court nor the Zagreb Misdemeanour Court explained how the applicant's pounding on the fence violated the rights and freedoms of other people. Even if it is considered that the fence that the applicant (together with the other 200 or so protesters) pounded upon was knocked down, that is, that the property of others was destroyed, the fact remains that the applicant was found guilty only of pounding on the fence.

Pounding on a fence creates noise, which is regarded as normal in public gatherings and protests. This applicant's behaviour does not itself constitute inappropriate and unacceptable behaviour during a peaceful protest and thus may not be considered a misdemeanour.

Accordingly, in the view of the Constitutional Court, the disputed provisions violated the applicant's right to public assembly and peaceful protest in Article 42 of the Constitution separately and together with Article 16 of the Constitution.

Having found the violation of the right to public assembly and peaceful protest, the Constitutional Court did not examine other objections of the applicant.

Cross-references:

- no. U-I-241/1998, 31.03.1999, *Bulletin* 2000/3 [CRO-2000-3-017];
- nos. U-I-295/2006 and U-I-4516/2007, 06.07.2011.

European Court of Human Rights:

- *Ashughyan v. Armenia,* no. 33268/03, 17.07.2008;
- *G. v. Germany*, no. 13079/87*,* 06.03.1989.

Languages:

Croatian, English.

Identification: CRO-2013-3-015

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 28.10.2013 / **e)** U-VIIR-5292/2013 / **f)** / **g)** *Narodne novine* (Official Gazette), 131/12 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

4.9.2.2 Institutions – Elections and instruments of direct democracy – Referenda and other instruments of direct democracy – **Effects**.

Keywords of the alphabetical index:

Constitutional Court, decision, effects / Referendum, amendment to Constitution / Referendum, constitutional, effects / Referendum, decision to organise, effects / Referendum, preliminary warning / Referendum, national / Referendum, wording.

Headnotes:

Voters called upon for a popular referendum to amend the Constitution must directly decide on the merits (i.e., on the very referendum question). The form of the referendum question has been proposed by a minimum of ten percent of the total number of voters. The voters vote for or against the proposal in question.

The decision in which the Constitutional Court confirms a specific popular referendum to amend the Constitution also means that the Constitution is amended on the day the referendum is held with immediate legal effect. The date when the Constitutional Court declares the decision is published in the Official Gazette.

Summary:

Pursuant to Article 125.9 of the Constitution and Articles 87.2 and 89 of the Constitutional Act on the Constitutional Court (hereinafter, the "Constitutional Act"), the Constitutional Court published a warning regarding the Proposal of a Decision of the Committee on the Constitution, Standing Orders and Political System of the Parliament to call a national referendum of 24 October 2013.

The Proposed Decision determines that a national referendum will be called on 1 December 2013. It is based on a petition to call a national referendum of the civil initiative "In the Name of the Family", requesting a vote for or against the proposal to amend the Constitution. The question is whether to include therein the definition of marriage as a union for life between a woman and a man. A total of 683,948 voters' signatures were collected for the calling of the referendum (hereinafter, "referendum on the definition of marriage"), which is more than the necessary ten percent of the total number of voters in the state.

The Constitutional Court recalled that the Proposed Decision recommends the holding of the first popular referendum to amend the Constitution (i.e., the first case of direct decision-making by the people in the meaning of Article 1.3 of the Constitution regarding a specific proposal to amend the Constitution). This occurs when legal rules on the procedure and method of implementing a popular initiative to amend the Constitution have not been fully elaborated.

It was, therefore, particularly important that both the decision and the procedure initiated thereby stay within the Constitution since they clearly have the significance of a precedent, not just with regard to future parliamentary practice and referendum procedures, but also with regard to the realisation of direct democracy.

The Constitution fails to regulate the procedure for amending the Constitution when the decision regarding this amendment is directly made by the people by voting FOR or AGAINST a specific popular initiative in the meaning of Article 87.3-5 of the Constitutional Act in conjunction with Article 1.3 of the Constitution. On the other hand, Head VIII of the Constitution, entitled "Amending the Constitution", regulates the procedure to amend the Constitution. This occurs when the decision on this amendment is made directly by the Parliament on the proposal of authorised state authorities (the President of the state and the Government) or of a qualified majority of members of the Parliament.

With this warning, the Constitutional Court fulfilled its constitutional task of promptly expressing the direction that should be taken concerning the implementation of a popular initiative to amend the Constitution. This allows the referendum on the definition of marriage to be conducted on the day determined in the Proposed Decision.

In realising this task, the Constitutional Court warned that particular parts of point I and point III.4 of the Proposed Decision are not acceptable in constitutional law. These are (marked in bold):

- part of item I of the Proposed Decision determining that the referendum question be based on a petition to call a national referendum of the civil initiative "In the Name of the Family"

"to begin the procedure to amend the Constitution of the Republic of Croatia". Contrary to this, in item III.1 of the Proposed Decision, it is clear that on 14 June 2013 the Parliament received a petition to call a national referendum of the civil initiative "In the Name of the Family" requesting the calling of a national referendum "to amend the Constitution"; and

- part of item III.4 of the Proposal of the Decision determines that at the referendum "a decision will be made on beginning the procedure to amend the Constitution of the Republic of Croatia".

Judging from the stated normative wordings, in items I and III.4 of the Proposed Decision, there seems to be confusion between, or a mixing up of, two separate constitutional instruments. These include amendments to the Constitution based on a popular initiative to amend the Constitution in the meaning of Article 87.3 in conjunction with Article 87.1 of the Constitution, and amendments to the Constitution in the Parliament in the meaning of Heading VIII of the Constitution.

Namely, in the view of the Constitutional Court, the wording in items I and III.4 of the Proposed Decision, in accordance with which at the referendum "a decision will be made on beginning the procedure to amend the Constitution", leads to the conclusion that the subject of decision-making at the popular referendum to amend the Constitution is not just a referendum question, but that it is exclusively a procedural question about whether or not a procedure to amend the Constitution will be initiated based on a specific referendum question. It can further be concluded that, following the referendum where the voters make "a decision on beginning the procedure to amend the Constitution", the Parliament will decide on the very referendum question in accordance with Heading VIII of the Constitution. Finally, the final decision on whether the Constitution will be amended or not will also be adopted solely by the Parliament, which will also promulgate it.

The Constitutional Court emphasised that in the part of Article 87.1 of the Constitution which reads: "a referendum on proposals to amend the Constitution", the legal term "proposal" means a proposal of ten percent of voters to amend the Constitution in conformity with the referendum question, and not a "proposal on beginning the procedure to amend the Constitution" in a procedural sense, as can be derived from the Proposed Decision.

The difference between the wording (Article 87.1 of the Constitution deals with "proposals to amend the Constitution", while Heading VIII of the Constitution deals with "the procedure for amending the Constitution") points to the different position of the Parliament in these two separate procedures that allow for amendments to be introduced in the national Constitution.

In line with the above, a decision where the Constitutional Court confirms that a specific popular referendum to amend the Constitution – where the people, in the meaning of Article 1.3 of the Constitution, vote FOR a proposed referendum question – conducted in conformity with the Constitution also means that the Constitution is amended on the day the referendum is held with immediate legal effect. The date the Constitutional Court determines in a declarative manner in its decision is published in the Official Gazette.

The Constitutional Court commented on the specific popular initiative to amend the Constitution based on which the Proposed Decision was adopted. It noted the lack of any precise legal rules on the content and form of a referendum question that proposes amendments to the Constitution and the lack of examples in referendum practice that would provide guidelines to word such a question when it comes to amending the Constitution. As such, no subsequent objections should be made in this sense to the specific proponents of the referendum on the definition of marriage.

Finally, the Constitutional Court found the necessity to amend the disputed parts of item I and item III.4 of the Proposed Decision that are the subject of this warning by the Constitutional Court. It also agreed with the necessity to supplement the Proposed Decision with a new item where the constitutional amendment will be defined and which will – if the result of the referendum is positive – lead to the amendment of Article 62 of the Constitution (according to the original texts and correct numerical identifications: Article 61 of the Constitution). This would lead to a new paragraph 2 to be added, and where the current paragraph 2 will become paragraph 3.

The Court emphasised that the disputed parts of item I and item III.4 of the Proposed Decision do not provide for the protection of the fundamental values of the constitutional state. The reason is that they open up an unacceptable constitutional and legal possibility for the Parliament to subsequently change the decision of voters expressed at a popular referendum to amend the Constitution.

Cross-references:

- Communication no. SuS-1/2013, 28.10.2013, *Bulletin* 2013/3 [CRO-2013-3-016].

Languages:

Croatian, English.

Identification: CRO-2013-3-016

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 14.11.2013 / **e)** SuS-1/2013 / **f)** / **g)** *Narodne novine* (Official Gazette), 138/13 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

1.3.3 Constitutional Justice – Jurisdiction – **Advisory powers**.
4.9.2 Institutions – Elections and instruments of direct democracy – **Referenda and other instruments of direct democracy**.

Keywords of the alphabetical index:

Referendum, amendment to Constitution / Referendum, constitutional, supervision / Referendum, decision to organise, effects / Referendum, precondition / Referendum, preliminary communication / Referendum, national.

Headnotes:

From a substantive law perspective, it is relevant that Croatia legally recognises both marriage and common-law marriage, and same-sex unions, and that Croatian law is today aligned with the European legal standards regarding the institutions of marriage and family life.

Any supplement to the Constitution by provisions to which marriage is defined as the union for life between a woman and a man may not have any influence on the further development of the legal framework of the institution of common-law marriage and same-sex unions, in line with the constitutional requirements that everyone has the right to respect and legal protection of their personal and family life, and their human dignity.

The incorporation of legal matters into the Constitution must not become a systematic occurrence, and exceptional individual cases must be justified by being linked, for example, with deeply rooted social and cultural characteristics of society.

Summary:

The Constitutional Court adopted the Communication on the citizens' constitutional referendum on the definition of marriage.

At a session held on 8 November 2013, the Parliament adopted the Decision to call a national referendum (hereinafter, the "Decision"). The Decision was based on the request by the civil initiative "In the Name of the Family," requesting the calling of a national referendum to amend the Constitution whereby the definition of marriage would be included in the Constitution as the union for life between a man and a woman (hereinafter, "referendum on the definition of marriage").

The institution of a national referendum, including those called by the Parliament based on a citizens' constitutional initiative, that is, when it is requested by ten percent of the total number of voters (hereinafter, "citizens' constitutional referendum") is subject to a constitutional review. The mechanism by which the constitutional order is initially protected from citizens' constitutional initiatives that do not conform to the Constitution is prescribed in Article 95 of the Constitutional Act on the Constitutional Court (hereinafter, the "Constitutional Act"). The Article provides, *inter alia*, that at the Parliament's request, the Constitutional Court shall establish whether the question of the referendum is in accordance with the Constitution and whether the requirements for calling a referendum have been met. The Parliament's request takes places only if at least ten percent of the total number of voters calls for a referendum.

Pursuant to these provisions, the Constitutional Act indicates that there are questions about which it is prohibited to hold a referendum by force of the Constitution. The Constitutional Court establishes these in each specific case.

By rendering a decision to dismiss the proposal for the Parliament to act on Article 95 of the Constitutional Act and then by adopting the Decision, the Parliament expressed its legal will that it deemed the content of the referendum question on the definition of marriage to conform with the Constitution. It confirmed that the constitutional requirements had been met to call a referendum on that question.

Pursuant to Articles 125.9 and 2.1 of the Constitution in conjunction with Article 87.2 of the Constitutional Act, the Constitutional Court has the general constitutional task to guarantee respect of the Constitution. The Court also oversees the conformity of a national referendum with the Constitution, right up to the formal conclusion of the referendum procedure.

Accordingly, after the Parliament rendered a decision to call a national referendum on the basis of a citizens' constitutional initiative and it had not prior to that acted on Article 95.1 of the Constitutional Act, the Constitutional Court's general supervisory authority over the conformity with the Constitution of a referendum called in this way does not cease.

However, out of respect for the constitutional role of the Parliament as the highest legislative and representative body in the state, the Constitutional Court believes that it is only permissible to make use of its general supervisory authorities in exceptional situation. This includes situations when it establishes the formal and/or substantive unconstitutionality of a referendum question, or a procedural error of such severity that it threatens to destroy the structural characteristics of the constitutional state. That is, its constitutional identity, including the highest values of the constitutional order (Articles 1 and 3 of the Constitution). The primary protection of those values does not exclude the authority of the framer of the Constitution to expressly exclude some other question from the circle of permitted referendum questions.

In that light, the Constitutional Court has found it is necessary to reply to several questions regarding the citizens' constitutional referendum on the definition of marriage.

Today, in all relevant international documents on human rights, it is still generally accepted that marriage and family life are not synonymous and not identical legal institutions. It is sufficient to recall two documents on human rights that are legally binding and directly applicable: Article 12 ECHR and Article 9 of the Charter of Fundamental Rights of the European Union.

A review of domestic legislation (Articles 35 and 61 of the Constitution, the Family Act, the Act on Same-sex Civil Unions and the Anti-discrimination Act) shows that the existing regulation on marriage is defined as a union for life between a woman and a man. This definition is alongside the simultaneous legal recognition and the appropriate legal effects, of same-sex civil unions, within the framework of today's European legal standards.

Sexual and gender diversity are protected by the Constitution. The rights of all persons are also protected, regardless of gender and sex, to respect and legal protection of their personal and family life and their human dignity (Article 35 of the Constitution). These legal facts are today considered to be the permanent values of the constitutional state.

Accordingly, regarding the referendum on the definition of marriage, the Constitutional Court emphasises that this is not a referendum on the right to respect for family life. The right to respect for family life is guaranteed by the Constitution for all persons, regardless of gender and sex, and is under the direct protection of the Constitutional Court and the European Court of Human Rights.

The referendum question on the definition of marriage in terms of its content is a positive legal provision contained in the Family Act. Article 5 of that Act reads: "Marriage is a legally governed life union between a woman and a man."

The Constitutional Court recalled the standpoint of the Venice Commission, the advisory body of the Council of Europe for constitutional matters. Specifically, it recalled the unacceptable systematic "constitutionalisation" of legislation in a democratic society, in view of the fact that this undermines the democratic principle of "checks and balances" and the principle of separation of powers.

The Constitutional Court in this sense pointed out that the incorporation of legal matters into the Constitution must not become a systematic occurrence, and exceptional individual cases must be justified by being linked, for example, with deeply rooted social and cultural characteristics of society.

Cross-references:

- Warning no. U-VIIR-5292/2013, 28.10.2013, *Bulletin* 2013/3 [CRO-2013-3-015];
- Ruling no. U-VIIR-4696/2010, 20.10.2010;
- Ruling no. U-VIIR-5503/2013, 14.11.2013;
- Decision no. U-VIIR-72/2012 *et al.,* 16.01.2012.

European Court of Human Rights:

- *Vallianatos and Others v. Greece* [GC], nos. 29381/09 and 32684/097, 07.11.2013;
- *Schalk and Kopf v. Austria*, no. 30141/04, 24.06.2010.

Languages:

Croatian, English.

Czech Republic
Constitutional Court

Statistical data

1 September 2013 – 31 December 2013

- Judgments of the Plenary Court: 5
- Judgments of panels: 54
- Other decisions of the Plenary Court: 12
- Other decisions of panels: 1 208
- Other procedural decisions: 22
- Total: 1 301

Important decisions

Identification: CZE-2013-3-007

a) Czech Republic / **b)** Constitutional Court / **c)** Third Chamber / **d)** 10.09.2013 / **e)** III. ÚS 665/11 / **f)** Extradition of foreigners – relationship between extradition and asylum proceedings / **g)** / **h)** http://nalus.usoud.cz; CODICES (Czech).

Keywords of the systematic thesaurus:

2.1.1.4.5 Sources – Categories – Written rules – International instruments – **Geneva Convention on the Status of Refugees of 1951**.
5.1.1.3.1 Fundamental Rights – General questions – Entitlement to rights – Foreigners – **Refugees and applicants for refugee status**.
5.3.11 Fundamental Rights – Civil and political rights – **Right of asylum**.

Keywords of the alphabetical index:

Extradition, proceedings / Extradition, competence / Asylum, powers / Asylum, request, refusal.

Headnotes:

When extradition and asylum proceedings are conducted simultaneously and the result of each of them, independently of the order in which the proceedings end, can be relevant to a decision by the Minister of Justice to permit extradition, the extradited person cannot be denied the opportunity to have his or her application for international protection (asylum) heard, including a possible judicial review.

If the Minister of Justice granted extradition before the end of asylum proceedings, this would violate Articles 36.1, 36.2 and 43 of the Charter of Fundamental Rights and Freedoms (hereinafter, the "Charter"). The extradited person would be simultaneously denied the procedural guarantees of the principle of non-refoulement under Article 33.1 of the Convention Relating to the Status of Refugees and Articles 2 and 3 ECHR, which, as an obligation under a treaty on the protection of human rights, takes precedence over other international treaty obligations.

Summary:

I. Authorities of the Russian Federation requested the extradition of the complainant for criminal proceedings on suspicion of committing the crime of murder, or hiring another person to commit murder. The ordinary courts, which first decided on the admissibility of extradition, concluded that if extradited, the complainant, as a supporter of Chechen independence, was in danger of persecution and a deterioration of his position in criminal proceedings.

The Supreme Court, however, rejected this conclusion as insufficiently supported. In further proceedings, the ordinary courts reached the opposite conclusion and found that the complainant could be extradited. The Minister of Justice subsequently decided to grant extradition. However, this decision was not enforced because in the meantime the European Court of Human Rights indicated an interim measure preventing his extradition until the final decision is handed down. The Constitutional Court also suspended the enforceability of the decision by the Minister of Justice.

Moreover, at the time of the general courts' decision on the admissibility of the extradition, the complainant filed an application for international protection (asylum). That was ruled on by the Ministry of the Interior by a decision of 5 April 2013, which did not grant asylum. The complainant contested this decision in proceedings before the Municipal Court in Prague, where it is now pending.

II. Based on the foregoing factual and legal situation, the Constitutional Court concluded that the Minister of Justice decided to allow extradition without waiting for a decision to grant asylum, or a decision by the administrative courts on review of that decision by the Ministry of the Interior. The decision thereby violated the complainant's fundamental right to judicial and other protection under Article 36.1 and 36.2 of the Charter and the right to apply for asylum guaranteed in Article 43 of the Charter in connection with the principle of non-refoulement contained in Article 33.1 of the Convention on the Status of Refugees. In reviewing this issue, the Constitutional Court took as its starting point its previous plenary decision, file no. Pl. ÚS-st. 37/13 of 13 August 2013 (262/2013 Coll.).

The Constitutional Court also stated that the court decisions on the permissibility of extradition and the decision of the Ministry of the Interior to grant asylum are two separate and mutually independent proceedings, each of which pursues a different aim. Therefore, the courts are not obliged to wait for the end of asylum proceedings and can decide on the permissibility of an extradition while it is still on-going. However, a different obligation applies to the Minister of Justice, who cannot grant extradition until such time as the asylum proceeding is concluded, including the related judicial review of the decision of the Ministry of the Interior. Otherwise, the complainant would be denied the opportunity to have his asylum application reviewed. In the event of an extradition, he would be denied the procedural guarantee of the principle of non-refoulement, which, as a human rights obligation, prevails over the state's obligation to extradite a person for criminal prosecution.

III. The judge rapporteur in the matter was Pavel Rychetský. None of the judges filed a dissenting opinion.

Languages:

Czech.

Identification: CZE-2013-3-008

a) Czech Republic / **b)** Constitutional Court / **c)** Third Chamber / **d)** 11.09.2013 / **e)** II. ÚS 1375/11 / **f)** Extradition of foreigners – extradition to the Russian Federation / **g)** / **h)** http://nalus.usoud.cz; CODICES (Czech).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Extradition, proceedings / Extradition, evidence by receiving state / Offence, criminal, elements, essential / Procedure, criminal, extradition / Extradition, possibility / Extradition, assurance by receiving state.

Headnotes:

If a court rules on the permissibility of extradition of a person for criminal prosecution abroad, it has an obligation to review the essential requirements of the decision by foreign bodies based on which criminal proceedings were initiated against the extradited person in the requesting state. It must be evident from that decision that the criminal prosecution is based on a certain set of evidence, which reasonably justifies suspicion of a commission of a crime. If the ordinary court overlooks serious shortcomings in the actions based on which the criminal proceeding is being conducted in the requesting state, it violates the extradited person's right to judicial protection under Article 36.1 of the Charter of Fundamental Rights and Freedoms (hereinafter, the "Charter").

Summary:

I. The High Court ruled that it was permissible to extradite the complainant to Russia for criminal prosecution. The complainant contested this decision in a constitutional complaint in which he claimed that he would not receive a fair trial in Russia (or specifically, in Dagestan). He cited reports from non-governmental organisations and other materials documenting the bad conditions in Russian jails and individual cases of torture and inhuman treatment of persons serving sentences or being held in detention. The complainant objected that the high court did not appropriately assess these materials and on the contrary, demonstrated blind faith in the guarantees of the Russian General Prosecutor's Office. The complainant also raised an objection against the steps taken by the High Court, which, in the verdict of its decision, modified an extradition fact without admitting any evidence for that purpose. The complainant believes that the action for which he is to be extradited does not meet the condition of being a crime in both countries. The complainant also pointed to the fact that his asylum proceedings are still pending in the Czech Republic.

II. The Constitutional Court first stated that it does not share the complainant's blanket condemnations regarding the guarantees of a fair trial and corresponding treatment of imprisoned persons in Russia. It emphasised that Russia is a member state of the UN and the Council of Europe, and a signatory to conventions concerning the protection of human rights. Therefore, one can expect a certain standard of these rights, and Russia is subject to the proceedings and control mechanisms that international treaties provide, including proceedings before the European Court of Human Rights. For that reason, among others, the complainant's request, flatly rejecting extradition for criminal proceedings to Russia *per se* appears unacceptable.

The Constitutional Court also stated that when reviewing the permissibility of extradition, one cannot overlook the shortcomings of extradition materials, especially as regards definition of the act that is or was the subject matter of the criminal proceedings in the requesting state (see conclusions from Judgment file no. III. ÚS 534/06 of 3 January 2007). It stated that the general court that rules on the permissibility of extradition to a foreign country for criminal proceedings cannot accept a description of the grounds for extradition that is so vague that one cannot with certainty recognise individual elements of one of the crimes defined in the Czech Criminal Code. This requirement must be applied not only to objective elements but also to the issue of fault and other subjective elements.

However, in the present case the decisions by the requesting country's authorities do not contain any justification, and it is not evident on what evidentiary basis the Russian authorities came to suspect that the complainant committed the cited act. Of course, in a proceeding where a Czech court is to rule on the permissibility of extradition, it cannot replace the powers of the foreign court and admit evidence concerning guilt regarding the crime that is the basis for extradition. However, in terms of its international human rights obligations, the Czech side has an obligation to require that the extradition materials provided by the requesting country indicate that the generally accepted standards for criminal proceedings have been observed. It is unthinkable for a Czech court to pretend that it does not see quite flagrant shortcomings in the actions based on which the subject criminal proceeding is being conducted in the requesting state. Moreover, to a certain degree that procedure permits dispersing potential objections by the extradited person that the proceeding in the requesting state was completely fabricated, is the result of politically motivated arbitrariness, and so on.

Insofar as the high court accepted a laconic ruling on the opening of proceedings issued by the Russian investigator as sufficient grounds for an extradition proceeding, it thereby violated the complainant's right to judicial protection under Article 36.1 of the Charter. For that reason, the Constitutional Court annulled the contested decision of the High Court. It dismissed the complainant's remaining proposals and objections as being unjustified.

III. The judge rapporteur in the matter was Jan Musil. None of the judges filed a dissenting opinion.

Languages:

Czech.

Identification: CZE-2013-3-009

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 22.10.2013 / **e)** Pl. ÚS 19/13 / **f)** Reimbursement Decree for 2013 / **g)** / **h)** http://nalus.usoud.cz; CODICES (Czech).

Keywords of the systematic thesaurus:

3.10 General Principles – **Certainty of the law**.
3.12 General Principles – **Clarity and precision of legal provisions**.
5.4.6 Fundamental Rights – Economic, social and cultural rights – **Commercial and industrial freedom**.
5.4.19 Fundamental Rights – Economic, social and cultural rights – **Right to health**.

Keywords of the alphabetical index:

Public health care, free / Medical care / Business licence, conditions / Medical practitioner, participating in health insurance scheme / Health, insurance company / Byelaw.

Headnotes:

If the application of a legal regulation requires the combination of several mathematical operations, this does not mean that the legislation is unpredictable or incomprehensible, especially if these norms are directed at a limited circle of subjects who are expected to have expert knowledge of the subject matter.

It is inconsistent with the principle of predictability and the prohibition of arbitrariness if a health care provider is penalised for exceeding the limits for the volume of care provided, because it cannot estimate or affect the scope in which care will be provided.

As a result of the level of reimbursements, if health care providers after exceeding the volume of care in a calendar year are forced to provide care even though the reimbursement does not cover even only the essential expenses, the right to engage in commercial activity and the right to protection of health and to free health care are violated.

Summary:

I. A group of senators of the Parliament submitted a petition to the Constitutional Court seeking annulment of the Ministry of Health decree no. 475/2012 Coll., on setting the value of points, the level of reimbursement of covered services, and regulatory limits for 2013 (the "reimbursement decree"). The petitioners found the decree unconstitutional in that it exceeded the statutory authorisation for issuing a reimbursement decree and in the unpredictability of the legislative framework, resulting from the complex formulas and criteria for calculating reimbursement for health care services. The petitioners also objected that the decree reduced reimbursements compared to 2011, although actual expenses for health care increased. They also considered unconstitutional the fact that health care service providers are penalised under the decree if the specified amount of covered health care is exceeded.

The petitioners believe that this framework unjustifiably penalises health care service providers for the fact that they provide health care, and is inconsistent with the right to engage in commercial and other economic activity. The petitioners made a similar assessment of the reduced reimbursement in the event of provision of "urgent" care by a health care provider that has not concluded an agreement with the patient's health insurance company. As a result, all the cited reductions of reimbursement are violations of the right to protection of health under Article 31 of the Charter of Fundamental Rights and Freedoms (hereinafter, the "Charter").

II. The Constitutional Court did not recognise the objection to exceed the statutory authorisation, because the statutory term "level of reimbursements" includes setting the value of points and regulatory restrictions as means for determining it. It accepted only partly the objection that the contested legislation is non-predictable, incomprehensible, and uncertain. The Constitutional Court stated that a combination of several mathematical operations does not alone

make legislation unforeseeable or incomprehensible, especially if these norms are directed at a limited circle of subjects who are expected to have a certain expert knowledge of the subject matter. It found unpredictability and room for arbitrariness only in the case of "regulatory" withholding, which is applied if a health care provider prescribes medicines and health care aids in a scope higher than the level of reimbursements in 2011.

In the Constitutional Court's opinion, the limits of these deductions are not in accordance with the limits for the volume of health care provided. Thus, with a substantial segment of providers, there is then room for exercising these deductions as a consequence of the fact that the provider fulfils its obligations and prescribes medicines so that the treatment will be effective. In the case of requested care, the provider is not at all capable of estimating or influencing the scope in which care will be provided and whether it will not be provided in a scope greater than that in which it was requested. Nevertheless, the provider is penalised for exceeding the limits.

The Constitutional Court also did not agree with the objection that the overall coverage of the level of reimbursements compared to 2011 is a violation of the right to engage in commercial activity and the right to protection of health. In its opinion, this reduction does not affect the essence and significance of these rights. However, it noted that under certain circumstances, the reduction of the volume of care could come into conflict with the right to protection of health and that the exercise of that right may require increasing the funds for public health insurance.

In contrast, the Constitutional Court found that limiting the level of reimbursement when the volume of health care provided was exceeded, violated the right to engage in commercial activity and the right to protection of health and free health care. Health care providers cannot refuse to provide care but at the same time, they are forced, when the volume of care in a calendar year is exceeded, to provide it in a situation where the reimbursement does not cover even only necessary expenses. This situation would not be a problem in terms of Article 26 of the Charter, if the cause of the loss was the provider's own business decisions.

However, it is unacceptable if it arises as a necessary consequence of the setting of the level of reimbursements. Health care providers cannot predict the overall scope of health care services that they will be required to provide during the year. They certainly cannot affect whether there will be a marked increase as a result of extraordinary events, e.g. mass accidents, epidemics, etc. Thus, the fundamental problem is that the reimbursement decree does not distinguish between exceeding the volume of care as a result of real waste or overuse of care or as a result of the health care provider's fulfilling its obligations. In the second case, the decree lacks an entitlement for settlement or compensation. Therefore, the contested legal framework is inconsistent with Article 26 of the Charter and simultaneously threatens the right to protection of health under Article 31 of the Charter. The reason is that it forces health care providers, in their own economic interest, to limit the health care they provide.

The Constitutional Court also found unconstitutional the unequal position of contractual and non-contractual providers in the payment of reimbursements for urgent care provided. If a provider of urgent care does not have a contract with the insured person's insurance company, it has a claim against that health insurance company for material fulfilment at the level of 75% of the value of a point. Thus, a non-contractual provider unjustifiably finds itself in a significantly worse position than a contractual provider.

The Constitutional Court postponed the annulment of the decree to 31 December 2014. It was led to do so primarily by an interest in preserving legal certainty and the stability of the system for financing health care.

III. The judge rapporteur was Jiří Nykodým. Dissenting opinions were filed by judges Stanislav Balík and Vladimír Kůrka.

Languages:

Czech.

Identification: CZE-2013-3-010

a) Czech Republic / **b)** Constitutional Court / **c)** First Chamber / **d)** 28.11.2013 / **e)** I. ÚS 111/12 / **f)** Failure of state authorities to respect the principle of speciality enshrined in Article 406.1 of the Criminal Procedure Code / **g)** / **h)** http://nalus.usoud.cz; CODICES (Czech).

Keywords of the systematic thesaurus:

5.1.1.1.1 Fundamental Rights – General questions – Entitlement to rights – Nationals – **Nationals living abroad**.
5.3.5.1 Fundamental Rights – Civil and political rights – Individual liberty – **Deprivation of liberty**.

Keywords of the alphabetical index:

Custody, surrender / Sentence, serving, punishment / National, European Union, member state / European Arrest Warrant.

Headnotes:

The provision of Article 406.1 of the Criminal Procedure Code provides that unless one of the exceptions expressly provided therein exists, a person who is surrendered to the Czech Republic from another European Union member state on the basis of the European arrest warrant cannot be prosecuted, have his or her liberty restricted, or be deprived of his or her liberty for a crime committed before the surrender, other than the crime for which the person was surrendered. This principle of speciality establishes the subjective right of the person surrendered not to be prosecuted or deprived of liberty for a crime for which she or he was not surrendered. Therefore, failure by state authorities to respect this principle would violate the person's fundamental right to liberty because under Article 8.2 of the Charter of Fundamental Rights and Freedoms (hereinafter, the "Charter"), no one may be prosecuted or deprived of liberty except on the grounds and in the manner specified by law.

Summary:

I. A regional court decision of 30 June 2003, ref. no. 6 To 264/2003-93, in a criminal case conducted at a district court under file no. 4 T 204/2002, sentenced the complainant to a prison term, which sentence, however, he did not arrive to serve as ordered. The complainant was subsequently arrested in Italy for theft and was taken into custody, and the appropriate authorities of the Czech Republic were informed of this. Based on this information, the district court issued the European arrest warrant (file no. 6 T 338/2007) for purposes of prosecuting the complainant in a different matter. The complainant was surrendered to the Czech Republic and immediately delivered to serve his sentence, but on the basis of an order from the district court that was issued in the first criminal case (file no. 4 T 204/2002). According to the complainant, serving that sentence is in conflict with the prohibition of restriction or deprivation of liberty arising from the principle of speciality under Article 406 of the Criminal Procedure Code (hereinafter, the "CPC"). The reason is that he is serving a prison sentence to which he was sentenced before being surrendered to the Czech Republic on the basis of the European arrest warrant and which the surrendering state did not give consent that he should serve.

II. The provision of Article 406 CPC, which is a transposition of Article 27 of the Council of the European Union's Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and surrender procedures between member states (hereinafter, the "framework decision"), enshrines in paragraph 1 the principle of speciality for criminal proceedings conducted against a person who was surrendered to the Czech Republic from another European Union member state based on a European arrest warrant. The principle of speciality establishes the surrendered person's subjective right not to be prosecuted or deprived of liberty for a crime for which he was not surrendered, unless one of the expressly stated exceptions applies in his case. This right clearly corresponds to the text and purpose of Article 27 of the framework decision. It is not changed in any way by the issue of potential conflict between domestic legislation and Article 27.1 of the framework decision, which sets forth an exception to the principle of speciality for relations between Member States that gave a notification to the General Secretariat of the Council. That is, they are presumed to have given consent that a person be prosecuted, sentenced, or detained with a view to the carrying out of a custodial sentence or detention order connected with a prison sentence for a crime other than the one for which he was surrendered and which he committed before being surrendered. The exception is that, in a specific case, the acting judicial body provides otherwise in its decision on surrender. However, neither the Czech Republic nor Italy gave such a notification; therefore that exception is not relevant in the present matter.

The Constitutional Court stated that the surrender on the basis of the European arrest warrant issued by the district court in the criminal case file no. 6 T 338/2007 did not in any way affect the serving of the prison sentence that the complainant received in criminal case file no. 4 T 204/2002, conducted before the same court. Also, none of the exceptions to the principle of speciality provided by law were present. The complainant's liberty was restricted for reasons of serving a prison sentence to which he had been sentenced by a legally effective decision in the criminal case conducted before the district court as file no. 4 T 204/2002, in conflict with Article 406.1 CPC.

At the moment of his surrender for purposes of criminal prosecution in a different criminal matter, the part of that decision that imposed on the complainant the obligation to serve that sentence ceased to be enforceable. Therefore, in terms of Article 8.1 and 8.2 of the Charter, that sentence could not justify restriction of his liberty. In the Constitutional Court's opinion, in these circumstances, it was the obligation of the court in question to respond to the situation upon its own initiative immediately after being informed that the complainant had been delivered to serve the sentence.

The Constitutional Court did not question the sentence given to the complainant on the basis of the legally effective decision, or that serving the remainder of the sentence would be completely impermissible. For purposes of arranging the serving of the sentence, the district court should have requested the consent of the Italian judicial bodies, by proceeding according to Article 406.3 in connection with Article 405 CPC. This judgment in no way prevents the request for consent from being made after this judgment is issued. If the request is granted, this would heal (retroactively) the inconsistency of the serving of the sentence with Article 406.1 CPC. In that case, nothing would prevent the complainant from serving the remainder of this sentence. These conclusions do not affect the possibility of serving sentences from any other legally effective decisions that sentenced the complainant for the crimes for which he was surrendered to the Czech Republic on the basis of the European arrest warrant.

The Constitutional Court concluded that failure by the district court to respect the prohibition on depriving a person of liberty under Article 406.1 CPC and Article 27 of the framework decision violated the surrendered person's fundamental right to liberty under Article 8.1 and 8.2 of the Charter. It forbade the district court to continue the violation of the complainant's rights and freedoms, consisting of the order to serve a prison sentence on the basis of the legally effective decision of the regional court of 30 June 2003, ref. no. 6 To 264/2003-93. It also ordered it to recall the order to serve the prison sentence from that decision immediately upon delivery of this judgment. The Court denied the remainder of the constitutional complaint.

III. The judge rapporteur in the matter was Pavel Rychetský. None of the judges filed a dissenting opinion.

Languages:

Czech.

France
Constitutional Council

Important decisions

Identification: FRA-2013-3-007

a) France / **b)** Constitutional Council / **c)** / **d)** 11.10.2013 / **e)** 2013-346 QPC / **f)** Société Schuepbach Energy LLC (Prohibition of hydraulic fracturing in relation to the prospecting and exploitation of hydrocarbons – Revocation of prospecting licences) / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 13.10.2013, 16905 / **h)** CODICES (French, English, Spanish).

Keywords of the systematic thesaurus:

5.3.39 Fundamental Rights – Civil and political rights – **Right to property**.
5.4.6 Fundamental Rights – Economic, social and cultural rights – **Commercial and industrial freedom**.
5.5.1 Fundamental Rights – Collective rights – **Right to the environment**.

Keywords of the alphabetical index:

Hydraulic fracturing.

Headnotes:

Prohibiting the use of the hydraulic fracturing technique to prospect and exploit hydrocarbons conforms with the Constitution.

The different treatment between the two hydraulic fracturing processes applied to rock (for hydrocarbons and geothermal energy) is not contrary to the principle of equality.

The restriction imposed on both the prospecting for and exploiting of hydrocarbons is not, in the current state of knowledge and techniques, disproportionate to the aim pursued.

The complaints relating to infringement of the guarantee of rights and ownership were dismissed. The legislature had drawn conclusions from the new prohibitions relating to prospecting techniques; hence, there was no adverse effect on a situation acquired through operation of law. Licences for underground prospecting granted for specific areas and for a limited length of time by the administrative authority cannot be assimilated to assets in respect of which the owners hold property rights.

The complaints based on Articles 5 and 6 of the Charter for the Environment were dismissed.

Summary:

I. The Constitutional Council had a priority question on constitutionality referred to it on 12 July 2013 by Schuepbach Energy LLC. That question related to the constitutionality of Articles 1 and 3 of Law no. 2011-835 of 13 July 2011. The said Law prohibited prospecting for and exploitation through hydraulic fracturing of fluid or gaseous hydrocarbon deposits, and to the revocation of the exclusive prospecting licences encompassing projects that make use of that technique.

The applicant company criticised those provisions, claiming they are contrary to the principle of equality before the law and to freedom to engage in business activities. Specifically, they infringe on the guarantee of rights and ownership and principles enshrined in Articles 5 and 6 of the Charter for the Environment.

II. The Constitutional Council dismissed these four series of complaints, ruling that the provisions of the law of 13 July 2011 at issue conformed with the Constitution:

- The Constitutional Council found that, in prohibiting any use of hydraulic fracturing of rock to prospect for or exploit hydrocarbons on national territory, the legislature had intended to prevent the risks that this prospecting and exploitation process might entail to the environment. The legislature viewed that the hydraulic fracturing of rock used to stimulate water circulation in geothermal reservoirs did not present the same risks to the environment. Also it had intended not to impede development of the exploitation of geothermal resources. The Constitutional Council found that the difference in treatment between the two processes of hydraulic fracturing of rock (one for hydrocarbons and the other for geothermal energy) was directly related to the purpose of the law that established it. It therefore dismissed the complaint based on infringement of the principle of equality.

- The Constitutional Council also dismissed the complaint based on infringement of the freedom to engage in business activities. It found that, in prohibiting the use of drilling followed by hydraulic

fracturing of rock for all prospecting for and exploitation of hydrocarbons, which were subject to a system of administrative authorisation, the legislature had pursued a public interest aim of protecting the environment. The Council concluded that the restriction was not, in the current state of knowledge and techniques, disproportionate to the aim pursued.

- The Constitutional Council dismissed the complaints about infringement of the guarantee of rights and ownership. It found that, by providing for the revocation of prospecting licences when their holders had not complied with their reporting obligations or had mentioned the use or planned use of drilling followed by hydraulic fracturing of rock, the legislature had drawn conclusions from the new prohibitions relating to prospecting techniques. Therefore, this had not adversely affected a situation acquired through operation of law. The licences for underground prospecting granted for specific areas and for a limited length of time by the administrative authority could not be assimilated to assets in respect of which the owners held property rights. Consequently, the provisions at issue did not entail deprivation of property in conditions contrary to the Constitution.

- The Constitutional Council already had occasion to rule that Article 6 of the Charter for the Environment did not institute a right or freedom guaranteed by the Constitution and could not therefore be relied on in the context of a priority question of constitutionality. It also ruled that the complaint based on infringement of Article 5 of the Charter where the permanent prohibition was concerned was in any case ineffective. It therefore dismissed the complaints based on those provisions of the Charter for the Environment.

Languages:

French, English, Spanish.

Identification: FRA-2013-3-008

a) France / **b)** Constitutional Council / **c)** / **d)** 18.10.2013 / **e)** 2013-353 QPC / **f)** Mr Franck M. and others [Officiating at weddings – Absence of a "conscience clause" for registrars] / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 20.10.2013, 17279 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

5.2.2.11 Fundamental Rights – Equality – Criteria of distinction – **Sexual orientation**.
5.3.18 Fundamental Rights – Civil and political rights – **Freedom of conscience**.
5.3.34 Fundamental Rights – Civil and political rights – **Right to marriage**.

Keywords of the alphabetical index:

Marriage, couple, same sex / Marriage, registrar, conscience clause.

Headnotes:

In view of the duties of the registrar in officiating at weddings, the legislature has not infringed on the registrar's freedom of conscience by failing to provide for a "conscience clause" enabling mayors and their deputies, as registrars, to refrain from officiating at weddings between persons of the same sex.

Summary:

I. The Constitutional Council had a priority question on constitutionality referred to it on 18 September 2013 by Mr Franck M. and another six mayors. The question related to the constitutionality of Articles 34-1, 74 and 165 of the Civil Code and Article L. 2122-18 of the General Code on local and regional authorities.

Furthermore, the Constitutional Council had received requests to intervene from the mayors of seven municipalities. The simple fact that the persons concerned were required in that capacity to apply the provisions at issue and supported the applicants' arguments did not make their requests to intervene admissible. These were, therefore, not admitted.

The applicants argued that, by failing to make provision for a "conscience clause" enabling mayors and their deputies, as registrars, to refrain from officiating at weddings between persons of the same sex, the provisions at issue infringed *inter alia* their freedom of conscience.

II. The Constitutional Council found that, by not allowing registrars, based on their disagreement with the provisions of the law of 17 May 2013, to refrain from performing the duties assigned to them by the law where officiating at weddings was concerned, the legislature had intended to ensure application of the law by its officers and thereby to guarantee the proper operation and neutrality of the public registry service. The Council ruled that, given the registrars' officiating duties at weddings, the legislature had not

infringed on their freedom of conscience. It ruled that the provisions at issue conformed with the Constitution.

Languages:

French.

Identification: FRA-2013-3-009

a) France / **b)** Constitutional Council / **c)** / **d)** 29.11.2013 / **e)** 2013-357 QPC / **f)** Société Wesgate Charters Ltd [Search of vessels by Customs officers] / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 01.12.2013, 19603 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

1.6.5.5 Constitutional Justice – Effects – Temporal effect – **Postponement of temporal effect**.
5.3.13.2 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Effective remedy**.
5.3.39 Fundamental Rights – Civil and political rights – **Right to property**.

Keywords of the alphabetical index:

Customs / Vessel, search.

Headnotes:

The provisions of Articles 62 and 63 of the Customs Code allowing Customs officers to search any vessel, in any circumstances, whether at sea, in port or moored on rivers or canals, without appropriate remedies being provided making it possible to verify that those measures are implemented in the conditions and on the basis of the arrangements for which the law provides, deprive legal safeguards that the requirements stemming from Article 2 of the 1789 Declaration provide.

Summary:

I. The Constitutional Council had a priority question on constitutionality raised by Wesgate Charters Ltd referred to it on 1 October 2013 by the Court of Cassation. The question related to the conformity with the rights and freedoms guaranteed by the Constitution of Articles 62 and 63 of the Customs Code.

Articles 62 and 63 of the Customs Code allow officers of the Customs authority to search vessels in the maritime frontier zone.

II. The Constitutional Council noted that the prevention of Customs fraud justified the empowering of Customs officers to search vessels, including parts assigned to private use or to use as a home. Authorisation of such search by a court was not constitutionally necessary, given the mobility of vessels and the difficulties of supervising them at sea. However, the law should provide for safeguards to ensure compliance with the constitutional requirements for the protection of privacy.

Articles 62 and 63 of the Customs Code allowed Customs officers to search any vessel, in any circumstances, whether at sea, in port or moored on rivers or canals. Irrespective of the supervision exercised by the court applied to, if applicable, in the context of criminal or Customs proceedings, appropriate remedies were not provided for so that implementation of those measures in the conditions and on the basis of the arrangements for which the law provided could be verified. The Constitutional Council therefore ruled that the provisions at issue deprived legal safeguards stemming from Article 2 of the 1789 Declaration.

The Constitutional Council thus deemed Articles 62 and 63 of the Customs Code were unconstitutional. It postponed until 1 January 2015 the date of the repeal to allow the legislature to remedy this unconstitutionality. Measures taken before that date in application of the provisions declared to be contrary to the Constitution could not be challenged based on that unconstitutionality.

Languages:

French.

Identification: FRA-2013-3-010

a) France / **b)** Constitutional Council / **c)** / **d)** 19.12.2013 / **e)** 2013-682 DC / **f)** Law on the financing of social security for 2014 / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 24.12.2013, 21069 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

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

Life insurance contract, social levy.

Headnotes:

The Constitutional Council considers that the legislature cannot, without a sufficient public interest ground, alter a situation acquired through operation of law or call into question the effects which may legitimately be expected of such situations (recognition of a principle of legitimate expectation).

Article 8 of the Law on financing social security for 2014 amends the rules relating to the social levies on certain investment proceeds with effect from 1 January 1997.

The Constitutional Council issued a reservation as to interpretation excluding the application of the levy rates applicable at the date on which the contract expires for the proceeds accrued over the first eight years after the opening of the life insurance contract. This applied to contracts started between 1 January 1990 and 25 September 1997.

The calling into question of the “historic” levy rates on those proceeds would in practice disregard the legitimate expectation that taxpayers who complied with the required period for holding the contract may have as to the application of the taxation arrangements conditional on compliance with that period.

Summary:

In decision no. 2013-682 DC of 19 December 2013, the Constitutional Council issued a ruling on the Law on the financing of social security (LFSS) for 2014. The case had been referred to it in pursuance of Article 61 of the Constitution by over 60 members of the National Assembly and over 60 Senators. They had challenged the sincerity of the LFSS and the constitutionality of Articles 8, 13, 14, 32, 47, 48, 49 and 82. The Constitutional Council expressed a reservation as to the conformity of Article 8 with the Constitution, and ruled that some of the provisions of Article 14 were unconstitutional. It dismissed, however, the other complaints made by the applicants. It examined of its own motion Articles 34, 37, 57 and 58 and censured those as not having their place in the LFSS (misplaced provisions of a social nature).

Article 8 amended the rules relating to the social levies on the proceeds of life insurance contracts received with effect from 1 January 1997, which were exempt from income tax and for which those levies were paid when the contract expired or when the insured person died. Those proceeds henceforth had to be taxed at the rate in force on expiry or on death.

Firstly, the Constitutional Council ruled that Article 8 did not infringe on the principle of equality. The legislature, because of the particular characteristics of life insurance, treated the proceeds thereof in a different way from those of other savings products exempt from income tax.

Secondly, the Constitutional Council dismissed the complaint based on the retroactivity of Article 8. Generally speaking, that article was not retroactive when applied to levies paid on expiry of the contract or on the death of the insured person. It was retroactive only in so far as it applied to 26 September 2013, the date on which those provisions were published, in order to avoid the announcement of the reform from entailing immediate effects contrary to the aim pursued, which was not contrary to the Constitution.

Thirdly, the Constitutional Council noted that the legislature had, for life insurance contracts taken out before 26 September 1997, introduced a special taxation arrangement for the proceeds of those contracts to encourage holders to keep them for a period of six years, where those dating to before 1 January 1990 were concerned; and a period of eight years, where those opened from that date

onwards were concerned. In addition to exemption from income tax, the application of the "historic" rates of social levies to those proceeds was the other consideration attached to compliance with this period of six or eight years of holding the contracts.

The Constitutional Council ruled that the legislature, in aiming to increase the yield from the social levies applied to the proceeds of life insurance contracts, was able to provide for a rise in the rates of those levies for that part of the proceeds accrued or recorded beyond the statutory period required to benefit from the special taxation arrangement. In contrast, such a ground, purely financial, did not constitute a sufficient, public interest aim to justify the amendment of the rates of social levies applicable to such proceeds. That would call into question the legitimate expectation that taxpayers who complied with the period of holding might have had as to the application of the taxation arrangement conditional on compliance with that period. The Constitutional Council therefore expressed a reservation on interpretation relating to Article 8 excluding the application of the levy rates applicable on the contract date of expiry or of the death of the insured person regarding proceeds accrued or recorded during the first eight years after the opening of the life insurance contract, where those contracts opened between 1 January 1990 and 25 September 1997 were concerned.

Languages:

French.

Germany
Federal Constitutional Court

Important decisions

Identification: GER-2013-3-021

a) Germany / **b)** Federal Constitutional Court / **c)** Third Chamber of the Second Panel / **d)** 10.07.2013 / **e)** 2 BvR 2815/11 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights**.
3.16 General Principles – **Proportionality**.
5.3.1 Fundamental Rights – Civil and political rights – **Right to dignity**.
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:

Prisoner, search / Prisoner, undressing / Ruling on appeal, deviation from case-law of the Federal Constitutional Court and of the European Court of Human Rights / Right of personality, general.

Headnotes:

The physical search of a prisoner without conducting an adequate proportionality test violates his or her general right of personality.

A ruling on appeal for which no reasons are provided, and which manifestly deviates from the case-law of the Federal Constitutional Court and of the European Court of Human Rights, violates the guarantee of legal protection under Article 19.4 of the Basic Law.

Summary:

I. The constitutional complaint concerns the limits to the permissibility of a prisoner's strip search under § 64.3 of Prison Code III of the Federal Land Baden-Württemberg (hereinafter, the "Code"). The provision reads as follows:

§ 64 Search and Controls for Narcotics Abuse

(1) …

(2) Only in individual cases, and following an order from the prison governor, or in an emergency, shall it be permissible to perform a strip search. It may only be carried out in the presence of men in case of male prisoners, and in the presence of women in the case of female prisoners. It shall be carried out in a closed room. No other prisoners may be present.

(3) The prison governor may order in general terms that prisoners may be searched according to section 2 on reception, after contacts with visitors, and after any absence from the prison.

(4)…

The applicant served time in a prison.

In April 2011, before being taken before the Regional Court *(Landgericht)*, he was strip searched, which included a cavity search. He was then cuffed and taken to the hearing, travelling alone with two prison officers. On arrival, they handed him over to two guards who took him to the hearing. After the hearing, he was handed back to the prison officers and driven to the prison. There he was freed of the cuffs and – following a general order issued by the prison governor – once more strip-searched.

The applicant applied for a court ruling against the search that was carried out after his return.

The Regional Court rejected this motion with the challenged order. The applicant lodged an appeal against this. With the challenged order, the Higher Regional Court *(Oberlandesgericht)* rejected the appeal as inadmissible, stating that it was not required to review the challenged order; this would not help to refine the law or to ensure uniform case-law.

The applicant lodged a constitutional complaint against the orders of the Regional Court and the Higher Regional Court.

II. The constitutional complaint is well-founded. The decisions challenged by the applicant violate his fundamental rights. They were therefore reversed; the case was remitted to the Regional Court.

The Regional Court's interpretation and application of § 64 of the Code violates the applicant's general right of personality under Article 2.1 in conjunction with Article 1.1 of the Basic Law.

The interpretation and application of ordinary law is, in principle, a matter for the regular courts. They are, however, subject to constitutional review as to whether they decided arbitrarily or fundamentally disregarded the significance of a fundamental right. Even the fundamental rights of prisoners may only be restricted by or pursuant to a law, and only in accordance with the principle of proportionality.

Strip searches constitute a severe interference with the general right of personality. This applies especially to cavity searches, which involve an inspection of bodily orifices that are normally covered. Because of the particular weight of acts of interference that affect the prisoner's intimate sphere and sense of shame, the prisoner is entitled to special consideration.

This assessment also forms the basis of the European Court of Human Rights' case-law, which is to be taken into account when interpreting the fundamental rights of the Basic Law. Strip searches and cavity searches may thus be justified by the requirements of security and order in the prison. They must, however, be carried out gently, *inter alia* out of the potential sight of other prisoners or unnecessarily present staff, and may not be carried out routinely and regardless of individual reasons for suspicion (see in detail ECHR, *Van der Ven v. The Netherlands*, 4 April 2003, Application no. 50901/99, para. 62; *Lorsé and others v. The Netherlands*, 4 April 2003, Application no. 52750/99, para. 74; *Frérot v. France*, 12 June 2007, Application no. 70204/01, paras. 41 and 47; *Savics v. Latvia*, 27 November 2012, Application no. 17892/03, paras. 133 and 142 *et seq*.).

A prisoner cannot demand unlimited staffing and other resources to be used in order to avoid restrictions to his or her fundamental freedoms. Administrative procedures may be simpler where it is not necessary to exercise consideration in order to avoid interference with the prisoners' rights. This is not, however, permissible justification for forgoing such consideration when ordering searches that affect the prisoner's intimate sphere and sense of shame.

According to these standards, the challenged order of the Regional Court does not stand up to constitutional review. The abstract risk of prohibited objects being brought on the premises suffices for situations mentioned in a general provision such as § 64.3 of the Code, provided that exceptions can be made in individual cases, if warranted by proportionality considerations. It would be impossible to effectively prevent items from being smuggled if specific positive suspicions were always required.

The Regional Court failed to examine the decision of the prison authority as to the exercise of discretion. In order to avoid disproportionate interference, such discretion must be exercised in accordance with the constitutional standards and the provision of ordinary law that is aligned with it if it is apparent to the respective prison officers, or could be apparent without much effort, that under the specific circumstances, the danger of articles being smuggled in is very small. The Regional Court, however, broadly denied the need for the exercise of discretion on a case-by-case basis.

This cannot be viewed as irrelevant simply because it was foreseeable that the outcome of the review could only have been unfavourable for the applicant. A risk of smuggling prohibited articles would be relatively small where a prisoner was continuously cuffed while taken outside or before a court, was under uninterrupted supervision by prison officers, and only had contact with them and a judge. Thus, such an assessment would have required additional reasons.

Nor is it self-evident that it was impossible to take account of such special circumstances for reasons of practicability. Taking them into account does require a certain effort to ensure the necessary communication and its reliability. The officers responsible for the decision on whether to search returning prisoners need to be informed in good time and in a reliable manner, not only by the prisoner in question. However, in view of the seriousness of the interference, it is not clear that this would conflict with an obligation to take them into account.

The challenged ruling of the Higher Regional Court violates the applicant's fundamental right under Article 19.4 of the Basic Law. This right guarantees effective judicial protection that is as comprehensive as possible against acts by public authorities. The appeal courts may not render an appeal ineffective for the applicant via the manner in which they implement and apply the statutory prerequisites for access to a decision on the merits.

According to this standard, the order of the Higher Regional Court is incompatible with Article 19.4 of the Basic Law. Under the Prison Act, the court's Criminal Panel may refrain from providing reasoning for the ruling on the appeal if it considers the complaint to be inadmissible or manifestly unfounded. The Criminal Panel availed itself of this possibility. No reasons were therefore given for the decision that the Federal Constitutional Court could subject to a constitutional review, beyond the findings that are contained in the operative provisions of the order: that the requirements for the admissibility of an appeal – the control being necessary to refine the law or to ensure uniform case-law – were not satisfied. This, however, does not mean that the order itself could not be subject to constitutional review or that the standards applying to such a review were to be relaxed. Rather, the ruling is already to be reversed in such a case if there are serious doubts as to its compatibility with the applicant's fundamental rights. This is the case here, since the content of the Regional Court's order manifestly deviated from the case-law of the Federal Constitutional Court and from the case-law of the European Court of Human Rights, which is to be taken into account when interpreting the fundamental rights.

Cross-references:

European Court of Human Rights:

- *Van der Ven v. The Netherlands*, 04.02.2003, Application no. 50901/99, para. 62;
- *Lorsé and others v. The Netherlands*, 04.02.2003, Application no. 52750/99, para. 74;
- *Frérot v. France*, 12.06.2007, Application no. 70204/01, paras. 41 and 47;
- *Savics v. Latvia*, 27.11.2012, Application no. 17892/03, paras. 133 and 142 *et seq.*

Languages:

German.

Identification: GER-2013-3-022

a) Germany / **b)** Federal Constitutional Court / **c)** First Chamber of the Second Panel / **d)** 18.08.2013 / **e)** 2 BvR 1380/08 / **f)** / **g)** *BVerfGE* (Official Digest) 131, 239 / **h)** *Europäische Grundrechte-Zeitschrift* 2013, 630-636; *Neue Juristische Wochenschrift* 2013, 3714-3716; CODICES (German).

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

Keywords of the alphabetical index:

European Convention on Human Rights, violation, redress / European Convention on Human Rights, violation, compensation / Equal protection under the law / Legal aid / European Convention on Human Rights, constitutional significance / European Court of Human Rights, decisions, aid to interpretation / Interpretation that is open to the Convention / Civil law dispute, reopening.

Headnotes:

1. The requirement of equal protection under the law is violated in particular when a regular court demands too much with regard to the chances of success of the envisaged legal action with which somebody wants to assert or defend his legal rights, and when the point of legal aid is thereby clearly missed.

2. The guarantees of the European Convention on Human Rights (hereinafter, the "Convention") have constitutional significance in that they influence the interpretation of the fundamental rights and the rule-of-law principles of the Basic Law. The regular courts are obliged to consider the guarantees of the Convention and to integrate them into the relevant part of the national legal system. Under these parameters, the decisions by the European Court of Human Rights have also to be considered as an aid to interpretation, even when they do not concern the same subject-matter.

3. To consider the Convention does not, however, aim at a schematic parallelisation of individual statutory or constitutional-law provisions. The possibilities of an interpretation that is open to the Convention end where it no longer appears justifiable according to the recognised methods of interpretation of statutes and of the Constitution. An adaptation of public international law terminology without further reflection is not permissible.

Summary:

I. The applicant challenged the refusal to grant her application for legal aid for a restitution claim that was based on § 580.7.b of the Code of Civil Procedure (hereinafter, the "Code"). She sought to reopen a civil law dispute that had previously been completed ("the original dispute"), in which she had unsuccessfully sued a private psychiatric hospital for compensation for injuries to her health. While the Regional Court had issued a judgment in her favour, the Higher Regional Court reversed the decision upon appeal by the defendant and dismissed the applicant's claim.

After the completion of the original dispute, the European Court of Human Rights found that the applicant's confinement in the private hospital constituted a violation of the Convention, and it granted her compensation.

II. The Federal Constitutional Court decided that the constitutional complaint was, in part, inadmissible and, regarding the remaining part, in any case unfounded.

The Court found that the applicant had not sufficiently substantiated her claim that the Higher Regional Court had misjudged the scope of Article 46 ECHR, which made this part of her constitutional complaint inadmissible. The European Court of Human Rights did not state that the Federal Republic of Germany had an obligation that went beyond the payment of damages and compensation for the costs, and the applicant did not claim that this judgment had not been implemented. Neither did the applicant sufficiently substantiate her allegation that criminal and civil proceedings were treated differently in an unconstitutional way. It further seems problematic whether the applicant fulfilled the requirements of the principle of subsidiarity. The requested full compensation, for example, could have been demanded on the basis of Article 5 ECHR, instead of via a reopening of the case.

The Court further found that the refusal to grant the application for legal aid in any case did not violate the applicant's right to equal protection under the law, and that it could thus remain open whether the constitutional complaint was admissible.

According to the constitutional standards that applied in the year 2006 – explained, *inter alia*, in the Federal Constitutional Court's *Görgülü* decision of 14 October 2004, the Higher Regional Court had no possibility of bringing about another decision on the applicant's original request for compensation.

According to the prevailing view at that time, § 580.7.b of the Code could be applied neither directly nor analogously to court decisions that were rendered after a judgment had become final. Neither the Convention nor the case-law of the European Court of Human Rights demanded a different interpretation. The Court further held that there were also no fundamental concerns under the Convention with regard to the German legal aid system, and that

this system granted the individuals sufficient guarantees to protect them from arbitrariness. The Court added that the guarantees of the Convention do not require that civil cases that had been completed in a lawful way could be reopened. How to redress a legal situation that violates the Convention is, in general, left to the states parties (see also Article 46.1 ECHR). They have to fulfil this obligation within the limits of what is possible under the national legal system, which is also recognised by Article 41 ECHR. The Court further held that the applicant could also not derive any further rights from the case-law of the European Court of Human Rights, which only renders declaratory judgments. It does not have the authority to reverse national decisions or to order the reopening of a case. Nor are the states parties to the Convention obliged to discard a judgment that violates the Convention.

Cross-references:

- Decision 2 BvR 1481/04 of 14.10.2004, *Bulletin* 2004/3 [GER 2004-3-009].

Languages:

German.

Identification: GER-2013-3-023

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 17.09.2013 / **e)** 2 BvR 2436/10, 2 BvE 6/08 / **f)** Observation of members of Parliament / **g)** to be published in the Federal Constitutional Court´s Official Digest / **h)** *Neue Zeitschrift für Verwaltungsrecht* 2013, 1468-1479; *Europäische Grundrechte-Zeitschrift* 2013, 612-629; CODICES (German).

Keywords of the systematic thesaurus:

3.3 General Principles – **Democracy**.
4.5.10 Institutions – Legislative bodies – **Political parties**.
4.5.11 Institutions – Legislative bodies – **Status of members of legislative bodies**.
4.11.3 Institutions – Armed forces, police forces and secret services – **Secret services**.

Keywords of the alphabetical index:

Member of Parliament, observation of / Federal Office for the Protection of the Constitution / Member of Parliament, independent mandate / Free democratic basic order, protection of / Free democratic basic order, fight against / Political party, radical forces within / Parliamentary democracy, principle of.

Headnotes:

1. The second sentence of Article 38.1 of the Basic Law safeguards a communicative relationship between a parliamentarian and the voters that is free from governmental interference, as well as the parliamentarian's freedom from observation, supervision and surveillance by the executive.

2. Observation of a parliamentarian by Offices for the Protection of the Constitution represents interference with the independent mandate under the second sentence of Article 38.1 of the Basic Law, which may be justified in individual cases in order to protect the free democratic basic order. This interference is subject to strict proportionality requirements, and must have a sufficiently specific statutory basis that meets the requirements of the statutory reservation.

3. The first sentence of § 8.1 and § 3.1.1 in connection with the first sentence, letter c of § 4 of the Act on Cooperation between the Federation and the *Länder* (federal states) in Matters of Protection of the Constitution and on the Federal Office for the Protection of the Constitution, introduced when that Act was adopted in 1990, constitutes a sufficiently specific statutory basis, that meets the requirements of the statutory reservation, for the observation of members of the German *Bundestag* (Federal Parliament), even though these provisions make no express reference to parliamentarians' rights under the second sentence of Article 38.1 of the Basic Law.

Summary:

I. The Federal Office for the Protection of the Constitution observes individual members of the German Federal Parliament who are members of the parliamentary group *DIE LINKE* ("The Left"). Since 1986, it has kept a personal file on the applicant, who is a former member of the Federal Parliament and a current member of a state Parliament for this party. The information collected concerns the applicant's work within and for the party, as well as his work as a member of Parliament, with the exclusion of his voting behaviour and his statements both in Parliament and in the committees. The applicant

himself is not suspected of pursuing activities against the free democratic basic order. The sole justification for his observation is his membership of and his functions within the party *DIE LINKE*.

With his constitutional complaint, the applicant challenged a judgment by the Federal Administrative Court which endorsed the observation.

II. The Federal Constitutional Court decided that the challenged judgment violated the applicant's independent mandate. It reversed the decision and remitted the case to the Federal Administrative Court.

The Court held that the independent mandate, according to the second sentence of Article 38.1 of the Basic Law, safeguards the parliamentarian's unimpaired forming of opinions, which includes a communicative relationship between the parliamentarian and the voters that is free from governmental interference and surveillance. It further held that the principle of free formation of opinions was closely connected to the principle of parliamentary democracy according to the second sentence of Article 20.2 of the Basic Law. The parliamentarians' right to be free from observation by the executive also applied to members of Parliament in federal states (Article 28.1 of the Basic Law).

The Court found that the observation of a member of Parliament by Offices for the Protection of the Constitution and the implied collection and saving of data constitutes an interference with the independent mandate. While this interference can be justified in individual cases, it is subject to strict proportionality requirements. If, for example, there were indications that the parliamentarian misused his or her mandate for the fight against the free democratic basic order or fought this order in an active and aggressive way, the interest in the protection of the free democratic basic order might prevail over the independent mandate. While belonging to a certain political party could constitute one aspect of the required overall assessment, the mere party membership could only justify a temporary observation to clarify the parliamentarian's functions, importance and standing in the party, relationship to anti-constitutional segments, and to assess the relevance of such segments within the party and for the parliamentarian's work. Furthermore, the Court held, such observation required a statutory basis which met the requirements of specificity and clarity according to the rule of law.

The Court held that the judgment of the Federal Administrative Court did not sufficiently meet these criteria and that the observation of the applicant constituted an unjustified interference with the independent exercise of his mandate. While the relevant provisions of the Act on the Federal Office for the Protection of the Constitution constituted a sufficiently specific statutory basis that met the requirements of the statutory reservation, the longstanding observation of the applicant did not meet the requirements of the principle of proportionality. The Court found that in an overall balancing of all factors, the minor additional insights which the Federal Administrative Court saw for the establishment of a comprehensive picture of the party were disproportionate compared to the severity of the interference with the applicant's independent mandate.

In the case at hand, the applicant himself was not suspected of pursuing anti-constitutional activities, and there were no indications about radical forces being a dominant influence within the party. According to the Court, partisan political activities which are based on the free democratic basic order strengthen this order – especially if they take place within a party in which different forces and segments are struggling with each other for influence.

The Court added that the Federal Administrative Court did not see that the instruments used by the Federal Office for the Protection of the Constitution were disproportionate with regard to the applicant's behaviour in the parliamentary sphere, which was especially protected by Article 46.1 of the Basic Law. There was no balancing of interests concerning the fact that parliamentary documents were being collected and evaluated.

Languages:

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

Identification: GER-2013-3-024

a) Germany / **b)** Federal Constitutional Court / **c)** Third Chamber of the Second Panel / **d)** 29.09.2013 / **e)** 2 BvR 939/13 / **f)** / **g)** / **h)** CODICES (German, English).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Informational self-determination, right to / Prognosis-based decision / Cell tissue, collection of / Molecular and genetic examination / DNA profile, establishment, storing, future use.

Headnotes:

1. When interpreting and applying § 81g of the Code of Criminal Procedure (hereinafter, the "Code"), the regular courts need to take the fundamental right to informational self-determination sufficiently into consideration.

2. In a prognosis-based decision pursuant to § 81g of the Code, the Court making the decision is not bound by the social prognosis of another court that decided whether to suspend the sentence and grant probation. In the case of contradictory prognoses, however, the subsequent imposition of a measure pursuant to § 81g of the Code requires a more comprehensive justification.

Summary:

I. In his constitutional complaint, the applicant claimed a violation of his right to informational self-determination pursuant to Article 2.1 in conjunction with Article 1.1 of the Basic Law. He challenged an order to collect cell tissue from him and to subject it to a molecular and genetic examination in order to establish identity in future criminal proceedings.

In February 2012, the Hamburg Regional Court convicted the applicant of the handling of stolen goods (§ 259.1 of the Criminal Code) and sentenced him to a prison sentence of one year and five months. The sentence was suspended and the applicant was granted probation pursuant to § 56.1 and 56.2 of the Criminal Code.

Because of this conviction, the Hamburg Local Court ordered, based on § 81g of the Code, that cell tissue be collected from the applicant and subjected to molecular and genetic examination. The Court justified this measure as follows. Although the applicant had no prior convictions, the amount and value of the stolen goods indicated that he suffered from a severe distortion of his personality. This made it likely that there would be future investigations against him on suspicion of having committed a criminal offence of substantial significance. It was to be expected that committing such a crime would lead to evidence that contained cell tissue. The Hamburg Regional Court dismissed the applicant's complaint against this order as unfounded.

II. The Third Chamber of the Second Panel of the Federal Constitutional Court accepted the constitutional complaint for decision and found it admissible and well-founded.

This decision was based on the following considerations:

The establishment, storing, and (future) use of a DNA profile interferes with the fundamental right to informational self-determination guaranteed by Article 2.1 in conjunction with Article 1.1 of the Basic Law. This right grants the power that individuals may generally decide for themselves when and within which limits to disclose aspects of their personal lives – a power that follows from the idea of self-determination. This guarantee may only be limited in the overriding interest of the public, provided that the limitation complies with the principle of proportionality, and that it is based on a law; the limitation may not be wider than is absolutely necessary in order to protect public interests. When interpreting and applying § 81g of the Code, the Court must adequately consider the meaning and scope of this fundamental right.

It is necessary for the imposition of a measure pursuant to § 81g of the Code that because of the nature of the prosecuted offence or the way it was committed, the personality of the convicted offender, or because of other information, there are reasons to assume that criminal proceedings will be conducted against him in the future because of a criminal offence of substantial significance. This prognosis-based decision requires that it be preceded by sufficient clarification of the facts and that the relevant aspects are balanced comprehensively. To do this, it is necessary to give affirmative reasons that relate to the specific case at hand; mere repetition of the legal text is not sufficient. It is necessary that the facts which the Court considers are comprehensively laid out in the reasoning of the decision.

The challenged decisions did not meet these constitutional requirements. In particular, the courts did not include all circumstances that were relevant for the necessary balancing act, or did not state them sufficiently. The Federal Constitutional Court thus reversed the decisions of the Hamburg Local Court and the Hamburg Regional Court and remitted the case to the Hamburg Local Court.

Languages:

German.

Identification: GER-2013-3-025

a) Germany / **b)** Federal Constitutional Court / **c)** First Chamber of the Second Panel / **d)** 16.10.2013 / **e)** 2 BvR 736/13 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

3.1 General Principles – **Sovereignty**.
4.16 Institutions – **International relations**.
5.1.1.5.2 Fundamental Rights – General questions – Entitlement to rights – Legal persons – **Public law**.
5.3.13.3.1 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts – **"Natural judge"/Tribunal established by law**.

Keywords of the alphabetical index:

Preliminary injunction, conditions / Public international law and foreign relations / Sovereign acts, immunity for / Foreign states, enforcement of judgments against / Sovereignty, interference with.

Headnotes:

1. The narrow conditions under which the Federal Constitutional Court may regulate a situation via a preliminary injunction become even narrower when dealing with a measure which has implications for public international law or foreign relations.

2. If the principal proceedings are not from the outset inadmissible or clearly without merits, and if their outcome is unclear, the Federal Constitutional Court has to balance the consequences and weigh the disadvantages that would ensue if a preliminary injunction were not issued while the constitutional complaint were successful in the principal proceedings against the disadvantages that would ensue if the requested preliminary injunction were issued while the principal proceedings were unsuccessful.

Summary:

I. The applicant in this case is the Hellenic Republic. A Greek citizen (hereinafter, the "claimant") filed a claim against the Hellenic Republic before the Munich Labour Court, requesting that he be paid a certain amount of money that the Hellenic General Consulate retained from his monthly pay-checks, money which the General Consulate considered to be tax on the claimant's income. The Munich Labour Court rendered a partial judgment by default in May 2011 and, in June 2011, issued the claimant with an enforceable copy of the judgment. The applicant challenged this successfully before the Munich Regional Labour Court. However, the Federal Labour Court reversed its decision in February 2013 and rejected the applicant's complaint against the order by the Munich Labour Court.

In its constitutional complaint, the applicant claimed a violation of the second sentence of Article 101.1 of the Basic Law. It argued that the Federal Labour Court should have recognised the Hellenic Republic's tax-related measure as a sovereign act. It should thus have rejected the claimant's complaint against the decision by the Regional Labour Court. The applicant further argued that there was relevant case-law on this issue by the Federal Labour Court and the Federal Constitutional Court. If the Federal Labour Court wanted to deviate from this or refuse to see the measure as a sovereign act, it would have had to refer the matter either to the Grand Panel pursuant to § 45.2 of the Labour Courts Act, or to the Federal Constitutional Court pursuant to Article 100.2 of the Basic Law. The Court, it claimed, had failed to do so in an arbitrary manner.

In its application for a preliminary injunction, the applicant requested to temporarily stay the compulsory enforcement of the partial judgment by default that the Munich Labour Court had issued in May 2011.

II. The Federal Constitutional Court found that the requirements for issuing a preliminary injunction were met, and it stayed the compulsory enforcement of the partial judgment by default by the Munich Labour Court.

This decision was based on the following considerations:

The application for a preliminary injunction was neither inadmissible from the outset, nor clearly without merits, since not only national public-law legal persons, but also foreign public- and private-law legal persons can invoke the second sentence of Article 101.1 of the Basic Law. The balancing that is required under § 32 of the Federal

Constitutional Court Act thus resulted in a positive outcome for the applicant:

If the requested preliminary injunction was issued and the constitutional complaint later found to be unfounded, the compulsory enforcement of the partial judgment by the Munich Labour Court, which was not yet final, would only have been delayed for the claimant. On the claimant's side, the issue of a preliminary injunction would only lead to a delay in the settlement of claims, some of which were more than ten years old. There appeared to be no other important issues at stake, notably no irrevocable disadvantages or threats to his livelihood.

If, however, a preliminary injunction was not issued and the constitutional complaint later found to be well-founded, the situation would have entailed severe disadvantages. While the enforcement of judgments against foreign states is not generally impermissible according to the general rules of public international law, it is recognised that states have immunity with regard to claims that derive from sovereign acts. In any case, to access the assets of a foreign state constitutes a particularly severe interference with its sovereignty. Moreover, an inadmissible compulsory enforcement against a foreign state would entail the danger that the Federal Republic of Germany would suffer severe disadvantages in the area of foreign relations. This has to be a major concern in the overall balancing, since it could lead other subjects of international law to doubt Germany's commitment to public international law and its willingness to abide by customary international law in the future.

Languages:

German; English (on the Court´s website).

Identification: GER-2013-3-026

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 23.10.2013 / **e)** 1 BvR 1842/11, 1 BvR 1843/11 / **f)** / **g)** to be published in the Federal Constitutional Court´s Official Digest / **h)** *Neue Juristische Wochenschrift* 2014, 46-51; CODICES (German).

Keywords of the systematic thesaurus:

3.17 General Principles – **Weighing of interests**.
5.4.4 Fundamental Rights – Economic, social and cultural rights – **Freedom to choose one's profession**.
5.4.5 Fundamental Rights – Economic, social and cultural rights – **Freedom to work for remuneration**.

Keywords of the alphabetical index:

Professional services, remuneration / Counteracting social and economic imbalances by mandatory statutory law / Conflicting fundamental rights / Copyright law, right to equitable remuneration / Private autonomy / Non-retroactivity, principle.

Headnotes:

1. To counteract social or economic imbalances, the legislator may limit by mandatory statutory law the freedom to agree on payment for professional services in individual contracts, a freedom protected by Article 12.1 of the Basic Law.

2. A copyright provision that grants the right to have the adequacy of contractually agreed remuneration for the exploitation of a work reviewed by a court is compatible with the Basic Law.

Summary:

I. The applicant, a hardcover publisher, challenged § 32 of the Act on Copyright and Related Rights (hereinafter, the "Act"), as well as two decisions by the Federal Court of Justice on the adequacy of translators' fees in publishing, which were based on this provision. § 32 of the Act gives authors the opportunity to ask the courts for a review of the adequacy of their remuneration for contracts on the granting of exploitation rights and on permission for the exploitation of their work. If the agreed compensation is not equitable, the author may require the other party to consent to a modification of the agreement so that the author is granted equitable remuneration. This provision entered into force on 1 July 2002. In addition, the third sentence of § 132.3 of the Act stipulates that the provision also applies to contracts concluded between 1 June 2001 and 30 June 2002, provided that the right or permission granted was used after 30 June 2002.

Under contracts with the applicant, the plaintiffs in the initial proceedings translated a non-fiction book and a novel. In both cases, the Federal Court of Justice reversed the judgments of the lower courts in part and ordered the applicant to pay the plaintiffs

additional money, as well as to consent to an increase of the plaintiffs' shares in sales fees and ancillary rights.

II. The Federal Constitutional Court decided that the constitutional complaint was unfounded.

It found § 32 of the Act to be compatible with the freedom of occupation (Article 12.1 of the Basic Law). This fundamental right also encompassed the freedom to bindingly negotiate remuneration for professional services. While the legislator could limit this freedom by mandatory statutory law to counteract social and economic imbalances, it had to recognise the conflicting fundamental rights and – taking account of its mandate to ensure a social state – balance them according to the principle of practical concordance in such a way that they were as effective as possible for all parties. The legislator had a broad margin of appreciation for creating such a balance. It was the legislator's political responsibility to assess the economic and social factors relevant to the conflict, and to forecast future developments and effects of its regulations.

The Court noted that the legislator had assumed that the authors' equitable participation in the economic success of their labour and their works was only partially guaranteed. It found that § 32 of the Act was intended to help, in particular, low-income authors who are in a weak negotiating position to put their copyright to economic use, and that the judicial review of the adequacy of an author's remuneration adequately balanced the fundamental rights of the different parties. Copyright law was based on the general principle that authors are to share equitably in the economic success of their works, which was laid down in the participation principle of the second sentence of § 11 of the Act. The author's right to equitable remuneration, the Court added, was subject to international and European guarantees.

The Court recognised that the provision considerably impaired the exploiters' freedom to practice an occupation, since the freedom to negotiate the content of remuneration agreements with their authors was an important part of their professional practice as well as an essential aspect of private autonomy. The Court also considered that § 32 of the Act limits the function of a contract to provide security for both parties with regard to legal questions and planning.

An overall assessment, however, showed that the impairment of the exploiters' freedom to practice an occupation was not disproportionate to the protection of the authors' interest in an equitable share in the economic success of their works. § 32 of the Act did not completely eliminate the exploiters' options to negotiate the amount and conditions of the authors' remuneration, but merely excluded agreements on inadequately low remuneration. The provision thus required a comprehensive consideration of all relevant circumstances.

The Court further found that it did not violate the principle of non-retroactivity pursuant to Article 20.3 of the Basic Law that the transitional provisions of the third sentence of § 132.3 of the Act required § 32 of the Act to apply to contracts concluded before the new regulation's entry into force. The legislator was seeking to prevent, via the retroactive effect, a situation where works for which contracts had already been signed, and for which no additional compensation would have to be paid, had to compete with works whose exploitation rights were transferred under the new regulation. This sufficed to justify the new regulation's retroactive effect during the short period of 13 months.

Languages:

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

Identification: GER-2013-3-027

a) Germany / **b)** Federal Constitutional Court / **c)** First Chamber of the Second Panel / **d)** 05.11.2013 / **e)** 2 BvR 1579/11 / **f)** / **g)** / **h)** CODICES (German, English).

Keywords of the systematic thesaurus:

2.1.1.4.19 Sources – Categories – Written rules – International instruments – **International conventions regulating diplomatic and consular relations**.
2.1.3.2.3 Sources – Categories – Case-law – International case-law – **Other international bodies**.
5.3.13.17 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Rules of evidence**.

Keywords of the alphabetical index:

Public international law violation / Foreigner, arrest, consular rights, advice / Public international law, Constitution, openness to / Statutory international law, application of.

Headnotes:

1. The regular courts must take the International Court of Justice's case law on consular rights into consideration. If they fail to do so, the person concerned can, under certain conditions, challenge this as a violation of his right to a fair trial (Article 2.1 of the Basic Law).

2. According to the German law on criminal procedure, the failure to instruct somebody about his consular rights can be challenged as a relative reason for an appeal on law via a complaint against procedural irregularities (*Verfahrensrüge*, § 337 and first sentence of § 344.2 of the Code of Criminal Procedure, hereinafter, the "Code"). This ensures that a violation of public international law does not generally remain without consequences.

3. Public international law does not prescribe that evidence must always be inadmissible in case of a violation of the obligation to instruct pursuant to Article 36.1 of the Vienna Convention on Consular Relations (hereinafter, the "Convention"); the Federal Court of Justice can thus use what is known as the "balancing approach" when assessing the consequences of such failure to instruct.

4. It is not objectionable to require that, if a judgment is to be reversed in case of a failure to instruct, the judgment must be based on the procedural irregularity. The International Court of Justice also does not require that a violation of public international law be sanctioned in each and every case; instead, there has to be a causal link between the disadvantage to the person affected and the violation of public international law.

Summary:

I. The constitutional complaint concerns the question of whether the Federal Court of Justice complied with its constitutional duty to take the International Court of Justice's case-law on the rights pursuant to Article 36 of the Convention into consideration.

Pursuant to Article 36.1 of the Convention, if a foreigner is arrested, the authorities have to immediately notify the consular post of his home state. The consular officers have the right to contact the arrested person and to ensure his legal representation. Under Article 36.1.b.3 of the Convention, the arrested person must be told about these rights straightaway.

The Regional Court convicted the applicant, a Turkish citizen, of blackmail and use of force against life or limb causing death in conjunction with attempted robbery causing death, and sentenced him to a prison sentence of eleven years.

The applicant challenged this judgment on legal grounds, claiming that before his interrogation by the police, he had not been instructed pursuant to Article 36.1.b.3 of the Convention. The Federal Constitutional Court's Fifth Criminal Chamber dismissed this appeal twice; in both cases the applicant challenged the respective decision via a constitutional complaint. Both times, the Constitutional Court revised the decision since the Federal Court of Justice had not sufficiently taken into account the International Court of Justice's case-law. After the second constitutional complaint, the Court remitted the case to a different Criminal Chamber of the Federal Court of Justice. It again struck out the applicant's appeal, but it gave a very detailed reasoning.

In his constitutional complaint, the applicant claimed a violation of his rights under Article 2.1 in conjunction with Article 20.3 of the Basic Law (fair trial), as well as under sentence 2 of Article 101.1 and Article 3.1 of the Basic Law (prohibition of arbitrariness).

II. The Federal Constitutional Court refused to admit the constitutional complaint for decision, stating that the applicant's rights had not been violated.

In terms of the right to a fair trial (Article 2.1 in conjunction with Article 20.3 of the Basic Law), the decision was based on the following considerations.

The regular courts are obliged to take the International Court of Justice's case-law on consular rights into consideration. This duty derives from the Constitution's openness to public international law in conjunction with the judicature being bound by law and justice. The regular courts must take notice of the relevant case-law and consider it. However, the constitutional obligation to consider relevant public international law will only be violated if the International Court of Justice's case-law has been understood in a clearly erroneous way. Its judgments usually concern a different legal order, and it is not always easy to decide how to apply its determinations in the German legal system. The regular courts must consider and apply the relevant statutory public international law like any other federal statutory law within the limits of a methodologically justifiable interpretation. To misjudge the scope of protection of a violated procedural provision can interfere with the accused person's right to a fair trial as much as to prescribe overly narrow requirements for regarding unlawfully obtained evidence as inadmissible.

Following these criteria, the Federal Court of Justice fulfilled its obligation to consider the International Court of Justice's relevant case-law when assessing the consequences of a violation of Article 36.1.b.3 of the Convention. It took notice of and comprehensively considered the requirements that followed from the case-law of the International Court of Justice.

The fact that, under the German law on criminal procedure, an appeal on legal grounds pursuant to § 337 of the Code can be directly based on the failure to instruct, which constitutes a violation of public international law, ensures that a violation of public international law does not generally remain without consequences.

It is not necessary to require that because of the failure to instruct, the evidence be generally inadmissible, or that the procedural violation be compensated in another way. The Federal Court of Justice could decide within the scope of a balancing approach whether the evidence was inadmissible. In this context it could consider that the applicant had been properly instructed pursuant to § 126.1 and § 163a of the Code. The Federal Court of Justice did not have to consider that the applicant's second interrogation by the police happened without legal counsel. At this point, the applicant had already consulted a lawyer, which means that at least the protective purpose of the public international law obligation had been met.

The Federal Court of Justice was also not obliged to make a deviation referral *(Divergenzvorlage)* pursuant to § 132.2 of the Law on the Constitution of Courts, and therefore there was no violation of sentence 2 of Article 101.1 of the Basic Law.

Languages:

German; English (on the Court´s website).

Identification: GER-2013-3-028

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 17.12.2013 / **e)** 1 BvR 3139/08, 1 BvR 3386/08 / **f)** / **g)** / **h)** CODICES (German, English).

Keywords of the systematic thesaurus:

3.17 General Principles – **Weighing of interests**.
3.18 General Principles – **General interest**.
5.3.6 Fundamental Rights – Civil and political rights – **Freedom of movement**.
5.3.9 Fundamental Rights – Civil and political rights – **Right of residence**.
5.3.13.2 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Effective remedy**.
5.3.39.1 Fundamental Rights – Civil and political rights – Right to property – **Expropriation**.

Keywords of the alphabetical index:

Social, regional and urban relations, protection of / Open cast lignite mining / Condemnation of land / Forced resettlement, protection against / Homeland, right to *(Recht auf Heimat)*.

Headnotes:

1. Under Article 14.3 of the Basic Law, expropriation can only be justified by a sufficiently weighty public interest objective, the determination of which is reserved for the parliamentary legislator. The law must stipulate sufficiently clearly the purpose, the conditions under which and the projects for which expropriations are permissible. Expropriation cannot simply be justified for "a project serving the common good".

2. If an expropriation serves a project that is to further a public interest objective pursuant to the first sentence of Article 14.3 of the Basic Law, the expropriated good must be indispensable for the realisation of the project.

A project is necessary within the meaning of Article 14.3 of the Basic Law if it may reasonably be required for the public good because it substantially contributes to achieving the public interest objective.

3. An expropriation requires an overall assessment of, on the one hand, all public and private interests that exist in favour of the project, and, on the other hand, the public and private interests affected by its realisation.

4. The guarantee of effective legal protection against violations of the right to property is only sufficient if legal protection against the taking of property is available so early that, with regard to preliminary determinations or the actual execution of the project, one can still realistically expect an open-ended review of all expropriation requirements.

5. The fundamental right to freedom of movement does not grant a right to take up residence and to remain in places in those parts of the Federation's territory where regulations on real estate or land use conflict with a permanent residence, as long as they apply generally and are not intended to specifically target the freedom of movement of certain persons or groups of persons.

6. Article 14 of the Basic Law also protects the existence of specific (residential) property with regard to its established social and urban relations, provided these relations are tied to land-connected property rights.

Article 14 of the Basic Law grants those whose property rights are affected by extensive resettlement projects a right to have the specific scale of the resettlements and the ensuing hardships for the various persons affected to be taken into consideration in the overall assessment.

Summary:

I. The *Garzweiler* opencast lignite mine in the federal state of North Rhine-Westphalia is based on lignite plans from 1984 and 1994/1995. By notification of 22 December 1997, the Düren Mining Office officially approved the "framework operating plan for the *Garzweiler I/II* opencast mine".

The applicant in the proceedings 1 BvR 3139/08 owns a piece of land in the mining area. He lives in a residential house built on this land. His constitutional complaint challenged the official approval notification of the Düren Mining Office, as well as the decisions by the authorities and administrative courts that had confirmed it.

The applicant in the proceedings 1 BvR 3386/08 is a nature conservation association that is recognised in North Rhine-Westphalia. In 1998, it bought a piece of land, which had been scheduled to be utilised for the mining project. By order of 9 June 2005, the Arnsberg district government expropriated the association and transferred the property to the project developer. The applicant's constitutional complaint challenged the order of condemnation *(Grundabtretungsbeschluss)* by which the Arnsberg district government had exercised the power of eminent domain, as well as the court decisions that had confirmed this order.

II. The Federal Constitutional Court decided that the constitutional complaint in the proceedings 1 BvR 3386/08 was, to the extent that it was admissible, also well-founded. The applicant had been expropriated by the challenged condemnation of its land; its fundamental rights under the first sentence of Article 14.1 and the forth sentence of Article 19.4 of the Basic Law had been violated. This finding was based on the following considerations:

Pursuant to Article 14.3 of the Basic Law, an expropriation can only be justified by a sufficiently weighty public interest objective, the determination of which is reserved for the parliamentary legislator. For this determination, the legislator has a margin of appreciation which is subject to limited review by the Constitutional Court. The law must stipulate sufficiently precisely for which purpose, under what conditions, and for what kind of projects expropriations are permissible. In case of expropriations for the benefit of private parties which only indirectly serve the common good, stricter requirements have to be met. A project is necessary within the meaning of Article 14.3 of the Basic Law if it may reasonably be required for the public good because it substantially contributes to achieving the public interest objective. The expropriation itself, however, is only necessary if the expropriated good is indispensable for the realisation of the project. The guarantee of effective legal protection against violations of the right to property is only sufficient if legal protection against the taking of property is available so early that, with regard to preliminary determinations or the actual execution of the project, one can still realistically expect an open-ended review of all expropriation requirements.

§ 79.1 of the Federal Mining Act (hereinafter, the "Act") is in accordance with Article 14.3 of the Basic Law, as long as its public interest provision is interpreted in conformity with the Constitution. Partially inadequate are, however, the expropriation provisions of the Act with respect to the required overall assessment and the necessary effective legal protection.

The challenged decisions by the authorities and courts violate the applicant's rights under Article 14.1 and 14.3 of the Basic Law because they have not made the required overall assessment with regard to the *Garzweiler* opencast mine and because they are based on an interpretation of the Act which, at that time, had a structural deficit with regard to legal protection.

The Federal Constitutional Court decided, based on the considerations below, that the constitutional complaint in the proceedings 1 BvR 3139/08 was admissible, but unfounded.

The challenged official approval of the framework operating plan for the *Garzweiler* opencast mine does

not interfere with the applicant's fundamental right to freedom of movement (Article 11 of the Basic Law).

Article 11 of the Basic Law protects the right to remain at the place chosen in one's exercise of the right to freedom of movement, and thus generally protects against forced resettlement. However, it does not grant a right to take up residence and to remain in place in those parts of the Federation's territory where regulations on real estate or land use conflict with a permanent residence. Provided they are of general application and are not intended to specifically target the freedom of movement of certain persons or groups of persons, such provisions do not affect the scope of Article 11.1 of the Basic Law. An independent right to a homeland *(Recht auf Heimat)* is not guaranteed by Article 11.1 of the Basic Law. The affected persons' particular hardships, which result from the loss of social, regional and urban relations, can be considered in the context of the fundamental rights protection under Article 14.1 and 14.3 of the Basic Law, insofar as interferences with the right to property are concerned, and otherwise under Article 2.1 of the Basic Law.

The interference with the applicant's right to property (Article 14 of the Basic Law) as a result of the official approval of the framework operating plan is justified under the Constitution.

The scope of Article 14 of the Basic Law also includes established social and urban relations. The official approval of the framework operating plan does not deprive the applicant of the ownership of his property but it does interfere with it since it contains, *inter alia*, the finding that the opencast mine project is, in general, approvable. Because of the resulting advance effects, the interference with the right to property is only justified if the conditions for an expropriation are met at least in principle. This is the case if the public interest objective pursued by the opencast mining project derives from a sufficiently precise statutory public interest provision, if the project is reasonably required to achieve the public interest objective, if the decision-making process complies with minimum constitutional requirements, and if the official approval is reasonably based on a comprehensive overall assessment.

The mining of lignite implements a public interest objective which is sufficiently defined by law and which is sufficiently viable. The Federation and the federal states have considerable flexibility and a wide margin of appreciation in their choice of energy sources. The *Garzweiler* opencast lignite mine is necessary for the public interest objective to significantly contribute to the desired energy mix for the state of North Rhine-Westphalia. While the statutory provisions for the official approval of an opencast lignite mine project have shortcomings, the actual steps in the procedure that led to the official approval of the framework operating plan for the *Garzweiler* opencast lignite mine do not violate the constitutional minimum requirements.

Languages:

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

Hungary
Constitutional Court

Important decisions

Identification: HUN-2013-3-008

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 04.10.2013 / **e)** 24/2013 / **f)** On the constitutional review of the Nullity Act / **g)** *Magyar Közlöny* (Official Gazette), 2013/164 / **h)**.

Keywords of the systematic thesaurus:

3.4 General Principles – **Separation of powers**.
3.9 General Principles – **Rule of law**.
5.3.13.14 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Independence**.
5.3.31 Fundamental Rights – Civil and political rights – **Right to respect for one's honour and reputation**.

Keywords of the alphabetical index:

Amnesty / Conviction, change / Pardon, restriction / Hooliganism / Riot.

Headnotes:

An Act which invalidates convictions for vandalism, use of force and hooliganism related to the 2006 riots based solely on police reports is not unconstitutional.

Summary:

I. Act XVI of 2011 concerning the remedy of convictions following the dispersal of crowds at demonstrations in autumn of 2006 (hereinafter, the "Nullity Act") had been challenged by twenty ordinary judges. They contended that the Nullity Act violated a number of provisions of the Fundamental Law, such as the principle of the rule of law, the separation of powers, judicial independence, human dignity and the right to good reputation.

II. The Constitutional Court held in its decision that the Nullity Act was not contrary to the Fundamental Law. The Constitutional Court decided that constitutional requirements in the field of criminal law shall be enforced, taking into consideration the specificity of the legal institution of nullity.

The Constitutional Court held that the legislator has the right to adopt an Act in order to do justice by implementing its political aims, but conformity with the Fundamental Law must always be ensured. The constitutional requirements that are specified in the field of criminal law must be applied, taking into consideration the specificities of the legal institution of nullity.

The Court declared that altering final verdicts for the benefit of the convicted person does not constitute a violation of the requirements of the rule of law. According to the Court, the lawmaker did not violate the principle of the separation of powers and judicial independence when it annulled by law those verdicts that convicted participants in demonstrations in autumn 2006. Although Parliament assigned tasks to the courts, the independence and self-determination of the judiciary, which are ensured in the Fundamental Law, have not been derogated.

The Court stated that although the lawmaker could have chosen other solutions in order to resolve the question of the convictions – for example, by granting general amnesty by law – after having thoroughly examined the experience of other States, the Court concluded that alternative solutions would also have posed problems and would not have offered a more effective remedy. The Court declared that when the lawmaker has to address extraordinary situations, it should have the freedom to decide how to secure social reconciliation, provided that the provisions of the Fundamental Law are not violated.

III. Justice Imre Juhász and László Salamon attached concurring opinions and Justices Elemér Balogh, András Bragyova, László Kiss and Miklós Lévay judges attached dissenting opinions to the decision.

Supplementary information:

The Act in question was drawn up by current Constitutional Court Justice István Balsai in 2010, when he was a Fidesz MP, therefore he did not take part in delivering the ruling.

Languages:

Hungarian.

Identification: HUN-2013-3-009

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 05.12.2013 / **e)** 36/2013 / **f)** On the constitutional review of judicial case transfer / **g)** *Magyar Közlöny* (Official Gazette), 2013/202 / **h)**.

Keywords of the systematic thesaurus:

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950**.
2.2.1.4 Sources – Hierarchy – Hierarchy as between national and non-national sources – **European Convention on Human Rights and constitutions**.
5.3.13 Fundamental Rights – Civil and political rights – **Procedural safeguards, rights of the defence and fair trial**.
5.3.13.3.1 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts – **"Natural judge"/Tribunal established by law**.
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:

Lawful judge, principle / Judicial case, transfer.

Headnotes:

A regulation, previously in force, which had allowed the transfer of judicial cases, was contrary to the right to a fair trial under both the Fundamental Law and the European Convention on Human Rights; in particular, the principle of the lawful judge and the right to an impartial court. The regulation failed to fully define instances in which case transfer was permissible, authorised the President of the National Office for the Judiciary to appoint the acting court at his or her discretion, and did not provide any remedy for the concerned person against the decision of the President of the National Office for the Judiciary concerning the case transfer.

Summary:

I. The defendants in two different criminal cases – which had been transferred from the competent courts to other courts – challenged the case transfer regulation as being contrary to the Fundamental Law and international human rights treaties, including the European Convention on Human Rights. The petitioners argued that the case transfer, which was applied in their cases as well, violated the essential guarantees of justice.

Since the petitioners did not have the right to initiate the review from the point of view of international law, the Court in this respect rejected the petition, but at the same time *sua sponte* examined whether the concerned provision was contrary to an international treaty; namely, the European Convention on Human Rights. As the Constitutional Court has taken into consideration if certain fundamental rights – i.e. the essential content of fundamental guarantees of justice – are defined in the Fundamental Law in the same way as in the Convention, the level of legal protection provided by the Constitutional Court cannot be lower than the level of legal protection provided by the European Court of Human Rights.

II. The Constitutional Court declared that the concerned provisions, which had since been repealed, violated two requirements of fair trial: the principle of the lawful judge and the right to an impartial court.

The Constitutional Court pointed out that the requirement concerning the courts – that are established by an Act in accordance with the Fundamental Law and the Convention – involves the principle of the lawful judge. This means the right to a judge designated by a pre-established distribution of cases and based on pre-defined rules of competences and jurisdiction in an Act. The challenged regulation did not meet this requirement, given that some conditions of the transfer of the cases were not defined in the Act. The concerned regulation authorised the President of the National Office for the Judiciary to appoint the acting court at his or her discretion, which resulted in violation of the principle of the lawful judge.

The Court referred to the Venice Commission opinions given on the Cardinal Acts on the Judiciary CDL-AD(2012)001, CDL-AD(2012)020, paras 60-74, 90-91 and the CDL-AD(2013)012 opinion of the Venice Commission on the Fourth Amendment to the Fundamental Law (paras 73-74). In these documents, the transfer of cases has been strongly criticised by the Venice Commission. According to the Commission, the system of transferring cases was not in compliance with the principle of the lawful judge.

In addition, the Constitutional Court declared that the concerned regulation, without any guarantees, also violated the requirement of the right to an impartial court. The transfer of cases may comply with the previously mentioned requirements only when the rules for the transfer of cases are transparent, pre-defined and clear. The objective requirement for impartiality may be fulfilled only when the regulation ensures adequate guarantees to exclude any doubt

concerning the partiality of the court. The Constitutional Court held that the challenged provisions fulfilled neither the requirement of impartiality nor the appearance of impartiality that are guaranteed in the Fundamental Law and the Convention.

The Court accordingly held that regulation also to be contrary to the Fundamental Law and the Convention given that it did not provide any remedy for the concerned person against the decision of the President of the National Office for the Judiciary concerning the case transfer.

The petitioner also requested review of the decision of the President of the National Office for the Judiciary. According to the Court, this decision was not a judgment, but an administrative decision. As a result, to review it as a constitutional complaint was not possible, thus this part of the petition was rejected.

III. Justices István Balsai, Egon Dienes-Oehm, Imre Juhász, László Kiss, Barnabás Lenkovics, Béla Pokol, László Salamon and Mária Szívós attached dissenting opinions and Justice Miklós Lévay attached a concurring opinion to the decision.

Cross-references:

- no. 166/2011, *Bulletin* 2011/3 [HUN-2011-3-008].

Languages:

Hungarian.

Ireland
Supreme Court

Important decisions

Identification: IRL-2013-3-002

a) Ireland / **b)** Supreme Court / **c)** / **d)** 14.10.2013 / **e)** SC 419/2012 / **f)** Gilligan v. Ireland and Others / **g)** [2013] IESC 45 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.4 General Principles – **Separation of powers**.
3.16 General Principles – **Proportionality**.
3.21 General Principles – **Equality**.
5.3.5 Fundamental Rights – Civil and political rights – **Individual liberty**.

Keywords of the alphabetical index:

Separation of powers, criminal law, sentencing, proportionality, equality before the law, discrimination, custodial sentence, consecutive sentence.

Headnotes:

Legislation which specifies the powers of a court in the sentencing of persons who, while serving a sentence in prison for other offences, commit a further offence is not unconstitutional, is not discriminatory or is not disproportionate.

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 civil, criminal and constitutional law. The decision of the Supreme Court summarised here is an appeal from a decision of the High Court, and is concerned with the sentencing power of the judiciary in criminal law matters. The appellant argued that Section 13 of the Criminal Law Act 1976 is unconstitutional. Section 13 specifies the powers of a court in the sentencing of persons who, while serving a sentence in prison for other offences, commit a further offence. It provides that custodial sentences for such offences are to be consecutive. The appellant argued that the mandatory consecutive nature of such sentences is an impermissible

invasion of the judicial powers of government, and offends against the principle of the separation of powers which is guaranteed in the Constitution as a protection of the right to liberty. The appellant, at the time of the appeal, was serving a number of sentences of imprisonment. The first sentence was a lengthy one of 20 years for drugs-related offences. During this time, he assaulted a prison officer, and for this he was sentenced to a further two years imprisonment to run consecutively after the 20 year term. While serving this sentence in turn, he was convicted in the District Court of two further offences in relation to the possession of mobile phones while in prison and sentenced to consecutive terms of imprisonment. The appellant also argued that he is the subject of discrimination and denied the right to equality before the law because Section 13 is not applicable to persons serving a mandatory life sentence, yet it applies to the appellant, even though in effect the sentence he is serving is lengthier than many life sentences.

II. The written judgment of the Court was delivered by Mac Menamin J. The Supreme Court considered carefully the respective roles of the executive, legislature and judiciary when considering the roles of the legislature and judiciary in the sentencing of offenders. The Supreme Court surveyed relevant Irish case law tracing the separation of powers amongst the three branches of government. The Supreme Court found that Section 13 does not involve the executive selecting the sentence. It noted that the executive has no role at all in the trial process and that a sentence of a particular type or term is not mandatory.

The Supreme Court also noted that one of the hallmarks of the exercise of judicial discretion in sentencing is the application of the overriding principle of proportionality i.e. that in general, every sentence must be proportionate to the gravity of the offence, and take into account the personal circumstances of the offender. The term "proportionality" is used in the sense of the judicial task of striking a balance between the particular circumstances of the offence, and the circumstances of the offender to be sentenced. This applies to every case where the offence, on conviction, carries a maximum, as opposed to a mandatory sentence. The Court held that the appellant could not argue that by virtue of his status as a prisoner serving a lengthy term of imprisonment, he will be subject to a sentence which is either disproportionate or unduly severe. This is because Section 13 does not mandate any standard or minimum level of punishment in any given case. It must be presumed that any sentence imposed according to Section 13.1 must be proportionate. A judge has a constitutional duty to ensure proportionality when imposing sentences for all offences. If an offender considers that the sentence imposed is unduly severe, he or she will have the right to appeal to the relevant appeal court in order to ensure any error in principle is cured.

The Supreme Court made reference to Article 49.3 of the Charter of Fundamental Rights of the European Union which provides that: "The severity of penalties must not be disproportionate to the criminal offence". The Supreme Court noted that the appellant actually availed of, and benefited from, the application of the principle of proportionality in the sentences imposed on him.

The Supreme Court then examined the "totality concept" which is a form of check to ensure that where proportionate sentences are chosen for each offence the court may when appropriate, adjust that overall sentence, or the last sentence imposed, in order to achieve proportionality and overall fairness. The Supreme Court held that in carrying out the constitutional function of sentencing, a court (except in a case where there is a true mandatory sentence, which does not arise here) must balance the considerations of individuation and consistency, applying the principle of proportionality, which may involve considering the totality of the sentence as part of the process. The Court found that it cannot be said that the court's discretion, in carrying out the sentencing process, is impermissibly fettered. The Supreme Court noted that if the legislative provision were to have the effect of preventing the courts from differentiating between the circumstances of each case, or each offender, constitutional questions might arise as a court would be prevented from considering all the circumstances of the case. But this was not so in this case.

The Supreme Court held that Section 13 does not demonstrate any discrimination which the appellant argued was the case. The legislature placed emphasis on the elements of deterrence and punishment which are part of a necessary and rational criminal sanction. The sentencing regime in the Act seeks deterrence to dissuade an offender in a specific category from committing further offences.

The Supreme Court also held that Section 13 is not arbitrary in its scope or effect. It takes effect only in a manner which is legitimate to its legislative purpose, relevant to that purpose, and allows for constitutional fairness. The general principles applicable to sentencing remain the same. The Supreme Court noted that it is true that there is an effect arising from the consequence that a consecutive sentence would follow a conviction – but in this case, such situation can be justified on the basis that the nature and

circumstances of such an offence are grave. The rule is intended to advance a rational, logical and legitimate goal, that is, to mark the gravity of a situation where a prisoner, while serving a term of imprisonment, commits another offence during that time. Furthermore, where it is judicially determined that a sentence of imprisonment should be imposed on a person for an offence committed while he is already serving a sentence, it would defeat the legitimate purpose of such a sentence, including its deterrent effect, if the sentence was not consecutive but concurrent to the sentence already being served. The Supreme Court held that there is nothing in the legislative provisions which has an arbitrary or discriminatory intent or effect.

In summary, the Supreme Court held that Section 13 does not ascribe a constitutionally questionable role in the administration of justice either to the executive or the legislature. It is to be presumed that the Section will be applied in a constitutional manner. The Section itself does not prescribe a fixed mandatory sentence; but, rather, only stipulates that, in certain limited conditions, an offender on conviction will receive a consecutive sentence. The provision challenged allows for the application of proportionality by the judiciary in sentencing. There is a rational connection between the nature of the penalty and the harm it seeks to address. For these reasons, the appeal was dismissed.

Cross-references:

- *Gilligan v. Ireland and Others* [2013] IESC 45.

Languages:

English.

Israel
Supreme Court

Important decisions

Identification: ISR-2013-3-003

a) Israel / **b)** Supreme Court (High Court of Justice) / **c)** Panel / **d)** 04.06.2013 / **e)** HCJ 7245/10 / **f)** Adallah v. Ministry of Welfare / **g)** / **h)**.

Keywords of the systematic thesaurus:

3.20 General Principles – **Reasonableness**.
5.2.1 Fundamental Rights – Equality – **Scope of application**.
5.3.1 Fundamental Rights – Civil and political rights – **Right to dignity**.
5.4.14 Fundamental Rights – Economic, social and cultural rights – **Right to social security**.
5.4.19 Fundamental Rights – Economic, social and cultural rights – **Right to health**.

Keywords of the alphabetical index:

Child, care, benefit, reduction / Equality, violation / Health, effective protection / Health, public.

Headnotes:

A cut in child benefit paid on behalf of children who did not receive required vaccination does not violate the right to autonomy or to parental autonomy – in the legal sense of the right – because of the relatively slight degree of coercion latent in the amendment. However, such a cut does violate the constitutional right to equality, due to the considerations underlying the vaccination programme being extrinsic to the social goal of the child benefit arrangement.

The cut is worthy in itself, advancing an important social goal of caring for the health needs of the general population, and those of children in particular. Refraining from undergoing required vaccination presents a health hazard not only to the specific child, but even to the broader public. The principle of mutual responsibility can also justify the measure as being worthy.

Summary:

I. Amendment 113 of the Israeli Social Security Law, 5755-1995 (hereinafter, the "amendment") enables a cut in child benefit paid on behalf of children who did not receive the vaccinations required by the vaccination plan of the Ministry of Health. The amendment refers to a vaccination named MMRV, given to one-year-old infants who were born after 1 January 2012. The petitioners, who are social organisations working for the benefit of the Arab and Bedouin minorities in Israel, as well as organisations whose general purpose is the welfare of children in Israel, petitioned the Supreme Court requesting that the court strike down the amendment as an unconstitutional violation of parents' rights, and because of serious flaws in the process of its passing in parliament.

II. The Supreme Court, sitting as the High Court of Justice, denied the petitions. Justice E. Arbel, who wrote the leading decision, ruled that the flaws in the process of passing the law were not severe enough to warrant judicial intervention. Concerning the amendment itself, Justice Arbel reasoned that the amendment does not violate a person's basic right to dignity, because the petitioners did not establish sufficient factual grounds demonstrating the said violation. She likewise decided that the amendment does not violate the right to autonomy or to parental autonomy – in the legal sense of the right – because of the relatively slight degree of coercion latent in the amendment. Yet, Justice Arbel ruled that the amendment does violate the constitutional right to equality, due to the considerations underlying the vaccination programme being extrinsic to the social goal of the child benefit arrangement. In spite of this, Justice Arbel ruled that the violation meets the four conditions listed in Basic Law: Human Dignity and Liberty. No dispute was presented before the court concerning the constitutionality of the said violation, and the amendment's compatibility with the general values of the State of Israel was likewise not contested. It was further established that the purpose of the amendment, which is augmenting the percentage of children undergoing vaccinations, is a worthy in itself, advancing an important social goal of caring for the health needs of the general population, and those of children in particular. Refraining from undergoing required vaccination presents a health hazard not only to the specific child, but even to the broader public, and based on this Justice Arbel noted that the principle of mutual responsibility can also justify the amendment as being worthy. Moreover, she decided that the resulting violation is proportional, since the constitutional arrangement creates a suitable balance between the rights and interests of related parties, in light of the purpose of the amendment and in consideration of the fact that the amendment entails cutting a financial benefit. Therefore, Justice Arbel decided that the amendment is constitutional, and does not warrant judicial intervention.

III. Justice D. Barak-Erez concurred with the above decision of Justice Arbel, adding that the result is supported by the understanding of child benefits as a means to advancing children's welfare. The requirement to vaccinate children, which benefits not only the public at large but first and foremost the relevant child himself, is thus not extrinsic to the general purpose of child benefits. Further to this, Justice Barak-Erez explained that the legal review of stipulations applied to statutory entitlements must include a number of considerations, including: the relationship between the relevant stipulation and the purpose of the entitlement; the presence of a voluntary element in the relevant stipulation (which does not apply where the stipulation relates to an inherent identity trait, raising a concern for discrimination); the scope of the stipulation (does it apply to the entire entitlement, or only to part of it?). Based on the foregoing factors, Justice Barak-Erez decided that the chosen means of encouraging vaccinations was proportional, based, among other factors, on a comparison with alternative means employed in other countries (such as the exclusion of children who were not vaccinated from educational institutions).

Justice E. Hayut concurred with the decision issued by Justices Arbel and Barak-Erez to deny the petitions, but based on alternative argumentation. Justice Hayut reasoned that the amendment was not in violation of any constitutional right, including the right to equality. The reason given was that the purpose of the amendment is to advance the health of the public, and in this context there is a relevant distinction between parents who choose to have their child vaccinated, and those who refrain from doing so. This distinction justifies, according to Justice Hayut, the differential treatment of the law with regard to child benefits. Justice Hayut deferred the petitioners' claim whereby the lack of correlation between the social purpose of child benefits and the purpose of advancing vaccination among children leads inevitably to a violation of the right to equality, based on the argument that the legislature retains the right to establish a legal mechanism integrating a primary purpose together with secondary purposes. Examples to this principle were supplied principally from the field of taxation law, where the legislature advances secondary social goals in conjunction with the primary aims of taxations. Justice Hayut also noted the difficulty of establishing an "equivalence group" in respect of the previous purpose of the current arrangement standing for constitutional investigation, since the previous purpose is not

normatively superior to the current goal. Yet, Justice Hayut stressed that correlation with the purpose of a given law is not the sole criterion upon which the violation of the constitutional right to equality is reviewed, and based on normative law the question is whether the law is discriminative in relation to "the essential nature of the matter, the basic values of the legal system, and particular circumstances of the case and current social outlooks." Based on these criteria, too, Justice Hayut reached the conclusion that there is a relevant distinction between respective groups of parents, in the light of the need to ensure the health of the public, and augmenting the percentage of children who are vaccinated. In conclusion, Justice Hayut decided that the petitions should be denied.

Languages:

Hebrew.

Identification: ISR-2013-3-004

a) Israel / **b)** Supreme Court (High Court of Justice) / **c)** Panel / **d)** 26.06.2013 / **e)** HCJ 2442/11 / **f)** Shtanger v. The Chairman of the Knesset / **g)** / **h)**.

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
5.3.1 Fundamental Rights – Civil and political rights – **Right to dignity**.
5.3.5.1.1 Fundamental Rights – Civil and political rights – Individual liberty – Deprivation of liberty – **Arrest**.
5.3.5.1.3 Fundamental Rights – Civil and political rights – Individual liberty – Deprivation of liberty – **Detention pending trial**.
5.3.13.13 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Trial/decision within reasonable time**.

Keywords of the alphabetical index:

Appeal, decision of High Court / Appeal, extraordinary, Supreme Court / Appeal, leave to appeal / Appeal, right / Arrest, legality, review / Detention, length / Criminal proceedings.

Headnotes:

Limiting the right to appeal and enabling only an appeal by leave does not infringe the right to liberty, which must also be seen as protecting procedural defences and rights that assure its fulfilment. Revoking procedural rights may, in some cases, infringe on the right to liberty directly, but this must be decided in each instance separately. The right to liberty does not include the right to a second appeal limiting the appeal to an appeal by leave is not equivalent to revoking the right to appeal all together. Giving a second right to appeal in every instance will greatly burden the judicial system. This infringes the litigants rights to end the deliberation within a reasonable period of time.

The Court's authority to extend the period of arrest up to 150 days per instance does limit the constitutional right to liberty. Nonetheless, this limitation withstands the conditions of the limitation clause in the basic law, as it includes checks and balances: court's discretion; power given to highest instance; legal criteria for exercise of discretion.

Summary:

Two amendments to the Criminal Procedure Law (Powers of Enforcement – Arrest), 1996, were ruled constitutional. The First, regarding the limitation of a defendant's right to an appeal by right, distinguished from an appeal by leave. The Second, regarding the court's authority to prolong a defendant's arrest by a period of 150 days, in comparison to the former authority of arrest for only 90 days. In implementing constitutional review, the court must review the infringement of the constitutional right, prior to the reviewing the conditions of the limitation clause enabling such infringement.

I. The Supreme Court denied a petition regarding the constitutionality of two amendments to the Criminal Procedure Law (Powers of Enforcement – Arrest), 1996. The first amendment states that an appeal on certain district court decisions will be granted by leave and not by right. These decisions include district court rulings on appeals on magistrate court decisions regarding arrest, release, violation of probation or second review (second instance appeals), and district court decision's regarding bail (first instance appeals). The second amendment states that in certain instances, justices of the Supreme Court will have the authority, in certain cases, to prolong the arrest of a defendant until the end of proceedings for an additional 150 days after the stated 9 months (repeatedly). Previously, the Court was authorised to prolong the arrest for only 90 days in each instance.

II. In its review, the Court emphasised the importance of differentiating between the phases of the constitutional review. Specifically, the Court emphasised the distinction between the first stage of review, in which the Court reviews whether there was an infringement of a constitutional right, and the second stage of review, which is relevant only if such an infringement occurred, in which the Court reviews if the limitation to the right withstands the conditions of the limitations clause in the basic law. The first stage is meant to define the conceptual scope of the constitutional right. It is meant to define the right's limitations by interpreting it and balancing it with other constitutional rights. The second stage reviews weather an infringement to the defined right withstands the conditions of the limitations clause: if the limitation is anchored in legislation; if it is for a worthy purpose; does is suit the values of the state of Israel as a Jewish and Democratic state and whether it is proportionate. At this stage the scope of protection to the right is defined, as well as the limitations the legislator is faced with when interfering with the right. The Court emphasised the importance of the first phase of the review, even in cases where determining whether an infringement occurred is complex, and when the second phase will lead to the conclusion that the legislation withstands the limitation clause.

Upon viewing the merits regarding the first amendment of the law, the Court ruled that limiting the right to appeal and enabling only an appeal by leave does not infringe the right to liberty. The right to liberty must not be interpreted narrowly as referring only to the arrest itself, but must also be seen as protecting procedural defences and rights that assure its fulfilment. Revoking procedural rights may, in some cases, infringe on the right to liberty directly, but this must be decided in each instance separately. In this case, the Court held that the right to liberty does not include the right to a second appeal. This can be deduced by the general scope of the right to appeal, and by the general rule in Article 17 of the Basic Law: The Judiciary, which grants each plaintiff the right to only two reviews: by a trial court and an appellate court. The Court ruled that the limitation of the right to appeal must be limited and distinguished from the right to ask leave to appeal. Secondly, the Court noted that limiting the appeal to an appeal by leave is not equivalent to revoking the right to appeal all together. Thirdly, limiting the right to appeal enables the promotion of the finality of the deliberation. Finally, giving a second right to appeal in every instance will greatly burden the judicial system. This infringes the litigants' rights to end the deliberation within a reasonable period of time. The Court compared the limitation of the right in procedures of arrest to other judicial decisions, such as giving a final verdict, in which the defendant is granted only one appeal by right.

As for the second amendment to the law, regarding the Court's authority to extend the period of arrest up to 150 days per instance, the Court ruled that in this case the legislation does limit the constitutional right to liberty. Nonetheless, the Court denied the appeal, stating that this limitation withstands the conditions of the limitation clause in the basic law, as it includes checks and balances limiting the infringement of the right. These balances includes the Court's discretion to decided if to prolong the arrest by 90 days or, as an exception, to prolong the arrest by 150 days. Also, the authority has been granted to the highest instance – the Supreme Court. Finally the law names specific conditions which must exist in order to extend the arrest by 150 days – relating to the type of offence; the complexity of the case; having multiple charges, witnesses or defendants, which lead the Justice to the conclusion that the inquiry may not be resolved in a shorter period of time.

Languages:

Hebrew.

Identification: ISR-2013-3-005

a) Israel / **b)** Supreme Court (High Court of Justice) / **c)** Panel / **d)** 16.09.2013 / **e)** HCJ 7146/12 / **f)** Adam v. The Knesset / **g)** / **h)**.

Keywords of the systematic thesaurus:

5.1.1.3.1 Fundamental Rights – General questions – Entitlement to rights – Foreigners – **Refugees and applicants for refugee status**.
5.3.1 Fundamental Rights – Civil and political rights – **Right to dignity**.
5.3.5.1.1 Fundamental Rights – Civil and political rights – Individual liberty – Deprivation of liberty – **Arrest**.
5.3.5.1.2 Fundamental Rights – Civil and political rights – Individual liberty – Deprivation of liberty – **Non-penal measures**.
5.3.5.1.3 Fundamental Rights – Civil and political rights – Individual liberty – Deprivation of liberty – **Detention pending trial**.

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

Keywords of the alphabetical index:

Arrest, legality, review / Detention, length.

Headnotes:

Holding infiltration (illegal migrants) in custody for a period of three years was unconstitutional as it disproportionately limits the constitutional right to liberty determined in Basic Law: Human Dignity and Liberty.

Summary:

I. The amendment of the Prevention of infiltration Law was meant to deal with a recent phenomenon of infiltration into Israel, mainly from the countries of Eritrea and Sudan, amounting to approximately 55,000 illegal migrants currently present in Israel. The Law defines "infiltration" as "a person who has entered Israel knowingly and unlawfully and who at any time between 1947 and his entry was:

1. a national or citizen of the Lebanon, Egypt, Syria, Saudi-Arabia, Trans-Jordan, Iraq or the Yemen; or
2. a resident or visitor in one of those countries or in any part of Palestine outside Israel; or
3. a Palestinian citizen or a Palestinian resident without nationality or citizenship or whose nationality or citizenship was doubtful and who, during the said period, left his ordinary place of residence in an area which has become a part of Israel for a place outside Israel.

Regarding citizens of Eritrea, the State of Israel today applies the international principle of non-refoulement, meaning that the state will not send a person to a place where his life or liberty are in danger. Sending people back to the Republic of Sudan is not possible due to the lack of diplomatic ties with Israel. Therefore, at this stage the illegal migrants cannot be deported, for practical or normative reasons. The amendment allowing imprisonment began to be implemented in June 2012, and at the time of the case approximately 2,000 illegal migrants were in custody pursuant to it.

II. The imprisonment limits the right to liberty enshrined in Basic Law: Human Dignity and Liberty. Therefore, the Court examined whether the limitation of the right to liberty withstands the conditions of the limitations clause in the basic law. It was held that the limitation is made by a statute, and that the point of departure should be that the amendment befits the values of the State of Israel. As for the condition regarding a proper purpose, two purposes of the amendment were discussed: One purpose is preventing illegal migrants from settling in Israel, and the state's need to deal with the implications of the phenomenon. It was held that this purpose does not raise difficulty. The second purpose is the deterrence of other potential illegal migrants from coming to Israel. This raises difficulties, as is treats the person as a means and not as an end, thus limiting his dignity. Most of the Justices were willing to assume that the purpose is proper, noting that in an extreme situation this purpose may become necessary for the state and the preservation of its most basic interests.

The Court then proceeded with the proportionality test. The Court found that there is a rational nexus between taking illegal migrants into custody and preventing their settling in Israel and the negative implications stemming from their presence in Israel. However, according to the data, there are 55,000 illegal migrants in Israel. Of them, only 1,750 are in custody, the maximum volume that could be held at the time of the case. Therefore, there is great doubt whether the purpose is actually fulfilled. The rational nexus between the deterrence purpose and the taking of illegal migrants into custody is not clear. The difficulty stems, *inter alia*, from the disagreement whether the illegal migrants are mere labour immigrants, or refugees fleeing from atrocities in their countries. The numerical data indicate a drastic reduction in the number of illegal migrants reaching Israel since the middle of 2012, but taking illegal migrants into custody was carried out simultaneously with the completion of the border fence between Israel and Egypt, making the contribution of each factor to the decrease in the number of illegal migrants unclear. Nonetheless, the Court assumed that this proportionality subtest is satisfied.

The second subtest of the proportionality test, regarding choosing the least harmful means, is not satisfied. To the extent that the purpose of the amendment is deterrence, there are considerable chances that the border fence between Israel and Egypt will be sufficient. As for the purpose regarding settling in Israel and the negative implications of the infiltration phenomenon, a variety of alternate means that will fulfil that purpose in a less harmful way can be formulated. The Court surveyed the means in which other countries in the world confront similar phenomena without denying liberty for a long period of time.

In obiter, the Court also examined the third subtest of proportionality, regarding the existence of a reasonable ratio between the limitation of the constitutional right and the benefit stemming from the limitation. It was held that this subtest is also not satisfied. Imprisoning the illegal migrants and denying their liberty for a long period of three years is a critical and disproportionate blow to their rights, their bodies and their souls. It is uncontroversial that most of the illegal migrants arrive from countries in which their living conditions are most difficult, and where the human rights situation is very bad. This fact should also be taken into account when measuring the intensity of the limitation.

The Court emphasised that a situation might occur, in which illegal migrants continue to swarm into the State of Israel despite all the other means employed, putting the state in danger of severe harm to its vital interests. In such a situation it may be possible to say that the benefit is greater than the damage, making such provisions proportional.

Preventing illegal migrants from settling in Israel and the negative implications stemming from their presence in Israel is a legitimate deterrent purpose. However, custody does not represent the least harmful way to reach this purpose.

The relief granted in the petition was the annulment of Section 30A.c.3 of the Prevention of Infiltration Law, that determines the taking into custody of illegal migrants for a period up to three years. No separation can be made between the parts of the amendment when its central provision is void. Therefore, all of Section 30a will be annulled, and the existing arrangement in the Entry into Israel law will take its place. This law determines a period of 90 days for examining the causes for release, which is set as the maximum period for examining the cases of all of those in custody. A person whose examination has been completed and regarding whom there is no cause to prevent release – shall be released without delay.

III. Justice N. Hendel concurred with the majority opinion that Section 30A.c.3 must be annulled, but in his opinion there is no need to annul the entire temporary provision. Other parts of the statute contain positive components which are not subject to conditions regarding the length of confinement. Annulling part of the provision enables the legislature to concentrate upon the main issue – determining a different maximum period for custody, in order to complete the legislation without deviating from the 90 day deadline which has been determined.

In President A. Grunis's opinion the law is faulty not because it does not withstand the second subtest of proportionality, but rather because it does not withstand the third subtest, as it does not maintain a reasonable relationship between the period of custody and the advantages stemming from the law.

Languages:

Hebrew.

Kyrgyz Republic
Constitutional Chamber

Important decisions

Identification: KGZ-2013-3-001

a) Kyrgyz Republic / **b)** Constitutional Chamber / **c)** Plenary / **d)** 06.11.2013 / **e)** 8-p / **f)** Madinov O.K. / **g)** Official website and Bulletin of Constitutional Chamber 2014 / **h)**.

Keywords of the systematic thesaurus:

5.3.1 Fundamental Rights – Civil and political rights – **Right to dignity**.
5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression**.
5.3.22 Fundamental Rights – Civil and political rights – **Freedom of the written press**.
5.3.31 Fundamental Rights – Civil and political rights – **Right to respect for one's honour and reputation**.

Keywords of the alphabetical index:

Insults, criminal liability.

Headnotes:

Legislative provisions which attach criminal liability to insulting someone's honour and dignity are not in line with the Constitution.

Summary:

I. Under Article 128 of the Criminal Code, insulting somebody's honour and dignity carries criminal liability. The Criminal Code defines insult as "the deliberate abasement of honour and dignity of another person expressed in an unseemly manner". Under Part 2 of Article 128, an insult in a public statement, in publicly exhibited work or in the media is deemed to be a qualified indicator of the same crime.

The applicants argued that this provision ran counter to constitutional norms, such as the ban on prosecution for dissemination of information defaming the honour and dignity of the individual which is not subject to any restriction, and the principle that nobody should be subject to criminal prosecution for the dissemination of information which discredits or humiliates a person's honour and dignity.

Human rights and freedoms are proclaimed within the Constitution. They are of direct application and determine the meaning and content of norms issued by legislative, executive and local authorities. The honour and human dignity of the person is also proclaimed as an integral part of human rights and freedoms within the Constitution and international treaties (International Covenant on Civil and Political Rights), which are an integral part of the legal system of Kyrgyz Republic; there is a universal right to privacy and the protection of honour and dignity. Everyone, including the judiciary, is entitled to protection from improper collection, storage, disclosure of confidential information and information about the privacy of individuals, and is guaranteed the right to compensation for material and moral damage caused by unlawful activity. However, the Constitution, under Article 33.5, rules out prosecution for the dissemination of information defaming honour and dignity; such actions cannot be considered as a crime. There is no reason to consider as a crime actions against the honour and dignity of the person representing less danger to the public, set out in paragraph 1 of the same Article. Since the norms of Article 128 of the Criminal Code only cover features of one crime, it is necessary to consider them in a close relationship. The Constitutional Chamber found that Article 128 of the Criminal Code was out of line with Articles 20.4.6 and 33.5 of the Constitution.

It observed, however, that the legislator should consider an effective mechanism for the protection of honour and dignity by making appropriate changes and additions to the civil and administrative law, including protective measures in actions aimed at insult.

Languages:

Russian.

Identification: KGZ-2013-3-002

a) Kyrgyz Republic / **b)** Constitutional Chamber / **c)** Plenary / **d)** 19.11.2013 / **e)** 10-p / **f)** Supreme and local courts / **g)** Official website and Bulletin of Constitutional Chamber 2014 / **h)**.

Keywords of the systematic thesaurus:

4.11.1 Institutions – Armed forces, police forces and secret services – **Armed forces**.
5.1.1.4.4 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Military personnel**.
5.2.2.6 Fundamental Rights – Equality – Criteria of distinction – **Religion**.
5.3.18 Fundamental Rights – Civil and political rights – **Freedom of conscience**.
5.3.20 Fundamental Rights – Civil and political rights – **Freedom of worship**.

Keywords of the alphabetical index:

Military service.

Headnotes:

Legislative provisions requiring citizens, undergoing alternative service rather than standard military service because of their religious convictions, to make a payment into an account controlled by the Ministry of Defence are in breach of the Constitution.

Summary:

I. “Alternative service” is a type of service provided for citizens of the Kyrgyz Republic in place of compulsory military service, in accordance with their age, religious beliefs, marital status, criminal record and state of health.

Under the legislative provisions in question, male citizens aged between eighteen and twenty-five, who are not entitled to delay their call up and who have not already undertaken military duty, may be called up for alternative service if they are members of a registered religious organisation the religious doctrine of which does not permit the use of weapons and service in the military forces.

Alternative service requires a payment by civilian employees into a special account of the authorised state organ in charge of defence issues. Money raised in this way goes towards the conducting of assemblies, the improvement of training facilities, enhanced financial security for military personnel, incentives for servicemen and entertainment. Citizens who have completed alternative service and paid the whole sum required will then be included in the list of citizens liable for “call-up of the second category” and will be listed in the reserves.

The applicants had been convicted under Article 351.2 of the Criminal Code for avoidance of alternative service in the military forces. They contended that they were members of the religious organisation “Jehovah’s Witnesses”. Their payment for alternative service would have gone to the account of the Ministry of Defence. This was, in their view, contradictory. They indicated on several occasions their willingness to make the required payment for alternative service to the General Fund of Kyrgyz Republic and other state organs not linked to the Ministry of Defence.

II. Article 56 of the Constitution places citizens under a sacred duty to defend their native country. Military service or its replacement by alternative training is established, in accordance with the Constitution, by the Law on the general military duty of citizens of Kyrgyz Republic and on military and alternative service. Since defence of the native country is a sacred duty and obligation for citizens, the state should create appropriate conditions for its realisation. Liability for avoidance of military service is set out in the Criminal Code.

The problem with the legislation on general military duty and military and alternative service was that it required payment to be made by those undergoing alternative service to the special account of the authorised state organ in charge of defence issues. The rationale behind alternative service is that it is in line with the views of citizens who profess religious doctrines based on peacefulness and the development of peace.

The universal freedoms of conscience and religion are enshrined in Article 32 of the Constitution. Each person is entitled to profess their own religion (or none at all), whether individually or alone. Article 20.3 of the Constitution also stipulates that restrictions on rights and freedoms in pursuit of other aims cannot be established by law to a greater extent than is stipulated by the Constitution.

The State should not expose to suppression or punish in any way those who, from a moral perspective, are excluded from military service or “alternative service” supported by the state and held under its control and leadership.

The Constitutional Chamber found the first paragraph of Articles 32.4, 32.7 and 35.1 of the Law to be in breach of the Constitution. It indicated to the legislature that appropriate changes should be made to the Law without delay.

Languages:

Russian.

Identification: KGZ-2013-3-003

a) Kyrgyz Republic / **b)** Constitutional Chamber / **c)** Plenary / **d)** 27.11.2013 / **e)** 18-p / **f)** Toktonaliev A.S. / **g)** Official website and Bulletin of Constitutional Chamber 2014 / **h)**.

Keywords of the systematic thesaurus:

4.4.6.1.2 Institutions – Head of State – Status – Liability – **Political responsibility**.
4.6.9 Institutions – Executive bodies – **The civil service**.
4.6.10.2 Institutions – Executive bodies – Liability – **Political responsibility**.
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:

Political office, dismissal.

Headnotes:

The impracticability of judicial review of decisions by the President, Parliament or Prime Minister regarding dismissal from political office is not a limitation of the constitutional right to judicial protection. Positions of political power occur in the public sphere and are derived from the implementation of democracy and the rights of citizens to participate in the affairs of the state. They cannot be regulated by employment law.

Summary:

I. Article 427 of the Labour Code regulates the extra-judicial adjudication of individual labour disputes of executives elected, confirmed or appointed by the President of Kyrgyz Republic, the Kyrgyz Parliament, and the Prime Minister of Kyrgyz Republic.

The applicants argued that Article 427 of the Labour Code deprived citizens of the right to judicial protection and thus ran counter to Article 20.5 of the Constitution, which prohibits the enactment of restrictions on the right to judicial protection, and Article 40.1 of the Constitution, which guarantees all individuals judicial protection of their rights and freedoms.

II. The phrase “executives appointed by the President of Kyrgyz Republic, Kyrgyz Parliament, and the Prime Minister of Kyrgyz Republic” covers those who are engaged in political public office.

Under the Constitution and relevant legislation, enforced termination of political service generally consists of compulsory or political retirement (removal from office) in the implementation of which senior officials are usually guided by political discretion. Those taking up political office should understand that they are not immune from dismissal on political grounds.

Those holding political positions can be dismissed without legal basis. This right derives from the specifics of the form of government established by the Constitution. Political liability does not derive from an offence.

The process of dismissal or resignation from state political office established by the Constitution does not imply the existence of any individual dispute. The process is carried out through mutual negotiation and subsequent approval of decisions. In particular, an expression of distrust to the Parliament becomes the basis for resignation if the President so decides. Distrust expressed by local councils to the head of the local public administration becomes the basis for the Prime Minister’s decision to release him or her.

The impracticability of judicial review of decisions by the President, Parliament or Prime Minister regarding dismissal from political office is not a limitation of the right to judicial protection guaranteed by the Constitution. It is a consequence of the nature of the mechanism of democratic government to ensure political competition as a factor in the turnover of holders of political office, as well as the effectiveness of their political responsibility.

In terms of the rules regulating political positions, these legal relationships occur in the public sphere and are derived from the implementation of democracy and the political rights of citizens to participate in the affairs of the state. They cannot therefore be regulated by employment law and the President, Parliament, the Prime Minister and persons appointed to political office cannot be regarded as employers and employees.

Consequently, when someone is dismissed from political position, the guarantees established by employment law will not apply.

The release of executive workers in the public service, particularly in administrative government positions, is carried out by order of the Prime Minister in a manner established by legislation. It is not acceptable to introduce restrictions on the right to judicial review of decisions taken on the dismissal of such workers, transfers to other positions, payment for enforced periods of absence or performance of lower-paid work and disciplinary action.

This category of executive worker can only be dismissed on the grounds specified by legislation. In particular, these public servants must have guarantees for the independence of their activity from political changes within the state. The performance of their professional duties should have an “apolitical” character.

The same principle should be applied to other executive workers within the range of positions for which appointment, confirmation and discharge from the post is performed by the Prime Minister.

Article 427 of the Labour Code is therefore consistent with the Constitution to the extent to which these provisions are relevant to persons appointed, elected, approved by the President, Parliament or Prime Minister for political office under the implementation of the powers specified in the Constitution.

Article 427 of the Labour Code was found unconstitutional to the extent to which its provisions are relevant to persons holding administrative public office, as well as other categories of executives appointed by the President, Parliament, and the Prime Minister.

The decision of the Constitutional Chamber is final and not subject to appeal. It enters into force upon proclamation.

Languages:

Russian.

Identification: KGZ-2013-3-004

a) Kyrgyz Republic / **b)** Constitutional Chamber / **c)** Plenary / **d)** 29.11.2013 / **e)** 12-p / **f)** Trofimov I.A. / **g)** Official website and Bulletin of Constitutional Chamber 2014 / **h)**.

Keywords of the systematic thesaurus:

4.3.1 Institutions – Languages – **Official language(s)**.
4.3.2 Institutions – Languages – **National language(s)**.
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**.
5.3.41.2 Fundamental Rights – Civil and political rights – Electoral rights – **Right to stand for election**.

Keywords of the alphabetical index:

Language, public services, use.

Headnotes:

The right to use one’s native language is not absolute; the rationale is to ensure the realisation of human interests in the socio-cultural sphere, but not to provide people with endless possibilities of using their native language in all public dealings.

The essence of the task performed by the national language correlates with enhanced requirements for candidates for the highest political and state positions to have proficiency in the national language; these derive from their responsibilities for implementing the functions and powers of state bodies on a professional basis and life within a multi-ethnic society.

Summary:

I. The Constitutional Chamber of the Supreme Court was asked to assess the constitutionality of provisions of the Law on the Ombudsman, along with certain provisions of the Law on the state language of Kyrgyz Republic and of the Law on normative legal acts of the Kyrgyz Republic, as well as provisions of the Law on the Regulation of the Kyrgyz Parliament and the Constitutional Law on the Government of the Kyrgyz Republic.

The applicant in these proceedings ran for the post of deputy of the Kyrgyz Parliament in 2005. In 2011 he ran for the post of President of Kyrgyz Republic. On 12 August 2013 he submitted an application to participate in the elections for the post of Ombudsman. The main obstacle to work in the civil service, in his opinion, is required knowledge of the state language.

According to the Declaration of State Sovereignty of the Kyrgyz Republic adopted on 30 December 1990, the Kyrgyz nation gave a name to a Republic with an ancient history, unique culture, language, customs, traditions and which wished to preserve the integrity of its ethnic groups, nationhood, cultural and linguistic heritage on the basis of public policy of internationalism, cooperation and mutual respect of citizens of all nationalities (Article 3 of the Declaration).

State sovereignty is ensured by complete state authority in all spheres of public life including the presence of the state language (Article 5 of the Declaration). The first Constitution of 5 May 1993 declared the Kyrgyz language as a national language; this still pertains in the current Constitution.

In view of the ethnic diversity of the people of Kyrgyzstan and historical circumstances the Constitution provides for Russian as the official language.

A “national language” and an “official language”, based on the meaning of the Constitution, perform similar functions but are not identical. Both languages serve the needs of the state in the field of official communication, law and justice. However, the scope of functions performed by the national and official languages and scope of their use may vary. The legislator, in determining the status of an official language, states that its application in areas of public life and in the activities of state and local authorities is carried out in cases where use of the national language for substantive reasons is difficult.

At the same time the obligation of the Kyrgyz Republic as a legal, social, democratic unitary state is to ensure that all minorities have equal rights and freedoms. In pursuing these objectives, the Kyrgyz Republic guarantees the representatives of all ethnic groups that comprise people of Kyrgyzstan the right to preserve their native language and to create conditions for its study and development (Article 10.3 of the Constitution).

The right to use one’s native language should not be absolute; the rationale behind it is to ensure the realisation of human interests in the socio-cultural sphere, but not to provide people with endless possibilities of using their native language in all their public dealings.

The essence of the task performed by the national language correlates with enhanced requirements for candidates for the highest political and state positions to have proficiency in the national language; these derive from their responsibilities for the implementation of the functions and powers of state bodies on a professional basis and for the life within a multi-ethnic society.

Official recognition of the Kyrgyz language as a national language initially supposes the need to maintain records and meetings of public authorities in the Kyrgyz language.

Language in the activity of Armed Forces cannot be otherwise than national, to fulfil the tasks of national importance mentioned above.

Giving the Kyrgyz language the status of national language presupposes the establishment of the language of legislation. The use of the state language by local government authorities should be regarded as the implementation of the constitutional regulations.

In terms of the restriction of rights in the field of postal and telegraph lines, postal and telegraphic correspondence within the territory of the Kyrgyz Republic is done in the national language, and, if necessary, in the official language. Addressed mail sent outside the country is indicated in the official language or in the relevant foreign languages (Article 28 of the Law on the State Language of Kyrgyz Republic). The legislation has therefore provided favourable language conditions; its action in this area cannot be regarded as discriminatory.

The Constitutional Chamber resolved to recognise as constitutional Article 4.1 of the Law on the Ombudsman, the Articles of the Law on the State Language of the Kyrgyz Republic, Articles 24.3 and

27.3 of the Law on normative legal acts of Kyrgyz Republic, Articles 38.1 and 164.1 of the Law on the Regulation of Kyrgyz Parliament and Article 10.1.7 of the Constitutional Law on the Government of the Kyrgyz Republic.

Languages:

Russian.

Identification: KGZ-2013-3-005

a) Kyrgyz Republic / **b)** Constitutional Chamber / **c)** Plenary / **d)** 30.12.2013 / **e)** 17-p / **f)** Sultanov K.K., Nasirov T.J. / **g)** Official website and Bulletin of Constitutional Chamber 2014 / **h)**.

Keywords of the systematic thesaurus:

3.4 General Principles – **Separation of powers**.
4.7.4.1.6 Institutions – Judicial bodies – Organisation – Members – **Status**.
4.7.4.3 Institutions – Judicial bodies – Organisation – **Prosecutors / State counsel**.
4.7.16.2 Institutions – Judicial bodies – Liability – **Liability of judges**.

Keywords of the alphabetical index:

Prosecutor, powers.

Headnotes:

Judicial independence and immunity are not privileges for judges, but safeguards against external pressures in their decision-making.

Summary:

The Constitutional Chamber was asked to assess the constitutionality of Article 30.1 of the Constitutional Law on the Status of Judges (hereinafter, “Constitutional Law”).

Following a resolution by a prosecutor of the Osh region on 16 October 2012, criminal proceedings against the Chairman of the Uzgen District Court for the Osh region were instigated for a crime under Article 313.2.1 and 313.2.2 of the Criminal Code.

The decision on the issue of criminal proceedings against a judge was taken by a prosecutor of Osh region in accordance with Article 30.1 of the Constitutional Law.

In the applicant’s view, the decision contradicted paragraph 2 of Article 11.2 of the Constitutional Law, under which guarantees of independence of judges stipulated by the Constitution cannot be cancelled or diminished under any circumstances. Paragraph 2 of Part 1 of Article 11 of the Constitutional Law imposes a prohibition on any interference whatsoever in the activity of a judge. This regulation is also secured in Article 94.4 of the Constitution. The applicant observed that, for the purposes of law enforcement, prosecutors from Bishkek and Osh seemed to be able to interfere in the implementation of justice.

The judiciary, as one of the branches of government, is designed to protect the legal foundations of public life from all violations. Judges have the responsibility of taking the ultimate decisions on the freedoms, rights, duties and property of citizens and legal entities. For that reason, judicial independence is of vital importance in upholding the law and pivotal to all those seeking justice and protection of human rights.

Judicial power is exercised by means of constitutional, civil, criminal, administrative, and other forms of legal proceedings (Article 93.2 of the Constitution). It belongs only to the courts through judges (Article 1.1 of the Constitutional Law). However, every individual has the right to judicial protection, under the Constitution, laws and international treaties ratified by the Kyrgyz Republic and the generally recognised principles and norms of international law (Article 40.1 of the Constitution).

Judicial protection is a universal legal instrument of the state, designed to protect human rights and freedoms. This legal remedy can only be efficient and effective in conditions of independence of the judiciary and judges. Judicial independence is for this reason enshrined in the Constitution.

The legal status of judges is defined by constitutional regulations on independence, immunity, subordination to the Constitution and laws and the prohibition of interference in the implementation of justice. This serves to secure the judiciary as an independent and impartial branch of government (Article 94.1, 94.2 and 94.3 of the Constitution).

The rationale behind the principle of judicial independence is to provide an environment where judges can be free in their decision-making, subordinate only to the Constitution and laws, and can act without any restriction, external influence or pressure from any quarter.

Consideration of a case by an independent and impartial judge is proclaimed in a number of international treaties ratified by the Kyrgyz Republic.

The Universal Declaration of Human Rights provides that everyone is entitled to have their rights and obligations determined by public hearing and in compliance with all requirements of justice by an independent and impartial tribunal (Article 10). The International Covenant on Civil and Political Rights, to which the Kyrgyz Republic acceded by resolution of Parliament of 12 January 1994 no. 1406-XII, enshrines the right to a fair and public hearing by a competent, independent and impartial tribunal established by law (Article 14). The CIS Convention on Human Rights and fundamental Freedoms Rights, ratified by Law no. 182 of 1 August 2003, sets out the universal right to a fair and public hearing within a reasonable time by an independent and impartial tribunal.

The UN General Assembly, by resolutions of 29 November 1985 and 13 December 1985, endorsed the Basic Principles on the Independence of the Judiciary, adopted at the Seventh United Nation Congress. These principles established that independence of the judiciary is to be guaranteed by the state and enshrined in Constitutions and laws. Government and other institutions must respect and observe the independence of the judiciary (Article 1).

The United Nations Social and Economic Council, in its resolution 2006/23 of 27 July 2006 invited Member States to take into consideration the Bangalore Principles when reviewing or developing rules with respect to the professional and ethical conduct of members of the judiciary. Judicial independence lies at the core of the Bangalore Principles, a fundamental guarantee of fair resolution of court proceedings.

The Kyrgyz Republic has committed itself to ensuring that cases are heard by an independent and impartial tribunal by enshrining the independence of the judiciary within its Constitution, by joining, signing and ratifying several international legal instruments in the field of human rights and freedoms and by being a member of the UN.

The independence of the judiciary and judges should not be regarded as a privilege of the judge but rather as a safeguard against external pressures, justified by the need to give judges an opportunity to fulfil their obligation to protect human rights and freedoms.

Therefore, in accordance with Article 97.6.1 of the Constitution, Articles 42, 46, 47, 48, 51 and 52 of the Constitutional Law on the Constitutional Chamber of the Supreme Court of Kyrgyz Republic, the Constitutional Chamber resolved to recognise unconstitutional that part of Part 1 of Article 30 of the Constitutional Law which allowed prosecutors authorised by General Prosecutor who were from Bishkek and Osh Cities and who had attained at least the status of Regional Prosecutor to institute criminal proceedings against judges.

It requested that Parliament should make the appropriate changes and additions to the legislation arising from the decision.

Languages:

Russian.

Latvia
Constitutional Court

Important decisions

Identification: LAT-2013-3-003

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 07.11.2013 / **e)** 2012-24-03 / **f)** On the requirements as to knowledge of the Official Language for Members of Local Government Councils / **g)** *Latvijas Vestnesis* (Official Gazette), 11.11.2013, no. 220(5026) / **h)** CODICES (Latvian, English).

Keywords of the systematic thesaurus:

3.21 General Principles – **Equality**.
4.3.1 Institutions – Languages – **Official language(s)**.
4.8.6.1.1 Institutions – Federalism, regionalism and local self-government – Institutional aspects – Deliberative assembly – **Status of members**.
5.3.29 Fundamental Rights – Civil and political rights – **Right to participate in public affairs**.

Keywords of the alphabetical index:

Municipal Council, member, requirement / Language, knowledge.

Headnotes:

Use of the official language at the level and to the degree necessary for performing the duties of office is a prerequisite for participating in the work of the State and local government.

The term “employee” cannot be interpreted narrowly, without consideration of the system and aims of the legal regulation.

Stable and effective functioning of State institutions that have been properly legitimised is one of the preconditions for the existence of a democratic order. Comprehensive and consistent use of the official language at an appropriate level in the work of these institutions is necessary.

Summary:

I. The applicants, three members of local government councils, submitted a constitutional complaint in which they took issue with a legal provision that prescribed the level and degree of the necessary proficiency in the official language. This, they claimed, disproportionally restricted their possibilities of performing the duties of office of a member of the local government council. The provision also lacked a legitimate aim. The requirement that the official language be used in the work of local government could be complied with by other, more effective means, such as by using a translator when communicating with electors.

The applicants observed that the contested regulation was incompatible with the principle of equality; it envisaged differentiated treatment of persons, depending on the language in which they were educated.

The requirements of the contested provision could not, in their view, be applied to the members of local government councils, since they are not employees in the meaning of the Labour Law (they do not sign an employment agreement and have no employer).

II. The Constitutional Court found that in the Latvian legal system, the term “employee” is used not only in the meaning of the Labour Law, but also in a broader meaning. It can be applied to offices and professions whose legal employment relations are not based upon employment contracts, but have another legal basis. It does in fact cover members of the local government council.

In order to assess the constitutionality of restrictions to fundamental rights, the Constitutional Court must determine whether the restriction was established by law, whether it has a legitimate aim and whether it complies with the principle of proportionality.

The Constitutional Court concluded that the restriction defined by the contested norm was established on the basis of law. The regulation of the Official Language Law gives clear and accurate authorisation to the Cabinet of Ministers to define the level of official language knowledge and skills which people need.

The legitimate aim of this restriction is to ensure the proper functioning of State institutions and to strengthen the Latvian language as the only official language in Latvia.

In terms of proportionality, the Constitutional Court concluded that due performance of local government functions, as defined in law, would not be guaranteed if the deputies were only to participate in the work of local government council formally, without knowing and using the official language to the degree necessary for performing duties of office.

The Constitutional Court also established that the requirements imposed on members of local government councils and other officials of State and local government institutions are the result of continuous and constant policy on the part of the State. They are enshrined in the Constitution and laws. It is in the interests of society that deputies perform their duties of office properly. This includes being able to communicate with inhabitants in the official language.

The Constitutional Court emphasised that the legislator had also taken account of the interests of those deputies who had already been elected to serve as members of local government councils when the provision in question came into force but were then unable to satisfy its requirements. They were allowed to remain in office until the expiry of their mandate. The amount of monetary fine imposed upon the applicants, and the requirement that the test of proficiency in the official language be repeated within six months, cannot be regarded as disproportionally severe legal consequences.

The contested regulation did not cause significant harm to the applicants; the restriction was proportional. The Constitutional Court found it to be in line with the Constitution.

Cross-references:

Previous decisions of the Constitutional Court:

- no. 2000-03-01, 30.08.2000; *Bulletin* 2000/3 [LAT-2000-3-004];
- no. 2000-07-0409, 03.04.2001; *Bulletin* 2001/1 [LAT-2001-1-002];
- no. 2001-02-0106, 26.06.2001; *Bulletin* 2001/2 [LAT-2001-2-003];
- no. 2001-04-0103, 21.12.2001; *Bulletin* 2001/3 [LAT-2001-3-006];
- no. 2002-15-01, 23.12.2002;
- no. 2004-18-0106, 13.05.2005; *Bulletin* 2005/2 [LAT-2005-2-005];
- no. 2004-25-03, 22.04.2005;
- no. 2005-03-0306, 21.11.2005; *Bulletin* 2005/3 [LAT-2005-3-007];
- no. 2005-02-0106, 14.09.2005;
- no. 2005-24-01, 11.04.2006;
- no. 2005-19-01, 22.12.2005;
- no. 2008-37-03, 29.12.2008;
- no. 2009-49-01, 02.02.2010;
- no. 2010-50-01, 11.03.2011.

European Court of Human Rights:

- *Podkolzina v. Latvia*, 09.04.2002, para 34;
- *Jutta Menzen alias Mencena v. Latvia*, 06.04.2005.

Languages:

Latvian, English (translation by the Court).

Identification: LAT-2013-3-004

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 19.11.2013 / **e)** 2013-09-01 / **f)** On the compliance of the words of Section 21.2 of Latvian Administrative Violations Code “if the fine intended for it does not exceed thirty *lats*”, with the first sentence of Article 91 of the Constitution / **g)** *Latvijas Vestnesis* (Official Gazette), 11.11.2013, no. 220(5026) / **h)** CODICES (Latvian, English).

Keywords of the systematic thesaurus:

3.9 General Principles – **Rule of law**.
3.19 General Principles – **Margin of appreciation**.
3.21 General Principles – **Equality**.
4.6.3 Institutions – Executive bodies – **Application of laws**.

Keywords of the alphabetical index:

Offence, administrative, minor / Traffic offence / Penal policy / Penalty, individualisation / Traffic, safety.

Headnotes:

The rationale behind the principle of equality within a state governed by the rule of law is that laws are applied universally, objectively and comprehensively without favouring any particular group.

Uniformity of the legal order does not mean levelling out; equality within a democratic society allows for differentiated treatment. Legal policy considerations

define the aim to be reached, i.e., economic, political and social changes of a general nature. Juridical considerations lead to rules. These must be adhered to, not because they would ensure the desirable economic, political and social outcome, but because this is required by the rule of law.

The principle of the rule of law requires that a decision-making body, when adopting new regulations or amending those already in force, should comply both with the relevant procedure and the requirements of legal norms with higher legal force.

Neither the Constitutional Court nor the applicant can take the legislator's place and reassess the effectiveness of those means, which are intended for reaching the aim of the policy in question. The legislator enjoys discretion in its preparation and decision-making, provided the fundamental principles of the constitutional order of the state are respected.

Summary:

I. The applicant, an Administrative District Court, had been examining an administrative violations case (the parking of a vehicle in an inappropriate place). The vehicle was parked in a parking space envisaged for persons with special needs. This infraction attracts a monetary fine under the law amounting to 40 *lats*.

The Administrative District Court noted that the law allows a person to be released from administrative liability if the violation is a minor one, but a road traffic infraction will attract a monetary fine. The Administrative District Court found this regulation to be incompatible with the principle of equality.

II. The Constitutional Court noted that the legislator has broad discretion to impose sanctions for concrete violations, and to determine conditions whereby somebody can be released from liability for them. In so doing, the legislator will usually follow the general values and opinions accepted by society.

It noted that in this particular case the person was fined for parking a car in a disabled parking bay. It stressed, in the light of Latvia's international commitments, the need to ensure that parking spaces were available for persons with special needs. It can be difficult for persons with special needs to access vital public areas in their private vehicles, and they need to be guaranteed the same accessibility to public infrastructure as other persons. The State must ensure that those with special needs can move around freely, park their cars in specifically designated parking areas and thus exercise their rights.

The contested norm pertained to the area of road traffic, where the legislator must protect the rights to life, health and property of other road users.

The applicant pointed out that the contested norm did not allow the court to set an individual penalty for each administrative violation. The Constitutional Court recognised that the large number of administrative violations committed in road traffic was a sufficiently serious indication which allowed the legislator to introduce fixed sanctions. Decisions on such violations are taken both by officials of executive power and of judicial power. In a situation like this, it is permissible that the legislator opts to comply with the principle of procedural economy.

The Constitutional Court also noted that in this situation the legislator was entitled to determine that the set of measures aimed at protecting somebody's life and health of a person should be given priority, both compared to the obligation imposed upon a private person to pay the fine for the violation, and compared to the discretion of an official or a court to recognise the administrative violation in question as petty.

It therefore found the contested norm to be in line with the principle of equality.

Cross-references:

Previous decisions of the Constitutional Court:

- no. 04-03(99), 09.07.1999; *Bulletin* 1999/2 [LAT-1999-2-003];
- no. 2001-02-0106, 26.06.2001; *Bulletin* 2001/2 [LAT-2001-2-003];
- no. 2002-15-01, 23.12.2002;
- no. 2003-05-01, 29.10.2003; *Bulletin* 2003/3 [LAT-2003-3-011];
- no. 2004-01-06, 07.07.2004; *Bulletin* 2004/2 [LAT-2004-2-006];
- no. 2005-02-0106, 14.09.2005;
- no. 2005-08-01, 11.11.2005;
- no. 2006-03-0106, 23.11.2006; *Bulletin* 2006/3 [LAT-2006-3-005];
- no. 2007-11-03, 17.01.2008; *Bulletin* 2008/2 [LAT-2008-2-002];
- no. 2008-08-0306, 20.01.2009;
- no. 2010-31-01, 06.01.2011;
- no. 2010-40-03, 11.01.2011; *Bulletin* 2011/2 [LAT-2011-2-003];
- no. 2011-11-01, 03.02.2012;
- no. 2012-15-01, 28.03.2013;
- no. 2012-26-03, 28.06.2013.

Languages:

Latvian, English (translation by the Court).

Identification: LAT-2013-3-005

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 18.12.2013 / **e)** 2013-09-01 / **f)** On the compliance of Section 23.5.2 and 23^1.1 of Law on National Referenda, Legislative Initiatives and European Citizens' Initiative with Article 1 of the Constitution / **g)** *Latvijas Vestnesis* (Official Gazette), 20.12.2013, no. 250(5026) / **h)** CODICES (Latvian, English).

Keywords of the systematic thesaurus:

3.1 General Principles – **Sovereignty**.
3.3.2 General Principles – Democracy – **Direct democracy**.
3.4 General Principles – **Separation of powers**.
3.9 General Principles – **Rule of law**.
3.19 General Principles – **Margin of appreciation**.
4.7.9 Institutions – Judicial bodies – **Administrative courts**.
4.9.1 Institutions – Elections and instruments of direct democracy – **Competent body for the organisation and control of voting**.
4.9.2 Institutions – Elections and instruments of direct democracy – **Referenda and other instruments of direct democracy**.
4.9.2.1 Institutions – Elections and instruments of direct democracy – Referenda and other instruments of direct democracy – **Admissibility**.

Keywords of the alphabetical index:

Power, constitutional / Legislation, initiation / Administrative Court, jurisdiction.

Headnotes:

When setting out the procedure for national referenda and the implementation of electoral legislative initiatives, the legislator enjoys discretion to the extent it is not limited by constitutional norms. It also has the discretion to select, from a number of laws, the law in which the corresponding regulation will be included, and also in terms of issues linked to legislative technique within the framework of a single law.

A draft law cannot be considered to be fully elaborated in terms of content if:

1. it envisages deciding on issues which are not to be regulated by law at all;
2. it would be incompatible, were it to be adopted, with the norms, principles and values of the Constitution;
3. it would be incompatible, were it to be adopted, with international commitments.

A distinction should be drawn between legal assessment as to whether draft legislation should be deemed to be fully elaborated and the assessment of its usefulness, admissibility or its political assessment, which can only be performed by the legislator or the people.

Anyone applying the law must apply the Constitution directly and immediately. The courts of general jurisdiction and administrative courts must verify the way the party applying the law has interpreted the content of a concept and whether the outcome of applying the legal norms complies with the fundamental principles of a judicial and democratic state.

Summary:

I. The applicant, the Administrative Department of the Supreme Court, had been examining the case concerning the decision by the Central Election Commission (hereinafter, the "CEC") not to submit the draft law "Amendments to the Citizenship Law" for collection of signatures.

In the applicant's opinion, the contested norm is incompatible with the principle of the separation of powers enshrined in the Constitution. The jurisdiction of the CEC and the Supreme Court, as defined by the contested norms, was too broad. CEC should verify the constitutionality of the submitted draft law. The Supreme Court, in its turn, in examining the legality of the CEC's decision, must perform the control of the legislative initiative as to its content. Issues like these should only be within the jurisdiction of the Constitutional Court.

II. The Constitutional Court noted that the Central Election Commission had to determine whether the submitted draft law was fully elaborated as to its content.

In establishing the scope of the CEC's jurisdiction in assessing the content of draft legislation submitted by the electorate, the Constitutional Court noted that people should be able to influence decision-making within the state and that the will of the people should

be the source of state power. The right to legislative initiative, in its turn, is a powerful tool, which the people can use to act as legislator. The CEC must accordingly register all draft laws submitted by the electorate, except for cases when it is not fully elaborated as to its content.

The Supreme Court verifies the lawfulness of decisions taken by the CEC and must establish whether the draft legislation submitted is definitely not fully elaborated as to its content and whether the incompatibility of the draft law with the respective requirement has been legally substantiated in the decision adopted by the CEC.

The Constitutional Court also noted that it had exclusive jurisdiction to recognise legal norms as being incompatible with legal norms of a higher legal force and declare them invalid. However, the Administrative Court must, within the framework of each case, verify the compatibility of the applicable legal norms with legal norms of a higher legal force.

It therefore recognised the contested norms as being compatible with the principle of the separation of powers and with the Constitution.

Cross-references:

Previous decisions of the Constitutional Court:

- no. 2006-04-01, 08.11.2006;
- no. 2006-05-01, 16.10.2006; *Bulletin* 2006/3 [LAT-2006-3-004];
- no. 2006-12-01, 20.12.2006; *Bulletin* 2006/3 [LAT-2006-3-006];
- no. 2007-10-0102, 29.11.2007; *Bulletin* 2008/2 [LAT-2008-2-001];
- no. 2008-40-01, 19.05.2009;
- no. 2010-09-01, 13.10.2010;
- no. 2011-15-01, 13.10.2011;
- no. 2011-18-01, 08.06.2012;
- no. 2010-02-01, 19.06.2010;
- no. 2012-03-01, 19.10.2012.

Languages:

Latvian, English (translation by the Court).

Lithuania
Constitutional Court

Important decisions

Identification: LTU-2013-3-006

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 01.07.2013 / **e)** 125/2010-26/2011-21/2012-6/2013-8/2013-10/2013 / **f)** On the reduction of the remunerations of state servants and judges / **g)** *Valstybės Žinios* (Official Gazette), 103-5079, 01.10.2013 / **h)** CODICES (English, Lithuanian).

Keywords of the systematic thesaurus:

1.1.3.6 Constitutional Justice – Constitutional jurisdiction – Status of the members of the court – **Remuneration**.
4.5.6 Institutions – Legislative bodies – **Law-making procedure**.
4.6.9.3 Institutions – Executive bodies – The civil service – **Remuneration**.
4.10.2 Institutions – Public finances – **Budget**.
5.1.5 Fundamental Rights – General questions – **Emergency situations**.

Keywords of the alphabetical index:

State servants / Judges, remuneration / Salary, reduction, different extent / Disproportionality / Economic crisis.

Headnotes:

A state regulation to reduce the remuneration of state servants and judges, which is funded from the state budget, for a certain amount of time in response to economic and financial crisis, while justifiable in light of the public interest, must not violate the Constitution. That is, the basic amount to calculate the remuneration to be applied to the state servants, including judges, must not be reduced disproportionally among the different categories of the state servants' positions attributed to their qualifications, such that the procedure and formula to determinate their compensation must be applied fairly and constitutionally.

Summary:

I. Following petitions of the Supreme Administrative Court of Lithuania, the Vilnius Regional Administrative Court and the Vilnius City Local Court, the Constitutional Court considered whether the legal regulation to reduce the remunerations of state servants and judges due to the 2009 economic crises was unconstitutional. The petitioners stated that the challenged legal regulation had established different extents to reduce the remunerations of state servants of institutions funded from the state budget. That is, the positional salary coefficients had been reduced disproportionately only for state servants holding higher category positions. The additional pay for the corresponding qualification class of the state servants having the qualification class had been reduced not by the same percentage amount, whereas the work remuneration of the state servants who did not have it had not been reduced by a corresponding amount.

II. The Court noted that the legal regulation upon which the basic formula *inter alia* to calculate the reduced remunerations for judges for the current year was adopted in view of the deteriorating economic and financial situation of the state. The regulation stemmed from the concern that it seemed imminent the crisis would pose difficulty for the state to collect revenue to fund the needs provided for in the Law on the State Budget. The Court considered the deviation from the requirement, also established by law, to approve the basic amount to calculate the judges' remunerations only for the subsequent year, and the Seimas' constitutional imperative to be bound by the laws it adopted, which, here, was justified by the objective of ensuring an important public interest. That is, the guarantee of stability of the public finance that determines the necessity of the urgent and effective decisions.

The Constitutional Court acknowledged that the legal regulation had reduced the coefficients of the positional salary of state servants of the positions of 11–20 categories, and reduced the sizes of the additional pay for the qualification classes of the state servants. The disproportionate remuneration reduction of state servants, *inter alia* had violated the proportions of the remuneration amounts of the different positions attributed to the categories of the state servants. The proportion was established in the period prior to the occurrence of the particularly grave economic and financial situation in the state. Also, the remuneration amount of highly qualified state servants performing difficult tasks had been approximated to the remuneration of lower qualification persons performing less difficult tasks. The challenged legal regulation had reduced the remunerations of highly qualified state servants only on the grounds of a separate constituent part of the remuneration—the additional pay for the qualification class. The same decision was adopted concerning the disproportionate extent of the reduction of the remunerations of judges.

The Constitutional Court held that the legal provisions consolidating the disproportionate extent of the remuneration reduction of state servants and judges are unconstitutional. It also determined that the legal regulation that had prolonged the validity of these legal provisions three times and had postponed the coming into force of the legal regulation that used to be effective prior to the reduction of the remunerations, violate the Constitution. The Court emphasised that Article 23 of the Constitution required the legislator to develop a mechanism to compensate the incurred losses for persons paid for work from the funds of the state or municipal budgets. That is, the state must carry out the necessary procedure to compensate them for their disproportionate losses within a reasonable time and in a fair manner. In so doing, the state should consider the economic and financial situation and evaluate the possibilities of collecting [receiving] the funds necessary for such compensation.

The publication of this ruling in the official gazette (which means that also the entry in force of this ruling) was postponed for four months from its adoption. This provided the state the necessary time to prepare to revise the unconstitutionally reduced salaries and to find necessary recourses to redress the situation.

Languages:

Lithuanian, English (translation by the Court).

Identification: LTU-2013-3-007

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 03.07.2013 / **e)** 7/04-8/04 / **f)** On the construction of the provisions of a ruling of the Constitutional Court related to the right of judges to familiarise themselves with the information constituting a state secret / **g)** *Valstybės Žinios* (Official Gazette), 72-3595, 05.07.2013 / **h)** CODICES (English, Lithuanian).

Keywords of the systematic thesaurus:

3.24 General Principles – **Loyalty to the State**.
4.7.3 Institutions – Judicial bodies – **Decisions**.
4.7.4.1.6 Institutions – Judicial bodies – Organisation – Members – **Status**.

Keywords of the alphabetical index:

State secret / Work, permission / Information, classified / Credibility, loyalty to the state / Decision, unjust.

Headnotes:

Courts bear the constitutional duty to consider cases justly and objectively, and to adopt reasoned and substantiated decisions. Therefore, a court (judge) that considers a case possesses the right in all cases to become familiarised with the case material and/or material significant to the case constituting a state secret (or other classified information) regardless if he or she has the permission to handle or become familiar with the classified information issued under the Law on State Secrets and Official Secrets.

Summary:

I. The case was initiated by the Supreme Administrative Court, which was handling an appeal case that involved reviewing material containing state secret (or other classified information). All the justices of the First Instance Court dealing with this case were permitted to handle or become familiar with the classified information issued under the Law on State Secrets and Official Secrets. When the appeal was brought before the Supreme Administrative Court, not all the justices were granted the aforesaid permission. Thus, the officers of the State Security Department refused to provide them with the relevant information, arguing that the justices are not in the list of persons with access to the secret information and such access is not automatic merely by their responsibilities.

As such, the Supreme Administrative Court petitioned the Constitutional Court, asking it to construe some constitutional provisions, whereby a court would be unable to access case material that contains information constituting a state secret (or classified information). The petitioner specifically inquired whether this means that a judge, in administering justice, has the *ex officio* right in conformity with the Constitution to become familiar with classified information, even in a situation when, according to the Law on State Secrets and Official Secrets, he has no permission to handle or become familiar with classified information.

II. The Court emphasised that a court must properly discharge its constitutional obligation to administer justice *inter alia* in reality and effectively, and not defend the violated rights and freedoms of a person only in a perfunctory manner. Legal regulations must exist to ensure the right of a court (judge) that considers a case to become familiar with all the material and/or the material significant to the case. Thus, under the Constitution, no such situation is allowed where, in the course of fulfilling its constitutional obligation to administer justice and carrying out its duty to consider the case justly and objectively, the Court would be forced to adopt a decision without having any opportunity to become familiar with all the case material and/or the material significant to the case. This includes *inter alia* material that constitutes state secret or other classified information, regardless if the Court has the permission to work or become familiarised with classified information issued under the Law on State Secrets and Official Secrets. If the Court had to adopt a decision without comprehensively assessing all the case material and/or the material significant to the case, *inter alia* the material constituting state secret or other classified information, the adopted decision could not be substantiated properly and the preconditions would be created to adopt an unjust decision.

A person who is granted the right to familiarise himself with the information constituting a state secret must fulfil certain requirements. Such requirements are related to the person's credibility and his loyalty to the State of Lithuania, which concern the trust of the state in that person. The person who wants to become a judge also has to meet special requirements. That is, the judge must feel greatly responsible for how he administers justice; judges must meet very strict ethical and moral requirements: and their reputation must be impeccable. Consequently, the fact that the person is appointed as a judge and entrusted with the administration of justice in the name of the Republic of Lithuania shows the trust of the state in that person. Thus, it is presumed that there is no ground to doubt his credibility and loyalty to the State of Lithuania.

The Court in this decision also noted that the right of justices to access to all case material and/or material significant to the case constituting a state secret (or other classified information) does not permit justices to receive this information automatically, as the decision of construing constitutional provisions is not the law. The Court recalled the legislator's duty to change all the relevant legal provisions, such that they conform to the Constitution.

Languages:

Lithuanian, English (translation by the Court).

Identification: LTU-2013-3-008

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 05.07.2013 / **e)** 2/2012-12/2012-9/2013 / **f)** On bank bankruptcy procedures / **g)** *Valstybės Žinios* (Official Gazette), 73-3679, 09.07.2013 / **h)** CODICES (English, Lithuanian).

Keywords of the systematic thesaurus:

4.10.1 Institutions – Public finances – **Principles**.
5.4.6 Fundamental Rights – Economic, social and cultural rights – **Commercial and industrial freedom**.

Keywords of the alphabetical index:

Financial system, state / Area, financial activity / Bank bankruptcy / Financial institutions, trust / Deposit Insurance Fund / Claims, satisfaction / Commercial bank / National economy.

Headnotes:

The stability and efficiency of the financial system constitute a significant public interest and an essential condition for the functioning of the market, which determines the growth of the national economy. The aim to guarantee the security, stability, and reliability of the financial system requires establishing legal regulation aimed at ensuring the trust of persons in financial institutions, *inter alia* in banks.

When establishing differentiated legal regulation in the area of financial activity, the legislator is obliged to pay heed to the requirements concerning the balance of constitutional values and social harmony, coupled with the constitutional principles of justice and proportionality.

Summary:

I. A group of parliamentarians and the Vilnius Regional Court initiated the case, requesting the Constitutional Court to review whether certain provisions concerning bank bankruptcy comply with the Constitution. This case was received after the uncommon occurrence whereby one of the commercial banks had failed, which conditioned various claims in the courts relevant to the bankruptcy of this bank. The petitioners challenged the provisions of respective law, providing that state claims concerning the payment of taxes and the making of other payments to the budget, as well as those concerning the loans granted from the funds borrowed on behalf of the state and the loans granted with the guarantee of the state or a guarantee institution the fulfilment of whose obligations is guaranteed by the state, are satisfied in higher order of priority, than all others debts. The petitioners also claimed that the prohibition to discharge any financial obligation – including any set-off of counterclaims of the same kind – not discharged prior to the opening of a bankruptcy case, is unconstitutional.

II. The Constitutional Court did not find that the law regulating the process of bank filing for bankruptcy violated the Constitution. The Court explained that the economic activity carried out in the area of finances (e.g., provision of financial services) constitutes one of the specific types of economic activity. It is characterised by the fact that while carrying it out, one exerts a direct influence on the national financial system as well as on the entire national economy; and the stability and efficiency of the financial system constitute a significant public interest and an essential condition for the functioning of the market, which determines the growth of the national economy. Therefore, while regulating financial economic activity so that it serves the general welfare of the nation, the legislator is obliged to establish a legal regulation that would ensure the security, stability, and reliability of the financial system functioning in the country.

One of the means of guaranteeing the security, stability, and reliability of the financial system is to establish a legal regulation aimed at ensuring the trust of persons in financial institutions, *inter alia* in banks. The said objective can be achieved by various means. This includes establishing the legal regulation under which, given the established conditions, the creditors (depositors, investors) of a bank in bankruptcy proceedings would be compensated for the incurred losses. The legislator may opt for various models of compensation for losses, *inter alia* the insurance of deposits and investment.

Regarding claims that the State Enterprise “Deposit and Investment Insurance” expenses related to insurance payments to the affected depositors or investors shall be satisfied second in order of priority, the Court held the legislator should assess it to ensure that special measures are taken to pay the sums owed to the said depositors and investors. Upon the occurrence of other insured events, it would be still possible to fulfil the obligations to the depositors and investors concerned, and to ensure the stability of the banking system and the entire financial system. If the legislator, upon choosing the system of deposit and investment insurance, failed to establish any special measures to recover the sums back to the Deposit Insurance Fund and the Fund of the Insurance of Liabilities to Investors, the State Enterprise “Deposit and Investment Insurance” would not be able to properly perform its functions, *inter alia* in the event of the insolvency of other financial institutions. The said situation could shatter trust in banks. Consequently, it would result in a mass withdrawal of deposits from banks, which could have considerable negative consequences for the stability of the whole financial system of the state and would be incompatible with the public interest.

Similar arguments were used for the legal regulation concerning the higher order of priority to satisfy the payment of taxes and make other payments to the budget. The Court indicated that the latter legal regulation should be assessed as the legislator develops plans to collect revenue necessary to perform the state functions and to meet the public needs of society and the state. The state is able to properly perform the functions ascribed to it only when it has, for that purpose, sufficient budget revenue at its disposal.

Languages:

Lithuanian, English (translation by the Court).

Identification: LTU-2013-3-009

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 11.09.2013 / **e)** 6/2010 / **f)** On the establishment of the value of the restored land / **g)** *Valstybės Žinios* (Official Gazette), 97-4815, 14.09.2013 / **h)** CODICES (English, Lithuanian).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Ownership, rights / Restoration, ownership / Fair compensation / Present market value / Ancient value.

Headnotes:

To confirm the continuance of Lithuanian citizens’ rights of ownership that had been terminated by the occupation government, it appeared necessary to regulate the actual restoration of subjective rights to particular property by a legal act. Establishing the conditions to restore the rights of ownership is the legislator’s prerogative. Due to social and economic as well as other essential changes related to ownership, compounded with taking into consideration the possibilities of the State of Lithuania, it is impossible to restore all the rights of ownership infringed by the occupation government, by returning all the existing real property (including land) in kind. Thus, if it is impossible to retrieve the property in kind or it is necessary for the needs of society, property is bought out by the state by fairly compensating to the owners.

Summary:

I. The Vilnius Regional Administrative Court brought the case before the Constitutional Court, challenging the provisions of the Methods of Establishment of the Value and Equivalence of the Land, Forest and Water Bodies Bought by the State. The issue concerned the fact that the value of the land bought by the state, which is in the city and designated for another purpose, is 6,000 Lt/ha, while the present market value is much higher.

II. In light of Article 23 of the Constitution, the Court emphasised the constitutional guarantee of the inviolability of property, and that the constitutional regulation of the seizure of property for the needs of society denies the possibility of universal unrequited nationalisation. The provision supposes that, in the course of restoring citizen’s rights of ownership that were unlawfully and universally denied by the occupation government, the principle of fair compensation for the property bought by the state must be observed.

Land not returned to owners in kind due to its necessity to serve the needs of society is bought by the state; the owners are compensated under the manner and procedure specified in law. This law must balance the legitimate interests of the individual with that of society. When deciding whether compensation for the existing real property not returned in kind is just, the present market value of this property must not be overlooked. The value of the property at the time when it was unlawfully nationalised or disseized by other unlawful ways, and the changes in quality and value of the property, too, must be considered when evaluating whether the compensation was just.

The Constitutional Court added that just compensation for property unlawfully nationalised or disseized in other unlawful ways should not be misidentified or mistaken as just compensation for property seized for the needs of society. That is, when property for the needs of society is seized under Article 23 of the Constitution, the Court underscored that just compensation is that of equal value of the property seized.

The Constitutional Court, moreover, stated that the value of the land bought by the state, which is in the city and designated for another purpose, was adjusted considering the size of the city, date of the assignation of the plot of land to the city territory and other factors influencing its value. The Constitutional Court also noted the lack of an established land market in the beginning of the process of the restitution and the challenge of determining the limited material and financial capabilities of the state. The state had fixed the price of the land it had bought and that there was a fixed average price of land bought by the state in the whole territory of the city considering the significance and the size of the city. As such, the Court noted the impossibility of evaluating the land bought by the state individually.

Languages:

Lithuanian, English (translation by the Court).

Identification: LTU-2013-3-010

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 06.12.2013 / **e)** 43/2011 / **f)** On liability of owner of the potential hazardous object / **g)** *Valstybės Žinios* (Official Gazette), 133-6792, 21.12.2012 / **h)** CODICES (English, Lithuanian).

Keywords of the systematic thesaurus:

3.9 General Principles – **Rule of law**.
3.16 General Principles – **Proportionality**.
4.7.3 Institutions – Judicial bodies – **Decisions**.

Keywords of the alphabetical index:

Object, potentially hazardous / Solidary (several) liability, tort / Right to compensation / Claim in retrospect / Reasonableness / Duty of care / Causation.

Headnotes:

The necessity to reimburse a person for the damage inflicted to him or her is a constitutional principle. It must be established by law that a person to whom the damage has been caused by unlawful actions would be able, in all cases, to claim for fair reimbursement for the damage caused as well as to receive that reimbursement. In case of loss caused by the potentially hazardous object, the solidary (several) liability of the owner of the potentially hazardous object together with the person who caused the damage using this object ensures that the injured person will have the possibility to be reimbursed for the damage caused as soon as possible in the most effective way. Also, the owner of the potentially hazardous object can claim in retrospect the sum that he or she has paid for the person who caused the damage as the solidary (several) debtor. The Court must assess in every single case all the circumstances and establish which part of damage is attributed to the owner of the potentially hazardous object and which to the person who caused the damage, so that the possibilities to administrate justice are not restricted.

Summary:

I. The Supreme Court initiated the case to review the constitutionality of the Civil Code, specifically a provision stipulating that where the loss of operation of a potentially hazardous object results also from the fault of the owner, the latter and the person who seized the potentially hazardous object unlawfully shall be solidary (severally) liable for the damage. The Supreme Court considered whether the

provision conformed to the principles of justice and proportionality.

The claimant also asked the Court to examine whether the challenged provision allows courts to administer justice. The petitioner argued that this legal regulation is too strict and rigorous on the owner of the potentially hazardous object who lost it, despite it being his fault, but did not cause the damages directly by himself. Also, the claimant stated that this provision restricts the administration of justice because it does not consider circumstances of how the potentially hazardous object was lost, the extent of the owner's fault, the (non) existence of causal link, etc.

II. The Court explained that because of its nature, a potentially hazardous object means greater than normal risk to others and because of the increased risk of harm, it cannot be eliminated by means of normal precaution. Therefore the owner bears a heightened duty of care. That is, the owner must follow, *inter alia,* all requirements stemming from legal regulation or the principle of reasonableness (e.g., keep and properly safeguard the potentially hazardous object). The owner must also make all efforts to ensure that his object would not be lost and used by others. The required degree of care must be such that there would not be any preconditions to cause any damage to others. Otherwise, the owner would be deemed guilty for the loss of the potentially hazardous object and for failing to meet the standard of care required to avoid losing it, others taking possession of it, and any other preconditions that may cause damage to it or others.

Such failure would result in the owner being deemed solidary (severally) liable for the damage caused by the potentially hazardous object together with the person who caused the damage directly. The indirect causal link is enough to attribute responsibility because without the owner's negligence, no damage would have been caused.

Therefore the Court ruled that this legal regulation is in line with the constitutional principle to ensure that an injured person is reimbursed for damage caused to him or her. According to the Constitution, a person to whom the damage has been caused by unlawful actions would be able, in all cases, to claim for fair reimbursement for the damage caused as well as to receive that reimbursement. In this case, the legal regulation allows the injured person to claim reimbursement from both persons (the owner and the person who caused the damage) or from either of them. It also enables the injured person to claim part of the reimbursement or all of it due after the damage was caused, which ensures the injured person's right to fair and real reimbursement of damage, consistent with the provisions of the Constitution. The Court affirmed that the legal regulation does not violate the owner's right and the established means therein are considered proportionate because the potentially hazardous object was lost due to the fault of the owner. Although the owner indirectly contributed to the damage caused, he has the right, after he paid damages (all or a larger portion than he had to) to obtain reimbursement retrospectively from the person who caused the damage directly.

The implementation of the owner's right to retrospectively claim the overpaid sums (while reimbursing the injured person as solidary (severally) debtor) from the person who directly caused the damage, allows the courts to assess all the circumstances of the case. This includes how the potentially hazardous object was lost, the extent of the owner's wrongdoing, etc. This also allows the courts to decide which part of the reimbursement should be paid to the owner of the potentially hazardous object, and which part to the person who caused the damage. Therefore, the Court concluded that there is no reason to admit that the challenged legal regulation restricts the court's possibilities to administer justice.

Languages:

Lithuanian, English (translation by the Court).

Mexico
Supreme Court of Justice of the Nation

Important decisions

Identification: MEX-2013-3-016

a) Mexico / **b)** Supreme Court of Justice of the Nation / **c)** Plenary / **d)** 19.01.2012 / **e)** Unconstitutionality action 3/2010 / **f)** Physical disability as a ground for revocation of a mandate / **g)** Registration no. 24155, Tenth Period, *Semanario Judicial de la Federación y su Gaceta,* Tome XV, December 2012, p. 230 / **h)**.

Keywords of the systematic thesaurus:

2.3.2 Sources – Techniques of review – **Concept of constitutionality dependent on a specified interpretation**.
3.20 General Principles – **Reasonableness**.
5.2.1.1 Fundamental Rights – Equality – Scope of application – **Public burdens**.
5.2.2.8 Fundamental Rights – Equality – Criteria of distinction – **Physical or mental disability**.

Keywords of the alphabetical index:

Disability, discrimination / Interpretation, conformity / Public function, person discharging.

Headnotes:

A legal provision permitting revocation of the appointment of a City Council member on the grounds of physical or mental incapacity, as distinct from disability, does not breach the guarantee of equality and non-discrimination established by Article 1 of the Constitution or the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities, of which Mexico is a party. However, revocation of an individual's mandate, as established in the legislation being challenged, shall only occur when the physical or mental incapacity of the person is based on a medical report that evidences the impossibility of the civil servant to carry out his duties within the City Council.

Summary:

I. On 2 February 2010, the Chairman of the National Human Rights Commission (hereinafter, "CNDH"), an autonomous constitutional body of the Federal Government, filed an action of unconstitutionality to request the invalidity of Article 24.II of the Government and Municipal Public Administration Act of the State of Jalisco (hereinafter, the "challenged provision") published in the official journal of the state on 31 December 2009.

The CNDH argued that the challenged provision breaches the guarantee of equality and non-discrimination established by Article 1 of the Constitution by setting down a general rule that a physical disability is grounds for revocation of the appointment of a City Council member. The CNDH contended that this discriminatory provision lacks merit because not every disability of this nature prevents persons from properly executing the duties of their office. Moreover, the applicant argued that the provision being challenged breaches Article 133 of the Federal Constitution by establishing discriminatory treatment of persons with a physical disability, which violates the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities, of which Mexico is a party.

II. The plenary session of the SCJN, by a nine vote majority, determined that the challenged provision was constitutional because the article refers to incapacity and not disability; the difference being a complete inability to make, receive or learn anything. Therefore, the provision in question does not breach Article 1 of the Constitution. Consequently, rigorous measures must be taken to determine when the incapacity is permanent and when the disability restricts the individual with respect to that person's duties related to the City Council.

The plenary session of the SCJN determined that a detailed analysis was needed to differentiate incapacity and disability because all incapacity presupposes the existence of a disability, but not all disability leads to an incapacity. Therefore each case must be determined by medical reports about the physical and mental condition of the affected party so that it may be concluded in each case whether the disability will directly affect the duties that he perform in the City Council.

The Court held that revocation of an individual's mandate, as established in the legislation being challenged, shall only occur when the physical or mental incapacity of the person is based on a medical report that evidences the impossibility of the civil servant to carry out his duties within the City Council.

This condition would compromise the essential functions of the State, which are recognised by the constitution. However, the aforementioned situation may be clearly differentiated from other individual conditions, which do not disable persons from performing their duties. In the second case, the State Congress may not revoke the appointment by virtue of the fact that said reduction of authorities does not constitute a factor that prevents individuals from performing the duties of their office. Consequently, the provision being challenged does not breach the guarantee of equality and non-discrimination established by Article 1 of the Constitution.

The Court considered that, by incorporating international treaties and conventions into the national legal system through the procedures established by the constitution, rules are created that may, in certain cases, have an impact on the federal and local systems and as a result clash with the provisions produced internally despite being in accordance with the provisions of the Federal Constitution. Therefore, if this analysis has reached the conclusions that in strict adherence Article 24.II does not breach the guarantee of equality and non-discrimination established by Article 1 of the Constitution, then it is undeniable that the article being challenged cannot be considered in contradiction with Article 133 of the Constitution. Therefore, the claims of invalidity by the Chairman of the CNDH are unfounded.

Languages:

Spanish.

Identification: MEX-2013-3-017

a) Mexico / **b)** Supreme Court of Justice of the Nation / **c)** Plenary / **d)** 22.03.2012 / **e)** Unconstitutionality Action 8/2010 / **f)** Constitutional Control at a Local Level / **g)** Registration no. 23927, Tenth Period, *Semanario Judicial de la Federación y su Gaceta*, Tome XIII, October 2012, p. 198; *Official Gazette of Mexico*, 16 October 2012, Morning Edition, Third Section, Judiciary / **h)**.

Keywords of the systematic thesaurus:

2.2.2.2 Sources – Hierarchy – Hierarchy as between national sources – **The Constitution and other sources of domestic law**.
4.6.10.2 Institutions – Executive bodies – Liability – **Political responsibility**.
4.7.9 Institutions – Judicial bodies – **Administrative courts**.

Keywords of the alphabetical index:

Administrative Court, jurisdiction / Constitution, amendment / Democracy, participatory / Judicial procedures, parliamentary interference.

Headnotes:

Amendments to the State Constitution of Yucatán establishing revocation of mandates (also known as 'recall elections') as a mechanism to remove representatives from the local executive and legislative branches is incompatible with the Federal Constitution. The Federal Constitution only provides for civil, criminal, administrative and political responsibility, which are the only routes to demand responsibility from persons holding a position as a result of a popular election.

Other amendments to the State Constitution of Yucatán introducing constitutional control for legislative omission, and granting State courts the power to control the constitutionality of State are not incompatible with the Federal Constitution. The States have the power to establish their own system of constitutional procedural law, respecting, at all times, the Federal Constitution. It does not imply the direct participation of the judicial power in bills of law, because it does not involve the Legislative Power with respect to the sense and content of the regulations that must be voted on and approved.

The creation of a sole court in charge equally of resolving electoral matters and administrative litigation matters is not incompatible with the Federal Constitution, given that this did not equate to a merger of electoral justice and administrative justice in the Constitution of Yucatán, because both jurisdictions have been provided for specifically and separately, and therefore the specialty in each matter is focused on the specificity of its processes, terms, resources and characteristics, and not on the exclusive designation or dedication of the body that leads it and issues resolutions.

Summary:

I. On 15 June 2010, the Attorney General brought a legal action to the Supreme Court of Justice of the Nation (hereinafter, "SCJN") regarding the constitutionality of amendments to various articles of the Constitution of the State of Yucatán (hereinafter, "the Yucatán Constitution"), published on 17 May 2010 in the official journal of the state. The legal action had three main arguments.

First, the constitutional amendment in question introduced, to the State of Yucatán, revocation of mandates (also known as 'recall elections') as a mechanism that can be initiated by a percentage of the state electorate to remove representatives from the local executive and legislative branches (Article 30.XLI of the Yucatán Constitution). The Attorney General argued that the challenged regulation is contradictory to the provisions of Article 109 of the Federal Constitution, in virtue of the fact that it provides for the revocation of the mandate of public official elected by popular vote, in particular, of the governor and the legislators, as an attribution of the State Congress, which may be exercised when 65% of the constituency recorded on the nominal list requests the same, and a unanimous vote of the legislature is obtained in the case of the governor, and with respect to the legislators, two-third of the above.

Second, Article 70.III of the Yucatán Constitution introduced a mechanism of local constitutional control regarding legislative omission. The Attorney General contended that this is contrary to Articles 14, 115 and 116 of the Federal Constitution because the action, by a legislative or regulatory omission, imputable to the Congress, the Governor or the city councils overreaches the purpose of constitutional control at a local level, because the resolution of this type of a controversy would place the State judiciary, specifically the Plenary Session of the Supreme Court of Justice, above the Legislative and Executive powers, as well as the organs of the municipalities. In addition, an amendment to Article 70.IV of the State Constitution conceded to the state judicial branch functions of the local Constitutional Court, and one of the instruments that is granted to carry out this function is the prior control of constitutionality. The Attorney General argued that if the States have the right to control the regulation of the constitutionality of their local regulations, and the actions arising between different government agencies, such means of constitutional control must not overreach the principles of the Federal Constitution. If in fact the states are sovereign in their internal regulations, they should never create legal solutions that provide a state power with authority or power that invades the attributions of the other branches of government, or of municipal autonomy.

Third, the Attorney General argued that the creation of a sole court in charge equally of resolving electoral matters and administrative litigation matters, by Article 71 of the Yucatán Constitution, contradicted the provisions of the Federal Constitution when the latter considered that the creation of jurisdictional bodies must be marked by certain characteristics which are provided by Article 116.IV that establishes the creation of state courts in electoral matters, as well as Article 116.V which contemplates the possibility of creating state courts for administrative litigation. The Attorney General argued that this case concerns diverse institutions, which must not be merged into a sole jurisdictional body.

II. Regarding the first argument, the SCJN determined that this argument had sufficient legal merit. The revocation of the mandate of the position of governor or legislator of the State Legislature is unconstitutional when the Constitution or laws of a State establish a proceeding that is different and isolated from the constitutional framework of the responsibilities of the public servants as referred to under Title Four of the Federal Constitution. In terms of the federal Constitution, in order to impeach the party filling the position of governor or legislator of the Local Legislature, it is absolutely necessary that the constitutional framework, and the legal framework of the responsibilities of the public servants of the state, provide for impeachment, point out the causes that merit such a sanction, the public servants that may be subject to impeachment, as well as the proceeding to institute such a sanction, guaranteeing the right to a hearing and the defence of the affected party.

The Court referred to its previous decisions concerning the resolution of unconstitutionality 63/2009 and its related decisions, 64/2009 and 65/2009. By a majority of nine votes the SCJN declared this provision to be unconstitutional on the basis that the General Constitution of the Republic did not appear to establish the revocation of such mandate. In effect, such General Constitution only provides for civil, criminal, administrative and political responsibility, which are the only routes to demand responsibility from persons holding a position as a result of a popular election; such routes do not take into consideration the revocation of a mandate.

With respect to the second argument, the Court held that the constitutional principles of independence and non-subordination do not suffer from transgression since the involvement of the local (Yucatán) Supreme Court is limited to determining the presence of an omission during the legislative process. With respect

to mandatory legislative authority, it is possible that there would be an infraction derived from the undue compliance or efficiency of the superior regulation. However, it should be noted that such a legal declaration has the consequence that the responsible authorities, in the full exercise of their respective attributions, may cure the omission decreed within a certain time limit. This declaration shall not affect the autonomy of the basic decisions corresponding to each party (principle of independence).

There is also no subordination of one power with respect to another, since the action of the judicial power does not determine the regulations that must be issued (in line with the principle of non-interference). The courts are not responsible to generate the obligation to legislate or issue regulations, but rather such obligation arises out of a mandate provided for under the State Constitution or legislation (in line with the principle of non-subordination). Therefore, the determination of legislative omissions, established under the Yucatán Constitution, is in accordance with the Federal Constitution. A majority of ten votes of the Plenary session determined that the action as a result of a legislative or regulatory omission does not mean that the judicial power of the State can affect the exercise of the sovereign power of the Legislative Branch or the regulatory power of the Executive Branch, nor affect the regulatory legal authority of the Municipality.

With respect to the unconstitutionality of Article 70.IV, as amended, which established prior control over constitutionality, the SCJN determined, by a majority of seven votes, that this consideration has no legal basis. The prior consultation regarding constitutionality must not be analysed under the rigid perspective of the division of powers, but rather in the perspective of the nature of the means of constitutional control. The States have the power to establish their own system of constitutional procedural law, respecting, at all times, the Federal Constitution.

The proper legal action to take with respect to questions of prior control regarding the constitutionality of bills of law can be understood, as it has been legislated by the State of Yucatán, as a measure of constitutional control which determines whether a regulation is in line with the Constitution or not, before it is published.

Pursuant to the foregoing, the SCJN determined that as is provided under this legal action of control, the formulation of the same does not give rise to a distortion in the proceeding for the creation of laws, regulated by the Yucatán Constitution. This is regardless of the fact that this might give rise to an extension in the constitutional or legal terms that rule the issuance of various orders with a one-year valid term, with respect to mandatory legislative powers.

The above does not imply the direct participation of the judicial power in bills of law, because it does not involve the legislature with respect to the sense and content of the regulations that must be voted on and approved.

There is no essential difference between a local constitutional control, and a prior one. To think that this violates the separation of powers principle, would be equal to saying that absolutely everything that has to do with legal provisions are in the purview of the Congress.

As regards the Attorney General's third argument, the SCJN determined the constitutionality of the amendment in question by a majority of eight votes. The above is based on Article 116.I.IV of the Federal Constitution which states that with respect to state laws and constitutions, regarding electoral matters, electoral courts shall enjoy autonomy in their functions and independence in their decision-making. However, there is no constitutional mandate for these jurisdictional bodies to dedicate themselves solely and exclusively to the resolution of means of challenge with respect to electoral matters. Therefore, it is valid that the law grants them proficiency in other matters, as long as the regulations guarantee the know-how and preparation of the holders of such authority, in the matters of their expertise.

Article 116.V of the Federal Constitution establishes the possibility that state constitutions and laws founding administrative litigation courts that do not belong to the Judicial power, in which case this constitutional regulation demands that the law grant them full autonomy in order to issue judicial resolutions, because this would guarantee their impartiality and independence when resolving controversies between the State Public Administrative Body and individual parties.

Thus, electoral justice and administrative justice did not merge in the Constitution of Yucatán, because both jurisdictions have been provided for specifically and separately, Therefore, the specialty in each matter is focused on the specificity of its processes, terms, resources and characteristics, and not on the exclusive designation or dedication of the body that leads it and issues resolutions.

Languages:

Spanish.

Identification: MEX-2013-3-018

a) Mexico / **b)** Supreme Court of Justice of the Nation / **c)** Plenary / **d)** 16.10.2012 / **e)** Constitutional Controversies 63/2011, 64/2011, 65/2011 and 66/2011 / **f)** Citizen representation appointees are expressions of constitutional democracy and their implementation or delimitation does not affect customs governing indigenous peoples / **g)** / **h)**.

Keywords of the systematic thesaurus:

4.9.2 Institutions – Elections and instruments of direct democracy – **Referenda and other instruments of direct democracy**.
5.5.4 Fundamental Rights – Collective rights – **Right to self-determination**.
5.5.5 Fundamental Rights – Collective rights – **Rights of aboriginal peoples, ancestral rights**.

Keywords of the alphabetical index:

Community, indigenous, self-government, practices, customs, protection / Indigenous people / Indigenous right / Tradition / Local autonomy, rights.

Headnotes:

Amendments to the State Constitution of Oaxaca establishing additional forms of citizen participation at the state level (direct democracy, plebiscite, referendum, revocation of mandate and open council) do not contemplate new forms of organisation that affect indigenous communities, in terms of changing their institutions and the traditional forms of organisation in their indigenous municipalities, but rather complement those mechanisms already in existence. Consequently, the constitutional amendment in question must be understood as complementary to the processes and mechanisms of participatory democracy, which does not compromise the will expressed in the Federal Constitution to make public power a mandate that is institutional, limited, balanced and controlled.

Summary:

I. Several indigenous municipalities of the State of Oaxaca brought applications (63 to 66/2011) to the Supreme Court of Justice of the Nation (hereinafter, the "SCJN") to challenge the validity of Decree 397, which had amended, added to and repealed several provisions of the Constitution of the State of Oaxaca, published in the official journal of the state on 15 April 2011. The application focused on whether Articles 23, 24 and 25, part A, subsection IV, Section C, subsections I, II and III, paragraph six and Section V of the Constitution of the State of Oaxaca are in breach of Articles 1, 2, 14, 16 and 115 of the Federal Constitution, concerning, *inter alia*, the general duty of the State to uphold human rights and the prohibition of discrimination (Article 1), the recognition of indigenous identity and rights (Article 2) and the political organisation of the State (Article 115).

These municipalities contended that the challenged amendments to their local constitution undermined the rights of indigenous people in terms of changing their institutions and the traditional forms of organisation in their indigenous municipalities. The municipalities argued that the challenged constitutional articles impose forms of organisation and political participation that are different from those that have traditionally existed in their lands. In this sense, they considered that the forms of citizen participation that are established by the amendment to the local constitution (direct democracy, plebiscite, referendum, revocation of mandate and open council) are forms that are opposed to the uses and customs of indigenous peoples.

II. The plenary session of the SCJN ruled by a seven vote majority that the merits of the applicants' claims were unfounded because the provisions contained in the Decree being challenged do not contemplate new forms of organisation that affect the applicant municipalities, but that complement those already in existence.

Consequently, the constitutional amendment in question must be understood as complementary to the processes and mechanisms of participatory democracy, which does not compromise the will expressed in the Federal Constitution to make public power a mandate that is institutional, limited, balanced and controlled. The manner of citizen representation, as established by the Constitution of the State of Oaxaca are expressions of constitutional democracy and their implementation or delimitation does not affect customs governing indigenous peoples.

The Court therefore held that the provisions of the Constitution of the State of Oaxaca that are being challenged do not impact or affect in any manner the forms of community participation of indigenous communities and peoples as well as the manner of choosing their leaders by uses and customs. The

amendments to the Constitution of Oaxaca were declared valid and the merits of the claims filed by the municipalities who filed as the plaintiffs were disregarded.

Languages:

Spanish.

Moldova
Constitutional Court

Important decisions

Identification: MDA-2013-3-005

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 21.05.2013 / **e)** 9 / **f)** Constitutional review of Article 3 of Parliament's Decision no. 96 of 25 April 2013 on the removal from office of the President of the Parliament and of Law no. 101 of 26 April 2013 on amending the Article 14 of Parliament's Regulations, adopted by Law no. 797-XIII of 2 April 1996 / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

2.1.1.1.1 Sources – Categories – Written rules – National rules – **Constitution**.
3.9 General Principles – **Rule of law**.
3.13 General Principles – **Legality**.
4.5.2 Institutions – Legislative bodies – **Powers**.
4.5.3.1 Institutions – Legislative bodies – Composition – **Election of members**.
4.5.3.2 Institutions – Legislative bodies – Composition – **Appointment of members**.
4.5.4.1 Institutions – Legislative bodies – Organisation – **Rules of procedure**.

Keywords of the alphabetical index:

Complaint, constitutional / Parliament, action, internal / Parliament, member, revocation / President, powers, delegation.

Headnotes:

Under Article 2 of the Constitution, national sovereignty belongs to the people of the Republic of Moldova, who exercise it directly and through its representative bodies in the manner established by the Constitution.

The provisions contained in Article 2.1 of the Supreme Law are corroborated by Article 60, in which is stated that Parliament is the supreme representative body of the people of Moldova and the sole legislative authority of the state.

The legislative function is the main function of the Parliament, consisting of its ability to develop and pass laws.

Under Article 64 of the Constitution, the structure, organisation and functioning of Parliament are set out in its internal regulations.

Summary:

I. A complaint was lodged at the Constitutional Court by MPs Mihai Ghimpu, Valeriu Munteanu, Boris Vieru and Corina Fusu. They sought a constitutional review of Article 3 of Parliament's Decision no. 96 of 25 April 2013 on the removal from office of the Speaker of the Parliament and of Law no. 101 of 26 April 2013 on amending Article 14 of Parliament's Regulations, adopted by Law no. 797-XIII of 2 April 1996.

The applicants took issue with Article 3 of Parliament Decision no. 96, which granted the right to the Vice President of Parliament to perform the duties of the Speaker of the Parliament, in the absence of certain legal regulations, and the subsequent signing on 26 April 2013 of Law no. 101 on amending Article 14 of Parliament's Regulations. This, in their view, was contrary to Articles 2 and 64 of the Constitution.

II. The Court held that parliamentary regulatory autonomy cannot be generalised; the supremacy of the Constitution represents a general binding principle, which also covers Parliament and means that it cannot pass legislative acts and approve regulations on parliamentary procedure contrary to the principles and dispositions of the Constitution.

The Court noted that the Constitution only makes clear provision for the President and for the Prime Minister (Articles 91 and 101). Provision is not made for the concept of "the interim office of the Speaker of the Parliament" or for other Parliamentary bodies.

Parliament enjoys a degree of latitude in decision-making over issues related to its internal organisation and functioning for which specific provision is not made in the Constitution. Such autonomy is exercised by the will of the majority of its members expressed by their vote. Parliament enjoys exclusive competence to establish provisions on the duties of its main bodies and to decide on the way they are applied. Failure to respect certain regulatory provisions can be discovered and resolved exclusively through parliamentary procedures.

The Court noted that at the date of Speaker's removal (25 April 2013), there was no provision in the parliamentary regulations for the Deputy Speaker being able to perform the Speaker's duties if that office fell vacant, including the duty to sign adopted laws. However, by virtue of the regulatory autonomy of Parliament, the Deputy-Speaker of the Parliament was able to exercise this competence, vested with power through the deputies' majority vote, despite the lack of clear legal provision. The parliamentary regulations do not make exhaustive provision for the competences of the person exercising the interim office of President of the Parliament.

The Court held that the status of the *ad interim* President of the Parliament differs from that of the titular President of the Parliament. The status of the *ad interim* President is provisional; he or she is put in place to ensure continuity in performing the functions of Parliament. The person exercising interim office will not have gone through the process of appointment, inherent to that of a titular President of the Parliament (secret vote). Neither do they enjoy the benefit of guarantees of holding the office (removal by a secret vote of 2/3 of the deputies). The constitutional dispositions laid down in this respect exclude equating the mandate of the Speaker of the Parliament with its interim office. This guarantees continuity in the exercise of parliamentary functions but does not mark the beginning of a full mandate as Speaker of the Parliament.

The Court held that the person holding interim office as Speaker of the Parliament can only assume the functional competences of the titular Speaker on ordering the activity of Parliament, as provided for by the Regulations, including signing adopted laws and convening and leading parliamentary sessions.

The Court noted that the exclusive competences of Speaker established by the Constitution are *intuitu personae* and cannot be delegated or assumed and exercised by somebody holding interim office. An interim Speaker cannot, therefore, call for the election of Vice Presidents of the Parliament (Article 64.3 of the Constitution), cannot guarantee the interim office of the President of the Republic of Moldova (Article 91 of the Constitution), cannot submit proposals on the appointment or the removal of the General Prosecutor (Article 125 of the Constitution) or submit proposals on the appointment or removal of the President of the Court of Accounts (Article 133 of the Constitution).

The Court held that the Supreme Law (Article 74) only establishes conditions on the modality of passing the laws. The necessary number of votes by categories of law (constitutional, organic and ordinary) and procedures for signing are not covered by the applicability of constitutional provisions, being strictly administrative and parliamentary procedures.

It also noted that the function of the signing of laws is not a decision-making one, but of confirming that the content of the signed act corresponds to the text adopted by the deputies. This is a technical competence and cannot, by its nature, result in the obstruction of the functioning of Parliament in its capacity of supreme deliberative, collegial organ of the state.

The Court reiterated that the rationale behind the interim office is to deal with the situation which has arisen, because the person holding the titular mandate cannot perform their duties, and to avoid disturbing the smooth running of the institution.

The provisions and the spirit of the Constitution seek to assure continuity in the exercising of power by state institutions, established in line with the provisions of the Constitution. Situations such as interim office, which are aimed at avoiding a power vacuum and making sure plenipotentiary institutions run smoothly, will be eliminated as quickly as possible.

The Court noted that regardless of the circumstances determining the removal from office of the President of the Parliament, MPs have the imperative obligation to subordinate themselves to the Constitution and, in order to ensure the full functionality of state institutions, to carry out without delay elections for the office of titular Speaker of the Parliament, in line with the provisions of Article 64.2 of the Constitution.

The Constitutional Court found constitutional Article 3 of Parliament's Decision no. 96 of 25 April 2013 on removal of the President of the Parliament. It also found constitutional Law no. 101 of 26 April 2013 on amending Article 14 of Parliament's Regulations, adopted by Law no. 797-XIII of 2 April 1996.

Languages:

Romanian, Russian.

Identification: MDA-2013-3-006

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 05.09.2013 / **e)** 22 / **f)** Constitutional review of certain provisions on the immunity of judges / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

3.4 General Principles – **Separation of powers**.
4.7.4.3.1 Institutions – Judicial bodies – Organisation – Prosecutors / State counsel – **Powers**.
4.7.5 Institutions – Judicial bodies – **Supreme Judicial Council or equivalent body**.
4.7.16.2 Institutions – Judicial bodies – Liability – **Liability of judges**.
5.3.13.1.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Criminal proceedings**.
5.3.13.1.5 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Non-litigious administrative proceedings**.
5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts**.
5.3.13.14 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Independence**.

Keywords of the alphabetical index:

Corruption, fight / Judge, independence / Judge, immunity / Supreme Council / Prosecutor, office, authority / Search, arrest, safeguards / Offence, administrative.

Headnotes:

The application of the principle of separation of powers is a prerequisite for the operation of the rule of law.

In the Republic of Moldova, the legislative, executive and judiciary powers are separate and they cooperate in the exercise of their competences under the provisions of the Constitution (Article 6 of the Constitution).

Article 20 of the Constitution guarantees free access to justice to any person, including the right of litigants to have their cases determined by an independent and impartial court that is free from external influence.

Under Article 116.1 of the Constitution, judges of the courts of law are independent, impartial and irremovable in accordance with the law.

The persona of a judge is inviolable. Prosecution against a judge may be initiated only by the Prosecutor General, with the consent of the Superior Council of Magistracy in accordance with the Criminal Procedure Code (Article 19 of the Law on the status of judges).

Amendments to the Law on the status of judges resulted in there no longer being a necessity to obtain the consent of the Superior Council of Magistracy to initiate criminal proceedings against a judge and to carry out detention, forced arrest and searches for offences of passive corruption and traffic of influence, and for committing an administrative offence.

Summary:

I. The case arose from an application by the Supreme Court of Justice for the constitutional review of certain provisions on the immunity of judges.

The challenged provisions meant that there was no longer any need to obtain the consent of the Superior Council of Magistracy to initiate criminal proceedings against a judge and to carry out detention, forced arrest and searches for offences specified in Article 324 of the Criminal Code (passive corruption) and Article 326 of the Criminal Code (traffic of influence), and for committing administrative offences.

The argument was put forward in the application that these provisions endangered the independence of the judicial system. Depriving the Superior Council of Magistrates of the power to determine the "existence" or "non-existence" of grounds to initiate criminal proceedings or to apply sanctions against a judge for minor offences is an inadmissible interference with the procedural guarantees granted to magistrates to ensure their independence and impartiality in the exercise of justice.

II. The Court held that judicial independence is a compulsory condition for the rule of law state and a fundamental guarantee of a fair trial. Judicial independence is not a privilege or prerogative for judges but a guarantee against external pressure in the process of decision making. This independence must be protected by the state.

The independence of the judge does not exclude his or her liability.

The Court accepted Parliament's argument that the purpose of this law was the fight against corruption within the judiciary system, as well as the increase of confidence in judges.

In this context, the Court reiterated the findings laid down in Judgment no. 4 of 22 April 2013, in which it emphasised that "corruption undermines democracy and the rule of law, leads to human rights violation, undermines the economy and diminishes the quality of life. Consequently, the fight against corruption is an integral part of assuring the respect for the rule of law."

The Court held that judicial immunity is not an absolute guarantee. Therefore, it is within the legislator's remit and discretion to determine, by law, guarantees of judicial independence, including those that ensure inviolability and to assure a balance between independence and responsibility of judges, as well as society's trust in justice.

The Court noted that the constitutional principle of judicial independence involves the principle of judges' liability. Independence of the judge does not constitute and cannot be construed as a discretionary power or an obstacle to his criminal and disciplinary liability under the law.

The Court found that vesting the Prosecutor General with the power to launch criminal proceedings against a judge without the prior consent of the Superior Council of Magistracy is justified by the features of investigating corruption cases, which require promptness and confidentiality.

Pursuant to the above, the Court concluded that the provisions, which dispense with the need to obtain consent from the Superior Council of Magistracy for the Prosecutor General to initiate criminal investigation against judges, in cases of criminal offences of passive corruption and traffic of influence, do not violate the principle of judicial independence.

In terms of the necessity of obtaining permission from the Superior Council of Magistracy for the detention, forced arrest and searches of judges, where criminal offences of passive corruption and traffic of influence may have been committed, the Court noted that the legislator, given the special status of the judge as somebody vested with constitutional duties of making justice, has provided that only the Prosecutor General may initiate criminal proceedings against judges.

Presumably, the detention, forced arrest and searches of judges, where criminal offences of passive corruption and traffic of influence have been committed, will only be made once the Prosecutor

General has issued the order to initiate criminal action against the judge and, respectively, to commence prosecution.

Under the Criminal Procedure Code, criminal proceedings are deemed to have commenced once the complaint has been lodged or the competent body has independently initiated a criminal investigation following the organisation or commission of an offence, without issuing a separate procedural act.

Until the Prosecutor General has initiated criminal investigation against a judge, the investigating authority can, once the complaint has been lodged or once it has initiated the investigation on its own, perform certain procedural actions (detention and search), without the participation of the Prosecutor General.

The Court noted the lack of express provision both within the contested provisions of the Law on the status of judges and the criminal procedural rules that apply to detention, forced arrest and search of judges as to which procedural subjects can perform these actions before the criminal investigation is initiated. Nor is any provision made for the manner in which the Prosecutor General conducts or carries out control of the actions taken. The Court accordingly identified gaps in the rules under scrutiny in this matter and issued an address to Parliament to abolish them.

The Court held that subjecting a judge to detention, forced arrest or searches without permission from the Prosecutor General or of the Supreme Council of Magistracy could affect judicial independence.

The Court was of the view that consent by the Superior Council of Magistracy or the control of the Prosecutor General over procedural actions performed by the prosecution in cases of detention, forced arrest and searches of judges is a secure guarantee that reduces the risk of abuse, arbitrary action, and false allegations against judges.

The Court concluded that the changes could pave the way for a reduction in the independence of the judge and they thus run counter to Article 116 of the Constitution.

With regard to the provision regarding the imposition of sanctions on judges for minor offences, the Court concluded that it allowed sanctions to be imposed directly by an inspector.

Under the Code of Administrative Offences, appeals against decisions of the inspector are examined by a court of law. In this situation, the inspector whose action has been challenged becomes part of the process; somebody with a potential part to play in the judicial proceedings will then have the power to sanction a judge. This approach could endanger judicial independence.

Concurrently, the Court held that the participation of the Superior Council of Magistracy in the process of sanctioning judges could generate their disciplinary liability. This would contribute to the fulfilment of the judge's liability principle.

The Court concluded that the dispensing within the provisions of the Law on the status of judges with the need for the Superior Council of Magistracy to give consent for a judge to be subject to administrative sanctions issued by a court of law and the dispensing with the requirement that judges who are detained on suspicion of having committed an administrative offence will be released immediately after identification could generate abuse and lead to the diminishing of the judge's independence. There was also potential for violation of the principle of free access to justice, guaranteed by Article 20 of the Constitution, implicitly the right of litigants to have their case determined by an independent and impartial court of law which is free from external influence.

Languages:

Romanian, Russian.

Identification: MDA-2013-3-007

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 10.09.2013 / **e)** 24 / **f)** Constitutional review of certain provisions of Annex no. 2 of Law no. 48 of 22 March 2012 on the salary system for civil servants / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

2.1.1.1.1 Sources – Categories – Written rules – National rules – **Constitution**.
3.4 General Principles – **Separation of powers**.
3.21 General Principles – **Equality**.

4.7.4.2 Institutions – Judicial bodies – Organisation – **Officers of the court**.
5.2 Fundamental Rights – **Equality**.

Keywords of the alphabetical index:

Civil servant, salary.

Headnotes:

Under the constitutional principle of separation of powers, the legislative, executive and judiciary powers cannot interfere with each other. They must carry out their tasks in the exercise of state power separately, within the limits of the Constitution, through mutual co-operation.

The principle of the separation of powers is aimed at creating a system of governance which would stop abuse of one of the powers.

Legislation that draws a distinction between the wages of civil servants of the courts by comparison to civil servants working for the legislative power and executive authorities is out of line with the Constitution.

Summary:

I. An application was lodged with the Supreme Court, seeking a review by the Constitutional Court of certain provisions of Annex no. 2 of Law no. 48 of 22 March 2012 on the salary system for civil servants.

The applicant alleged that those sections of Annex no. 2 of Law no. 48 of 22 March 2012, which draw a distinction between the wages of civil servants of the courts in relation to civil servants of the authority of the legislative power and executive authorities, are contrary to the Articles 6 and 116.1 of the Constitution.

II. The Court began by observing that, under the principle of separation of powers, the legislative, executive and judiciary powers must not compete with each other and are responsible for carrying out their tasks in the exercise of state power through mutual cooperation for the exercise of state power.

The Court noted that a component of the state power with stronger potential to influence is capable of subordinating another power. In its jurisprudence, the Court has developed the principle of separation and collaboration of the state powers, guaranteed by Article 6 of the Constitution and has deduced as an inalienable part of this principle the balance between the branches of the state power.

In terms of the principle of equality, the Court has consistently held in its jurisprudence that any difference in treatment does not automatically imply a violation of Article 16 of the Constitution. A violation of Article 16 will only be found if different and discriminatory treatment has been applied to persons in similar or comparable situations.

A distinction is discriminatory if it is not based on an objective and reasonable justification, namely when it is not following a legitimate purpose or there is no reasonable relation of proportionality between the measures applied and the aim pursued.

Within the democratic system of applying the principle of separation of the three branches of state power, the existence of an independent judiciary is important, in order to maintain the rule of law.

The Court noted that the process of dispensing justice is achieved by involving several supporting components, in addition to judges who directly represent this power.

The Court held that the guarantee of a balance between state powers is also reflected in the degree of proportionality of the financial support for the administrative staff, which ultimately contributes in fulfilling the tasks of the representatives of these three powers.

The Court noted a distinction between wage rates for employees in identical functions of the legislative and executive authorities and for employees of the judiciary system.

The Court found that the discrepancy between the wage scale of employees of the Supreme Court and those of the Parliament Secretariat or of the State Chancellery is a discriminatory factor which has the potential to unbalance the state powers.

The Court emphasised that, in order to ensure an equivalent status for the judiciary power with the other two branches of state power, equivalent treatment should also be maintained for the supporting components of this power, including creating the necessary conditions for providing qualified and competitive staff.

A correlation should also, in the Court's opinion, be made with the provisions of Recommendation CM/Rec (2010)12 of the Committee of Ministers: "The efficiency of judges and of judicial systems is a necessary condition for the protection of every person's rights, compliance with the requirements of Article 6 of the Convention, legal certainty and public confidence in the rule of law. [...] Each state should allocate adequate

resources, facilities and equipment to the courts to enable them to function in accordance with the standards laid down in Article 6 of the Convention and to enable judges to work efficiently. [...] A sufficient number of judges and appropriately qualified support staff should be allocated to the courts."

The Court held that different wage scales for identical or similar competences of the authorities at the same level in the institutional hierarchy of powers constituted discriminatory treatment. Treating a person (or group of persons) in a manner less favourable than a person in a comparable situation constitutes discrimination.

The Court found that despite the fact that civil servants in the legislative, executive and judicial powers of the state do not exercise the correspondent state powers directly, they are the members of staff who contribute to the exercise of the respective state power. Therefore, in assessing the balance of the state powers, the civil servants working in these state powers represent a force that cannot be ignored.

Analysing the Sole Classifier of public functions, approved by Law no. 155 of 21 July 2011 the Court did not observe significant differences in the description of similar public functions and in the requirements submitted to those holding such functions. As outlined in the Law on the public office and the status of civil servant, the employment criteria are no different.

The Court noted that offering financial support to the civil servants of one power to the detriment of another can undermine the respective power, making it less attractive to qualified staff.

The Court held that laying down differentiated wage scales in the compartments "Secretariat of the Constitutional Court", "Superior Council of Magistracy", "Supreme Court", "Office of the Prosecutor General", "courts of appeal" and "courts, including the military court, territorial and specialised prosecution offices" of the Annex no. 2 of Law no. 48 in correlation with the compartments regarding the legislative and executive authorities has an impact on the principles enshrined in the Articles 6 and 16 of the Constitution.

In the light of the reasoning invoked above, the Constitutional Court declared unconstitutional the compartments "Secretariat of the Constitutional Court", "Superior Council of Magistracy", "Supreme Court", "Office of the Prosecutor General", "courts of appeal" and "courts, including the military court, territorial and specialised prosecution offices" of the Annex no. 2 of Law no. 48, 22 March 2012 on the salary system for civil servants.

Languages:

Romanian, Russian.

Identification: MDA-2013-3-008

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 05.12.2013 / **e)** 36 / **f)** Interpretation of the Article 13 of the Constitution / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

2.1.1.1.1 Sources – Categories – Written rules – National rules – **Constitution**.
2.2.2.2 Sources – Hierarchy – Hierarchy as between national sources – **The Constitution and other sources of domestic law**.
4.3.1 Institutions – Languages – **Official language(s)**.

Keywords of the alphabetical index:

Constitution, interpretation.

Headnotes:

Under Article 13.1 of the Constitution, the official language of the Republic of Moldova is "Moldovan language, based on Latin alphabet".

Concurrently, the Declaration of Independence of the Republic of Moldova operates with the term "Romanian" for the official language of the newly created state Republic of Moldova.

Therefore, the reference to "Romanian" as the official language is a factual situation ascertained in the actual text of the Declaration of Independence, which is the founding act of the Republic of Moldova. Regardless of glottonyms used in the legislation before the proclamation of independence, the Declaration of Independence uses the clearly distinguished and expressly preferred term "Romanian language".

Summary:

I. On 5 December 2013 the Constitutional Court delivered the Judgment on the interpretation of Article 13.1 inter-related with the Preamble of the Constitution and the Declaration of Independence of the Republic of Moldova (Complaints nos. 8b/2013 and 41b/2013).

The case stemmed from an application lodged at the Constitutional Court on 26 March 2013 by the MP, Mrs Ana Guţu, on the interpretation of Article 13 of the Constitution, according to which:

"(1) The State language in the Republic of Moldova is the Moldovan language based on the Latin alphabet. [...]"

The applicant sought from the Constitutional Court an interpretation of Article 13 of the Constitution, to explain:

- whether the phrase "Moldovan language based on the Latin alphabet" can be semantically equated with the phrase "Romanian language".

On 15 October 2013, the application was supplemented, the Constitutional Court having been asked to confer upon the Declaration of Independence of the Republic of Moldova, adopted on 27 August 1991, the status of a constitutional norm, confirming the official language of the Republic of Moldova as Romanian, and not "Moldovan language based on Latin alphabet" as formulated in Article 13 of the Constitution.

The case also stems from the application lodged at the Constitutional Court on 17 September 2013 by MP's Mihai Ghimpu, Valeriu Munteanu, Corina Fusu, Boris Vieru and Gheorghe Brega, on the interpretation of Article 1.1 correlated with Article 13.1 and the Preamble of the Constitution of Moldova, in which the following were requested:

- recognition of the Declaration of Independence of the Republic of Moldova as having a higher value than the Constitution of the Republic of Moldova;
- removal of the contradiction between the provisions of the Declaration of Independence of the Republic of Moldova and Article 13.1 of the Constitution, correlating the name of the official language of the Republic of Moldova according to the legal act considered by the Constitutional Court as the superior one.

In his written opinion, the President of the Republic of Moldova stated that the scientific name of the official language in the Republic of Moldova is a certainty, yet it continues to be a political matter.

In the opinion of the President of the Republic of Moldova, the Romanian nation is organised in two Romanian states: Romania and the Republic of Moldova.

The President of the Republic of Moldova considers that the issue regarding the name of the official language of the state, determined by the problem of linguistic identity of the titular nation, has caused a deep split within society. The Republic of Moldova must resolve its linguistic problems immediately, the official name of the state's language must be determined only in terms of scientific truth, with no political interference.

According to the Academy of Sciences of Moldova, the official language of the Republic of Moldova is Romanian and the phrase "Moldovan language, based on Latin alphabet" inserted in Article 13.1 of the Constitution can be equated semantically with the Romanian language. The Academy of Sciences of Moldova considers that in the Declaration of Independence of the Republic of Moldova the supreme legislative body recognised that the official name of the language spoken in Moldova is Romanian.

II. Having heard the reasoning of the parties and examined the case files, the Court held that the Declaration of Independence enshrines the creation of the newly independent state and lays the foundations, principles and values of the state organisation of the Republic of Moldova.

The Court held that the Declaration of Independence, being an integral part of the Preamble of the Constitution, has the value of a constitutional text and is a joined body with the Constitution, being the primary and immutable constitutional text of this Constitutional Block.

The Court held that the Declaration of Independence represents the legal and political foundation of the Constitution; no provision of the latter can exceed the Declaration of Independence.

Therefore, any constitutional review or interpretation must take into consideration not only the text of the Constitution, but also the constitutional principles laid down in the Declaration of Independence of the Republic of Moldova.

It ruled that, within the meaning of the Preamble to the Constitution, the Declaration of Independence of the Republic of Moldova is a joined body with the Constitution, being the primary and immutable constitutional text of this Constitutional Block. The Court also held that, in case of divergence between the text of the Declaration of Independence and the text of the Constitution, the primary constitutional text of the Declaration of Independence prevails.

Additionally, the Court noted that according to Article 13.1 of the Constitution, the official language of the Republic of Moldova is "Moldovan language based on the Latin alphabet". On the other hand, the Declaration of Independence operates with the term "Romanian language" as the official language of the newly created state, the Republic of Moldova.

Subsequently, no legal act, irrespective of its force, including the Fundamental Law, can be in collision with the text of the Declaration of Independence. Insofar as the Republic of Moldova is in the same political system created by the Declaration of Independence of 27 August 1991, the constituent legislator cannot adopt regulations contrary to it. However, in case when the constituent legislator admitted in the Fundamental Law certain contradictions with regard to the Declaration of Independence, the genuine text withstands the Declaration of Independence.

In light of the above, having examined the cumulative effect of the two provisions on the official language, the Court found that the corroborated interpretation of the Preamble and of Article 13 of the Constitution resides in the uniqueness of the official language, which name is given by the primary, imperative provision of the Declaration of Independence. Consequently, the Court considered that the provision contained in the Declaration of Independence on the Romanian language as the official language of the Republic of Moldova prevails over the provision regarding Moldovan language from Article 13 of the Constitution.

Languages:

Romanian, Russian.

Montenegro
Constitutional Court

Important decisions

Identification: MNE-2013-3-002

a) Montenegro / **b)** Constitutional Court / **c)** / **d)** 14.11.2013 / **e)** U-VI no. 9/13 / **f)** / **g)** *Službeni list Crne Gore* (Official Gazette), no. 54/13 / **h)** CODICES (Montenegrin, English).

Keywords of the systematic thesaurus:

1.3.4.5 Constitutional Justice – Jurisdiction – Types of litigation – **Electoral disputes**.
5.2.1.4 Fundamental Rights – Equality – Scope of application – **Elections**.
5.3.41 Fundamental Rights – Civil and political rights – **Electoral rights**.
5.3.41.2 Fundamental Rights – Civil and political rights – Electoral rights – **Right to stand for election**.

Keywords of the alphabetical index:

Election, voting right / Electoral Commission / Remedy, effective / Remedy, violation, constitutional right.

Headnotes:

According to Article 35.1 of the Law on the Election of Councillors and Members of Parliament and the Constitutional Court's case-law, the protection of the right to vote includes the right to file objections or complaints to competent bodies and courts and it applies to all stages of elections including issues pertaining to the appointment of the bodies for administering election procedure, which are also entrusted with the appointment of nominees of submitters of electoral lists for the authorised representatives to the extended formation of the polling board.

Summary:

I. Following the Constitution, the way in which the freedoms and rights of citizens are exercised include the right to vote and, as such, this right is exercised at elections and protection of the right is defined by laws

which are to be in compliance with the Constitution. The manner in which voting rights are exercised in the procedure for the election of councillors to municipal assemblies, the assembly of the capital city, the assemblies of urban municipalities and the Royal Capital and for members of the Parliament of Montenegro is regulated by the Law on the Election of Councillors and Members of Parliament. The Law prescribes, *inter alia*, the manner in which the right to vote is protected in relation to the procedure of electing councillors and members of parliament. In that sense, an electoral dispute refers to the examination by competent bodies of all violations of the rules of electoral procedure from the moment of calling for election to the moment of confirmation of the seats won at elections.

The electoral list *"Srcem za Cetinje"* of the political party *Pozitivna Crna Gora* submitted to the Constitutional Court a constitutional complaint against a Decision of the State Election Commission, whereby the Commission rejected their complaint against the Conclusion of the Election Commission of the Royal Capital Cetinje no. 01-14/13-88 dated 10 November 2013 on the basis of a lack of jurisdiction.

The complaint argued that the contested decision is illegal and unconstitutional, because the complainants were deprived of the right to a legal remedy under Article 20 of the Constitution and of the right to file a complaint stipulated in Article 108.2 of the Law on the Election of Councillors and Members of Parliament (hereinafter, the "Law"), given that the Commission by its decision acted in contravention to the provision of Article 32.1.1, 32.1.2 and 32.1.3 of the Law and entitled municipal commissions to pass conclusions in future which can, for example, reject proposals of all parties submitting electoral lists to appoint authorised representatives to polling boards or do any other infringement on the right stipulated by this law.

The State Election Commission rejected the complaint of the applicant against the conclusion of the election commission of the Royal Capital Cetinje, dated 10 November 2013, due to lack of competence, on the basis that the concrete case concerned, not violation of an electoral right, but the appointment of authorised representatives to a polling board, which does not fall within the remit of the Commission.

II. The Constitutional Court, having considered the contested decision and relevant submitted documentation held that the complaint was lodged in timely manner, was admissible and well-founded. Accordingly, the Constitutional Court approved the constitutional complaint and revoked the contested decision of the State Election Commission.

The Court held that those submitting electoral lists are eligible to nominate their authorised representatives to the extended formation of the polling board, are entitled to appoint their authorised representative each, and are to notify municipal election commission of such nominations. Within 24 hours the commission must send notices listing names of each and every person appointed into the extended polling board (Article 36 of the Law).

The Constitutional Court found that, in compliance with Article 108.2 of the Law, submitters of election lists are entitled to submit a complaint to the competent body, namely, the State Election Commission, if they think that an act or decision of the municipal election commission violated their right to nominate a representative to the extended formation of electoral board in the election process.

Starting from the quoted constitutional and legal provisions and the facts of the case, the Constitutional Court held that the State Election Commission had failed to vindicate the complainant's right to vote, in the procedure for establishing the list of nominees to be appointed representatives to the extended polling board for the election of the councillors in the assembly of the Royal Capital Cetinje, rejecting the complaint as inadmissible, due to its lack of jurisdiction.

The Constitutional Court therefore established that the contested decision of the State Election Commission was legally unfounded and the complaint legally founded. The State Election Commission must therefore decide about the applicant's complaint within the time prescribed by the law.

Languages:

Montenegrin, English.

Netherlands
Council of State

Important decisions

Identification: NED-2013-3-007

a) Netherlands / **b)** Council of State / **c)** General Chamber / **d)** 29.10.2003 / **e)** 200300512/1 / **f)** X (a citizen) v. Mayor and Aldermen of Bloemendaal / **g)** *ECLI:NL:RVS*:2003:AM5435; *Administratiefrechtelijke Beslissingen*, 2003, 463; *Jurisprudentie Bestuursrecht*, 2004, 3 / **h)** CODICES (Dutch).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Guardianship.

Headnotes:

Denial of the right to vote to persons placed under guardianship may violate the International Covenant on Civil and Political Rights.

Summary:

I. A person placed under guardianship who had, for that reason, lost the right to vote argued that the decision to deny him the right to vote had been in breach of Article 25 of the International Covenant on Civil and Political Rights (hereinafter, "ICCPR").

II. The Council of State held that the unconditional exclusion of persons placed under guardianship from the right to vote may in certain specific instances run counter to Article 25 ICCPR. However, the Council of State abstained from reviewing whether the relevant provisions in the Constitution and the Electoral Law ought to have been applied under Article 94 of the Constitution; this would have resulted in the Council of State overstepping the boundaries of its jurisdiction.

Supplementary information:

This judgment led to a change in Article 54 of the Constitution in 2008.

Languages:

Dutch.

Identification: NED-2013-3-008

a) Netherlands / **b)** Council of State / **c)** General Chamber / **d)** 22.12.2010 / **e)** 200909234/1/H2 / **f)** X (a citizen) v. Tax/Allowance Authorities / **g)** *ECLI:NL:RVS*:2010:BO8342, *Administratiefrechtelijke Beslissingen* 2011/169 / **h)** CODICES (Dutch).

Keywords of the systematic thesaurus:

5.1.1 Fundamental Rights – General questions – **Entitlement to rights**.
5.2.1.3 Fundamental Rights – Equality – Scope of application – **Social security**.
5.4.14 Fundamental Rights – Economic, social and cultural rights – **Right to social security**.

Keywords of the alphabetical index:

Rent allowance / Social security benefits / Illegal aliens / Exclusion clauses.

Headnotes:

Persons legally resident in the Netherlands may in certain circumstances be precluded from receiving benefits where they share their accommodation with somebody not legally resident. This is not unlawful or discriminatory.

Summary:

I. A woman legally residing in the Netherlands had applied for rent allowance. The Tax/Allowance Authorities (hereinafter, the "Authorities") granted the allowance but stopped it and reclaimed it when they discovered that the woman shared her house with her son, who was of full age and did not legally reside in the Netherlands.

II. Upon appeal, the Council of State held that the difference in treatment between tenants who share their accommodation with a legally resident housemate and tenants sharing their accommodation with a non-legally resident housemate did not amount to a violation of Article 26 of the International Covenant on Civil and Political Rights and Article 14 in conjunction with Article 8 ECHR. The principle stipulating that illegal aliens and, in certain cases, legally resident family members who have allowed them to stay at their home are not entitled to social security benefits and other social services, in general provides for reasonable and objective justification. Furthermore, the decision to stop and reclaim the allowances did not render it impossible for mother and son to share accommodation.

However, under Article 94 of the Constitution, Acts of Parliament cannot be applied if they violate self-executing treaty provisions such as those mentioned above. In exceptional circumstances a decision to stop and reclaim allowances from a tenant sharing accommodation with her non-legally resident child of full age may amount to a violation of the above anti-discrimination clauses. In this particular case, the tenant/mother was infected with HIV/AIDS and claimed dependence on her son. Her son had in the meantime obtained a residence permit, as he could not leave the country for reasons beyond his control. The authorities therefore should have examined whether the circumstances of the case were so exceptional that the exclusion clauses in the General Income-Related Regulations Act should not have been applied.

The Council of State quashed the decision (for lack of reasons) but upheld its legal effect. The exclusion clauses could be applied, as the desirability of the son's presence for social-medical reasons was not sufficient; it had not been proved that the son could only take care of his mother while sharing accommodation. Therefore, there were no exceptional circumstances requiring the non-application of the Act.

Languages:

Dutch.

Identification: NED-2013-3-009

a) Netherlands / **b)** Council of State / **c)** General Chamber / **d)** 30.03.2011 / **e)** 201006801/1/H2 / **f)** Foundation Islamic Schools Amsterdam v. Minister for Education, Culture and Science / **g)** ECLI:NL:RVS:2011:BP9541 / **h)** CODICES (Dutch).

Keywords of the systematic thesaurus:

3.5 General Principles – **Social State**.
3.7 General Principles – **Relations between the State and bodies of a religious or ideological nature**.
5.4.2 Fundamental Rights – Economic, social and cultural rights – **Right to education**.

Keywords of the alphabetical index:

Primary education / Active citizenship / Social integration.

Headnotes:

Schools enjoy a wide margin of discretion in terms of encouraging active citizenship and social integration; the requirements for these matters have not been enshrined formally in regulations or secondary legislation.

Summary:

I. The Primary Education Act requires schools to encourage active citizenship and social integration. The Education Inspectorate had doubts as to whether these goals were met by the As Siddieq school, an orthodox Islamic school in Amsterdam. The Inspectorate set the school an achievement scheme to improve its citizenship education programme. However, the school did not meet each and every requirement set by the Inspectorate. Therefore, the State Secretary for Education, Culture and Science (hereinafter, the "State Secretary") partially suspended the financing of the school. The school board objected, but the State Secretary turned down its objections. The board then appealed to the Council of State.

II. The Council of State noted that the requirements concerning educating for active citizenship and social integration set out in the Primary Education Act have not been specified within regulations formulating concrete targets, nor have they been specified in other secondary legislation. This means schools have a wide margin of discretion in the way they encourage active citizenship and social integration. This margin had been stressed by the drafters of the Act of

Parliament who aimed at including active citizenship and social integration aims in the Primary Education Act, while at the same time respecting the freedom of education. Despite the fact that the school may not have fulfilled the requirements set by the Inspectorate for the second period of its achievement scheme, the Council of State quashed the State Secretary's decision, taking into account that the school had started a project called 'The Peace-Loving School', which was sufficient, given the school's wide discretion in this matter.

Languages:

Dutch.

Norway
Supreme Court

Important decisions

Identification: NOR-2013-3-001

a) Norway / **b)** Supreme Court / **c)** Plenary / **d)** 23.10.2013 / **e)** HR 2013-02200-P / **f)** / **g)** *Norsk retstidende* (Official Gazette), 2013, 134 / **h)** CODICES (Norwegian, English).

Keywords of the systematic thesaurus:

5.3.38 Fundamental Rights – Civil and political rights – **Non-retrospective effect of law**.
5.3.38.2 Fundamental Rights – Civil and political rights – Non-retrospective effect of law – **Civil law**.
5.3.39 Fundamental Rights – Civil and political rights – **Right to property**.

Keywords of the alphabetical index:

Judicial review / Property, right to enjoyment / Retroactivity.

Headnotes:

The 2007 amendment that imposed a time limit on a 2005 regulation relating to structural quotas for the deep-sea fishing fleet, which contained no limit on the number of years during which a vessel could be allocated such quotas, did not imply any retroactive effect in conflict with Article 97 of the Constitution.

Summary:

I. The regulation relating to structural quotas for the deep-sea fishing fleet, as it originally read after the coming into force in 2005, contained no limit as to the number of years during which a vessel could be allocated such quotas. In 2007, the regulation was amended so that a time limit for the quotas was introduced.

II. The Supreme Court majority of 9 judges concluded that the amendment of the rule did not imply any retroactive effect in conflict with Article 97 of the Constitution. The majority took for their starting point that this was a question of an infringement of an

established legal position and that the norm for constitutional protection was accordingly whether the retroactive effect would be particularly unreasonable or unfair.

In the assessment of reasonableness, the point of departure was that the owner of a vessel that had been allocated a structural quota without any time limit based on the 2005 Regulation, and where the timeframe had now been limited to 25 years, could, objectively speaking, have strong expectations of retaining the quota without any time limit. On the other hand, importance was attached to the fact that the financial loss resulting from the time limit would not be very significant in view of the tax depreciation rules.

The majority also considered it important that the shipping company would obtain advantages as a result of other elements of the established structuring regime, that the brunt of the effect would occur at some point well into the future and that the State should have considerable freedom to act when it comes to regulating the content of the fishing fleet's framework conditions. The amendment to the regulation accordingly did not represent any particularly or clearly unreasonable or unfair infringement *vis-à-vis* the shipping company.

The Court also found that the amendment was not in contravention of Article 1 Protocol 1 ECHR. The majority found that paragraph 2 of the Article was applicable and that the infringement satisfied the proportionality requirement in this provision.

Languages:

Norwegian, English (translation by the Court).

Poland
Constitutional Tribunal

Statistical data
1 September 2013 – 31 December 2013

Number of decisions taken:

Judgments (decisions on the merits): 17

- Rulings:
  - in 14 judgments, the Tribunal found some or all of the challenged provisions to be contrary to the Constitution (or other act of higher rank)
  - in 3 judgments, the Tribunal did not find the challenged provisions contrary to the Constitution (or other act of higher rank)
- Initiators of proceedings:
  - 6 judgments were issued upon the request of the Commissioner for Citizens' Rights (i.e. Ombudsman)
  - 1 judgment was issued upon a request of a Municipal Council
  - 1 judgment was issued upon the request of the National Judiciary Council
  - 4 judgments were issued upon the request of the courts – the question of law procedure (in one case two requests of courts were examined jointly)
  - 4 judgments were issued upon the request of a physical person – the constitutional complaint procedure (in one case two requests of courts were examined jointly)
  - 1 judgment was issued upon the request of a legal person – the constitutional complaint procedure (in this case two requests of the same legal person were examined jointly)
- Other:
  - 2 judgments were issued by the Tribunal sitting in plenary session
  - 3 judgments were issued with a dissenting opinion

Important decisions

Identification: POL-2013-3-005

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 13.12.2012 / **e)** P 12/11 / **f)** / **g)** *Dziennik Ustaw* (Journal of Laws), 2012, item 14724; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2013, no. 11A, item 135 / **h)** CODICES (English, Polish).

Keywords of the systematic thesaurus:

3.17 General Principles – **Weighing of interests**.
3.25 General Principles – **Market economy**.
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:

Property, protection, constitutional / Expropriation, limits / Expropriation, right to re-acquire / Expropriation, carrying out public purposes / Expropriation, public interest / Real estate / Ownership.

Headnotes:

If a public purpose for which property (real estate) has been expropriated is not carried out or this property is not necessary for that public purpose, then there is no constitutional legitimacy to interfere with private ownership nor a legal basis for a public entity to acquire ownership. In such a situation, the previous owner has the right to re-acquire the ownership of this property.

The constitutional provision stipulating that expropriation may be allowed solely for public purposes and for just compensation to be paid may not be a higher-level norm to review the constitutionality of the lack of rules to return such property properly allocated for carrying out public purposes specified in relevant expropriation decisions within the statutory time-limits. Therefore, this provision does not establish the legislator's general obligation to return every property (real estate) which is, for the time being, used for a purpose different from the one specified in the relevant expropriation decision. It is used only after the initial purpose has been effectively achieved. However, the Constitutional Tribunal does not rule out that such an obligation could arise from other provisions of the Constitution.

Summary:

I. The Voivodeship Administrative Court in Gdańsk referred a legal question to the Constitutional Tribunal regarding a provision of the Act of 21 August 1997 on the Management of Property (real estate). The aim of this provision was to set out the terms for the expropriation of property (real estate) as well as the terms for returning expropriated property (real estate). According to the Act, the previous owners or their successors might, at any time, claim the return of expropriated property or parts of it, if said property no longer serves the purpose specified in the expropriation decision. At the same time, the statute provided that property (real estate) should be deemed not fit for the purpose specified in the expropriation decision if within a seven-year period, work was not commenced to carry out the purpose or despite the laps of a 10-year period, the said purpose was not carried out.

The Constitutional Tribunal recognised that the Voivodeship Administrative Court in Gdańsk requested the review of a legislative omission. Specifically, the content of the challenged statutory provision, indicating property (real estate) that is "not fit for the purpose specified in an expropriation decision", does not mention property (real estate) in the context of which said purpose was carried out within the time-limits set out in this provision, and after the lapse of said time-limits the property (real estate) was allocated to a different purpose than the one specified in the expropriation decision.

II. Pursuant to Article 21.2 of the Constitution, expropriation may be allowed solely for public purposes and if just compensation is paid. Expropriation constitutes an exception to the constitutional principle of the protection of private property established as a part of the rights of persons and citizens in Chapter II of the Constitution. As a consequence, if a public purpose for which a given property (real estate) has been expropriated is not being carried out or if this property is unnecessary for that public purpose, then there is neither constitutional legitimacy of interference in the realm of private ownership nor a legal basis for the acquisition of ownership by a public entity.

There is an inextricable link between the description of the public purpose in an expropriation decision and the actual use of the expropriated property (real estate). As such, there exists an inextricable link between an infringement with respect to the premises concerning the admissibility of the expropriation "solely for public purposes" and the emergence of an obligation on the part of the organs of a constitutional state to return the expropriated property (real estate). As a result, Article 21.2 of the Constitution may – as a

higher-level norm for review – concern the assessment of provisions regulating the conduct of the expropriator. This applies to the expropriator's rights to the property (real estate) acquired by expropriation as long as the public purpose specified in a relevant expropriation decision is not carried out.

Nevertheless, the Court indicated that no arguments could be found in the provisions to extend the normative scope of the constitutional principle to return expropriated property in relation to the assessment of the challenged Act. This seems to be the case insofar as it does not regard as unfit property for which a given purpose of expropriation was carried out, but subsequently redirected to a different purpose than the one specified in the relevant expropriation decision. As such, it is not subject to return to the previous owners. What follows from the aforementioned principle is that, after the purpose of expropriation ceased to exist, the expropriation carried out in the past is still assessed as consistent with the law, and actions taken in the context of the expropriated property are deemed appropriate.

The Constitutional Tribunal does not rule out that an obligation to return property that fails to fulfil the purpose for which it was expropriated, after this initial purpose had been effectively achieved, could arise from other provisions of the Constitution. Acquisition, disposal or the management of expropriated property by the state are subject to statutory regulation on the basis of Articles 216.2 and 218 of the Constitution. Furthermore, property expropriated by the units of local self-government is subject to guarantees set out in Articles 163 and 165.1 of the Constitution. The question of the potential return of the above-mentioned property is also covered by the scope of regulation of general systemic provisions: the principles of a democratic state governed by law, social justice, social market economy, solidarity and co-operation. However, the aforementioned higher-level norms remain outside the scope of review in the present case. Nonetheless, nothing stands in the way for the legislator to go beyond the constitutional minimum of the regulation and to introduce institutions that lead to re-acquiring expropriated property, e.g. the right of pre-emption, preferential right of acquisition, the right of repurchase, etc.

Cross-references:

Constitutional Tribunal:

- Judgment K 6/05 of 03.04.2008, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2008, no. 3A, item 41;
- Judgment K 8/98 of 12.04.2000, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2000, no. 3, item 87;
- Judgment P 25/02 of 21.06.2005, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2005, no. 6A, item 65; *Bulletin* 2005/2 [POL-2005-2-007];
- 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];
- Decision K 1/91 of 28.05.1991, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1991, item 4;
- Resolution W 11/91 of 24.06.1992, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1992, item 18;
- Judgment P 5/99 of 14.03.2000, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2000, no. 2, item 60, *Bulletin* 2000/1 [POL-2000-1-009];
- Judgment K 8/98 of 12.05.2000, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2000, no. 2, item 63;
- Judgment K 2/02 of 28.01.2003, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2003, no. 1A, item 4, *Bulletin* 2003/2 [POL-2003-2-013];
- Judgment K 61/07 of 09.12.2008, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2008, no. 10A, item 174.

Languages:

Polish, English (translation by the Tribunal).

Identification: POL-2013-3-006

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 26.06.2013 / **e)** K 33/12 / **f)** / **g)** *Dziennik Ustaw* (Journal of Laws), 2013, item 825; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2013, no. 5A, item 63 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

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

1.3.4.9 Constitutional Justice – Jurisdiction – Types of litigation – **Litigation in respect of the formal validity of enactments**.
1.3.4.14 Constitutional Justice – Jurisdiction – Types of litigation – **Distribution of powers between the EU and member states**.
1.3.5.1 Constitutional Justice – Jurisdiction – The subject of review – **International treaties**.
1.3.5.2.1 Constitutional Justice – Jurisdiction – The subject of review – Community law – **Primary legislation**.
2.1.1.3 Sources – Categories – Written rules – **Community law**.
2.1.3.2.2 Sources – Categories – Case-law – International case-law – **Court of Justice of the European Communities**.
2.2.1.1 Sources – Hierarchy – Hierarchy as between national and non-national sources – **Treaties and constitutions**.
2.2.1.6.1 Sources – Hierarchy – Hierarchy as between national and non-national sources – Community law and domestic law – **Primary Community legislation and constitutions**.
3.1 General Principles – **Sovereignty**.
3.26.3 General Principles – Principles of EU law – **Genuine co-operation between the institutions and the member states**.
4.5.2.1 Institutions – Legislative bodies – Powers – **Competences with respect to international agreements**.
4.5.6.3 Institutions – Legislative bodies – Law-making procedure – **Majority required**.
4.10.5 Institutions – Public finances – **Central bank**.
4.16.1 Institutions – International relations – **Transfer of powers to international institutions**.
4.17.2 Institutions – European Union – **Distribution of powers between the EU and member states**.

Keywords of the alphabetical index:

Competence, conferral, basis, constitutional / Competence, conferral, ratification procedure, statute giving consent / Court of Justice of the European Union, binding force of decisions / Euro zone.

Headnotes:

There are no grounds to state that the challenged Act on the ratification of the European Council Decision 2011/199/EU of 25 March 2011 leads to the conferral of "the competence of organs of State authority", within the meaning of Article 90 of the Constitution, which establishes a special legislative procedure for such acts. It does not follow from Article 136.3 of the Treaty on the Functioning of the European Union (hereinafter, "TFEU"), introduced with the aforementioned Decision, that competence previously vested in given state authorities would become part of the scope of competence of an international organisation.

Not every amendment to an international agreement on the basis of which competence of state authority has been conferred to an international organisation must be ratified in accordance with the special procedure set out in Article 90 of the Constitution. It needs to be examined each time that the given agreement introducing the aforementioned amendment constitutes a basis for the transfer of further competences.

Determining whether Article 48.6 of the Treaty on European Union (hereinafter, "TEU") constitutes the right basis for adopting the European Council Decision goes beyond the scope of jurisdiction of the Constitutional Tribunal, as the Court of Justice of the European Union (hereinafter, "CJEU") remains solely competent to rule on its validity.

The CJEU's statements were binding for the Constitutional Tribunal, specifically that the addition of Article 136.3 TFEU did not confer any new competences on the European Union (CJEU's Judgment no. C-370/12, case *Thomas Pringle v. Ireland)*, as well as the validity and interpretation of the European Council Decision 2011/199/EU.

Summary:

I. The European Council adopted Decision 2011/199/EU of 25 March 2011, introducing an amendment to Article 136 of the Treaty on the Functioning of the European Union. Article 136.3 TFEU added by the aforementioned Decision stipulates that the Member States whose currency is the euro may establish a stability mechanism to be activated if it is indispensable to safeguard the stability of the euro area as a whole. The decision has been adopted by "having regard to" Article 48.6 TEU. This requires a subsequent adoption of such decisions in compliance with relevant constitutional requirements of the Member States. The statute giving consent to the ratification has been adopted pursuant to ordinary legislative procedure on the 11 May 2012. Subsequently, on the basis of the statute, the President of the Republic of Poland ratified the European Council Decision 2011/199/EU on 25 October 2012.

A group of *Sejm* deputies questioned the adequacy of the ordinary legislative procedure applied to adopt the Act of 11 May 2012 on the ratification of the European Council Decision 2011/199/EU of 25 March 2011.

Regarding special ratification procedure, according to Article 90 of the Constitution, the Republic of Poland may, by virtue of international agreements, delegate to an international organisation or international institution the competence of organs of State authority in relation to certain matters. A statute granting consent to ratification of such agreement is passed by the *Sejm* and by the Senate by a qualified two-thirds majority vote in the presence of at least half of the statutory number of each house's members. In the applicants' view, as the challenged Act created procedural basis for conferring state authorities competences upon an international organisation – the European Stability Mechanism (hereinafter, the "ESM"), consent to the ratification of the foregoing should have been granted in accordance with the special procedure set out in Article 90 of the Constitution. The applicants made further allegations, including the inconsistency of the European Council Decision with Article 48.6 TEU, due to the fact that the said Decision was issued without a legal basis.

II. Not every agreement that affects the way in which a competence vested in the organs of state authority is exercised – restricting or modifying the scope of the said competence by imposing new obligations on the said organs – constitutes a delegation of competence within the meaning of Article 90 of the Constitution. Making a contrary presumption would result in an almost complete overlap of the scope of *ratione materiae* of Article 89 of the Constitution (simple ratification procedure) with that of Article 90 of the Constitution (special ratification procedure). A rational constitution-maker has assumed that, in the case of constitutionally significant matters leading to the modification of the scope of competence vested in the organs of state authority, the procedure indicated in Article 89.1 of the Constitution is the proper one to follow. In the event the competence is conferred, the proper procedure is the one set out in Article 90 of the Constitution. The uniqueness of Article 90 of the Constitution should also be recognised in the role that has been historically assigned to it. It was understood as a provision that was to make accession to the European Union possible, although this does not directly follow from its content.

"Competence" in the light of Article 90.1 of the Constitution entails authorising a given organ of public authority to take certain actions. The said actions, in principle, have legal effects and are related to issuing legally binding acts. The said acts may interfere with the realm of the legally protected personal interests of the individual. To determine whether the given competence is "competence" construed in the light of Article 90 of the Constitution, the following needs to be set out: to at least indicate the organ of state authority in which the competence is vested, entities or individuals governed by that competence, the content of the rights of the said organ, and obligations of subordinate entities or individuals corresponding to the said rights.

It may not be ruled out that, as a result of an amendment to an international agreement, the way of exercising competence will change so considerably that the exercise thereof by an international organisation will mean granting it new competences. The recognition that such conferral has taken place requires that the competence vested in the organs of state authority and the rules of interpretation that justify an assertion about the said conferral be set out. Therefore, it does not follow from Article 90 of the Constitution that an introduction of an amendment to an agreement concluded in accordance with the special ratification procedure always requires the same procedure.

The normative content of Article 136.3 TFEU neither indicates an international organisation nor any other body, to which the competence formerly vested in the state authority shall be conferred to. It does not impose any obligation or task or specify new fields of European Union activity. The significance of this provision is reduced to recognising the competence of the Member States whose currency is the euro, to conclude international agreements.

In accordance with the Treaties, it is the CJEU that determines whether the European Union or a relevant European Union institution, has the competence to issue an act. Within the scope of its competence, provided for in Article 267 TFEU, the CJEU examined the questions referred by the Supreme Court of Ireland for a preliminary ruling. The CJEU held that the amendment to Article 136 TFEU did not confer any new competences on the Union, and thus it could be introduced in accordance with a simplified revision procedure under Article 48.6 TEU. Furthermore, for the same reasons, the Constitutional Tribunal has no jurisdiction to adjudicate on the validity of European Union acts.

Cross-references:

Constitutional Tribunal:

- Judgment K 18/04 of 11.05.2005, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2005, no. 5, item 49, *Bulletin* 2005/1 [POL-2005-1-006];

- Resolution W 10/94 of 30.11.1994, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1994, part 2, item 48;
- Judgment Kp 3/08 of 18.02.2009, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2009, no. 2, item 9;
- Judgment K 11/03 of 27.05.2003, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2003, no. 5, item 43;
- Judgment K 32/09 of 24.11.2010, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2010, no. 9, item 108;
- Procedural decision Kpt 2/08 of 20.05.2009, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2009, no. 5, item 78;
- Judgment K 24/04 of 12.01.2005, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2005, no. 1, item 3;
- Judgment K 26/01 of 03.06.2002, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2002, no. 4, item 40;
- Judgment K 64/07 of 15.07.2009, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2009, no. 7, item 110;
- Judgment Kp 4/08 of 16.07.2009, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2009, no. 7, item 112;
- Procedural decision P 37/05 of 19.12.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2006, no. 11, item 177;
- Judgment SK 45/09 of 16.11.2011, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2011, no. 9, item 97.

Languages:

Polish, English (translation by the Tribunal).

Portugal
Constitutional Court

Statistical data
1 January 2013 – 31 December 2013

Total: 1 642 judgments, of which:

- Abstract reviews
  Prior: 6
  Ex Post Facto: 17
  Omission: -
- Referenda
  National: -
  Local: 1
- Concrete reviews
  Summary Decisions[1]: 780
  Appeals: 529
  Challenges: 107
- President of the Republic[2]: -
- Mandates of Members of the Assembly of the Republic[3]: -
- Electoral Matters[4]: 181
- Political Parties[5]: 15
- Declarations of Assets and Income: 1

[1] *Summary decisions are those that can be issued by the rapporteur if he/she believes that the Court cannot hear the object of the appeal, or that the question which is to be decided is a simple one – particularly because it has already been the object of a decision by the Court, or it is manifestly without grounds. A summary decision can consist of just a referral to earlier Constitutional Court jurisprudence. It can be challenged before a Conference of the Court (made up of three Justices from the same Chamber). The Conference's decision is then definitive if it is unanimous; otherwise it can itself be challenged before the Chamber's Plenary.*

[2] *Questions regarding the President's mandate, not his/her election.*

[3] *Questions involving disputes with regard to the loss of a seat.*

[4] *Cases involving electoral coalitions, electoral disputes and disputes about electoral administrative matters.*

[5] *Includes records of the abolition or disbanding of political parties, and challenges against decisions taken by party organs.*

- Incompatibilities[6]: -
- Funding of Political Parties and Election Campaigns[7]: 5

Important decisions

Identification: POR-2013-3-013

a) Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 20.09.2013 / **e)** 602/13 / **f)** / **g)** *Diário da República* (Official Gazette), 206 (Series I), 24.10.2013, 6241 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

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**.
5.4.18 Fundamental Rights – Economic, social and cultural rights – **Right to a sufficient standard of living**.
5.4.19 Fundamental Rights – Economic, social and cultural rights – **Right to health**.
5.4.20 Fundamental Rights – Economic, social and cultural rights – **Right to culture**.

Keywords of the alphabetical index:

Right to just and decent working conditions / Unemployed people, unfitness for work, temporary / Work, overtime, bonus / Worker, collective bargaining / Worker, conditions, collective settlement / Worker, protection.

Headnotes:

As regards a raft of amendments to the 2009 Labour Code, the Constitutional Court found a minority of the amendments to be unconstitutional. These amendments sought to: change the requisites for dismissing workers because their jobs are eliminated; do away with the requirement that, for an employer to be able to dismiss a worker whose existing job is eliminated, there cannot be another position at the same employer that is available and compatible with the worker's qualifications; and nullify certain provisions of collective labour regulation instruments (hereinafter, "IRCTs") and clauses of labour contracts that were entered into before the entry into effect of the Law that made the amendments in question, with regard to rest periods attributed as compensation for working overtime on normal working days, compensatory weekly rest days or public holidays.

Summary:

I. A group of Members of the Assembly of the Republic requested the Constitutional Court to conduct an abstract *ex post facto* review of norms contained in a 2012 Law that made a third set of amendments to the 2009 Labour Code. The government, defending the amendments, argued that this reform of the Labour Code is of fundamental interest if workers are to be ensured a labour market with better opportunities.

The case concerned six particular aspects of the amendments:

i. merging the existing three bank formats into one;
ii. the right to compensation for rest periods;
iii. the abolition of a number of public holidays and a mechanism for increasing a worker's annual holidays;
iv. dismissal of a worker on the grounds that the worker's job is being eliminated;
v. dismissal of a worker on the grounds of unsuitability; and
vi. questions of constitutionality relating to the relationship between the Labour Code (hereinafter, "CT") and the IRCTS.

As regards the first matter, the 2012 Law permits three hour bank formats: an hour bank created by an IRCT (this system already existed); the individual hour bank (created by *ad hoc* agreement or prearranged in the individual labour contract); and the group hour bank (an extension of one of the other two regimes, but applicable to a group of workers).The Commitment for Growth, Competitiveness and

[6] *Only with regard to declarations of incompatibility and disqualifications of political officeholders.*
[7] *Annual accounts of political parties, election campaign accounts, and appeals against decisions by the Political Accounts and Funding Entity (hereinafter, the "ECFP"). The ECFP is an independent organ that operates under the aegis of the Constitutional Court and whose mission is to provide the latter with technical support when it considers and scrutinises political parties' annual accounts and the accounts of campaigns for elections to all the elected entities with political power (President of the Republic; Assembly of the Republic; European Parliament – Portuguese Members; Legislative Assemblies of the autonomous regions; elected local authority organs).*

Employment (*Compromisso para o Crescimento, Competitividade et Emprego*, hereinafter the "CCCE") adopted in 2012 said that it was necessary to mould the regimes in ways that permit a better use of resources. As for the individual hour bank the question brought before the Court concerned the presumption of the norm that if an employer proposes the creation of such a bank, the worker is deemed to accept it unless he/she actually opposes it in writing. This presumption attaches value to the silence of the worker, which is deemed to constitute a declaration of acceptance.

As regards the second matter, the right to compensation for rest periods, the 2012 Law only maintained the right to paid compensatory rest for work carried out on mandatory weekly rest days and during the daily rest period, and for normal work carried out on public holidays at companies that are not required to close on such days (albeit in the latter case, the employer may choose to give extra pay as an alternative). The increases in hourly pay for overtime work were halved, and the possibility of IRCTs waiving increased rates for overtime was extended. The petitioners calculated that this reduction in overtime payments means that workers are no longer paid for an annual equivalent of 93.75 hours. These measures were designed to reduce the cost of overtime, and in introducing them the legislator stuck closely to the terms of the 2011 Memorandum of Understanding on Specific Economic Policy Conditionality *(Memorando de Entendimento sobre as Condicionalidades de Politica Económica)* and the CCCE.

Third, the amendments to the law included the abolition of four mandatory public holidays and of a mechanism whereby the number of days of annual holiday could be increased (by up to three days, as a reward for the worker's assiduity).

Fourth, the amendments permitted dismissal of a worker on the grounds that the worker's job is being eliminated. The possible reasons for this kind of dismissal were:

i. market-related: the company is reducing its activities due to a predicted fall in the demand;
ii. structural: an economic/financial imbalance, a change of business, a restructuring of the company's production organisation, or the replacement of dominant products; and/or
iii. technological: changes in manufacturing techniques or processes, the automation of production, control or loading equipment, or the computerisation of services or the automation of means of communication.

The challenged norm provided that when faced with multiple jobs with exactly the same functional content, it was up to the employer to define relevant, non-discriminatory criteria for deciding which individual employee's position should be eliminated.

Fifth, the amendments provided for dismissal on the grounds of unsuitability. This format of dismissal consists of termination of the labour contract by the employer on the grounds that the worker has become unsuited to his/her job.

The 2012 Law provides for two types of dismissal due to unsuitability: the traditional situation, in which a worker becomes unsuitable after changes have been made to his/her job or job station; the other type is new (the petitioners and some authors call it "ineptitude" *(inaptidão)* rather than "unsuitability" *(inadaptação)* and entails a substantial change in the worker's performance that is reflected in a lasting fall in productivity or quality, regardless of whether his/her job or job station has changed. The new norm did away with two requisites for dismissal due to unsuitability following changes to the employee's job or job station: that the employer does not have another vacant position that is compatible with his/her professional qualifications; and that the unsuitability is not derived from a lack of health and safety conditions at work for which the employer was responsible.

Sixth, and finally, the applicants raised the questions of constitutionality regarding relations between sources of regulation. The question of constitutionality under analysis here was whether the 2012 Law norms on relations between regulatory sources (CT and IRCTs) that remove various matters from the ambit of collective labour agreements do or do not respect that minimally significant set of matters, which the ordinary law is required to leave open to collective bargaining. The norms make certain aspects of the labour rules that are laid down in the 2012 Law mandatory, with the new legal provisions taking the place of those contained in IRCTs that were entered into before that Law entered into force.

II. In its decision on the first matter, the Court followed its earlier jurisprudence, which holds that the law can give silence declaratory value if the legislator takes the view that it is reasonable to impose a duty to respond. The Court noted that the norm in question does allow the worker to oppose the bank in writing and by a certain deadline. The Court also considered that although there are real obstacles that can make it difficult for the worker in a labour relationship to enjoy a true freedom of decision, a requirement for express consent would not eliminate or significantly lessen the factual constraints on him/her.

The question with regard to the group hour bank concerned the fact that an employer can unilaterally decide to impose such a bank on workers who have not consented to it. This can be done by extending an hour bank that is already provided for in an IRCT and already encompasses 60% of the workers in a given team, even when a particular worker who opposes it is not a union member, or is a union member but his/her union is not a party to that IRCT; and the employer can also impose the bank by extending individual agreements with 75% of the other workers in the unit, even if the worker in question expressly refuses it.

The Court considered the possibility of imposing this regime is underlain by an idea of solidarity that justifies subordinating individual interests to the collective interest. The presumption that workers are in favour of the implementation of the group hour bank regime is not an absolute one. The Labour Code says that workers who are covered by a collective agreement which says that such a regime is not permissible, and workers who are represented by a trade union which opposed the ministerial order extending the collective agreement in question, are excepted from this presumption. The Court accordingly held that the limitations under challenge are not excessive.

With regard to the second matter, the right to compensation for rest periods, the Court was of the view that there is no place here for a finding of unconstitutionality. The legislative amendments do not expand the legal grounds on which employers can require people to work overtime (although the number of situations that are deemed to fall within the concept of overtime has been cut); nor have the exceptions to the obligation to work overtime been restricted, and the daily and annual time limits on the amount of overtime worked have not been raised.

In the cases in which overtime pay has been reduced, it is still the object of quantitative differentiation in the form of a higher rate, albeit the amount of the increase is now less. The Court also pointed out that the new legal regime governing compensatory rest is not imperative – both IRCTs and individual labour contracts can establish terms that are more favourable to workers.

As regards the third matter, the Court held that the idea behind stopping work in mandatory public holidays is to make it possible to collectively celebrate dates or events. Abolishing mandatory public holidays is not an offence against workers' rights, because the purpose of creating public holidays is not directly to protect workers' rights, but rather to pursue public objectives on social, political, religious or cultural levels. The Court also said that calendar days (except for weekly rest days and annual holidays) are *ab initio* working days, unless the law suspends work because it says that the day is a public holiday. It is up to the legislator to determine which days are public holidays.

Turning to the abolition of the norm that used to increase the length of an assiduous worker's annual holiday, the Court recalled that this legal mechanism was not directly intended to increase the duration of the holiday period, but rather to fight absenteeism.

These are choices that imply making considered judgments that fall within the scope of the legislator's power to act.

Regarding the fourth matter, the Court emphasised that the constitutional concept of just cause includes both subjective just cause and objective just cause. The constitutional prohibition on dismissal without just cause can be breached by both legal provisions that allow inappropriate grounds for dismissal, and provisions that establish rules which do not do enough to safeguard the workers' positions.

The Court stated that whereas in the pre-2012 version of the Law, the individualisation of the job that is to be eliminated is subject to a clearly defined legal provision based on a purely objective type of criterion (seniority and the person's level within the same professional category), the new norm delegated the task of defining the criterion (a) that must govern the selection of which worker to dismiss to the employer, who was only given a number of directives to follow.

This means that it was now the entity with the interest in dismissing someone that formulated the criteria for justifying that dismissal.

With respect to the fifth matter, the Court concluded that dismissal on the grounds of unsuitability demonstrated solely by a reduction in the quality of the work done as reflected in either of the above situations and in cases in which it is reasonable to predict that that reduction will be permanent is not unconstitutional. But the Court held that dismissal on the grounds of the worker's unsuitability can only occur if no alternative position is available.

Concerning the sixth matter, the Court pointed out that under the Constitution workers are the holders of the right to enter into collective labour agreements, although they can only exercise it via trade unions. This exercise is guaranteed "under the terms laid down by law". Because this guarantee is founded in the Constitution, the fact that the details are left to "the terms laid down by law" cannot mean that the guarantee itself is placed in the hands of the ordinary legislator.

Portuguese constitutional jurisprudence has leant towards the interpretation that the right to collective agreements is a right which is up to the ordinary law to format, but that in doing so the latter can neither empty the right of its content, nor itself decide every aspect of labour law in ways that cannot be opted out of by collective agreements. The ordinary law cannot delimit the untouchable core of the right to enter into collective labour agreements, because otherwise one would be inverting the normative hierarchy and emptying the constitutional precept of its legal force.

All the norms in the 2012 Law that were before the Constitutional Court were intended to prevail over the IRCT provisions on the same matters. However, the Court highlighted the fact that not all of the Labour Code norms whose efficacy the 2012 Law sought to ensure are imperative.

The Court recalled that, as an expression of collective autonomy, the law recognises IRCTs to be a specific source of law governing labour contracts, and that the limits on the content of IRCTs include imperative legal norms contained in the CT. It also noted that legal norms can possess different degrees of imperativeness.

Firstly, on the subject of the compensation for collective dismissals and the amounts of and criteria for defining the compensation due for the termination of labour contracts, the 2012 Law has nullified IRCT provisions for amounts above those set out in the Labour Code when the IRCT in question took effect before the new Law. It also says that IRCTs subsequent to that date must comply with the CT in this respect, failing which they are null and void from day one.

The Court was of the view that it is not possible to exclude the compensation due for the termination of labour contracts from the scope of collective bargaining, but that, given the interests in play, nor can one exclude the legislator's competence to set limits – higher or lower – on the amounts payable under this heading.

Secondly, on the 2012 Law norms that revoked the compensatory rest due for overtime worked on normal working days, complementary weekly rest days or public holidays, and the increases in the length of annual holidays, the Court said that these matters do not come within the scope of an imperative regime. There is nothing in either the 2012 Law or the Labour Code that prevents the terms of IRCTs entered into after the 2012 Law came into effect from being more favourable to workers.

There is thus nothing imperative that would limit the permissible content of IRCTs and would justify their nullity, be it supervening or from the start.

The Court also took the stance that revoking provisions of earlier IRCTs would condition future collective agreements that address the same matters, because it would eliminate the point of reference that serves as their starting point.

The Court emphasised that the solution adopted by the Law was not fit for the purpose behind the standardisation of the applicable collective-agreement regimes – that of achieving a reduction in labour costs. By entering into new collective agreements, workers and employers could once again agree exactly the same solutions (or even more favourable ones) as the ones that the 2012 precepts sought to do away with. The Court held that the measures were neither a necessary nor a sufficient condition for bringing about the labour-cost reduction results intended by the legislator. The Court therefore declared these norms unconstitutional with generally binding force.

Thirdly, the Court then addressed the 2012 Law norms that imposed a two-year suspension on IRCT provisions on increased overtime rates above those set out in the Labour Code and on the pay or compensatory rest due for normal work done on public holidays at companies that are not obliged to suspend operations on such days.

The Court noted that the 2012 Law has significantly reduced the extra costs associated with work done in the above situations, halving both hourly overtime bonuses and the compensatory rest and the alternative additional pay for normal work on public holidays at such companies. The Court considered that this suspension constitutes an interference by the legislator within the scope of the protection due to the right to enter into collective labour agreements, inasmuch requiring a legal norm that reduces salaries and the value attached to labour to prevail over IRCTs necessarily interferes with the right to be paid for one's work in accordance with its nature and volume. However, in the light of the desired purpose and of the norm's temporary nature, the Court took the view that the measure is appropriate, necessary and balanced.

Fourth, for the automatic reduction by law imposed in the event that the relevant IRCT provisions (overtime rates, and pay or compensatory rest for normal work on public holidays) were not revised by the end of the two-year period, the scope of the norm meant that if they were not changed, the IRCT figures would be halved (on condition that they did not fall below the rates provided for in the CT), the Court said that the

Law was modelling the contents of contracts by replacing solutions that were created by means of collective autonomy and interfering with matters that are reserved to collective bargaining. The Court therefore declared the norm to be unconstitutional.

Fifth, the Court also looked at the 2012 Law norms on relations between sources of regulation. These precepts only affect the future effects of past normative acts; they do not prohibit effects of new collective or individual regulatory acts. The Court stated that the limitations on the efficacy of IRCTs imposed by the above precepts must be said to be included within the broad margin within which the legislator is free to shape legislation. Even if they can be criticised to some extent, the precepts are not ostensibly inappropriate to the pursuit of the public interests which the authors of the Law invoked as the reasons for amending the regime governing labour relations.

Supplementary information:

The exceptional number of dissenting opinions, all except one of which were accompanied by explanatory texts, reflects the extremely complex nature of the matters before the Court. The majority in relation to each of the questions varied in both size and individual composition.

Cross-references:

- Rulings nos. 64/91 of 04.04.1991; 229/94 of 08.03.1994; 581/95 of 31.10.1995; 966/96 of 11.07.1996; 517/98 of 15.07.1998; 634/98 of 04.11.1998; 550/01 of 07.12.2001; 391/04 of 02.06.2004 and 338/10 of 22.09.2010.

Languages:

Portuguese.

Identification: POR-2013-3-014

a) Portugal / **b)** Constitutional Court / **c)** First Chamber / **d)** 24.09.2013 / **e)** 605/13 / **f)** / **g)** / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

5.2.2.1 Fundamental Rights – Equality – Criteria of distinction – **Gender**.
5.2.2.12 Fundamental Rights – Equality – Criteria of distinction – **Civil status**.
5.3.8 Fundamental Rights – Civil and political rights – **Right to citizenship or nationality**.

Keywords of the alphabetical index:

Citizenship, acquisition, condition / Cohabitation / Naturalisation.

Headnotes:

A norm which provides that the competence to recognise that a couple have been cohabiting for more than three years, as a requisite for a foreigner who has been living in that situation with a Portuguese national to acquire Portuguese nationality, is not unconstitutional. The norm states that in such cases, in order for a person to make the formal declaration that they want to take Portuguese nationality, they must first bring an action asking a civil court to recognise their *de facto* relationship. The power to recognise the latter falls within the competences which the Constitution of the Republic attributes to the courts. Following its own abundant jurisprudence on the substantial definition of the jurisdictional function and the fact that the latter is reserved to the courts of law, the Constitutional Court emphasised that in constitutional terms, the courts' responsibility to administer justice includes ensuring the defence of citizens' interests and rights to which the law affords its protection. Those interests naturally include the ability to bring legal actions to defend rights.

Summary:

I. This concrete review was requested by the Public Prosecutors' Office, of a norm contained in a 2006 Organic Law that amended the Nationality Law, such that foreigners who have been cohabiting with a Portuguese citizen for more than three years are entitled to acquire Portuguese nationality. The Public Prosecutor's Office was legally bound to request review so because the Court *a quo* refused to apply the norm in question on the grounds that it considered it to be materially unconstitutional.

The Court seised of the case *a quo* took the view that this norm sees the court's decision (which takes the form of a sentence) as a mere document which serves as proof of the veracity of the declaration that is the first step in the registration process (declaration

by a foreign citizen that he or she wishes to take Portuguese nationality) – a process that later ends in a typically administrative act. In the opinion of the Court *a quo*, the judicial process is thus reduced to completing the formal elements of an administrative procedure, with the Court relegated to the position of a Public Administration organ – a status that would be illegitimate in the light of the competences which the Constitution attributes to the courts. The Court *a quo* also felt that the administration of justice always presupposes a conflict, but that in this situation and at the stage of the proceedings in which a court is called on to intervene, no such conflict exists.

II. The Constitutional Court noted that, although the new Organic Law had introduced many changes to the Nationality Law, those changes did not bring about a new form of law based on principles which differ from those that have structured the regime since 1981. In other words, one cannot say that a new law governing nationality was passed in 2006.

Where the acquisition of nationality by choice is concerned, the most significant change is the one that came before the Court in this case – i.e. the fact that a foreign citizen who has been cohabiting with a Portuguese national for more than three years on the date on which he or she declares his or her desire to take Portuguese nationality is now entitled to do so, on condition that the declaration has been preceded by a successful action asking a civil court to recognise the cohabitation situation.

Since 2006, cohabitation of a foreigner and a Portuguese national has been deemed equivalent to marriage for the purposes of the regime governing the acquisition of Portuguese nationality by an act of free will. Once a court has verified that the couple have constantly cohabited for more than three years, the declaration by the interested party is sufficient to initiate the process of taking nationality. The same three-year period also applies in the case of marriage. In both situations (marriage and cohabitation), the fact that the applicant is sharing bed and board with a Portuguese national is a precondition for nationality to be acquired simply because the applicant asks for it.

The declarations on which the award of nationality is dependent must be recorded on the Central Nationality Register, which is kept by the Conservatory of Central Registers (*Conservatória dos Registos Centrais*, CRC). Nationality-related disputes are resolved in accordance with the general regime applicable under the Statute governing the Administrative and Fiscal Courts (*Estatuto dos Tribunais Administrativos e Fiscais*, ETAF), the Code of Procedure of the Administrative and Fiscal Courts and other, complementary legislation. This regime was imposed by the 2006 Law (before that, the Lisbon Court of Appeal had the competence to hear appeals against any acts regarding the award, acquisition or loss of Portuguese nationality).

The Court said that this important change was justified for reasons that were originally not directly linked to the nature of the right to nationality. With the introduction of a new profile for the administrative jurisdiction (from the 1982 constitutional revision onwards), it became clear that the competence to hear disputes with material implications for the protection of fundamental rights should preferably pertain to the latter. Until then, the competence of the common jurisdiction to hear nationality-related disputes (among other things) had been recognised in a kind of homage to the idea that one should take the protection of the fundamental rights to the utmost; however, the new profile given to the administrative jurisdiction warranted the legislator's decision to entrust these matters to it.

The Court considered that this choice is underlain by the idea that, if the right to nationality does possess a particular "nature" (or if it is, in substance, of a public rather than a private kind), that nature is linked to the definition of the legal criteria that govern the formation of the bond between individuals and the Portuguese political community, and entails the way in which a certain right (a right that itself possesses an intrinsic constitutional value which the Portuguese Constitution recognises) is exercised.

Nationality law is understandably sensitive to constitutional values (which are essentially public in nature). This is why this area of the law had to be redefined by the ordinary legislator soon after the current Constitution came into force. The amendments that were made to the Nationality Law after 1981 were intended to reflect the effects of those constitutional values.

The Court pointed out that it was at that time that Portuguese law adapted itself to the different demands made by the values derived from the new constitutional order. The Court gave the example of the then new regime governing the acquisition of nationality through marriage, under which foreigners married to Portuguese nationals could (and still can) take Portuguese nationality by means of a declaration that can be made once they have demonstrated the constant and lasting nature of their marriage. The previous regime (instituted in 1959) said that a foreign woman who married a Portuguese man automatically took Portuguese nationality (except if, by the time the marriage took place, she declared that she did not

want to do so and proved that she was not going to lose her previous nationality), but the same was not true of a foreign man who married a Portuguese woman. This regime was contrary to the principle of equality between spouses and failed to consider the decisive importance of the person's will in the acquisition of nationality on the basis of marriage.

1994 saw the addition of the requirement that the marriage between the foreigner and the Portuguese national must have lasted for at least three years. From that point on, the reality of the marriage, which has to have existed for a significant period of time, became a factual precondition for the acquisition of Portuguese nationality by mere act of free will. This requirement was introduced in the light of the then recent increase in the pressure of migratory flows, and was designed to avoid fraudulent manipulation of this precondition for access to Portuguese citizenship.

In 2006, the legislator made cohabitation equivalent to marriage in this domain, in a move that paid tribute to constitutional principles such as those of equality and non-discrimination. However, as was already the case with marriage, it was simultaneously necessary to prevent this means of access to the status of Portuguese national, which is open to foreigners who possess life-bonds to the Portuguese community (and is the same as solutions that have been adopted by the law of other countries and by international conventions), from being fraudulently manipulated by people who allege cohabitation situations that do not really exist.

Cross-references:

- Ruling no. 583/98, 20.10.1998.

Languages:

Portuguese.

Identification: POR-2013-3-015

a) Portugal / **b)** Constitutional Court / **c)** First Chamber / **d)** 08.10.2013 / **e)** 648/13 / **f)** / **g)** / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Trade union, activity / Worker, protection / Working hours.

Headnotes:

The legal regime governing the protection of workers' elected representatives comprises a normative complex that fulfils the constitutional mandate which requires that such persons be protected against foreseeable reprisals by employers, in such a way as to avoid any discrimination designed to dissuade people from performing elected functions in trade unions. In particular, the regime ensures that workers who are elected to collective representative bodies are able to miss work by giving them a credit in the form of hours they can use for union purposes without loss of pay. However, the Court found no unconstitutionality in a norm which states that a worker's labour contract should be suspended if his or her absences due to his or her union activities exceed, or can be expected to exceed, one month. The norm does not affect the protection regime, because it does not constitute an inadmissible limitation on the right to legitimately exercise trade union functions.

Summary:

I. The question before the Court in this case was whether the Labour Code Regulations precept which says that the regime under which a labour contract is suspended 'due to a fact regarding the worker' is applicable when absences due to the exercise of trade union activities last for more than a month, violates the right of workers' elected representatives to adequate legal protection against all forms of restraint on the legitimate performance of their functions – a right that is enshrined in the Constitution.

II. The Court said that there is both a subjective and an objective dimension to the protection which the Constitution affords to workers' elected representatives. The subjective dimension is derived from the freedom to form, operate and belong to trade unions, which can pertain to both individuals and groups. Workers are both individually and collectively recognised to possess the right to freely form trade unions and engage in ensuing trade union activities. This dimension in turn gives rise to an objective dimension, which consists of a constitutional command to the ordinary legislator to

concretely implement adequate ways of protecting trade union leaders and delegates from foreseeable reprisals by employers. The idea is to avoid any and all discrimination designed to dissuade people from performing elected functions in trade unions.

In its jurisprudence the Court had already held that the Constitution only requires the legislator to create rules for the protection of workers who perform leadership roles in trade unions which ensure that they are not prevented from performing, or restricted in the performance of, those functions. In order to gauge the constitutional conformity of the norm before it, the Court thus had to analyse what measures the legislator had adopted in order to fulfil the constitutional mandate to ensure adequate protection for workers' elected representatives.

The Court considered that the pertinent provisions of the relevant legal regime show that the legislator has sought to provide this protection in two different ways: by establishing a credit in the form of a number of hours that workers' representatives can make use of in the performance of their union duties; and by laying down that when workers who are elected to collective representation bodies exceed the number of hours in that credit, for that purpose, those extra absences are classed as 'justified failures to attend the workplace' and count as effective time worked, except for remuneratory purposes. In the case of trade union delegates, as opposed to trade union leaders, such additional absences are only justified when they are required in order to engage in acts that are necessary for the exercise of the delegate's functions and cannot be put off to a later date.

In the light of this analysis, the Court considered that the concrete measures adopted by the legislator satisfactorily fulfil the constitutional mandate to adequately protect workers' elected representatives.

It is true that the norm before the Court means that the worker loses the right to be paid if his or her absences exceed the hour credit. However, this consequence, which is linked to the worker's decision not to work for his or her employer for a period that is, or can be expected to be, longer than one month, is not of a kind that would promote any discrimination intended to convince people not to perform elected functions in trade unions.

Languages:

Portuguese.

Identification: POR-2013-3-016

a) Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 30.10.2013 / **e)** 759/13 / **f)** / **g)** *Diário da República* (Official Gazette), 223 (Series I), 18.11.2013, 6477 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Tax, litigation, evidence, admissible / Taxation, taxable income, inspection / Witness.

Headnotes:

A norm contained in the Code of Tax Proceedings and Procedure, which provides for an absolute prohibition on the submission of evidence in the form of witness testimony in cases in which such evidence is generally admissible, is unconstitutional because it abstractly precludes evidence which may prove appropriate or even necessary to the clarification of facts in concrete cases, constitutes an excessive restriction and results in injury to the right to submit evidence, which is in turn included in the guarantee of access to the courts. However, there are constitutional norms that preclude the ordinary legislator from creating obstacles which make it difficult, or arbitrarily or disproportionately prejudice the ability, to exercise the right to gain access to the courts and to effective jurisdictional protection.

Summary:

I. The norm before the Court in this case formed part of the Code of Tax Proceedings and Procedures (*Código de Procedimento e Processo Tributário*, hereinafter "CPPT") and absolutely excluded the possibility of submitting testimonial evidence in cases in which it is generally admissible.

The General Tax Law (*Lei Geral Tributária*, LGT) states that taxable income can be indirectly assessed when a taxpayer does not submit a tax return, but displays the "manifestations" or outward signs of wealth listed in a table attached to the Law, or when

he or she declares income that is more than 50% below the level which the table considers to be standard for those manifestations. If the existence of situations that lead to such an indirect assessment of taxable income is verified, it is up to the taxpayer to prove that the income he or she has declared matches the reality and that there is some other source of his or her display of wealth – e.g. inheritances, gifts, income that is not subject to declaration, existing capital, or loans. The decision to indirectly assess taxable income can be appealed to the tax courts, whereupon the decision is suspended, but the Court must treat the proceedings as urgent.

One CPPT norm stated that in appeals against indirect assessments of taxable income, taxpayers could only submit documentary evidence. This meant that although the burden of proof that either his or her income tax return was accurate, or the "manifestations of wealth" were derived from another source, fell on the taxpayer, he or she was prevented from providing witness-based evidence to prove the facts which he or she called upon and which, in his or her opinion, were capable of refuting the data underlying the indirect assessment.

The question of constitutionality here was whether this limitation could be seen as conflicting with the Constitution in cases regarding the exclusion of testimonial evidence that would generally be admissible as a form of proof.

II. The Court decided to reaffirm its existing jurisprudence on the concrete review level, confirming its earlier finding of the norm's unconstitutionality, which it now declared with generally binding force.

The Court held that in deciding to limit the evidence taxpayers could submit in order to contradict the presumption arrived at on the basis of outward signs of wealth to that of a documentary nature, one could suppose that the legislator took the view that the latter would appear to be more effective and reliable than other kinds of evidence. Income tax declarations take the shape of and are underlain by documents, so the legislator thought that the latter should also be used to prove that outward signs of wealth indicating the receipt of higher income, do not in fact do so. In addition, the urgent status of the proceedings was thought incompatible with the use of other forms of evidence – namely witness testimonies.

The Court accepted that in situations in which it is possible to use documents to sufficiently prove that outward signs of wealth are not linked to the receipt of more income than that which has been declared, the legislator's intention was not unreasonable.

Legislators – and namely fiscal legislators – enjoy a degree of discretion in establishing both the preconditions for invoking certain facts that are subject to taxation or the causes of reductions in or deductions from taxable income on the one hand, and the forms of proof of the circumstances that support the correctness and plausibility of tax returns on the other.

The right of access to justice includes a right to provide evidence, but the latter subjective right does not mean that every type of evidence permitted by law must be admitted in every type of proceedings and with regard to every object of dispute; nor does it mean that there cannot be quantitative limitations on the submission of certain kinds of evidence (e.g. restricting the number of witnesses that each party can call to a given maximum). In many cases the reason for a legal restriction on the admissibility of evidence is the legislator's view that false testimony can have serious consequences. However, such cases of inadmissibility must be exceptional and possess a rational justification.

The Court considered that it was necessary to weigh up whether, in the case of this norm, the legislator proportionately and rationally respected the right to submit evidence, in a way that did not put the interested party in a situation in which it was impossible to mount a real defence of his or her rights or interests.

Determining the relationship between a given measure (or its alternatives) and the extent to which a given objective is achieved is sometimes complex, but may be necessary in order to answer the question of whether the measure is appropriate to the goal. When one considers the outcome of the taking of a particular measure, one must acknowledge that the legislator possesses a prerogative to assess. For the jurisdictional entity to find that an unconstitutionality exists because a given norm is in breach of the principle of proportionality, it must be able to identify a manifest error in the legislator's assessment of the relationship between the measure and its effects. One can imagine situations in which, in the light of the "manifestations of wealth" displayed by the taxpayer, one cannot use documentary evidence to answer questions about the truth of his or her income tax declaration, but one needs witness testimony instead or as well (obviously in cases in which testimonial evidence is admissible under the general rules of law). In such situations, the norm before the Court confronted the interested party with a clear and perhaps insuperable difficulty in proving his or her case exclusively with documentary evidence. He or she could be prevented from demonstrating facts that support his or her rights or interests. The Court therefore declared the norm unconstitutional.

III. The present Ruling was the object of a dissenting opinion. Its author did not believe that the requirement for evidence to be in the form of documents was unreasonable:

a. because he considered that this format is more effective and reliable;
b. because taxpayers are in any case under a duty to back up tax declarations in general with documents; and
c. because there is a need for simplicity and speed in tax-related proceedings.

In addition, he argued that this requirement for documentary proof has both a pedagogical effect and serves as a general means of preventing irregularities in the documentation of fiscally significant situations.

Supplementary information:

This case involved the generalisation of existing jurisprudence and was requested by the Public Prosecutors' Office under the terms of the Law governing the Organisation, *Modus Operandi* and Proceedings of the Constitutional Court *(Lei de Organização, Funcionamento e Processo do Tribunal Constitucional)*. This procedure applies to situations in which a given norm has been found unconstitutional (or illegal, in the event of breaches of a law with superior force) in three concrete cases. In such circumstances, any Constitutional Court Justice or representative of the Public Prosecutors' Office at the Court can take the initiative to ask the latter to initiate proceedings under the rules applicable to *ex post hoc* reviews of constitutionality. The generalisation of concrete judgments of unconstitutionality does not happen automatically. The existence of three concrete findings of unconstitutionality is a simple precondition for bringing an autonomous action for the abstract review of a norm's constitutionality. Each occasion is subject to the normal procedure in such cases, which particularly includes consulting the norm's author – a step that would not have been included in the earlier concrete review proceedings. The case is heard by the Court in Plenary, which can confirm or overturn the findings of unconstitutionality that had previously been handed down by individual Chambers. The *ratio* for this possibility includes the fact that the earlier decisions may even have been taken by the same Chamber, but at the limit by a three-to-two majority of the latter's five Justices, for example. It would thus not make sense for the Plenary made up of all thirteen of the Court's Justices to be restricted by the preceding decisions.

Cross-references:

- Ruling nos. 86/88 of 13.04.1988; 187/01 of 02.05.2001; 489/02 of 26.11.2002; 646/06 of 28.11.2006; 681/06 of 12.12.2006; 24/08 of 22.01.2008 and 22/13 of 10.01.2013.

Languages:

Portuguese.

Identification: POR-2013-3-017

a) Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 20.11.2013 / **e)** 781/13 / **f)** / **g)** *Diário da República* (Official Gazette), 243 (Series I), 16.12.2013, 6807 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

4.7.1.1 Institutions – Judicial bodies – Jurisdiction – **Exclusive jurisdiction**.
4.7.2 Institutions – Judicial bodies – **Procedure**.
4.7.3 Institutions – Judicial bodies – **Decisions**.
4.7.14 Institutions – Judicial bodies – **Arbitration**.
5.3.13.1.4 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Litigious administrative proceedings**.
5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts**.
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:

Arbitration, access to courts, exclusion / Arbitration, compulsory / Arbitration, court.

Headnotes:

It is unacceptable for the state to delegate powers of authority to a private entity, thereby effectively bringing about an organic privatisation of the Administration's responsibility to perform a given public task, while simultaneously precluding any

jurisdictional control by state courts of the merit of the administrative decisions taken within the legal framework of that delegation of competences.

Summary:

I. The President of the Republic asked for an *ex post hoc* review of norms included in the Law that both created the Sports Arbitration Tribunal (*Tribunal Arbitral do Desporto,* hereinafter, "TAD") and which approved the Law governing it. The constitutive Law had been passed by the Assembly of the Republic after the Court had declared the unconstitutionality of a norm in a prior review of an earlier Decree with the same purpose, which had then been vetoed by the President and sent back to the Assembly for reconsideration.

These norms limited access to the TAD's appeals chamber (*câmara de recurso*) to challenges against arbitration panel decisions:

i. in disputes that had been submitted to mandatory TAD arbitration and involved the possible imposition of sanctions for disciplinary infractions provided for by law or by the applicable disciplinary regulations; or
ii. in disputes that contradicted another decision which had already transited *in rem judicatam* and had itself been given by an arbitration panel or the TAD appeals chamber. In addition, the norms only allowed decisions taken by the TAD appeals chamber to be challenged before the Supreme Administrative Court (*Supremo Tribunal Administrativo* hereinafter, STA) in the form of an appellate review, and then only when this involved asking the STA to consider a question whose legal or social importance meant that it was of fundamental importance, or when admission of an appeal to the STA was clearly necessary in the interest of a better application of the law. The way in which these norms defined the possibility of appealing against arbitration decisions to state courts represented a breach of the right of access to the courts, both because of the limitations on the nature of the decisions, and because the requisites for a request for appellate review to be admitted are exceptional. The Constitutional Court therefore declared these norms unconstitutional with generally binding force.

The applicant in the present case argued that these new norms were also unconstitutional, because they disproportionately restricted the right of access to the courts and to effective jurisdictional protection.

II. The Constitutional Court noted that a comparison of the text of the articles that had been submitted to prior review with those before it in the present case showed that norms which had played a key part in the earlier finding of unconstitutionality had not been sufficiently amended.

The Court restated the understanding it had voiced in the prior review of the earlier Decree creating and governing the TAD: the creation of arbitration tribunals must take other constitutional principles into account – namely the guarantee of access to the courts and the guarantee that jurisdiction is reserved to those courts. The fact that resort to a state court is the main means of access to the law signifies that the formation of arbitration tribunals can be subject to certain limits based on that reserved jurisdiction.

The Court emphasised that, although the possibility of resorting to arbitration in the administrative dispute field can sometimes apply to disputes that involve the exercise of the Administration's powers of authority, the solution adopted in the TAD Law was different, because it said that mandatory arbitration was the only way in which the applicable disputes could be resolved; and no exception was made with regard to administrative acts that might come before an arbitration tribunal, because this mandatory system encompassed every act undertaken as part of the exercise of powers of authority, including those that entail the imposition of sanctions.

The Court accepted that, with the exception of the cases in which the Constitution exclusively reserves jurisdiction to the courts, it is permissible for the right of access to the latter to only be provided at the appeal level. In such cases one could say that there is a partially exclusive jurisdiction. However, in the present case there were special difficulties, because it concerned a mandatory form of arbitration, and the administrative authority involved in the arbitration process is a private entity that only intervenes in the performance of a task which possesses a public interest as a result of a transfer of the exercise of powers that belong to a public entity.

The Court was of the view that it is permissible for disputes whose object is an act or omission by a federation or other sporting body in the exercise of powers of a public nature, to be submitted to mandatory TAD arbitration. However, provision must be made for mechanisms that give the state courts the last word in the resolution of such disputes.

Where mandatory arbitration is concerned, the TAD's jurisdiction encompasses disputes arising from acts or omissions by federations, professional leagues and other sporting bodies. The Law said that many of

these disputes can only be heard by a single TAD instance – the arbitration panels – and that the latter's decisions in them could not be appealed to either the TAD's own appeal instance, or the state courts.

The fundamental right of access to the courts requires that the parties be able to debate the merit of an arbitration decision in a state court, and that there be no restriction on the right of access to the courts as a result of an absence of mechanisms for gaining access to state justice. It is necessary for there to be a mechanism whereby a judicial state organ can re-examine common situations in which a private individual wishes to challenge a decision on the essence of the question, or a decision which, while it does not go to the heart of the matter, does terminate the arbitration process. There must be mechanisms that enable state courts to have the last word on the resolution of disputes that are submitted to mandatory TAD arbitration.

The Constitutional Court said that the fundamental right of access to the courts tends to constitute a guarantee that access can be had to the state courts in particular – a tendency that results from the necessary link between the right of access and the principle that jurisdiction is reserved to those courts. It is only permissible for an arbitration-based jurisdiction to be exclusive when access to the arbitration tribunal is free and voluntary.

In the case of a mandatory arbitration-based jurisdiction, the impossibility of appealing against arbitration decisions represents a clear violation of the right of access to the courts, not only because the jurisdiction is mandatory, but also due to the nature of the rights and interests in play and to the fact that what is at stake is the exercise of delegated powers of authority.

The Court noted that, except with regard to certain "matters of noteworthy importance and complexity", the last word in the resolution of disputes submitted to mandatory TAD arbitration was still not in the hands of the state courts (this had already been the case with the norms in the earlier Decree creating the TAD, which had previously been the object of prior review proceedings in which the Court found them to be unconstitutional). It said that the mechanisms for guaranteeing access to state justice continued to be insufficient, in that they did not provide for a mechanism that would allow decisions to be re-examined before a state judicial organ in common situations in which a private individual wants to question a decision in which an arbitration body has pronounced itself on the essence of the case or terminated the proceedings.

The provision for a single form of appeal to the state courts, and on top of that, the fact that that appeal is primarily an objective one which is not in principle designed to defend those rights and interests of private persons to which the law affords its protection, is in breach of the fundamental right of access to the courts; and this because, among other things, the purpose of the latter right is to protect subjective legal positions that cannot be left unprotected simply because they are not socially or legally very important. What is more, the appellate review does not allow the parties to debate the merit of the factual matter which the arbitration jurisdiction has deemed established. This thus meant that as a rule, the last word with regard to judgments of what are or are not proven facts would pertain to the arbitration jurisdiction and not the Supreme Administrative Court; and this in turn signified that to this extent, the appellate review would also fail to overcome the insufficiency of the mechanisms that allow access to state justice – an insufficiency which the Constitutional Court had already pointed to in its ruling in the earlier prior review case.

The Constitutional Court considered that it was unacceptable for the state to delegate powers of authority to a private entity, thereby effectively bringing about an organic privatisation of the Administration's responsibility to perform a given public task, while simultaneously renouncing any jurisdictional control by state courts of the merit of the administrative decisions taken within the legal framework of that delegation of competences.

The Court noted that, notwithstanding the reformulation of the norms that had already been the object of prior review, the principle of necessity (as a material precondition for constitutional rights, freedoms and guarantees to be restricted) meant that it was still questionable whether pursuit of the objective of giving the country's sport a faster, more specialised system of justice justified not only submitting disputes linked to the legal rules governing sport first and foremost to an arbitration tribunal, but also only making provision for appeals to state courts in exceptional cases.

III. Two Justices dissented from the Court's decision. One accepted that the Constitution does to some extent prefer a justice that tends to be exercised by the state, namely when what is at stake is the judicial control of delegated powers of authority, but did not agree with the conclusion that the imposition of arbitration tribunals (i.e. making resorting to them mandatory) is only permissible if provision is made for the possibility of appealing against their decisions before state courts. The other dissenting Justice emphasised her view that although arbitration tribunals do not fit within the definition of courts as 'entities that exercise sovereignty' and are not state

organs, they must be classified as 'courts' for other constitutional purposes, inasmuch as the Constitution defines them as such and says that they constitute an autonomous category of courts. As such, they themselves form part of the constitutional guarantee of access to the law and the courts.

Cross-references:

- Ruling nos. 52/92 of 05.02.1992; 197/2009 of 28.04.2009 and 230/2013 (prior review of the Decree of the Assembly of the Republic that created the Sports Arbitration Tribunal).

Languages:

Portuguese.

Identification: POR-2013-3-018

a) Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 21.11.2013 / **e)** 794/13 / **f)** / **g)** *Diário da República* (Official Gazette), 245 (Series I), 18.12.2013, 36019 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

5.4.3 Fundamental Rights – Economic, social and cultural rights – **Right to work**.
5.4.5 Fundamental Rights – Economic, social and cultural rights – **Freedom to work for remuneration**.
5.4.17 Fundamental Rights – Economic, social and cultural rights – **Right to just and decent working conditions**.

Keywords of the alphabetical index:

Civil servant, employment, contract / Civil servant, remuneration / Employment, working conditions / Legitimate expectation, protection, principle / Salary, reduction / Work, legal length.

Headnotes:

A law that increases normal working hours for all public sector workers is not unconstitutional. Although the new rules are not included in a law with superior force to the laws that were in effect when the new norms came into force, those pre-existing laws cannot prevent new special laws from creating derogations from the new normal working period. Nor have they caused any alterations in the rules imposed by the Regime governing Public Sector Labour Contracts *(Regime do Contrato de Trabalho em Funções Públicas,* herinafter, *"*RCTFP"), or in the Executive Law that lays down the rules and general principles for matters linked to the length of working hours and the work schedules in the Public Administration. There was no breach of the prohibition on reversing fundamental social rights. This principle of irreversibility can only be valid when interpreted restrictively – i.e. when a change that reduces the content of social rights can be said to violate other constitutional principles as well. To accept any broader irreversibility of the level at which the ordinary legislator has already concretely set economic and social rights would be to almost completely destroy the autonomy of the legislative function. The prohibition on going backwards in social terms does not create its own parameter for controlling the extent to which social rights are negatively affected; when that control does take place, one must consider the parameters that can be extracted from the general principles present in the Constitution. There was also no unconstitutional violation of the principle of the protection of trust, as such a violation is only present when the underlying reasons for a norm are insufficient to justify a change in the legislator's behaviour, and the challenged law was designed to safeguard important public interests.

Summary:

I. This was an *ex post hoc* review of the constitutionality of norms contained in a Law that set the normal working hours of public sector workers at eight hours a day and forty hours a week, thereby amending the norm that had been in force until the new Law took effect, under which the working day could not exceed seven hours and the working week thirty-five.

The petitioners who requested the review argued that this increase in normal working hours was unconstitutional in its own right. They also alleged that the norm imposed an imperative minimum which superimposed itself on any special law or collective labour regulation instrument (hereinafter, "IRCT") that was already in force, thus making it impossible to set shorter working hours, including in the future, and that this was also unconstitutional.

II. The Constitutional Court held that the prevalence of the new rules only applies to the past, terminating the effect of any existing normative instruments that resulted in working hours shorter than those imposed by the new Law.

The Court observed that there continues to be a flexible working-time regime, which is subject to maximum daily and weekly limits. The latter can only be exceeded by flexitime mechanisms that are categorically imposed by law (the adaptability and hour bank systems are especially noteworthy in this respect). The Court had already decided in the past that this arrangement does not represent an illegitimate restriction on workers' rights to rest and leisure.

On the principle of the protection of trust, the Constitutional Court noted that its jurisprudence reflects the constant position that in order for a constitutional-law protection of trust to be applicable: the state (especially the legislator) must have displayed behaviour capable of generating expectations among private entities that there would be a continuity in the future; those expectations must be legitimate and justified; the private persons must have made life plans that took the prospect of the continuity of the state's behaviour into account; and there cannot be public-interest reasons which, when weighed against the private interests, warrant the non-continuity of the behaviour that generated the expectations.

The Court accepted that an increase in normal working hours that encompasses the entire universe of public sector workers is not a form of behaviour which the targets of the legislative decision had thought foreseeable. Until this new Law was published, the clear reduction in the past of the normal working day in the public sector – a reduction that had been consolidated over the previous twenty-five years – legitimated a consistent expectation that the length of that day would remain the same. This expectation may have served as the grounds for life choices and the formation of life plans based on the continuity of the situation.

The increase in working hours was significant and capable of causing difficulties in reconciling people's private and family lives and their work, or in the exercise of fundamental rights, such as the right to culture.

However, the Court was of the opinion that the tendency towards subjecting the regime governing Public Administration workers to the general labour rules made it possible to say that it was not entirely impossible to foresee a change like this one. The Court also stated that the idea of the protection of trust can only be seen as a constitutional parameter in situations in which its breach is contrary to the very idea of the state based on the rule of law.

In the present case the Court emphasised that increases in normal working hours in the public sector generally have a positive impact, both on labour costs and in terms of cutting public spending. Given the successive measures that were taken between 2010 and 2013 in order to restrain expenditure, and the evolution in the working conditions of Public Administration staff and the legislation governing them, the Court was of the view that any expectations as to the continuity of past practices were not adequately founded on consistent reasons.

The Court pointed out that the challenged measures formed part of a "package of measures" designed to reduce public spending included in the Seventh Revision of the Adjustment Programme for Portugal set out in the 2011 Memorandum of Understanding on Specific Economic Policy Conditionality *(Memorando de Entendimento sobre as Condicionalidades de Política Económica)*. Given the economic/financial crisis situation facing the country, it was correct to attach substantial weight to these objectives of reducing overtime pay and ensuring pay restraint.

The Court was not unaware of the depth of the sacrifice which the legislative changes imposed on public sector workers, but said that it was not clear that any legitimate expectations on their part should prevail over the need to protect the public interests underlying those legislative amendments.

The allegation of a violation of the principles of equality and proportionality was based on the assumption that the working-time regime applicable to private sector workers under the Labour Code establishes a sub-regime in which there are maximum limits, but these can be derogated from by collective labour agreements (hereinafter, "IRCTs"), whereas the regime approved by the Law containing the norms before the Court created a sub-regime of imperative minimum limits from which there could be no such derogation.

The Court was of the opinion that these amendments did not in fact change the solution involving maximum limits subject to derogation. The maximum limits on normal working hours can still be reduced by IRCTs, without any cut in the workers' pay.

On the alleged breach of the right to be paid for one's work, the Court considered that there was an obvious decrease in hourly pay (because more hours are now worked for the same salary), and that this has implications for overtime pay, but that there was no change in the amount of money full-time public sector workers receive in basic pay each month. Even where part-time work (seen as a fraction or percentage of normal full-time working hours) is concerned, the changes have meant an increase in the normal daily and weekly time that part-time

workers spend working. This increase is proportional to that laid down for full-time public sector workers and, as is the case for full-time staff, does not imply a nominal pay cut, but does mean an increase in the number of hours worked.

The Constitutional Court referred to its own jurisprudence on the question of the right to be paid, particularly with regard to Public Administration workers. That jurisprudence particularly notes that the Constitution does not contain any rule establishing a guarantee that salaries cannot be reduced *per se*. The Court said it was aware that increasing normal daily working hours can lead to additional expenses for workers (transport, caring for elderly or young dependents, etc.), but that the main disadvantage they suffer as a result of the norms in question is in terms of the time they have available for themselves, their families and the exercise of a range of other fundamental rights (the right to the free development of one's personality, the freedom to create and enjoy culture, and so on).

The Court considered that the real loss of pay was limited to that earned by doing overtime. It attached value to this fact, given the various effective pay cuts the universe of public sector workers had suffered in recent years. However, it stated that the payment of overtime is not included in the qualitative concept of remuneration, and so the constitutional guarantee that salaries cannot be reduced does not apply.

As such, the Court held that the reduction in the amounts of money effectively received in payment for overtime work was not a decisive element that would cause the norms to be unconstitutional.

III. This Ruling was the object of one concurring and six dissenting opinions (the Court's Plenary is composed of thirteen Justices). The concurring Justice based her position on the opinion that the content which the Ruling says the norm possesses is not to be found in the letter of the law, but that it was acceptable for the Court to correctively interpret the literal text in such a way as to arrive at an interpretation under which the norm is in conformity with the Constitution. She considered that whenever possible, constitutional judges should refrain from invalidating norms, on condition that they can find other interpretative mechanisms with the ability to avoid the effects that a declaration of unconstitutionality would entail. In the present case, she considered that the legislator had unequivocally demonstrated its intention to allow special laws and collective labour agreements that establish derogations from a maximum normal working schedule of eight hours a day and forty hours a week, in a sense that is more favourable to the public sector workers concerned, to remain in force. To her mind, this meant that it would not make sense for the Constitutional Court to insist on a declaration of unconstitutionality. She said that even if the constitutional judge were to deduce that the norm possesses an unconstitutional prescriptive content, he/she could (and in this Justice's opinion, should) interpret it in a way that places it in conformity with the commands and obligations imposed by the Constitution.

The dissenting Justices accepted that the increase in the working day is not in itself unconstitutional, but argued that the norm also prohibits special laws and IRCTs from establishing shorter normal working hours. They said that precluding the possibility that IRCTs can set a more favourable regime means that this normative solution is in breach of the constitutional right to collective bargaining. They considered that there is an effective elimination of the concrete exercise of the fundamental right to enter into collective labour agreements, which they said cannot be overcome by an interpretation under which the norm is in conformity with the Constitution.

Cross-references:

- Ruling nos. 128/09 of 12.03.2009; 304/01 of 27.06.2001; 3/10 of 06.01.2010; 338/10 of 22.09.2010; 396/11 of 21.09.2011; 187/13 of 05.04.2013; 474/13 of 29.08.2013 and 602/13 of 20.09.2013.

Languages:

Portuguese.

Romania
Constitutional Court

Important decisions

Identification: ROM-2013-3-005

a) Romania / **b)** Constitutional Court / **c)** / **d)** 01.10.2013 / **e)** 397/2013 / **f)** Decision on the exception of unconstitutionality of Articles 284.7 and 289.7 of National Education Law no. 1/2011 / **g)** *Monitorul Oficial al României* (Official Gazette), 663, 29.10.2013 / **h)** CODICES (Romanian).

Keywords of the systematic thesaurus:

3.9 General Principles – **Rule of law**.
3.12 General Principles – **Clarity and precision of legal provisions**.
3.21 General Principles – **Equality**.

Keywords of the alphabetical index:

Education, staff, status, temporary appointment, end / Education, teacher, employment, system / Law, precision, need.

Headnotes:

Regulations that provide retired teaching staff the possibility to attain tenured professorship, even only for a fixed duration, by the Board and respectively, by the University Senate, are discriminatory because they enshrine a way of obtaining such status other than through competition.

Summary:

I. The Constitutional Court, under Article 146.d of the Constitution, was requested to review the constitutionality of Articles 284.7 and 289.7 of the National Education Law no. 1/2011. The law provides the possibility for teaching staff to become tenured professors upon retirement. One of the conditions imposed by law in order to benefit from the possibility of tenured professorship is for the staff to forego their pension benefits.

The impugned legal text has been challenged as unconstitutional because it infringes the principle of equal rights, imposing the condition to stop collecting pension benefits for the duration of the tenured professorship. The teaching staff participates in the public pension scheme and benefits from pensions as a consequence of the affiliation to this scheme. Therefore, the staff must enjoy a non-discriminatory treatment in relation to the other retirees, who carried out their professional activity before retirement and who, after retirement, operate in different fields and do not have the obligation forego their pension benefits for the time they work in the public sector, if the pension does not exceed the average gross national income.

II. The Constitutional Court examined the objection as to the constitutionality of the said provisions. To determine whether foregoing pensions, as a condition for recognising their capacity to be tenured professors, constitutes discrimination, it examined the constitutionality of the same regulations from the perspective of establishing the possibility for the retired teaching staff to be recognised as having the capacity to be tenured professors.

The Court held that the status of tenured professors has a specific legal regime. Taking this regime into consideration, the status of tenured professors is obtained through competition, which is inferred from the systematic interpretation of the National Education Law no. 1/2011.

Therefore, the Court held that the impugned legal text basically establishes a modality to acquire the capacity as tenured professor by “recognising” it. This is contrary to the principles established by law for tenure, as well as to the legal regime encompassing the concept of “tenure holder” in the field of education. Discrimination in respect of employment in the education system results from this because for a certain category of people, the status as a tenured professor is achieved without competition but only upon the request and approval of the Board or of the University Senate, as appropriate.

As for higher education, the establishment of this exception tends practically to circumvent both the legal framework for retirement, as well as that on employment to teaching positions in higher education. Therefore, it violates the principle of legal certainty deriving from the provisions of Article 1.5 of the Constitution.

Furthermore, examining the entirety of the relevant provisions, the Court found that the category of teaching staff referred to in the impugned regulations is improperly called “tenured”, as long as the persons included in this category are employed on the basis of fixed-term employment contracts. Consequently, the specific methodology that applies

to tenured professors/teachers (defined, as regards elementary and secondary education, as being the teaching staff under permanent employment contracts) is not applicable in their regard.

The Court also found that the impugned provisions, as part of the respective legislation, set up a concept governed by an indistinct legal regime, the concept of "recognised tenured holder". He/she is a tenured teacher for a fixed term (elementary and secondary education) and practically, for an indefinite period (higher education), after reaching the retirement age and retiring in accordance with the law. Such a concept designated by the same concept, namely "tenure", to which National Education Law no. 1/2011 assigns a certain legal regime, is likely to breach the requirements of clarity and precision of regulation established by Article 1.3 and 1.5 of the Constitution.

The Court established a set of criteria that must be complied with in the law-making context: "precision, foreseeability and predictability as to enable an individual to regulate his conduct and therefore, avoid the consequences of the breach thereof" (Decision no. 61 of 18 January 2007, published in the Official Gazette of Romania, Part I, no. 116 of 15 February 2007, Decision no. 26 of 18 January 2012, published in the Official Gazette of Romania, Part I, no. 116 of 15 February 2012). To comply with these criteria, the concept of "tenure" in the field of education, as regulated by National Education Law no. 1/2011, must have an univocal meaning and an exclusive regime as regards accession to the status it designates.

Consequently, the Court found that the provisions of Articles 284.7 and 289.7 of National Education Law no. 1/2011 are unconstitutional. They infringe the provisions of Articles 1.3, 1.5, as well as 16.1 of the Constitution.

The Court declared the legislative solution enshrined by the impugned provisions unconstitutional, i.e. the possibility to recognise the capacity of a retired member of the teaching staff to become a tenured professor. As a result, it did not proceed to examine the conditions established by the same provisions for acquiring this status (forego pension benefits, referred to in the claim).

Languages:

Romanian.

Identification: ROM-2013-3-006

a) Romania / **b)** Constitutional Court / **c)** / **d)** 13.11.2013 / **e)** 460/2013 / **f)** Decision on the notification by the president of the Superior Council of Magistracy regarding the existence of a legal dispute of a constitutional nature between the judicial authority, represented by the High Court of Cassation and Justice, on the one hand, and the legislative authority, represented by the Senate of Romania, on the other hand / **g)** *Monitorul Oficial al României* (Official Gazette), 762, 09.12.2013 / **h)** CODICES (Romanian).

Keywords of the systematic thesaurus:

3.12 General Principles – **Clarity and precision of legal provisions**.
4.5.4.1 Institutions – Legislative bodies – Organisation – **Rules of procedure**.
4.5.8 Institutions – Legislative bodies – **Relations with judicial bodies**.
4.5.11 Institutions – Legislative bodies – **Status of members of legislative bodies**.

Keywords of the alphabetical index:

Law, precision, need / Parliament, member, other activity, incompatibility / Parliament, rules of procedure.

Headnotes:

The Senate's non-assumption of its power to declare the termination or non-termination of the capacity as Senator of Mr M.A.D., following the High Court of Cassation and Justice's decision to uphold the Assessment Report drawn up by the National Integrity Agency ascertaining the state of incompatibility of the respective person, generates a legal dispute of a constitutional nature. The dispute is between the judicial authority, represented by the High Court of Cassation and Justice; and the legislative authority, represented by the Senate of Romania. The Senate will declare whether to terminate Mr M.A.D.'s capacity as Senator following legal interpretation of the applicable legal provisions.

Summary:

I. The Constitutional Court, entrusted to adjudicate legal disputes of a constitutional nature between public authorities under Article 146.e of the Constitution, was requested to review the legal dispute between the High Court of Cassation and Justice, and the Senate of Romania. The dispute was triggered by the Senate's failure to complete the parliamentary procedure regarding the termination or non-termination of Mr M.A.D.'s capacity as Senator, which followed the High Court of Cassation and Justice's decision, finding the Assessment Report drawn up in a case by the National Integrity Agency as legal and well-founded.

In the respective case, there are two interpretations of the same legal text concerning the consequences of the National Integrity Agency report finding a state of incompatibility, namely the ban to occupy "the same office for period of 3 years from the termination of the mandate". According to the Senate's Committee for Legal Affairs, Appointments, Discipline and Validations, the word "same" used by the legislator cannot be interpreted as synonymous with "all". The legislator precisely identified the respective elective office. In the case of Mr M.A.D., this means the office of county councillor – not that of Senator. The Senate's Standing Bureau communicated this interpretation to the National Integrity Agency.

The issue regarding termination or non-termination of the capacity of Senator of Mr M.A.D., however, was not placed on the agenda of the Plenum of the Senate. According to the interpretation by the High Court of Cassation and Justice, "once established definitively the existence of a state of conflict, the person on whose account this state was established loses his right to occupy any other office of the type that caused the incompatibility". In this case, it is also the office of Senator.

II. Finding the existence of a legal dispute of a constitutional nature, the Constitutional Court stated the following:

According to the provisions of Article 183.1 of the Senate's Regulations, the Senate's Committee for Legal Affairs, Appointments, Discipline and Validations was obliged to prepare a report on the cases of incompatibility sent for examination to the Standing Bureau of this Chamber. The proposals contained in the report of the Committee were to be debated by the Senate in its Plenum. This procedure, however, was not followed in the present case.

Thus, the Senate's Standing Bureau decided to transmit to the National Integrity Agency the viewpoint of the Committee for Legal Affairs, Appointments, Discipline and Validations. Specifically, the incompatibility established by the National Integrity Agency would result in a ban to occupy, for a period of three years, the elective office as county councillor and not that as Senator. This circumstance would entail the Senate's lack of competence to rule on sanctions or bans for violating legal obligations regarding incompatible offices not related to the mandate of Senator.

It has been thus blocked, namely the procedure set forth in the Regulations stating that, after the Committee's preparation of the report, the Plenum of the Chamber of Parliament proceed to debates and vote on the existence of a state of incompatibility of a MP. According to the provisions of Article 36.1.h of the Senate's Regulations, the Senate's Standing Bureau should have placed the debate regarding the proposals contained in the report of the Committee for Legal Affairs, Appointments, Discipline and Validations on the agenda of the Senate's Plenum. The reason is that the Senate is the deliberative body through which Parliament fulfils its constitutional powers.

However, noting the parliamentary committee report, the Standing Bureau of the Senate decided to act as a decisional body. It debated on matters contained in the document prepared by the Committee and decided, by unanimous vote, to communicate it to the National Agency Integrity. The procedure that followed and the decision that was taken exceeded the jurisdiction of the Standing Bureau of the Senate, which by its conduct had involved the Senate, as a public authority, in a constitutional dispute of a legal nature.

Therefore, the Court found that there was a legal dispute of a constitutional nature between the judicial authority and the legislative authority, which came about as a result of the non-assumption of jurisdiction to decide in this case and the authority's refusal to fulfil the constitutional and legal powers it was vested with. Therefore, the Senate, in its Plenum, is required to decide by vote on the termination or non-termination of the capacity as Senator of Mr M.A.D., as a result of the report of the National Integrity Agency finding him in a state of conflict.

Regarding the Senate decision on the matter, the Court held that it will be based on the provisions of Article 25.2 second sentence of Law no. 176/2010 on integrity in the exercise of public office, and amending and completing Law no. 144/2007 on the setting up, organisation and functioning of the National Integrity

Agency. It will also include amending and completing other normative acts, a text of law that provides: "If the respective person has held an elective office, he/she cannot occupy the same office for a period of three years from the termination of the mandate."

However, given the two possible interpretations of the text in question, in order to decide on the termination or non-termination of the capacity as Senator, Parliament must firstly proceed to the legal interpretation of the mentioned provisions. That is, initiating a legislative procedure for the purpose of adopting a law to interpret the provisions of Article 25.2 of Law no. 176/2010.

The Senate will decide on the termination or non-termination of the capacity as Senator of Mr M.A.D. after the legal interpretation of Article 25.2 of Law no. 176/2010.

III. A judge filed a concurring opinion.

Languages:

Romanian.

Russia
Constitutional Court

Important decisions

Identification: RUS-2013-3-006

a) Russia / **b)** Constitutional Court / **c)** / **d)** 10.10.2013 / **e)** 20 / **f)** / **g)** *Rossiyskaya Gazeta* ((Official Gazette)), 28.10.2013 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
5.3.29.1 Fundamental Rights – Civil and political rights – Right to participate in public affairs – **Right to participate in political activity**.
5.3.41.1 Fundamental Rights – Civil and political rights – Electoral rights – **Right to vote**.
5.3.41.2 Fundamental Rights – Civil and political rights – Electoral rights – **Right to stand for election**.

Keywords of the alphabetical index:

Sentenced persons / Right to be elected, restriction / Necessity of customising procedures.

Headnotes:

Restriction on the right to be elected must be proportionate and enable the intended aim to be achieve. The Constitutional Court removed the "criminal filter" provided for in electoral law.

Summary:

I. Examination of this case was prompted by an application from citizens challenging the constitutionality of certain provisions of the Federal Law "On fundamental guarantees of the electoral rights of citizens".

The norm impugned stipulated that persons sentenced to more than 10 years imprisonment may not, for the remainder of their life, stand for election, at any level. Accordingly, several individuals were refused the right to stand for election by the electoral commission and the Court rejected their appeals.

The applicants claimed that this “criminal filter” contravened not only the Constitution but also Article 86.6 of the Criminal Code, which stipulates that the execution or striking of a sentence annuls all the legal consequences related thereto.

II. The Constitutional Court ruled in favour of the applicants. It pointed out that, while it was important to restrict the right to be re-elected to protect legitimate interests, the restriction had to be proportionate and must enable the intended aim to be achieved. The Court referred to the stance taken by the European Court of Human Rights on this matter and the need to customise the procedures governing restrictions, according to the individual convicted and the type of offence.

The Court also held that this ban did indeed constitute a sanction in addition to the sentence handed down. Accordingly, the legislator had to amend the law on electoral rights, to introduce mechanisms allowing customisation and proportionality of the ban on participating in elections.

Languages:

Russian.

Identification: RUS-2013-3-007

a) Russia / **b)** Constitutional Court / **c)** / **d)** 06.12.2013 / **e)** 27 / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 18.12.2013 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

1.2.3 Constitutional Justice – Types of claim – **Referral by a court**.
2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights**.

Keywords of the alphabetical index:

European Court of Human Rights, final judgments / Decisions of the European Court of Human Rights, application / Constitution.

Headnotes:

The final judgments of the European Court of Human Rights are binding on Russia. The State has an obligation to pay compensation to the victim and ensure that the rights violated are restored. On the other hand, the ECHR is not a body that stands over the national courts. If the judgment of the ECHR clashes with the Constitution, the State must act accordingly, bearing its national interests in mind.

Summary:

I. The Constitutional Court ruled on the question whether to apply the judgments of the European Court of Human Rights (ECHR) that oppose the principles laid down in the Constitution.

The case was prompted by a request to clarify the law from the military court in Saint Petersburg, following the European Court's review of the high-profile case of Konstantin Markin concerning discrimination within the army.

The case of officer Markin, a father of three children, was brought as a result of his command's refusal to grant him paternity leave.

In 2009, the Constitutional Court had rejected the application lodged by Markin, stating that the restrictions applying to servicemen with children were justified by the interests of national defence.

In 2012, the Grand Chamber of the ECHR (as had one of the Court's chambers in 2010) recognised that this decision of the commanding hierarchy had been discriminatory and awarded Markin compensation of 6,150 euros to be paid by Russia for violating his rights.

II. The Constitutional Court had not declared the laws on leave for servicemen to be unconstitutional. It concluded that, consequently, Article 3 of the Code of Criminal Procedure challenged by the military court did not apply to this case.

On the one hand, the final judgments of the ECHR are binding on Russia, and the State has an obligation to pay compensation to the victim and ensure that the rights violated are restored.

On the other hand, the ECHR is not a body that stands over the national courts. Accordingly, an ECHR judgment cannot annul a court ruling handed down on the territory of a State signatory to the European Convention on Human Rights. However, it constitutes a basis for reviewing cases in the light of newly discovered facts.

The Supreme Court has already long pointed out that if a case is reviewed based on an ECHR judgment, it is not mandatory to annul the decisions handed down by Russian courts.

If the Court has difficulties concerning a judgment's application, it may request an opinion of the Constitutional Court to settle a case.

The European Court of Human Rights has the right to point out to countries errors found in their laws. If ECHR judgments clash with the Constitution, the State must act accordingly, bearing its national interests in mind.

Languages:

Russian.

Serbia
Constitutional Court

Important decisions

Identification: SRB-2013-3-005

a) Serbia / **b)** Constitutional Court / **c)** / **d)** 04.07.2013 / **e)** IUz-245/2011 / **f)** / **g)** *Službeni glasnik Republike Srbije* (Official Gazette), no. 71/2012 / **h)** CODICES (English, Serbian).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Conflict of interest / Fight against corruption / Discrimination.

Headnotes:

No one can hold a state or public office that conflicts with their other offices, jobs or private interests. The Constitution and the law determine the existence of the conflict of interest and the authority responsible for resolving it.

Summary:

The Constitutional Court (hereinafter, the “Court”) on the basis of the filed motion, initiated the procedure to determine the constitutionality of the provisions of Articles 28.9, 30.6 and 31.7 of the Law on Anti-Corruption Agency, *Službeni glasnik Republike Srbije,* (Official Gazette) nos. 97/08, 53/10 and 66/11 (hereinafter, the “Law”).

The Law was adopted by the National Assembly, pursuant to Article 6 of the Constitution, which established that no one can hold a state or public office that conflicts with their other offices, jobs or private interests. The existence of a conflict of interest and the responsibility to resolve it are determined by the Constitution and the law.

Pursuant to the above, in order to preserve the public interest in the performance of the state and public offices, the Constitution set out the incompatibity of certain public offices.

The Constitution, additionally, left the determination of the existence of the conflict of interest for certain categories of officials to be regulated by special laws that govern the position, competence and organisation of certain state and other bodies. The laws took into account all specific characteristics of those bodies and different situations that may violate the principle of prohibiting the conflict of interest in performing the duties within the competences of those bodies.

The law that systematically regulates the rules in relation to preventing the conflict of interest in performing the public offices is the Law on Anti-Corruption Agency. It should be noted that preventing the conflict of interest is one of the most important segments of the fight against corruption in any society. In line with the above, the Anti-Corruption Agency is competent, among other things, to resolve the conflict. In the procedure to resolve the conflict, the Agency is authorised to decide in each particular case, in the procedure envisaged by the law, whether a conflict of interest exists in the simultaneous exercise of public offices or performing certain jobs or activities during the exercise of a public office.

The general rule of prohibition of performance of another public office is prescribed by the provision of Article 28.1 of the Law. Here, it was established that an official may perform only one public office, unless obliged by law or another regulation to perform multiple offices. An exception to this general rule is envisaged by Article 28.2. It stipulates that an official may hold another public office, but only with the consent from the Agency, which will within the legally prescribed procedure resolve whether the performance of that other office conflicts with the interest of the office that the official already holds.

The provisions of Article 28.4 to 28.8 envisage the procedure to resolve the conflict in a situation when an official files a request to the Agency for consent to hold another office. However, in the same procedure, the disputed provision of Article 28.9 of the Law, the Agency Director is authorised to pass a general act, whereby certain categories of officials can hold other public offices without the Agency's consent.

The same power is vested upon the Agency Director in the procedure to resolve the conflict in performing a public office and another job or activity at the same time. Namely, the disputed provision of Article 30.6 of the Law provides that for certain categories of officials, the Agency Director may, under a general act establish the jobs or activities which may be performed without the consent from the Agency.

Provisions of Article 31.7 of the Law, moreover, state that for certain categories of officials or rather for certain jobs and activities, the Agency Director may prescribe, under a general act that it is not necessary to submit to the Agency a notification to perform another job or activity at the moment of entering into public office.

The legislator vested the Agency Director with the power to independently, by passing a legal act, determine for certain officials when there is no conflict of interest in performing another public office. That is, in performing another job or activity whereby, in accordance with the determination of the Court, contrary to Article 6.2 of the Constitution, the legislator allowed that the issues referring to the existence of the conflict of interest are regulated by a legal act with lower legal power than the law.

The constitutional obligation to regulate the existence of the conflict of interest only by the Constitution and the Law, directly causes another violation of the Constitution, namely the principle of division of power under Article 4.2 of the Constitution. It is against the Constitution to leave the Agency Director to regulate this matter, which falls within the exclusive competence of the National Assembly as the bearer of constitutional and legislative power.

As for the prohibition of discrimination under Article 21 of the Constitution, the Court notes that the legal acts of the Agency Director refer only to a certain category of officials. This marks a difference between the officials in the manner of resolving the conflict of interest. It is contrary to the right of equality before the Constitution and the law guaranteed under the Constitution and the general prohibition of discrimination under all grounds, as determined by Article 21.1 and 21.3 of the Constitution.

Based on the above, the Court established that the disputed provisions of Articles 28.9, 30.6 and 31.7 of the Law, are in conflict with the provisions of Articles 4.2, 6.2, 21.1 and 21.3 of the Constitution. The reason is that in this manner, the legislator provided that a bye-law issued by an incompetent authority regulates a purely constitutional and legal matter relating to the existence and resolution of conflicts of interest.

Languages:

English, Serbian.

Slovenia
Constitutional Court

Statistical data
1 September 2013 − 31 December 2013

In this period, the Constitutional Court held 20 sessions – 13 plenary and 7 in panels: 3 in the civil panel, 2 in the criminal panel and 2 in the administrative panel. It received 119 new requests and petitions for the review of constitutionality/legality (U-I cases) and 314 constitutional complaints (Up cases).

In the same period, the Constitutional Court decided 167 cases in the field of the protection of constitutionality and legality, as well as 488 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 fulltext 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 fulltext version of the dissenting/concurring opinions);
- On the website of the Constitutional Court (fulltext in Slovene, English abstracts and a selection of fulltexts): www.us-rs.si;
- In the IUS-INFO legal information system on the Internet, fulltext in Slovene, available through www.ius-software.si;
- In the CODICES database of the Venice Commission (a selection of cases in Slovene and English).

Important decisions

Identification: SLO-2013-3-005

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 14.03.2013 / **e)** U-I-212/10 / **f)** / **g)** *Uradni list RS* (Official Gazette), 31/2013 / **h)** *Pravna praksa*, Ljubljana, Slovenia (abstract); CODICES (Slovenian, English).

Keywords of the systematic thesaurus:

5.2.2.11 Fundamental Rights – Equality – Criteria of distinction – **Sexual orientation**.
5.3.33.2 Fundamental Rights – Civil and political rights – Right to family life – **Succession**.

Keywords of the alphabetical index:

Civil partnership, same-sex, unregistered / Discrimination, prohibited grounds, list / Discrimination, sexual orientation / Inheritance, right / Inheritance, statutory rules.

Headnotes:

The legislature's failure to regulate the right to legal inheritance of unregistered same-sex partners in the same manner as the right is regulated for common-law spouses entails unconstitutional discrimination.

Summary:

I. The case at issue originated from a civil-law dispute regarding inheritance. For several years the claimant had had been living with the deceased in a same-sex partnership which they did not formally register in accordance with the Registration of a Same-Sex Civil Partnership. The deceased died without a will and the claimant instituted proceedings claiming that she was entitled to the same right to legal inheritance from her unregistered same-sex partner as a surviving common-law spouse in her position would have been entitled to in the event of his or her partner's death. As the regulation of inheritance in force did not provide for such a right between unregistered same-sex partners, the court stayed the proceedings and lodged a request for a review of the constitutionality of the regulation of inheritance in force. It alleged that the challenged regulation entails discrimination against unregistered same-sex partners in comparison to common-law spouses regarding inheritance and is therefore inconsistent with Article 14.1 of the Constitution.

II. The Constitutional Court initially noted that, in addition to the types of partnerships that are formally established in accordance with the law, such as marriage, which is only open to different-sex couples, and registered partnership, which is only open to same-sex couples, the Slovene legal order also regulates common-law marriage. In accordance with the Inheritance Act, the same rules on inheritance as apply to spouses also apply to common-law spouses, i.e. a man and a woman who live together in a long-term partnership and are not married, provided there are no reasons which would render a marriage between them void. Long-term (unregistered) cohabitation between two persons of the same sex as such, however, is not regulated by law.

In the case at issue, the Constitutional Court applied the criteria for assessing an allegation of discriminatory treatment that it had already established in Decision no. U-I-425/06, dated 2 July 2009 (Official Gazette RS, no. 55/09, and OdlUS XVIII, 29, *Bulletin* 2009/2 [SLO-2009-2-005]), wherein it compared the position of a spouse and the position of a registered partner with regard to inheritance in the event of their partner's death. In the case at issue, the Constitutional Court firstly observed that the applicant claims discriminatory treatment in ensuring the right to inheritance, determined in Article 33 of the Constitution. The Court noted that under the Inheritance Act a common-law spouse enjoys the same right to inheritance as a spouse, while no right of inheritance arises from a long-term unregistered cohabitation of two persons of the same sex. In contrast to a common-law spouse, an unregistered same-sex partner is not included in the circle of the decedent's legal heirs and may only inherit from his or her partner on the basis of a will. The legal order thus evidently treats persons of the same sex and persons of different sexes who live in stable *de facto* partnerships differently as regards inheritance in the event of their partner's death.

Common-law marriage produces legal effects merely on the basis of the fact that two persons of different sexes live together in a long-term partnership and provided there are no reasons due to which a marriage between them would be void. The law does not determine any additional conditions for a decedent's common-law spouse to be able to inherit his or her partner's estate. Therefore, in order to establish whether the position of a common-law spouse and the position of an unregistered same-sex partner are comparable from the viewpoint of the right to legal inheritance, the Constitutional Court only had to compare their factual positions. It thus noted that in today's society, there remains no disagreement regarding the fact that loving and lasting relationships are established by same-sex and different-sex couples alike. An unregistered same-sex partnership is the union of two persons who are connected as a couple, whereby their (relatively lasting) relationship is defined by their emotional, moral, spiritual, and sexual attachment on their shared life path, which is also characteristic of common-law marriage. As the legally relevant factual positions of a common-law spouse and an unregistered same-sex partner upon fulfilment of the conditions for legal inheritance are thus essentially equivalent, the different regulation of inheritance of these partners is evidently not based on any objective, impersonal grounds for differentiation, but on sexual orientation.

The regulation of inheritance in force thus interfered with the unregistered same-sex partner's right to non-discriminatory treatment (Article 14.1 of the Constitution). The Constitutional Court stressed that differentiation on the grounds of sexual orientation may only be justified by especially weighty reasons. However, the legislature did not demonstrate the existence of any objectively justified aim for such differentiation, and such also could not be derived from the legislative materials regarding the challenged Act. Therefore, the Constitutional Court concluded that the challenged regulation of inheritance is inconsistent Article 14.1 of the Constitution without proceeding to perform a test of proportionality.

As it established an unconstitutional legal gap, the Constitutional Court issued a declaratory Decision and established the manner of its implementation. Therefore, until the established inconsistency is remedied, the same rules apply for inheritance between partners in unregistered same-sex partnerships – these must be the same in substance as partnerships between registered same-sex partners, whereby there must not be any reasons due to which the registered partnership would be void – as apply for inheritance between common-law spouses in accordance with the regulation of inheritance in force.

III. The first and second points of the operative provisions of the Decision were adopted by seven votes against two. Judges Klampfer and Mozetič voted against. The third point of the operative provisions was adopted by six votes against three. Judges Jadek Pensa, Klampfer, and Mozetič voted against. Judge Jadek Pensa submitted a partially concurring and partially dissenting opinion; Judges Sovdat and Zobec submitted concurring opinions.

Cross-references:

- OdlUS XVIII, 29, *Bulletin* 2009/2 [SLO-2009-2-005].

Languages:

Slovenian, English (translation by the Court).

Identification: SLO-2013-3-006

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 11.04.2013 / **e)** U-I-40/12 / **f)** / **g)** *Uradni list RS* (Official Gazette), 39/2013 / **h)** *Pravna praksa*, Ljubljana, Slovenia (abstract); CODICES (Slovenian, English).

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**.
5.3.13.19 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Equality of arms**.
5.3.32 Fundamental Rights – Civil and political rights – **Right to private life**.
5.3.35 Fundamental Rights – Civil and political rights – **Inviolability of the home**.
5.3.36 Fundamental Rights – Civil and political rights – **Inviolability of communications**.
5.4.6 Fundamental Rights – Economic, social and cultural rights – **Commercial and industrial freedom**.

Keywords of the alphabetical index:

Legal person / Privacy / Search warrant, judicial / Search, order.

Headnotes:

A legal entity, which is an artificial form within the legal order, also enjoys the constitutionally-protected right to privacy which the Constitution otherwise ensures to natural persons as a human right. Interferences with the spatial and communication privacy of legal entities, insofar as they are protected by Article 36.1 and the first paragraph of Article 37.1 of the Constitution, are only admissible if they are ordered by a court.

Summary:

I. The Supreme Court submitted a request for the review of the constitutionality of several provisions of the Prevention of Restriction of Competition Act to the Constitutional Court. The challenged provisions *inter alia* authorised the Public Agency of the Republic of Slovenia for Protection of Competition (hereinafter, the "Agency"), to order an investigation into a company in supervisory proceedings. The Supreme Court alleged that such powers were inconsistent with the right to the inviolability of the home, determined by Article 36 of the Constitution, and the right to protection of the confidentiality of correspondence, determined by Article 37 of the Constitution, as well as Article 8 ECHR.

II. Firstly, the Constitutional Court examined the allegations regarding the fact that the decision on the basis of which the search of business premises and the examination of business documentation are conducted is adopted by the Agency instead of a court. To this end, the Court clarified that constitutional rights are not only guaranteed to natural persons, but to legal entities as well. Legal entities also enjoy the constitutionally protected right to privacy, however, the constitutional protection of the right to privacy of legal entities is adapted to the nature of that right and to the nature of legal entities, which are established by natural persons for the exercise of their rights, specifically the right to free enterprise. The Court stressed that it is important for the existence of legal entities and for the normal performance of their activities that there exists a certain sheltered internal sphere that is protected to a reasonable extent from outside intrusions and within which the legal entity may pursue the purpose for which it was established. The Constitution guarantees legal entities the possibility to safeguard facts and data regarding their functioning from arbitrary interferences by the state and from interferences by private persons; it guarantees them, in a space which is generally not publicly accessible and in which they perform their activities, the protection of privacy, protection against undesired intrusions, and the possibility to communicate at a distance safely and in privacy.

However, the spatial and communication privacy of legal entities is protected less intensely than the spatial and communication privacy of natural persons. This is necessary in order to enable state supervision of the economic activities of legal entities. The lower level of protection of legal entities in comparison with natural persons can be reflected mainly in the less strict conditions for ordering interferences both on the abstract level as well as in specific procedures, and in

the possibility of ordering more invasive and long-lasting interferences. However, it cannot be reflected in dispensing with the constitutional requirement of a court order, the purpose of which lies in preventing abuses and in respecting the equal legal treatment of all subjects.

The Constitutional Court explained that the Constitution and the European Convention on Human Rights ensure an equal level of protection of the right to spatial privacy of legal entities, while as regards communication privacy, the Constitution guarantees a greater level of protection than the European Convention on Human Rights. Therefore, even though the applicant also invoked a violation of the European Convention on Human Rights, it reviewed the alleged interferences only with regard to Articles 36 and 37 of the Constitution.

The Constitutional Court thus held that interfering with the spatial and communication privacy of legal entities, insofar as they are protected by Articles 36.1 and 37.1 of the Constitution, is, on the basis of the Constitution, admissible only if such is ordered by a court. Court approval of the interference in advance, as required by Articles 36.2 and 37.2 of the Constitution, is a safeguard against arbitrary interferences by the state with the activities of individual subjects, and legal entities must also be entitled to such protection. The challenged Act determines that interferences with the spatial and communication privacy of companies are always ordered by the Agency, even if they entail intrusive measures that amount to a search within the meaning of Articles 36.2 and 37.2 of the Constitution. The Court therefore concluded that the challenged Act is inconsistent with the rights determined by Articles 36.1 and 37.1 of the Constitution, because it does not require that a prior court order approving a search be obtained before a search may be conducted.

The Constitutional Court also reviewed allegations of an interference with the right to a legal remedy, determined by Article 25 of the Constitution, and the right to judicial protection, determined by Article 23.1 of the Constitution, but found that they were not substantiated. The Court held that the regulation in the challenged Act interfered with the right of the parties determined by Article 22 of the Constitution, which, *inter alia*, ensures the possibility to state facts and to propose evidence that benefit them. However, the interference was found to be proportionate.

III. The first to third points of the operative provisions of the Decision were adopted by seven votes against one; Judge Mozetič voted against. The fourth point of the operative provisions was adopted unanimously. Judge Mozetič submitted a partly dissenting opinion. Judge Zobec submitted a concurring opinion. Judge Jadek Pensa was disqualified from deciding on the case.

Languages:

Slovenian, English (translation by the Court).

South Africa
Constitutional Court

Important decisions

Identification: RSA-2013-3-022

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 27.09.2013 / **e)** CCT 136/12 / **f)** *Mail and Guardian Media Limited and Others v. Chipu NO and Others* / **g)** www.constitutionalcourt.org.za/Archimages/21371.pdf; 2013] ZACC 32 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

1.6.2 Constitutional Justice – Effects – **Determination of effects by the court**.
3.20 General Principles – **Reasonableness**.
4.7 Institutions – **Judicial bodies**.
5.1.1.3.1 Fundamental Rights – General questions – Entitlement to rights – Foreigners – **Refugees and applicants for refugee status**.
5.1.4 Fundamental Rights – General questions – **Limits and restrictions**.
5.3.11 Fundamental Rights – Civil and political rights – **Right of asylum**.
5.3.13.9 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Public hearings**.
5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression**.
5.3.24 Fundamental Rights – Civil and political rights – **Right to information**.

Keywords of the alphabetical index:

Asylum, proceedings, access, public / Asylum, proceedings, confidentiality / Media, asylum proceedings, access / Foreign law, comparison.

Headnotes:

Section 21.5 of the Refugees Act (hereinafter, the "Act") bars outsiders, including the media, from refugee appellate proceedings. This is not a reasonable and justifiable limitation of the right to freedom of expression to the extent that no discretion is conferred upon the Refugee Appeal Board (hereinafter, the "RAB") to allow third parties access to its proceedings in appropriate cases and subject to particular conditions.

Absolute confidentiality in asylum application procedures is not an essential requirement of the right to freedom of expression. There are less restrictive means available to preserve the integrity of the asylum process and ensure the level of transparency required by a constitutional democracy. Many foreign jurisdictions do not impose absolute confidentiality.

Summary:

I. Section 21.5 of the Act provides that the "confidentiality of asylum applications and the information contained therein must be ensured at all times". This section precludes any member of the public or the media from attending appeal proceedings in asylum application cases.

Mr Radovan Krejcir applied for asylum in South Africa in 2007. After this was refused, Mr Krejcir appealed to the RAB. The applicants, three newspaper companies, requested permission to have journalists present. Their requests were refused. They sought to have the RAB's refusal set aside in the High Court. In the alternative, they sought an order declaring Section 21.5 unconstitutional to the extent that it precludes members of the public or the media from attending and reporting on RAB proceedings.

The High Court dismissed the challenge to the refusal and held that, although Section 21.5 of the Refugees Act constituted a limitation on the freedom of the press and other media and the right to receive or impart information or ideas, the limitation was justifiable given the importance of confidentiality to the integrity of the asylum process. The High Court thus declared Section 21.5 to be constitutional.

In the Constitutional Court the main issue was whether the requirement of absolute confidentiality in proceedings before the RAB is a justifiable limitation of the constitutional right to freedom of expression.

The applicants argued that absolute confidentiality was an unjustifiable limitation of this right, and requested the Court to read provisions into the Act conferring a discretion on the RAB to allow third parties to attend certain hearings and to publish in relation thereto. The respondents contended that a rule of absolute confidentiality is required in order to maintain an effective asylum system, and therefore that Section 21.5 constitutes a reasonable and justifiable limitation on the right to freedom of expression.

The Southern Africa Litigation Centre (hereinafter, "SALC") was admitted as *amicus curiae*. SALC's concern was that the requirement of absolute confidentiality in asylum proceedings renders the asylum system vulnerable to abuse, compromising South Africa's obligations to ensure accountability for international crimes.

II. In a unanimous judgment written by Justice Zondo, the Constitutional Court held that, to the extent that Section 21.5 does not confer a discretion upon the RAB to allow access to its proceedings in appropriate cases, the limitation on the right to freedom of expression is unreasonable, unjustifiable and accordingly invalid. The Court suspended the declaration of invalidity for a period of two years to allow Parliament an opportunity to remedy the defect. The Court crafted a temporary reading-in order, conferring a discretion on the RAB, on application and on conditions it deems fit, to allow any person to attend and report on its hearings. This discretion is to be exercised with due regard to relevant factors, such as whether the asylum seeker consents to the third party's access or whether it is in the public interest to allow attendance.

The Court declined to make an order permitting the media access to Mr Krejcir's appeal hearing because the applicants had elected not to appeal against the High Court's decision upholding the RAB's refusal, and further because, after the handing down of the judgment, the RAB will have the discretion to relax the requirement of confidentiality.

Supplementary information:

- Sections 16 and 36 of the Constitution of the Republic of South Africa, 1996;
- Section 21.5 of the Refugees Act 130 of 1998.

Cross-references:

- *Johncom Media Investments Limited v. M and Others with the Media Monitoring Project* as *amicus curiae, Bulletin* 2009/1 [RSA-2009-1-003];
- *South African Broadcasting Corporation Limited v. National Director of Public Prosecutions and Others, Bulletin* 2006/3 [RSA-2006-3-011];
- *Rail Commuters Action Group and Others v. Transnet Ltd t/a Metrorail and Others, Bulletin* 2004/3 [RSA-2004-3-012];
- *Andrew Lionel Phillips and Another v. Director of Public Prosecutions, Witwatersrand Local Division, and Others, Bulletin* 2003/1 [RSA-2003-1-001];
- *Khumalo and Others v. Holomisa, Bulletin* 2002/2 [RSA-2002-2-012];
- *Bel Porto School Governing Body and Others v. The Premier of the Province, Western Cape and Another, Bulletin* 2002/1 [RSA-2002-1-002];
- *The State v. Russell Mamabolo, Bulletin* 2001/1 [RSA-2001-1-005];
- *The State v. Manamela and Another, Bulletin* 2000/1 [RSA-2000-1-005];
- *National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others, Bulletin* 2000/1 [RSA-2000-1-001];
- *South African National Defence Union v. Minister of Defence and Another, Bulletin* 1999/2 [RSA-1999-2-006];
- *National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others, Bulletin* 1998/3 [RSA-1998-3-009];
- *Fraser v. Children's Court, Pretoria North, and Others, Bulletin* 1997/1 [RSA-1997-1-001].

Languages:

English.

Identification: RSA-2013-3-023

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 03.10.2013 / **e)** CCT 12/13 / **f)** The Teddy Bear Clinic for Abused Children and Another v. Minister of Justice and Constitutional Development and Another / **g)** www.constitutionalcourt.org.za/Archimages/21439.pdf; [2013] ZACC 35 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

1.6.2 Constitutional Justice – Effects – **Determination of effects by the court**.
1.6.9 Constitutional Justice – Effects – **Consequences for other cases**.
3.16 General Principles – **Proportionality**.
5.1.1.4.1 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Minors**.
5.1.4 Fundamental Rights – General questions – **Limits and restrictions**.
5.1.4.3 Fundamental Rights – General questions – Limits and restrictions – **Subsequent review of limitation**.

5.3.1 Fundamental Rights – Civil and political rights – **Right to dignity**.
5.3.32 Fundamental Rights – Civil and political rights – **Right to private life**.
5.3.44 Fundamental Rights – Civil and political rights – **Rights of the child**.

Keywords of the alphabetical index:

Child, best interests / Child, protection and assistance / Criminal law, sexual offence / Criminal record, sexual offence / Minor, sexual crime, victim / Privacy, right, minor, accused / Sexual offence against children, special nature / Sexual self-determination / Child, developmentally normative conduct.

Headnotes:

Children, no less than adults, enjoy each of the rights granted by the Constitution to "everyone". There may, however, be constitutionally justifiable reasons for limiting a child's rights in particular circumstances because, for example, of his or her stage of development.

The criminalisation of consensual sexual conduct is a form of stigmatisation that infringes the constitutional rights to human dignity and privacy of those targeted by the criminal sanction. With children, criminalising sexual conduct that is developmentally normal degrades adolescents and infringes their right to human dignity.

The best-interests-of-the-child standard in Section 28.2 of the Constitution is both a guiding principle in each case concerning a child and a standard by which to measure the effect of a statutory provision on children generally.

When the constitutionality of a statute is impugned and the justification for that statute is based on factual or policy considerations, the State must place evidence regarding before the court of review. If it fails to do so, the State will fail to defend the constitutionality of the impugned statute.

Summary:

I. Two civil society organisations that advocate for children's rights (the applicants) challenged, by way of an application for abstract review, the constitutionality of certain provisions of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. The provisions were challenged to the extent that they made it a crime for children between the ages of 12 and 16 (adolescents) to engage in consensual sexual conduct with other adolescents.

The North Gauteng High Court, Pretoria ruled in favour of the applicants. It held that the impugned provisions unjustifiably infringed children's constitutional rights to dignity, privacy and bodily and psychological integrity, as well as their right under Section 28.2 of the Constitution to have their best interests treated as of paramount importance in all matters concerning them (the best-interests principle). The High Court issued a declaration of invalidity and read certain words into the Act to address the unconstitutionality. In terms of Section 172.2.a of the Constitution, the High Court's order had no force and effect unless and until confirmed by the Constitutional Court.

Before the Constitutional Court the applicants, relying on expert evidence regarding the sexual development of adolescents, argued that the impugned provisions criminalised developmentally normative conduct in which almost every adolescent participates. (The experts explained that "developmentally normative" meant that it is not unusual or necessarily unhealthy and harmful for adolescents to engage in sexual behaviours as they begin to learn about their sexuality and become more mature in several life domains.) Thus, to the extent that those provisions target consensual sexual behaviour, they unnecessarily exposed adolescents to the trauma and indignity of the criminal justice system, violating the fundamental rights to human dignity, privacy and bodily and psychological integrity, as well as the best-interests principle.

The Minister of Justice and Constitutional Development and the National Director of Public Prosecutions (NDPP) sought to defend the Act, but did not dispute the applicants' expert evidence. Instead, they argued that the impugned provisions did not limit the rights as alleged by the applicants, alternatively that the limitations were reasonable and justifiable and therefore passed constitutional muster.

II. In a unanimous judgment by Justice Khampepe, the Court found that the impugned provisions were unconstitutional in that they infringed adolescents' rights to dignity and privacy, and violated the best-interests principle. Relying on the undisputed expert evidence, the Court concluded that the impugned provisions criminalise what constitutes developmentally normative conduct for adolescents, and adversely affect the very children the Act seeks to protect. The effects of the impugned provisions were found not to be rationally related to the State's purpose of protecting children.

The provisions were declared invalid only to the extent that they criminalise consensual sexual conduct between adolescents: the criminal prohibitions against non-consensual sexual conduct with children of any age, and against sexual activity between adults and older children on the one hand, and adolescents on the other hand, remain in place.

The Court suspended the declaration of invalidity for 18 months to allow Parliament to amend the provisions. But the Court ordered a moratorium on all investigations, arrests, prosecutions and criminal and ancillary proceedings (regarding adolescents) in relation to the impugned provisions, until Parliament has remedied the defects identified. Finally, the Minister was ordered to take the necessary steps to ensure that the details of any adolescent convicted under the impugned provisions will not appear in the National Register for Sex Offenders and that such an adolescent will have his or her criminal record expunged.

Supplementary information:

- Sections 10, 14 and 28 of the Constitution of the Republic of South Africa, 1996;
- Sections 15, 16 and 56 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

Cross-references:

- *S v. M* (Centre for Child Law as *Amicus Curiae)*, *Bulletin* 2007/3 [RSA-2007-3-011];
- *Khumalo and Others v. Holomisa, Bulletin* 2002/2 [RSA-2002-2-012];
- *S v. Steyn, Bulletin* 2000/3 [RSA-2000-3-018];
- *National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others, Bulletin* 1998/3 [RSA-1998-3-009];
- *Bernstein and Others v. Bester and Others NNO, Bulletin* 1996/1 [RSA-1996-1-002].

Languages:

English.

Identification: RSA-2013-3-024

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 03.10.2013 / **e)** CCT 135/12 / **f)** Member of the Executive Council for Education in Gauteng Province and Others v. Governing Body of the Rivonia Primary School and Others / **g)** www.constitutional court.org.za/Archimages/21442.pdf; [2013] ZACC 34 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

4.6.8 Institutions – Executive bodies – **Sectoral decentralisation**.
5.3.44 Fundamental Rights – Civil and political rights – **Rights of the child**.
5.4.2 Fundamental Rights – Economic, social and cultural rights – **Right to education**.

Keywords of the alphabetical index:

Child, best interests / Education, access / Education, interests of the child / Education, oversight / Education, school governing body / Education, school, admission policy / Education, school, enrolment, possibility of refusal, procedural fairness / Education, school, self-governance.

Headnotes:

The South African Schools Act 84 of 1996 (hereinafter, the “Act”) vests in a school governing body the power to determine a school’s admission policy, including its capacity. However, provincial education departments have the power to intervene in the school’s admission policies where lawfully authorised.

Admission policies do not inflexibly bind decision-makers, and may be departed from when justified by constitutional and statutory imperatives. However, any departure by national or provincial government from a school’s admission policy must be procedurally fair.

In disputes between school governing bodies and national or provincial government, cooperation is the general norm. This principle is rooted in the state’s constitutional obligation to ensure that the best interests of learners are furthered and that the right to a basic education is realised.

Summary:

I. In 2010 a Grade 1 learner was refused a place at Rivonia Primary School (a public school) for the 2011 academic year, because of the school's supposed lack of capacity, and was placed on a waiting list in accordance with the school's admission policy. The mother of the learner lodged a complaint with the Gauteng Provincial Department of Education (hereinafter, the "Department"). The mother also lodged an appeal to the Member of the Executive Council for Education in the Gauteng Province (hereinafter, the "MEC").

The Head of Department took the view that the school had the capacity to admit the learner. The Department overturned the school's refusal and issued an instruction to the principal to admit the learner. The learner's mother then brought the learner to the school, but the principal refused to admit her. Departmental officials arrived at the school on the following day with security guards and physically placed the learner in one of the Grade 1 classrooms.

The school brought an application in the South Gauteng High Court, Johannesburg, (hereinafter, the "High Court") seeking a declaration that it had the power to make the admission policy and admit learners in accordance with that policy. The High Court dismissed the application. It held that the Act and the applicable provincial regulations give the Department the power to determine the maximum capacity of a public school, that the MEC is the ultimate arbiter of whether a learner should be admitted, and that the Department is empowered to intervene where necessary to ensure that children threatened with being deprived of access to schooling may be accommodated. On the facts, the Court was satisfied that the Department had acted fairly and reasonably.

The Supreme Court of Appeal unanimously upheld the school's appeal. That Court held that the Act and the regulations empowered the school to determine its own admission policy, which includes determining school capacity. The Court held that oversight exercised by the Head of Department must be exercised in accordance with the school's admission policy, not by overriding it. The Supreme Court of Appeal declared that the Head of Department's instruction to the principal to admit the learner, contrary to the school's admission policy, was unlawful, as was placing the learner in the school.

Before the Constitutional Court the state appellants argued that although a governing body makes admission policies, the Act and provincial legislation make it clear that a decision by a school to reject a learner is never final, but is subject to confirmation by the Department. They argued further that the Department is under a constitutional and statutory obligation to ensure that schools with the requisite capacity accommodate learners unable to find places.

The school and other respondents contended that the power to determine the capacity of a school vests in the school governing body; the Department can depart from the school's admission policy only if it that policy is duly set aside.

II. The Court unanimously concluded that the Head of Department had the power to admit the learner. It accepted that a school governing body may, in terms of the Act, determine capacity as part of its admissions policy. However, this power is subject to other provisions of the Act, which state that the Department maintains ultimate control over the implementation of admission decisions. Further, the provincial regulations afford the Head of Department the specific power to overturn a principal's rejection of a learner's application for admission. Moreover, the Court held that the capacity determination set out in a school's admission policy cannot inflexibly limit the discretion of the Head of Department.

However, the majority of the Court, in a judgment written by Acting Justice Mhlantla and concurred in by six other judges, went on to hold that the Head of Department had not exercised his power in a procedurally fair manner. The Head of Department had intervened well into the school term, several months after the school had last been given the opportunity to explain its rejection of the learner's application. The school statistics, on the basis of which the Department concluded the school had the necessary capacity, had also become available only after this explanation. Finally, during earlier discussions with the school, the Department had acknowledged the school's position that the learner needed to wait until a placement became available in accordance with the school's policy. For these reasons, the Court held that the Department had acted unfairly in forcibly intervening without first giving the school an opportunity to make representations regarding the learner's placement.

The Court emphasised that cooperation is the compulsory norm in disputes between school governing bodies and national or provincial government. Such cooperation is rooted in the shared constitutional goal of ensuring that the best interests of learners are furthered and that the right to basic education is realised.

III. Justice Jafta, in a minority judgment concurred in by one other judge, agreed with the majority judgment that the Head of Department was empowered to instruct the principal to admit the learner in excess of the limit imposed by the school's admission policy. However, he disagreed with the majority judgment's declaration that the Head of Department had acted procedurally unfairly. He held that the question of procedural fairness was not before the Court as it had not been pleaded by the parties.

Supplementary information:

- Sections 28 and 29 of the Constitution of the Republic of South Africa, 1996;
- Sections 3, 5, 5A, 16, 16A, 22, 25 and 58C of the South African Schools Act 84 of 1996.

Cross-references:

- *Head of Department, Department of Education, Free State Province v. Welkom High School and Another, Bulletin* 2013/2 [RSA-2013-2-024];
- *Head of Department: Mpumalanga Department of Education and Another v. Hoërskool Ermelo and Another, Bulletin* 2009/3 [RSA-2009-3-020].

Languages:

English.

Identification: RSA-2013-3-025

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 14.11.2013 / **e)** CCT 56/13 / **f)** Patrick Lorenz Martin Gaertner and Others v. Minister of Finance and Others / **g)** www.constitutionalcourt.org.za/Archimages/21539.pdf; [2013] ZACC 38 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

1.6.2 Constitutional Justice – Effects – **Determination of effects by the court**.
1.6.7 Constitutional Justice – Effects – **Influence on State organs**.
1.6.9 Constitutional Justice – Effects – **Consequences for other cases**.
3.16 General Principles – **Proportionality**.
5.3.32 Fundamental Rights – Civil and political rights – **Right to private life**.

Keywords of the alphabetical index:

Privacy, invasion, proportionality / Privacy, search, warrant / Search, warrant, purpose / Search, premise, definition / Search, manner, guidance / Search, routine, non-routine, distinction.

Headnotes:

The Customs and Excise Act 91 of 1964 (hereinafter, the "Act"), to the extent that it authorised warrantless searches of premises which were not licensed under the Act, is unconstitutional for infringing the right to privacy because the objectives of such searches could be achieved by requiring warrants, which are less invasive of the right to privacy.

Summary:

I. Mr Gaertner and Mr Klemp are directors of Orion Cold Storage (hereinafter, "OCS"). OCS imports and distributes bulk frozen foodstuffs. Officials of the South African Revenue Service (hereinafter, "SARS") conducted a search at OCS's premises and subsequently at Mr Gaertner's home. These searches were undertaken in terms of Section 4 of the Act, which does not require a warrant.

They launched proceedings in the Western Cape High Court, Cape Town (hereinafter, the "High Court"), seeking orders:

a. declaring the relevant part of Section 4 to be unconstitutional to the extent that it permitted non-routine searches to be conducted without judicial warrant;
b. declaring the searches to have been unlawful; and
c. requiring SARS to return everything taken or copied.

The High Court held that portions of Section 4 are inconsistent with the Constitution and declared them invalid. This declaration was ordered not to be retrospective and was suspended for a period of 18 months to allow the Legislature to make remedial changes. To allow SARS to continue its regulatory activity, the High Court read provisions into the Act allowing searches under certain conditions.

The parties agreed that Section 4 is inconsistent with the Constitution and should be declared invalid. However the parties contested the extent of the invalidity and the interim relief that should be granted while the Legislature is remedying the defect.

OCS argued that the section is overbroad in that it allows for non-routine (targeted) searches to be conducted by SARS without judicial warrant. The SARS respondents argued that the extent of the invalidity was more limited.

II. In a unanimous judgment written by Justice Madlanga, the Constitutional Court held that Section 4 unjustifiably infringes the right to privacy. The section is overbroad as it does not define the premises that can be searched without a warrant, nor does it give guidance to the inspectors on the manner in which the searches are to be conducted. The Court suspended the declaration of invalidity for six months to allow Parliament time to remedy the constitutional deficiency in the Act. As an interim measure, and to allow SARS to ensure compliance with the Act, the Court read in a warrant requirement when SARS officials wish to search private residences for purposes of the Act. The High Court's reading-in, which invoked a distinction between routine versus non-routine searches, was discountenanced.

Supplementary information:

- Section 14 of the Constitution of the Republic of South Africa, 1996;
- Section 4 of the Customs and Excise Act 91 of 1964.

Cross-references:

- *Magajane v. The Chairperson, North West Gambling Board and Others, Bulletin* 2006/2 [RSA-2006-2-005];
- *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];
- *Mistry v. Interim Medical and Dental Council of South Africa and Others, Bulletin* 1998/2 [RSA-1998-2-006];
- *Bernstein and Others v. Bester and Others NNO, Bulletin* 1996/1 [RSA-1996-1-002];
- *Ferreira v. Levin NO and Others, Bulletin* 1995/3 [RSA-1995-3-010].

Languages:

English.

Identification: RSA-2013-3-026

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 28.11.2013 / **e)** CCT 44/13 / **f)** Minister of Justice and Constitutional Development and Another v. Nontombi Masingili and Others / **g)** www.constitutional court.org.za/Archimages/21576.pdf; 2013] ZACC 41 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Robbery, armed / Sentence, mandatory minimum / Sentence, proportionality / Robbery, aggravating circumstance / Aggravating circumstance, foreseeability.

Headnotes:

Robbery with aggravating circumstances is not a crime separate to robbery. Hence a person can be guilty of robbery with aggravating circumstances without having specific foresight of those circumstances. The statutory minimum sentences therefore apply. This does not infringe the right not to be deprived of freedom arbitrarily because:

a. that the accused was unaware of the aggravating circumstances may be taken into account in sentencing;
b. the purpose of statutory minimum sentences is rational and not arbitrary; and
c. the accused must still have criminal intent for robbery, which is an inherently violent crime.

It also does not infringe the right to be presumed innocent, as the prosecution must prove the elements of robbery and the existence of aggravating circumstances.

Summary:

I. The respondents were convicted of "robbery with aggravating circumstances". The third and fourth respondents had robbed a shop by threatening the owner with a knife. The first respondent (Ms Masingili)

acted as a scout and the second respondent (Mr Volo) acted as a driver. Because they were convicted of robbery with aggravating circumstances (the third and fourth respondents as perpetrators, and Ms Masingili and Mr Volo as accomplices), the statutory minimum sentence applied. The respondents appealed to the High Court.

The High Court held that the prosecution had not proven that Ms Masingili and Mr Volo had foreseen the use of the knife, which constituted the aggravating circumstances. It reasoned that the phrase "or an accomplice" in Section 1.1.b of the Criminal Procedure Act means that an accomplice to robbery with aggravating circumstances is guilty of that form of the crime even without foresight of those circumstances. This unjustifiably limited the right not to be deprived of freedom arbitrarily or without just cause under Section 12 of the Constitution and the right to be presumed innocent under Section 35. The High Court therefore declared the words "or an accomplice" in Section 1.1.b unconstitutional and postponed the appeal pending confirmation proceedings in the Constitutional Court.

On appeal to the Constitutional Court, the Minister argued that there is no imprisonment without fault under the offence because the state must prove the subjective intent for robbery coupled with the objective existence of aggravating circumstances. The Minister argued that this level of fault satisfies constitutional requirements and that the High Court thus erred. The respondents argued that it is a constitutional requirement that the state must prove the subjective intent behind each element of a crime in order to secure conviction, including aggravating circumstances.

II. In a unanimous judgment written by Justice Van der Westhuizen, the Constitutional Court declined to confirm the High Court's order of constitutional invalidity. The Court held that robbery with aggravating circumstances is not a separate criminal offence, distinct from robbery. The aggravating circumstances are relevant for sentencing and, for reasons of fairness and practicality, must be proved before conviction. Intent regarding the circumstances is not required for conviction, exactly because an accused will be convicted of robbery, given that armed robbery is merely a form of robbery.

The absence of intent regarding the aggravating circumstances may be taken into account in sentencing and may result in the imposition of a sentence lighter than the statutorily prescribed minimum. Even when it does not, the statutory determination that the existence of aggravating circumstances calls for a harsher sentence than would be appropriate for mere robbery does not amount to the arbitrary deprivation of freedom, or deprivation without just cause. Therefore Section 12.1.a of the Constitution is not contravened, nor is Section 35.3.h violated.

Supplementary information:

- Sections 12 and 35.3 of the Constitution of the Republic of South Africa, 1996;
- Section 51 read with Part II of Schedule 2 of the Criminal Law Amendment Act 105 of 1997;
- Section 1.1.b of the Criminal Procedure Act 51 of 1977.

Cross-references:

- *Buzani Dodo v. The State, Bulletin* 2001/1 [RSA-2001-1-004];
- *State v. Coetzee, Bulletin* 1997/1 [RSA-1997-1-002].

Languages:

English.

Identification: RSA-2013-3-027

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 29.11.2013 / **e)** CCT48/13 / **f)** AllPay Consolidated Investment Holdings (Pty) Ltd and Others v. Chief Executive Officer of the South African Social Security Agency and Others / **g)** www.constitutional court.org.za/Archimages/21613.pdf; [2013] ZACC 42 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

4.15 Institutions – **Exercise of public functions by private bodies**.
5.2.3 Fundamental Rights – Equality – **Affirmative action**.

Keywords of the alphabetical index:

Public procurement, affirmative action / Public procurement, procedural fairness / Public procurement, remedy, equitable / Public contract, tender, obligation / Public procurement, dispute, settlement, procedure / Social security, grant, payment, possible interruption.

Headnotes:

The correct approach to the assessment of the fairness and lawfulness of a government procurement process must be independent of the outcome. The court must begin its assessment pursuant to Section 217 of the Constitution and relevant legislation. These mandate that state procurement systems must be fair, equitable, transparent, competitive and cost-effective. As instances of administrative action, state procurement procedures must also be assessed for compliance with the Promotion of Administrative Justice Act. Only after this independent assessment is made, may the court consider the consequences of invalidating the tender and how it bears on the public interest, when determining a just and equitable remedy.

Summary:

I. At issue was the procedural validity of the process leading to the award of a tender by the South African Social Security Agency (hereinafter, "SASSA") to Cash Paymaster Services Ltd (hereinafter, "CPS") for the administration of social grants.

SASSA was established in terms of the South African Social Security Agency Act in 2004. When it came into operation, it inherited the task of administering social grants, which had previously been done by provincial authorities. SASSA had to develop a system to manage the payment of approximately 15 million social grants per month throughout the country.

SASSA initiated a tender process to select an entity that would administer the social grants system for five years. One of the major problems was the high level of fraud and theft of social grants. A successful bidder would have to have to offer a payment solution that was both convenient for recipients and addressed the risk of fraud by offering a method to verify the identities of grant beneficiaries. After evaluating several bid proposals, SASSA awarded the tender, worth R10 billion (approximately USD$1 billion), to CPS in February 2012.

AllPay Consolidated Investment Holdings Ltd (hereinafter, "AllPay"), an unsuccessful bidder, approached the North Gauteng High Court, Pretoria alleging that there had been irregularities in the tender process. The High Court concluded that the process had not complied with the requirements in the tender documents and was procedurally unfair. The High Court declared the tender process invalid, but declined to set aside the tender because that would disrupt the payment of social grants. AllPay appealed to the Supreme Court of Appeal, which overturned the finding of the High Court that the process was flawed. The Supreme Court of Appeal held that a fair process does not demand perfection in every step, and that a tender need not be set aside for "inconsequential irregularities" that would not have affected the outcome of the award. On this basis it concluded that the award of the tender to CPS was not unfair. AllPay appealed against the judgment of the Supreme Court of Appeal to the Constitutional Court.

II. In a unanimous judgment by Froneman J, the Constitutional Court upheld the appeal. The Court held that the assessment of the fairness and lawfulness of the procurement procedure must be independent of the outcome. The correct approach to assess the validity of a public procurement process must begin with Section 217 of the Constitution and the legislation that gives effect to it. These mandate that state bodies must contract for goods or services in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. They also provide for procurement policies that give preference to persons historically disadvantaged by unfair discrimination. In addition, the Court held that, as an instance of administrative action, the procurement procedure followed by SASSA had to be assessed in light of Section 33 of the Constitution and the Promotion of Administrative Justice Act.

It is only after this independent assessment of the validity of the procurement process has taken place that a court may consider the possible consequences of setting aside a tender and how it would bear on the public interest. This will occur when the court determines the just and equitable remedy provided for under the Constitution.

Regarding the tender criteria, the Court found that SASSA had failed to have due regard to the importance of black empowerment in procurement. SASSA had an obligation to investigate and confirm the empowerment credentials of the bidders before the award. The Court further found that the second Bidders' Notice, issued by SASSA as a supplement to the original documents inviting tender bids, was vague and gave rise to uncertainty about the requirements for a successful proposal. This vagueness and uncertainty made the tender process procedurally unfair.

On these bases, the Constitutional Court declared the decision to award the tender to CPS constitutionally invalid. However, because setting aside the tender could cause serious disruption to the payment of social grants, the Court suspended the declaration of invalidity pending the determination of a just and equitable remedy. A further hearing to determine the remedy is scheduled for 11 February 2014.

Supplementary information:

- Sections 33 and 217 of the Constitution of the Republic of South Africa, 1996;
- Sections 1-6 of the Promotion of Access to Justice Act 3 of 2000.

Languages:

English.

Identification: RSA-2013-3-028

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 12.12.2013 / **e)** CCT 61/13 / **f)** Director-General Department of Home affairs and Another v. Mukhamadiva / **g)** www.constitutionalcourt.org.za/Archimages/21649.pdf; [2013] ZACC 47 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

1.3.1 Constitutional Justice – Jurisdiction – **Scope of review**.
1.3.3 Constitutional Justice – Jurisdiction – **Advisory powers**.
1.3.5.12 Constitutional Justice – Jurisdiction – The subject of review – **Court decisions**.

Keywords of the alphabetical index:

Appeal, effect / *Functus officio*, doctrine / Appeal, hypothetical question / Court order, effect, practical, absence / Justice, interests.

Headnotes:

When a case or judgment entails no order that the Constitutional Court could make that would have any practical effect on the parties or the public at large, the interests of justice do not require the Court to hear the matter.

Summary:

I. In November 2011, Ms Mukhamadiva, an Uzbekistani national, arrived at Cape Town International Airport but was refused entry into South Africa. Aggrieved, she successfully launched an urgent application in the High Court and obtained an order requiring the Department of Home Affairs to show good cause why she should not be permitted to enter the country. However, before the order could be implemented, Ms Mukhamadiva returned to her country of origin. A Home Affairs official, Mr Grobler, knew of the order before her return. The High Court proceeded, of its own accord, to investigate why its order had not been implemented.

The High Court found that no official had been guilty of contempt of court in failing to implement its order. However, it issued a further order directing the Head of Immigration in the Western Cape Province to file a report on the procedures and plans for executing court orders at Cape Town International Airport. Unhappy with the report filed, the High Court requested counsel to present argument on a hypothetical question regarding the enforcement of court orders. A judgment was subsequently delivered, which, in the High Court's words, contained an "advisory opinion" regarding departmental policy, rather than an order. Leave to appeal against the High Court's judgment was refused, both by that Court and by the Supreme Court of Appeal. The Minister and the Director-General thus sought relief from the Constitutional Court.

II. In a unanimous judgment authored by Deputy Chief Justice Moseneke, the Constitutional Court held that the judgment of the High Court was not appealable as there was no live dispute for resolution. The Court went on to note that, generally, a court has no power to make further pronouncements on an issue once it has issued a final judgment, nor is it part of the judicial function to settle abstract disputes. However, the concern that the High Court may have overstepped the mark by providing an advisory opinion to the Executive was not sufficient to justify the Constitutional Court hearing the appeal. Because no order that the Constitutional Court could make in this matter would have any practical effect on the parties or the public at large, and because there were no further compelling reasons requiring the Court to hear the appeal in order to serve the interests of justice, the application for leave to appeal was dismissed with no order as to costs.

Languages:

English.

Switzerland
Federal Court

Important decisions

Identification: SUI-2013-3-007

a) Switzerland / **b)** Federal Court / **c)** Second Public Law Chamber / **d)** 16.11.2013 / **e)** 2C_1032/2012 / **f)** Verein gegen Tierfabriken Schweiz VgT v. Swiss Broadcasting Corporation SSR / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 139 I 306 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

3.13 General Principles – **Legality**.
3.16 General Principles – **Proportionality**.
3.17 General Principles – **Weighing of interests**.
3.18 General Principles – **General interest**.
5.3.23 Fundamental Rights – Civil and political rights – **Rights in respect of the audiovisual media and other means of mass communication**.
5.3.24 Fundamental Rights – Civil and political rights – **Right to information**.

Keywords of the alphabetical index:

Media, public broadcaster, state influence / Media, broadcasting, freedom / Media, television, freedom of information / Advertising / Advertising, audiovisual / Advertising, restriction.

Headnotes:

Article 10 ECHR; Article 16.2 of the Federal Constitution (freedom of information), Article 17 of the Federal Constitution (freedom of the media), Article 35.2 of the Federal Constitution (upholding of fundamental rights) and Article 93.3 of the Federal Constitution (independence of television in deciding on programming); Act on Radio and Television (LRTV); obligation of the Swiss Broadcasting Corporation SSR to respect fundamental rights in the field of advertising; advertisement "*Was das Schweizer Fernsehen totschweigt"* (What Swiss television doesn't tell you).

In its private-law advertising activity, the SSR is required to respect fundamental rights. In particular, it must (also) take account of the content of freedoms in terms of ideas. The mere fear that a controversial advertisement (bearing a message) could harm its reputation is not a significant reason for it being justified in refusing to broadcast an advertisement that criticises it, provided that the advertiser does not act unlawfully (recitals 3-5).

Summary:

The association against factory farming, ACUSA, which seeks to reduce the consumption of meat in the interest of animals, requested airtime on the Swiss Broadcasting Corporation (hereinafter, the "SSR"), through its subsidiary, Publisuisse SA, to broadcast an advertisement presenting its logo and its website address, along with the text "What Swiss television doesn't tell you". The association accuses the SSR of concealing important information about animal and consumer protection in its broadcasts. On the basis of its terms and conditions, the SSR refused to include the advertisement in its programming on the ground that it would harm its business and its image.

The appeal to the Independent Broadcasting Complaints Authority against this refusal was turned down, but the applicant association won its case in the Federal Court.

In the context of its secondary advertising activity, the SSR is not directly independent as in its programming (Article 6 of the Federal Act on Radio and Television). As a privileged holder of a concession from the Swiss Confederation, it performs a state task and is not free like a private company; when it enters into private-law advertising contracts to finance its broadcasts, it must respect fundamental rights and help to uphold them (Article 35.2 of the Federal Constitution). Insofar as it is clear to television viewers that material broadcast originates from a third party in the form of advertising, the SSR's autonomy is reduced.

Anybody who performs state tasks and finances them through secondary activities is not only required to comply with the prohibition of arbitrary measures and ensure equal treatment, but must also take account of the content of individual freedoms in terms of ideas. It must objectively weigh up the divergent interests at stake and take appropriate account of legitimate needs to be able to make appeals to the public. It must not itself assess the value or importance of the message, but must confine itself to a neutral and objective opinion and also accept a degree of criticism of itself.

In the advertisement in question, the applicant association referred to its website in order to inform the public about its objectives and the partial, or incomplete, manner in which the media report on its work. The advertisement comes under freedom of information (Article 16.2 of the Federal Constitution). Admittedly, restrictions are allowed and unlimited advertising is not compatible with the editorial content of the programming; restrictions related to the capacity available for advertising and hence also selection are necessary, but – as in the case of any public advertising – the latter must respect fundamental rights.

The SSR's interference with the applicant's freedom of information therefore had to have a legal basis. The terms and conditions of Publisuisse SA, which provide that advertisements which harm its business or its image may be refused, are not sufficient, and no other legal basis was put forward. It would be acceptable to refuse an advertisement which violated human dignity or public morals, was discriminatory or incited racial hatred or violence. The same would apply to advertisements which denigrated political or religious beliefs, were misleading or unfair or incited behaviour that endangered health, the environment or personal safety. The disputed advertisement does not fall into any of these categories and the SSR has not shown that it violates personality rights under the Civil Code or the fairness of competition; it is part of a multimedia campaign with which the applicant association invites the public to consult its website and the information available there, as the other media, in particular television, do not cover them. The wording of the advert attacks the SSR directly, but the mere fear that it could harm its reputation is not a significant reason for refusing to broadcast it, as freedom of expression also allows criticism of the authorities and of individuals or private companies which perform state tasks.

In the absence of a legal basis or an overriding public interest, and in keeping with the principle of proportionality, the SSR and Publisuisse SA were therefore required to broadcast the advertisement in the desired version. The decision of the Independent Broadcasting Complaints Authority must therefore be set aside and it must be held that the refusal to broadcast the advertisement violated the fundamental rights of the applicant association.

Languages:

German.

Identification: SUI-2013-3-008

a) Suisse / **b)** Federal Court / **c)** First Chamber of Social Law / **d)** 22.11.2013 / **e)** 8C_912/2012 / **f)** S. v. State of Vaud, Department for Economic Affairs / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 139 I 272 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

5.3.1 Fundamental Rights – Civil and political rights – **Right to dignity**.
5.3.3 Fundamental Rights – Civil and political rights – **Prohibition of torture and inhuman and degrading treatment**.
5.3.32 Fundamental Rights – Civil and political rights – **Right to private life**.

Keywords of the alphabetical index:

Nuclear shelter / Social assistance, asylum seeker / Asylum, application, rejection / Home, respect / Temporary accommodation, conditions / Temporary accommodation, asylum seeker.

Headnotes:

Article 7 of the Federal Constitution (human dignity) and Article 12 of the Federal Constitution (right to assistance when in need); Articles 3 and 8.1 ECHR; Article 86.1 of the Federal Act on Foreign Nationals (social assistance and health insurance); Article 82 of the Asylum Act (social benefits and emergency aid); emergency aid granted to individuals subject to final and enforceable removal orders.

In the case of a single man in good health, having to spend the night in a civil defence shelter does not contravene the minimum requirements of Article 12 of the Federal Constitution and, in particular, does not violate the right to respect for human dignity (recital 3). The hardships relating to temporary accommodation in a civil defence shelter are not of sufficient severity to be in breach of Article 3 ECHR, which prohibits inhuman or degrading treatment (recital 4). In view of the individual's personal and family circumstances, they do not involve infringement of private life or violate respect for the home within the meaning of Article 8.1 ECHR either (recital 5).

Summary:

S., an Eritrean national born in 1978, applied for asylum in Switzerland. The Federal Office for Migration refused to consider the asylum application and ordered S.'s removal. S. then disappeared. A few months later, he again applied for asylum in Switzerland and his application was again turned down. He was placed in a civil defence shelter. S. requested to be transferred to another type of accommodation on the ground that the accommodation conditions in the shelter reminded him of the inhumane and traumatising conditions of his periods of detention in Ethiopia and in Libya. The relevant authority rejected S.'s request to be transferred to another type of accommodation. S. appealed against the decision to various cantonal bodies, which all refused the transfer. S. lodged an appeal in matters of public law with the Federal Court.

Under both federal and cantonal law, individuals residing illegally in Swiss territory are entitled to emergency aid if they are no longer able to provide for themselves because of an actual or unavoidable situation of hardship; such emergency aid in principle includes accommodation, usually in a collective accommodation centre, the supply of food and personal hygiene items, emergency medical care and, if the need is demonstrated, the supply of other basic essentials.

The appellant relies on the right to the protection of human dignity enshrined in Articles 7 and 12 of the Federal Constitution and the right to respect for private life within the meaning of Article 8 ECHR. He makes numerous complaints relating to his accommodation conditions in a civil defence shelter, which he regards as humiliating and contrary to human dignity within the meaning of Article 3 ECHR.

Article 12 of the Federal Constitution provides that persons in need and unable to provide for themselves have the right to assistance and care, and to the financial means required for a decent standard of living. Human dignity must be respected and protected. The fundamental right to minimum living conditions does not guarantee a minimum income, but merely the satisfaction of the basic needs for survival in keeping with the requirements of human dignity, such as food, housing, clothing and basic medical care. In other words, Article 12 of the Federal Constitution is confined to what is necessary for ensuring the decent survival of individuals so that they are not left begging on the streets; by definition, the emergency assistance is temporary in nature. Its purpose is only minimum assistance – i.e. a temporary safety net for persons who do not receive

any support from the existing welfare institutions – so as to ensure a dignified human existence. The implementation of Article 12 of the Federal Constitution differs according to the status of the person receiving assistance. In the case of asylum seekers whose applications are not considered on formal grounds, no integration objective is to be pursued and no lasting social contacts have to be ensured, given that the individuals' presence in Swiss territory is in principle temporary. The granting of minimum benefits is also justified in order to reduce incentives to stay in Switzerland.

In the instant case, the appellant is 34 years old, single and has no dependants and no known medical problems. For a single man in good health, having to spend the night in a civil defence shelter is certainly not contrary, in the present circumstances, to the minimum requirements of Article 12 of the Federal Constitution. Given his status as a foreign national in the country unlawfully, the appellant is in a particular situation of dependency, which does entitle him to receive assistance but, in return, requires him to submit to certain constraints which may restrict his freedoms, at the very least when such constraints remain within acceptable limits and do not seriously infringe his fundamental rights.

Article 3 ECHR prohibits inhuman or degrading treatment. Such treatment must, however, be of a minimum level of severity, with the assessment of that minimum level depending on all the circumstances of the case. Civil defence facilities are admittedly emergency shelters which, although inhabitable, are not designed as long-term accommodation solutions. Having to stay there in the context of emergency assistance, which is temporary in principle, cannot, however, be regarded as inhuman or degrading treatment for a person who is not particularly vulnerable. Under cantonal law, asylum seekers are in principle housed in reception centres or in flats. In the event of massive and unexpected arrivals of asylum seekers, civil defence shelters may be opened to provide temporary accommodation for persons unlawfully present in the canton. Moreover, the appellant does not put forward any evidence to show that his accommodation in a civil defence shelter resulted in physical or psychological harm. In these circumstances, the hardships complained of by the appellant do not attain the minimum level of severity to be in breach of Article 3 ECHR.

Article 8.1 ECHR guarantees the right to respect for private and family life, in other words, the right of all individuals to choose their lifestyles, organise their leisure activities, establish and develop relations with their peers, freely maintain their family relationships and lead family lives. In particular, the right to respect for private life protects individuals' physical and psychological integrity. It also guarantees their right to respect for their homes. Infringements of the right to respect for one's home do not only include physical or tangible violations, such as entry by unauthorised individuals, but also intangible infringements, such as noise, emissions, smells and other types of interference. Article 8 ECHR serves to protect the individual against arbitrary interferences by the public authorities but may also in certain circumstances involve positive obligations relating to effective respect for private or family life. It does not, however, require the contracting states to provide particular financial benefits or guarantee a particular standard of living. The Federal Court accordingly found that, in the light of the personal and family situation of the appellant, the accommodation conditions in a civil defence shelter of an individual subject to an enforceable removal order do not involve infringement of private life or violate respect for the home within the meaning of Article 8.1 ECHR.

Languages:

French.

"The former Yugoslav Republic of Macedonia"
Constitutional Court

Important decisions

Identification: MKD-2013-3-002

a) "The former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 25.09.2012 / **e)** U.br.168/2012 / **f)** / **g)** / **h)** CODICES (Macedonian, English).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Search, private home, warrant / Search, necessity, threat, imminent.

Headnotes:

There are certain instances where a home may be entered without a search warrant (where the owner consents to it; for the purpose of detention or the forcible taking of a person under a court order; the deprivation of liberty of an offender caught *in flagrante*; or for the purpose of inspection of the scene of a crime). This does not contradict the Constitution.

Summary:

I. The applicant in this matter, the political party "Democratic Union" represented by its President Mr Pavle Trajanov, asked the Court to examine the constitutionality of Article 193.1 of the Law on Criminal Procedure ("Official Gazette of the Republic of Macedonia", nos. 150/2010, 51/2011 and 100/2012).

This provision allows for entry into a home without a search warrant if the owner agrees to it; if there is somebody there who, upon court order, should be detained or brought in by force; for the purpose of the deprivation of liberty of a perpetrator caught in the act of committing a criminal offence prosecuted *ex officio*; or for the purpose of inspection of the scene of a crime.

The applicant claimed that the provision was out of line with Article 26 of the Constitution, which expressly guarantees the right to inviolability of the home and envisages the cases in which this right may be restricted.

II. The Court held that the absence of a written court order for conducting a search of a home when the home owner agrees to this does not violate the Constitution, since the violation of the privacy of the citizen takes place with his or her consent.

Entry into the home for the purpose of taking in somebody who, by order of the court, should be detained or brought in by force, does not violate Article 26 of the Constitution; the order for arrest contains a search warrant.

Entry into the home without a court warrant in order to deprive somebody of their liberty who has been caught in another person's home, committing a criminal offence which is prosecuted *ex officio* is in accordance with Article 26 of the Constitution.

Entry into a home without a search warrant in order to conduct an inspection of the scene of a crime does not violate Article 26 of the Constitution.

The Court did not, therefore, initiate proceedings for constitutional review of Article 193.1 of the Code on Criminal Procedure.

III. The President of the Court Branko Naumoski and Judge Natasha Gaber-Damjanovska disagreed with the majority and submitted a joint separate opinion which is attached to the Resolution.

Languages:

Macedonian.

Identification: MKD-2013-3-003

a) "The former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 04.12.2013 / **e)** U.br.43/2012 / **f)** / **g)** / **h)** CODICES (Macedonian, English).

Keywords of the systematic thesaurus:

4.10.5 Institutions – Public finances – **Central bank**.
5.3.39.3 Fundamental Rights – Civil and political rights – Right to property – **Other limitations**.

Keywords of the alphabetical index:

National Bank, head / Bank, shares, restrictions.

Headnotes:

Authorisations of the Governor of the National Bank of the Republic of Macedonia to undertake additional measures towards shareholders who have acquired shares contrary to the law, violate the constitutional guarantees of the right to property.

Summary:

I. The applicant in this matter, a lawyer from Skopje, requested a constitutional review of Article 137.3 and 137.4 of the Banking Law ("Official Gazette of the Republic of Macedonia" nos. 67/2007, 90/2009, 67/2010 and 26/2013). The applicant claimed that these Articles were contrary to Article 8.1.3.6 and 7, Article 30.1 and Article 58 of the Constitution because they violated the fundamental rights of ownership of shares (a shareholder's right to participate in the management of the company and to participate in the distribution of its profits i.e. the right to receive dividends). The rights of certain shareholders in a bank had been violated by the contested authorisations of the Governor of the National Bank of the Republic of Macedonia.

Article 137 of the Banking Law is entitled "Restriction of rights arising from shares". It reads:

1. The Governor shall determine that any shareholder who acquired shares contrary to Article 59 of this Law and shares the issued approval for which was revoked as specified by Article 153 of this Law shall not bear any voting rights.
2. The Governor shall require from the shareholder who acquired shares contrary to Article 59 of this Law and from the shareholder whose issued approval was revoked as specified by Article 153 of this Law, to dispose of the shares within a specified period which may not exceed 180 days, other than in cases under Article 59.2 of this Law, when the Governor may determine a longer period.
3. If the shareholder referred to in paragraph 2 of this Article fails to dispose of the shares within the specified period, the Governor shall, within 8 days after the expiration of the specified period, determine that such shares shall not bear, in addition to the voting right, any right of payment of dividend and shall conduct a sale of the shares on behalf of the shareholder under paragraph 2 of this Article.
4. Provided that in the period from adoption of the decision under paragraph 3 of this Article to the sale of shares, the bank paid a dividend to the other shareholders, the dividend of the shareholder whose right of payment of dividend has been withdrawn by the decision of paragraph 3 of this Article shall be distributed in the general reserve of the bank.

The Court examined the constitutional guarantees of the right to property, in particular safeguards in cases of deprivation of property and the relevant provisions of the Law on the National Bank of the Republic of Macedonia ("Official Gazette of the Republic of Macedonia" nos. 158/2010 and 123/2012) in relation to the role and objectives of the National Bank (maintaining the stability of the financial system). It also noted the provisions of the Banking Law, especially those relating to the authorisations of the Governor of the National Bank *vis-à-vis* shareholders of the bank who do not respect the regulations that govern the operations of banks or their internal procedures. Under Article 131.1 of the Banking Law, the Governor is to take measures and determine deadlines for their implementation if the bank, banking group, shareholders or organisations within the banking group do not adhere to the regulations governing the bank's operations or its internal procedures. Measures taken by the Governor include regular measures, additional measures, introduction of administration, withdrawal of approval and revocation of licence.

The Court held that the disputed provisions of the Banking Law granted the Governor of the National Bank excessively broad powers to take additional measures towards the bank's shareholders to be taken in exceptional situations. In effect, they allow the Governor to dispose of shares belonging to other shareholders because if the shareholder does not sell the shares within the specified period, then, by order of the Governor, they will be sold on the stock exchange and the funds will be placed in the reserves

of the bank. This places the Governor out of reach of the management bodies of banks. The authorisations violate the constitutional right to property, with no discernible public interest. The Court accordingly repealed Article 137.3 and 137.4 of the Banking Law.

III. Judge Natasha Gaber – Damjanovska disagreed with the majority and submitted a separate opinion which is attached to the Decision.

Languages:

Macedonian.

Identification: MKD-2013-3-004

a) "The former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 04.12.2013 / **e)** U.br.55/2013 / **f)** / **g)** / **h)** CODICES (Macedonian, English).

Keywords of the systematic thesaurus:

4.5.10.1 Institutions – Legislative bodies – Political parties – **Creation**.
5.1.1.1 Fundamental Rights – General questions – Entitlement to rights – **Nationals**.
5.3.27 Fundamental Rights – Civil and political rights – **Freedom of association**.

Keywords of the alphabetical index:

Political party, freedom to create, registration.

Headnotes:

Citizens of the Republic of Macedonia have the right to set up a political party within the Republic of Macedonia. A requirement that those setting up a political party should submit citizenship certificates as proof of their citizenship does not run counter to the Constitution.

Summary:

I. The applicant in this matter, an individual from Skopje, asked the Court to examine the constitutionality of Article 18.2.7 of the Law on Political Parties ("Official Gazette of the Republic of Macedonia", nos. 76/2004, 5/2007, 8/2007, 5/2008 and 23/2013).

Under Article 18.1 of this Law, a political party is obliged to submit, within 30 days of the date of the holding of the constitutive assembly, an application for registration in the court registry. Under Paragraph 2 item 7, the founders' original citizenship certificates or photocopies certified by a notary must be submitted with the application for registration of the political party in the court registry.

The applicant claimed that this provision represented an unconstitutional fetter on the rights and freedoms of citizens and individuals. Requiring those setting up a political party to provide their original citizenship certificates or certified copies imposes a financial burden on them and will make it difficult or impossible to gather together one thousand founders.

II. Taking Articles 20.1 and 54.1 of the Constitution as its starting point, the Court noted that the rationale behind the requirement for those seeking to found a political party to submit a citizenship certificate or a copy certified by a notary is not to restrict freedom of association and to deter or discourage citizens from creating a political party, but rather to check the credibility of statements that a political party is founded by citizens of the Republic of Macedonia, which implies citizens whose citizenship is acquired pursuant to the Law on Citizenship. The Court concluded that there were no grounds to contest the constitutionality of the challenged provisions of the Law on Political Parties and did not initiate proceedings for constitutional review.

III. Judge Sali Murati disagreed with the majority and submitted a separate opinion which is attached to the Resolution.

Languages:

Macedonian.

Turkey
Constitutional Court

Important decisions

Identification: TUR-2013-3-004

a) Turkey / **b)** Constitutional Court / **c)** Second Section / **d)** 17.09.2013 / **e)** B.2012/752, K.2012/54 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 30.10.2013, 28806 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Life, risk, duty to protect.

Headnotes:

The public authorities have a duty to investigate whether the Governor and other public officials had duly conducted their legal duties to determine and evacuate damaged buildings after an earthquake.

Summary:

I. On 23 October 2011, an earthquake recorded at 7.2 intensity hit the province of Van (Turkey), which led to a great number of people losing their lives. Following the earthquake, aftershocks continued and a second earthquake measured at 5.6 intensity occurred on 9 November 2011.

During the second earthquake, 24 people staying at the Bayram Hotel located in the city center of Van, including the applicants' acquaintance Selman KERİMOĞLU (S.K.), lost their lives as a result of the collapse of the hotel building. After the event, the Office of the Chief Public Prosecutor in Van launched an official investigation. In the expert report drawn up within the scope of the investigation, more than one person was found liable and the relevant units that did not assess the degree of the building damage were also found to be at fault (negligent).

The expert report indicated that the building in dispute was built haphazardly in the year it was constructed (1964) without making its static project and statements. Also, the materials and equipment did not meet the criteria of Regulations for Buildings to be Constructed in Disaster Areas during that period and the building was developed with one extra storey according to the construction license, which added an extra load on the building. The report also indicated that it had collapsed during the second earthquake and was affected by the aftershocks between the two earthquakes even though it was standing during the first earthquake.

The Chief Public Prosecutor filed a criminal complaint against the hotel manager at the High Criminal Court for the crime of "leading to the death of more than one person through conscious negligence". He referred the investigation file of the Governor of Van and the officers of the Head of Department of Disaster and Emergency Concerns (Matters) to the Office of the Chief Public Prosecutor of the Court of Cassation, having decided on the lack of jurisdiction in accordance with Articles 3 and 12 of the Law on Trial of Civil Servants and Other Public Officials, no. 4483, 2 December 1999.

The Office of the Chief Public Prosecutor of the Court of Cassation decided on 9 October 2012 not to process the complaint on the grounds that assertions about the Governor of Van and the officers of the Head of Department of Disaster and Emergency Concerns (hereinafter, "HDDEC") concerning misconduct in office were not based on concrete information and documents. Also, the Office reasoned that the situation did not give rise to a crime affecting the concerned people or required a pre-examination. The decision was notified to the applicants' attorney on 23 October 2012.

Following the Office's decision, the applicants (i.e., wife, children and brothers of the deceased S.K.), lodged an individual application before the Constitutional Court, claiming that the right to life of their acquaintance S. K. has been breached. The reason is that the Governor of Van and other public officials failed to perform tasks assigned to them in legislation, giving rise to misconduct while in office. Specifically, because the damage assessment was not made at the hotel and entrance into the hotel was not forbidden despite the damage, their negligence led to the killing by gross negligence. They also argued that the decision of the Chief Public Prosecutor not to process the complaint about the Governor and other public officials violated the procedural aspect of the right to life and right to a fair trial.

II. The Second Section of the Constitutional Court found the complaints admissible and examined the merits of the application. The Court, firstly, asserted that the right to life guaranteed by Article 17 of the Constitution imposes negative and positive obligations on the State to protect life. Whereas a negative obligation compels the State to refrain from harming the life of any person within its jurisdiction wilfully and unlawfully, the positive obligation means it must protect the right to life of all the individuals against harm arising from the action of public authorities, other individuals and the person.

The State must protect the material and spiritual integrity of the individual from every kind of danger, threat and violence. This obligation also includes taking the necessary precautions to protect life against foreseeable natural disasters and imminent real dangers. The Court also stated that there is a procedural aspect of the positive obligations and the State should conduct an official investigation, so that people responsible for unnatural deaths of others can be identified and if necessary, punished. The main aim of such an investigation is to guarantee the efficient enforcement of law that protects the right to life and when public officials or bodies are involved, to enable them to account for deaths that occurred under their obligation.

Considering the ongoing trials before the criminal and administrative first instance courts, the Constitutional Court only examined the question of whether the decision of the Chief Public Prosecutor at the Court of Cassation not to process the complaint that the Governor and other public officials had violated the procedural aspect of the right to life.

The Court stated that the relevant legislation states that the Governor and HDDEC officials have the duty to assess the damage after the earthquake; to determine whether buildings have been damaged and if so, evacuate them immediately; to take necessary precautions to shelter homeless people; etc. As a result, it ruled that the failure to investigate whether such legal duties were duly conducted and whether the misconduct arising from the failure to carry out the duties resulted in the death of 24 people, including S.K., had violated the procedural aspect of the right to life guaranteed by Article 17 of the Constitution. The Court awarded the applicants, 20.000 TL compensation for non-pecuniary damages.

Languages:

Turkish.

Identification: TUR-2013-3-005

a) Turkey / **b)** Constitutional Court / **c)** First Section / **d)** 04.12.2013 / **e)** B 2012/1272 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 13.12.2013, 28850 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

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

Detention, length / Parliament, member, detention, condition.

Headnotes:

Even if a member of parliament (hereinafter, “MP”) cannot benefit from parliamentary immunity and is subject to a criminal procedure, in order to decide whether to continue the detention after his/her election, the Court should show a prevailing public interest when depriving an MP of his/her liberty.

Summary:

I. In 2007, the Istanbul Public Prosecutors Office opened an investigation following a showing that grenades were found in a home. The investigation turned into a major criminal case (referred to as *“Ergenekon”*) that involved a plot to overthrow the elected government by a military coup. Twenty-two different indictments were joined into a single case and 275 people were tried. The First Instance Court rendered its decision on 5 August 2013.

The applicant was a columnist for the *Cumhuriyet Daily*. He was arrested on 1 July 2008 and interrogated by the public prosecutor about information relating to military coup plans found in his computer. On 5 March 2009, he was arrested the second time and detained by a court decision. The public prosecutor opened a criminal case by an indictment

dated 8 March 2009. The applicant was accused of being one of the leaders of an organisation that aimed to overthrow the elected government officials by military coup. While he was in detention, the applicant became a candidate to the Parliament representing the People's Republican Party in the elections of June 2011. He was elected as MP.

Following the election, he asked the Court for his release. The Court refused his demand on the grounds that the collection of evidence had not been completed, all the witnesses had not been heard by the Court, and his release might affect the witnesses. The Court refused the applicant's later demands of release for the same reasons. On 5 August 2013, the applicant was convicted for four crimes and sentenced with 34 years and 8 months imprisonment. The applicant appealed the decision before the Court of Cassation.

The applicant lodged an individual application before the Constitutional Court on 26 December 2012, claiming that he has been detained without reason; the length of detention exceeded a reasonable time; and his right to a fair trial, right to stand for election and political activity and freedom of expression were violated.

II. The First Section of the Constitutional Court found the complaints relating to the right to a fair trial and freedom of expression inadmissible on the ground that other remedies had not been exhausted. The Court held that the complaints relating to the legality of detention were ill-founded. However, it ruled that the complaints about the length of detention and right to stand for election and political activity were admissible, and examined the merits of the application in terms of these complaints.

The Court reviewed the complaints about the length of detention and the right to stand for election and political activity together, indicating the applicant could not have attended parliamentary activities because he was not released following his election as MP. The Court noted that the applicant was elected on 12 June 2011. His detention period from his arrest on 5 March 2009 to the first instance court's decision on 5 August 2013 lasted for 4 years and 5 months. After he was elected as MP, his detention lasted for more than two years.

The Court ruled that the right to stand for election encompasses participation in parliamentary activities. The Court also stated that considering the importance of freedom of political activity in a democracy, the Constitution recognised some immunities and privileges for parliament members in terms of criminal investigations and trials. These privileges also include protection from detention. Even if some crimes are exempted from parliamentary immunities and an MP accused of committing such crimes can still be tried, the detention of an MP should be applied as a last resort if it is absolutely necessary in order for those to be a fair trial. Therefore, a court that refuses to release an MP should clearly justify its decision.

The Constitutional Court ruled that the First Instance Court failed to justify its decision not to release the applicant. As a result, the Court held unanimously that the rights of the applicant, guaranteed by Articles 19 and 67 of the Constitution, were violated.

Languages:

Turkish.

Identification: TUR-2013-3-006

a) Turkey / **b)** Constitutional Court / **c)** First Section / **d)** 19.12.2013 / **e)** B 2013/2187 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 07.01.2014, 28875 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

5.2.2.1 Fundamental Rights – Equality – Criteria of distinction – **Gender**.
5.3.4 Fundamental Rights – Civil and political rights – **Right to physical and psychological integrity**.
5.3.32 Fundamental Rights – Civil and political rights – **Right to private life**.
5.3.33 Fundamental Rights – Civil and political rights – **Right to family life**.

Keywords of the alphabetical index:

Woman, married, surname / International agreements, priority.

Headnotes:

When domestic law and international agreements relating to human rights conflict, the courts should apply provisions of international agreements to which Turkey is a party.

Summary:

I. The applicant, a lawyer admitted into the Istanbul Bar Association, brought an action with the request of permission to use her pre-marital surname "Akat" as her surname, which had become "Akat Eşki" after marriage. During the trial of the case on the file of the 2nd Family Court in Fatih, the Court lodged an application before the Constitutional Court claiming that Article 187 of the Turkish Civil Code was contrary to the Constitution. The Constitutional Court refused the request, finding the aforementioned provision was not unconstitutional on 10 March 2011. The applicant's action was dismissed by the 2nd Family Court in Fatih on 14 June 2011. The applicant's request for appeal was refused by the 2nd Civil Chamber of the Court of Cassation on 24 November 2012.

The applicant lodged an individual application before the Constitutional Court on 21 March 2013, claiming that the denial of her request to use her pre-marital surname as the surname after marriage was discriminatory based on her gender and her right to private and family life guaranteed by the Constitution.

II. The First Section of the Constitutional Court found the complaints admissible and examined the merits of the application. The Court reviewed the application under Article 17 of the Constitution, which stipulates that "Everyone … the right to protect and develop his material and spiritual entity". The Court stated that the surname, which is an inseparable element of his/ her personality and identity, is within the scope of the spiritual entity of the person. It also stated that denying the applicant's request for permission to use her pre-marital surname as the surname after marriage constitutes interference with her right guaranteed by Article 17 of the Constitution.

Then, the Court examined whether the interference is lawful, which is a requirement provided by Article 13 of the Constitution. The Constitutional Court indicated that the first and second degree courts based their decision on Article 187 of Civil Code, which does not allow a married woman to use her pre-marital surname without her husband's surname. The Court noted that Article 90 of the Constitution requires the application of international agreements in the area of fundamental rights duly put into effect if there is a conflict between them and domestic laws. The Court stated that there is a conflict between the aforementioned Article of the Civil Code and Article 8 ECHR (making reference to the Judgments of the European Court of Human Rights in the cases, *Ünal Tekeli v. Turkey,* no. 29865/96, 16 November 2004; *Leventoğlu Abdulkadiroğlu v. Turkey,* no. 7971/07, 28 May 2013; *Tuncer Güneş v. Turkey,* no. 26268/08, 3 October 2013; *Tanbay Tüten v. Turkey,* no. 38249/09, 10 December 2013) and Article 16 of the CEDAW to which Turkey is a party.

The Court ruled that the first and second degree courts' decisions, which contradict Article 90 of the Constitution, do not meet the legal requirement stipulated in Article 13 of the Constitution. The Court, therefore, held unanimously that Article 17 of the Constitution was violated.

Languages:

Turkish.

Ukraine
Constitutional Court

Important decisions

Identification: UKR-2013-3-007

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 19.09.2013 / **e)** 2-v/2013 / **f)** Conformity of the draft law on introducing amendments to the Constitution on strengthening guarantees of independence of judges with Articles 157 and 158 of the Constitution / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette) / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

4.4.3 Institutions – Head of State – **Powers**.
4.5.2 Institutions – Legislative bodies – **Powers**.
4.7.4.1.1 Institutions – Judicial bodies – Organisation – Members – **Qualifications**.
4.7.4.1.2 Institutions – Judicial bodies – Organisation – Members – **Appointment**.
4.7.4.1.4 Institutions – Judicial bodies – Organisation – Members – **Term of office**.
4.7.4.1.5 Institutions – Judicial bodies – Organisation – Members – **End of office**.
4.7.4.3.4 Institutions – Judicial bodies – Organisation – Prosecutors / State counsel – **Term of office**.
4.7.5 Institutions – Judicial bodies – **Supreme Judicial Council or equivalent body**.
4.7.7 Institutions – Judicial bodies – **Supreme Court**.
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:

Constitution, amendment / Judicial office, candidate, selection, requirement / Prosecutor general, term of authority / High Council of Justice, appointment process / High Council of Justice, authorities / Supreme Court, homogeneity of decisions, review.

Headnotes:

Draft legislation introducing amendments to the Constitution on strengthening guarantees of the independence of judges was in line with the requirements of Articles 157 and 158 of the Constitution.

Summary:

I. The *Verkhovna Rada* presented the Constitutional Court with a petition seeking its opinion as to the conformity with Articles 157 and 158 of the Constitution of a draft law on introducing amendments to the Constitution on strengthening guarantees of independence of judges (registration no. 2522a) (hereinafter, the “draft Law”).

Under Article 85.1.1 of the Fundamental Law, amendments to the Constitution within the limits and in the manner provided in Chapter XIII of the Constitution fall within the remit of Parliament.

Under Article 159 of the Fundamental Law, draft legislation on introducing amendments to the Constitution is considered by Parliament, upon the availability of an opinion of the Constitutional Court on the conformity of the legislation with Articles 157 and 158 of the Constitution.

II. In terms of the conformity of the draft Law with Article 157.1 of the Constitution, the Constitutional Court observed that the proposed changes did not envisage the cancelling or restriction of human rights and freedoms and were not aimed at threatening the independence or violating territorial integrity.

Under the draft legislation, Article 55 of the Fundamental Law would be supplemented by a new Article following Article 55.2. The suggested norm reproduces the provisions of Article 6.1 ECHR, whereby everybody is entitled to a fair and public hearing within a reasonable time by an independent and impartial court established by law.

Amendments to Article 85.1.27 of the Constitution are supplemented by the authority of Parliament to determine the system, formation, and dismantling of courts of general jurisdiction upon petition by the President. The suggested wording complied with the provisions of Article 92.1.14 of the Fundamental Law.

The draft Law provided new wording for Article 106.1.23 of the Constitution and sought to replace Article 128.1 of the Constitution with two other articles. The rationale behind these changes was to give the President the authority to appoint and dismiss judges on the proposal of the High Council of Justice, and to transfer them, on the proposal of the High Qualification Commission of Judges. The Constitutional Court noted that the High Council of Justice is an independent constitutional body responsible for the formation of a highly qualified judicial body. The amendments to Article 131 of the Constitution suggested that the High Council of Justice should be composed mainly of judges.

Decisions of the High Council of Justice are adopted collectively by voting. Thus, issues on judicial recruitment, transfer and promotion of judges are actually settled by the judiciary, guaranteeing its independence from other state bodies.

In terms of the amendment to Article 106.1.23 of the Constitution, the draft law proposed to eliminate the number “23”.

The draft Law proposed excluding Article 122.2 of the Constitution. In the Constitutional Court’s opinion, allowing the Prosecutor General to exercise his powers without a five year limitation period would contribute to his impartiality and independence, and to the stability of the functioning of the Prosecutor's General office headed by him.

The draft Law proposed introducing amendments to Article 125 of the Constitution, similar to those proposed for Article 85.1.27 of the Constitution; to complement the principles of the system of courts of general jurisdiction by the principle of instance (i.e. organising the courts in such a manner that an appeal of a court ruling can be made to a higher instance); to grant the Supreme Court the authority to ensure uniform application of the legislation by all courts of general jurisdiction, in order to create a constitutional and legal mechanism for the formation of a unified court practice.

Under the proposed wording of Article 126 of the Constitution, the High Council of Justice would be authorised to give consent to the detention or arrest of a judge, upon the proposal of the High Qualification Commission of Judges. In the Constitutional Court’s view, consent to detention or arrest of judges by bodies consisting mainly of judges is an additional guarantee of the independence of the judicial power. Judges would also, under the draft legislation, have life tenure. The draft legislation also proposed to clarify the grounds for dismissal of judges and set an age limit (seventy years) for service as a judge. This was, in the Court’s view, a matter of expediency and came about due to the simultaneous increase in the age at which a citizen could be recommended for the office of a judge which was also suggested by the draft legislation. The suggested changes to the existing order of the termination of authority of a Constitutional Court judge were aimed at ensuring the stable uninterrupted operation of constitutional justice.

The Constitutional Court observed, in terms of the changes proposed to Article 127 of the Constitution, that the determination at the constitutional level of the High Qualification Commission of Judges as a permanent body within the judicial system, authorised to recommend citizens to judicial office, making provision for the competitive selection of candidates and designating the age of thirty as being the point at which a citizen may run for the position of judge, was aimed at securing highly qualified professional staff for the judiciary, based on life experience and social maturity. These are moral qualities necessary for the administration of justice; the changes would help to ensure equal opportunities for judicial office to be filled on a competitive basis.

The draft legislation suggested supplementing a list of basic principles of the judiciary provided in Article 129.3 of the Fundamental Law with a new concept – the automated distribution of cases among judges.

A new wording was proposed for Article 131 of the Constitution, which would supplement the authority of the High Council of Justice, including the authority to appoint judges to and dismiss them from administrative positions in courts of general jurisdiction, except the Supreme Court, upon the proposal of the relevant councils of judges. It would also be possible to change the composition and the order of appointment of members of the High Council of Justice and to stipulate, at the constitutional level, the establishment and operation of the High Qualification Commission of Judges and to grant it the authority to make proposals to the High Council of Justice on granting consent for the detention or arrest of a judge.

The “Final and Transitional Provisions” are an integral part of the draft legislation; they determine the procedure for its entry into force and provide measures aimed at the implementation of amendments to the Constitution.

Thus, the proposed changes do not contravene the requirements of Article 157.1 of the Constitution.

Under Article 157.2 of the Fundamental Law the Constitution may not be amended under martial law or a state of emergency. The Constitutional Court noted that such conditions did not currently exist and so this part of the draft law did not run counter to Article 157.2.

Under Article 158.1 of the Constitution, draft legislation on introducing amendments to the Constitution, considered by Parliament but not adopted, may be submitted to Parliament no sooner than one year from the date of adoption of the decision on this draft Law. The Constitutional Court noted that the draft Law was not considered within the specified period by Parliament and had not been adopted as a law.

Under Article 158.2, Parliament, within the term of its authority, must not amend the same constitutional provisions twice. The *Verkhovna Rada*, at the seventh convocation during the term of its authority, has not changed the provisions of Articles 55, 85, 106, 122, 125, 126, 127, 128, 129 and 131 of the Constitution.

The draft Law did not, in the Constitutional Court's view, conflict with the requirements of Articles 157 and 158 of the Constitution.

Languages:

Ukrainian, Russian (translation by the Court).

Identification: UKR-2013-3-008

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 15.10.2013 / **e)** 9-rp/2013 / **f)** Official interpretation of Article 233.2 of the Labour Code / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette) / **h)** CODICES (Ukrainian).

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**.
5.4.3 Fundamental Rights – Economic, social and cultural rights – **Right to work**.
5.4.18 Fundamental Rights – Economic, social and cultural rights – **Right to a sufficient standard of living**.

Keywords of the alphabetical index:

Salary, indexation / Wages, unpaid, recovery.

Headnotes:

In cases where the legislation on labour payments has been breached, employees are entitled to apply to the Court to claim for wage indexation recovery and compensation for the loss of part of their income due to the violation of their terms of payment – as components of the appropriate wages to be paid to an employee irrespective of whether such sums were calculated by an employer. No limitation period applies to such claims.

Summary:

I. Ukraine, as a social, democratic, law-based state must create conditions to allow its citizens to exercise fully their right to work, and provide opportunities for people to earn a living by work which they choose freely, allowing them equal opportunities to choose a profession and type of employment and appropriate working conditions and timely payment (Articles 1, 43.1, 43.2, 43.4 and 43.7 of the Constitution).

Remuneration for work performed by an employee is the source of his or her existence. It must ensure him or her an adequate standard of living. This determines the duty of the state to create appropriate conditions for the implementation of the right to work by citizens, optimisation of the balance of interests of the parties of labour relationships, in particular through state regulation of payment for labour.

One method of state regulation of payment for labour is the establishment of a minimum wage. The rate for this, under Article 9 of the Law on Remuneration of Labour dated 24 March 1995, no. 108/95-VR (hereinafter, the "Law"), is determined in accordance with the needs of employees and their families, the cost value of food, and the minimum level of non-food items and services sufficient for ensuring the normal functioning of an able-bodied person, the preservation of his or her health, and basic social and cultural needs. It is also determined in line with the level of the average salary and labour efficiency.

The state also envisages measures aimed at securing real salary, i.e. pecuniary reward for work done as an equivalent of costs of consumer goods and services. Under Article 95.6 of Labour Code (hereinafter, the "Code") and Articles 33 and 34 of the Law, such measures include salary indexation and compensation to employees for loss of part of their incomes due to the violation of their terms of payment.

Under Article 33 of the Law, in the period between the revision of the minimum salary, individual salaries are subject to indexation pursuant to the current legislation.

Indexing of the cash income of the population is the mechanism for increasing the cash income of the population, established by law and other normative-legal acts, allowing for partial or full indemnity for rises in the price of consumer goods and services. Enterprises, institutions and organisations raise salary rates of employees by indexing them at their own expense (Articles 1, 5.1 of Law on Indexation of Population Monetary Incomes of 3 July 1991, no. 282 – XII as amended).

Article 34 of the Law stipulates compensation for partial loss of salary for employees related to violation of terms of payment. Under Articles 1 and 2 of the Law on Compensation to Citizens for Loss of Part of Incomes due to Violation of Terms of Payment of 19 October 2000, no. 2050 – III, enterprises, institutions and organisations of all forms of ownership and management make compensation to citizens for such loss. This covers situations where the owner or a person or body authorised by him or her is at fault, in cases of delay in payment of accrued incomes of pensions, social benefits, stipends, salary etc. for one or more calendar months.

In the light of the above legislative provisions, the Constitutional Court concluded that costs relating to the indexing of salary and compensation to employees of part of their salary due to the violation of their terms of payment have a compensatory nature. They are aimed at guaranteeing a real salary for employees, to allow them to maintain an adequate standard of living and purchasing power in line with inflation and increases in consumer prices for goods and services.

Under Article 233.2 of the Code, in cases of violation of legislation on remuneration of labour, employees are entitled to apply to court with claims for recovery of wages. There is no limitation period on such claims.

The Constitutional Court found that in regard to labour disputes over the recovery of salary to be paid to employees, Article 233.2 of the Code should apply in cases of claims for the recovery of payments that form part of salary structure. The application of these provisions should not be connected with the fact of the calculation or non-calculation of the disputed payments by an employer.

Languages:

Ukrainian, Russian (translation by the Court).

Identification: UKR-2013-3-009

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 26.11.2013 / **e)** 11-rp/2013 / **f)** Official interpretation of the provisions of Article 37.13 of the Law on Civil Service in connection with the provisions of Article 40.1.2 and 40.2 of the Labour Code and Article 21 of the Law on Basic Principles of Social Protection of Labour Veterans and Other Elderly Citizens / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette) / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

4.6.9 Institutions – Executive bodies – **The civil service**.
5.4.14 Fundamental Rights – Economic, social and cultural rights – **Right to social security**.
5.4.16 Fundamental Rights – Economic, social and cultural rights – **Right to a pension**.

Keywords of the alphabetical index:

Public servant, retirement allowance.

Headnotes:

Civil servants seeking early retirement from their work in a state body will be entitled to receive an allowance in the amount of ten monthly position salaries, provided they have a civil service record of at least ten years and sufficient pensionable service to have accrued a retirement pension on at least the minimum scale. This is not related to attainment of the pension age under the legislation governing the Civil Service.

Summary:

I. Citizen Zinayida Pastukh asked the Constitutional Court for an official interpretation of Article 37.13 of the Law on the Civil Service (hereinafter, “Law no. 3723”). This provision, in conjunction with Articles 40.1.2 and 40.2 of the Labour Code (hereinafter, the “Code”), Article 21 of the Law on Basic Principles of Social Protection of Labour Veterans and Other Elderly Citizens (hereinafter, “Law no. 3721”) allows civil servants seeking early retirement, who have a civil service record of at least ten years, to receive an allowance in the amount of ten monthly position salaries. The applicant contended that inconsistent application of this provision by courts and the Main Control and Revision Office had led to a breach of her right to social protection.

II. The Constitutional Court held that the right to pension provision forms part of the constitutional right to social protection (paragraph 1 of item 5 of the motivation part of the Decision of the Constitutional Court dated 11 October 2005, no. 8-rp/2005).

The right to pension provision, general conditions of assignment of pensions, the order of their calculation and scales are defined by the laws on "Pension Provision" and on "Mandatory State Pension Insurance". These laws allow persons to acquire the right to a retirement pension not only after attainment of the generally established pension age or the pension age provided by specific legislation but also, under certain circumstances, in cases of early retirement. Article 21 of Law no. 3721 envisages cases where the pensionable age for specific categories of individuals defined in this article, in particular, civil servants, is reduced by eighteen months by comparison to the generally established age.

The pension status of certain categories of individuals, in particular those who are civil servants, are regulated additionally by special laws or separate provisions of the above laws.

The right to a civil service pension is provided to men who have attained the age of 62 and women who have attained the pension age established by Article 26 of the Law on Mandatory State Pension Insurance provided they have accrued enough pensionable service for them to be assigned a retirement pension on the minimum scale envisaged by paragraph one of Article 28.1 of the above Law, namely a civil service record of at least ten years and who were in office as a civil servant at the time they reached the age mentioned above. It is also provided to those with a civil service record of at least twenty years, irrespective of their place of work by the time the above age is reached (Article 37.1 of Law no. 3723).

In cases of retirement, a civil servant with a civil service record of at least ten years will be assigned an allowance in the amount of ten monthly position salaries (Article 37.13 of Law no. 3723). Article 37.13 imposes no other conditions on the assigning of allowances to a civil servant in cases of retirement.

The Constitutional Court found that the allowance envisaged by the above legislative provision is of a "one-off" nature. The right to receive it is connected to the individual's record of service as a civil servant and termination of this position in view of retirement on a civil service pension. The dissolution of a labour contract with a civil servant will not, therefore, mitigate his or her right to assignment of the allowance provided he or she has a civil service record of at least ten years.

A civil servant looking to retire early (no earlier than eighteen months before the legislatively established term) on a civil service pension on the grounds of Article 40.1.2 of the Code (in cases of inconsistency with the office for medical reasons and impossibility of voluntary transfer to another office under Article 40.2 of the Code) will, provided he or she has a minimum service record of ten years and sufficient pensionable service, be entitled to an allowance in the amount of ten monthly position salaries, the same as other civil servants retiring from civil service upon attainment of the age established in Article 37.1 of Law no. 3723.

Cross-references:

- Decision of the Constitutional Court dated 11.10.2005, no. 8-rp/2005 (paragraph 1 of item 5 of motivation part).

Languages:

Ukrainian, Russian (translation by the Court).

Identification: UKR-2013-3-010

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 28.11.2013 / **e)** 12-rp/2013 / **f)** Official interpretation of provisions of Article 5.1.7 of the Law on Court Fees in connection with provisions of Article 49.1.r of the Law on Copyright and Related Rights / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette) / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

4.7.15 Institutions – Judicial bodies – **Legal assistance and representation of parties**.
5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts**.
5.3.23 Fundamental Rights – Civil and political rights – **Rights in respect of the audiovisual media and other means of mass communication**.
5.4.12 Fundamental Rights – Economic, social and cultural rights – **Right to intellectual property**.

Keywords of the alphabetical index:

Collective management, copyright / Court fee, exemption.

Headnotes:

Organisations of collective management of property rights of subjects of copyright and related rights established in accordance with the legislation governing copyright and related rights are not exempt from court fees when applying to the Court with claims relating to the protection of the rights and interests of other persons.

Summary:

I. A non-profit, non-commercial economic association known as the "House of Music Authors" submitted a request to the Constitutional Court for an official interpretation of the provisions of Article 5.1.7 of the Law on Court Fees dated 8 July 2011 no. 3674-VI (hereinafter, "Law no. 3674") in connection with the provisions of Article 49.1.r of the Law on Copyright and Related Rights dated 23 December 1993, no. 3792-XII (hereinafter, "Law no. 3792"). They wanted to know whether the provisions of Article 5.1.7 of Law no. 3674 on exemption from court fees applied to organisations of collective management of the property rights of subjects of copyright and related rights (hereinafter, "organisations of collective management") when they lodged proceedings in court for the protection of the property rights and interests of subjects of copyright and related rights.

II. The Constitutional Court stated that the term "intellectual property right" includes personal non-property rights and intellectual property rights, the content of which is defined by the Civil Code (hereinafter, the "Code") and other laws (Article 418.2 of the Code).

The subjects of copyright and related rights may handle their property rights personally, by proxy or collectively through organisations of collective management created by such subjects (Articles 45 and 47.2 of Law no. 3792). Organisations of collective management are legal entities which collectively manage the property rights of subjects of copyright and related rights; they are non-profit-making entities (Articles 1.1.19 and 48.2 of Law no. 3792). Under the Code, these organisations are non-entrepreneurial companies – legal entities of private law (Articles 81.2, 85 and 87.2).

The authority to manage property rights collectively is transferred to organisations of collective management by authors and other subjects of copyright and related rights on the basis of written contracts (Article 48.3 of Law no. 3792). Organisations of collective management may take action to protect the rights of these subjects, through the courts (Article 49.1.r of Law no. 3792).

Judicial protection of the property rights of subjects of copyright and related rights by organisations of collective management envisages their application to the relevant judicial body with a view to the restoration or recognition of these rights if they are not recognised or are disputed or challenged. Such judicial recourse entails court fees and has a bearing on the possibility of access of an individual to justice and judicial protection as guaranteed by Article 55 of the Constitution.

Law no. 3674 sets out the legal grounds collecting court fees, those who pay them, objects and scales of court fees, order of payment, exemption from payment and refunds.

Article 2 of Law no. 3674 provides that those who pay court fees are citizens, foreigners, stateless persons, enterprises, institutions, organisations, other legal entities (including foreigners) and natural persons/entrepreneurs who apply to court or who have a court decision adopted against them.

Article 3.2 of Law no. 3674 sets out those applications which do not attract court fees. Article 5 sets out an exhaustive list of subjects who are exempt from court fees when they file a claim before the Court or when documents are issued to them by the Court. It also sets out grounds for the exemption from court fees of persons lodging claims to protect the rights and interests of others rather than their own personal interests.

The protection of the rights and interests of other persons in court is one of the guarantees of implementation of the universal constitutional right to judicial protection. It covers the application to the Court by state bodies, local government authorities and natural and legal persons who have been given the right to apply to the Court on somebody else's behalf, in order to protect that person's rights, freedoms and interests (Article 45 of the Civil Procedural Code, Article 60 of the Code of Administrative Proceedings and Articles 2.1, 21.2 and 28 of the Commercial and Procedural Code). Under Article 47.5 of Law no. 3792, state organisations are authorised to manage the property rights of the subjects of copyright and related rights, and specifically to turn to the Court to protect these rights, where their statutory documentation envisages this function.

The Constitutional Court concluded that, under Article 5.1.7 of Law no. 3674, only state bodies and state enterprises, institutions and organisations which apply to the Court in order to protect the rights and interests of others in cases envisaged by law are exempt from paying court fees. The above provisions do not apply to organisations of collective management as legal entities of private law.

Under the above provision, however, civil organisations applying to the Court to protect the rights and interests of others are exempt from paying court fees. The legal and organisational principles of activities of civil organisations are determined by the Law on Civil Associations. The Constitutional Court observed that, according to Article 2.2.6 of this Law, it did not extend to social relations in the sphere of the establishment, registration, activity and termination of non-entrepreneurial companies (which are not civil associations) established on the grounds of other laws. The Court indicated that since organisations of collective management are created, subject to registration, carry out and terminate their activity according to Law no. 3792, they are not civil organisations.

The Constitutional Court accordingly came to the conclusion that organisations of collective management established in pursuance of Article 47.2 of Law no. 3792 are not state or civil organisations and are not therefore exempt from paying court fees on the grounds of Article 5.1.7 of Law no. 3674 if they apply to the Court for the protection of property rights and interests of subjects of copyright and related rights in cases envisaged by Article 49.1.r of Law no. 3792.

Languages:

Ukrainian, Russian (translation by the Court).

United States of America
Supreme Court

Important decisions

Identification: USA-2013-3-008

a) United States of America / **b)** Supreme Court / **c)** / **d)** 05.11.2013 / **e)** 12-414 / **f)** Burt v. Titlow / **g)** 134 *Supreme Court Reporter* 10 (2013) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.6.3 General Principles – Structure of the State – **Federal State**.
4.8.6.3 Institutions – Federalism, regionalism and local self-government – Institutional aspects – **Courts**.
5.3.13.27 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to counsel**.

Keywords of the alphabetical index:

Counsel, effective assistance / Ethics, professional.

Headnotes:

The Constitution guarantees the right of a criminal defendant to effective assistance of counsel.

A criminal defendant claiming a violation of the constitutional right to assistance of counsel bears the burden of showing that her or his counsel's representation was ineffective.

To establish a violation of the constitutional right to effective assistance of counsel, a criminal defendant must show as a threshold matter that her or his counsel's performance fell below an objective standard of reasonableness.

As a principle of federalism, the courts of the states as constituent units are adequate forums for the vindication of federal statutory and constitutional rights.

The constitutional right to assistance of counsel in criminal proceedings does not guarantee a right to perfect counsel; instead, it promises only a right to effective assistance.

An attorney's violation of ethical norms during the course of her or his representation of a criminal defendant does not make the attorney's assistance *per se* ineffective for purposes of the constitutional guarantee of assistance of counsel.

Summary:

I. The Sixth Amendment to the U.S. Constitution, which guarantees the right to a fair trial, states in part that "In all criminal prosecutions, the accused shall…have the Assistance of Counsel for his defence." The Sixth Amendment is applied to the States through the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.

In *Strickland v. Washington* (1984), the U.S. Supreme Court articulated standards for determining when a counsel's representation has been sufficiently ineffective to constitute a violation of the Sixth Amendment guarantee. In the *Strickland* test, a criminal defendant must establish as a threshold matter that the counsel's performance fell below an objective standard of reasonableness.

In the instant case, a jury in a Michigan State Court found Vonlee Titlow guilty of second degree murder. The trial court sentenced her to a term of imprisonment of twenty to forty years. Shortly before commencement of the trial, Titlow had withdrawn a plea of guilty under which the prosecution had offered conviction of the lesser charge of manslaughter a prison term of seven to fifteen years.

In appealing to the Michigan State Court of Appeals, Titlow claimed that she had received ineffective assistance of counsel because her counsel had advised withdrawal of the guilty plea without taking time to learn more about the case and the strength of the State's evidence. Rejecting that claim, the Michigan Court of Appeals concluded after reviewing the factual record and applying the *Strickland* standard that Titlow's counsel had acted reasonably in light of his client's protestations of innocence.

Titlow sought federal court review, by means of a petition for *habeas corpus*, of the Michigan Court of Appeals decision. Under the federal Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter, the "AEDPA"), a federal court, in reviewing a *habeas* petitioner's challenge of the factual basis for a state court decision, may overturn that decision only if it was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." The U.S. District Court concluded that the ruling of the Michigan Court of Appeals was "completely reasonable on the law and the facts" and denied Titlow's petition.

The Federal Court of Appeals for the Sixth Circuit reversed the District Court's decision. It ruled that the Michigan Court of Appeals had unreasonably interpreted the factual record, and also concluded that the record did not contain any evidence that Titlow's counsel had fully informed Titlow about the possible consequences of withdrawing the guilty plea.

II. The U.S. Supreme Court accepted review and reversed the decision of the federal Court of Appeals. The Supreme Court ruled that the federal Court of Appeals had failed to apply the proper standard of review established in the Supreme Court's case law. That "doubly deferential" standard, which gives both the state court and the defence attorney the benefit of the doubt, is grounded in AEDPA's recognition of a principle of federalism that state courts are adequate forums for the vindication of federal statutory and constitutional rights. Thus, as recognized in the Court's case law, AEDPA erects a formidable barrier to federal *habeas* relief for prisoners whose claims have been adjudicated in state court. That barrier requires a prisoner to show that the state court's ruling was so lacking in justification that there was an error beyond "any possibility for fair-minded disagreement."

Based upon its review of the facts, the Court ruled that the decision of the federal Court of Appeals did not meet this standard. In addition, the Court rejected as "troubling" the Sixth Circuit's emphasis on an absence of evidence that Titlow's counsel rendered constitutionally adequate advice on whether to withdraw the guilty plea. The Court stated that in doing this the federal Court of Appeals had turned that presumption of effectiveness on its head: instead, the correct presumption established in *Strickland* is that counsel provided adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Therefore, a defendant claiming ineffective assistance bears the burden of showing that counsel's performance was deficient. The absence of evidence cannot overcome this strong presumption.

The Court also addressed the matter of the conduct of Titlow's counsel. The Court cited several examples of her counsel's conduct that were possible violations of the rules of professional ethics. However, it also emphasized that the Sixth Amendment does not guarantee a right to perfect counsel; instead, it promises only a right to effective assistance. Under

its case law, the Court stated, an attorney's violation of ethical norms during the course of her or his representation of a criminal defendant does not make the attorney's assistance *per se* ineffective.

Meanwhile, the Court noted, although the actions of Titlow's counsel were troubling, they were not relevant to the narrow questions that was before the federal Court of Appeals: whether the state court reasonably determined that Titlow was adequately advised before deciding to withdraw the guilty plea.

The Court's judgment was adopted by a 9-0 vote among the Justices. One Justice wrote a separate opinion concurring in the Court's opinion, and another Justice wrote a separate opinion concurring in the judgment.

Supplementary information:

- *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674.

Languages:

English.

Identification: USA-2013-3-009

a) United States of America / **b)** Supreme Court / **c)** / **d)** 11.12.2013 / **e)** 12-609 / **f)** Kansas v. Cheever / **g)** 134 *Supreme Court Reporter* 10 (2013) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Adversarial principle / Evidence, psychiatric / Evidence, rebuttal / Expert witness testimony / *Mens rea*.

Headnotes:

The Constitution provides that no person shall be compelled in a criminal proceeding to be a witness against himself.

In a criminal proceeding, the prosecution's offering of expert witness testimony based on a court-ordered psychiatric examination of the defendant does not violate the constitutional right against self-incrimination if it is presented for the limited purpose of rebutting expert witness testimony offered by the defence that the defendant lacked the requisite mental state to commit the alleged crime.

When a criminal defendant presents testimony by an expert witness who has examined the defendant, the prosecution, despite the constitutional right against self-incrimination, is permitted to use the only effective means of challenging that evidence: testimony from an expert who also has examined the defendant.

When a defendant chooses to testify in a criminal case, the right against self-incrimination does not allow her or him to refuse to answer related questions on cross-examination, because such a rule would undermine the adversarial principle by allowing the defendant to provide the jury with a one-sided and potentially inaccurate view of the facts.

Summary:

I. The State of Kansas charged Scott Cheever with the murder of a County Sheriff by shooting him with a revolver. At his trial in Kansas State Court, Cheever presented a defence of voluntary intoxication, claiming that his use of methamphetamine had rendered him incapable of premeditation. Thus, he lacked the ability to form the requisite *mens rea* for commission of the crime. In support of this argument, Cheever offered testimony from an expert witness who was a specialist in psychiatric pharmacy. The expert witness testified that in his opinion Cheever's long-term methamphetamine use had damaged his brain, and also that Cheever was acutely intoxicated on the morning of the shooting. According to the witness, Cheever's actions were "very much influenced by" his use of methamphetamine.

After the defence rested its case, the prosecutor sought to present rebuttal testimony from an expert witness, a forensic psychiatrist, who had examined Cheever in an earlier proceeding against Cheever in federal court. In that proceeding, the federal court had ordered Cheever to submit to the psychiatric evaluation for an assessment of how methamphetamine use had

affected him when he shot the Sheriff. Later, the federal proceeding was discontinued for unrelated reasons before commencement of the trial in state court.

In the state court trial, Cheever's defence counsel objected to the prosecutor's presentation of the forensic psychiatrist's rebuttal testimony on grounds that it would violate Cheever's right against self-incrimination guaranteed under the Fifth Amendment to the U.S. Constitution. The Fifth Amendment states in relevant part that no person "shall be compelled in any criminal case to be a witness against himself." It is made applicable to the States through the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.

According to the defence, Cheever's right against self-incrimination would be violated because the forensic psychiatrist's opinions were based in part on statements that Cheever had made during a court-ordered mental examination to which Cheever had not voluntarily agreed. The prosecution countered that the testimony was necessary to rebut Cheever's voluntary-intoxication defence.

The trial court allowed the prosecution to introduce the forensic psychiatrist's testimony for the purpose of showing that Cheever did the shooting because of his antisocial personality, not because his brain was impaired by methamphetamine. The jury subsequently found Cheever guilty of murder and imposed a sentence of death. On appeal, the Kansas Supreme Court reversed the trial court, ruling that Cheever's Fifth Amendment rights had been violated.

II. The U.S. Supreme Court agreed to review the decision of the Kansas Supreme Court, and reversed it. The U.S. Supreme Court's ruling was grounded on the fact that Cheever's defence had introduced expert witness testimony for the purpose of showing that Cheever lacked the ability to form the requisite state of mind for commission of the crime. In this regard, the Court cited and re-affirmed its rule set forth in *Buchanan v. Kentucky* (1987): when a defence expert who has performed a psychiatric examination of the defendant testifies that the defendant lacked the requisite mental state to commit an offense, the prosecution may present psychiatric evidence in rebuttal. In the specific circumstances of the instant case, this means that the prosecution may offer evidence from a court-ordered examination for the limited purpose of rebutting the defendant's evidence. The Kansas Supreme Court had distinguished the *Buchanan* precedent, concluding that voluntary intoxication was not a "mental disease or defect" under Kansas law. However, the U.S. Supreme Court said that this reasoning misconstrued its precedents.

The U.S. Supreme Court added that admission of rebuttal testimony in the circumstances of the instant case is consistent with the broader Fifth Amendment principle that when a defendant chooses to testify in a criminal case, the right against self-incrimination does not allow her or him to refuse to answer related questions on cross-examination. Any other rule, the Court explained, would undermine the adversarial process by allowing a defendant to provide the jury with a one-sided and potentially inaccurate view of the defendant's mental state at the time of the alleged crime. When a defendant presents evidence through an expert who has examined that defendant, the government likewise is permitted to use the only effective means of challenging that evidence: testimony from an expert who also has examined the defendant. For this reason, the Court rejected Cheever's suggestion that the prosecution could effectively have rebutted the testimony of his expert by introducing testimony from experts who had not personally examined him.

The Court's decision was unanimous.

Supplementary information:

- *Buchanan v. Kentucky*, 483 U.S. 402, 107 S. Ct. 2906, 97 L. Ed. 2d 336 (1987).

Languages:

English.

European Court of Human Rights

Important decisions

Identification: ECH-2013-3-008

a) Council of Europe / **b)** European Court of Human Rights / **c)** Section I / **d)** 03.10.2013 / **e)** 552/10 / **f)** I.B. v. Greece / **g)** / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

5.3.32 Fundamental Rights – Civil and political rights – **Right to private life**.
5.4.3 Fundamental Rights – Economic, social and cultural rights – **Right to work**.

Keywords of the alphabetical index:

HIV (AIDS), discrimination / Employment, HIV-positive employee, dismissal, unjustified.

Headnotes:

In the event of industrial conflict the need to protect the employer's interests has to be very carefully balanced against the need to protect the interests of the employee – the weaker party to the contract – particularly if he or she is HIV positive. Supposed or expressed prejudice on the part of other employees, particularly when based on clearly inaccurate information, namely the "contagious" nature of the applicant's illness, cannot be relied on as a pretext for terminating the contract of an HIV-positive employee, especially when HIV status does not affect his or her capacity ability to carry out his work or is likely to have an adverse impact on his or her contract.

Summary:

I. In February 2005, while he was on annual leave, the applicant learned that he had contracted the human immunodeficiency virus (hereinafter, "HIV"). This news spread throughout the company in which he was employed. Members of staff began to complain to the employer about having to work with a person who was HIV-positive and called for his dismissal. The applicant's employer then invited an occupational doctor to visit the workplace to explain the HIV infection, and its means of transmission, to the staff. The doctor tried to reassure the employees and explained what precautions should be taken. Nonetheless, about half of the staff sent a letter to the applicant's employer, calling for his dismissal in order to "preserve their health and their right to work", and stating that the harmonious atmosphere which reigned in the company was likely to deteriorate if he remained. Two days before the applicant's return from leave, the employer dismissed him, while paying the allowance provided for under Greek law. The applicant applied to the courts. Overturning the judgment of the Court of appeal, the Court of Cassation held that the applicant had not been unfairly dismissed.

II.a. Applicability of Article 14 ECHR in conjunction with Article 8 ECHR – The applicant complained that the authorities had failed to protect his private sphere against interference by his employer, which could engage the State's responsibility. There was no doubt that issues concerning employment and situations involving persons with HIV came within the scope of private life. The present case had a particular feature: the dismissal of an HIV-positive employee. There was no doubt that, while the reason given for the applicant's dismissal had been the preservation of a harmonious working environment in the company, the trigger had definitely been the news of his positive HIV status. It was this event which had resulted in the employees' open threat to disrupt the company's operations so long as the applicant continued to be employed there. It was clear that his dismissal had resulted in stigmatisation of an individual who, although HIV-positive, had shown no symptoms of the disease. This measure could not fail to have serious repercussions on his personality, the respect which was shown to him and, ultimately, on his private life. Mention had also to be made of the uncertainly arising from the search for new employment, as the prospects of finding a new job could reasonably be considered remote, given his experience with his existing employer. The fact that the applicant had found new employment following his dismissal was not sufficient to eliminate the damaging effects that the impugned events had had on his ability to lead a normal personal life. Articles 8 and 14 ECHR, taken together, were therefore applicable.

b. Merits – The applicant's situation had to be compared to that of the company's other employees, since this was what was relevant in assessing his complaint of a difference in treatment. It was undisputed that the applicant had been treated less favourably than another colleague would have been, solely on the basis of his HIV-positive status. In its judgment in *Kiyutin v. Russia*, the Court had held that ignorance about how this disease spreads had bred

prejudices which, in turn, stigmatised or marginalised those who carried the virus. It therefore considered that people living with HIV were a vulnerable group with a history of prejudice and stigmatisation and that the States should be afforded only a narrow margin of appreciation in choosing measures that could single out this group for differential treatment on the basis of their HIV status. However, the applicant's employer had terminated his contract on account of the pressure to which it was subjected by certain employees, and this pressure had originated in the applicant's HIV status and the concerns that it had given rise to among those persons. Furthermore, the company's employees had been informed by the occupational doctor that there was no risk of infection in the context of their working relations with the applicant.

The Court of appeal had expressly recognised that the applicant's HIV-positive status had no effect on his ability to carry out his work and there was no evidence that it would lead to an adverse impact on his contract, which could have justified its immediate termination. It had also recognised that the company's very existence was not threatened by the pressure exerted by the employees. The employees' supposed or expressed prejudice could not be used as a pretext for ending the contract of an HIV-positive employee. In such cases, the need to protect the employer's interests had to be carefully balanced against the need to protect the interests of the employee, who was the weaker party to the contract, especially where that employee was HIV-positive.

However, the Court of Cassation had not weighed up the competing interests in such a detailed and in-depth manner as the Court of appeal. In reasoning that was relatively short, given the importance and unprecedented nature of the issues raised by the case, it held that the dismissal had been fully justified by the employer's interests, in the correct sense of that term, since it had been decided in order to restore calm within the company and ensure its smooth operation. While the Court of Cassation had also not disputed the fact that the applicant's illness had no adverse effect on the fulfilment of his employment contract, it had nonetheless based its decision, in justifying the employees' fears, on clearly inaccurate information, namely the "contagious" nature of the applicant's illness. In so doing, it had ascribed to the smooth functioning of the company the same meaning which the employees wished to give it, and had aligned it with the employees' subjective perception of that issue.

Finally, the only issue at stake for the applicant before the Court of Cassation was the compensation he had been awarded by the Court of appeal, as his initial request to be reinstated in his post had been dismissed by both the first-instance and appeal courts. Moreover, the Court could not speculate as to what the attitude of the company's employees would have been had the Court of Cassation upheld the findings of the lower courts in this case, or, in particular, had there existed in Greece legislation or well-established case-law protecting HIV-positive individuals in their workplace.

In conclusion, the Court of Cassation had not provided an adequate explanation as to how the employer's interests outweighed those of the applicant, and had failed to weigh up the rights of the two parties in a manner consistent with the European Convention on Human Rights. Therefore, there had been a violation of Article 14 ECHR in conjunction with Article 8 ECHR.

Cross-references:

- *Kiyutin v. Russia*, no. 2700/10, ECHR 2011.

Languages:

English, French.

Identification: ECH-2013-3-009

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 21.10.2013 / **e)** 55508/07 / **f)** Janowiec and Others v. Russia / **g)** *Reports of Judgments and Decisions* / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

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:

Jurisdiction, temporal / Mass murder / Secrecy, state secret, access by court.

Headnotes:

In order for a "genuine connection" to be established enabling the Court to exercise temporal jurisdiction to examine a complaint under Article 2 ECHR of a failure to conduct an effective investigation into a death that occurred before the entry into force of the European Convention on Human Rights in respect of the respondent State concerned, the period of time between the death event and the entry into force of the European Convention on Human Rights in respect of that State must have been reasonably short (in principle, not exceeding ten years) and a major part of the investigation must or ought to have been carried out after the entry into force.

Although, even where the "genuine connection" test is not satisfied, the Court can in extraordinary situations exercise jurisdiction in order to ensure the real and effective protection of the guarantees and underlying values of the European Convention on Human Rights, it cannot do so where the impugned events occurred prior to the adoption of the European Convention on Human Rights on 4 November 1950.

Summary:

I. The applicants were relatives of Polish officers and officials who were detained in Soviet camps or prisons following the Red Army's invasion of the Republic of Poland in September 1939 and who were later killed by the Soviet secret police without trial, along with more than 21,000 others, in April and May 1940. The victims were buried in mass graves in the Katyń forest. Investigations into the mass murders were started in 1990 but discontinued in 2004. The text of the decision to discontinue the investigation remained classified at the date of the European Court's judgment and the applicants were not given access to it. Their repeated requests to gain access to that decision and to declassify its top-secret label were continuously rejected by the Russian courts. The Russian authorities also refused to produce a copy of the decision to the European Court on the grounds that the document was not crucial to the applicants' case and that they were prevented by domestic law from disclosing classified information.

II. Article 2 ECHR (procedural aspect): The Court reiterated that its temporal jurisdiction to review a State's compliance with its procedural obligation under Article 2 ECHR to carry out an effective investigation into alleged unlawful killing by State agents was not open-ended where the deaths had occurred before the date the European Convention on Human Rights entered into force in respect of that State. In such cases, the Court had jurisdiction only in respect of procedural acts or omissions in the period subsequent to the European Convention on Human Rights's entry into force and provided there was a "genuine connection" between the death as the triggering event and the entry into force. For a "genuine connection" to be established, the period between the death and the entry into force had to have been reasonably short and a major part of the investigation had or ought to have been carried out after the date of entry into force. For this purpose, a reasonably short period meant a period of no more than ten years.

On the evidence, the applicants' relatives had to be presumed to have been executed by the Soviet authorities in 1940. However, Russia had not ratified the European Convention on Human Rights until May 1998, some fifty-eight years later. That period was not only many times longer than the periods which had triggered the procedural obligation under Article 2 ECHR in all previous cases that had come before the Court, but also too long in absolute terms for a genuine connection to be established between the deaths and the entry into force of the European Convention on Human Rights in respect of Russia. Further, although the investigation into the origin of the mass burials had only been formally terminated in 2004, six years after the entry into force of the European Convention on Human Rights in respect of Russia, it was impossible, on the basis of the information available in the case file and in the parties' submissions, to identify any real investigative steps after the date of entry into force. The Court was unable to accept that a re-evaluation of the evidence, a departure from previous findings or a decision regarding the classification of the investigation materials could be said to have amounted to the "significant proportion of the procedural steps" required for establishing a "genuine connection" for the purposes of Article 2 ECHR. Nor had any relevant piece of evidence or substantive item of information come to light in the period since the critical date. Accordingly, neither criterion for establishing the existence of a "genuine connection" had been fulfilled.

Nevertheless, as the Court had noted in *Šilih v. Slovenia*, there might be extraordinary situations which did not satisfy the "genuine connection" standard, but where the need to ensure the real and effective protection of the guarantees and the underlying values of the European Convention on Human Rights would constitute a sufficient basis for recognising the existence of a connection. For the required connection to be found in such cases the triggering event would have to be of a larger dimension than an ordinary criminal offence and amount to the negation of the very foundations of the European Convention on Human Rights. Serious crimes under international law, such as war crimes, genocide or crimes against humanity would fall into

that category. However, this so-called "Convention values" clause could not be applied to events which occurred prior to the adoption of the European Convention on Human Rights on 4 November 1950, for it was only then that the European Convention on Human Rights had begun its existence as an international human-rights treaty. A Contracting Party could not be held responsible under the European Convention on Human Rights for not investigating even the most serious crimes under international law if they predated the European Convention on Human Rights. In this connection, there was a fundamental difference between a State having the possibility to prosecute for a serious crime under international law where circumstances allowed, and it being obliged to do so by the European Convention on Human Rights. The events that might have triggered the obligation to investigate under Article 2 ECHR had taken place in early 1940, more than ten years before the European Convention on Human Rights came into existence. Accordingly, there were no elements capable of providing a bridge from the distant past into the recent post-entry-into-force period and the Court had no competence to examine the complaint under Article 2 ECHR.

Article 3 ECHR: In its case-law, the Court had accepted that the suffering of family members of a "disappeared person", who had gone through a long period of alternating hope and despair, might justify finding a violation of Article 3 ECHR on account of the particularly callous attitude of the authorities towards their requests for information. However, in the applicants' case, the Court's jurisdiction only extended to the period starting on 5 May 1998, the date of entry into force of the European Convention on Human Rights in respect of Russia. By then, no lingering uncertainty as to the fate of the Polish prisoners of war remained. Even though not all of the bodies had been recovered, their deaths had been publicly acknowledged by the Soviet and Russian authorities and had become an established historical fact. It necessarily followed that what could initially have been a "disappearance" case had to be considered a "confirmed death" case. Since none of the special circumstances of the kind which had prompted the Court to find a separate violation of Article 3 ECHR in "confirmed death" cases (for example, being a direct witness of the victim's suffering), were present in the applicants' case, their suffering had not reached a dimension and character distinct from the emotional distress inevitably caused to relatives of victims of a serious human-rights violation. Therefore, there had been no violation of Article 3 ECHR.

Article 38 ECHR: The Government had not complied with the Court's request to provide it with a copy of the decision of September 2004 to discontinue the Katyń investigation, on the grounds that the decision had been lawfully classified top-secret at domestic level and that the Government were precluded from communicating classified material to international organisations in the absence of guarantees as to its confidentiality.

The Court reiterated that, even where national security was at stake, the concepts of lawfulness and the rule of law in a democratic society required that measures affecting fundamental human rights must be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision and the relevant evidence, otherwise the State authorities would be able to encroach arbitrarily on rights protected by the European Convention on Human Rights.

In the instant case, the national courts had not subjected to any meaningful scrutiny the executive's assertion that information contained in the decision to discontinue the investigation should be kept secret more than seventy years after the events. They had confined the scope of their inquiry to ascertaining that the classification decision had been issued within the administrative competence of the relevant authorities, without carrying out an independent review of whether the conclusion that its declassification constituted a danger to national security had a reasonable basis in fact. They had not addressed in substance the argument that, since it brought to an end the investigation into one of the most serious violations of human rights committed on orders from the highest level, the decision was not in fact amenable to classification under the domestic law. Nor had they performed a balancing exercise between, on the one hand, the alleged need to protect the information and, on the other, the public interest in a transparent investigation and the private interest of the victims' relatives in uncovering the circumstances of their death. Given the restricted scope of the domestic judicial review of the classification decision, the Court was unable to accept that the submission of a copy of the 2004 decision to discontinue the investigation could have affected Russia's national security.

The Court also emphasised that legitimate national security concerns could be accommodated in proceedings before it by means of appropriate procedural arrangements, including restricted access to the document in question under Rule 33 of the Rules of Court and, in extremis, the holding of a hearing behind closed doors. However, the Government had not requested the application of such measures. Therefore, the defendant State had failed to comply with Article 38 ECHR.

Cross-references:

- *Šilih v. Slovenia* [GC], 71463/01, 09.04.2009.

Languages:

English, French.

Identification: ECH-2013-3-010

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 07.11.2013 / **e)** 29381/09 / **f)** Vallianatos and others v. Greece / **g)** *Reports of Judgments and Decisions* / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

5.2 Fundamental Rights – **Equality**.
5.2.2.11 Fundamental Rights – Equality – Criteria of distinction – **Sexual orientation**.
5.3.32 Fundamental Rights – Civil and political rights – **Right to private life**.
5.3.33 Fundamental Rights – Civil and political rights – **Right to family life**.

Keywords of the alphabetical index:

Discrimination / Homosexuality, registered partnership.

Headnotes:

Legislation introducing a form of civil union other than marriage will violate Article 14 ECHR read in conjunction with Article 8 ECHR if such union is not available to same-sex couples despite the fact that they have a particular interest in entering into a civil union since, unlike the position with different-sex couples, it is the only basis in Greek law on which they can obtain legal recognition of their relationship.

Furthermore, a trend is currently emerging with regard to the introduction of forms of legal recognition of same-sex relationships.

Summary:

I. The first application was lodged by two Greek nationals, and the second by six Greek nationals and an association whose aims include providing psychological and moral support to gays and lesbians. On 26 November 2008 Law no. 3719/2008, entitled “Reforms concerning the family, children and society”, entered into force. It introduced an official form of partnership for unmarried couples called a “civil union”, which was restricted to different-sex couples, thereby excluding same-sex couples from its scope.

II.a. Applicability of Article 14 ECHR in conjunction with Article 8 ECHR – The applicants had formulated their complaint under Article 14 ECHR taken in conjunction with Article 8 ECHR, and the Government did not dispute the applicability of those provisions. The Court found it appropriate to follow that approach. Furthermore, the applicants’ relationships fell within the notion of “private life” and that of “family life”, just as would the relationships of different-sex couples in the same situation. Article 14 ECHR taken in conjunction with Article 8 ECHR was therefore applicable.

b. Merits – The applicants were in a comparable situation to different-sex couples with regard to their need for legal recognition and protection of their relationships. However, Section 1 of Law no. 3719/2008 expressly reserved the possibility of entering into a civil union to two individuals of different sex. Accordingly, by tacitly excluding same-sex couples from its scope, the Law in question introduced a difference in treatment based on the sexual orientation of the persons concerned.

The Government relied on two sets of arguments to justify the legislature’s choice not to include same-sex couples in the scope of the Law. Firstly, they contended that if the civil unions introduced by the Law were applied to the applicants, this would result for them in rights and obligations – in terms of their property status, the financial relations within each couple and their inheritance rights – for which they could already provide a legal framework under ordinary law, that is to say, on a contractual basis. Secondly, the Law in question was designed to achieve several objectives, including strengthening the legal status of children born outside marriage and making it easier for parents to raise their children without being obliged to marry. That aspect, they argued, distinguished different-sex couples from same-sex couples, since the latter could not have biological children together. The Court considered it legitimate from the standpoint of Article 8 ECHR for the legislature to enact legislation to regulate the

situation of children born outside marriage and indirectly strengthen the institution of marriage within Greek society, by promoting the notion that the decision to marry would be taken purely on the basis of a mutual commitment entered into by two individuals, independently of outside constraints or of the prospect of having children. The protection of the family in the traditional sense was, in principle, a weighty and legitimate reason which might justify a difference in treatment. It remained to be ascertained whether the principle of proportionality had been respected in the present case.

The legislation in question was designed first and foremost to afford legal recognition to a form of partnership other than marriage. In any event, even assuming that the legislature's intention had been to enhance the legal protection of children born outside marriage and indirectly to strengthen the institution of marriage, the fact remained that by enacting Law no. 3719/2008 it had introduced a form of civil partnership which excluded same-sex couples while allowing different-sex couples, whether or not they had children, to regulate numerous aspects of their relationship.

The Government's arguments focused on the situation of different-sex couples with children, without justifying the difference in treatment arising out of the legislation in question between same-sex and different-sex couples who were not parents. The legislature could have included some provisions dealing specifically with children born outside marriage, while at the same time extending to same-sex couples the general possibility of entering into a civil union. Lastly, under Greek law, different-sex couples – unlike same-sex couples – could have their relationship legally recognised even before the enactment of Law no. 3719/2008, whether fully on the basis of the institution of marriage or in a more limited form under the provisions of the Civil Code dealing with de facto partnerships. Consequently, same-sex couples would have a particular interest in entering into a civil union since it would afford them, unlike different-sex couples, the sole basis in Greek law on which to have their relationship legally recognised.

Lastly, although there was no consensus among the legal systems of the Council of Europe member States, a trend was currently emerging with regard to the introduction of forms of legal recognition of same-sex relationships. Of the nineteen States which authorised some form of registered partnership other than marriage, Lithuania and Greece were the only ones to reserve it exclusively to different-sex couples. The fact that, at the end of a gradual evolution, a country found itself in an isolated position with regard to one aspect of its legislation did not necessarily imply that that aspect conflicted with the ECHR. Nevertheless, in view of the foregoing considerations, the Court found that the Government had not offered convincing and weighty reasons capable of justifying the exclusion of same-sex couples from the scope of Law no. 3719/2008.

Therefore, there had been a violation of Article 14 ECHR in conjunction with Article 8 ECHR.

Cross-references:

- *Schalk and Kopf v. Austria*, no. 30141/04, ECHR 2010.

Languages:

English, French.

Identification: ECH-2013-3-011

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 12.11.2013 / **e)** 5786/08 / **f)** Söderman v. Sweden / **g)** *Reports of Judgments and Decisions* / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

5.1.3 Fundamental Rights – General questions – **Positive obligation of the state**.
5.3.32 Fundamental Rights – Civil and political rights – **Right to private life**.
5.3.44 Fundamental Rights – Civil and political rights – **Rights of the child**.

Keywords of the alphabetical index:

Child pornography / Sexual abuse / Criminal law, provision, incomplete / Legal gap / Legal framework, adequate / Covert filming / Personal integrity.

Headnotes:

State's positive obligations under Article 8 ECHR include a duty to maintain and apply in practice an adequate legal framework consisting of criminal and/or civil-law remedies and affording sufficient

protection against violations of personal integrity, such as covert filming by private individuals.

Summary:

I. In 2002, when the applicant was fourteen years old, she discovered that her stepfather had hidden a video camera in the laundry basket in the bathroom. The camera was directed at the spot where the applicant had undressed before taking a shower. She took it to her mother who burned the film without anyone seeing it. The incident was reported in 2004 when the mother heard that the applicant's cousin had also experienced incidents with the stepfather. The stepfather was prosecuted and in 2006 convicted by a district court of sexual molestation under Chapter 6, Article 7 of the Penal Code, as worded at the material time. His conviction was, however, overturned on appeal after the Court of appeal found that his act did not come within the definition of the offence of sexual molestation. The Court of appeal went on to point out that the conduct might have constituted the separate offence of attempted child pornography, but did not consider the issue further in the absence of any charge. The Supreme Court refused leave to appeal.

In a judgment of 21 June 2012 a Chamber of the Court found, by four votes to three, that there had been no violation of Article 8 ECHR.

II. The Court endorsed the domestic court's finding that the stepfather's act had constituted a violation of the applicant's personal integrity. Even though the event in question had not involved any physical violence, abuse or contact, it had affected the applicant in highly intimate aspects of her private life. There was no evidence that the domestic authorities had failed to comply with their obligation to conduct an effective prosecution. The question before the Court was therefore whether, in the circumstances of the case, Sweden had had an adequate legal framework to protect the applicant against the actions of her stepfather, in compliance with its obligations under Article 8 ECHR. The Grand Chamber chose a different approach from that followed by the Chamber, which had affirmed that "only significant flaws in legislation and practice, and their application, would amount to a breach of the State's positive obligations under Article 8". Such a significant flaw test, while understandable in the context of investigations, had no meaningful role in an assessment as to whether the respondent State had had in place an adequate legal framework in compliance with its positive obligations since the issue before the Court concerned the question of whether the law had afforded an acceptable level of protection to the applicant in the circumstances.

As regards the possibility that the stepfather's act could have constituted attempted child pornography under the Penal Code, the Court was not convinced that the act had been covered by that offence. There was no information that the prosecutor had considered indicting the stepfather with that crime. Instead, the respondent Government had enumerated a number of reasons why the prosecutor might have decided not to do so; in particular difficulties in providing sufficient evidence to show that there had been a "pornographic" picture. According to the applicant, even if the film – which had been destroyed – had still existed, the material would hardly have qualified as pornographic. The term "pornographic picture" was not defined in the Swedish Penal Code and the preparatory works on the provision on child pornography underlined that its intention was not to criminalise all pictures of naked children.

As regards the provision on the offence of sexual molestation under the Penal Code – which penalised in particular exposure in an offensive manner and indecent behaviour by word or deed – the appeal court had found that the stepfather could not be held criminally responsible for the isolated act of filming the applicant without her knowledge. Under the Swedish law in force at the time, it had been a requirement for the offence of sexual molestation to be made out that the offender intended for the victim to find out about it or that the offender was indifferent to the risk of the victim finding out. However, that requirement had not been fulfilled in the applicant's case. It was not on account of a lack of evidence that the stepfather had been acquitted of sexual molestation, but rather because, at the time, his act could not have constituted sexual molestation. The provision on sexual molestation as worded at the material time could not legally have covered the act in question and thus had not protected the applicant against the lack of respect for her private life.

The gaps in protection of her rights had not been remedied by any other provision of criminal law at the time. Indeed, the absence of a provision covering the isolated act of covert or non-consensual filming or photographing had long been a matter of concern in Sweden. New legislation, designed to cover an act such as the one in the applicant's case, had recently been adopted and had entered into force in 2013.

In the instant case recourse to the criminal law was, in the Court's view, not necessarily the only way the respondent State could have fulfilled its obligations under Article 8 ECHR. As regards civil-law remedies, when acquitting the stepfather, the appeal court had also dismissed the applicant's civil claim for damages. Under the Code of Judicial Procedure, when a civil claim was joined to a prosecution, the

courts' finding on the question of criminal liability was binding for the decision on the civil claim. There were, moreover, no other grounds on which the applicant could have relied in support of her claim for damages. Finally, the Court was not persuaded that the Swedish courts could have awarded her compensation on the basis of finding a breach of the European Convention on Human Rights alone.

In conclusion, the Court was not satisfied that the relevant Swedish law, as in force at the time, had ensured protection of the applicant's right to respect for her private life in a manner that complied with the State's obligations under Article 8 ECHR. The act committed by her stepfather had violated her integrity and had been aggravated by the fact that she was a minor, that the incident had taken place in her home, and that the offender was a person whom she was entitled and expected to trust. Therefore, there had been a violation of Article 8 ECHR.

Languages:

English, French.

Identification: ECH-2013-3-012

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 26.11.2013 / **e)** 27853/09 / **f)** X v. Latvia / **g)** *Reports of Judgments and Decisions* / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

5.1.3 Fundamental Rights – General questions – **Positive obligation of the state**.
5.3.13.18 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Reasoning**.
5.3.33 Fundamental Rights – Civil and political rights – **Right to family life**.
5.3.44 Fundamental Rights – Civil and political rights – **Rights of the child**.

Keywords of the alphabetical index:

Hague Convention, child abduction / Risk, grave.

Headnotes:

Article 8 ECHR imposes on the domestic authorities a particular procedural obligation: when assessing an application for a child's return, the courts must not only consider arguable allegations of a "grave risk" for the child in the event of return, but must also make a ruling giving specific reasons in the light of the circumstances of the case. Both a refusal to take account of objections to the return capable of falling within the scope of Articles 12, 13 and 20 of the Hague Convention and insufficient reasoning in the ruling dismissing such objections would be contrary to the requirements of Article 8 ECHR.

Summary:

I. The applicant lived in Australia and in 2005 gave birth to a daughter while living with her partner T. The child's birth certificate did not state the father's name and no paternity test was ever carried out. In 2008 the applicant left Australia with her daughter and returned to her native Latvia. T. then filed a claim with the Australian courts seeking to establish his parental rights in respect of the child, alleging that the applicant had taken the child without his consent when leaving Australia, contrary to the Hague Convention on the Civil Aspects of International Child Abduction. The Australian courts decided that T. and the applicant had joint custody of the child and that the case would be further reviewed once the child was returned to Australia. When the competent Latvian authorities received notification from the Australian authorities, they heard representations from the applicant, who contested the applicability of the Hague Convention on the ground that she had been the child's sole guardian. The Latvian courts granted T.'s request, concluding that it was not for them to challenge the conclusions reached by the Australian authorities concerning his parental responsibility. Consequently, the applicant was ordered to return the child to Australia within six weeks. In March 2009 T. met the applicant, took the child and returned with her to Australia. Ultimately, the Australian courts ruled that T. was the sole guardian and that the applicant was only allowed to visit the child under the supervision of social services and was not allowed to speak to her in Latvian.

II. The Court was called on to examine whether the interference with the applicant's rights under Article 8 ECHR, resulting from the decisions of the national courts, had been "necessary in a democratic society". To that end, the Court reiterated that, in determining whether the decisions of the national courts had struck the fair balance that must exist between the competing interests at stake – those of the child, of the two parents, and of public order – within the

margin of appreciation afforded to States in such matters, the best interests of the child had to be of primary consideration. In that connection, in order to achieve a harmonious interpretation of the European Convention on Human Rights and the Hague Convention, the factors capable of constituting an exception to the child's immediate return in application of Articles 12, 13 and 20 of the said Convention had, first of all, genuinely to be taken into account by the requested court, which had to issue a decision that was sufficiently reasoned on this point, and then to be evaluated in the light of Article 8 ECHR. It followed that Article 8 ECHR imposed on the domestic authorities a procedural obligation, requiring that, when assessing an application for a child's return, the courts had to consider arguable allegations of a "grave risk" for the child in the event of return and make a ruling giving specific reasons. As to the exact nature of the "grave risk", the exception provided for in Article 13.b of the Hague Convention concerned only the situations which go beyond what a child could reasonably bear.

In the present case, the Court noted that, before the Latvian courts, the applicant had adduced several factors to establish that the child's return to Australia would entail a "grave risk" for her child; she had also submitted that T. had criminal convictions and referred to instances of ill-treatment by him. In particular, in her appeal pleadings, the applicant had submitted a psychologist's certificate concluding that there existed a risk of trauma for the child in the event of immediate separation from her mother. Although it was for the national courts to verify the existence of a "grave risk" for the child, and the psychological report was directly linked to the best interests of the child, the regional court had refused to examine the conclusions of that report in the light of the provisions of Article 13.b of the Hague Convention. At the same time, the national courts had also failed to deal with the issue of whether it was possible for the mother to follow her daughter to Australia and to maintain contact with her. As the national courts had failed to carry out an effective examination of the applicant's allegations, the decision-making process under domestic law did not satisfy the procedural requirements inherent in Article 8 ECHR, and the applicant had therefore suffered a disproportionate interference with her right to respect for her family life. Therefore, there had been a violation of Article 8 ECHR.

Cross-references:

- *Maumousseau and Washington v. France*, no. 39388/05, 06.12.2007;
- *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, 06.07.2010.

Languages:

English, French.

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 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.

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.

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.

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.

35 For questions of constitutionality dependent on a specified interpretation, use 2.3.2.

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.

39 Presumption of constitutionality, double construction rule.
40 Including the principle of a multi-party system.
41 Includes the principle of social justice.
42 See also 4.8.
43 Separation of Church and State, State subsidisation and recognition of churches, secular nature, etc.
44 Including maintaining confidence and legitimate expectations.
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.

53 For example, presidential messages, requests for further debating of a law, right of legislative veto, dissolution.
54 For example, nomination of members of the government, chairing of Cabinet sessions, countersigning.
55 For example, the granting of pardons.
56 For regional and local authorities, see Chapter 4.8.
57 Bicameral, monocameral, special competence of each assembly, etc.
58 Including specialised powers of each legislative body and reserved powers of the legislature.
59 In particular, commissions of enquiry.
60 For delegation of powers to an executive body, see keyword 4.6.3.2.
61 Obligation on the legislative body to use the full scope of its powers.
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.
70 See also 4.8.
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.
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.
81 See also keywords 5.3.41 and 5.2.1.4.
82 Organs of control and supervision.
83 Including other consultations.
84 For questions of jurisdiction, see keyword 1.3.4.6.
85 Proportional, majority, preferential, single-member constituencies, etc.
86 For example, *Panachage*, voting for whole list or part of list, blank votes.
87 For aspects related to fundamental rights, see 5.3.41.2.
88 For the creation of political parties, see 4.5.10.1.
89 For example, names of parties, order of presentation, logo, emblem or question in a referendum.
90 Tracts, letters, press, radio and television, posters, nominations, etc.
91 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.
97 Includes ownership in undertakings by the state, regions or municipalities.
98 Parliamentary Commissioner, Public Defender, Human Rights Commission, etc.
99 For example, Court of Auditors.
100 The vesting of administrative competence in public law bodies situated outside the traditional administrative hierarchy. See also 4.6.8.
101 *Staatszielbestimmungen*.

102 Institutional aspects only: questions of procedure, jurisdiction, composition, etc. are dealt with under the keywords of Chapter 1.
103 Including state of war, martial law, declared natural disasters, etc.; for human rights aspects, see also keyword 5.1.4.1.
104 Positive and negative aspects.
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.

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.
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.
[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.

Page numbers of the alphabetical index refer to the page showing the identification of the decision rather than the keyword itself.

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